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Notice of Appeal.

(Filed December 28, 1931.)

IN CHANCERY OF NEW JERSEY

71/182

Between

MARTIN J. MACDONNELL,
Complainant,

and

MICHAEL J. VITILLE, *et als.*,
Defendants.

On Bill, &c.,

The complainant, Martin J. MacDonnell, hereby appeals to the Court of Errors and Appeals in the Last Resort in all Causes from so much of the Final Decree made by the Chancellor, on the advice of Vice-Chancellor John O. Bigelow, in the above entitled cause, on the 29th day of December, 1930, as adjudges and decrees that the exceptions taken by complainant to the Master's Report herein should be overruled, excepting, however, that complainant does not appeal from said Final Decree to the extent that, such exceptions taken by complainant are in and by said Final Decree granted and sustained and credit is therein given to complainant for omitted and defective work in the sum of $6,295.20, not allowed by the Master and credit is therein given against allowances made by the Master for alleged extra work, in the sum of $363.00, as in said Final Decree set forth; and complainant also appeals from so

much of said Final Decree as adjudges and decrees that the principal sum due from complainant on account of the contract price and for extra work and materials performed and furnished by the defendant contractors is the sum of $13,862.87; and that complainant pay said sum of $13,862.87; and that complainant pay interest on said sum from October 1, 1927, to the date of said Decree, being the sum of $2,698.62, making in all the sum of $16,561.49; and also from so much of said Final Decree as adjudges and decrees that complainant is required to bear one-half of the sum of $2,000.00, the amount allowed to Harry Lane, Esq., one of the Masters of this Court, for his services; and also from so much of said Final Decree as adjudges and decrees that after deducting their proportionate share of the Master's fees, the defendant stop notice claimants are entitled to be paid by the complainant the amounts hereinafter stated:

Edward Griffith	$ 320.40
Antonio Mamolite and Pasquale Ricciardi	1,492.32
Hoegger, Inc.	508.00
Cadel Brothers, Inc.	2,543.00
North Hudson Manufacturing Company	1,923.18
Thomas Henry, Inc.	5,142.87
Edward DeForge, Inc.	376.00
Louis Bogorad	1,203.00
Walton N. Cable	435.00
Irving Trust Company as trustee in bankruptcy of Indiana Flooring Company	1,563.43
Guido Crocetti	54.29

and that the complainant pay to the said respective defendants the said sum so found due to them and that failing to do so, said defendants or any of them, be at liberty to apply to this court upon notice to the principal and surety on the said bond for summary relief under the said bond so furnished by said complainant; and also from so much of said Final Decree as adjudges and decrees that no costs be allowed to complainant as against any of the other parties.

Dated, December 26, 1931.

PLATOFF, SAPERSTEIN & PLATOFF,
Solicitors of Complainant.

I conceive there is good cause for appeal in the above entitled cause.

J. EMIL WALSCHEID,
Of Counsel with Complainant.

Petition of Appeal.

(Filed January 16, 1932.)

MARTIN J. MACDONNELL, Complainant, *and* MICHAEL J. VITILLE, *et als.*, Defendants.	On Appeal from Court of Chancery. PETITION OF APPEAL.

TO THE HONORABLE COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES.

The petition of Martin J. MacDonnell, the appellant in the above entitled cause, respectfully shows that:

1. Petitioner finds himself aggrieved by a Final Decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Vice-Chancellor John O. Bigelow, bearing date the 29th day of December, 1930, in a certain cause in said Court of Chancery wherein the said Martin J. MacDonnell was complainant and Michael J. Vitille, et al., were defendants, in this respect, to wit: That said Final Decree adjudges and decrees in part as follows:

That the exceptions taken by complainant to the Master's Report filed in the above cause should be overruled, excepting however, and petitioner is not aggrieved by and does not appeal from said Final Decree to the extent that such exceptions taken by complainant are in and by said Final Decree granted and sustained and credit is therein

given to complainant for omitted and defective work in the sum of $6,295.20, not allowed by the Master and credit is therein given against allowances made by the Master for alleged extra work in the sum of $363.00 as in said Final Decree set forth; and that said Final Decree further adjudges and decrees in part that the principal sum due from complainant on account of the contract price and for extra work and materials performed and furnished by defendant contractors is the sum of $13,862.87; and that complainant pay said sum of $13,862.87; and that complainant pay interest on said sum from October 1, 1927, to the date of said Decree, being the sum of $2,698.62, making in all the sum of $16,561.49; and that complainant is required to bear one-half of the sum of $2,000.00, the amount allowed to Harry Lane, Esq., one of the Masters of this Court, for his services; and that after deducting their proportionate share of the Master's fees, the defendant stop notice claimants are entitled to be paid by the complainant the amounts hereinafter stated:

Edward Griffith	$ 320.40
Antonio Mamolite and Pasquale Ricciardi	1,492.32
Hoegger, Inc.	508.00
Cadel Brothers, Inc.	2,543.00
North Hudson Manufacturing Company	1,923.18
Thomas Henry, Inc.	5,142.87
Edward DeForge, Inc.	376.00
Louis Bogorad	1,203.00
Walton N. Cable	435.00
Irving Trust Company as trustee in bankruptcy of Indiana Flooring Company	1,563.43
Guido Crocetti	54.29

and that the complainant pay to the said respective defendants the said sum so found due to them, and that failing to do so, said defendants or any of them, be at liberty to apply to this court upon notice to the principal and surety on the said bond for summary relief under the said bond so furnished by said complainant; and that no costs be allowed to complainant as against any of the other parties.

And petitioner appeals from such parts of said Final Decree of the Chancellor which adjudge and decree as aforesaid because the same are erroneous for the following reasons:

1. Under the pleadings and the evidence in the cause the Chancellor should have sustained complainant's exception to the Master's finding that the complainant-appellant-owner is chargeable with the amount of the final payment under the general contract with the general contractors in suit, and with the amount of extras as set forth in said Master's Report, without the issuance of and dispite the refusal of the architect to issue certificate for said final payment and for said extras.

2. Under the pleadings and the evidence in the cause the Chancellor should have sustained complainant's exception to the Master's finding that the general contractors were entitled to their final certificate for work done under the general contract in suit, and that the withholding thereof by the architect would amount to fraud.

3. Under the pleadings and the evidence in the cause the Chancellor should have sustained complainant's exception to the Master's finding that

the production by the general contractors of the architect's certificate approving final payment under the general contract in suit and approving payment of any extras, may be dispensed with under the circumstances of this case.

4. Under the pleadings and the evidence in the cause, the Chancellor should have found that the complainant-appellant-owner is not chargeable with the amount of the final payment under the general contract in suit, and/or with the amount of any extras as claimed by defendant contractors, and/or allowed by the Master herein, because of the non-production by the general contractors of an architect's certificate therefor as required by the building contract and the specifications marked in evidence as Exhibits D-51 and D-52.

5. Under the pleadings and the evidence in the cause, the Court should have sustained complainant's exception to the Master's finding that the general contractors were entitled to an allowance for and/or payment from the complainant-appellant-owner on account of extras despite the non-issuance therefor of and the failure of the general contractors to produce a written order or written orders therefor.

6. The Chancellor should have found, under the pleadings and the evidence in this cause, that the complainant-appellant-owner is not chargeable with the amount of any extra work for which no written orders were given or procured.

7. Under the pleadings and the evidence in this cause, the Chancellor should have sustained complainant's exception to the Master's finding that

complainant-appellant-owner could be charged with extra work ordered by the architect.

8. Under the pleadings and the evidence in the cause, the Court should have sustained complainant's exceptions to the Master's refusal to give full credit to complainant for omitted and defective work and materials.

9. The credits allowed by the Court to complainant for omitted and defective work and materials are insufficient and inadequate and contrary to the evidence in this cause as to the extent and value of said omitted and defective work and materials.

10. Under the law and the evidence in the cause the Court should have sustained complainant's exception to the Master's refusal to give to the camplainant-appellant-owner proper credit for the following items of omitted and/or defective and inferior work and materials and should have ordered, adjudged and decreed that complainant was entitled to credit for the following items of omitted and/or defective and inferior work and materials, according to the extent of the value thereof as shown by the testimony:

1 (b). Inferior face brick on exterior walls.

1 (d). Coping not of cast stone.

1 (e). Chimney fire brick omitted.

1 (f). Lath in shafts and plaster with three coats omitted.

1 (g). Gypsom block in floors and ceilings omitted and insufficient allowance therefor.

1 (j). Plaster cornice in each hall not installed as required.

2 (a). Cabinet trim omitted and insufficient allowance therefor given.

2 (b). Grounds for base picture panels and wall panels omitted.

2 (d). Oak floor not No. 1 quality white oak.

2 (f). Platforms for laundry omitted.

2 (x). Six inch base substituted for ten inch base.

3 (b). Marble cheeks in vestibule omitted.

5 (a). Sliding dumbwaiter doors not installed as required by specifications.

5 (b). Twenty-one kalamein doors improperly installed and fit.

9 (b). Insufficient allowance for failure to furnish bonded Barrett roof.

11. Under the pleadings and the evidence in the cause, the Court should have sustained complainant's exceptions to the Master's allowances to the contractors for extra work as excessive and contrary to the pleadings and evidence in the cause.

12. Under the pleadings and evidence in the cause, the Court should have found that the contractors are not entitled to any allowance or credit against or from the complainant-appellant-owner for extra work.

13. Under the pleadings and the evidence in this cause, the Court should have sustained complainant's exceptions to the Master's allowances to the contractors for the following items of extra work as excessive and improper, and should have adjudged and decreed that the contractors were not entitled to any allowance from or credit against the complainant-owner-appellant for the following items of alleged extra work, to wit:

(3). Furnishing white cement.

(5). Deafening apartments and south dividing walls.

(9). Kalamein frame and shaft in vent shafts.

(10). Furnishing flax linum.

(11). Removing window frame in toilet.

(12). Installing Kitchen Maid cabinets.

(15). Taking down and re-erecting new partition.

(16). Furring walls for Frigidaire pipes.

(17). Additional cost of coal bin.

(21). Erecting partition around Frigidaire.

(22). Erecting bookcase in Doctor's waiting room.

(25). Erecting Doctor's room in electric therapeutic room.

(26). Building bench for screens and cellar.

(27). Erecting dark room in cellar.

(28). Installing instrument cases.

(29). Building up table in doctor's kitchenette; patent locks and bench for telephone books, etc.

(31). Putting moulding around Kitchen Maid cabinets.

(32). One piece of birch veneer for Kitchen Maid cabinets.

(33). Furnishing and handing hardware on fifteen sets French doors; hanging three pairs of French doors supplied by North Hudson Manufacturing Company.

(34). Extras on outside stucco as per contract of Ed. DeForge, Inc.

(35). Extra for mill work.

(36). Extras on heating work, John G. Keller Co.

(39). Extras on tile work, G. M. Groccotti.

(40). Extras on iron work.

14. Under the law and the evidence in the case the Court should have found that the general contractors were not entitled to any allowance from or credit against the complainant-appellant-owner for or on account of any extra work, excepting only items 2, 10, 13, 14, 18, 19 and 20 as referred to in Master's Report filed herein.

15. Under the law and the evidence in the case the Court erred in adjudging and decreeing that the principal sum due from complainant on account of the contract price and for extra work and materials performed and furnished by defendant contractors is the sum of Thirteen Thousand Eight Hundred Sixty-two and 87/100 ($13,862.87) Dollars.

16. Under the pleadings and evidence in the case the Court erred in adjudging and decreeing that complainant-appellant is under an obligation to pay interest on the said sum of Thirteen Thousand Eight Hundred Sixty-two and 87/100 ($13,862.87) Dollars from October 1st, 1927, to the date of said Decree, to wit, December 29th, 1930.

17. Under the pleadings and evidence in the case, the Court should have found that complainant is not chargeable with any interest on any principal sum due from complainant in this cause.

18. Under the pleadings and evidence in the case, the Court should have found that complainant is not chargeable with any interest on any principal sum due from complainant in this cause, by reason of the fact that complainant

could not safely pay the amount chargeable against him to anyone prior to the determination of this Court without being subjected to the liability to make payment twice, in view of the conflicting claims presented to complainant by the various defendants; by reason further of the fact that the amount owing by complainant was unliquidated and could not be paid by him until the determination of this Court; by reason further of the fact that complainant has heretofore tendered into Court the amount admitted by him to be due, and such further sum as this Court should find to be due from him, and by reason further of the fact that complainant filed a bond in this cause to cover any amount which should be found due from him.

19. The Court erred in adjudging that complainant is obligated to pay the sum of Thirteen Thousand Eight Hundred Sixty-two and 87/100 ($13,862.87) Dollars and interest on said sum, in the sum of Two Thousand Six Hundred Ninety-eight and 62/100 ($2,698.62) Dollars, making in all the sum of Sixteen Thousand Five Hundred Sixty-one and 49/100 ($16,561.49) Dollars, by reason of the fact that the Court failed to give complainant proper, sufficient and adequate credits for omitted, defective and inferior work and materials, and by reason of the fact that the Court erred in making improper allowances to the contractors for alleged extra work, and by reason further of the fact that the Court erred in finding that complainant is liable for interest on the principal sum due from him from October 1st, 1927, to the date of said Decree.

20. The Court erred in finding that complainant is required to bear one-half of the sum of

Two Thousand ($2,000.00) Dollars, the amount allowed to Harry Lane, Esq., one of the Masters of this Court for his services.

21. The Court should have adjudged and decreed that complainant is not required to bear or pay any portion of the sum or sums allowed to Harry Lane, one of the Masters of this Court, for his services, by reason of the fact that complainant's suit or action in the nature of interpleader was properly brought, and should have adjudged and decreed that all of the said Master's fees should be paid out of the fund required to be paid into Court by complainant.

22. The Court erred in adjudging and decreeing that after deducting their proportionate share of the Master's fees, the defendant stop notice claimants are entitled to be paid by the complainant the amounts hereinafter stated:

Edward Griffith	$ 320.40
Antonio Mamolite and Pasquale Ricciardi	1,492.32
Hoegger, Inc.	508.00
Cadel Brothers, Inc.	2,543.00
North Hudson Manufacturing Company	1,923.18
Thomas Henry, Inc.	5,142.87
Edward DeForge, Inc.	376.00
Louis Bogorad	1,203.00
Walton N. Cable	435.00
Irving Trust Company as trustee in bankruptcy of Indiana Flooring Company	1,563.43
Guido Crocetti	54.29

and that the complainant pay to the said respective defendants the said sum so found due to them

and that failing to do so, said defendants or any of them, be at liberty to apply to this court upon notice to the principal and surety on the said bond for summary relief under the said bond so furnished by said complainant, by reason of the fact that the sums so alleged to be due are predicated on the aforementioned adjudication that complainant is liable to pay on account of the contract price and for extra work and materials performed and furnished by defendant contractors the sum of Thirteen Thousand Eight Hundred Sixty-two and 87/100 ($13,862.87) Dollars, and interest thereon in the sum of Two Thousand Six Hundred Ninety-eight and 62/100 ($2,698.62) Dollars, making in total the sum of Sixteen Thousand Five Hundred Sixty-one and 49/100 ($16,561.49) Dollars, which adjudication is erroneous for the reasons hereinabove mentioned.

23. The Court erred in adjudicating and decreeing that no costs be allowed to complainant as against any of the other parties, and the Court should have adjudged and decreed that complainant should be allowed costs to be paid out of the fund required to be paid into Court by complainant for the reason that complainant's suit or action in the nature of interpleader was properly brought.

Petitioner therefore prays that the said Decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this Court may seem proper.

Dated, January 15th, 1932.

PLATOFF, SAPERSTEIN & PLATOFF,
Solicitors for Petitioner.

J. EMIL WALSCHEID,
Of Counsel with Petitioner.

Stipulation.

NEW JERSEY COURT OF ERRORS AND APPEALS.

MARTIN J. MACDONNELL, Complainant-Respondent, *v.* MICHAEL J. VITILLE, *et als.*, Defendants-Appellants.	On Appeal from Court of Chancery.
MARTIN J. MACDONNELL, Complainant-Appellant, *v.* MICHAEL J. VITILLE, *et als.*, Defendants-Respondents.	On Appeal from Court of Chancery.

WHEREAS, the above entitled appeals are cross appeals in the same suit and have been for purposes of argument consolidated,

IT IS HEREBY STIPULATED AND AGREED by and between the solicitors for and of counsel with O. C. Bianchi and Michael J. Vitille, James J. Kinsella and Joseph Cunhy, defendants-appellants on the appeal first above referred to and defendants-respondents on the appeal secondly referred to, and the solicitors for and of counsel with Martin J. MacDonnell, complainant-respondent on the appeal first above referred to, and complainant-appellant on the appeal secondly referred to, that the State of Case as prepared and served by solicitors and counsel for Martin J. MacDonnell, complainant-appellant in the appeal secondly above referred to, and the matters and things therein contained, shall be deemed, as to the appeal first above

referred to, a supplement to the State of Case filed therein, and may be referred to and used by counsel for Martin J. MacDonnell, complainant-respondent, in the argument of the issues raised by O. C. Bianchi and Michael J. Vitille, James J. Kinsella and Joseph Cunhy, defendants-appellants in the appeal first above referred to.

Dated, April 26, 1932.

O. C. BIANCHI,
Solicitor pro se and solicitor for and of counsel with Michael J. Vitalle, James J. Kinsella and Joseph Cunhy.

PLATOFF, SAFERSTEIN & PLATOFF,
Solicitors for Martin J. MacDonnell.

J. EMIL WALSCHEID,
Of counsel with Martin J. MacDonnell.

Bill of Complaint.

(Filed Dec. 7, 1928.)

IN CHANCERY OF NEW JERSEY.

To The Honorable Edwin Robert Walker,
Chancellor of the State of New Jersey:

The complainant, Martin J. MacDonnell, of the Township of North Bergen, in the County of Hudson and State of New Jersey, respectfully shows that:

1. On October 13, 1926, complainant entered into a certain agreement in writing with Michael

J. Vitille, James J. Kinsella and Joseph Cunhy, trading as Vitille, Kinsella & Cunhy, hereinafter referred to as contractors, whereby the said contractors agreed to erect a five story apartment building on a certain tract of land owned by complainant, located on the northeast corner of Thirtieth Street and Park Avenue, in said Township of North Bergen, at a price of Ninety-eight Thousand ($98,000.00) Dollars, to be paid in the manner and at the times in said contract set forth.

2. Said lands and premises are more particularly described as follows:

> "All that plot, tract or parcel of land and premises, situate, lying and being in the Township of North Bergen, in the County of Hudson and State of New Jersey, more particularly described as follows:
>
> BEGINNING at the point of intersection of the northerly line of Thirtieth Street, produced easterly and the easterly line of Bulls Ferry Road, as said street and road are laid down on a certain map entitled 'Map "A" of a portion of the property belonging to the Woodcliff Land Improvement Company, Township of North Bergen, Hudson Co. N. J., Sept. 1892' duly filed in the Register's Office of the said County of Hudson, on the fifteenth day of September, eighteen hundred and ninety-two; thence (1) easterly and along the northerly line of Thirtieth Street, produced easterly, eighty-seven and eighty one-hundredths (87.80) feet to a point; thence (2) northerly, and at right angles to the first course, fifty (50) feet to a

point; thence (3) westerly and parallel with the first course ninety-one and nine one-hundredths (91.09) feet to a point in the easterly line of Bulls Ferry Road; thence (4) southerly and along the easterly line of Bulls Ferry Road fifty and eleven one-hundredths (50.11) feet to the point or place of beginning.

3. On October 14, 1926, and before any work was performed, or materials were furnished in pursuance of the said contract, the said agreement, together with the specifications accompanying the same and referred to therein, was duly filed in the Office of the Clerk of the County of Hudson, in which County said lands and premises are situate.

4. The said contractors proceeded with the construction of the said building and complainant from time to time made to them payments provided for by said contracts in strict conformity with the terms thereof, and a total of Eighty-five Thousand Two Dollars and Seven ($85,002.07) Cents was paid by complainant to said contractors, as provided for in and by said contract.

5. The said total of Eighty-five Thousand Two Dollars and Seven ($85,002.07) Cents comprises the entire contract price with the exception of the sum of Thirty-six Hundred Forty-six ($3646.00) Dollars, withheld on the eighth installment payment, and the sum of Eleven Thousand Eight Hundred Eighty-four Dollars and Sixty-eight ($11,884.68) Cents, withheld on the ninth and final installment payment, which sums are withheld for the reasons more particularly hereinafter set forth.

6. On August 20, 1927, one David Ach, the architect under whose supervision the building

was being erected and who was required by the terms of said contract to issue his certificate before any sums should become due and payable thereunder, duly issued his certificate, certifying that the sum of Seventeen Thousand Seven Hundred and Sixty-five ($17,765.00) Dollars was due to the said contractors as the eighth payment on account of said contract, and between said August 20, 1927 and September 10, 1927, the entire amount of said eighth payment was duly paid to said contractors, except the sum of Thirty-six Hundred Forty-six ($3646.00) Dollars.

7. Prior to the payment of said balance of Thirty-six Hundred Forty-six ($3646.00) Dollars, complainant received from Antonio Mammolite and Pasquale Ricciardi, a notice in writing dated September 10, 1927, that they had performed for said Vitille, Kinsella & Cunhy, contractors, certain work and labor in the erection of said building to the amount of Four Thousand One Hundred Sixty-six Dollars and Thirty-eight ($4,166.38) Cents, and that said contractors had, upon demand, refused to pay said amount of Four Thousand One Hundred Sixty-six Dollars and Thirty-eight ($4166.38) Cents to said Antonio Mammolite and Pasquale Ricciardi.

8. Prior to the payment of said balance of Thirty-six Hundred Forty-six ($3646.00) Dollars, complainant received from Hoegger, Inc., a corporation of the State of New Jersey, a notice in writing dated September 12, 1927, that it had furnished to said Vitille, Kinsella & Cunhy, contractors, certain bathroom accessories used in the erection of said building to the amount of Five Hundred Forty ($540.00) Dollars, and that said

contractors had, upon demand, refused to pay said amount of Five Hundred Forty ($540.00) Dollars to said Hoegger, Inc.

9. Prior to the payment of said balance of Thirty-six Hundred Forty-six ($3646.00) Dollars, complainant received from Cadel Brothers, Inc., a corporation of the State of New Jersey, a notice in writing dated September 13, 1927, that it had performed certain work for, and furnished certain materials to, said Vitille, Kinsella & Cunhy, contractors, to the amount of Eighteen Hundred Seventy-five ($1875.00) Dollars, pursuant to contract, and to the amount of Eight Hundred Thirty-two ($832.00) Dollars, for extra work, and that said contractors had, upon demand refused to pay said amounts, or either of them, to said Cadel Brothers, Inc.; and on October 1, 1928, said Cadel Brothers, Inc., instituted an action in the Hudson County Circuit Court against this complainant, to recover the sum of Two Thousand Seven Hundred and Seven ($2,707.00) Dollars, which action is still pending and undisposed of.

10. Prior to the payment of said balance of Thirty-six Hundred Forty-six ($3646.00) Dollars, complainant received from North Hudson Manufacturing Company, a corporation of the State of New Jersey, a notice in writing dated September 13, 1927, that it had furnished certain materials used in the erection of said building to the amount of Two Thousand Forty-seven Dollars and Eighteen ($2,047.18) Cents to said Vitille, Kinsella & Cunhy, contractors, and that said contractors had, upon demand, refused to pay said amount of Two Thousand Forty-seven Dollars and Eighteen Cents ($2,047.18) to said North Hudson Manufacturing

Company; and on October 1, 1928, the said North Hudson Manufacturing Company instituted a suit in the Hudson County Circuit Court against this complainant, to recover the said sum of Two Thousand Forty-seven Dollars and Eighteen ($2,047.18) Cents, which suit is still pending and undisposed of.

11. Prior to the payment of said balance of Thirty-six Hundred Forty-six ($3646.00) Dollars, complainant received from Thomas Henry, -Inc., a corporation of the State of New Jersey, a notice in writing dated September 13, 1927 that it had furnished to said Vitille, Kinsella & Cunhy, contractors, certain masons' materials used in the erection of said building to the amount of Five Thousand Six Hundred Ninety-one Dollars and Twenty-seven ($5,691.27) Cents and that said contractors had, upon demand, refused to pay said amount of Five Thousand Six Hundred Ninety-one Dollars and Twenty-seven ($5,691.27) Cents to said Thomas Henry, Inc.; and on October 3, 1928, said Thomas Henry, Inc., instituted a suit in the Hudson County Circuit Court against this complainant, to recover the sum of Five Thousand Three Hundred Twenty-nine Dollars and Thirty-nine ($5,329.39) Cents, which suit is still pending and undisposed of.

This complainant is unable to explain the discrepancy between the amount of said Stop Notice and the amount claimed in said suit.

12. Prior to the payment of said balance of Thirty-six Hundred Forty-six ($3646.00) Dollars, complainant received from Edward De Forge, Inc., a corporation of the State of New Jersey, a notice

in writing dated September 21, 1927, that it had performed for said Vitille, Kinsella & Cunhy, contractors, certain work in the erection of said building, to the amount of Four Hundred ($400.00) Dollars, and that said contractors had, upon demand, refused to pay said Four Hundred ($400.00) Dollars to said Edward De Forge, Inc.; and on October 5, 1928, said Edward De Forge, Inc., instituted a suit in the Hudson County Circuit Court to recover said sum of Four Hundred ($400.00) Dollars, which suit is still pending and undisposed of.

13. Prior to the payment of said balance of Thirty-six Hundred Forty-six ($3646.00) Dollars, complainant received from one Louis Bogorad, a notice in writing dated October 1, 1927, that he had furnished to said Vitille, Kinsella & Cunhy, contractors, certain materials in the erection of said building to the amount of Thirteen Hundred ($1300.00) Dollars, and that said contractors had, upon demand, refused to pay said amount of Thirteen Hundred ($1300.00) Dollars to said Louis Bogorad; and on October 31, 1928, said Louis Bogorad instituted a suit in the Hudson County Circuit Court against this complainant to recover said sum of Thirteen Hundred ($1300.00) Dollars, which suit is still pending and undisposed of.

14. Prior to the payment of said balance of Thirty-six Hundred Forty-six ($3646.00) Dollars, complainant received from Indiana Flooring Company, a corporation of the State of New York, a notice in writing dated October 5, 1927, that it had furnished to said Vitille, Kinsella & Cunhy, contractors, certain materials to the amount of Sev-

enteen Hundred Eighty-two Dollars and Forty-three ($1782.43) Cents "less freight charges," the amount of said freight charges being unknown to complainant, and that said contractors had, upon demand, refused to pay said amount of Seventeen Hundred Eighty-two Dollars and Forty-three ($1782.43) Cents "less freight charges" to said Indiana Flooring Company.

15. Prior to the payment of said balance of Thirty-six Hundred Forty-six ($3646.00) Dollars, complainant received from Hudson Fireproof Block Co., a corporation of the State of New Jersey, a notice in writing dated October 14, 1927, that it had furnished to said Vitille, Kinsella & Cunhy, contractors, certain materials in connection with the erection of said building, to the amount of One Hundred Twenty-one Dollars and Thirty-two ($121.32) Cents, and that said contractors had, upon demand, refused to pay said amount of One Hundred Twenty-one Dollars and Thirty-two ($121.32) Cents to said Hudson Fireproof Block co.

16. Prior to the payment of said balance of Thirty-six Hundred Forty-six ($3646.00) Dollars, complainant received from one Guido M. Crocetti, a notice in writing dated October 18, 1927, that he furnished to said Vitille, Kinsella & Cunhy, contractors, certain work in the erection of said building to the amount of Sixteen Hundred ($1600.00) Dollars, pursuant to contract, and to the amount of One Hundred Fifty-five ($155.00) Dollars, for extra work, and that said contractors had, upon demand, refused to pay said amount of Seventeen Hundred Fifty-five ($1755.00) Dollars to said

Guido M. Crocetti; and on September 19, 1928, said Guido M. Crocetti instituted a suit in the Hudson County Circuit Court against this complainant to recover the said amount of Seventeen Hundred Fifty-five ($1755.00) Dollars, which suit is still pending and undisposed of.

17. Prior to the payment of said balance of Thirty-six Hundred Forty-six ($3646.00) Dollars, complainant received from Scagliola Manufacturing Co. Inc., a corporation of the State of New Jersey, a notice in writing dated March 28, 1928, that it had furnished materials to and performed labor for, said Vitille, Kinsella & Cunhy, contractors, used in the erection of said building, to the amount of Two Hundred Seventy-five ($275.00) Dollars, and that said contractors had, upon demand, refused to pay said amount of Two Hundred Seventy-five ($275.00) Dollars to said Scagliola Manufacturing Co. Inc.

18. Prior to the payment of the said balance of Thirty-six Hundred Forty-six ($3646.00) Dollars, complainant received from one Carl F. Diffenbach, a notice in writing dated September 13, 1928, that he had furnished to said Vitille, Kinsella & Cunhy, contractors, work, labor and materials in connection with the covering of roof, together with the furnishings of side-lights, gutters and leader flashings used in the erection of said building, to the amount of Ten Hundred Forty ($1040.00) Dollars, and that said contractors had, upon demand, refused to pay said amount of Ten Hundred Forty ($1040.00) Dollars to said Carl F. Diffenbach, Jr.

19. Ever since the issuance of said eighth certificate by said architect the said Vitille, Kinsella

& Cunhy, contractors, have demanded of this complainant payment of the balance of Thirty-six Hundred Forty-six ($3646.00) Dollars due under said certificate, but complainant has refused to make said payment to said contractors by reason of the service upon him of the aforesaid notices in writing.

20. The said Stop-Notice claimants who have instituted suits as hereinbefore set forth threaten to prosecute said suits to judgment and the said Stop-Notice claimants who have not yet instituted suits against complainant threaten to institute the same and prosecute the same to judgment, and complainant has been and will continue to be harassed by multitudious suits at law to his irreparable injury, unless relief is granted to him in this Court.

21. Complainant has been unable to, and is still unable to determine to whom of the aforesaid claimants the said sum of Thirty-six Hundred Forty-six ($3646.00) Dollars, and such other or further sums as complainant shall be decreed to pay, rightfully belong, by reason of the fact that complainant is informed and believes that the order of priority among said Stop-Notice claimants may be affected by the fact that said Stop-Notices were not received by complainant in the order in which they are dated; and further by the fact that the claims for labor may be preferred to the claims for materials under the Mechanics' Lien Law; and further by defects in the form of several of said Stop Notices, to wit, the Stop Notice filed by Hoegger, Inc., which fails to allege the location of said building; the Stop Notice filed by Thomas

Henry, Inc., the amount of which fails to coincide with the amount set forth in the complaint filed by said Thomas Henry, Inc., in the Hudson County Circuit Court; the Stop Notice filed by Edward De Forge, Inc., which is not properly signed by the claimant; and the Stop Notice filed by Indiana Flooring Company, in which the amount demanded is not specified as nearly as possible.

22. Subsequent to the issuance of said eighth certificate by said architect, said Vitille, Kinsella & Cunhy, contractors, demanded payment from complainant of the balance of said contract price, and also demanded and still demand the sum of Fourteen Thousand Six Hundred Fifty-five Dollars and Sixty-seven ($14,655.67) Cents, which said contractors claim for extra materials alleged to have been furnished and extra labor alleged to have been performed in the erection and construction of said building; but said contractors had not, prior to the filing of the bill of complaint herein, instituted any proceedings at law for the recovery of the amounts so claimed.

23. Complainant alleges that neither the balance of said contract price, except the said sum of Thirty-six Hundred Forty-six ($3646.00) Dollars, nor the amount of said extras, ever became due and payable from complainant to said contractors, by reason of the fact that the said architect has refused, and still refuses to issue certificates authorizing the payment of the same; by reason further of the fact that no authorization in writing was ever procured for many of the items included in said claim for extras as provided in said contract; by reason further of the fact that

many of the items claimed to be extras by said contractors are included in the original specifications; and by reason further of the fact that the said claim for extras is grossly excessive, and that the fair value of any and all the extras alleged to have been furnished is not more than Six Thousand One Hundred Fifty-seven Dollars and Fifty-five ($6,157.55) Cents.

24. Complainant further alleges that he is entitled to credit against any sum or sums found to be owing from him to said contractors for work defectively performed or omitted under said contract, materials deviating from the specifications annexed to said contract, and work unfinished and materials unfurnished, and complainant is informed and believes that the reasonable value of said credits is in excess of the sum of Twelve Thousand ($12,000.00) Dollars.

25. The said Vitille, Kinsella & Cunhy, contractors, have never paid or settled the demands of said Stop Notice claimants, or any of them, and the said Stop Notice claimants still demand the payment of their claims from complainant.

26. Complainant has always been willing, and still is willing to pay said sum of Thirty-six Hundred Forty-six ($3646.00) Dollars, and such further sum or sums as may be found to be owing from complainant to said contractors, after due credit has been given to complainant for such set-offs as he may have, to such person or persons as is or are lawfully entitled to receive the same, and to whom he can pay such sum or sums with safety, and he hereby tenders said sum of Thirty-six Hundred Forty-six ($3646.00) Dollars, into this Court.

Complainant is without adequate remedy in the Courts of Law, and therefore prays:

1. That said Michael J. Vitille, James J. Kinsella and Joseph Cunhy, Antonio Mammolite and Pasquale Ricciardi, Hoegger, Inc., a corporation, Cadel Brothers, Inc., a corporation, North Hudson Manufacturing Company, a corporation, Thomas Henry, Inc., a corporation, Edward De Forge, Inc., a corporation, Louis Bogorad, Indiana Flooring Company, a corporation, Hudson Fireproof Block Co., a corporation, Guido M. Crocetti, Scagliola Manufacturing Co. Inc., a corporation, and Carl F. Diffenbach, Jr., who are the defendants to this suit, may answer this bill of complaint and each statement therein made, and may interplead and determine their rights to said sum of Thirty-six Hundred Forty-six Dollars ($3646.00) and such further sum or sums as may be found owing from complainant to said contractors, after due credit has been given to complainant for such set-offs as he may have;

2. That complainant may be ordered to pay into this court the said sum of Thirty-six Hundred Forty-six ($3646.00) Dollars, and such further sum or sums as may be found owing from complainant to said contractors, after due credit has been given to complainant for such set-offs as he may have;

3. That an account may be taken and a settlement of the amount due from complainant to said defendants, Vitille, Kinsella & Cunhy, may be had;

4. That complainant, upon payment into this Court of said Thirty-six Hundred Forty-six ($3,-

646.00) Dollars, and such further sum or sums so found owing from complainant to said contractors, and procuring the said defendants to inter-plead and settle their rights to said sum of money, may be Ordered, Adjudged and Decreed to be discharged from all liability to said defendants, or any of them, in the premises;

5. That pending the determination of this suit, the defendants, Cadel Brothers, Inc., a corporation, North Hudson Manufacturing Company, a corporation, Thomas Henry, Inc., a corporation, Edward De Forge, Inc., a corporation, Louis Bogorad and Guido M. Crocetti, may be restrained and enjoined from taking any further proceedings in the actions at law heretofore instituted by them against this complainant; and that the defendants Michael J. Vitille, James J. Kinsella, Joseph Cunhy, Antonio Mammolite and Pasquale Ricciardi, Hoegger, Inc., a corporation, Indiana Flooring Company, a corporation, Hudson Fireproof Block Co., a corporation, Scagliola Manufacturing Co. Inc., a corporation, and Carl F. Diffenbach, Jr., may be restrained and enjoined from instituting any action or actions at law against complainant for the recovery of any sum or sums alleged to be due to them or any of them, by virtue of labor performed or materials furnished in the erection and construction of the building of complainant, described in the bill of complaint;

6. That complainant may be paid out of said fund paid into Court by him, his costs of these proceedings;

7. That a writ of subpoena may issue, commanding said defendants to answer this bill of

complaint, and to abide by such decree as this Court may make in the premises.

PLATOFF, SAPERSTEIN & PLATOFF,
Solicitors of Complainant.

DAVID SAPERSTEIN,
of Counsel.

Addition to Bill by Way of Supplement.

(Filed—April 18, 1929.)

IN CHANCERY OF NEW JERSEY.

71-182.

Between

MARTIN J. MACDONNELL,
Complainant,
and
MICHAEL J. VITILLE, *et als.*,
Defendants.

On Bill, &c.

TO THE HONORABLE EDWIN ROBERT WALKER,
CHANCELLOR OF THE STATE OF NEW JERSEY:

The complainant, Martin J. MacDonnell, of the Township of North Bergen, in the County of Hudson and State of New Jersey, by way of supplement and addition to his bill of complaint filed herein, by leave of this Court first obtained, respectfully shows:

1. Since the filing of the said bill of complaint complainant has received from Edward Griffith,

a notice in writing, dated December 10, 1928, that he furnished to Michael J. Vitille, James J. Kinsella and Joseph Cunhy, trading as Vitille, Kinsella & Cunhy, contractors, work, labor, and materials in the erection and construction of the building described in the bill of complaint herein, to the amount of Three Hundred Six Dollars and Nineteen ($306.19) Cents, and that said contractors had, upon demand, refused to pay said amount of Three Hundred Six Dollars and Nineteen ($306.19) Cents.

2. Since the filing of the said bill of complaint complainant has received from the Newark Sheet Metal & Kalamein Co., a corporation of the State of New Jersey, a notice in writing, dated December 20, 1928, that it furnished to Michael J. Vitille, James J. Kinsella and Joseph Cunhy, trading as Vitille, Kinsella & Cunhy, contractors, work, labor and materials in the erection and construction of the building described in the bill of complaint herein, to the amount of Six Hundred Seventy Dollars and Fifty (670.50) Cents, and that said contractors had, upon demand, refused to pay said amount of Six Hundred Seventy Dollars and Fifty (670.50) Cents; and on the twenty-fourth day of December, 1928, an order was made by this Court that the said Newark Sheet Metal & Kalamein Co. be made a party defendant to the bill of complaint filed in this cause.

3. Since the filing of the said bill of complaint trading as P. Goranson Dumbwaiter Co., a notice in writing dated January 31, 1929, that he furnished to Michael J. Vitille, James J. Kinsella and Joseph Cunhy, trading as Vitille, Kinsella & Cunhy, contractors, materials in the erection and construction

of the building described in the bill of complaint herein, to the amount of Three Hundred Twenty ($320.00) Dollars, and that said contractors had, upon demand, refused to pay said amount of Three Hundred Twenty ($320.00) Dollars; and on the eleventh day of February, 1929, an order was made by this Court that the said Peter Goranson be made a party defendant to the bill of complaint filed in this cause.

4. Since the filing of the said bill of complaint complainant has received from John G. Keller, Inc., a corporation of the State of New Jersey, a notice in writing, dated February 18, 1929, that it had furnished to Michael J. Vitille, James J. Kinsella and Joseph Cunhy, trading as Vitille, Kinsella and Cunhy, contractors, certain labor and materials in the erection and construction of the building described in the bill of complaint herein, to the amount of Nineteen Hundred Seventy-four Dollars and Ninety-five ($1974.95) Cents pursuant to contract, and to the amount of One Hundred Forty ($140.00) Dollars, for extra work, and that said contractors had, upon demand, refused to pay the total sum of Twenty-one Hundred Fourteen Dollars and Ninety-five ($2114.95) Cents.

Complainant therefore prays that Edward Griffith, Newark Sheet Metal & Kalamein Co., a corporation, Peter Goranson and John G. Keller, Inc., a corporation, who are the defendants to this addition by way of supplement to the bill of complaint filed herein, may answer the same and each statement therein made, and may interplead and determine their rights to said sum of Thirty-six Hundred Forty-six ($3646.00) Dollars, and such further sum or sums as may be found owing from

complainant to said contractors, after due credit has been given to complainant for such set-offs as he may have;

That this complainant may have the same relief against said defendants, Edward Griffith, Newark Sheet Metal & Kalamein Co., a corporation, Peter Goranson and John G. Keller, Inc., a corporation, as he might have had if the facts hereinbefore stated by way of supplement had been stated in this complainant's original bill of complaint.

That complainant may be ordered to pay into this court the said sum of Thirty-six Hundred Forty-six ($3646.00) Dollars, and such further sum or sums as may be found owing from complainant to said contractors, after due credit has been given to said complainant for such set-offs as he may have;

That an account may be taken and a settlement of the amount due from complainant to the defendants, Michael J. Vitille, James J. Kinsella and Joseph Cunhy, may be had;

That complainant, upon payment into this court of said sum of Thirty-six Hundred Forty-six Dollars ($3646.00) and such further sum or sums so found owing from complainant to said contractors, and procuring said defendants to interplead and state their rights to said sum of money, may be ordered, adjudged and decreed to be discharged from all liability to said defendants, or any of them in the premises;

That pending the determination of this suit, the defendants, Edward Griffith, Newark Sheet Metal & Kalamein Co., a corporation, Peter Goranson and John G. Keller, Inc., a corporation, may be restrained and enjoined from instituting any action or actions at law against complainant for the re-

covery of any sum or sums alleged to be due to them, or any of them, by virtue of labor performed or materials furnished in the erection and construction of the building of complainant described in the bill of complaint;

That complainant may be paid out of said fund paid into this Court by him, his costs of these proceedings;

That a writ of subpoena may issue, commanding said defendants to answer this addition to bill by way of supplement, and to abide by such decree as this Court may make in the premises.

PLATOFF, SAPERSTEIN & PLATOFF,
Solicitors of Complainant.

DAVID SAPERSTEIN,
Of Counsel.

Second Addition to Bill of Complaint.

(Filed—January 3, 1930.)

This addition to bill by way of supplement was similar in form to the preceding bill, and joined as defendant the following stop notice claimant, to wit: Walton H. Cable.

Answer and Counterclaim of Michael J. Vitille, James J. Kinsella & Joseph Cunhy, trading as Vitille, Kinsella & Cunhy.

(Filed April 9, 1929.)

71/182.

IN CHANCERY OF NEW JERSEY.

Between

MARTIN J. MACDONNELL,
Complainant,
and
MICHAEL J. VITILLE, *et als.*,
Defendants.

On Bill, etc.

The defendants, Michael J. Vitille, James J. Kinsella and Joseph Cunhy, trading as Vitille, Kinsella & Cunhy, by way of answer say that:

1. They admit the allegations contained in paragraph 1.

2. They admit the allegations contained in paragraph 2.

3. They admit the allegations contained in paragraph 3.

4. They deny the allegations contained in paragraph 4, and allege that the amount paid on the contract amounts to $83,740.20, and that the complainant is entitled to a credit of $400.00 for the cost of twenty dresses, leaving a balance due to the defendant contractors of $13,859.80.

5. Defendants deny the allegations contained in paragraph 5.

6. Defendants deny the allegations contained in paragraph 6.

7. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 7, and leave the complainant to his proof thereof.

8. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 8, and leave the complainant to his proof thereof.

9. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 9, and leave the complainant to his proof thereof.

10. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 10, and leave the complainant to his proof thereof.

11. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 11, and leave the complainant to his proof thereof.

12. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 12, and leave the complainant to his proof thereof.

13. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 13, and leave the complainant to his proof thereof.

14. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 14, and leave the complainant to his proof thereof.

15. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 15, and leave the complainant to his proof thereof.

16. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 16, and leave the complainant to his proof thereof.

17. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 17, and leave the complainant to his proof thereof.

18. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 18, and leave the complainant to his proof thereof.

19. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 19, and leave the complainant to his proof thereof.

20. Defendants have not sufficient knowledge or information whereof to form a belief as to the

allegations contained in paragraph 20, and leave the complainant to his proof thereof.

21. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 21, and leave the complainant to his proof thereof.

22. The defendants admit the allegations contained in paragraph 22, but allege that the sum they have alleged for extra work is $14,882.86 and they have refrained from instituting suit on the said claim by reason of the fact that the complainant has promised from time to time to make payment in full of the amount due to the defendants. Defendants further allege that the complainant has promised to pay to them the balance due on the contract, together with the said extra work, making a total due to the defendants of $28,742.66.

23. Defendants deny the allegations contained in paragraph 23, and allege there is due to them the sum of $14,882.86, for extra work ordered by the complainant, and for which he promised to pay to the defendants, and the further sum of $13,-359.80 being the balance due on the original contract.

24. The defendants deny the allegations contained in paragraph 24, and allege their work was done in a good workmanlike manner, and that all the material furnished on the said job was of the best quality and that the plans and specifications were carefully followed by the defendants in doing all of the work called for by the complainant's plans and specifications and agreement therewith.

25. Defendants admit that they have not paid all of the Stop Notices filed with the complainant, by reason of the fact the complainant has failed to live up to his agreement to pay the balance due on the contract, and that he has failed to pay all of the extra work ordered by him and which he promised to make payment of, and that the defendants are ready and willing to pay the said Stop Notices as soon as the complainant fulfills his part of the agreement to his original contract and extra work.

26. Defendants deny that the complainant has ever offered to them the sum of $3646.00 but allege instead that the complainant has promised to pay the balance due on the contract and for the extra work ordered by him and that he has failed to do so.

FIRST DEFENSE.

Defendants by way of defense and relief ask that the court order the complainant to pay unto the court the sum of $13,859.80 due and owing to them on the original contract and the further sum of $14,882.86 due to them for extra work, and that the defendants may be permitted to substitute and proceed with their claim against the said complainant in an action at law.

COUNTERCLAIM.

The defendants by way of Counterclaim say that:

1. They repeat the allegations contained in paragraphs 1 and 2 of the complainant's Bill, and

allege there is due and owing to them on the contract mentioned in paragraph 1, a balance of $13,-859.80 for which payment has been demanded and the same has not been paid.

2. Defendants allege that there is due and owing to them the sum of $14,882.86 for work, labor and material ordered by the complainant, and which work, labor and material the said complainant, after ordering the same promised to pay. The said work, labor and material ordered by the complainant was all extra work, separate and apart from the contract, plans and specifications, and was done for and at his request and under the supervision of his architect, and the payment of the same has been demanded by the defendants and the same has not been paid, and there is now due and owing to them the full sum of $14,882.86 for extra work.

3. The defendants demand a judgment against the complainant for the full sum of $13,859.80 due on the original contract and the further sum of $14,882.86 due for extra work, labor and material, making a total sum of $28,742.66 due and owing to them from the complainant, and for which sum the defendants demand a judgment against the complainant for together with interest.

O. C. BIANCHI,
Solicitor of defendants, Michael & Joseph Cunhy, trading as Vitille, Kinsella & Cunhy.

Answer of North Hudson Manufacturing Co.

(Filed: April 23, 1930.)

IN CHANCERY OF NEW JERSEY.

Between MARTIN J. MACDONNELL, Complainant, *and* MICHAEL J. VITILLE, *et als.*, Defendants.	On Bill, etc. Answer of Defendant, North Hudson Manufacturing Co., to Bill of Complaint and Addition to Bill by Way of Supplement.

The defendant North Hudson Manufacturing Co., a corporation of New Jersey, answering the bill of complaint herein, and the addition to bill by way of supplement, respectfully shows that:

1. The defendant has no knowledge of the allegations contained in paragraph 1 of the bill of complaint, but is informed and believes that the said allegations are true, but for greater certainty begs leave to refer to the said writing.

2. It has no knowledge of the allegations contained in paragraph 3 of the bill of complaint herein, but is informed and believes that the allegations therein contained are true.

3. It denies paragraph 5 of the bill of complaint.

4. It has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 6, 7, 8 and 9.

5. It admits that it served upon complainant a notice in writing dated September 13th, 1927, that

it had furnished certain materials to Vitille, Kinsella & Cunhy, contractors, in the sum of $2,047.18, and that said contractors did, upon demand, refuse to pay said amount to this defendant, and that thereafter this defendant instituted an action in the Hudson County Circuit Court against complainant to recover the sum of $2,047.18, and that that action is still pending and undisposed of. It has no knowledge or information sufficient to form a belief as to the other allegations contained in paragraph 10.

6. It has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 11, 12, 13, 14, 15, 16, 17, 18 and 19 of the bill of complaint herein.

7. This defendant admits that it has instituted a suit to enforce its claim against complainant and at the time of the filing of the bill was prosecuting its claim to judgment. It has no knowledge or information sufficient to form a belief as to the other allegations contained in paragraph 20, and leaves the complainant to make proof thereof.

8. This defendant denies the allegations contained in paragraph 21 of the bill of complaint.

9. It has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 22.

10. It denies the allegations contained in paragraphs 23 and 24 of the bill of complaint.

11. This defendant admits that Vitille, Kinsella & Cunhy, contractors, have not paid or settled the

demands of this defendant and this defendant demands payment of its claim from complainant and said contractors.

12. It denies paragraph 26 and further alleges that the amount remaining unpaid in the hands of the complainant under the said contract and for labor and materials furnished in the erection and construction of the building on the lands of the complainant in addition to that provided by the said contract is far in excess of the sum of $3,646, and that the defendant caused to be served a stop notice on complainant in accordance with the statute in such case made and provided, that there was ample money in the hands of complainant at the time of the service of the said notice to pay the claim of this defendant, that the said contractors, Vitille, Kinsella & Cunhy, have never disputed the claim of this defendant, but, on the contrary, have admitted it and the said stop notice operated to assign to this defendant so much of the moneys then in the hands of the complainant as were sufficient to pay the claim of this defendant in full, that the complainant has wholly failed and refused to pay this defendant the said sum so due to it.

By way of answer to the addition to bill by way of supplement, this defendant respectfully shows that:

1. It has no knowledge or information sufficient to form a belief as to the allegations of paragraphs 1, 2, 3 and 4 thereof.

Further answering the bill of complaint herein and the addition thereto by way of supplement, this defendant says that:

Answer of North Hudson Manufacturing Co.

1. At the time of the service upon complainant of the stop notice of this defendant there was then in complainant's hands, due and owing to the general contractors, Vitille, Kinsella & Cunhy, on the eighth installment under the said contract, the sum of upwards of $3,646.00; that prior to the service upon complainant of the stop notice of this defendant no other stop notices had been served upon complainant; that the claim of this defendant was not disputed by the said contractors, Vitille, Kinsella & Cunhy, and the said stop notice operated to assign and appropriate from and out of the moneys then admittedly due and owing to the said contractors, to this defendant the sum of $2,047.18 for materials furnished to said Vitille, Kinsella & Cunhy, pursuant to the contract.

Further answering the bill of complaint herein and the addition thereto by way of supplement, this defendant says that:

1. Complainant delayed filing of its bill of complaint in this cause until December 7th, 1928, a period far in excess of four months after the last work and materials were furnished for the erection and construction of the said buildings pursuant to the said contract by the said contractors, Vitille, Kinsella & Cunhy, and the said contractors have lost their right to file a mechanics lien against the lands and premises described in the bill of complaint so that should this court, at the instance of complainant, restrain this defendant from prosecution of its suit at law, the position of this defendant having been changed by the laches of the complainant will be greatly prejudiced, the complainant will be at liberty to part with the title to

the said lands and premises, and this defendant may be unable to collect the amount of its claim.

Further answering the bill of complaint herein and the addition thereto by way of supplement, this defendant says that:

Complainant has failed to apportion the amounts of stop notice claims as between laborers and materialmen.

THOMAS MCNULTY,
Solicitor of defendant
North Hudson Mfg. Co.

Answer or Statements of Claim of Stop-Notice Claimants.

In addition to the answer filed by stop-notice claimant North Hudson Manufacturing Co., answers or statements of claim were filed by the following stop-notice claimants:

Antonio Mamolite and Pasquale Ricciardi,
Hoegger, Inc.,
Cadel Bros., Inc.,
Thomas Henry, Inc.,
Edward De Forge, Inc.,
Louis Bogorad,
Irving Trust Company, as Trustee in Bankruptcy of Indiana Flooring Company,
Hudson Fireproof Block Company,
Guido M. Crocetti,
Scagliola Manufacturing Company,
Carl F. Diffenbach,
Edward Griffith,

Newark Sheet Metal & Kalamein Co.,
Peter Goranson,
John G. Keller, Inc.,
Walton M. Cable.

Said stop notice claimants filed either answers similar to that of North Hudson Manufacturing Co., or simple statements of claim. They are not set forth because the claims and priorities of the stop-notice claimants, as found by the master, are not in dispute on this appeal.

Order Imposing Restraints, etc.

(Filed, April 29, 1929.)

IN CHANCERY OF NEW JERSEY.

71—182.

Between

MARTIN J. MACDONNELL,
Complainant,
and
MICHAEL J. VITILLE, *et als.*,
Defendants.

} On Bill, &c.

This matter having come on for argument on the order to show cause made herein on the seventh day of December, 1928, in the presence of Platoff, Saperstein & Platoff, Esquires, solicitors of the complainant; and Israel N. Greene, Esquire, C. C. Bianchi, Esquire, Thomas McNulty, Esquire,

William F. Burke, Esquire, and Howard Gilmour, Esquire, solicitors of defendants; and the Court have considered complainant's bill of complaint, and the affidavits thereto annexed, and the answering affidavits filed on behalf of the defenddants; and having heard argument of counsel thereon, it is on this 29th day of April, 1929,

ORDERED that until the further order of the Court the defendants, Michael J. Vitille, James J. Kinsella and Joseph Cunhy, Antonio Mammolite and Pasquale Ricciardi, Hoegger, Inc., a corporation, Cadel Brothers, Inc., a corporation, North Hudson Manufacturing Company, a corporation, Thomas Henry, Inc., a corporation, Edward De Forge, Inc., a corporation, Louis Bogorad, Indiana Flooring Company, a corporation, Hudson Fireproof Block Co., a corporation, Guido M. Crocetti, Scagliola Manufacturing Co., Inc., a corporation, and Carl M. Diffenbach, Jr., and Edward Griffith, Newark Sheet Metal & Kalamein Co., a corporation, Peter Goranson and John G. Keller, Inc., a corporation, and their attorneys, agents and servants, desist and refrain from instituting any action or actions to recover from complainant any sum or sums alleged to be due to them or any of them by virtue of labor performed or materials furnished in the erection and construction of the building of complainant described in the bill of complaint, and that said actions so instituted, remain in all respects in status quo: PROVIDED HOWEVER, AND THIS ORDER IS MADE UPON THE EXPRESS CONDITION that the complainant do deposit with the Clerk of this Court, the sum of Thirty Thousand One Hundred court in this cause, which said sum of $30,186.35

Cents, on or before May 14, 1929, to secure the payment of such decree as may be made by this court in this cause, which said sum of 30,186.35 shall limit the maximum liability of complainant; or in lieu of cash, the complainant may file in this cause, his bond in said sum on or before May 14, 1929, in form and surety to be approved by the court, which bond shall contain a provision that it may be enforced in this court in a summary manner after due notice to the principal and surety and after hearing thereon, conditioned to pay such decree as may be made in this cause, limited as aforesaid; and it is further

ORDERED that unless said cash or bond is filed and approved within the time hereinbefore limited, this order, and the order to show cause dated the seventh day of December, 1928, shall be and shall be deemed to be dissolved, vacated and of no force and affect after May 14, 1929, anything in the orders to the contrary notwithstanding.

And it is further ordered that the complainant pay the cost of the premium on said bond in the first instance and that he be repaid out of the fund finally decreed to be paid into court by him, the cost of the excess amount of said bond over the amount so finally decreed to be paid by him.

Respectfully advised:

E. R. WALKER,
C.

JOHN BENTLY,
V. C.

Bond.

(Filed, June 5, 1929.)

IN CHANCERY OF NEW JERSEY.

71—182.

Between

MARTIN J. MACDONNELL,
Complainant,
and
MICHAEL J. VITILLE, *et als.*,
Defendants.

} On Bill, &c.

KNOW ALL MEN BY THESE PRESENTS, that we, Martin J. MacDonnell, as principal, and Union Indemnity Company, a corporation of the State of Lousiana, duly authorized to transact business in the State of New Jersey, as surety, are held and firmly bound unto the Chancellor of the State of New Jersey, in the sum of Thirty thousand one hundred eighty-six Dollars and thirty-five ($30,186.35) Cents, lawful money of the United States, for which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 31st day of May, 1929.

The condition of this obligation is such, that,

WHEREAS, the above bounden Martin J. MacDonnell has filed his bill of complaint in the Court of Chancery of New Jersey against Michael J. Vitille, James J. Kinsella, and Joseph Cunhy,

Bond.

Antonio Mammolite and Pasquale Ricciardi, Hoegger, Inc., a corporation, Cadel Brothers, Inc., a corporation, North Hudson Manufacturing Com-
Louis Bogorad, Indiana Flooring Company, a corporation, Edward De Forge, Inc., a corporation,
10 Louis Bogorad, Indiane Flooring Company, a corporation, Hudson Fireproof Block Co., a corporation, Guido M. Crocetti, Scagliola Manufacturing Co., Inc., a corporation, and Carl F. Diffenbach, Jr., and Edward Griffith, Newark Sheet Metal & Kalamein Co., a corporation, Peter Goranson and John G. Keller, Inc., a corporation; praying, among other things, that, pending the determination of said suit, the said defendants may be restrained and enjoined from instituting any action
20 or actions at law, and from taking any further proceedings in any actions at law theretofore instituted by them against the said Martin J. MacDonnell, for the recovery of any sum or sums alleged to be due to them by virtue of labor performed or materials furnished in the erection and construction of the building of said Martin J. MacDonnell, more particularly described in said bill of complaint; and,

30 WHEREAS, the said defendants have been so enjoined and restrained upon the express condition that the said complainant should file in this cause, his bond in the sum aforesaid, conditioned to pay such decree as may be made in this cause, the maximum amount of which is limited to Thirty Thousand, One Hundred Eighty-six Dollars and Thirty-five ($30,186.35) Cents;

NOW, THEREFORE, the condition of this obligation is such that if the above bounden Martin J.
40 MacDonnell shall abide by such order or decree as

the Chancellor shall make in the premises, and shall well and truly pay into Court the amount of such decree as may be made against him in the said cause, upon the entry thereof, or, if the appellate proceedings are taken by complainant, upon the conclusion of said appellate proceedings, then the above obligation to be void, otherwise to be and remain in full force and effect, provided that in the event that default shall be made by complainant in the performance of the terms of such decree, this bond may be enforced in this Court, in a summary manner, after due notice to the principal, and after hearing thereon.

Signed, sealed and delivered
in the presence of:

MARTIN J. MacDONNELL L. S.

UNION INDEMNITY COMPANY,
By CARROLL W. LAIRD,
Attorney in Fact.

Attest:

FRANK P. CASEY,
Attorney in Fact.

State of New Jersey, }
County of Hudson, } ss.:

BE IT REMEMBERED that on this 31st day of May, 1929, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Martin J. MacDonnell, who, I am satisfied, is the principal named in the foregoing bond, to whom I first made known the contents thereof, and thereupon

he acknowledged that he signed, sealed and delivred the same as and for his voluntary act and deed, for the uses and purposes therein expressed.

DAVID SAPERSTEIN,
Master in Chancery of New Jersey.

Order of Reference.

71/182.

IN CHANCERY OF NEW JERSEY

Between

MARTIN J. MACDONNELL,
Complainant,
and
MICHAEL J. VITILLE, *et als.*,
Defendants.

On Bill, etc.

It appearing to the Court that the complainant has filed with the Clerk of the Court his bond in the sum of $30,186.35 in form and with surety approved by the Court conditioned to pay such decree as may be made in this cause, in compliance with the order of the Court made herein on the 29th day of April, 1929; and it further appearing that the complainant's bill of complaint is properly brought, and application having been made to speed the cause, and due notice of this motion having been given, it is on this 15th day of October, 1929,

Ordered that this matter be referred to Harry Lane one of the Masters of this Court, to hear the

same for the Chancellor and to report to him; that the said Master take and state the account between the complainant and all the defendants on the building contract referred to in the bill of complaint and for extra work, and to report what amounts are due from the complainant to the defendants respectively, after crediting all proper payments made by the complainant thereon and making all proper allowances and set offs to which the parties maybe justly entitled to upon said building contract and extra work, and that said Master also ascertain and report the amounts due, if anything, on the several claims and demands of the parties to this suit as against the funds to be paid to the Court, and the order of priority of such claims, and it is

Further Ordered that the parties to this suit do within twenty days from the date of service of a copy of this order, file with the Clerk of this Court statements in writing of their several claims to said fund and that the complainant and all defendants interplead, settle and adjust their several claims and matters in controversy in this suit as between and among themselves before said Master, and it is

Further Ordered that the said Master complete said testimony and file his report with all convenient speed, and it is

Further Ordered that all further equities are reserved until the coming in of the Master's report.

E. R. WALKER,
C.

Respectfully advised,

JOHN BENTLEY,
V. C.

Order of Re-Reference.

Filed Dec. 11, 1930.

71/182.

IN CHANCERY OF NEW JERSEY.

Between

MARTIN J. MACDONNELL,
Complainant,
and
MIICHAEL J. VITILLE, *et als.*,
Defendants.

On Bill, etc.

The above cause remaining unheard, it is, on this 17th day of November, 1930, Ordered, that said cause now be heard before the Honorable John O. Bigelow one of the Vice-Chancellors of this Court to hear the same for the Chancellor, and to report the same to him and to advise what order should be made thereon, and that said hearing be heard at the time and place to be fixed.

EDWIN ROBERT WALKER,
Chancellor.

Master's Report.

(Filed June 18, 1930.)

IN CHANCERY OF NEW JERSEY

Between MARTIN J. MACDONNELL, Complainant, *and* MICHAEL J. VITILLE, *et als.*, Defendants.	71/182 On Bill, etc.,

In pursuance of the Order of Reference entered in the above entitled cause on the 15th day of October, A. D. 1929, whereby it was, among other things, referred to the undersigned, one of the Master's of this Court, to hear the same for the Chancellor, and to report to him and to take and state the account between the complainant and all the defendants on the building contract referred to in the Bill of Complaint and for extra work, and to report what amounts are due from the complainant to the defendants respectively after crediting all proper payments made by the complainant thereon and making all proper allowances and set-offs to which the parties may be justly entitled to upon said building contract and extra work, and that the undersigned also ascertain and report what the amounts due, if anything on the several claims and demands of the parties to this suit as against the funds to be paid to the Court are, and the order of priority of such claims, I do respectfully report to his honor, the Chancellor, that I have been attended by the solicitors for the parties as hereinafter set forth; and I do report

that I have taken the testimony of the witnesses produced before me and have received and inspected the exhibits produced in such manner, which testimony and exhibits are submitted herewith and made a part of this, my report.

I do report that all the following appeared before me during the course of the taking of the depositions.

APPEARANCES:

Mr. John H. Platoff for Platoff, Saperstein & Platoff, Solicitors for Martin J. MacDonnell, complainant.

Mr. O. C. Bianchi, solicitor for defendants, Michael J. Vitille, James J. Kinsella and Joseph Cunhy.

Mr. Israel Greene, Solicitor for defendant, Guido M. Crocetti.

Mr. Gilmour for McDermott, Enright & Carpenter, Solicitors for defendant, Irving Trust Company, as Trustee in Bankruptcy of Indiana Flooring Company.

Mr. Frank Cozzolini, Solicitor for defendants, Antonio Mamolite and Pasquale Ricciardi.

Mr. Thomas McNulty, Solicitor for defendants, Cadel Bros. Inc., North Hudson Mfg. Co., and Thomas Henry, Inc.

Mr. George Marcus for Wright, Vanderburgh & McCarthy, Solicitors for defendant, Carl F. Diffenbach, Jr., and Edward Griffith.

Mr. Morris Gotlieb, as agent for Hoegger, Inc., pro se.

Mr. Louis De Forge, Solicitor for defendant, Edward De Forge, Inc.

Mr. Sinisi, as agent for Hudson Fireproof Block Co., pro se.

Mr. Dante Rivetti, Solicitor for Scagliola Manufacturing Co., Inc.

Mr. Herrigel for Herrigel, Lindabury & Herrigel, Solicitors for defendant, Newark Sheet Metal & Kalamien Co.

Mr. Louis R. Kagan, Solicitor for defendant, Peter Goranson.

Mr. Oscar Stempler, Solicitor for defendant, John G. Keller.

Mr. Molloy for Heine & Laird, Solicitors for defendant, Walton N. Cable.

Mr. A. Theodore DeMuro, Esq., Solicitor of Angelo Rich, (not a party defendant).

Mr. Emanuel P. Scheck, of Osborne, Cornish & Scheck, Solicitors of S & S Supply Company, appearing Specially.

STATEMENT.

The Bill of Complaint was filed in this cause, setting up the contract entered into between the complainant, as owner, and the defendants, Michael J. Vitille, James J. Kinsella and Joseph Cunhy, trading as Vitille, Kinsella & Cunhy, as contractors, for the erection of a five story apartment building in the Township of North Bergen, at a price of $98,000.00. The Bill further set forth that the building contract and specifications had been filed in the County Clerk's office and that numerous stop notices had been filed with the owner under the provisions of the Mechanics Lien Act, and that in some instances suits had been instituted. The contractors and the Stop Notice claimants were made parties defendants. Subsequently, additions to Bill by way of supplement were filed bringing in additional stop notice claim-

ants. The Bill set forth that all of the contract price had been paid with the exception of $3,646.00 withheld on the eighth installment payment, and the sum of $11,884.68 withheld on the Ninth and final installment payment. The Bill further set forth that the contractors claimed that there was due to them for Extras the sum of $14,655.67, but complainant alleges that the fair value of any and all of the extras alleged to have been furnished is not more than $6,157.55. Complainant, in his Bill, also contends that he is entitled to credit for work defectively performed or omitted under the contract, materials deviating from the specifications annexed to the contract, and work unfinished and materials unfurnished, the reasonable value of said credits he alleges to be in excess of $12,000.00.

In the twenty-sixth paragraph of his Bill, complainant sets forth that he has always been willing and still is willing to pay the said sum of $3,646.00 and such further sum or sums as may be found to be owing from complainant to the contractors after due credit has been given to complainant for such set-offs as he may have, to such person or persons as is or are lawfully entitled to receive the same, and to whom he can pay such sums with safety, and complainant tendered said sum of $3,646.00 into Court.

Complainant, in his prayer in the Bill of Complaint, prayed that the contractors and stop notice claimants, who were made defendants to the suit, should interplead and determine their rights to said sum of $3,646.00, and such further sum or sums as may be found owing from the complainant to the contractors after due credit has been given to complainant for such set-offs as he might have, and that complainant be ordered to pay such

sum into Court. That an account might be taken and a settlement of the amount due from complainant to the contractors had, and that complainant be decreed to be discharged from all liability to said defendants or any of them in the premises. The Bill also prayed for a restraint against the contractors and stop notice claimants from proceeding at law against complainant.

The original papers on file disclose that upon the argument of the Order to Show Cause why restraint should not issue, an Order was entered on the 29th day of April, A. D. 1929, containing the restraint prayed for; "provided, however, and this order is made upon the express condition, that the complainant do deposit with the Clerk of this Court the sum of Thirty Thousand, One Hundred Eighty-six Dollars, Thirty-five Cents ($30,186.35), on or before May 14th, 1929, to secure the payment of such decree as may be made by this Court in this cause, which said sum of $30,186.35 shall limit the maximum liability of complainant; or in lieu of cash, the complainant may file in this cause, his bond in said sum on or before May 14th, 1929, in form and surety to be approved by the Court, which bond shall contain a provision that it may be enforced in this Court in a summary manner after due notice to the principal and surety and after hearing thereon, conditioned to pay such decree as may be made in this cause, limited as aforesaid."

POINT ONE

I have been advised that the bond provided for in said order was duly filed.

Under these circumstances, I apprehend that under the order of reference there are two sep-

arate and distinct matters to be determined, viz.: first, the amount due from the owner to the contractors; second, the amount due to each stop notice claimant respectively and their order of priority. At the inception of the taking of the depositions and endeavoring to keep the testimony on these two questions as separate and distinct as possible, I first took the testimony of each stop notice claimant on his particular claim, endeavoring as much as possible to keep the testimony respecting the claim of each stop notice claimant separate. I then took up the question of the testimony respecting the contractor's claim.

In this Report I feel that the two matters should be treated in just the reverse order and that first I should deal with the contractors' claim and ascertain the amount of the fund in which the stop notice claimants are to participate.

CONTRACTORS' CLAIM.

As between counsel for the owner and counsel for the contractors and the stop notice claimants, there was developed before me a sharp clash respecting the legal rules to be applied in determining the amount due the contractors, and numerous memorandums of law were filed with me by respective counsel.

Counsel for the owner in his memorandum raised five points of law, which I shall briefly discuss for the benefit of the Court and to apprise the Court of the reasons for my findings herein set forth.

Where a building contract provides that payments shall accrue only upon the production of a certificate by the architect, such provision is a condition precedent to the liability of the owner

to make payments in the absence of fraud or collusion.

With this general statement of the law I have no quarrel, but if by this contention of counsel he means that because there has been no final certificate issued by the architect, that therefore there can be no recovery from the owner (although in his memorandum he does not appear to go so far), I cannot agree with him in view of all of the facts and circumstances of this case.

The testimony shows that the building was completed for occupancy on October 1st, 1927. The testimony further shows that on numerous occasions the architect promised to check up the building and issue his final certificate. That, at no time did the architect specifically refuse to issue the certificate for any particular reason except that he had not had time to check up, nor did he at any time serve upon the contractors any demand to perform any incomplete work. The architect, Mr. Ach, testified on page 279 of the testimony, that the building was substantially completed. The architect further testified that he had granted certificates up to the final certificate. In this connection, it is well to remember that a great deal of the alleged omitted or substituted work, if not all, had been omitted or substituted prior to the issuance of the Eighth certificate by the architect. It is also well to remember that the amount retained from the contract price approximates the fifteen percent retained percentage. I feel that in view of all of the testimony, that with the exception of a few items for which I hereafter give credit to the owner, that the contractors were entitled to their final certificate, and particularly in view of the testimony of the

architect himself and Mr. Scheidecker, the building expert produced on behalf of the owner, that its withholding would amount to legal fraud under the cases.

See Rizzolo v. Poysher, et al, (Court of Errors and Appeals), 99 Atl. Rep. 390.

Furthermore, complainant has applied in this Court for equitable relief and in his Bill of Complaint tenders to pay what is justly due to the contractors and prays that an account may be taken and a settlement of the amount due from him to contractors may be had after due credit has been given for such set-offs as complainant may have. The question of the architect's certificate is not made an issue in the Bill. And, upon this bill the complainant has obtained the equitable remedy of injunction. If on no other doctrine, I feel that the maxim "he who seeks equity must do equity" woud estop complainant from raising this point.

POINT TWO

The production of the certificate may be waived but the waiver must be express or reasonably clear from the acts and conduct of the parties.

In my opinion, the complainant could not, even at law, resist payment of the amount that may be meritoriously due because no final certificate has been issued, but I am confident that in this suit he must be held to have waived the nonproduction of the final certificate when he came into this Court, asked for and obtained an injunction, prayed for an accounting to determine the amount due and tendered himself ready to pay such amount as may be found to be due.

POINT THREE

Where a contract provides that no extra work or change shall be made except in pursuance of a written order, the production of the writing is a condition precedent to the right to recover unless it was waived.

The testimony shows that the specifications used by the architect was a stereotyped set of specifications and that constantly changes were being made both by the architect and the owner, and that the changes were substantial. The testimony shows that the owner is a doctor and was vitally interested in the erection of this apartment house and particularly in the apartment on the first floor, which was to be used by himself as a combination office and living quarters. The owner, with the exception of two or three weeks when he took a trip, was daily in and out of the building and watching its progress. It is admitted by both the owner and the architect that at the owner's request and direction numerous changes and additions were made. The architect says that in some instances written orders were issued but in most instances no written orders were issued. Mr. Vitille testified that all of the extra work was done upon orders of the owner and the architect. Whether this be so or not, I am convinced from the testimony, from the actions of the owner that he impliedly gave authority to the architect to order extra work orally and that he was in and about the building and satified such orders for extra work and that the contractors had the right to rely upon the orders given for extra work. Further, that the owner is estopped by reason of his actions from raising this question, and further

by the filing of his Bill in a Court of equity and obtaining equitable relief as hereinbefore reverted to. In a number of instances the extra work was ordered in writing. In a number of others the architect admits that the extra work was ordered by him orally with the owner's consent.

In the leading case of Headly v. Cavilier, 82 Atl. Rep. 908, the Court of Errors and Appeals considers this question with great thoroughness and holds that no matter how stringent the provisions are placed in a contract prohibiting it from being altered or added to in any wise, that parties who have contracted together have a right to cancel their contract, or alter it in any wise not prohibited by law, or to supplement it by another additional contract and that no matter how stringently such clauses may be worded, it is always open for the parties to agree orally or otherwise, upon proper consideration, that they be partially or entirely disregarded and another arrangement substituted.

POINT FOUR

The architect has no authority to waive any of the substantial rights of the owner under the contract.

There is no doubt but that the above is a true statement of the strict legal law. However, under the circumstances of this case and in view of the testimony of both the contractor, Vitille, that all of the extras were ordered by the owner, and the architect, and I believe this to be true, and furthermore, in view of the testimony of the architect and the owner that numerous items of extra work were verbally ordered at the express directions of the owner and that the owner was con-

stantly in and out the building while the extra work was being performed, I do not believe that in order for the contractors to recover for the extra work, that it is necessary to hold that the architect alone waived any provision of the contract and specification in the ordering of this extra work. Likewise on the equitable principle heretofore adverted to, the complainant having received the benefit of this extra work and which I find was at either his express knowledge or with his acquiescence, I find that he should not be permitted to escape payment for such extra work as was performed.

POINT FIVE

The owner may have set-off against any unexpended balance due on the contract or for extra work, for which certificates have not been issued, his claim for incompleted or defective work.

I thoroughly agree with this statement of the law and have in this report allowed to the owner all credits to which I feel he is entitled to by reason of any incompleted or defective work.

The foregoing are all of the points raised by counsel for the owner in his memorandum and argument before me. I am aware that it is somewhat unusual in a reference of this kind for the Master to consider in detail legal questions raised, but in view of the fact that their application to the case at bar is principally determined upon the evidence submitted, I feel that it was appropriate for me to dispose of them before generally considering the evidence produced pro and con on the contractor's case.

According to the statement of their claim, filed by the contractors, their claim is as follows:

Contract Price		$98,000.00
Credits:		
Amount paid on account	$83,740.20	
Credit for 20 dressers	400.00	
Total Credits		84,140.20
Balance due on contract.....		13,859.80
Amount due for extra work.....		14,882.62
Total amount of claim.....		$28,742.66

Credits to Owner for Moneys Paid on Account

There was some question as to the amount of credit which the owner was entitled to receive for moneys paid on account to the contractors. At the suggestion of the Master, the owner and his counsel and the contractors and their counsel got together and checked up all of the payments with the result that at the conclusion of the hearings it was stipulated on page 636 of the Testimony that the owner was entitled to credits for payments made on account of the sum of $84,190.20.

Credits Allowed to Owner for Omitted and Defecive Work and Materials

In addition to Mr. Vitille, one of the contractors, and the owner and the architect, experts were produced on both sides. The complainant produced Mr. Shilowitz, an architect, to testify to certain omissions. Mr. Shilowitz testified as to

the value he placed upon the omitted work and materials without in anywise giving credit for the alleged substituted work and materials. Furthermore, an examination of his testimony indicates, to my mind, that most of the values placed by him were simply approximate values. The other expert produced on behalf of the owner, Mr. Scheidecker, was, to my mind, a most fair witness and I have placed great reliance upon his testimony. I feel that his testimony was not biased as is usually the case in the testimony of experts. An examination of the testimony of Mr. Scheidecker shows that the building was substantially completed. He further testified that in numerous instances, where there were discrepancies between the materials specified in the specifications and the materials placed in the building, that the materials placed in the building more nearly approximated what, in his judgment, were proper in the erection of an apartment house of the size and character of the building in question. For instance, he testified that the hanging of gypsum block from the ceiling in the Doctor's apartment was absolutely impractical, and also that the use of cabinet trim in a building of this nature was unusual. Also, that it was usual for the stair soffets not to be enclosed and plastered. Mr. Shilowitz claimed an allowance of $1,500.00 because there was not a bonded Barrett roof placed on the building. Mr. Scheidecker, on the other hand however, testified that the roof that was placed on the building was a good roof and that the only difference between that and a bonded Barrett roof was the absence of the bond. He also testified that the cost of the bond saved to the contractors was approximately $90.00.

From an examination of the entire testimony on both sides, I am convinced that the specifications were a stereotyped form of specification and that in reading them in connection with the plans, it was necessary to make the specification comply with the plans and that numerous changes were necessary as the work progressed. I am further convinced from the testimony that the erection of this apartment house was a personal enterprise of Dr. MacDonnell and that he, as well as the architect, was constantly upon the job, and that he himself, as the work progressed, made numerous changes. For instance, Mr. Scheidecker testified to a difference between the face brick used in the building and that specified, whereas, I am convinced that the contractors were directed to use a face brick similar to that used in Tudor Hall, an apartment house erected in the City of Englewood, and that in fact Mr. Vitille was taken up to Tudor Hall to see the kind of face brick there used. Under these circumstances, I do not believe that the complainant is entitled to credit for a large number of the items of alleged omitted materials which in most instances were substituted by other materials in pursuance with the orders and directions of both the owner and the architect. I find, however, that there are numerous items of omitted work and materials and defective work and materials for which I hereafter give the owner credit.

From an examination of the entire testimony, I find that the owner is entitled to credit in the amounts indicated for the following omitted and defective work and materials:

Kitchen dressers omitted: (Contractors admit credit for $400)..	$500.00
Iron Doors in vestibule substituted by Kalamine doors	150.00
Kalamine doors not set properly.....	150.00
Back Painting of trim omitted.....	231.00
Radiators: were to have one coat of prime and two coats of American Radiator Enamel—instead aluminum silver was used. Allowance	240.00
Vestibule entrance trim: specifications provided for trim to run to floor, whereas trim as set only runs to top of wainscoating. Allowance	35.00
Roof: Roof on long enough to have shown defects in material and workmanship. Testimony is to effect that roof is in very good condition. Allowance—saving of cost of bond.....	90.00
Cellar Ceiling: One coat of plaster used instead of three as specified.....	120.00
Water Closet in Doctor's apartment omitted. Allowance	100.00
Deafening in bathrooms omitted. Allowance	100.00
Grounds omitted. Allowance	114.00
Plinth Blocks omitted. Allowance.....	40.00
Cabinet trim: Saving to contractors...	267.00
Milk Cabinets in basement omitted. Allowance	75.00
Towel Bars in bathrooms omitted. Allowance	25.00
Platform for laundry omitted. Allowance	25.00
Dumbwaiters: Gorenson dumbwaiters used instead of Sedgwick as specified. Saving to contractors	100.00

Roofing: Copper flashings around parapet omitted. Allowance	160.00
Painting work. Allowance for omission of sandpapering and pumicing of woodwork and improper and defective painting	500.00
Total amount of credit to owner for omitted and defective work and materials	$3,022.00

EXTRA WORK.

Mr. Vitille testified as to each item of extra work.

In considering the items for extras on the contract, I have used Exhibit D-56, which is the exhibit used by Mr. Ach, the architect, in his testimony respecting the extra work. The direct testimony of Mr. Ach respecting the extra work is found on pages 293 to 307 of the testimony. Mr. Ach had a copy of Exhibit D-56 before him and in his testimony referred to each item by number. I have on the right side of the exhibit numbered the items so as to be in accordance with the testimony of Mr. Ach. In this report I will refer to the respective items by the numbers so designated. It will be noted from a reading of Mr. Ach's testimony that on numerous occasions he allows the items but that there is a slight discrepancy as to the amount he allows the item for. This in numerous instances is caused by the fact that he only allowed five per cent. on each item instead of ten per cent. overhead and ten per cent. profit. I am convinced from the testimony that the charge of ten per cent. overhead and ten per cent. profit made by

the contractors is proper, and I have on each item allowed, included this percentage.

With respect to the various items:

Item No.		*Amount Disallowed*	*Amount Allowed*
1.	Lumnite Cement ..... I have not allowed this item in view of the architect's testimony on page 293 that the substitution of Lumnite Cement was necessary to prevent freezing and the contractors neglected to provide proper facilities for heating materials.	$105.00	$
2.	Rock Excavation per requisition ..... Both the owner and the architect agree that this item should be allowed.		1,212.75
3.	White Cement		191.25
4.	Elevator Shafts concreted and waterproofed ..... I have not allowed this item in view of the architect's testimony on page 294.	100.17	
5.	Deafening apartments ...		720.11
	Deafening south dividing walls ..... The architect on page 295 agrees that the work was done and the contractors should have allowance therefor.		178.37

Item No.		*Amount Disallowed*	*Amount Allowed*
	6. Face Brick and Laying..		363.00
	7. Sand, Cement and Labor	267.65	
10	I have not allowed this item in view of the architect's testimony on page 295.		
	8. Furnishing and erecting Kalamine and Iron Buck for Vestibule doors.....		108.90
20	I have allowed this item, but in giving credit for omissions I have given credit for the iron doors omitted.		
	9. Kalamine frames and sash in vent shafts		139.15
	The architect agrees that contractors should have allowance for this item.		
	10. Furnishing Flax Linum..		730.48
	Laying Flax Linum	264.42	
30	I have not allowed for the laying of the Flax Linum in view of the architect's testimony on page 296. The architect agrees that the contractors should have allowance for the furnishing of the flax linum.		
	11. Removing window frame		
40	in toilet		49.67

Item No.		*Amount Disallowed*	*Amount Allowed*
12.	Installing kitchen-maid cabinets		189.97
13.	Rock Excavation ..... In view of the architect's testimony on page 297, I have allowed this item for $377.00 instead of the amount charged, to wit: $598.95.	221.95	377.00
14.	Removing partition in Janitor's apartment ..... The architect, on page 297, agrees that the contractors should have allowance for this item.		101.72
15.	Taking down and reerecting new partition ..... The architect, on page 297, agrees that contractors should have allowance for this item.		155.48
16.	Furring walls for frigidaire pipes ..... The architect agrees on page 298 that the contractors should have allowance for this item.		100.44
17.	Additional cost of coal bin		63.67
18.	Erecting dressing room in electric room		166.98

Item No.		*Amount Disallowed*	*Amount Allowed*
	The architect, on page 298, agrees that contractors should have allowance for this item.		
19.	Erecting linen closet in hall ..... The architect, on page 298, agrees that contractors should have allowance for this item.		50.80
20.	Cutting floors and walls, etc. in Dr. Fisher's office The architect, on page 298, agrees that the contractors should have allowance for this item.		390.83
21.	Erecting partition around frigidaire ..... I have allowed this item for the reason that the architect admits that the work was done.		14.52
22.	Erecting book case in Doctor's waiting room... I have allowed this item because the architect admits on page 300 that it was done in pursuance with his order.		58.08
23.	Erecting extra shelving.. I have not allowed this item in view of the architect's testimony on page 300.	181.50	

Item No.		*Amount Disallowed*	*Amount Allowed*
24.	New Door opening to Ward-room ..... I have not allowed this item in view of the architect's testimony on page 300.	33.18	
25.	Erecting dressing room in electric-room		58.08
26.	Building bench for screens in cellar		21.78
27.	Erecting dark room in cellar		101.64
28.	Installing instrument cases		29.04
29.	Building up table in Doctor's kitchenette		12.00
	Patent locks and bench for telephone books, etc... The architect, on page 304, agrees that the contractors should have allowance for these items.		6.00
30.	Installing book cases in Doctor's office ..... I have not allowed this item in view of the architect's testimony on page 340, and that this work seems to have been covered in the plans and specifications.	72.60	
31.	Putting moldings around kitchen-maid cabinets ...		58.08

Item No.		*Amount Disallowed*	*Amount Allowed*
32.	One piece of birch veneer for kitchen-maid cabinets The architect agrees on page 304 that contractors should have allowance for this item.		3.72
33.	Furnishing and hang hardware on 15 sets French doors		980.10
	Hanging three pairs of French doors supplied by North Hudson Mfg. Company		72.60
	This was ordered by the Doctor and the architect agrees on page 304 that the contractors should have allowance for this item.		
		$1,246.47	$6,706.21
	SUBCONTRACTORS.		
34.	Extras on outside stucco per contract of Edward De Forge, Inc.		$400.00
	I have allowed this item. The architect allowed it for only one-half, but I can see no reason why, in view of the testimony, that the contractors should not have allowance		

Item No.		*Amount Disallowed*	*Amount Allowed*
	for this extra charge on De Forge, Inc. sub-contract.		
35.	Extra for mill work—North Hudson Mfg. Co... I have allowed this item in view of all of the testimony. The architect, on page 305, testified but does not seem to be very clear with respect to this item.		775.43
36.	Extras on heating work—John G. Keller Co..... The architect agrees on page 305 that the contractors should have allowance for this item.		140.00
37.	Extras on electrical work—S. & S. Supply Company ..... The testimony shows that this bill is not against the contractors and that the owner is directly responsible to the S. & S. Supply Company for same. On page 636 it was stipulated that the contractors should not be allowed for this item.	$3,243.70	
38.	Extras on plumbing work—Cadel Bros. Inc.		832.00

Item No.		*Amount Disallowed*	*Amount Allowed*
	The items covered by this bill were selected and ordered by the owner. Also, see architect's testimony on page 306.		
39.	Extras on tile work—G. M. Croccetti		195.00
40.	Extras on iron work — Foscale Iron Works		159.27
		$3,243.70	$2,501.70
	Total amounts of subcontractors' bills allowed amount to	$2,501.70	
	10% Overhead allowed	250.17	250.17
		$2,751.87	
	10% Profit allowed...	275.19	275.19
	Total amount of extras—subcontractors		$3,027.06

RECAPITULATION.

Extras—General contractors	$6,706.21
Extras—Subcontractors	3,027.06
Total amount	$9,733.27

Master's Report.

CLAIMS

of

STOP-NOTICE CLAIMANTS.

Stipulation as to Interest.

It was stipuated on Page 22 of the testimony that all claims allowed should be allowed for the principal amount due without interest.

In the taking of the testimony I endeavored to, nearly as possible with so many parties involved, keep the testimony respecting the stop notice claimants separate and apart from the testimony of the contractors' claim against the owner, and to keep the testimony on each stop notice claim separate and part from the others.

In considering each stop notice claim I will indicate the pages of the testimony relating to the particular claim. I will also consider the stop notice claims in the order set up in the Bill of Complaint and the supplements and indicate in each instance the paragraph.

Re: Claim of

Antonio Mamolite and Pasquale Ricciardi

Paragraph 7 of Bill of Complaint.
Testimony Pages 3-18; 97-100.

Exhibits:

D-1—Stop Notice.
D-1A—Sub-contract.
D-1B—Statement of Claim.
Amount Claimed $1,588.32
Amount Conceded by Contractors (P-3) $1,588.32
Stop Notice served September 10, 1927.

Objection was raised to the stop-notice on the ground that there was a wilful mis-statement of the amount due. The amount claimed in the stop-notice was $4,166.38. From the testimony it appears that at the time the stop-notice was served, that the claimants claimed that that was the proper amount due to them although they had received a note for $1,500. This note was subsequently paid and after the demand for payment and the serving of the stop-notice, the claimants and the general contractors got together in an endeavor to adjust certain disagreements between them with the final result that a compromise was effected, which after giving credit for the note and for the allowances made, reduced the amount of the claim to $1,588.32, which is the amount now claimed by the claimants and conceded by the general contractors to be due. I am of the opinion that under all of the circumstances of the case, as evidenced by the testimony that there was no wilful mis-statement as to the amount due and that the claim should be allowed.

I have therefore allowed the claim of Antonio Mamolite and Pasquale Ricciardi in the sum of One Thousand, Five Hundred Eighty-eight Dollars, Thirty-two Cents ($1,588.32), with priority as of September 10, 1927.

Master's Report.

Re: Claim of

Hoegger, Inc.

Paragraph 8 of Bill of Complaint.
Testimony Pages 19-26.

Exhibits:

D-2—Stop-Notice, dated September 12, 1927.
D-2A—Letter enclosing Stop-Notice, dated September 12, 1927.
D-3—Postal Registry Return Receipt.
Stop-Notice served September 13, 1927.
Amount Claimed $540.00
Amount Conceded by Contractors... 540.00

Two main objections were made to the allowance of this claim:

1—That the stop-notice was not sufficient.

2—That the proof of service was not sufficient.

I am of the opinion that the stop-notice sufficiently complies with the provisions of the statute and that the proof of mailing to the owner and its receipt was sufficient. The testimony shows that the letter and stop-notice were mailed by registered mail on September 12th and that they were receipted for by Mrs. Retzel, whom the owner testified was the caretaker in charge of his home at that time, he, the owner, being away on a vacation.

I have allowed the claim of Hoegger, Inc., in the sum of Five Hundred Forty Dollars ($540.00) with priority as of September 13, 1927.

Re: Claim of

Cadel Bros., Inc.

Paragraph 9 of Bill of Complaint.
Testimony Pages 58; 80-93.

Exhibits:

D-21—Contract between general contractors and claimant.
D-25—Stop-Notice served September 16, 1927.
D-29—Copy of Summons and Complaint in suit instituted by claimant against owner in Hudson County Circuit Court.

Amount Claimed	$2,707.00
Amount Conceded by Contractors..	2,707.00

I have allowed the claim of Cadel Bros., Inc., in the sum of Two Thousand, Seven Hundred Seven Dollars ($2,707.00), with priority as of September 16, 1927, which I find was the date of service of the stop notice for the reasons set forth in this report respecting the claim of North Hudson Manufacturing Company.

Re: Claim of

North Hudson Manufacturing Co.

Paragraph 10 of Bill of Complaint.
Testimony Pages 59-72; 80-93.

Exhibits:

D-22—Contract between general contractors and claimant for mill work.
D-23—Itemized statement.

D-24—Copy of Summons and Complaint in suit instituted by claimant against owner in Hudson County Circuit Court, to which is annexed copy of Stop-Notice bearing date September 13, 1927, claiming $2,047.18.

D-26—Stop-Notice served September 16, 1927.

Amount Conceded by Contractors.. $2,460.50

Counsel for claimant waived the excess over and above the amount of $2,047.18, stated in the stop-notice.

Considerable testimony was taken as to the serving of this stop-notice, as well as the stop-notices of Cadel Bros., Inc., and Thomas Henry, Inc. It is shown by the testimony that Mr. John H. Sheridan, a lawyer, on September 15, 1927, mailed three sets of stop-notices, one directed to the owner at his residence in Woodcliff; one directed to the owner care of the Mt. Royal Hotel in Canada, and the other directed to the owner at a hotel in Poughkeepsie, New York. The owner, at that time, was on a trip to Canada and back. I am of the opinion that the stop notices mailed to the owner at his home address in Woodcliff, would, in the ordinary course of events, be received on the following day, to wit: September 16, 1927, and that this is the date which should be considered in fixing priority. It was agreed by counsel that these three claims should have the same priority and I have therefore also fixed September 16, 1927, as the date of priority for the two other claims, Cadel Bros., Inc., and Thomas Henry, Inc.

After a careful consideration of the testimony, I have allowed this claim in the sum of Two Thousand Forty-seven Dollars, Eighteen Cents ($2,047.18), with priority as of September 16, 1927.

Master's Report.

Re: Claim of

Thomas Henry, Inc.

Paragraph 11 of Bill of Complaint.
Testimony Pages 73-93.

Exhibits:

D-27—Stop-Notice served September 16, 1927.
D-28—Copy of Summons and Complaint in suit instituted by claimant against owner in Hudson County Circuit Court.

Amount Claimed	$5,691.27
Amount Conceded by Contractor..	5,743.43

Excess over amount claimed in stop-notice waived (P. 73).

Objections were raised to this stop-notice in particular for the reason that included in the amount claimed was the sum of $121.27 for materials furnished in August, which under the terms of sale—30 days—would not be due until September 18th, and further, because there was included in the bill $94.83 interest. I am of the opinion that the inclusion of these amounts was not any wilful misstatement as to the amount due, and I have, therefore, allowed the claim amounting to Five Thousand, Six Hundred Ninety-one Dollars, Twenty-seven Cents ($5,691.27), deducting therefrom, however, the said sum of $121.27 for materials furnished in August, and $94.83 interest charged, amounting to $216.10, which would leave a balance due of Five Thousand, Four Hundred Seventy-five Dollars, Thirty-seven Cents ($5,475.37). I have, therefore, allowed the claim of Thomas Henry, Inc., in the sum of Five Thousand, Four Hundred Seventy-five Dollars, Thirty-seven Cents

($5,475.37), with priority as of September 16, 1927, which I find was the date of service of the stop-notice for the reasons set forth in this report respecting the claim of North Hudson Manufacturing Co.

Re: Claim of

Edward De Forge, Inc.

Paragraph 12 of Bill of Complaint.
Testimony Page 28.

Exhibits:

D-4—Stop-Notice served September 24, 1927.
Amount Claimed $400.00
Amount Conceded by Contractors.. $400.00

It was conceded that this claim should be allowed and have priority as of September 24, 1927.

I have, therefore, allowed the claim of Edward De Forge, Inc., in the sum of the Four Hundred Dollars ($400.00) with priority as of September 24, 1927.

Re: Claim of

Louis Bogorad

Paragraph 13 of Bill of Complaint.
Testimony Page 29.

Exhibits:

D-5—Stop-Notice served October 1, 1927.
Amount Claimed $1,300.00
Amount Conceded by Contractors.. 1,280.00

It was conceded that this claim should be allowed in the sum of $1,280.00 and to have priority as of October 1, 1927.

I have, therefore, allowed the claim of Louis Bogorad, in the sum of One Thousand, Two Hundred Eighty Dollars ($1,280.00), with priority as of October 1, 1927.

Re: Claim of

Irving Trust Company, as Trustee in Bankruptcy of Indianna Flooring Company

Paragraph 14 of Bill of Complaint.
Testimony Pages 30-31.

Exhibits:

D-6—Copy of Answer of Indianna Flooring Company.

D-7—Copy of Order entered in this cause, bearing date Nov. 18, 1929, admitting Irving Trust Company as trustee in bankruptcy of Indianna Flooring Company, as party defendant.

D-8—Copy of petition of Irving Trust Company, as trustee in bankruptcy of Indianna Flooring Company, be admitted as party defendant.

D-9—Stop-Notice of Indianna Flooring Company, served October 10, 1927.

Amount Claimed (less freight chgs.) $1,782.43
Amount Claimed on Hearing..... 1,668.43
Amount Conceded by Contractors.. 1,663.43
(Difference of $5 waived by counsel).

It was conceded that this claim should be allowed in the sum of $1,663.43 with priority as of October 10, 1927.

I have, therefore, allowed the claims of Indianna Flooring Company in the sum of One Thousand, Six Hundred Sixty-three Dollars, Forty-three Cents ($1,663.43), with priority as of October 10, 1927.

Re: Claim of

Hud-Cin Fireproof Block Company

Paragraph 15 of Bill of Complaint.

This claimant did not proof its claim, although its agent, Mr. Sinisi, appeared on the first day of the taking of depositions, but when the claim was called had left and did not return.

I am therefore obliged to disallow this claim.

Re: Claim of

Guido M. Crocetti

Paragraph 16 of Bill of Complaint.
Testimony Page 33.

Exhibits:

D-10—Stop-Notice served October 18, 1927.
Amount Claimed $1,755.00
Amount Conceded by Contractors.. 1,755.00

Objection was made to the form of the stop-notice on the ground that it does not comply with the provisions of the statute in so far as it does not set forth the materials furnished or the work performed and does not describe the building upon which the work had been performed.

Master's Report.

I have examined the stop-notice and in my opinion it is sufficient under the statute.

I have, therefore, allowed this claim of Guido M. Crocetti in the sum of One Thousand, Seven Hundred Fifty-five Dollars ($1,755.00) with priority as of October 18, 1927.

Re: Claim of

Scagliola Manufacturing Company

Paragraph 17 of Bill of Complaint.
Testimony Page 34.

Exhibits:

D-11—Stop-Notice served March 28, 1928.
Amount Claimed $275.00
Amount Conceded by Contractors... 275.00

It was conceded that this claim should be allowed in the sum of $275.00 and to have priority as of March 28, 1928.

I have, therefore, allowed the claim of Scagliola Manufacturing Company in the sum of Two Hundred Seventy-five Dollars ($275.00) with priority as of March 28, 1928.

Re: Claim of

Carl F. Diffenbach

Paragraph 18 of Bill of Complaint.
Pages of testimony 36-48.

Exhibits:

D-13—Stop-Notice served September 14, 1928.
D-14—Contract between general contractors and claimant, for roofing work.
Amount Claimed $1,040.00
Amount Conceded by Contractor.. 890.00

After the taking of considerable testimony it was conceded by counsel for claimant that there should be a credit of $125.00 allowed for defective work. In the taking of the testimony, the claimant admitted (P-41) that his contract covered the furnishing of a bond, and that he did not furnish it. I have allowed the owner as against the general contractors' claim a credit of $90.00 representing the saving of the cost of the furnishing of the roofing bond. The claimant's contract calling for the furnishing of the bond and he not having furnished it, I feel that, as between the claimant and general contractors, that the claimant should be charged with this item. I therefore find that the general contractors are entitled to a credit of $90.00, which, with the $125.00 makes a total credit of $215.00. Deducting this credit of $215.00 from the amount claimed, or $1,040.00, leaves a balance due of $825.00.

I have therefore, allowed the claim of C. F. Diffenbach in the sum of Eight Hundred Twenty-five Dollars ($825.00) with priority as of September 14, 1928.

Re: Claim of

Edward Griffith

Paragraph 1 of First Addition to Bill of Complaint.
Testimony Pages 49-53.

Exhibits:

D-15—Stop-Notice served December 10, 1928.
D-16—Itemized bill.

I have allowed this claim in the sum of Three Hundred Forty Dollars, Ninety Cents ($340.90) and in view of the fact that it is a claim for labor only, it is entitled to preference and I have therefore fixed its priority in preference to all claims for material.

Re: Claim of

Newark Sheet Metal & Kalamien Co.

Paragraph 2 of First Addition to Bill of Complaint.
Testimony Page 35.

Exhibit:

D-12—Copy of Stop-Notice served December 20, 1928, and affidavit of service.

Amount Claimed	$670.50
Amount Conceded by Contractors...	670.50

It was conceded that this claim should be allowed and have priority as of December 20, 1928.

I have, therefore, allowed the claim of Newark Sheet Metal & Kalamien Co. in the sum of Six Hundred Seventy Dollars, Fifty Cents ($670.50), with priority as of December 20, 1928.

Master's Report.

Re: Claim of

Peter Goranson

Paragraph 3 of First Addition to Bill of Complaint.
Testimony Page 54.

Exhibit:

D-17—Stop-Notice served February 5, 1929.
Amount Claimed $320.00
Amount Conceded by Contractors.... 320.00

It was conceded that this claim should be allowed and have priority as of February 5, 1929.

I have, therefore, allowed the claim of Peter Goranson in the sum of Three Hundred Twenty Dollars ($320.00) with priority as of February 5, 1929.

Re: Claim of

John G. Keller, Inc.

Paragraph Four of First Addition to Bill of Complaint.
Testimony Pages 55-57.

Exhibits:

D-18—Stop-notice served February 19, 1929.
D-19—Letter of architect certifying completion of heating work.
D-20—Copy of itemized statement.
Amount Claimed $2,114.95
Amount Conceded by Contractors.. 2,114.95

I have allowed the claim of John G. Keller, Inc., in the sum of Two Thousand, One Hundred-fourteen Dollars, Ninety-five Cents ($2,114.95), with priority as of February 19, 1929.

Master's Report.

Re: Claim of

S. & S. Supply Company, Inc.

Paragraphs 1, 2, 3 of Second Addition to Bill of Complaint.
Testimony Pages 437; 487-514; 528-541.

Respecting the claim of S. & S. Supply Company, Inc., an officer of the claimant appeared before the Master and the testimony shows that the work performed was performed by contract direct with the owner and therefore, S. & S. Supply Company, Inc., did not make any claim against the general contractors or against the amount due from the owner to the general contractors.

Re: Claim of

Walton N. Cable

Admitted as a party defendant by order advised by Vice Chancellor Bentley.

Testimony Pages 467-473.

Exhibits:

D-33—Copy of Stop-Notice dated September 12, 1927, and served October 3, 1927 (see pp. 469, etc.)
D-34—Statement.
Amount Claimed in Stop-Notice... $1,000.00
Amount Claimed at Hearing..... 462.00

The difference in amount is explained by the fact that the amount set forth in the stop-notice

also included materials furnished to the contractors which had been used in another job.

I find that there was no wilful misrepresentation of the amount and that at the time of the service of the stop-notice, claimant had no positive means of knowing on just what jobs the materials were used (see pp. 471, etc.)

Amount conceded by contractors as being due for materials supplied for this particular job—$462.00.

I have therefore allowed claim of Walton N. Cable in the sum of Four Hundred Sixty-two Dollars ($462.00) with priority as of October 3, 1927.

Re:

Angelo Rich

Testimony Pages 638-662.

Exhibits:

D-30—Stop-Notice.
D-31—Memorandum of General Contractors to Owner.
D-32—Statement.

This claimant was not made a party to the suit. Application was made on his behalf to Vice Chancellor Bentley for an order admitting him as a party to the suit. At the suggestion of the Vice Chancellor I took the testimony offered on behalf of Mr. Rich, subject to the final determination of the Vice Chancellor, and return the testimony with this Report.

I am advised that Vice Chancellor Bentley refused to advise the order admitting this claimant as a party defendant, and I therefore have made no report as to his claim.

I do, therefore, respectfully report that there is due from the complainant (the owner), to the defendants, Vitille, Kinsella & Cunhy, the contractors, the sum of Twenty Thousand, Five Hundred Twenty-one Dollars, Seven Cents ($20,521-.07), together with interest thereon from October 1, 1927, to July 1, 1930, amounting to Three Thousand, Three Hundred Eighty-five Dollars, Ninety-five Cents ($3,385,95), making the total amount including interest up to July 1, 1930, the sum of Twenty-three Thousand, Nine Hundred Seven Dollars, Two Cents ($23,907.02).

Annexed hereto and marked "Schedule A" is a schedule of the contractors' claim against the complainant.

Annexed hereto and marked "Schedule B" is a statement of the claims of stop-notice claimants and their order of priority.

Annexted hereto is a schedule of the exhibits submitted in evidence and returned with this report.

All of which is respectfully submitted this Eighteenth day of June, One Thousand, Nine Hundred Thirty.

Special Master of Chancery of
New Jersey.

SCHEDULE A.

Amount of Contractors' Claim Against Complainant.

Contract Price		$98,000.00
Amount of Extras Allowed		9,733.27
Total		$107,733.27
Credits:		
Amount paid on account.	$84,190.20	
Amount allowed the owner for omitted and defective work and materials	3,022.00	
Total Credits		$87,212.20
Total Amount of Claim		$20,521.07
Interest from Oct. 1, 1927 to July 1, 1930		3,385.05
Total amount of contractors' claim against owner with interest to July 1, 1930		$23,907.02

SCHEDULE B.

Schedule of Stop-Notice Claims and Priorities.

Name	*Date of Priority*	*Amount*
Edward Griffith	Labor Claim (Preferred)	$ 349.90
Antonio Mamolite and Pasquale Ricciardi	Sept. 10, 1927	1,588.32
Hoegger Inc.	Sept. 12, 1927	540.00
Cadel Bros. Inc.	Sept. 16, 1927	2,707.00
North Hudson Mfg. Co.	Sept. 16, 1927	2,047.18
Thomas Henry, Inc.	Sept. 16, 1927	5,475.37
Edward De Forge Inc.	Sept. 24, 1927	400.00
Louis Bogorad	Oct. 1, 1927	1,280.00
Walton N. Cable	Oct. 3, 1927	462.00
Irving Trust Company, as Trustee in Bankruptcy of Indianna Flooring Co.	Oct. 10, 1927	1,663.43
Guido M. Crocetti	Oct. 18, 1927	1,755.00
Scagliola Mfg. Co.	Mar. 28, 1928	275.00
Carl F. Diffenbach	Sept. 14, 1928	825.00
Newark Sheet Metal & Kalamien Works	Dec. 20, 1928	670.50
Peter Goranson	Feb. 5, 1929	320.00
John G. Keller Inc.	Feb. 19, 1929	2,114.95
Total		$22,464.65

Exceptions to Master's Report.

(Filed July 14, 1930.)

IN CHANCERY OF NEW JERSEY

Between MARTIN J. MACDONNELL, Complainant, *and* MICHAEL J. VITILLE, *et als.*, Defendants.	71/182 On Bill, &c.

The complainant, Martin J. MacDonnell, hereby excepts to the report filed in this cause by Henry Lane, Esq., one of the Masters of this Court, bearing date June 18, 1930, in the following respects and for the following reasons:

1. The said Master's finding that the owner is chargeable with the amount of the final payment and the amount of the extras as set forth in said report without the issuance of certificates for said final payment and for said extras by the architect, is contrary to the provisions of the building contract and to the specifications marked in evidence as Exhibits D-51 and D-52, and is not supported by the testimony.

2. The said Master's finding that the said contractors were entitled to their final certificate and that the withholding thereof would amount to fraud, is contrary to the evidence, contrary to the contract between the owner and said contractors, and contrary to law.

New Jersey State Library

3. The testimony showed that said architect never agreed to issue said final certificate, and the said Master's finding that the contractors were entitled to receive the final payment, was erroneous as a result thereof.

4. The said Master's finding that the work and materials alleged by the owner to have been omitted or substituted had been performed or furnished before the issuance of the eighth certificate by the architect, is irrelevant and immaterial, and is not the basis for a finding that the owner is required to pay for all work and materials performed or furnished prior to the issuance of said certificate by reason of the fact that the contract between the parties, and the certificates themselves provided that the issuance of any certificate shall not be deemed a waiver of any of the owner's rights.

5. The said Master erred in his conclusion that complainant, by tendering in his bill of complaint, payment of what is justly due to the contractors, waived any rights he might have to set up the non-production of the architect's certificates against the claims of said contractors; and further erred in stating that the question of the architect's certificate is not made an issue in the bill of complaint, which statement is in direct contradiction to Paragraph 23 of the bill of complaint; and further erred in stating that the production of the architect's certificates may be dispensed with under the maxim that "He who seeks equity, must do equity."

6. The said Master's finding that the production of the architect's certificates may be dispensed

with under the circumstances of this case, is contrary to the valid and lawful agreement between the owner and the contractors and results in effect, in the creation of a new contract between said parties.

7. The said Master's finding that the production of the architect's certificates had been waived, is erroneous and contrary to the evidence, and said Master's conclusion that complainant waived the same by tendering himself ready to pay such amount as may be due in the bill of complaint, is not a sufficient basis for a finding that said certificates had been waived.

8. The said Master's finding that in all cases where extra work was performed without written authorization therefor the said written authorization was waived, is contrary to the evidence, and contrary to law, and the said Master's finding that the owner is chargeable with the amount of sa d extra work where no written orders were procured. is contrary to the contract between the parties, and the specifications.

9. The said Master's finding that the owner impliedly gave authority to the architect to order extra work orally, is irrelevant and immaterial, and cannot be made the basis of a finding that the owner thereby became responsible to pay for said extra work.

10. The said Master's finding that the owner is estopped by reason of his conduct from denying his liability for extra work by reason of the non-production of a written order therefor, is contrary to

law and to equity, and is in violation of the contract between the owner and the contractors.

11. The said Master's finding that the owner and contractors orally agreed to waive that portion of the contract providing that a written order would be required to charge the owner for extra work, is erroneous, and any such alleged agreement was not supported by adequate consideration.

12. The said Master's finding that the owner could be charged with extra work ordered by the arichitect is erroneous by reason of the fact that there is no proof that the architect was authorized to waive any of the substantial rights of the owner under the contract.

13. The credits allowed to complainant for omitted and defective work and materials, are insufficient and inadequate, and contrary to the evidence of the value of said defective work and materials.

14. The said Master's finding that where work or materials were substituted for those specified in the contract and specifications such substitutions were as suitable or more suitable for the building in question, are irrelevant and immaterial, and contrary to the contract between the owner and contractors, and do not warrant the Master in rejecting the claim of complainant for omitted and defective work for which substitutions were made.

15. The measure of damages adopted by the Master for the loss to complainant by reason of the failure of the contractors to furnish a bonded Barrett roof was erroneous in that complainant was

entitled to the difference between the value of the roof installed and the value of a bonded Barrett roof.

16. The amount allowed to the contractors for extra work is excessive and contrary to the evidence, and the said contractors were not entitled to credit for any extra work for the reasons hereinabove set forth.

17. The said Master's finding that the complainant is liable for interest in the sum of Thirty-three Hundred Eighty-five Dollars and Ninety-five Cents ($3385.95) from October 1, 1927, to July 1, 1930, is contrary to law, and complainant is not chargeable with interest in this cause by reason of the fact that complainant could not safely pay the amount chargeable against him to anyone prior to the determination of this Court * * * without being subjected to the liability to make payment twice, in view of the conflicting claims presented to complainant by the various defendants; by reason further of the fact that the amount owing by complainant was unliquidated and could not be paid by him until the determination of this Court; and by reason further of the fact that complainant has heretofore tendered into Court the amount admitted by him to be due, and such further sum as this Court should find to be due from him.

And by reason of the exceptions above stated, complainant alleges that said Master has not reported properly and in accordance with the order of this Court referring the same to him, and with the principles of law and equity.

PLATOFF, SAPERSTEIN & PLATOFF,
Solicitors of Complainant,
Martin J. MacDonnell.

Order on Exceptions.

(Filed July 21, 1930.)

IN CHANCERY OF NEW JERSEY

Between MARTIN J. MACDONNELL, Complainant, *and* MIICHAEL J. VITILLE, *et als.*, Defendants.	71/182. On Bill, &c.

This matter being opened to the court by Platoff, Saperstein & Platoff, solicitors of complainant, in the presence of O. C. Bianchi, solicitor of defendant Michael J. Vitille et al, Thomas McNulty, solicitor of defendants Thomas Henry Inc., Cadel Bros. and North Hudson Manufacturing Co. and George J. Marcus, solicitor of other defendants, on complainant's exceptions to the master's report and on defendants' motion to confirm the master's report and after hearing the arguments of counsel,

It is on this 21st day of July, 1930, Ordered that complainant, within 15 days from the date hereof, serve on O. C. Bianchi and file with the court, a memorandum on his excetpions and that said O. C. Bianchi serve on complainant and file with the court within 10 days thereafter a reply memorandum and thereafter the court will decide the matter on such briefs as have been filed.

And it is further ORDERED that Harry Lane, Esq., the special master, to whom this matter was referred, be and he hereby is allowed the sum of $2,000.00 in lieu of all other fees and allowances, such

sum to be paid by the complainant, in the first instance, without prejudice.

E. R. WALKER,
C.

Respectfully advised,

J. O. BIGELOW,
V. C.

Memorandum of Vice-Chancellor.

COURT OF CHANCERY OF NEW JERSEY
One Exchange Place
Jersey City

JOHN O. BIGELOW
Vice Chancellor

November 5, 1930.

Platoff, Saperstein & Platoff, Esq'rs,
400-38th Street,
Union City, N. J.

Ovidio Bianchi, Esq.,
319 Main Street,
Orange, N. J.

MacDonnell vs. Vitille 71/182.

Gentlemen:

I have delayed so long deciding this case that I will not take the further time which would be required to put my conclusions into a formal opinion.

Memorandum of Vice-Chancellor.

The general exceptions argued in Part I of complainant's brief should be overruled.

The exceptions to the Master's refusal to give credit for certain items of omitted or defective work are sustained to the following extent:

Item 1(a)	$1,000.00
(c)	100.00
(g)	865.20
(i)	130.00
2(a)	750.00
(b)	400.00
3(a)	700.00
4(a)	100.00
6(c)	100.00
8(a and b)	1,500.00
9(a)	150.00
(b)	500.00
	$6,295.20

The exceptions to the Master's allowance of extras should be sustained as to item 6, $363. All other exceptions relating to the principal sum due are overruled. The principal found due is therefore $13,862.87.

The owner has had the income of this building; interest should therefore be allowed from October 1, 1927 to the date of the decree, and thereafter on the total therein stated until paid either into court or to the persons entitled. But if the owner has already paid the money into court; then interest at six percent should be calculated to the date of payment into court, and thereafter at the rate (if any) allowed by the Clerk.

In this controversy both the owner and the contractor made excessive claims. They should each

bear their own costs; the Master's fee should be divided equally between complainant on the one hand and the defendants who share the fund on the other. As the complainant has paid this fee the decree should give him credit for one-half, namely $1,000 on the amount found due by him. The charge of this sum of $1,000 should not be borne by one-stop notice claimant. The claim of each stop notice claimant sharing in the fund should be reduced pro rata, so as to absorb this charge.

Notice of the settlement of the decree should be given to all parties, and those stop-notice claimants who, by the terms of the decree as drafted will receive no part of the fund or less than the amount found due them, should be expressly so advised.

Yours very truly,

J. O. BIGELOW.

Final Decree.

(Filed December 29, 1930.)

IN CHANCERY OF NEW JERSEY.

71—182.

Between

MARTIN J. MACDONNELL,
Complainant,
and
MICHAEL J. VITILLE, *et als.*,
Defendants.

On Bill, &c.

This matter coming on to be heard on application of O. C. Bianchi, Esq., solicitor of Michael J. Vitille, James J. Kinsella and Joseph Cunhy, trading as Vitille, Kinsella & Cunhy, defendant contractors, on application to confirm report of Harry Lane, Esq., one of the masters of this court to whom an order of reference was made herein on October 15th, 1929 and upon motion of Platoff, Saperstein & Platoff, solicitors of the complainant on exceptions to the said master's report and in the presence of O. C. Bianchi, Esq. solicitor of defendants, Michael J. Vitille, *et als.*, Israel Greene, Esq., solicitor for defendant Guido M. Crocetti, Messrs. McDermott, Enright & Carpenter, solicitors of defendant Irving Trust Company, trustee in bankruptcy of Indiana Flooring Company, Frank Cozzolini, Esq., solicitor for defendants, Antonio Mamolite and Pasquale Ricciardi, Messrs. Leo Vanderburgh and George Marcus, solicitors for defendants, Carl F. Dieffenbach, Jr., and Edward Griffith, Dante Rivetti, Esq., solicitor for Scagliola Manufacturing Co., Inc., Messrs.

Herrigel, Lindabury & Herrigel, solicitors for defendant Newark Sheet Metal & Kalamien Co., Louis R. Kagan, Esq., solicitor for defendant, Peter Goranson, Oscar Stempler, Esq., solicitor for defendant, John G. Keller, Messrs. Heine & Laird, solicitors for defendant, Walton H. Cable, Otto Cooper, Esq., solicitor for defendant, Louis Bogorad,, Louis De Forge, Esq., solicitor for defendant Edward DeForge, Inc., and Thomas McNulty, Esq., solicitor for defendants, Cadel Brothers, Inc., North Hudson Manufacturing Company and Thomas Henry, Inc., and upon the bill of complaint, addition by way of supplement to the bill of complaint, and second addition by way of supplement to the bill of complaint heretofore filed herein and upon the answers, counterclaims and claims filed on behalf of the respective defendants herein and upon all the papers and proceedings heretofore had herein, and the court having read and considered the testimony taken before the master and the report of the said master and having heard and considered the arguments of counsel thereon and being of opinion that the exceptions taken by the complainant to the said master's report should be overruled except that credit should be given to complainant for certain items of omitted or defective work in the aggregate sum of $6,295.20, not allowed by the Master, as follows:

Item 1A	$1,000.00		Exhibit C-3
Item 1C	100.00		Exhibit C-3
Item 1G	865.20	(part allowed) (testimony, pp. 356 and 357)	Exhibit C-3
Item 1-1	130.00	(part allowed)	
Item 2A	750.00	(part allowed)	Exhibit C-3
Item 2B	400.00		Exhibit C-3
Item 3A	700.00	(testimony, p.16)	Exhibit C-3
Item 4A	100.00		Exhibit C-3
Item 6C	100.00		Exhibit C-3
Item 8A and B	1,500.00	(part allowed)	Exhibit C-3
Item 9A	150.00		Exhibit C-3
Item 9B	500.00	(part allowed)	Exhibit C-3
Total	$6,295.20		

and that credit should be given to complainant against allowances made by the master for alleged extra work in the sum of $363.00 (Item 6, p. 18 of master's report); and that the principal sum due from the complainant is the sum of $13,862.87 and the court being further of opinion that since the complainant has received the income of the building, the master's allowance of interest on the principal sum from October 1st, 1927 should be sustained and that interest should be allowed on the principal sum to the date of this decree and included herein; and the court being further of opinion that complainant and the defendant contractors Vitille, Kinsella & Cunhy have each made excessive claims and that therefore no costs should be allowed to either as against the other and the court being further of the opinion that the amount allowed Harry Lane, Esq., for his services as master, to wit, the sum of $2,000.00 and which amount it has been represented to the court has

been paid by the complainant, should be apportioned equally between the complainant on the one hand and the defendant stop-notice claimants whose claims will be paid hereunder, if and when the amounts decreed to be due to the said defendant stop-notice claimants are paid, in the proportion that their several claims bear to the total amount found to be due from the owner; and it appearing that the complainant has deposited a surety bond made to the Chancellor of the State of New Jersey, pursuant to an order of this court heretofore made herein and that part of the premium representing the excess of the principal sum of the bond over the amount found due from complainant should be deducted and retained by the complainant from and out of the moneys decreed to be due from him to the defendants.

And application having been made by O. C. Bianchi, Esq., solicitor of the defendant contractors Vitille, Kinsella & Cunhy, and upon filing proof of service of notice thereof on all parties in interest to enter a final decree in this cause to settle the manner of distribution of the principal sum found to be due and fixing counsel fees and allowances, if any, to be made to the solicitors of the respective parties to this cause and in the presence of Platoff, Saperstein & Platoff, and upon the return of the said notice, presented to the court a petition (under Chapter 201 of the Laws of 1914, the Attorney's Lien Act), setting up an alleged contingent agreement made by him with his clients, the defendant contractors Vitille, Kinsella & Cunhy, whereunder they agreed to pay him for his counsel fees one-third of the amount decreed to be due defendant contractors from complainant herein and requested the court to provide in this decree that a lien be impressed upon

the moneys so found to be due from the said complainant and that he be paid the amount thereof before any payments to the defendant stop-notice claimants, and the court having heard and considered the arguments of counsel thereon; and thereafter a further petition, together with two assignments executed by the defendant contractors to said O. C. Bianchi, Esq., having been filed wherein the said contractors by one of said assignments purported to assign all their right, title and interest in the amount due to the said contractors on the general contract and extra work, and the other purporting to be an assignment by said contractors, under which said O. C. Bianchi, Esq., claims a lien upon the amount of moneys decreed to be due for extra work alleged to have been done independently of the contract and the court having read and considered the arguments made thereon and being satisfied that the prayers of the petitions of the said O. C. Bianchi, Esq., should be denied; and application having been made by Israel B. Greene, Esq., solicitor of Guido M. Crocetti, defendant, for a counsel fee in the sum of $500.00, and the court being of opinion that the application should be denied:

It is on this 29th day of December, 1930, ORDERED, ADJUDGED and DECREED that the exceptions filed to the master's report herein should be overruled, except that the complainant is entitled to credit not allowed by the master for omitted and defective work in the sum of $6,295.20 and is entitled to credit against allowances made by the master for alleged extra work, in the sum of $363.00 as above set forth,

And it is further ORDERED, ADJUDGED and DECREED that the entire principal sum due

from the complainant on account of the contract price and for extra work and materials performed and furnished by said defendant contractors, is the sum of $13,862.87;

And it is further ORDERED, ADJUDGED and DECREED that the complainant pay as hereinafter directed, said sum of $13,862.87, together with interest thereon from October 1st, 1927, to the date hereof, being the sum of $2,698.62 making in all the sum of $16,561.49, and that upon making said payment complainant and the lands and premises described in the bill of complaint be released, acquitted and discharged from all claims, liens or liabilities to any of the defendants in this suit for, upon or by reason of said fund and all of the matters involved in said suit and that the bond heretofore filed by the complainant be discharged and that all suits heretofore instituted by any of the defendants against the complainant be terminated, discontinued and permanently enjoined, without costs.

And it is further ORDERED, ADJUDGED and DECREED that the amount heretofore allowed to Harry Lane, Esq., one of the masters of this court, for his services herein, to wit, the sum of $2,000.00, when this decree has been performed by complainant, shall be borne equally by the complainant on the one hand and the defendant stop-notice claimants whose claims are allowed on the other hand, as hereinafter provided, in the proportion which the amount decreed to be due to said stop-notice claimants bears to the total amount found to be due from the said complainant.

And it is further ORDERED, ADJUDGED and DECREED that the complainant be permitted to retain in his hands the sum of $1,000.00, being half of the amount allowed to Harry Lane, Esq., as master for his services herein pursuant to an order of this court heretofore made in this cause, which allowance was paid by complainant, and that the said complainant also retain in his hands the sum of $320.00 being the excess of the amount of the premium on complainant's bond heretofore filed herein over the amount found to be due from the said complainant, and that said complainant be authorized to set off said amounts from the sum decreed to be paid by him.

And it is further ORDERED, ADJUDGED and DECREED that the claims of the defendant stop-notice claimants are hereby allowed in the order and in the amounts as follows:

Defendants Antonio Mamolite and Pasquale Ricciardi, September 10th, 1927	$1,588.32
Defendant Hoegger, Inc., September 12th, 1927	540.00
Defendant Cadel Brothers, Inc., September 16th, 1927	2,707.00
Defendant North Hudson Manufacturing Company, September 16th, 1927	2,047.18
Defendant Thomas Henry, Inc., September 16th, 1927	5,475.37
Defendant Edward DeForge, Inc., September 24th, 1927	400.00
Defendant Louis Bogorad, October 1st, 1927	1,280.00
Defendant Walton N. Cable, October 3rd, 1927	462.00
Defendant Irving Trust Company, as trustee in bankruptcy of Indiana Flooring Company, October 10th, 1927	1,663.43
Defendant Guido Crocetti	57.29

And it is further ORDERED, ADJUDGED and DECREED that after deducting the said proportionate share of said master's fees, the said defendant stop-notice claimants are entitled to be paid by the complainant the amounts hereinafter stated:

Edward Griffith	$ 320.40
Antonio Mamolite and Pasquale Ricciardi	1,492.32
Hoegger, Inc.	508.00
Cadel Brothers, Inc.	2,543.00
North Hudson Manufacturing Company	1,923.18
Thomas Henry, Inc.	5,142.87
Edward DeForge, Inc	376.00
Louis Bogorad	1,203.00
Walton N. Cable	435.00
Irving Trust Company, as trustee in bankruptcy of Indiana Flooring Company	1,563.43
Guido Crocetti	54.29

And it is further ORDERED, ADJUDGED and DECREED that the counterclaim of the defendants Michael J. Vitille, *et al.,* be and the same is hereby dismissed.

And it is further ORDERED, ADJUDGED and DECREED, that the complainant pay to the said respective defendants the said sum so found due to them and that failing to do so, said defendants or any of them, be at liberty to apply to this court upon notice to the principal and surety on the said bond for summary relief under the said bond so furnished by said complainant.

And it is further ORDERED, ADJUDGED and DECREED that the prayers of the petitions of

the said O. C. Bianchi, Esq., solicitor of and counsel for said defendant contractors be and the same are hereby denied.

And it is further ORDERED, ADJUDGED and DECREED that the application of Israel Greene, Esq., for counsel fee be and the same is hereby denied.

And it is further ORDERED, ADJUDGED and DECREED that no costs be allowed to any of the parties as against any of the others.

Respectfully advised,

E. R. WALKER,
C.

J. O. BIGELOW,
V. C.

Depositions.

Claim of GUIDO M. CROCETTI, referred to in paragraph sixteen of the bill of complaint.

By Mr. Bianchi: The amount admitted by the general contractor on this claim is $1,775. It is stipulated that the proper amount is $1,755.

By Mr. Greene: The notice was served on October 18, 1927, upon Dr. MacDonnell personally.

By Mr. Green: I offer in evidence stop-notice.

By Mr. Marcus: I object to the form of the alleged notice on the ground that it does not comply with the provisions of the mechanics' lien act and insofar as it does not set forth the materials furnished or the work performed and it does not describe the building upon which the work had been performed, and therefore does not comply with the provisions of the general lien act.

By the Master: I understand it is stipulated that that paper was served on Dr. MacDonnell, the complainant, on October 18, 1927.

By Mr. Marcus: My objection goes only as to form of the notice.

By the Master: Stop-notice is marked Exhibit D-10 for identification.

Claim of CARL F. DIFFENBACH, referred to in paragraph eighteen of the Bill of Complaint.

By Mr. Marcus: The amount which we claim is $1,040.

By Mr. Bianchi: The general contractor admits there is a balance due of $890.

By Mr. Marcus: The date of our stop-notice is September 14, 1928.

By Mr. Greene: When do you claim this was served?

By Mr. Marcus: On September 14, 1928.

Mr. Platoff produces alleged stop-notice which it is conceded was served on the 14th day of September, 1928.

By Mr. Marcus: I offer stop-notice in evidence.

By Mr. Greene: I object to this notice on the ground that this notice was not signed by the claimant but appears to be by George R. Marcus, who styled himself as attorney, that such a signature is not sufficient. To be a lien it must be made by claimant.

By the Master: Same is marked Exhibit D-13 for identification.

State of New Jersey, } ss.:
County of Hudson, }

CARL F. DIFFENBACH, being duly sworn, according to law, on his oath deposes and testifies:

Examination by Mr. Marcus:

Q. Did you on or about the 13th day of September, 1928, authorize me in your behalf to execute a stop-notice for you? A. I did.

Q. Mr. Diffenbach, I show you a contract dated the 11th day of March, 1927, entered into between

yourself and Vitille, Kinsella & Cunhy and ask you if that is a contract signed by you? A. Yes.

Q. Did that contract provide for the furnishing of the material and labor at the price of $1,800? A. Right.

By Mr. Marcus: I offer that in evidence.

By the Master: Same is marked Exhibit D-14 for identification.

Q. Was that contract signed by Vitille, Kinsella & Cunhy? A. It was.

Q. And, did you perform all the work and furnish all materials under the terms of said contract? A. With one exception.

Q. What was that exception? A. The agreement between Mr. Ach, the owner, and myself was to furnish a bonded Barrett roof; to furnish a bond for the roof?

Q. Did you furnish that bond? A. No, I did not.

Q. Did they ever object to any of the work?

By Mr. Green: I object—

By Mr. Marcus: I withdraw the question.

Q. Did you perform any extra work, Mr. Diffenbach? A. I did.

Q. What work did you perform? A. At the beginning of the job we had no trouble with any leaks. On my inspection of the job, I suggested that we coat the walls with elasticgum because the walls leaked.

Q. Were these leaks on the walls or from the roof? A. On the walls.

Q. Were you requested to do that work? A. Yes, by Mr. Vitille.

Q. Did you perform that work? A. I did, at my suggestion for his protection.

Q. What was the reasonable value that you would say, for the work that you performed in coating the walls? A. To protect the rain from getting in.

Q. What was the reasonable value of it? A. About $20.

Q. And, did you also give it another coat? A. I did.

Q. What was the value of that work? A. Mr. Vitille suggested that that I put on another coat to have more additional protection.

Q. What was the value of that coat? A. No value.

Q. How much did you charge? A. Same amount.

Q. Would you say that that was a reasonable charge for the work? A. Yes.

Q. Did you also connect some case over nipples? A. I did.

Q. What was your charge for that work? A. I don't remember.

Q. I show you a copy of the stop-notice and ask you whether or not these are the charges you made and whether the charges are reasonable charges? A. They are.

Q. Making a total of $1,865. What payments did you receive on account? A. I cannot remember off hand.

Q. I show you and ask you whether these are the payments you received on account. $275, $250, $300, total of $825. A. That is right.

By Mr. Bianchi: The general contractor admits that these are the amounts of cash payments.

Q. Leaving a balance due you on your contract, together with extras, of $1,040. A. Yes.

Q. Is that the amount you filed the stop-notice for? A. Yes.

By Mr. Bianchi:

Q. Your general contract was for $1,800? A. Yes.

Q. Then, you charged them $20 for making a pipe connection? A. Yes.

Q. And you charged $20 for placing a coat of elasticgum? A. I did.

Q. Thereafter there was a leak developed in the roof, is that true? According to the contention of the contractor?

By Mr. Marcus: I object to the form of the question as being improper.

Q. Was there a question raised about the leak on the roof? A. Several questions.

Q. And Mr. Vitille showed you where damage had ensued as a result of a leak from the roof? A. He showed where damage was done and I proved to him that it did not come from the roof in presence of another roofer.

Q. Wasn't a question raised about the leak on the roof A. ——.

Q. Wasn't a question that you were to pay him $125 for the damage? A. No.

Q. You personally took this matter up with Mr. Vitille concerning this particular leak? A. I took it up with him but did not agree to that.

By Mr. Marcus:

Q. Mr. Diffenbach, as a result of your confer-

ence with Mr. Vitille, you recommended that the walls be treated?

By Mr. Greene: I object to that question because I think that any agreement he had with Mr. Vitille, the general contractor, is not a proper item in the stop-notice or a claim against the contractor.

By Mr. Marcus: I don't think so. We are entitled to recover against the general contractor or the owner the amount due under the contract and for extra work in pursuance with instructions of general contractor.

Q. As a result of your conversation, were you authorized to treat the walls? A. I was.

Q. And you did treat the walls? A. Yes.

Q. Now, you say that the damage done as alleged by Vitille was that as a result of your defective work? A. No.

Q. Can you tell us the reason for that damage? A. Simple reason that it was not in according to the specification and I proved that to Vitille. I proved to Mr. Vitille in the presence of Mr. Yonkers and Mr. Just.

Q. Who are these gentlemen?

Q. Roofers? A. Familiar with roofing.

Q. And, at whose request did these gentlemen appear there? A. Accidently appeared there that day and Mr. Vitille and I requested them and they went to the roof to make inspection of the roof and the parapet wall between the roofing sheet and the ceiling.

Q. Did you at any time concede to any demand made by Vitille for any damage alleged to have occurred as a result of leaking? A. No.

Q. Did they ever serve you with any notice requiring you to make any repairs of the alleged damages? A. I believe they did.

Q. As a result of that notice what happened? A. I immediately came on the job and inspected it and found the parapet walls leaking.

Q. And, subsequently repaired these walls? A. I didn't have anything to do with these walls.

Q. You coated these walls? A. I did.

Q. For which you are making now the claim? A. Yes.

By Mr. Platoff:

Q. In your contract it is stated that you were to cover this building with a 20 year guarantee? A. Yes.

Q. Did you do that? A. I did not. I covered the roof but I did not furnish the bond.

By Mr. Greene:

Q. Did you do this work personally? A. I supervised it.

Q. Have you any record of the time that you say was employed? I'm talking about the extra work.

By Mr. Marcus: Is there a dispute as to the amount charged for extra work. The real dispute is as to amount of credit which the contractor claims he is entitled for loss caused by improper work of the sub-contractor.

By Mr. Greene:

Q. This loss that you speak of, the repair of this

loss was not ordered or authorized by the owner? A. There was no roof loss.

Q. Didn't you make some repairs? A. Not to the roof; to the parapet walls, not the roof.

Q. Was that work ordered by the owner or contractor? A. Contractor.

By Mr. Marcus: Is there any contention made in respect to this bond that wasn't furnished?

By the Master:

Q. Why didn't you furnish the bond? A. When I accepted the contract from the architect, and the builder was present, before I signed the contract, I stated to the architect that I was not able to furnish a bond. He in turn replied to me he did not see just why it was necessary, for myself being reputable enough in roofing in the locality, that I should and that he would pass on it and it would not be necessary for me to produce a bond.

By Mr. Platoff:

Q. No change was made in the contract about that bond? A. No.

By Mr. Marcus:

Q. The architect was the representative of the owner—

By Mr. Platoff: I object to that question—

By the Master: I will sustain the objection.

By Mr. Marcus:

Q. Did the architect ever raise any objection in connection with the furnishing of the bond? A. Not for the entire job.

By Mr. Platoff:

Q. You didn't have to furnish the bond usually until the job is finished? A. Not until it is completed.

Q. Therefore, there is nothing unusual for you failing to furnish the bond? A. There was furnished a certificate of inspection from the Barret Company.

Q. When? A. While the job was going on.

Q. How long did you take to finish this job? A. About five working days.

Q. You never talked to Dr. MacDonnell about this contract of yours, did you?

By Mr. Marcus: I object to the form of the question on the ground it is immaterial.

By Mr. Platoff: I will withdraw the question.

By Mr. Greene:

Q. Did you ever receive a certificate in writing from the owner or the architect approving or accepting your work?

By Mr. Marcus: I object because this is immaterial. There is no proof that any certificate or approval in writing is required under the terms of his contract.

By Mr. Greene: It will be shown by introduction of the general contractor that

work must be passed by the architect. Therefore, since that contract was incorporated as part of this contract, this claimant, to sustain his claim must show that he has complied and fulfilled that provision.

By Mr. Marcus: There is nothing to indicate as far as the evidence goes into that, that we are required in any way under general contract to furnish any certificate from the architect as to the completion of the work. I understand it is conceded by the contractor that the work has been performed.

By the Master: Of course by the contractor does not bind stop-notice claimants except where they agree to be bound. I will admit this testimony and question at this time.

A. I never received any certificate from the architect.

By Mr. Marcus:

Q. Do you know any other materialmen or laborers that furnished work or material that received certificates from the architect?

By Mr. Platoff: I object. That is absolutely immaterial.

Q. Do you know. A. Only the general contractor.

By Mr. Greene:

Q. You know that by hearsay; not of your own knowledge? A. It is a fact.

By Mr. Marcus: I offer this contract in evidence.

By the Master: Same will be marked Exhibit D-14.

By the Master: I would suggest to Mr. Bianchi that he call whatever witnesses he has as to this specific claim of leaking and only on that question.

State of New Jersey, }
County of Hudson, } ss.:

MICHAEL J. VITILLE, being duly sworn according to law, on his oath deposes and testifies:

By Mr. Bianchi:

This testimony is solely on the question of the leak.

Examination by Mr. Bianchi:

Q. After the roof had been placed n the building by the roofer, what happened? A. After the roof was on there were some leaks around the bulkhead, around the copper work, which we tested by throwing the water through a hose against the bulkhead and the water went through down the ceiling to the rooms.

Q. Was there any damage done to the rooms? A. Yes.

Q. Did you have to pay to have that damage repaired? A. Yes.

Q. How much?

By Mr. Marcus: I object. It is immaterial. The question is whether or not the charge is the reasonable value of the work.

Q. Do you know what the reasonable value of the work is?

By Mr. Marcus: I object. There is no qualification in evidence.

Q. What is your line of business, Mr. Vitille? A. Contractor.

Q. What kind of work was done in this room after it was damaged?

By Mr. Marcus: I object. It is immaterial.

By the Master: I will admit it.

Q. What kind of work was done in this room after it was damaged? A. We had to repaint the two rooms.

Q. Are you acquainted with painting? A. Yes, sir.

Q. You know how it has to be done? A. Yes, sir.

Q. How many years have you of painting experience? A. Six or seven.

Q. How many years as general contractor? A. About eight or nine years a general contractor, including painting.

Q. You know what the reasonable cost of these repairs was? A. $1.25 for two rooms and hall.

By Mr. Marcus:

Q. Mr. Vitille, when did you have that work done? A. In December, 1927.

Q. How long after the roof had been on? A. About four or five months.

Q. Now, were any leaks coming through after the walls were treated? A. The wall was treated; that's a different question.

Q. Were there any leaks after the walls were treated? A. Yes, sir.

Q. When? A. Every time it was raining.

Q. Have you had any complaints from Dr. MacDonnell? A. Yes, sir.

Q. What was done to the roof in order to rent the apartment? A. After I tested the bulk head and called attention of Mr. Diefenbach and brought him under the ceiling of the roof and showed where the water comes in and the water pressure on the bulk head.

Q. Was that done prior to the damage or subsequently? A. After.

Q. After? A. Yes, after.

Q. Did you ever ask Mr. Diffenbach to make these damages good? A. Yes, sir.

Q. When did you ask him? A. Some time when I brought him to show him where the water was leaking in.

Q. Did you ever send him any notice? A. He had plenty notice.

Q. Did you ever serve him in writing with a notice? A. Yes.

Q. When? A. From July up to November he had plenty notice.

Q. Have you a copy of that notice you served? A. The notice was served by the architect.

Q. Has the architect given you a copy of that notice? A. Yes.

Q. Have you a copy of it here? A. I have not here.

For the purpose of saving the time, we will concede a credit of $125 at this time. It was not conceded at the time of the filing of the stop notice.

Claim of NORTH HUDSON MANUFACTURING CO., referred to in Paragraph Ten of the Bill of Complaint.

State of New Jersey, } ss.:
County of Hudson, }

HARRY J. H. RUBLE, of full age, being duly sworn according to law, on his oath deposes and testifies:

By the Master: The amount of the Stop Notice is $2,047.18.

Examination by Mr. McNulty:

Q. What is the amount owing to your company? A. $2,315.43.

By Mr. McNulty: In the claim filed we have waived the excess over the amount of $2,047.18, the amount indicated in the stop notice.

By the Master: Mr. Bianchi, what have you to say as to what the contractor owes to the North Hudson Manufacturing Co.?

By Mr. Bianchi: The contractor states that the amount due to the North Hudson Manufacturing Co. is much in excess over the amount of the stop notice. The amount

due on general contract was $1,685.50 and there was $775 of extras, making a total of $2,460.50.

Q. Have you a contract? A. (Witness produces contract).

By Mr. McNulty: I offer in evidence the contract under which this work was done.

By the Master: Same is marked Exhibit D-22.

Cross Examination by Mr. Platoff:

Q. Is this the only contract which you had with Mr. Vitille for this work? A. Yes.

Q. I notice by the Stop Notice that you claim a balance of $2,047.18 on an itemized statement, apparently on your bill head, August 31, 1927, and I call your attention to the fact when you brought suit in the Hudson County Circuit Court on this claim you brought suit for $2,047.18. Will you explain to us what items make up the difference between this amount and the amount you originally claimed? A. The claim in the stop-notice, we had a contract and the contract called for certain materials. When we filed the stop-notice we were not sure that all the material according to contract was delivered, so we put in on contract what we figured or estimated the material that was delivered on the job on account of that contract was, and we used that figure in order to be sure our claim would be correct.

Cross Examination by Mr. Greene:

Q. Did you receive any amount on your contract? A. No, sir.

Q. When did you serve your notice? A. 3rd day of September. We served two notices, because I wasn't sure if the first notice was good, so we served another one.

Q. Have you got the form of notice of September 3rd? A. (Notice produced).

Q. I show you a paper and ask you if this is the notice which was served as you say on September 3, 1927? A. On September 2nd.

Q. And, at that time, had you supplied all of the materials you were bound to supply? A. All that we had for the amount we claimed. There was some materials delivered after which are in excess of that amount.

Q. Your contract called for payment when? A. —

Q. Your contract called for payments as follows: 85% of all materials delivered up to one month to be paid on or about the 20th of the month following, the balance to be paid when the job was completed. When was the job completed so far as your contract was concerned? A. As far as our contract was concerned the building was completed on August 19, 1927.

Q. Was it fully completed then? A. Yes, sir.

Q. All of your material had been delivered? A. As far as the contract was concerned, yes.

Q. Anything else to be performed? A. No. Some extras that were coming there.

Q. You said before that on or about September 13th, 1927 you filed a second stop-notice in the sum of $2,047.18 and that you reduced that amount below from $2,460.60 because you were not certain as to certain materials having been delivered, is that correct? A. That is correct.

Q. Were these materials delivered on September 13, 1927? A. Yes, sir.

Q. Why didn't you claim for them? A. Because we did not check our job at that time.

Q. Were all these materials delivered on September 2nd when the first notice was served? A. Yes, sir.

Q. You claimed it in the first notice and omitted it in the second notice, is that correct? A. Is the second notice lower than the first notice?

Q. Yes. Why is it that your second notice claims less than the first notice? A. Because there was a payment made of eighteen hundred and some odd dollars.

Q. When was that made? A. On September 9, of $1,850.

Q. Why was it necessary for you to serve a second notice? A. I did not know whether that was alright so that I would play safe and file another notice.

Q. Is this amount of $3,897.18 correct? A. Yes, sir.

Q. Therefore, on September 9th you got a payment of $1,850. That reduced your claim to $2,047.18. Is that correct? A. That's right.

Q. Does that sum of $2,047.18 actually represent the amount that was due you on September 13th? A. On September 13th? Yes.

Q. What about this material that you say that you were uncertain about as to whether it was delivered or not? A. It was delivered; after when we figured the whole thing up, and rechecked, the amount ran higher than we filed the stop-notice for. We checked up; there was contract and extras. We had to recheck and put in the items that were extras and contract what was contract. And the amount went over and we found we had a balance of more than our stop-notice.

Q. Didn't you examine your books to ascertain the amount that was due on the 13th of September? A. Yes.

Q. Was $2,047.18 due then? A. Yes.

Q. Wasn't any more due at that time? A. Yes, some more.

Q. Why didn't you include it? A. Because they were charged, some of it, in the extras.

Q. What difference would they make so far as the amount you claim; you were interested in filing the stop-notice for the correct amount. A. In our accounting, we have to furnish the material on the job and which part of it is contract and which part of it is extra, and we do not balance up until the job is completed and rechecked. Our books would be a trifle off on account of the condition of the account.

Q. So that at the time you filed your notice on September 13th you knew your books were off on the figures? A. We knew that the amount of the notice was absolutely correct, but there may be more.

Q. Did you know how much more? A. We knew there would be a trifle more.

Q. Did you know whether it was less or more? A. We knew it wasn't less.

Q. Did you personally check it up? A. Yes, some of them.

Q. Have you a list of the items which you were checking? A. No.

Q. Have you any delivery slips to show the days these materials were delivered? A. Yes, sir.

Q. Have them here? A. Yes, sir. (Witness produces slips).

Q. Where are the slips for the extra material? A. (Witness produces slips).

Q. Will you tell us the last day when you supplied materials on this job? A. Extras or contract?

Q. I don't care whether it was extra work or not. When was the last day you furnished any material? A. October 20th, Mr. Vitille came down and got some hardware he took up to the job.

Q. How much did that amount to? A. Eighty cents.

Q. What is the next previous date? A. October 4th.

Q. How much? A. $4.20.

Q What is the next previous date? A. October 5th.

Q. Amount? A. $3.56.

Q. Go right down the line to September 13th. A. October 6th, $1,94, September 28, $17.20, September 21, $.30. There were no deliveries after September 13th.

Q. What was the exact amount due your company on September 13th? A. I would have to add these items up and take them off this bill.

Q. After you served your first stop-notice you received a payment of $1,850? A. Yes, sir.

Q. Who paid you? A. I don't remember.

Q. Check or cash? A. Check.

Q. You don't know whose check it was? A. No. I think it was Vitille, Kinsella & Cunhy check.

Q. Did you tell them you filed a stop-notice? A. They knew.

Q. Did you serve them with a copy of it? A. We made demand on him for payment and told him unless we got payment we would file a stop-notice.

Q. Did he know you filed a second stop-notice? A. I don't know.

Q. You never demanded payment? Before you served this second stop-notice, did you demand payment? A. Yes, sir, a few days after the payment of $1,850.

Q. A few days after you received a payment, you demanded another payment? A. Yes, sir, we were entitled to it.

Q. Did he tell you he was going to give you another payment? A. No.

Q. How often did you make demands thereafter? A. As often as we could see him.

Q. Personally make a demand? A. No, sir.

Q. How many demands did you personally make? A. I saw Mr. Vitille at the office one time and spoke to him.

Q. When was that? A. A few days or a week after the payment was made; the $1,850 payment.

Q. You personally made the demand on him? A. I asked him for a payment and told him we insisted on getting our money and he said—

Q. He did not refuse to pay you. A. No.

Q. With that one exception, did you personally ever make demand for payment? A. I did not, except where I would send our collector up to see him.

Q. You don't know of your own knowledge? A. No.

Q. This occasion was the only occasion that you made demand for payment, a few days after the $1,850 was paid you. How much did you ask of him at that time? A. I didn't ask for any amount, I just asked him for payment.

Q. You didn't know at that time the amount that was due you? A. I didn't give it any attention.

Q. You just asked for a payment? A. Yes.

Q. Didn't specify any amount? A. No.

By Mr. McNulty:

Q. You asked him to pay your bill? A. Yes. Mr. Vitille knew the amount of the bill.

By Mr. Marcus:

Q. When did you render Mr. Vitille a bill? A. October 20th.

Q. So that prior to September 13th, 1928, you did not serve him with a final bill? A. Prior, no.

Q. So that when you just testified you asked him for payment of a bill on September 13th, you had not— A. We gave him a bill prior to that time.

Q. What date, prior to that time, did you give him a bill? A. I think it was August 30th.

Q. What was the amount of that bill? A. I haven't got that here but I could check it up from here. I think it ran to the balance showed on the stop-notice, the amount of $3,897.18.

Q. And, based upon that bill you received a payment of $1,850? A. Yes, sir.

Q. Next bill you rendered him was in October? A. Yes.

Q. And subsequently you made a demand for payment under that bill? A. No. We made demand on the August 30th bill.

Q. You made a demand on September 9th and got a payment of $1,850? A. Yes, sir.

Q. Then you rendered a final bill in October? A. Yes, sir.

Q. And thereafter you demanded payment under that bill? A. No. We haven't made any demand on that since October 30th.

Q. Between the payment on September 9th and the rendering of your bill in October you did not

make and further demand? A. Yes. We demanded payment between that time.

Q. Based on what? A. The balance due us.

Q. What bill? A. The other bill. The balance due us on bill of August 30th.

Q. The second bill was not in excess, of September 30th? A. We don't consider the bill, we take the balance due us. He paid on account $1,850, and there was still an amount due us of over $2,000 and we figured we were entitled to it.

Q. You subsequently rendered a bill and subsequently made a demand for payment on that bill? A. Yes.

Q. On August 30th you rendered a bill and based upon that bill you received a payment of $1,850 on September 9th? A. Yes.

Q. Now, the next bill you rendered to Vitille, Kinsella & Cunhy was in October, 1928, is that so? A. 1927.

Q. And subsequently you made a demand for payment based on the October bill, isn't that what you testified? A. No.

Q. When did you demand the balance due on your bill? A. I should judge around September 12th. I'm not sure.

Q. Where did you demand the payment on that bill? A. Mr. Vitille was in my office.

Q. What day of the week was it, do you know? A. I don't know.

Q. Who else was present at that time? A. I don't know.

Q. Had the check for $1,850 that was issued to you on September 9th, been paid at that time? A. I suppose it was.

Q. And, in spite of that, you made a further demand three or four days afterward? A. Yes, sir.

Q. You personally make that demand? A. Yes, sir.

Q. Was anybody else there besides Vitille? A. I'm not sure about that.

Q. How much did you demand four days after September 9th? A. I didn't make any specific amount.

Q. What did you say or what did he say? A. I asked Vitille for another payment and when it was coming and we were entitled to more money, and he said he could not give me any more and he will give me some more as soon as he could.

Q. How much did you expect to receive on that day? A. I expected at least $3,000. I expected a great deal more than $1,850.

Q. And you got $1,850? A. Yes.

Q. You were satisfied? A. I had to take it.

Q. And the next bill that you rendered to Vitille, Kinsella & Cunhy was under date of October, 1927? A. Yes.

Q. Which showed a credit of $1,850 on September 9th. Is that right? A. Yes, sir.

Q. And subsequently you asked for a payment in the October bill? A. August bill.

Q. Who was acting as your attorney prior to September 9, 1927? A. Oh, I have three or four attorneys.

Q. Who did your work; Burke, Sheridan & Hourigan represent your company? A. Yes, sir.

By Mr. Cooper:

Q. On September 9th when you received a payment, have all the merchandise been delivered on the job? A. Practically all.

Q. Can you tell us what was the occasion or why Mr. Vitille came to your office on September

13th when you made this demand? A. He came to get some hardware.

Q. Do your records show whether or not there was a sale of merchandise to him on September 9th? A. There wouldn't be. He probably could come down to get information.

Q. How do you fix the date, just by memory? A. Approximately.

By Mr. Platoff:

Q. Upon the service of the first stop-notice by you, the payment then due from the owner to the general contractor was held up, was it not? A. He did not get the money.

Q. That you served this notice, as a result of which the payment was held up and therefore you agreed to withhold your stop-notice? A. I didn't know that I agreed to withdraw the stop-notice.

Q. The first stop-notice? A. No, I don't know anything about it.

By Mr. Cooper:

Q. The demand that you made on Mr. Vitille for payment subsequent to the receipt of the payment of $1,850, that might have been made on September 14th, might it not? A. It might have been.

Q. You are not sure as to the date? A. No.

By Mr. Greene:

Q. As I understand it, you are relying at all upon the first stop-notice you served, you are relying on the second stop-notice? A. I leave it with my attorneys.

Q. You realize that you cannot have two stop-notices?

Br. Mr. McNulty: I object to that.

By the Master: I will overrule the question. It is a question of law.

Q. Why did you file the second stop-notice? A. I explained that. I wasn't at the time sure that my first stop-notice, on account of the payment made on it, would hold so rather than be on the wrong side, I served a second stop-notice.

By Mr. Platoff:

Q. Is your recollection better now that you filed a second stop-notice because you received $1,850 on account of the first? A. I don't remember having done that.

By Mr. Greene:

Q. Are you in the habit of serving amended stop-notices after you receive payment?

By Mr. McNulty: I object to what his habit is.

By the Master: I would like to hear the answer.

Q. I never had occasion before so that's why I don't know how to handle these things.

By Mr. Gilmour:

Q. Your contract price is $6,300. How much did the extras amount to in all? A. I think it was, extras amounted in all to $1,481.63.

Q. So that for the contract price plus the extras there was due for total charges $7,781.63, is that right? A. That's right.

Q. When did you receive your payments on account which brought this down? Have you a statement? A. Yes, sir. (witness produces paper).

Q. Why did you wait until October 20th to submit this statement to Vitille, Kinsella & Cunhy? A. Because we wanted to make sure that the job is all completed and then we checked up.

Q. Wasn't it because under the terms of your contract, payment were to be made 85% of the material delivered to the job to the 20th of one month to be paid on or before the 20th of the month following? It really didn't become due— A. No, sometimes we take longer and we will check up the contract immediately after, and sometimes a little later on.

Q. Is this a copy of the bill that you sent to Vitille, Kinsella & Cunhy? A. I think they have a copy of that.

By Mr. Gilmour: I desire to offer this bill.

By the Master: Same is marked Exhibit D-23.

Q. Is this an itemized bill annexed to this statement marked Exhibit P-23, which was submitted to the contractors? A. This was the one extra (indicating); I don't know if there is another. This is the other itemized bill, $887 (indicating), that gives you two items.

By the Master: Exhibit D-23 consists of one small sheet being a general statement, and three sheets of itemized items amounting to $592.38. It is dated October 20th, including all of the sheets annexed to it.

(Witness produces several sheets of an additional bill.)

By Mr. Greene: I offer in evidence copy of a summons and complaint in the suit in the Hudson County Circuit Court in which the summons issued on first day of October, 1928, claiming $2,047.18. I call the Master's attention to the fact that that suit was predicated on a stop-notice dated September 13th, 1927.

By the Master: Same is marked Exhibit D-24.

By Mr. Gilmour:

Q. Was all the contract work completed before —what was the last item you did, extra or general contract work? A. Extra.

Q. Was every item furnished after September 1, 1927 an extra? A. Yes.

Q. You know how much they total, the items which were furnished from September 1, 1927? A. On all the papers in the statement.

CASE AS TO AMOUNT DUE FROM COMPLAINANT TO GENERAL CONTRACTORS.

CASE OF GENERAL CONTRACTORS.

MICHAEL J. VITILLE has previously been sworn, called as a witness on behalf of the defendants, Vitille, Kinsella & Cunhy, general contractors.

Examination by Mr. Bianchi:

Q. You are a partner and a member of the firm of Vitille, Kinsella & Cunhy? A. Yes, sir.

Q. And your partnership were the general contractors for the erection and construction and furnish the labor and material on the building being erected by Dr. MacDonnell, at 130th Street, Woodcliff, N. J.? A. Yes, sir.

Q. Did you on the 13th day of October, 1926 make a contract with him? A. Yes, sir.

Q. What was the amount of that contract? A. $98,000.00.

Q. I show you a document or a paper which purports to be a contract between you and Martin J. MacDonnell and ask you whether that is the contract you had? A. Yes, sir.

By Mr. Bianchi: I offer that contract in evidence.

By the Master: Same will be marked Exhibit.

Q. Is this the general contract covering all the work? A. Yes.

Q. I now show you papers purporting to be specifications for an apartment house for Dr. Martin J. MacDonnell as owner, located at Woodcliff, New Jersey, dated September 16, 1926 and ask you whether these were the specifications which were to be used in conjunction with the contract that you have just spoken of? A. Yes.

By Mr. Bianchi: I offer this set of specifications in evidence.

Q. In connection with the contract and specifications, did you receive a set of plans by which you were to do the work? A. Yes.

Q. Have you that set of plans with you here? A. Yes. (Witness produces set of plans.)

By Mr. Bianchi: I offer in evidence the plans which are referred to in the contract as "drawings."

Q. Were there more than one set of plans? A. Yes. More than one set.

Q. Were there any revised drawings? A. Yes.

Q. These drawings that you have in front of you on the witness table, are they the renewed drawings? A. Yes.

Q. Are all these drawings on this building? A. Yes.

Q. Then these drawing constitute the main work done at the building under the contract and specifications? A. Yes, sir.

By Mr. Bianchi: I offer one set of drawings consisting of eleven sheets, in evidence.

By the Master: Same will be marked Exhibit D-53. This exhibit will be admitted in evidence subject to the right of any parties to show any errors, corrections, omissions or to make any subsequent objection to their admission.

By Mr. Bianchi: I offer in evidence a statement purporting to be a copy of the record of payments paid under this contract. The total sum is $83,690.20 and shows the dates of payment and amounts.

By the Master: The paper will be marked Exhibit D-54 subject to any objections that may be subsequently made and subject to corrections.

By Mr. Platoff: I might state that the records that I have show that there have been payments made on this contract of $85,002.07.

Michael J. Vitille—Recalled, Direct.

MR. VITILLE recalled:

By Mr. Bianchi:

Q. Did you or did you not Mr. Vitille complete all of your work as per plans and specifications under this general contract? A. Yes, according to the plans and specifications with the exception of that which were changes. Changes were made in the plans which they demanded.

Q. Who was that? A. The owner and the architect.

Q. Is there any special work or items that they are entitled to credit for on the general contract? A. Yes.

Q. What is that? A. Sixty bags of Portland Cement at 45c.

Q. Is there any one special item on this general contract that they are entitled to credit? A. A. Yes. Dressers.

Q. How many? A. Twenty.

Q. The general contract called for certain dressers? A. Yes.

Q. You did not put them in? A. No.

Q. And they are entitled to credit for that? A. Yes, sir.

Q. What was the value of each dresser? A. $20.

By the Master:

Q. What do you mean by dresser? A. A kitchen cabinet or closet that they use in kitchens for dishes and so forth.

By Mr. Bianchi:

Q. Amounting to $20 each? A. Yes.

Michael J. Vitille—Recalled, Direct.

Q. Is there any other big item? A. No.

Q. In your claim, you have given them credit for that? A. Yes.

Q. Did you do any work on the building that was not called for in the plans and specifications? A. Yes.

Q. At whose request did you do any other work than that called for in the plans and specifications?

By Mr. Platoff: I object at this time to any testimony regarding any extra work unless the authorization therefor as regarding the contract.

By the Master: I will take the testimony subject to Mr. Platoff's objection and also subject to Mr. Platoff's objections in any other question in the same line.

Q. What is the first work that you did that is not called for in the plans and specifications? A. Rock excavating.

By Mr. Platoff: On this question, he cannot just testify that he did work that was ordered. I think to put the evidence in that it is necessary to show from whom they got the instructions and authorization and how they got the order and in what manner they did the work, and testify to the exact facts.

By Mr. Bianchi: The law appears to be that if you have a written order, then of course, you must file your written order. If you have not, then you must show and testify to an order and a promise to pay either a set amount or a reasonable amount

therefor and that is what we intend to prove in this case.

Q. At whose request did you do this rock excavating? A. The owner and the architect.

Q. Was there anything in writing for that work? A. No.

Q. Not for the rock excavating? A. No.

Q. Why was the rock excavating done? A. Because that cellar was not deep enough; it had to be made deeper.

Q. I show you what purports to be a copy of a requisition No. 1 and ask you what that covers? A. 1,077 yards of rock excavation, less 150 yards.

Q. Who made that? A. Mr. Ach.

Q. What kind of soil did you expect to find there? A. Dirt.

Q. After you started to do the job, what did you find? A. Rock.

Q. Were you to be paid different or extra for the rock? A. Yes.

Q. And, is this a statement made up by Mr. Ach because of your finding rock on the job? A. Yes.

Q. I call your attention to the fact that at the bottom of this requisition there is "O.K." Was that on there at the time you received it? A. Yes.

Q. What was the net amount due to you after giving the credits to the owner for this particular work? A. $2,208.35.

Q. That was due to you? A. Yes.

Q. Did you give the owner credit for all that he was entitled to in the change of the manner of work to be done? A. Yes.

Q. In computing these figures, how did you work it out? Did you give them credit so much

for the earth you had to remove and then charge for the rock? A. Yes.

By Mr. Bianchi: I offer this in evidence.

By the Master: Same is marked Exhibit D-55.

Q. What is your next item for extra work, if any? A. $150 for Lumnite cement which the architect ordered.

By Mr. Platoff: I object to any testimony on any items which the architect ordered.

By the Master: I will take the testimony subject to it being connected up later.

By Mr. Greene: May I call the Master's attention that it has been held that the architect is the agent of the owner.

By the Master: Any testimony along that line will be subject to his objection.

Q. Who was the architect that you say requested you? A. David M. Ach.

Q. How did you know he was the architect on the job? A. His name was on the plans and specifications and on the contract.

Q. Did the owner ever tell you anything that he was or was not the architect? A. Yes.

Q. What is this cement item you mentioned? A. 150 bags of Lumnite Cement, price of 45c a bag. The architect ordered another cement that we had to use.

Q. Was Lumnite cement called for in either the plans or the contract or specifications? A. No.

Q. Is there a difference in cost between the Lumnite Cement and the ordinary cement? A. Yes.

Q. How much did you charge him for the Lumnite Cement? A. $2.50.

Q. Is that the market price? A. That is the market price according to the masons.

Q. What credit did you give him? A. 45.

Q. How much a bag was that? A. $.75 a bag, sixty bags of Portland Cement.

Q. Who told you to use Lumnite Cement in place of the other cement? A. The architect.

Q. What was the necessity for using this Lumnite Cement? A. To make a better job, for the foundation, for the footing.

Q. In what way does this make a better job? A. It is stronger.

Q. Does your specification call for Portland Cement? A. Yes.

Q. What is the next item? A. Elevator shafts.

Q. In the building? A. Yes.

Q. How many? A One.

Q. What kind of elevator was being put in the building? A. Otis.

Q. What was done in the elevator shaft? A. Waterproofing on the bottom of the shaft.

Q. Who told you to do this work? A. The architect.

Q. Do you know why? A. To make a better job.

Q. Was there anything said as to payments about this waterproofing job? A. Yes. He said put a concrete on and I told him that is extra work and we expect to be paid for that and he said "go ahead and do it."

Q. How much was your bill? A. $100.17.

Q. Was there anything else on the shaft? A. No.

Q. How much is it for the waterproofing of the shaft? A. $100.17.

Q. What was the next item? A. Deafening.

Q. What about deafening? A. Deafening between the—to divide the partitions of the apartments.

Q. What did you do? A. We put the gypsum block between the partitions and laid the cement mortar.

Q. And, how much was that? A. $720.11.

Q. Who ordered that work to be done? A. The owner and architect.

Q. Did you have a conversation with both of them? A. Yes.

Q. What was said between the three of you? A. He says, "Put the deafening between the partitions and we will pay what the reasonable price is."

Q. What you did between these walls, is that shown on the plans and specifications? A. No.

Q. Sure of that? A. Yes.

Q. Is that a reasonable price that you are charging? A. Yes.

Q. Why did they want that, do you know? A. To kill the sound between the apartments.

Q. The original plans did not show that? A. No.

Q. The original specifications did not show that? A. No.

Q. What is the next item? A. Deafening, too.

Q. Where was that done? A. Between the—divide the partition wall on all floors on the south wall.

Q. What did you put there? A. Gypsum block.

Michael J. Vitille—Recalled, Direct.

Q. Did your contract and specifications call for gypsum block.? A. Not for this particular work.

Q. Does your contract or specifications call for deafening the south wall with gypsum block? A. For one-half floor only.

Q. Did you charge him for that one-half floor that you were supposed to do? A. No.

Q. How much did you charge for this last half? A. $178.37.

Q. Who told you to do that? A. The owner and architect.

Q. Did you have a converastion with them? A. Yes.

Q. What was said? A. He says, "We want to have the deafening in the south wall and will pay what the reasonable price is."

Q. What was the next item? A. White cement and white sand.

Q. What is that used for? A. Color mortar for outside of brick.

Q. What was done on the outside of the brick work that was different from the original plans and specifications? A. You mean for the whole face of the building?

Q. What was supposed to be used on this building? A. Common mortar.

Q. Where was this mortar put? A. To lay the bricks.

Q. And did you use common mortar? A. No.

Q. What did you use? A. White cement and white sand.

Q. Why? A. Because they wanted it.

By Mr. Bianchi: It seems to me that at this time, that statement can be offered in evidence and can be marked as an exhibit for identification. The witness will

testify that each of these items of extra work was performed by him and that the prices charged are reasonable prices and that they were ordered by the owner or the architect.

By the Master: This statement, consisting of eight pages, will be marked Exhibit D-56 for identification.

Q. Did you do all of this extra work? A. Yes.

Q. And, all is ordered by the architect or owner, right? A. Yes.

Q. Were there any promises made that they would pay for this work? A. Yes.

Q. When? A. Every time as we had to change our plan of construction.

Q. Have you been paid for this extra work? A. No.

Q. Have you been paid the balance due on the general contract? A. No.

Q. Giving credit for the payments which are shown on the exhibit which you put in evidence, does that last sheet of that exhibit, D-56, show the amount that you claim to be due both on the general contract and on the extra work of $30,177.53? A. Yes.

Q. Do you know whether the owner ever took the building over? A. Yes.

Q. You know when? A. In the middle of September or early part of October, 1927.

Q. What did he do? A. He put tenants in.

Q. Anybody move in? A. People moved in.

Q. People live in there now? A. Yes.

Q. Did you see them in there? A. Yes.

Q. All the apartments? A. Yes, except a few.

Q. Were those other few completed? A. Yes.

Q. How many apartments are there in the building? A. Twenty.

Q. Have you demanded a payment of the money due to you? A. Yes.

Q. Who did you demand payment of? A. The owner and the architect.

Q. What did the owner say? A. The owner said "Get the final certificate from the architect." The architect put it off day by day and up to date the certificate has not been delivered yet.

Q. And, you have no certificate of completion? A. No.

Q. Did you have any conferences in this matter? A. Yes.

Q. Were you ever denied payment by the owner or anyone?

By Mr. Platoff: This is immaterial. These payments are due and payable on the architect's certificate. Any promise short of that is without any value.

By Mr. Bianchi: Of course, if the owner promises to pay, it might be a waiver of the architect's certificate.

Q. Did the owner promise to pay? A. The owner promised to pay if I got the certificate.

Q. What else? A. That's all.

Q. What did you do after that? A. I went to the architect for the certificate, and he failed to give it to me. He promised day to day.

Q. He promised to give it to you but he never did? Did he inspect the job? A. Yes, sir.

Q. Did the architect say that he would never give you a certificate? A. He never said that. He promised to give it to me.

Q. How many times did he promise to give you the certificate? A. —.

Q. Did you go to the owner and speak about this matter? A. Yes. The owner said all the time, "get the certificate from the architect."

Q. Did he tell you about the money— A. He said "As soon as you get the certificate you get the money."

Q. Did you receive a letter dated October 31, 1928, from Mr. Ach in which he said:

My dear Mr. Vitille:

I expect to finish your certificate surely by Friday of this week.

A. Yes.

By Mr. Bianchi: I offer that letter in evidence.

By the Master: Same is marked Exhibit D-57.

MICHAEL J. VITILLE recalled for cross examination.

Cross Examination by Mr. Platoff:

Q. Mr. Vitille, you testified that you performed the contract all in accordance with the specifications, did you not? A. According to the plans and specifications with the exceptions of changes as made on the job as they were demanded.

Q. When you say "they" whom do you mean? A. The owner and architect.

Q. Exactly what changes did the architect or owner demand? A. Changes on the outside of the brick work.

Q. Give them to me carefully. A. Give me the plans and I will tell you what they are. Sheet No. 1: These plans show the picture of the building as been made in the plans; no changes have been made in the specifications.

Q. What changes were made in the plans?

By the Master: So that the plans can be discussed intelligently, I will mark each sheet in numerical order.

Q. What change was made on Sheet No. 1? A. The building is designed for limestone; changed to brick work and stucco.

Q. Mr. Vitille, isn't it a fact before you signed contract, Exhibit D-51 the architect had given you a new page one showing new changes from limestone to brick? A. Yes.

Q. And this change you refer to, was it a change after the contract was made? A. Yes.

Q. Before or after you made the contract? A. After. Sheet No. 1 was changed before signing the contract.

Q. You are sure about that? A. I am sure.

Q. Give me the next change. A. Sheet No. 12 changed from stucco to brick.

Q. What did you change from stucco to brick? A. Was to be two story from stucco and made one story stucco and one story more brick.

Q. You are sure that was done after the contract was signed? A. Yes.

Q. What is the next change? A. Sheet No. 1—Change small window to larger one for tenement house requirements; the owner would not accept it; told architect to have the same window back again. Sheet No. 2—Changed three room apart-

ment; change was made to make room different way. The owner did not like it after partitions were all up ready for plaster. The owner and the architect made the change; they tore down the partition and replaced partition again.

Q. You said the owner and architect; just which one was it? A. The owner and the arrhitect.

Q. Both together? A. Yes.

Q. Where were you? A. In the building.

Q. You are sure the owner was there and the architect? A. Yes.

Q. Both together? A. Yes. Sheet No. 5—Changed laundry and partition—was ready for plaster. Tore it down and built new partition to make room large for janitor.

Q. Who ordered the change? A. The architect.

Q. How about the owner? A. The owner was there because everything was decided together.

Q. How about specifications which show laundry? A. The architect asked for it.

Q. Did the owner have anything to do with it? A. Yes.

Q. Was he there when the architect desired you to make the change? A. Yes.

Q. You are sure about that? A. Yes. Sheet No. 6: The partition for all bathrooms on all floors on the north side were changed after the partitions were partly built because they interfered with the plumbing.

Q. Who ordered that change, the owner or the architect, or both? A. The owner and the architect.

Q. Both together ordered that change? A. Yes.

Q. Who gave you the order? A. Architect.

Q. Did the owner give the order? A. Not in this case.

Q. Was the owner present while the architect gave you the order? A. Yes.

Q. You are sure? A. Yes.

Q. The owner was present when the architect gave you the order? A. Yes. The plumber could not put the pipes, soil and vent, because the iron girder was in the way. On account of the iron girder being in the way we had to move the partition. Sheet No. 6: For all floors changed the frigidaires. The owner did not like the position that the architect ordered.

Q. You mean changed the position of the frigidaire equipment? A. Yes. I had to change it from one corner to another in the same room. The plumber could not put fixtures in.

Q. Who requested that change, Mr. Vitille? A. The owner and architect.

Q. Both together? A. Yes.

Q. What is next? A. Sheet No. 6: The north side of apartment on all floors at the back, changed the bathroom doors and passage hall door. The doors were too big the way shown in plans and cannot be used.

Q. Who ordered that change? A. The architect.

Q. The owner present? A. The owner was with the architect talking about it.

Q. Was the owner with the architect when he told you to make the change? A. I don't remember. I know the owner was with the architect, but I don't remember whether he ordered change or not.

Q. By the way, that change was ordered before you did any work? A. Change was made after we were ready to hang doors. We could not use the doors. The way the doors were originally made the size we could not hang the doors free; it blocked the passage. I have a letter on that.

Q. From whom? A. From the North Hudson Mfg. Co. to Mr. Ach, the architect.

Q. Isn't it a fact that this defect is a defect for which you are responsible because you did not verify the work and the architect rejected the work and therefore you made this change? A. No.

Q. What is the next change? A. Sheet No. 6: For all floors furring out frigidaire pipe.

Q. Who ordered that? A. The architect.

Q. The owner present? A. I don't remember.

Q. What is next? A. Sheet No. 6: Changed doors in ward room on first floor in doctor's apartment.

Q. Who ordered that? A. The architect and owner.

Q. Both together? A. Yes.

Q. What is next? A. Sheet No. 6: In doctor's apartment build up booth in electrical room.

Q. Who ordered that? A. Doctor and architect. Sheet No. 6: New linen closet in hall in doctor's apartment.

Q. Who ordered that? A. Both.
Sheet No. 6: Changed instrument case in doctor's apartment.

Q. What is that change? A. The doctor did not like what the architect designed.

Q. You omitted that case? A. Yes.

Q. You left it out? A. No, we put it up and had to take it down because he did not like it.

Q. You put it up and had to take it down? A. Yes.

Q. You rebuilt it? A. Yes.

Q. You are sure you rebuilt it? A. Yes.

Q. You are sure that the instrument case was built? A. We built a frame for it and it is supposed to be made out of metal. We had to set up frame to hold the metal that they wanted.

Q. Who ordered that? A. Owner and architect. Sheet No. 6: In doctor's apartment, the book case.

Q. Changed? A. We put in what was specified and owner did not like it. We had to wait over a month before they made decision and we made new drawing for book case and we had to set it for them.

Drawing offered in evidence.

By the Master: I will make this exhibit D-53, sheet No. 13.

Q. Where is the first drawing for this book case; the one you just offered in evidence is the second drawing? A. It is on Sheet No. 6.

Q. Show me where it appears on Sheet No. 6. A. Witness indicates on Sheet No. 6 between doctor's office and examination office, first floor, marked book cases.

Q. How does the book case indicated on Sheet No. 6 differ from the new drawing you just offered in evidence. A. Differs in design, the style for the shelves, on the door, and material.

Q. As shown on Sheet No. 6 and on the new drawing what material is called for? A. Specifications for Sheet No. 6 showed white wood; in change I don't remember.

Q. Can you say it was a change? A. Yes.

Q. Isn't it a fact that Sheet No. 6 doesn't show any detail as to these book cases except as to location? A. No details here.

Q. Isn't it a fact that this later drawing, Exhibit D-53, Sheet No. 13 merely shows a front picture of those bookcases? A. Yes.

Q. Does the specification show how the original should be made? A. Yes.

Michael J. Vitille—Recalled, Cross.

Q. Do those specifications show something different than these specifications? A. Yes.

Q. Take the specifications and show them to us. A. Witness refers to Sheet No. 25 of Exhibit D-52 under heading of bookcases and instrument cases: "Build in where shown bookcases and instrument cases with 1⅛" rebated doors, ⅞" moulded movable shelves on pins, base and caps to match detail of wainscoting and to be glazed with leaded glass of neat pattern."

Q. How does Exhibit D-53, Sheet No. 13 differ from the specifications that you have just read? A. Changed the height.

Q. Show me anything to indicate on the original specification the height of the book cases. A. It does not show the height but we took our best knowledge of how high to make it accordingly with the architect's consent. Before we ordered book case we asked him and explained to him and he told us everything O. K. and go ahead and make it.

Q. How does it differ from the original plan and specification? A. It cost more for what architect designed later. We had already had the lumber work from the mill and we erected it in the building. When the architect saw it he wanted it taken down. I have a letter dated October 14, 1927 from David M. Ach, architect to the general contractors. The first paragraph of the letter reads as follows: "Please order the book cases from the North Hudson Manufacturing Co. The Doctor has approved the price and sketch."

By Judge Bianchi: I offer the letter in evidence.

By the Master: Letter will be marked Exhibit D-58.

Q. Did you make a price for your work to anybody? A. I gave a price to Mr. Ach.

Q. In writing? A. I don't remember whether in writing or if I called him up because he wrote me back.

Q. What price did you give him? A. $145 if I don't make a mistake.

Q. What did you charge him for it? Is that the item for which you charged $58.08 on page 4 of this statement? A. That is for labor only. Materials are charged no doubt on the bill, referring to item under date of Sept. 15, 1927, on page 4 of Exhibit D-56.

Q. What is the next change? A. Sheet No. 6, first floor vestibule, additional pair of doors.

Q. Who ordered that? A. The architect.

Q. Are those doors shown in the specifications? A. They don't show on the plans.

Q. Do they show on the specifications? A. I don't believe they show.

Q. Do you know whether they show in the specifications or not? A. I believe they show; I don't know. Witness refers to Sheet No. 6. They are pencil marks which were made by Mr. Ach himself on the plans which show the new pair of doors in the vestibule. Reading from page 14 of specifications: front vestibule, entrance doors, trim, etc. The front entrance, vestibule doors, sidelights and transoms will be of iron and made 2 inches thick built up of plates 3/32″ and 1/16″ metal and put together without screws, bolts or any connections showing.

Q. Are those the same doors that you refer to having installed in the vestibule? A. Yes.

By Mr. Bianchi:

Q. Why did you have to make the extra doors?

Michael J. Vitille—Recalled, Cross.

A. Because it is not shown on the plans and the ironworkers and kalamein sheet metal workers did not get the extra pair of doors because they were not shown on the plans

Q. And had they figured on these plans that you gave them A. Yes.

By Mr. Platoff:

Q. Did you give them the specifications? A. Yes.

Q. And the specification does include these doors, does it not? A. The specifications do not show on the plans.

Q. Doesn't the specification provide for these doors? A. Yes.

By Mr. Bianchi:

Q. What does the specification provide for, what kind of doors should be used? A. Iron doors.

Q. Isn't this a description of the kind of doors that should be used for front vestibule? Our argument is that this specification is simply a copy of other specifications used for other buildings and these specifications are for other buildings and never intended that they should be used in this building and that is the reason they are shown on the plan, sheet No. 6, and there are other items which will appear in these specifications which are not shown on the plans for the same reason. This architect has made a practice in copying these specifications which other architects have done.

By Mr. Platoff:

I understand that the specifications give general

instructions to the contractor but the contractor is obliged to install work in the specifications.

By the Master: Referring to Exhibit D-52 Are these the specifications given you to work on?

A. Yes.

Q. Are they the only set of specifications you had? A. We had a couple more.

Q. All the same? A. One is a little different than the others. This is a little different than the others.

By Mr. Platoff:

Q. What is different? A. A couple of things we came across.

Q. Where is the first page of those specifications?

By Mr. Bianchi: The specifications which the witness has are marked job 26926 and dated Sept. 16, 1926 for apartment house of Dr. M. J. McDonnell, Woodcliff and numbers given on specification which witness is using are same numbers as shown on the plans or blue prints Exhibit D-53.

By the Master: Where is the first page of these specifications?

A. I don't know.

Q. Have you any of the other sheets of the specification that were given to you? A. No.

Q. Where are they? A. Subcontractor had some.

By the Master: The paragraph which Mr. Platoff is referring to is the first paragraph

on the first page of the specification Exhibit D-52 which apparently has the first two pages missing.

By Mr. Platoff:

Q. What is the next change? A. Sheet No. 5 —changed the window frame in ventilator shaft from what is shown on original plan to kalamein or fireproof on all floors in the rear.

Q. How many floors? A. Five. Ten frames.

Q. Who ordered the work? A. Mr. Ach, the architect.

Q. Sheet No. 6—deafening between apartment partitions in all apartments on all floors with gypsum block.

Q. What is next? A. Sheet No. 6—deafening all floors with flax linum. Sheet No. 6—In elevator shaft for all floors channel iron.

Q. What change was that? A. New channel ordered by elevator people.

Q. Wasn't that in specifications? A. No, doesn't show on the plans?

Q. Who ordered that? A. Elevator people—Mr. Ach.

By the Master: How do you know?

A. Because I have a letter.

Q. From whom? A. Mr. Ach send me copy of letter from elevator people.

Q. Have you that letter? A. Yes.

Witness produces carbon copy of letter dated Feb. 17, 1927 from Otis Elevator Co. of New York City to D. M. Ach and referring to this job, heading Dr. MacDonnell, Woodcliff.

Michael J. Vitille—Recalled, Cross.

By Mr. Bianchi: I offer this letter in evidence.

By the Master: Letter will be marked Exhibit D-59 and letter from Mr. Ach to Mr. Vitille dated March 19, enclosing approved drawings of the Otis Elevator Co., marked Exhibit D-59A.

By Mr. Platoff:

Q. I call to your attention page 14 of specifications which reads as follows: "Elevator Equipment—This contractor shall furnish all the necessary grilles, guards, etc., under machinery at top of elevator shafts and for all caging and shall furnish all cagings for elevator counterweights as provided for by building department." And I ask you if they do not include channel iron? A. No.

Q. How many elevator shafts are there in this building? A. One.

Q. I call your attention to page 11 of this specification under necessary work reading as follows: "Furnish and erect all iron work required such as anchor braces, bolts, chains, channels, angles, columns, cable and bases and templates, etc. Contractor will furnish lintels where required" and I ask you whether that covered channel work as required? A. No.

By Mr. Bianchi:

Q. Is it a fact they only relate to necessary and ornamental iron? A. No.

By Mr. Platoff:

Q. Isn't it a fact that every elevator shaft for

proper running of the elevator requires channel iron like you put in this job? A. Some.

Q. And isn't it a fact that you knew this when you took this contract? A. No.

Q. You mean when you took this contract you did not know the elevator shaft would require a certain quantity of channel iron? A. No.

Q. What was the next change? A. Sheet No. 5 —Built a dark room in basement, in the cellar.

Q. Who ordered it? A. The owner and the architect.

Q. Is that a closet more in a room? A. A dark room.

Q. How big is it? A. I believe it is 5 x 6 or 5 x 8.

Q. It is a little closet? A. No, it is 5 x 8.

By Mr. Bianchi:

Q. Where did you build it? A. In the basement.

By Mr. Platoff:

Q. Who told you to build it? A. The owner and the architect.

Q. Both together? A. Yes.

By Mr. Bianchi:

Q. For what purpose is it? A. For the doctor's purpose.

By Mr. Platoff:

Q. When did you build it? A. In the latter part of October, 1927.

Q. Have you records here to show exactly when

you built it? A. Sept. 29 to October 6, as shown on page No. 4 of Exhibit D-56.

Q. Isn't it a fact that Dr. McDonnell was away while you built that dark closet? A. Dr. McDonnell before he went away had a talk with me and my foreman during the period of the time he is away if anything the superintendent and tenants want to have done in the building to take care and let him know, and doctor's room had been ordered by the architect and the owner before the owner went away.

Q. You are sure about that? A. Yes. Sheet No. 5—Built screen rack in the cellar.

Q. Was that shown on the original plan? A. No.

Q. Who ordered it? A. Mrs. McDonnell.

Q. When did she order it? A. This was done when the doctor was away but under the superintendent's direction which doctor said before he went away if anything the superintendent or tenant wants have no dispute about it. This is referred to on page No. 4 of Exhibit D-56, under date of September 29, ordered by the superintendent.

Q. Did Dr. McDonnell tell you to take orders from the superintendent? A. Yes, before he went away.

Q. He told you personally? A. Yes.

Q. What next? A. Changed the coal bins on page No. 5 in the cellar. Changed the water pipe and put meter in; cut partition off and extended partition under the ceiling.

Q. Why was that necessary? A. For the gas meter and water meter, I believe.

Q. Who ordered that? A. The architect.

Q. You had provided for these meters in the coal bin, didn't you, and the architect made you change it? A. No.

Michael J. Vitille—Recalled, Cross.

By Mr. Bianchi:

Q. Did you make a mistake? A. No.

By Mr. Platoff:

Q. You did not make any mistakes on this job, Mr. Vitille? A. No.

Q. But the contract provided that you finish building in six months. How long did it take you to finish the building? A. About ten months.

By Mr. Bianchi:

Q. Why did it take longer? A. Because the owner did not have the money to pay the requisitions as they were made out.

By Mr. Platoff:

Q. Isn't it a fact that as the architect's certificates were issued the owner promptly paid the full amount? A. No.

Q. What certificate didn't he pay in full? A. Only one.

Q. Which one did he pay in full? A. The first one.

Q. What happened on the second one; didn't he pay the amount on the first and second? A. Yes, on the first and second.

Q. Did he pay the full amount on three certificates? A. No.

Q. Have you a copy of the three certificates? A. Yes.

Q. What is next? A. Sheet No. 6—built closet in doctor's waiting room.

Q. Who ordered that? A. The owner and the architect.

Q. What was the change? A. That is new.

Q. What is next? A. Sheet No. 7—in rear for all floors changed the garbage cans.

Q. Who ordered that? A. The architect.

By the Master:

Q. How many? A. Eight.

By Mr. Platoff:

Q. What next? Did you remove the garbage cans that you moved on page No. 7? A. Changed, yes.

Q. What did you do? A. We took the cans out.

Q. What did you do with them, put them in some other place? A. We could not put them in another place because there was no other place to put them.

Q. You took them out? A. Yes. Sheet No. 7—in rear changed the stock for gas range in five apartments.

Q. Who ordered that? A. The architect.

Q. What is next? A. On Sheet No. 6 in the doctor's apartment built new table.

Q. Who ordered it? A. The owner and architect. Sheet No. 6—for all floors, changed the kitchen closet to Kitchen Maid cabinets.

Q. That is an omission from the plan, is it not? A. Yes.

Q. The kitchen cabinets were left out and you did not furnish them? A. Yes.

Q. The owner supplied the Kitchen Maid cabinets and at his own expense? A. Yes. The owner did not like them and they did not fit and we had to fit them and we charged labor and

necessary charges. Sheet No. 7—Installed new French doors. Did not show on the plans.

Mr. Platoff: We are disputing only the question of amount.

Mr. Vitille: Sheet No. 12—changed design on the top of tower on Park Ave. side.

Q. Who ordered it? A. The architect and owner.

Q. Isn't it a fact that you made this change in the top of the tower in accordance with the plans and specifications? A. No. Sheet No. 5—changed foundation for elevator shaft from cinder block to water proof concrete.

Q. Isn't that in the plans and specifications? A. It does not show in the plans.

Q. In the specifications? A. I don't think it shows in the specifications.

Q. Show me that work on the plans. I call your attention to Sheet No. 3 and I ask you whether that page doesn't indicate in the legend the kind of material to be used? A. Yes.

Q. By reference to Sheet No. 5 and Sheet No. 3, isn't it a fact that the kind of material you are supposed to use is indicated to be concrete, water proof concrete? A. This section here, referring to Sheet No. 3, the whole building has been changed, the design and material, and when they made revised plans they revised part and another part they did not revise.

By Mr. Bianchi:

Q. What shows on the plan you were to use cinder blocks? A. This shows gypsum block.

Q. How did you know cinder blocks were to go there? A. The architect ordered it.

Michael J. Vitille—Recalled, Cross.

Q. How did you come to make the change from cinder blocks to gypsum blocks? A. Because he desired it.

Q. Did you put cinder blocks in first? A. It is additional cost from what we are supposed to use and what he made us use.

By Mr. Platoff:

Q. The specifications provide all footings shall be concrete, don't they? A. Yes.

Q. You put concrete in here? A. Yes.

Q. What kind of concrete did you put in? A. One cement, two sand and four stone.

Q. Is that what the specifications call for? A. Yes.

Q. Why should there be an additional charge for it? A. Because I made the walls bigger than what it shows.

By Mr. Bianchi:

Q. What walls? A. Foundation walls.

By Mr. Platoff:

Q. Are there any other changes or deviations in plans and specifications other than those you mentioned here? A. Sheet No. 7—extra shelf for all floors, all apartments.

Q. Who ordered that? A. The owner.

Q. What else? A. Sheet No. 7—in Dr. Fisher's office, second floor, we had to cut floor and walls for plumbing for dentist's equipment.

Q. Who ordered that? A. Owner and architect.

Q. What is next? A. Sheet No. 5—build partition around motor room for frigidaire, one floor.

Q. Who ordered that? A. The owner. Sheet No. 5—telephone bench for books in basement.

Q. Who ordered it? A. Superintendent. Sheet No. 6—in doctor's apartment changed closet facing hall.

Q. Who ordered it? A. The owner and the architect.

Q. What else? A. Sheet No. 6—operating room for doctor's apartment—new tile walls.

Q. Who ordered it? A. The owner.

Q. Didn't the owner put them in and pay for them? A. No.

Q. Who put them in? A. The tile contractor.

Q. Don't you know Dr. McDonnell paid for it? A. He sent me the bill.

Q. Have you the bill? A. Yes.

Q. Did you pay it? A. No.

Q. Who was the tile man? A. Crochetti.

By the Master:

Q. You know that Crochetti has a claim in here? A. Yes.

Q. Does that claim cover any of this new tile work? A. Yes.

Q. It does? A. Yes.

By Mr. Bianchi:

Q. Are you sure? A. According to the bill that he sent me.

By Mr. Platoff:

Q. What next? A. I can't show anything else on the plans but the electrician sent me a bill for some extras which he claims were ordered by the architect.

Michael J. Vitille—Recalled, Cross.

By the Master:

Q. Do you know anything about it of your own knowledge? A. No. Sheet No. 6—they changed radiators. I don't remember—there was two, I think.

Q. Who ordered it? A. The architect.

Q. The specifications call for shelving as follows: linen and kitchen closets to have four and other closets to have two shelves and beaded clothes hook strips on three sides. Have you installed new shelves in addition to what is included in those specifications? A. Yes.

Q. Didn't you go through the building with Dr. MacDonnell to examine the shelving? A. Not all the way through.

Q. Didn't you when you went through to inspect with the doctor admit you had not installed shelves required by the specification? A. No.

Q. Except for what you have testified to here, are there any other changes in the plans? A. I don't believe so.

Q. Have you constructed this building in accordance with the plans and specifications .except as to those changes and deviations which you have testified to here this afternoon? A. Yes.

Q. You made no other changes or deviations from the plans except as you have given in your testimony? A. Specifications have never been changed.

Q. There were no other changes made? A. No.

Q. And as to those changes you have testified here to everything in your testimony? A. Yes.

Q. And you have constructed this building subject to these changes and deviations which you have now testified to? A. Yes.

Michael J. Vitille—Recalled, Cross.

MICHAEL J. VITILLE, on stand on behalf of claim of contractor against complainant.

Cross Examination by Mr. Platoff:

Q. Mr. Vitille, except as to those changes in the plans and specifications as you have testified to in this hearing, were there any other changes in the plans and specifications? A. Yes. Some change for the subcontractors. Between the architect and the owner and the subcontract.

Q. What changes are these? A. Well, the plumbing.

Q. What else? A. The heating; the electrical work; the steel work; the extra heating. The statement, John J. Keller & Company extra on electrical work as per statement of S. & S. Supply Company. Extra on plumbing work as per statement of Cadel Bros., Inc. Extra on tile work as per statement of J. M. Crocetti. Extra for mill work as per statement of North Hudson Mfg. Co.

Q. Extra on outside stucco? A. Contract of Edward DeForge, Inc. Extra on elevator shaft as per statement of Foscale Iron Works.

Q. Aren't all these extras included in the testimony you gave heretofore? A. Not all.

Q. Aren't they included in the statement which you offered in evidence? A. We testified according to list we had that night.

Q. And all these extras are on that list, right? A. Yes, on last page.

Q. Outside of these, were there any other deviations or changes from the plans and specifications? A. —

Q. Mr. Vitille, did you omit anything in the

building of that building that are provided for in the plans and specifications? A. No.

Q. You have performed everything that the plans and specifications call for except with these modifications you testified about? A. Yes.

Q. You are sure about that? A. Yes, and what the architect ordered me to do except the dressers.

Q. Did the owner change anything in the plans and specifications except as to what you heretofore testified to? A. No.

Q. Mr. Vitille, I call your attention to mason work as provided for in the plans and specifications and I ask you whether you fireproofed the columns and beams? A. Yes.

Q. Sure about that? A. Just as I was directed to.

Q. I am not asking you that. I am asking you, did you do it as provided in the plans and specifications? A. Yes.

Q. Did you construct the exterior walls that matched the brickwork? A. Yes.

Q. Did you make the mortar with buff or with white— A. What he instructed me to do. That's what I did.

Q. I am not asking you that— A. I used white cement and white sand, just what he asked me to do.

Q. I did not ask you that. Did you make it a white or buff? A. White cement and white sand turned buff.

Q. Is it white or is it buff? A. Buff.

Q. Did you make the coping of cast stone or of cement? A. Cast stone and cement.

Q. What did the specifications require? A. The specifications called for the cast stone and the vitrified coping and the plans called for cast stone.

Q. What did you make it out of? A. Cast stone.

Q. Sure about that? A. Yes, sir.

Q. Did you include in the building the chimney fire brick? A. Where it was required, yes.

Q. Do you remember whether you lined the chimney with fire brick or not? A. I don't remember.

Q. Did you construct lath in the shafts? You plaster them? A. What shafts?

Q. Dumbwaiter shaft and elevator shaft. A. Dumbwaiter shafts we never plaster. He does not want it plaster.

Q. You know what the specifications called for? A. Specifications not plain enough.

Q. Do you know what the specifications provides for? A. The specifications was not plain enough and I asked the architect and he directed not to plaster dumbwaiter shaft but we were supposed to plaster the elevator shaft. We did plaster the elevator shaft.

Q. Did you construct gypsum block in the floors? A. He made a change. He did not want that.

Q. Who? A. The architect and the owner.

Q. Both spoke to you personally? A. The architect spoke to me. He told me that's what the owner wants. He picked out the stuff and we had to use it.

Q. Did you make any allowance for the gypsum block? A. It cost more money than I put in my estimate at first.

Q. Did you make any allowance? A. Yes.

Q. Did you put anything in the ceiling of the doctor's apartment; anything soundproof? A. Yes.

Q. What? A. Celotex and flax linum.

Q. Isn't it a fact that flax linum was put in the floors only not in the ceiling? A. Yes, that's what they asked me.

Q. Isn't it a fact that flax linum was put in the floors only and not in the ceiling? A. Yes.

Q. It was not put in the ceiling? A. No.

Q. Nothing was put in the ceiling? A. No.

Q. And the specification called for gypsum block in the ceiling, right? A. They changed it.

Q. Did you make any allowances for the change? A. Yes.

Q. Where? A. In the bill that I submitted.

Q. I want you to show me the bill you say you made the allowances on. A. On the second page is a statement, the item "credit for work included in contract, 1452 square feet flax linum at 5½¢ a square foot, $79.86.

Q. Is that correct, that that is the credit for the gypsum block? A. That's the credit for the flax linum and full amount of which we had we measured up what it will take for the doctor's apartment and the ceiling and we gave him the credit for the amount of flax linum which we were supposed to put in and the flax linum cost more than the gypsum block cost. That's what he ordered. We spoke to him many times before we ordered the stuff.

Q. What has that to do with the gypsum block? A. That's the order as instructed by the architect.

Q. Isn't it a fact that the specifications required you to put flax linum in every floor? A. Not every floor.

Q. Which floor was excluded? A. No floor at all.

Q. Wasn't there a contract for extra work which provided for construction of flax linum in all the floors? A. No.

Q. What floors did you put flax linum in? A. All floors.

Q. Why? A. Because the architect and the owner ordered it.

Q. Isn't it a fact that allowance for flax linum applies for extra work on flax linum not on gypsum block? A. Credit for flax linum is for what we supposed to put up for gypsum block.

Q. How many coats of plaster did you put on the cellar? A. Just what's required.

Q. How many? A. Just what the specifications called for.

Q. How many coats of plaster did you put on the cellar? A. I don't specifically remember how many, but I know it was as many as the specification required.

Q. Did you plaster the stair soffets? A. Yes.

Q. What is a stair soffet? A. A stair soffet is underneath the steps and bulkhead up to the roof.

Q. You mean the steps under the stair case? A. Yes, and the bulkhead goes all the way up to the roof.

Q. You are sure you plastered all these stair soffets? A. You can't plaster them. That's steel.

Q. You said you did. Did you or did you not? A. It is not required.

Q. Did you or did you not?

By Mr. Bianchi: I object. He has given you an answer.

By Mr. Platoff: I insist that's not a proper answer to that question.

Michael J. Vitille—Recalled, Cross.

By the Master: I think Mr. Platoff is right.

A. Plastered on all sides of wall except underneath the part where the stairs were; where the iron stairs were put up, no plaster.

Q. Did you plaster the cornices in the hall? A. Yes, sir.

By Mr. Greene: May I suggest to the Master unless counsel really intends to the doing of these things with his it seems to me futile.

By the Master: I understand Mr. Greene, before you came in, Mr. Platoff had an itemized list of what he claims were items that were omitted from the work and materials that were included in the specifications and for which he is going to claim credit and he intends to put in testimony to prove these items.

Q. What did you plaster them with? What kind of material? A. White sand and white cement, float finish.

Q. Did you install the garbage receptacles? A. Yes.

Q. What kind of trim did you finish in this building? A. What they picked out.

Q. Was a sample of the trim submitted? A. Yes.

Q. Was the trim that was installed in accordance with that sample? A. Yes.

Q. Was the trim that was installed in accordance with the specifications? A. The trim was installed according to what the doctor and Mr. Ach wanted; like that in the building in Engle-

wood. The trim was put into the building according to what Dr. MacDonnell and Mr. Ach, the architect, picked out in the building in Englewood. That's the kind of style and finish trim they wanted and that's what they got.

Q. Did you make any allowances for the difference in trim? A. No allowance.

Q. Did you install the instrument cases? A. Yes.

Q. Did you install kitchen dressers? A. No.

Q. Did you make any allowances? A. Yes.

Q. How much did you allow for it? A. Four hundred and some dollars.

Q. What quality oak flooring did you install? A. What is specified.

Q. What is specified? A. Oak flooring.

Q. No. 1 oak flooring? A. I don't remember just what the specification says.

Q. You know whether you installed No. 1 or No. 2 flooring? A. I submitted a sample to the architect.

By Mr. Bianchi:

Q. Is there such a thing as No. 1 or No. 2 oak flooring? A. That's just the name but they are the same thing.

By Mr. Platoff:

Q. Did you construct the milk cabinets in the basement? A. Yes.

Q. Sure you did? A. Yes.

Q. Did you construct the platforms for laundry in the cellar? A. Yes.

Q. Did you install door checks? A. Yes.

Q. Did you construct marble stringers of Ten-

nessee Pink Marble from the first floor to the roof? A. No.

Q. Did you make any allowance? A. No, because there was no allowance.

By the Master:

Q. Why no allowance? A. Because the stuff they picked out cost more than what was specified and that's what they wanted done.

Q. Did you make any charge for the new marble? A. No.

By Mr. Platoff:

Q. What did you put instead of it? A. Tennessee Marble.

Q. You just said you did not put Tennessee Marble? A. A different grade.

Q. What did you put in this building? A. Tennessee Marble, same as sample submitted.

Q. Tennessee Pink Marble? A. Yes.

Q. From first floor to the roof? A. On stairs.

Q. What does the specification call for on stairs or any other place? A. On the stairs and base.

Q. What did you actually put in there? A. The base—

Q. Then you did not put in what the specifications called for? A. He did not want it.

Q. Did you put in Tennessee Pink Marble? A. No.

Q. Did you put anything else in place of it? A. The stringers.

Q. Did you put anything else in place of the stringers? A. Plaster.

Q. Which cost more, plaster or marble? A. Marble.

Q. Did you make any allowance for the marble? A. No, sir. That was all fixed in the contract.

Q. Did you construct marble cheeks in the vestibule? A. No.

By Mr. Bianchi: I would like to ask the defense to produce copies of blue prints that were sent with the letter of May 21, 1927, from the architect to Mr. Vitille.

Mr. Platoff: This has nothing to do with the present question.

Q. What did you substitute for these cheek pieces, if anything? A. Tennessee marble.

Q. Do you remember whether the marble was to be 1¼″ thick? A. I do not remember.

Q. Do you remember how thick the marble was that you put in? A. No.

Q. Did you install marble plinth blocks? A. No.

Q. Does the trim in the vestibule entrance run to the floor? A. Yes.

Q. Did you install towel bars? A. That was required, yes.

Q. Did you install baluster of 1 x 1 bars? A. No.

Q. What did you install? A. Nothing.

Q. Doesn't the plans and specifications call for 1 x 1 bars? A. Not in the plans, in the specifications.

Q. You did not install it? A. No.

Q. Did you make any allowance for it? A. No.

Q. Did you install the iron doors in the vestibule? A. Yes, sir.

Q. You are sure you installed the iron doors in the vestibule? A. That's kalamien doors what he ordered.

Q. Did you install sliding doors in the dumb-waiters? A. No. The architect changed those.

Q. Do you know whether the 21 Kalamien doors that you installed in the apartments fit or not? A. Yes, they was fit.

Q. Did you install the water-closet in the doctor's apartment? A. No.

Q. Isn't it a fact that the sewerage pipe in the basement is required to be concealed? A. I think they are underneath except one piece.

Q. The plan calls for them all to be placed underneath the floor, doesn't it? A. That's a change the architect made.

Q. Did you install refrigerator pans and drain pipe in cellar sink? A. Yes.

Q. Isn't it a fact that that was omitted when the plumbing was put in? A. That's part of the plumbing, if there is any change between the plumber and architect, I don't know. The plumber and the architect made changes every day when the plumber was on the job.

Q. Are the electric bell wires concealed in conduits? A. According to specification the architect made.

Q. Are they or are they not? A. No.

Q. The specification called for them to be concealed, didn't they? A. He made a revised specification.

Q. Have you got the revised specification? A. Yes. Wires were put in according to the architect's orders to the electrician. I have the modified specifications.

Q. Is there anything in this modified specification which changes the requirements for the concealment of the wire?

By Mr. Bianchi: I object. The modified specification speaks for itself.

Michael J. Vitille—Recalled, Cross.

By the Master:

Q. Who drew that specification you have in your hand? A. The architect.

By Mr. Bianchi: The letter I offer, from Mr. Ach to the contractors, dated March 30, 1927, wherein there is enclosed a copy of the revised electrical specifications, and the specifications as received, and I call the attention of the court to the last page, third paragraph, relating to bell wires, changing the general specifications to an ordinary No. 18 bell wire.

By Mr. Platoff: I object to the admission of these papers on the ground that they are not signed by the owner or by anyone duly authorized, or by the contractor.

By Mr. Bianchi: In the general contract, we are duly pointed out to take instructions from the architect as to such changes as he may suggest and as may be necessary for the proper doing of the work.

By the Master: I understand that there is no contention made as to the fact that the three sheets of revised electrical specifications are not the copy received in the letter.

I will receive them in evidence for what they are worth, to be passed upon at some future time. Marked Exhibit D-60.

By Mr. Platoff:

Q. Take that paper and look at it and show me what part of it you say excuses you from concealing in conduits the electrical bell wire?

Michael J. Vitille—Recalled, Cross.

By Mr. Gilmour: I object on the ground that the specifications speak for themselves.

By the Master: I will allow the question.

A. The third paragraph on the last page.

By Mr. Platoff: I will call the Master's attention to the third paragraph which has been referred to, that there is nothing in that paragraph, as I read it, about electrical conduits.

Q. Are the other wires in this building in conduits? A. No.

Q. What are they? A. Wire.

Q. What kind of wire? A. Electrical wire, V.X.

Q. Is that what the specification calls for? A. According to revised specification.

Q. By the revised specification, do you mean Exhibit 60? A. Yes.

Q. Is there anything in the revised specification, Exhibit P-60, which changes the original specification? A. Yes.

By Mr. Bianchi: My contention is that this revised specification for electrical work wipes out anything that may be said in the original specification.

By the Master:

Q. When did you receive from the architect Exhibit D-60, before or after the original contract was executed? A. After.

Q. How long after? A. About March 30, 1927.

Q. The original contract was executed when? A. October 13, 1926.

Michael J. Vitille—Recalled, Cross.

By Mr. Bianchi:

Q. When was the electrical subcontract made? A. February 24, 1927.

Q. Then you received this right after that? A. Yes.

Q. Did the architect and the subcontractor talk things over about this subcontract? A. Yes, I believe so.

Q. Do you know? A. Yes.

Q. That's when you received this, shortly thereafter, right? A. Yes.

By Mr. Platoff:

Q. Mr. Vitille, you say you made your subcontract on February 24th? A. Yes.

Q. And you received from Mr. Ach the revised specifications, on what date? A. March 30th.

By Mr. Bianchi:

Q. Who recommended the S. & S. Electrical people to you?

By Mr. Platoff: I object. I think it is immaterial.

By the Master: I will allow the question.

A. The architect.

By Mr. Platoff:

Q. Are any electrical wires in conduits? A. Not in conduits, in v. x.

Q. Did you construct the duct from the vent shaft to the court?

By Mr. Bianchi: I object to it except if Mr. Platoff says the plans and specifications call for duct in a specific place.

A. No. That was not put in. The architect was to decide what he wanted.

Q. You did not put it in? A. No.

Q. Did you construct a Barrett Roof, and furnish the bond? A. No, that's up to the roofing contractor.

Q. You remember how radiators were treated, were they painted or enameled? A. No.

Q. Do you remember what was done with them? A. I don't remember.

Q. Was the painting done according to the specification? A. Yes.

Q. Did you examine the painting? A. The architect examined the painting.

Q. Did you? A. I saw it, yes.

Q. Is, in your opinion, the painting done according to the specifications? A. Yes.

Q. Do you know whether or not the sand papering of wood work was done? A. Yes.

Q. In each room? A. I saw him when he was working. I saw he was doing it.

Q. You know how many coats of paint were applied to the walls? A. Yes.

Q. The specification calls for three coats of paint. Do you know whether or not they applied three coats of paint or whether they kalsomined the painting? A. I don't know. He had a supervisor on the job. I didn't pay much attention to it.

Q. Then, how can you say this painting was done according to the specification? A. I saw the paint delivered on the job, and it was according to specification, and the men were working there.

Q. What paint was delivered there? A. All the paint that was specified.

Q. What kind of a dumbwaiter was installed? A. Just what the architect approved.

Q. What kind was installed, you know? A. I don't know the name of it, I don't remember.

Q. You know what dumbwaiter was specified? A. Yes.

Q. What kind? A. —

Q. A Sedgewick was specified. Do you know whether or not a Sedgewick was installed? A. No. I don't know. It was talked about and picked out by the architect. That's what he recommended and that's what I gave him.

Q. You never received a final certificate from the architect on this job, did you? A. No.

Q. You testified that all the changes and extra work was ordered by the owner and architect. Is that still your answer? A. Yes.

Q. What extra work have you written authorization for, if any?

Witness produces a pencil memorandum signed by Mr. Ach, addressed to "Mike," to which a designed pencil plan bearing the stamp "David M. Ach, Architect" and a blue print bearing the name of David M. Ach, architect, being revised plan of apartment (southeast) for first floor for Dr. MacDonnell. The three papers will be marked Exhibit D-61.

Witness produces a blue print entitled "book case in doctor's office" which bears the printed name of "David M. Ach, architect" and is marked Exhibit D-62.

Witness produces Revised Specification from Mr. Ach, dated January 27, 1927, cov-

ering the plumbing work on this building, consisting of a letter dated Jan. 27th, 1927, from Mr. Ach, together with typewritten statement consisting of eight pages. This is marked Exhibit D-63.

MR. VITILLE, recalled:

By Mr. Bianchi: I offer a letter bearing date January 11, 1926, written by Mr. Ach the architect to the contractors; also a letter dated February 16, 1927; also letter dated May 31, 1927. These are the only written letters the contractor can find showing any changes or additions to the plans or specifications. However, the plans and specifications show markings in pencil showing changes which were made at the order of the architect or owner. The—

By the Master: The letter bearing date January 11, 1926, will be marked Exhibit D-64; that of February 16, 1927, will be marked Exhibit D-65, and May 31, 1927, Exhibit D-66.

Continued Examination by Mr. Platoff:

Q. Did you furnish any written proposal in connection with the extra work or written estimate? A. No.

Q. None whatever? A. No.

Q. Sure about that? A. Yes.

Q. When was the first time you rendered a bill for extra work? A. In November, 1927.

Q. How much was that bill—have you a copy of it? A. It is the bill that I submit here.

Michael J. Vitille—Recalled, Cross.

Q. Didn't you submit a bill before that? A. I submitted a bill to the architect to check up the work and he was not satisfied the way the bill was made out and just to please him I had to make a regular itemized bill.

Q. Isn't it a fact that you first submitted a bill for $6,000 for extras? A. No.

Q. I show you this bill and ask you whether you prepared and rendered this bill?

By Mr. Bianchi: I object to it unless the final bill submitted by him is here.

By the Master: I will let him answer it.

A. Yes.

Q. To whom did you give it? A. Mr. Ach.

Q. That was after this job was finished? A. Yes.

Q. How much did you ask for extras in that bill—isn't it a fact you asked for $5,927.90 for extras on that bill? A. That is for the subcontract.

Q. Can you fix a date when you gave this bill? A. It was in November, 1927.

Q. At the time you submitted his bill did you submit an additional bill? A. I submitted a full bill. You will have to get the rest of the sheets, this is only one of the sheets.

By Mr. Green: I move that the entire testimony with respect to this bill be stricken out unless the entire bill is produced.

By the Master: I will take up the question and rule on that objection at a subsequent time if it becomes necessary.

By Mr. Platoff: I ask that this bill be marked for identification.

Michael J. Vitille—Recalled, Cross.

By the Master: The bill will be marked Exhibit C-1 for Identification.

By Mr. Platoff:

Q. I show you what purports to be a whole itemized statement dated March 22, 1927, and ask you whether you rendered that? A. Yes.

Q. Is it complete? A. No, because the architect made me change it.

Q. When you rendered this memorandum or bill or whatever it was in November 22, 1927, was it a complete statement of the payments you received and work done on the job? A. At that time, yes.

By Mr. Platoff: I offer that in evidence.

By the Master: The bill consisting of five sheets marked Exhibit C-2 and all objections to the offer will be reserved.

By the Master:

Q. In reference to Exhibit C-1 for Identification, at the time you rendered that bill was the lead pencil notations on the bill? A. No.

By Mr. Platoff:

Q. On Exhibit C-2 the amount given is $5,838.68 for extras, is it not? A. That is for subcontract.

Q. What extra work did you do besides that reflected on this bill? A. On the front sheet you will find it; where is the first page?

Q, Was it a bill you rendered before this bill after the job was done? A. No.

By Mr. Markus: I object because it is immaterial and irrelevant. As work was or-

dered changed it does not make any difference if he told Dr. MacDonnell. We are just here for reasonable work.

By the Master: If for nothing else I will take the evidence to test the credibility of the witness.

Q. Did you ever tell Dr. MacDonnell how much this extra would be? A. No.

Q. Did you ever meet at the office of Mr. Sheridan after the job was finished? A. Yes.

By Mr. Bianchi: I object to this line of questioning because he can do it under cross examination. Nothing has been testified to in direct examination which would open the door to this cross examination.

By the Master: I will allow the question.

Q. You remember meeting at Mr. Sheridan's office? A. Yes.

Q. You remember telling Dr. MacDonnell that this work would be $6,000? A. I didn't tell him such a thing.

Q. You remember Dr. MacDonnell asking you to prepare a bill for the extras? A. No.

Q. You never did? A. No.

Q. When did you get off this job? A. The job was completed in the latter part of October, 1927.

By Mr. Green:

Q. I call your attention to this Exhibit C-2 and refer you specifically to the third page which shows extras due to the sub-contractor $5,838.68. From whom was this figure due and to whom? A. To sub-contractor.

Q. The amount due from you to the sub-contractor? A. Yes.

Q. Was not the full amount for extras due you from Dr. MacDonnell? A. No.

Q. Whose marks are those in red pencil? A. The architect's.

Q. Why did the architect ask you to change the form of that statement? A. Because he said he did not understand the way the bill was made out and he wants regular itemized statement bill.

Q. And you prepared an itemized statement for him? A. I prepared an itemized statement for him.

By the Master: And this is Exhibit D-56?

A. Yes.

By Mr. Bianchi:

Q. How did you come to use a Goranson dumbwaiter instead of a Sedgwick? A. Because I had the figure for this Goranson dumbwaiter and I told Mr. Goranson to go to Mr. Ach and if he approved to accept the Goranson dumbwaiter, I was willing to give him the job.

Q. Did he accept them? A. The man went to him and he accepted.

Q. Did anybody ever tell you don't put them in? A. No.

Q. Was the electrical wiring done to meet specifications of underwriters of New Jersey? A. Yes.

Q. Was a certificate issued for that? A. Yes, I think there was.

Q. And is there a building inspector in the town where the work was done? A. Yes.

Q. Did he inspect the work from time to time? A. Yes.

Michael J. Vitille—Recalled, Cross.

Q. Did Mr. Ach inspect the work from time to time? A. Yes, pretty nearly every other day.

Q. Did you prepare your plan for the elevator pit? A. Yes.

Q. Did Mr. Ach see that before the work was done? A. No.

Q. This is only an itemized bill to show how work was done.

Q. And this shows some of the extra work you are suing for? A. Yes.

Q. More in detail? A. Yes.

I offer that in evidence.

By Mr. Platoff:

Q. You made this drawing yourself? A. I did.

By. Mr. Bianchi:

Q. You have been an engineer for how many years? A. About twenty years.

By Mr. Platoff:

Q. You are licensed engineer? A. No.

Q. When did you make this up? A. Made it up after the job was complete.

Q. Did you make it up since the last time we were here. A. Yes. I have got the sketch home and made it to bring here.

By the Master: This will be marked Exhibit D-67.

By Mr. Bianchi:

Q. Have you ever been served with an itemized

list of work that you should go back to the job and complete which you have refused to complete? A. No.

Q. Were you ever served with a copy of this list of objections or omissions which Mr. Platoff presented in court this morning? A. No, never.

Q. Do you know anything about the radiator in the bathroom? A. I heard there is a dispute about it.

Q. Do you know anything about the plumbing fixtures and piping? A. Yes, according to what he wrote to me.

State of New Jersey, } ss.:
County of Hudson, }

CHARLES SHILOWITZ, a witness, having been duly sworn, on his oath testified as follows:

By Mr. Platoff:

Q. Where do you live? A. Jersey City, 61 Duncan Avenue.

Q. What is your business? A. Architect and engineer.

Q. How long have you been an architect? A. Practically two years and a half.

Q. How long have you been an engineer? A. Since 1923.

Q. And you make it a business of being an architect? A. Yes.

Q. And you have been in this business continously? A. Yes.

Q. Have you constructed or drawn plans and specifications for construction of apartment

houses? A. In Hudson County about 80% of the larger apartment houses.

Q. State some of your work. A. Nathan Meltzer—

By Mr. Bianchi: I will admit his qualifications as a registered architect for the State of New Jersey.

By Mr. Platoff:

Q. Have you examined this building of Dr. MacDonnell's at 24-30th Street, Woodcliff? A. Yes, I have.

Q. At our request? A. Yes.

Q. Have you read the plans and specifications for that job? A. Yes.

Q. Have you made a careful inspection of the job?

Q. As a result of your inspection, will you tell us what you found there by indicating the defects? A. I have noticed discrepancies between the specifications, plans and building.

By Mr. Bianchi: I object to this testimony unless it is shown that he has also read amended specifications and revised specifications used in this job and changes made from time to time.

By the Master: Did you know the provisions of these revised specifications and changes at the time that you make your inspection and did you make your inspection solely in relation to the original plans and specifications?

A. I made the inspection according to the revised plans and specifications on file in the Court House.

Q. You did not have before you revised plumbing specifications or any alleged revised electrical specifications? A. No.

Q. Nor did you have before you any letter from the architect making any proposed changes of anything of that nature? A. No.

By the Master: I think that the witness could be permitted to testify and as he testifies to any particular deviation from the specifications which have not already been covered by the testimony of Mr. Vitille, then opportunity would be afforded to show that those deviations if admitted would be made under consent of the architect and owner.

Q. When did you make the inspection? A. About three months ago; two or three weeks before the first hearing.

This is work that has not been performed in connection with the plans and specifications.

The fireproofing around columns and beams omitted. Specifications call for fireproofing around all beams and columns in building and $1,000 is a reasonable charge for that omission.

In fixing these prices I am fixing the price not on what it would cost to rip down and put the material in but what it would have cost the contractor if he had gone ahead and done the work when he was building the building. In other words by omitting these items there was an actual saving to the contractor of the amounts in my opinion.

Face brick for exterior walls were to have matched the brick of the other building. The present brick is inferior to that brick. That is worth about $200 on the entire job. The mortar joints

on face brick were to be buff. They were replaced with white joints. That is worth $100 because of the work attached laying up the face bricks separate from the common.

The coping was to be cast stone as in the specifications. It was replaced with cement. That is worth $350.

There was supposed to be a chimney fire brick according to the specifications; that is omitted; worth $250. Supposed to be lath in shafts and to be plastered with three coats of plaster. It was omitted. That is worth about $550.

Gypsum block was to be used in the doctor's apartment and that was omitted; worth about $1,500 for floors and ceiling.

Cellar ceiling was to have three coats of plaster and it has only one but has the right amount in the janitor's apartment; that is worth $300.

The stair soffets were to be plastered; that was omitted; worth $200. Plaster cornice in each hall is not similar to that shown on the plans; worth about $400 to run a moulding.

Carpenter and Trim:

Specifications call for cabinet trim glued and dowelled at the mill and to be set up in the building. That has not been done; worth $1,750. Instrument cases omitted in Doctor's apartment which are called for in specifications; worth $400. Specifications call for kitchen dressers and trim; worth $1,000. That has been omitted. Oak flooring is not No. 1 quality white oak; that is worth $500.

By the Master: What kind of floor is there?

A. It is oak floor, but it must be a No. 1 common; that is about 1/3 clear.

By the Master: You heard the testimony of the floor man that it was No. 1 quality clear white oak. Is it or is it not?

A. It is not. That is worth about $500 in the entire building. The milk cabinets have been omitted; that is worth about $50. Platforms for laundry have been omitted; that is worth $50. Doorchecks omitted; that is worth $100.

Tile and Marble:

Marble stringers were to be placed from the first floor to the roof; they were omitted; that is worth $1,500. According to the specifications, the marble stringers were to be placed on both sides of each stairway.

The plans show marble cheeks in the vestibule but they were omitted. That is worth $250. The marble is not 1¼" thick as specified. No amount.

Q. Is there any difference in value?

By Mr. Marcus: I object on the ground that the witness is not qualified to testify on marble nor has he stated his qualifications as to values.

By Mr. Platoff: His qualifications have been admitted:

By Mr. Marcus: But not as a marble expert.

By Mr. Bianchi: Before we go any further on these figures, we ought to see if this man is qualified as to values.

By the Master: I can see the point and as long as he has gone this far and has already testified to the largest items I think that I will permit him to go ahead and testify as he will be severely cross examined, and what weight will be given to any figures he will

state will naturally be governed by his qualifications on any item.

By Mr. Marcus: I admit it is not our duty to show that the man is qualified. Here is a man attempting to testify as to different values. There is no qualifications for this man as to buying and selling values.

By the Master: I am going to permit the witness to continue along with these items and you can have whatever relief you wish either upon argument before me or upon argument before the court that any counsel can desire. And naturally the testimony along this whole line will be taken subject to objections of all counsel.

By Mr. Platoff:

Q. Was there any difference in value between marble installed in building and marble 1¼" thick as specified? A. There is a difference.

Q. Are you prepared to say what that difference of cost in this building is? A. No, I am not.

Plinth block were omitted; amount $50.

Trim in the vestibule entrance does not run to the floor but only to the top of the wainscoting; worth $50.

Specifications call for two towel bars in each bathroom. There is only one; that is worth about $25.

Ornamental Iron:

Balusters in specification call for 1" x 1" bars; those installed are ⅛" x ⅝" stock.

Iron doors in vestibule were omitted; worth about $150.

Kalamein Work:

Dumbwaiter doors were to be sliding doors. At

present they are self-closing on hinges; that is worth $150. Kalamein doors at present from main hall to each apartment are not set properly; locks cannot be operated and to set those 21 kalamein doors would be $300.

Plumbing:

The W. C. is omitted in the Doctor's apartment. The plans call for one; that is $100. The sewerage pipe in the basement is exposed on the basement floor, whereas the plumbing plans show they are supposed to be concealed. That is worth $100.

Plumbing layout calls for refrigerator pans and drain pipe and cellar sink; were omitted; $100.

Electrical Wiring:

According to the specifications all the wiring except for the bells, feeders and main branches are supposed to be in conduits of black iron enamel. They are BX. That is worth $3,000.

Roofing and Sheet Metal Work:

There is a metal duct omitted from one of the inner courts to the outer court; that is worth $150. Roof is not a bonded Barrett roof as called for in the specifications; worth $1,500.

Painting:

There has not been any back painting of trim; $300. Specifications call for radiators to have one coat of prime and two coats of enamel. They have only one coat of aluminum silver; $300. There is no evidence of sandpapering of woodwork in the 80 rooms and the walls, floors and doors are not properly painted; that is worth about $800. Sedgwick dumbwaiter is called for in the plans and has been replaced by a Goranson; that is worth $100.

Q. Did you notice the floors in this apartment house? A. I did.

Q. Would you say the floors were laid in a good workmanlike way? A. I noticed that the floor in the basement is coming up and that the floors above are wavy.

By the Master: Why did you not make up a list to include in the other list

A. That is a question of defective workmanship and not an omission.

Q. Did you notice the plaster in this job? A. The plaster is not of the best workmanship.

Q. Is it good workmanlike work? A. It is not.

Q. Did you notice the brick work? A. I did, the exterior brick.

Q. Would you say it was done in a good workmanlike manner? A. I should say not.

Continuation of Direct Examination of Mr. CHARLES SHILOWITZ.

By Mr. Platoff:

Q. Mr. Shilowitz, when you began your testimoney, I recall, you stated that you would state your opinion of the cost of work which has been omitted on this building if it had been constructed by the general contractor at the proper time, at the erection of the building. Will you please further explain? A. I have read the plans and I have read the specifications and have examined the building and I am here to state that which has been omitted in the construction of the building as that deviated from the plans and specifications. I am not stating that which has been substituted, its value but

that which has been omitted during the first construction of the building as deviating from the plans and specifications and what the cost of putting that omitted part in without any allowance for that substituted.

Q. In relation to the deviations that you have testified to, have you on your examination of the building made any discovery of further omissions? A. I have examined the building yesterday with a building superintendent and Mr. Charles Scheidecker, and we discovered that there are further omissions and some of them are serious omissions, such as that leakage of water coming through the roof.

Q. Will you please state item by item what further discovery you have made in your opinion what the cost would have been to construct that portion at the time the building was erected? A. In the carpentry and trim there have been no grounds put down for base picture panels and wall panels, for the window trim and for door trim. That's worth about ten cents a lineal foot and an average of two hundred feet in a room, that would run to about $1200. The deafening in the bath rooms has been omitted. That's worth about $100. The specifications call for 10″ base which has been substituted by 6″ base. I have not figured what the difference would be.

Q. Could you figure it? A. I have to take the plans and take the total number of feet.

Q. Give us the items, only the kind of items you know the amount on. A. The copper flashing around the parapet roof. That is in roofing and sheet metal work, copper flashing around parapet has been omitted. That's worth $160.

Q. Since your last testimony have you examined

the sample of the roof? A. I have. It was examined by myself and a representative of the Barrett Roofing people and we took a cut of the roof about 3′ long and 8″ wide. I made an examination with the Barrett man.

Q. You qualified to testify if you were there? A. The testimony of the Barrett man would be better than mine.

Q. Is he here? A. He can be here.

Q. Have you examined the bill for extra work submitted by the contractors? A. Just gave it a superficial examination, but have not gone through each detail.

Q. Will you be able to do that in a half hour? A. I will be able to.

By Mr. Greene: We will never get through with this case if it is necessary for all the parties to have a sufficient adjournment to have to hold up the examination. This business of taking a wink and then testifying, and again taking a wink and coming back, will continue this matter from now to eternity.

Cross Examination by Mr. Bianchi:

Q. When were you registered as an architect? A. Two years ago in October.

Q. So, at the time that this building was put up you were not a registered architect? A. I was not.

Q. Then you were not doing any plans for any building that time? A. No.

Q. The jobs you have worked on were all speculative jobs, weren't they? A. Some and some for investment.

Q. Which is an investment job? A. For Mr. Gershannon on the Boulevard, Jersey City.

Q. Did you supervise that job? A. Not full supervision.

Q. Any other investment job? A. Another one is in Bayonne, Boulevard and 33rd Street.

Q. What did you do on that job? A. Supervision on that job.

Q. Full supervision? A. Full supervision.

Q. In your opinion, what is the difference between a speculative job and an investment job? A. An investment job is one in which the owner is building the building for investment purposes so as to put in a certain amount of money which will yield a certain amount of return by holding the work, not by selling the building. Usually a better kind of work than that for speculation.

Q. You have to do the same cut and same work? A. Same cut, but not the same work. All a matter of specification.

Q. As to mechanics, you have to use the same kind of material? A. Not necessarily. A matter of specifications and plans.

Q. Do you mean to tell this Court that an owner states to you "I'm going to build this for the purpose of selling it", or, "I'm going to build this for the purpose of keeping it"? A. He doesn't state it, but you can tell when he goes to the architect he tells the kind of material he wants to use. He usually tells me he wants to build for investment purposes. Some builders say that they want to build it as cheaply as possible.

Q. As to what material is used, is a question of judgment whether one material is better than another, as to in whose opinion, the certain material may be better than another? A. How do you mean that?

Q. One man may claim that a certain brand of cement is better than another brand. One man may claim that one way to lay beams is better than another way. A. It doesn't mean work exactly that way.

Q. As to after all, after the job was completed, as to whether it was speculation or investment job naturally is a matter of opinion only, isn't it? A. There is a difference in the plans and specifications.

By Mr. Greene:

Q. You, of your own knowledge, don't know the prices of various materials at the time this apartment was being erected, do you?

Answer stricken out.

By the Master:

Q. Answer, yes or no. A. Well, I would like to know just what materials you mean. Specify the materials.

By Mr. Greene:

Q. Building materials in general. Do you know what the values of the materials were in 1926 when this building was erected?

By Mr. Platoff: There are all kinds of building materials. He should be questioned on materials to which he has testified.

By the Master: Mr. Greene, limit the question to the building materials he has already testified to.

Q. Do you know of your own knowledge the cost of the building materials that went into this building as of 1926, when this building was erected?

By Mr. Platoff: I object to the question on the same ground. He only testified on certain building materials.

By the Master: Well, on his general qualifications, he is entitled to ask that question.

By Mr. Platoff: I don't think it effects the witness' qualifications. When he testi- as to the roof, he should be questioned only on what he testified.

By the Master: He said 'materials that went into the building'.

By Mr. Greene: He has examined the building and therefore should know what materials went into that building. I simply asked him if he knows of his own knowledge the value of materials that went into this building in 1926 when this building was erected.

A. No, I don't know the value of all the materials that went into the building.

By Mr. Bianchi:

Q. Do you, of your own knowledge, by that I mean of your own knowledge, know the cost of the labor that went into that building in 1926? A. Yes.

Q. What did masons receive in 1926? A. An apprentice or full mason?

Q. Full mason? A. $10 a day.

Q. What did an apprentice get? A. $8 a day.

Q. Carpenter? A. $10 a day.

Q. Apprentice carpenter? A. I don't know.

Q. What did a plasterer get? A. $10 and $12.

Q. Apprentice plasterer? A. Two dollars less.

Q. What did electricians get? A. $10 a day.

Q. Apprentice electricians? A. Juniors were getting $10.

Q. What did roofers get? A. There are all kinds of roofers. There are skilled and unskilled mechanics.

Q. I am talking about a skilled roofer. A. No definite wage.

Q. Or don't you know? A. There is no definite wage.

Q. Is there such a thing as a roofers' union? A. No.

Q. Never heard of a roofers' union? A. No.

Q. Do you know what master plumbers were getting? A. $10 a day.

Q. What did apprentices get? A. Juniors got $9 a day.

Q. What did lathers get? A. $10 a thousand.

Q. What is the source of your knowledge with respect to these prices in 1926? A. Experience on buildings at that time, when I was not practicing.

Q. Are you talking about union prices? A. I am talking of prices received by me on jobs.

Q. Union prices or non-union? A. I don't know.

Q. Do you know whether the labor on this job was labor on union or non-union rates? A. I don't know.

Q. Would that make a difference in the cost of labor? A. It may.

Q. What did steel workers get in 1926? A. They were getting $10 a day.

Q. What is the source of that knowledge? A. As I said before, work on jobs.

Q. Did you ever work on jobs where there were any steel workers at work? A. Yes.

Q. What job? A. Not working, but being familiar with the job.

Q. Do you know of any steel worker that got $10 a day in 1926? A. Not any definite one.

Q. Isn't it a fact that steel workers were getting $14 and $15 a day? A. Not three years ago.

Q. In 1926, at the time this building was being erected? A. No.

Q. You inspected this building for the first time when? A. I think it was about three weeks before.

Q. About three years after this building was completed? A. That's correct.

Q. And you mean to say that by looking at this building or inspecting the work three years after this work was completed, you can tell now whether it was done in a good and workmanlike manner when the building was completed in 1926 or 1927? A. Absolutely.

Q. You can also tell us now whether the painting work done in 1926 and 1927 was done in good workmanlike manner? A. No.

Q. You testified that there were some omissions in the painting? A. That's right.

Q. Is there any painting at all in those parts of the building that you say the painting was originally omitted? A. No.

Q. Not even now? A. No.

Q. Is it possible that there may have been some painting and the painting was removed? A. It is not possible.

Q. Do you know or don't you know, of your own opinion? A. It would have to be scraped or

planed, and it does not show any evidences of scraping or planing.

Q. You deduce this, but of your own knowledge you don't know? A. It is my own knowledge.

Q. That's a deduction. Do you know as a fact or do you merely deduce this because there is no evidence of scraping or planing?

By Mr. Platoff: I object. He has answered that question before very plainly.

Q. Are you concluding that there was no painting done because of your own knowledge or because of your opinion? A. Of my own knowledge.

Q. You went up to look at this property. You went to inspect the roof with a roofer. Why did you need a roofer? Aren't you competent to inspect that roof without the aid of a roofer? A. I am not competent to cut a roof and patch it.

Q. Is that the reason? A. One of the reasons.

Q. I assume that you had a roofer with you because you were not competent yourself to know the value of that roof? A. Yes.

Q. So that was all hearsay; information you received from the roofer? A. That's correct.

Q. You called Mr. Scheidecker on the job, didn't you? A. Yes, that's right.

Q. For what purpose did you call him on the job? A. To go over the entire job and see if there were any further omissions.

Q. Why did you call him on the job? For what purpose? A. To see if there were any further omissions.

Q. Weren't you competent to pass on these omissions? A. Yes.

Q. Why did you need him? A. For obvious reasons.

Q. They may be obvious to you, but are not obvious to me. A. In seeking any further omissions, I took in someone who is more expert than myself on that.

Q. You didn't consider yourself as good an expert as Mr. Scheidecker? A. No.

Q. You testified on your direct examination, Item Number One, A, Fireproofing around columns and beams omitted. A. That's right.

Q. Have you looked at the plans and specifications? A. I have.

Q. What do they call for? A. Fireproofing around columns.

Q. What kind of columns? A. Steel columns.

Q. Round or H? A. Structural.

Q. Round or H? A. Some are H and some are square.

Q. What is called for—the columns to be of? A. Structural steel?

Q. What was used? A. Structural steel was used.

Q. H columns? A. H, that's right.

Q. And they were covered with what, metal lath? A. They were not covered with metal lath. They are exposed.

Q. What is the condition of the columns in the basement? A. They are exposed.

Q. What's up above that; next floor? A. There are columns above it.

Q. Are they covered with metal lath? A. No.

Q. And plastered? A. They are plastered.

Q. Where is the plaster? A. On the lath.

Q. What kind of lath? A. Not fire proofing.

Q. Well, what kind of lathing is it? A. Expanded metal lath.

Q. Isn't that fireproof? A. Specifications call for 2″ of fireproofing around the lath.

Q. Isn't the wire lath covered over with plaster? A. It is not covered according to plans and specifications with plaster.

Q. Doesn't the specification call for concrete on the columns? A. (No answer.)

Q. Specifications call for concrete fireproofing, right? A. That's right. "All columns will be protected with 2″ fireproofing except when columns are encased with brick.

Q. Will you now state as a matter of fact that there is no metal lath around these columns? A. There is metal lath, but not fireproofing.

Q. You know what is on the metal lath? A. Three coats of plaster.

Q. Do you know whether the architect specified that he wanted it done that way? A. Specifications call for all columns to be protected by 2″—

Q. But, you don't know that the architect specified or changed anything? A. I don't know.

By the Master:

Q. Do I understand that your testimony in reference to these omissions is that they are omissions in strict accordance with the specifications as originally drawn, that you have there, and not taking into consideration any changes that may have been authorized by the architect? A. That's right.

By Mr. Bianchi:

Q. What was done on the columns?

By Mr. Platoff: I object. It is immaterial. The specifications are part of the contract and speak for themselves.

By the Master: I will let him answer it.

Q. Isn't it, as a matter of fact, that what was done on these columns is the same as is done on most every job? A. No. Every building cut is different.

Q. This is not a fireproof job? A. No.

Q. It is not classified as such by the building department? A. No.

Q. Would it have cost any more to put cement on there instead of three coats of plaster? A. No.

Q. Would be about the same, wouldn't it? A. Yes.

Q. Probably less labor to put cement on there instead of three coats of plaster? A. You would have to have a plaster finish over that. It would cost more. It would cost less to put cement on, but it would cost more to finish.

Q. Why would you have to put three coats of plaster on? A. In order to finish the job same as the rest of the walls.

Q. If you put a coat of cement on, how do you figure that three coats of plaster would have to go on too? A. Union rules call for three coats of plaster.

Q. So you do know something about Union rules, don't you? A. Yes.

Q. But you didn't know on examination by Mr. Greene as to what union men were getting three years ago? A. Only from experience on jobs.

Q. How do you figure that the owner has suffered a loss of $1,000 or a depreciation of the value of that building because the cement on these columns was omitted? A. I am testifying merely as to what is actually omitted in the building. I don't know whether he suffered a loss.

Q. How do you figure someone is entitled to a loss of $1,000? A. The value of the work if done in accordance with the plans and specifications would cost $1,000.

By the Master:

Q. Does that include the plastering on the concrete? A. No. Just the concrete.

By Mr. Greene: It seems to me that the question of alleged damage is not a proper item to be computed in this case, because the rule is that the complainant is entitled to recover only the difference between the cost of the building contract and what it would reasonably cost to make good any deviations.

By the Master: As I understand it the testimony went almost to the extent of showing that it cost about the same to put it in, but it wasn't followed up to see if he knows what was the actual difference.

By Mr. Bianchi:

Q. How many feet of columns were there? A. There are more than two thousand feet, lineal feet, of column and structural steel.

Q. Do you know exactly how many? A. I have not figured up exactly.

Q. Have you your figures as to how you arrive at $1,000? A. There are approximately 2,000 lineal feet, that's worth 50¢. It is usually figured by the foot.

Q. How many cubic feet did you figure? A. Lineal feet.

Q. How many? A. Approximately 2,000.

Q. How many cubic yards of material would have to be used? A. That all depends on beams and columns and also the method used by the contractor in putting that in.

Q. Tell us how many yards of material did the contractor save by not putting that material on? A. This is figured lineally not in cubic dimensions at all. When fireproofers put it on they use the lineal measure.

Q. You speak of 2,000 lineal feet. How much per lineal foot? A. 50¢.

Q. How do you arrive at the specific price of 50¢? A. By averaging. 45¢ and 58¢ divided by 2 and that gives an average of 50¢.

Q. What is the 45¢ for? A. For columns per lineal foot.

Q. For what? A. Fireproofing.

Q. For what kind of material? A. For putting up forms and putting concrete in the forms.

Q. The columns in the basement, they are exposed aren't they? A. They are.

Q. What would be the girth of measurement on that column of the cement? A. Depends upon the size of the columns.

Q. Have you any figures showing just how much you figure for the first floor, second and third and fourth floors, in this building? A. Lineal feet dimensions, no.

Q. Have you any figures? A. From the plan. I have taken off the quantity.

Q. Have you any memorandum? A. No.

Q. Did you recipher that all out before you put this 2,000 feet down? A. I ran it off.

Q. Where? A. On the plan.

Q. Where did you put it down? A. On scrap paper.

Q. No memorandum book? A. No.

Q. That's very unusual, isn't it? A. No.

Q. You simply arrived at 2,000 feet? A. Could be more. Should be more.

Q. Take "B" under Item One. How did you form that figure? A. The face brick on that job was about $33 a thousand brick, and brick on Tudor Hall in Englewood is $34.

Q. Who told you this brick was to match the brick in Tudor Hall ? A. There is a revised plan.

Q. Did you examine the other? A. Tudor Hall? Yes, several times. Much before I knew about this job.

By the Master: As I understand you to say that there was a revised plan.

Witness: A revised elevation.

Q. Showing a different brick? Where is something to show the comparison of brick with some other job? A. There is a revised plan showing the change in elevation. The architect informed the contractor that the same brick was to be used as that on Tudor Hall.

Q. There is not anything in the specification calling for a comparison of bricks, is there? A. No. The specification calls for claytex factory No. 5 colonial brick.

Q. And that is what is put in the building, isn't it? A. That's in the building.

Q. As called for by specifications? A. There is a revision.

Q. This building is put up with this particular brick? This particular brick is there? A. Some of it is there.

Q. "C" under Item One. Mortar Joints on face brick were to be buff; they were replaced with

white. Charge of $100. How do you arrive at the figure of $100? A. The $100 involved the approximate cost of the pigment and the labor involved in putting up the colored jointing.

Q. As a matter of fact, what they used was white sand and white cement, right? A. Right.

Q. Isn't that a more expensive job than if they had used Portland Cement and lime as specified? A. No.

Q. You mean to say white sand and white cement is not more expensive? A. No.

Q. What was the price of Portland Cement in 1926? A. $3.65.

Q. Price of white cement? A. Approximately $5.35.

Q. Price of white sand in 1926? A. I don't know.

Q. Price of common sand? A. At that time, I don't know.

Q. What is the price of common sand today? A. I don't know.

Q. The price of white sand today? A. I don't know.

Q. Will you testify to the Court now that you don't know that white sand cost more than common sand? A. It does cost more.

Q. Then, when I ask you that if it isn't a fact that white sand and white cement cost more than Portland Cement, you said it did not. A. I thought you meant the substitution for pigment.

Q. Pigment is something you put in there to color it? A. Yes.

Q. So that what he put in there cost more than if he had used ordinary Portland cement? A. He did not use white sand and white cement. He used lime.

Q. Did you see him mix it? A. I took a piece out of there.

Q. That is not white cement? A. No. There is lime in it, and ordinary sand.

Q. Is there any white sand? A. No.

Q. What was used to make it white? A. The lime.

Q. What was used with the lime to make it body? A. Lime, cement and sand.

Q. What kind of sand? A. Cowboy sand.

Q. Was that white sand? A. That's not white sand.

Examination by Charles Shilowitz continued by Mr. Bianchi:

Q. How did you arrive at the figure of $100? A. I took a bricklayer with me and he took off that quantity.

Q. How many thousand bricks did he take off? A. I don't know how many were taken off.

Q. So what you are telling us now is what this bricklayer told you? A. That is correct.

Q. You did not measure the number of bricks yourself? A. No.

Q. So $100 is simply guess work as related to you by the bricklayer? A. That is correct.

Q. If I were to tell you that the price of white cement for February, 1927, was $2 per bag or $8 a barrel, would that make you change your opinion as to what you have testified as to the value of white cement? A. No, where is that taken from.

Q. Did you ever hear of Thomas Henry, Inc., of Palisade Ave., Weehawken? A. No, I haven't.

By Mr. Bianchi: I move that the testimony respecting this $100 be stricken out.

By Mr. Platoff: I say it should not be stricken out. This man was there with a competent man.

By the Master: All questions relating to striking out testimony of this nature will be duly considered on the argument.

Q. The coping was to be cast stone and was replaced with cement. Where did you get the figure of $350? A. The omission of the cast stone coping from the plans.

Q. Will you look over the specifications on page 5 under coping; where does it speak about cast stone? A. On page 6 it says all ashlar, moulded work, copings, curbs, water tables, steps, balustrades, balconies, etc., to be of artificial limestone (cast Portland Cement) of an even color free from all defects and shall have a rubbed finish. Steps will be of bluestone.

Q. Isn't it a fact that when you speak of $350 that you are talking about coping and not stone work. The heading that you speak of now is stone work. A. This stone work is under mason work and brick work.

Q. I will ask you to go back to coping for which item you have charged $350. The specifications read as follows: Coping which was to be cast stone was replaced with cement, $350. Under coping in your specification what was to be used? A. Specifications read under coping; provide for all parapet walls. It also says on page 6 the paragraph that I have just read.

Q. That is heading under stone work, is it not? A. Yes.

Q. Read the specifications under coping. A. Provide for all parapet walls, except on front which will be cast cement or where otherwise shown on plan, salt glazed tile coping, all to be laid in Portland cement mortar and thoroughly bedded in Portland cement mortar.

Q. Under coping, was there any salt glazed tile coping used on the job? A. None on the job.

Q. Then your plans and specifications conflict, don't they? A. Not necessarily. The specifications call for salt glazed tile and the plans show cast stone coping.

Q. So that they conflict? A. No, because the specifications are part of the plans and what is specified in the specifications is omitted in the plans does not necessarily say it is an omission.

Q. Then they do conflict. Under coping doesn't it say where otherwise shown on plan? A. There is no otherwise shown on the plan. That is why he has omitted salt glazed tile in its construction.

Q. Isn't it all cast cement on there now? A. Yes, but not pre-cast cement.

Q. Under coping, it calls for cast cement, doesn't it? A. Yes.

Q. And that was used on this job? A. That was a cast cement used on the job but it was to be cast stone.

Q. Can't you cast stone from the box on the job? A. There is a technical difference; that which is cast before coming on the job is cast stone; that which is cast on the job is cast cement.

Q. Cast cement is made by building forms and pouring the cement? A. Yes, that is right.

Q. And that is done right on the job? A. Cast cement, yes.

Q. And it makes a good tight job? A. No, sir.

Q. If it is done in a good workmanlike manner? A. It may and it may not.

Q. The cement is poured right there? A. That is right.

Q. And there are no joint? A. There is a joint where the cement abuts against the brick. Even if a good job, cement is not a certainty.

Q. Cast stone is brought there in slabs and finished on the wall? A. Pre-cast.

Q. And it has to be anchored there? A. Not necessarily anchored there.

Q. A good job has anchors? A. Not necessarily.

Q. What would hold it there? A. Center of gravity. It is set down at that point.

Q. So where was the error made by the contractor on this particular coping? A. Plans call for cast stone coping and we have cast cement.

Q. And is cast cement more expensive to place on the job than cast stone? A. I should say not.

Q. Doesn't it make a better job, cast cement? A. It does not.

Q. You are speaking from your two years experience? A. Not only from two years experience but about fifteen years experience on buildings.

Q. How old are you? A. 28 years.

Q. And where did you get your experience about coping that makes you now feel that cast cement is not good? A. I was superintendent for a contractor for about three years and have been on jobs otherwise, being familiar with that kind of construction for the last fifteen years.

Q. You were about thirteen years when you started? A. I have been familiar with that kind

of work since I could walk up to the job. It has been in the family.

Q. How do you figure the amount of $350? What units do you use to get the difference between cast stone and cast cement?

By the Master: Does that figure represent a difference between cast stone and cast cement?

A. No. It represents cost of cast stone as called for on the plans.

Without any allowance for cast cement that was put in?

A. That is correct.

Q. Who gave you the figure of $350? A. I did myself.

Q. How many lineal feet did you figure? A. I have not the sheet; I can tell you in a second.

Q. Where are your details? A. I threw them in the waste basket.

Q. Did you expect to testify when you came here? A. I didn't know.

Q. You did not know you were going to be called? A. No.

Q. Why were you told to inspect the building? A. To go and see what is actually on the job and make a list of approximate cost of things.

Q. And you had no knowledge that you were going to court to testify? A. If I had I would have had a regular report with details.

Q. But you gave these figures? You knew they were to be used? A. Yes.

Q. When counsel said you had an itemized statement, counsel was in error? A. He probably did not make out figures. 260 feet approximately.

Q. How much is it worth, the pre-east stone in lineal feet? A. Depends from whom you buy it; about $1.50 up.

Q. At the time this job was being put in what was the price of that sort of stone? A. That varies because specifications do not say whose make shall be used, so if taken at the lowest figure possible—

By the Master: Will you explain to me how you arrived at the figure of 260 feet?

A. The building is 50.9 on one side and 48.10 on the other, approximately 80'81" on one side and 78.6 on the other. By adding up the four dimensions of the building you arrive at the number of feet.

Q. How thick and how wide was the cast stone to be used on this job? A. Specifications do not state how much overlap to be used on the outside and on the inside of the building; usual custom is about one inch of projection on either side.

Q. What size did you figure on? A. I figured six inches according to the scale of elevation.

Q. Six inches thick? A. Yes.

Q. How wide? A. There are two widths to coping, 8" and 12"; that would make one side 10" and the other 14".

Q. Then you figure that $1.50 is an average cost? A. No, I say it is about the cheapest you can get.

Q. I mean the average cost between 10 and 14 inches? A. There would not be any difference in cost; run pretty nearly alike.

Q. If you were to buy cut stone in buildings like this. A. I would buy it by specification. Cast stone is an estimated quantity by the mortar

it takes, etc., so there is no such thing as lineal feet except in coping.

Q. Is that difference in addition to the cubic contents of the stone? A. Yes in the manufacturers' make up.

Q. What value would be the stone coping that was actually put on the job? A. Cement coping, I don't know.

Q. And therefore you are not in a position to give any allowance for it; you don't know whether it cost more or less. A. It cost less.

Q. What makes you give that opinion it cost less? A. From previous experience taking off cast stone and cast cement on jobs that I have done.

Q. Isn't it a fact that cast cement would cost more? A. It would not.

Q. Or an equal amount as the result of making a form? A. It would not.

Q. How do you form the conclusion that this cast cement should not cost as much as cast stone? A. You can get that from any contractor doing a job.

Q. You don't know of your own knowledge the cost of cast cement? A. Well, it would vary with each contract.

Q. You saw this job, what would you say that that cost? A. I don't know.

Q. What next? A. Chimney fire brick omitted.

Q. Where does it call for that item in the specifications? A. On page 6 at the bottom of the page it says: All chimneys shall be constructed with common brick as specified above and shall be thoroughly lined with fire clay lining. Chimneys shown shall be laid up in Portland Cement and lime mortar.

Q. Where does it call for fire brick as specified in this item? A. Fire brick is a form of fire clay.

Q. And tile flue lining is also a form of fire brick? A. Of fire clay.

Q. What is generally used on those jobs? A. Most of the jobs that I have designed have fire clay brick up to the second story.

Q. So that in your opinion these tiles are used on both so that if fire clay lining was used there, there has been no change on specifications? A. Usually my practice has been to call lining flue lining and to specify size and when I use fire clay I usually refer to brick.

Q. That is your opinion as to what you generally do? A. That is what I do.

Q. But there is nothing here to indicate that there is a lining. A. I said the term for lining would be flue lining.

Q. So that you have no basis for forming the conclusion by which you feel that you should charge an item of $250? A. No buildings I have done have fire clay brick lining.

Q. But there is nothing in this particular building specification to show that was to be done. A. You could use either one or the other, according to the specification.

By Mr. Bianchi: I move to strike out that item on the ground that the witness has testified that this contract might be changed on the specifications.

By the Master: Mr. Platoff, what do you say as to that so we can have the motion to strike out the response.

By Mr. Platoff: This is not a proper time to make such a motion.

Q. $250, is that an allowance or a difference between what is there and what you say? A. That is not a difference; that is what cost would have been if omission has been put in.

Q. You allow nothing for flue lining? A. No.

Q. Who gave you this figure of $250? A. That was the bricklayer's figure.

By Mr. Bianchi: I use that as a further ground for striking out that testimony on the ground that it is clear hearsay.

By the Master: Unless there is some other testimony in respect to this item, my present opinion is that it should be stricken out. I am only stating that at this time so that Mr. Platoff can put in any other evidence he might want to at this time.

Q. Lath in shafts and plaster with three coats were omitted? A. Yes.

Q. Where does it call for this in the specifications that shafts should be covered with plaster and lath? A. On page 7, third paragraph down, third line in that paragraph is the word shaft.

Q. It does not say anything about shafts, plural. A. No, but it also says in fact all work throughout.

Q. And what did you charge $250 for? A. The elevator shaft and dumbwaiter shafts.

Q. Doesn't the specifications call for lathing the shafts? A. Yes, that is right.

Q. And would you use wooden lath in the elevator shaft?

By Mr. Platoff: I object on the ground that it is immaterial.

By Mr. Bianchi: He is charging $250 for lathing shaft.

A. I wouldn't lath it at all.

Q. So that when specifications say shaft it would not mean elevator shaft for which you are now charging $350 because of the fact that it is not practical to put wooden laths in an elevator shaft, is that true? A. No, it is not true. Specifications call for lath and plaster on shafts.

By the Master: How would you construe the specifications as to the shaft?

A. Shaft in the specification means any shaft in the building, enclosed in brick, usually of small dimensions running from shaft on first floor to roof.

Q. This is under the heading of lath and plaster. If it is not practical to use lath, wooden lath, if it is not practical and it is not done, the placing of wooden lath in an elevator shaft, under what theory do you now attempt to charge for lath that was omitted? A. On the theory that the specifications call for it.

Q. The specifications call for shaft, doesn't it? A. It says shaft, all work throughout except the stair and hall partitions will be lathed with the best quality spruce lath.

Q. If lath is never used in a elevator shaft, then why should you say that in this particular job you are going to make lath job? A. Not having seen every job, I have not seen any lath.

Q. If elevator shafts were to be covered with lath, it would be a wonderful fire trap also, would it? A. It may be a fire hazard.

Q. And it would be a great method of carrying vermin, rats, etc., wouldn't it? A. I couldn't see how mice or rats would go up and down plaster.

Q. In order to put plaster there you would have to lath it? A. Yes.

Q. And that is where the rats thrive. Don't you as an expert architect know methods that are used to prevent the thriving of rats and other animals? A. We are only interested in structure and fire proofing, but not in preventing vermin.

By Mr. Greene: Did you ever hear of an elevator or dumbwaiter shaft being lined with lath?

A. No.

Q. Did you ever see one in all your experience? A. I have seen them plastered on gypsum block but never on lath.

Q. In this particular job the gypsum block in the elevator shaft is plastered? A. It is a cement plaster.

Q. And gypsum block is fireproof material? A. Not fireproof, fire resistance.

Q. And in a dumbwaiter elevator there is no lath used? A. No, you can plaster right on the gypsum block.

By the Master: Can you point out in the specifications any place where it specifically says that there should be lath in the elevator shaft and lath in the dumbwaiter shafts other than that one paragraph which you are referring to on page 7 of the specifications under the heading Lathing and Plaster?

A. No.

By Mr. Bianchi: I make a motion that item be stricken out for the reason that

there is absolutely nothing shown in the specifications requiring lath in shafts testified to by the witness.

By the Master: That will take the same course.

Q. If we had put lath in that elevator shaft it would have been a violation of the fire code, would it not? It would have been stopped by any building inspector or underwriter. A. I don't know.

Q. Does the building code permit lath in elevator shafts? A. I don't know that section of the code.

Q. You are a certified and registered architect and you tell us that you don't know whether that is in the building code? A. That I am. I don't know. As a matter of fact, I don't think it is in the building code of North Bergen.

Q. Do you know whether this building was accepted by the underwriters? A. Which?

Q. Fire insurance underwriters. A. I don't know.

Q. Gypsum block in floor and ceiling of Doctor's apartment omitted; you have a price of $1,500. How did you arive at the sum of $1,500? A. Taking the area of the Doctor's apartment floor and ceiling and multiplying by 34¢ a square foot.

Q. Do you know how many square feet you found? A. I knew at the time; I haven't the data.

Q. You haven't the figures? A. No.

Q. Did you throw them away? A. Yes, they were on scrap paper.

Q. Would you say that there was 4412 square

feet as the number of feet you used. A. I don't know until I check it off.

Q. Where do the specifications call for that item? A. On page 7, second paragraph under gypsum block.

Q. Where is the omission in the Doctor's office? A. Specifications call for gypsum block in all partitions and floors and ceiling of Doctor's office.

Q. In your figures did you include the office and apartment? A. I took the entire quarters of the Doctor.

Q. Isn't it a fact that there is gypsum block in the partitions? A. I did not inspect all the partitions; I say the omission is in the ceiling and floor.

Q. Then you mean to say that $1,500 is for floor and ceiling? A. That is right.

Q. Will you look at your plans and see how you form your figures of $1,500? A. The area was 3,400 square feet.

Q. The partitions do contain gypsum block? A. I do not know; I did not inspect the partitions.

Q. If they do not contain gypsum block as specifications call for, then why didn't you examine them? You were there for the purpose of making an inspection of the Doctor's apartment? A. The floor and ceiling.

Q. Why didn't you examine the partitions? A. The Doctor was interested primarily in having floor and ceiling sound proof so that no sound would penetrate to the other apartments.

Q. As a result of the examination made of the floors and ceiling, can you tell as whether there was any gypsum block in the walls and partitions? A. I don't know about the partitions. I made an inspection of the floors and ceiling.

Q. Where did you look in the floors? A. We took a corner of the pantry up to the ceiling.

Q. When you were making an inspection of the corner, could you tell whether there was any gypsum block in the partitions or not? A. No.

Q. Will you give us the measurements of the ceiling, the area of the ceiling where you say blocks should have been? A. Approximately it would be 48.11 because there is a certain allowance to be left for furring on the outside wall and allowance for court and another allowance back of chimney.

Q. Can't you tell us accurately? A. About 3,400 square feet.

Q. What for the floor? A. The same as the ceiling.

Q. Would you say it was more than 3,100 square feet? A. I say it is approximately 3,400 square feet.

Q. Would you call 300 away from the last figures approximate? A. Yes, more or less.

Q. How much a foot? A. I used the architect's price of 34¢ a square foot.

Q. How much a block in figuring up feet? A. I took it per square foot.

Q. What about the 34¢ that you charged; how much did you include for blocks. A. I took approximate figure of 34¢ for blocks.

Q. Why would you have to have a contractor give you those? A. The architect does not function as a contractor and the contractor does not function as an architect. A design is for a certain cost and the building is based on certain approximate values so that when the owner goes to the contractor for a $100,000 building, he keeps within that range.

Q. You take the 34¢ as a figure someone else gave you? A. From practice.

Q. From someone else's practice? A. From my own practice.

Q. How then do you make it up? A. Those were the figures always taken by contractors.

Q. You have no knowledge of your own that you can say 34¢ is a fair cost? A. 34¢ is a fair cost; those are the figures given to me by the contractor.

Q. You think that is a fair cost? A. Yes.

Q. From your experience of from the age of ten or twelve years, are you able, as the result of all this, to figure this at 34¢ A. No, because it varies every day and in every locality. They also vary between different material men.

Q. I want you to tell the court so the court can tell whether you are giving fair figures or not how you arrive at the figures. A. They are approximate figures. It is based on the proration of cost of laying and cost of material for the block.

Q. If you are able to divide up the 34¢— A. I am not able to.

Q. You don't know as to the cost of the block, how much labor, over head, etc. A. No. Overhead is approximately 10%, some contractors 15%.

Q. How about the other figures that go into the cost? A. I don't know.

Q. Do you know that block is worth 12¢ a foot? A. It might be; what is the dimension of the block.

Q. In 1927 3″ blocks? A. What length?

Q. Three feet. A. I don't know.

Q. Did you find what had actually been put

into the floor to kill the sound? A. After we cut through we found a dust coming through.

Q. You were there to find out what was under the floors? A. I was there to see if gypsum block was there.

Q. As the result of pulling up that flooring in the corner what did you find there? A. There was another material.

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

Q. Did you examine it? A. No.

Q. From your experience as an architect at the age of 13 years, are you in a position to tell us what it was? A. No.

Q. Would you say it was thermofil? A. No.

Q. Do you know what it is? A. No.

Q. Do you know what there is used for deadening the sound? A. No.

Q. Don't you know that on this particular flooring in the Doctor's apartment that thermofil was put in to kill the sound? A. It seems to me that thermofil is used for heat, from its name; it may be used for deadening.

Q. It is used for killing sound? A. It may be.

Q. Did you find it there? A. There was some material there.

Q. Did you take any out to find out? A. I did not inspect it.

Q. It was filled in between the joints? A. Yes.

Q. And on the top of the plaster board from the basement? A. I did not inspect the basement.

Q. There is a dust in both but I did not know what it was. There was no gypsum block.

Q. Did you find flax linum between the floors? A. I did not inspect that.

Q. When you took up the floor you had to cut through—was there any furring? A. We went

from the cellar up and I did not find any gypsum block.

Q. You think gypsum block is to be there? A. It is to be in floors and ceiling as per specifications.

Q. Where would you place the gypsum block? A. In the floor and ceiling.

Q. How would you fasten it up there? A. If I were building it I would have steel supports, vertical supports upon which I would rest steel horizontal supports or bars spaced so that it will be the exact size of the gypsum block and put gypsum block on top of that.

Q. Then you would build a building absolutely different from what it was built; is that true? A. I would build it differently; every architect has his method of operation in cases of that kind.

By the Master: Are there any of these vertical steel uprights provided for in the plans?

A. There is structural steel provided for but I do not know how Mr. Ach intended it to be used.

By the Master: Is there anything in the plans which shows any provision for holding gypsum blocks in the ceiling?

A. I don't see any.

Q. And if you had the steel there to rest these on, the steel would carry the sound? A. Everything carries sound.

Q. And therefore gypsum block itself is not a sound deadener? A. Gypsum is sound resisting to a certain extent.

Q. But this filler that was used is the only thing to deaden sound? A. I would not say so; there are other ways of providing sound deadening.

Q. There are no provisions in the contract or plans for hanging, placing, or putting any gypsum blocks in the ceiling? A. Plans don't indicate, but specifications call for gypsum block in the celiing.

Q. But there is nothing to indicate how it would be fastened. A. In the plans, no.

By Mr. Greene: In the absence of some practical method of supporting the gypsum block so that they would adhere to the ceiling, the gypsum blocks would fall, wouldn't they?

A. Not necessarily; you could also place gypsum block by method of cleats in place of steel.

Q. Hence there is nothing indicated for holding or supporting the gypsum blocks and the gypsum blocks would fall from the ceiling? A. There is no detail showing the method of suspension or placing.

Q. In the absence of the method of suspending gypsum blocks, they would fall by their own weight if in the ceiling? A. In the absence of detail, the contractor is supposed to use the best of his knowledge to place the blocks. If he can't put them in he is to ask the architect how he intended to put them in.

Q. You can't put them in on a wooden base to make them sound resisting? A. So would any material.

Q. How about flax linum? A. That also carries sound to a certain extent.

Q. As a matter of fact, to put gypsum block in the manner that you contend the specifications call for, it would be absolutely impractical? A. I did not say it would be impractical because the plans do not show the detail of how they should be fastened, one is on joists and one on steel.

Q. How would you fasten them to the joists? A. By preparing the joists in such a way as to take the size of the block and by putting cleats on either side of the joists and you put plast blocks on either side.

Q. Did you ever see anybody hang gypsum blocks in the ceiling the way you have just spoken of? A. No, I have seen it done on steel.

Q. Have you seen it done any other way? A. No.

By Mr. Greene: What is the height of the room in the Doctor's apartment specified in the plans?

A. The tenement house law calls for nine feet clear.

Q. How thick are these blocks? A. It is not specified, but 3 or 3½ or 4.

Q. If you were to suspend gypsum blocks from the ceiling that would reduce the height of the room, wouldn't it? A. No, it wouldn't.

Q. You are now talking about changing the level of the floor structure in order to correspond with your method. A. No, not necessarily. As a matter of fact that will make less. It would be less by using steel construction which would not carry 8″ beams.

Q. If you took this ceiling and if you annexed gypsum blocks 3″ thick, wouldn't that necessarily reduce the height of the room? A. No, not necessarily.

Q. If you put gypsum block between those beams in the manner that has just been spoken of here, that would leave beams exposed and sound would go through wood? A. Sound is not transmitted through any material except through medium of wave.

Q. Doesn't sound go through timber? A. Through anything.

Q. Don't you know this that between the floor there was a flax linum lining? A. There may be.

Q. Did you look to see what was there when you cut into the floor? A. No.

Q. You went to see what you thought would make a good story and what you didn't like, you left out? A. I am merely interpreting the plans and specifications.

Q. Then tell us what you found there. A. There was no gypsum blocks in either floor or ceiling.

Examination of Mr. Shilowitz, continued.

Cross Examination by Mr. Greene:

Q. This floor is held up or sustained by timbers, isn't it? A. Yes.

Q. How far are these timbers placed from each other? A. I don't know. About sixteen inches.

Q. And how long are these gypsum blocks? A. There are all sizes of gypsum blocks.

Q. Where would you put the gypsum block, between the timbers on the floor? A. You could break gypsum block. You can get it to make it to suit.

Q. What would hold it there? A. It cleats on the side of the ceiling.

Q. Are they called for? A. No. I don't know the method of construction that Mr. Ach had in mind for it.

By Mr. Bianchi:

Q. The contention of the contractor is that the specification did not call for gypsum in the ceiling because it is not called for in the plans and specifications, and I call your attention to the last line, "Block to be set in lime and cement mortar and all shaft to be plumb and secure". How could you set the block in lime and cement mortar on the celing and hold it there? A. That gypsum block refers to several things. Refers to—

Q. The word "all" covers every room? A. That's right.

Q. As a result of reading that line, are you now willing to say that there is nothing in the specifications and plans to indicate that gypsum block was actually to be put in that celing? A. The specifications call distinctly for 4″ separating gypsum block.

Q. As a result of reading this last line, and as a result of going over your plans, would you still insist that this gypsum block was to be put in the ceiling? A. Yes.

By the Master: Did I understand you to say that these specifications also apply to some gypsum block that were put in dumbwaiter shafts?

A. Yes.

Q. Did you find out whether or not they were put in? A. They were.

Q. Notwithstanding the fact that it is impossible

to put gypsum block in the ceiling with lime and cement mortar, as called for in specifications, you still insist it was to be put in the ceiling? A. It does not say that the block is to be separated by means of the lime and cement.

Q. It should be stated there in technical architectural language. A. The word "set"? To set in material means to place two solid things together. In this instance here, to fill up the joint with a fluid, the fluid being anything but solid, it necessarily would have to be a gas or a water.

Q. That fluid in this particuar case would be lime and cement mortar. Can you use it that way? A. The specifications do not say that that is the means of support for gypsum block.

Q. Is there anything in this specification which shows how it should be held? A. No. It says that it shall be self supporting gypsum block.

Q. Where would you have put the gypsum block in the floor of the Doctor's office? Where would you put that block? A. It depends on type of construction. There are several ways of construction.

Q. There is nothing to indicate where it would be put? A. Not the method of installation.

Q. I said, where it would be put? A. Yes; floor and ceiling.

Q. Where would you put it? A. What do you mean?

Q. How would you carry out that plan? A. If I were the contractor, and looking at this plan, I would immediately ask the architect for details as to how to support this gypsum block.

Q. And without that you would not know how to do it? A. No. But the specifications call for it.

Q. Would it be possible to put it on the top of the under-floor? A. On top of it and then put the finish floor on top? It is possible but it would not last long. It is the worst kind of job possible.

Q. Why? A. It would break.

Q. In order to obtain the results that are necessary in order to use gypsum block as a sound resisting it is necessary to be continuous, isn't it? A. Yes.

Q. And not leave anything in between, solid, tight, isn't that true? A. Yes.

Q. Now if you were to put that on this floor you would raise your floor? A. That's right.

Q. And you would have a step? A. No.

Q. What would you do? A. Raise the floor joints in the rooms.

Q. There would be a general change of construction? A. No. It is a matter of placing the angle line at higher or lower.

Q. You would change the general construction of that floor? A. Not necessarily.

Q. The answers that you have given now on the ceiling and on the floor, would you still contend that the gypsum block go on the ceiling and floor? A. The specifications call for it.

Q. Is your experience as an architect with respect to the fact that a thing may be impractical, yet you still must follow the instruction? A. In estimating he is supposed, if he sees any discrepancy, something that is not practical to his mind, he is supposed to ask the architect just what he means.

Q. Don't you know that flax linum was used because of the fact that just that occurred between the contractor and the architect? A. I don't know that.

By the Master:

Q. What do you say is the difference in the deadening of sound between flax linum and gypsum block? A. The effectiveness? That's a thing we would have to find out through tests. The big thing is in application.

Q. Did you make any tests? A. No.

Q. Do you know what the difference in cost between flax linum and gypsum block would be? A. No.

By Mr. Bianchi:

Q. I, J and K under Item No. 1. Have you any detailed estimate showing how you arrive at the figures on these three items? A. No.

Q. You have not? A. No.

Q. Where on the plans and specifications are these items required? A. Item 1, I, stair soffets to be plastered—(indicating).

Q. What were these stairs constructed of? A. Constructed of steel.

Q. How wide are the stairs? A. I did not measure them.

Q. You don't know? A. I think they are three foot stairs. That's what the plan calls for—three feet, one inch stairs.

Q. The plaster boards are what size? A. I don't know what size these are.

Q. Well, 16 x 48? A. Maybe.

Q. Isn't that the standard size? A. That's the standard size.

Q. Isn't the stairway three feet wide? A. You mean actually constructed? I don't know. It couldn't be less than three feet. It would be rejected by the Tenement Board.

Q. How would you have constructed plaster board 15 x 32 on this stairway? A. Well, one way is to suspend angles from the bottom of the stringers and passing to the stringer and then apply metal furring or wood furring to which is nailed the plaster board and then plaster on top.

Q. If you used wood furring that would be a violation of the Fire Code?

Q. What? A. No. The code or the tenement board?

Q. Both? A. No provisions.

Q. They would not allow you to use it? A. They may and may not. There is fireproof material under the stairs and on all beams.

Q. Where in the plans and specifications is this method that you just described spoken of? A. I have not seen it. That's practiced though. The contractor should know that. He does not have to read specifications for that.

Q. There is no detail to show that, is there? A. No. Just matter of good practice.

Q. Who has given you the figures which you use in this—? A. Just approximate figures.

Q. From who? A. Myself.

Q. How much material did you figure? A. I just took it by yards.

Q. How many yards? A. I don't know. I have not the specified list.

Q. You haven't anything to show, have you? A. These are just approximate figures.

Q. In examining these stairs did you find that the stringers and the risers on the underside had been finished? A. I would like to know just what you mean.

Q. Did you find a finished job? A. The stringers and risers were painted.

Q. That was a finished job? A. Not according to plans and specifications.

Q. If they were finished off with paint, would it be necessary for soffets to be painted? A. Yes, of course.

Q. And, if they were painted, they would be finished? A. Different kind of finish.

Q. What did you allow for such a finish? A. Nothing.

Q. So, when you put down $200 you just guessed at it? A. Approximately. The value is $2 per square yard.

Q. And, you did not know how many square yards there were there? A. No.

Q. Now, will you look at this shop drawing of the iron work and see if the stairs that are now in the building are not in accordance to this plan? A. I cannot tell. I would have to see if the stairs are the right—. I don't know from this. I would have to check from both.

Q. Can't you tell from looking on this detailed drawing made purposely for that? A. This is not a complete detail. It says nothing about the angles in this here.

Q. What angles are you talking about? A. The shelf angles.

Q. Can't you tell the finish? A. What finish? The paint? There is nothing about the paint.

Q. Does that show any supports for soffets? A. On this drawing? No.

Q. Doesn't show any place for the soffets? A. I would like to have Mr. Ach point it out to me.

Q. Doesn't this shop drawing show the open stair case? A. Well, it is a bit conflicting on the shop drawing. It shows either way, one way or the other. However, here it shows that it is supposed to be a closed stringer.

By Mr. Bianchi: I ask that this shop drawing be marked in evidence.

By the Master: It will be marked Exhibit D-64 in evidence.

By Mr. Platoff: No objection.

By the Master: The following appears on this Exhibit D-64—Main stairs for building, Foscale Iron Works, approved by the architect May 14, 1926. This is written in red pencil, marked David M. Ach.

Q. As an architect, you have designed iron stair cases? A. Yes.

Q. I will show you a plan, cross section of this apartment, and ask you whether this shows an open or box stringer? A. Open stringer.

Q. And it shows the baluster going down to the tread? A. Yes, it does. Goes right down to the bottom. That drawing is more definite than the detailed shop plan, Exhibit D-64, which supersedes the architect's first drawing.

Q. But this is the first plan that was drawn? A. That's only an architectural representation. The shop drawing—

Q. And the shop drawing as approved by the architect shows a closed rail stringer with an ornamental rail? A. Not an ornamental rail. It shows an ornamental baluster.

By the Master: The question and answer refer to Exhibit D-64.

Q. I again call your attention to the original plans of this apartment and ask you whether there is anything shown on these plans to indicate any furring was to go on? A. These stairs as shown on this drawing are not to be—this drawing is not

to be used for construction details. This is an architect's representation.

Q. I call your attention to Exhibit D-53, Sheet 3, and ask you if there is anything on there that shows the method by which furred lath is to be put on there? A. No.

Q. I now show you the drawing which was approved by the architect, Exhibit D-64, and ask you whether that showed any method by which the soffets were to be supported? A. This plan does not show how the soffet is to be supported. Neither does it show the construction of the stair. That's only an assembly drawing.

Q. I now show you the whole plan and ask you if you can show me anywhere in this whole set of plans by which the soffets were to be supported (showing witness Exhibit D-53)?

By Mr. Platoff: We will concede without having Mr. Shilowitz go through the plans that they did not show it without, however, conceding that it would be necessary for them to show it. Our point being that the plans and specifications are to be read together and whatever is employed in one is intended to be covered by the other and the contract.

Q. If it had been omitted as you state, have you any detailed statement by which you show how you arrive at the figure of $200? A. Yes. $1 a square foot for the plaster and the construction necessary for it.

Q. How did you arrive at that? A. $1—

Q. Are there 200 square yards there? A. I don't know exactly. That's approximate.

Q. Then you don't know, do you? A. No.

Q. I call your attention to Item No. 3, a, and ask you how you arrive at $1,500? A. May I look up the specification to see what it calls for?

Q. Yes. A. (Reading from page 11 of the specifications) I find that it provides: That all wainscoating, cheek pieces, stair treads, stringers from entrance to roof be from Pink Tennessee Marble.

Q. According to that specification, would you construe that all the stringers should be covered by Tennessee Pink Marble? A. There is another section here that I am trying to find out in which it calls for both. That's the only one I see right now.

Q. You would say that the stringers from the entrance to the roof were shown on the plans should be Tennessee Pink Marble? A. That's right.

Q. Where are they shown on the plans? A. That's usually shown in the specifications or a detail in the plans.

Q. Have you a detail? A. Specifications show it.

Q. That's only where it occurs. It does not say they should be there. It say "if it occurs."

By Mr. Platoff: I object. The specifications are here.

By the Master: There is a lot in these specifications that the Court cannot read, and they need an expert to read them and explain them.

Q. Isn't it a fact that under the heading of marble that that is a general statement that if there is any marble used and shown on the plans that it shall be of Pink Tennessee Marble? A. It states specifically that the stringers from the roof down shall be of Tennessee Pink Marble.

Q. And, that all wainscoating, cheek pieces, stairtreads, stringers from entrance to roof be of Tennessee Pink Marble? A. Yes.

Q. And, doesn't that mean that where the plans show that any marble was to be used it means that it must be of a particular kind, Pink Tennessee Marble, isn't that so? A. Yes.

Q. In view of the fact that the plans show that this is a steel stringer and not of marble, that then there is nothing here that makes it necessary for this man to put this particular kind of marble? A. Not necessarily. The plans show the construction. The specification usually show the finish. The finish calls for marble.

Q. Where would you put the marble? A. On both sides of the stringer.

Q. This is the plan that was made with the contract. Now where would you put the marble? A. You will notice that there are no dimensions. This is not a plan to be used for construction purposes.

By the Master:

Q. Then, as I understand it, Mr. Shilowitz, your testimony is that at the time that the contract was made, that these plans, Exhibit D-53, and these specifications were not the plans that were to be used for the construction of the building except generally? A. With these specifications?

Q. With the specifications? A. That's right.

Q. And, that it would be necessary to have subsequent plans in order to construct the building? A. If called for, because you can build these stairs from the specifications.

Q. In other words, what you mean is that while

these plans show the position of the stair that in reference to the detail you would have to look in the specifications and they would not be in the detail? A. Yes, that's right.

By Mr. Bianchi:

Q. And, these plans show an open stair case? A. Yes.

Q. Built of steel? A. Yes. It calls for iron stairs.

Q. And not of marble? A. The construction of the stair is steel, but the finish is marble.

Q. Where does it say it should be marble? A. In the specification, under the section on page 11 that I have pointed out.

Q. Isn't that a general characterization that in case marble is called for that it shall be of Pink Tennessee Marble? A. No. It states specifically to use Tennessee Pink Marble on the stringers.

Q. And, it would be much more expensive than using just plain steel? A. Oh, yes.

By the Master:

Q. Did you mean by that, that first there should be steel stringer and then should be marble on both sides of the stringer? A. Yes.

Q. There would be two stringers then? A. Three. One on the outside and two on the inside.

Q. There would be two on the wall side? A. One on the wall side, one is in the masonry wall.

By Mr. Bianchi:

Q. Does the $1,500 include marble on both sides of the stairs or one side? A. Both sides of the stairs.

Q. How much a square foot did you figure? A. I don't remember. This is an approximate figure.

Q. How did you figure it? A. Per lineal foot.

Q. How much? A. I don't remember.

Q. How many lineal feet? A. I don't know.

Q. Do you mean to tell this Court you don't know how much per lineal foot you charged? A. These are approximate figures.

Q. You don't know how much you used per lineal foot? A. I would have to take the whole thing again.

Q. How much is an eight inch marble worth? A. What kind of marble?

Q. Pink Tennessee Marble? A. On the job?

Q. Yes. Polished. A. I don't know, rough.

Q. How did you arrive at the $1,500 cost if you don't know a thing about the marble? A. It is an architect's approximation.

Q. What architect? A. Myself.

Q. Well, you don't know? A. I do know.

Q. Well, tell us the price of marble, or the number of feet? A. I would have to go back to the details.

Q. Just give me your knowledge as an architect as to what Pink Tennessee Marble cost per lineal foot? A. I don't know.

Q. What thickness did you figure? A. I have to look at the specification.

Q. You haven't read the specification about marble? A. Yes.

Q. Well, as a result, can't you tell this Court what thickness you figured? A. I would have to look at it.

Q. What thickness is usually used on stringers? A. There is no such thing as generally or usually used.

Q. What does this (indicating to specification) show? A. I am going to look it up for you.

By the Master:

Q. Did you know what thickness the specification showed at the time you made these figures? A. Yes.

Q. Then there is no doubt but that the specifications do show what thickness the marble was of? A. Yes.

By Mr. Bianchi:

Q. Well, what was the thickness? A. The thickness was to be 1¼ inches.

Q. Is that what you figured on? A. That's right.

Q. How much is that figured at? A. I don't remember.

Q. Where did you get the price from which you made calculations? A. These were approximate calculations.

Q. From what did you form your conclusion? A. From general value of cost.

Q. I call your attention to page 15 of your specification, and doesn't that as a matter of fact, the third paragraph on that page, wherein it says "Exposed stringer to be panelled and molded with approved designed Brown Moldings". Doesn't that answer the question as to how these stringers are to be finished? A. It does not answer the question. The reading is of course as you have mentioned it, but it also calls for marble.

Q. But the steel of which these stringers are made are of a special design, and if you put that special design on that stringer you would not

put any marble on it, would you? A. Not necessarily.

Q. Because marble goes on rough stringers and the stringers in this building are finished stringers, isn't that right? A. Yes, that's right.

Q. A Brown Molding is a special patent molding, isn't it? A. It's a trade name.

Q. It's a finish that's put on steel, isn't it? A. Yes.

Q. Is it a finish? A. It is not the finish.

Q. I mean the molding; is it the finish of the stringers? A. Yes.

Q. I call your attention to Exhibit D-53 and point especially to the design or part of the plan showing stairway and ask you whether that does not call for marble on the floor? A. It calls for marble base.

Q. And, in the building there is now marble base? A. That's right.

Q. I also call your attention where it says iron stair marble treads. A. That's right.

Q. In this building, there is now marble treads, right? A. Yes.

By the Master:

Q. Still looking at that same plan in reference to the stringers everywhere where that plan shows the marble, there is marble now, is there? A. No.

Q. I am talking about the stairs. A. You mean whether it is in there now? No, because it says nothing here about the platforms.

Q. Where it said marble. A. Where it said marble, there is marble.

By Mr. Bianchi:

Q. Under Item 4A, who gave you the figure

of $100? A. I took that myself as an approximate figure.

Q. Where did you get it from? A. Just general knowledge of that.

Q. How many balusters did you figure making up that $100? A. Ten sets of balusters.

Q. Where did you get the figure? A. General knowledge of it.

Q. Just guessing at it? A. From experience what it cost.

Q. Averaging from what? A. Experience.

Q. Every figure you are giving now is just approximate? A. That's right.

Q. Isn't it a fact that the rail was building in accordance with this detail marked Exhibit D-64? A. The balusters, you mean?

Q. Yes? A. Yes. Well I would have to check up this. In design it is 16 x ¾ stock, but in stock of material it is not shown.

Q. Did you have any way of showing that there is a difference in stock? A. Yes. 1 x 1 bar is much more costly than that which was put in there.

Q. What would 1 x 1 bar cost? A. Different shapes cost differently on these things.

Q. How did you arrive at that price? A. Just an approximate figure.

Q. You don't know how you arrived at that figure? A. Approximate figure.

Q. In using the word "approximate" and figuring something to be approximate you mean, just what do you mean? A. Prices that I am getting on my own work, which are similar to this.

Q. Where did you get this price at which you arrived? A. In previous experience.

Q. Did you charge so much a bend; so much

a foot, or how did you charge? A. Different shapes cost different prices. They charge according to the kind of construction.

Q. What did you do, did you get figures from any factory? A. No.

Q. Did you ask anybody who knows anything about iron? A. No.

Q. Did you ask any stair builder to give you any figures? A. No.

Q. Would you say that a box stringer cost more money than a bend stringer? A. Depends on the moldings.

Q. This particular box stringer with this particular molding cost more than the bend? A. An open case, more.

Q. Where do you draw that conclusion from? A. There is much more labor attached to it.

Q. In what way? A. You have to get the moldings and mitre and you have to cut the stringer to get the openness of it, you have to have a heavier stringer because of the depth of the stringer is now less than it would have been if it were a closed stringer.

Q. Item 5, B, in which you say 21 kalamien doors are to be reset. Is that right? A. That's right.

Q. Kalamien doors are wooden doors over which steel has been weltered or nailed? A. It may be steel, brass, et cetera. It is wood with a metal covering.

Q. What's wrong with those doors? A. The bucks are out of plumb and the doors do not fit. There is rippling and some places there is looseness in the hinges.

Q. That is from wear, isn't it? A. No. If it is steel, how can it loosen up from wear?

Q. The bucks are where the hinges are? A. There are seven pieces of steel.

Q. That's where they loosened up? A. The buck doesn't loosen up. It cannot loosen up.

Q. And, doors of that kind have to be put in loose, don't they? A. No doors are supposed to fit loose.

Q. Kalamien doors are not supposed to fit loose? A. Of course not.

Q. There is no way of adjusting them, is there? A. If the job is first started poorly, it is difficult to adjust them.

Q. What was done poorly? A. The setting of the bucks.

Q. The bucks are the ones specified, aren't they? A. I don't know if the catch is the same but there are steel bucks there but they are of no value unless they are set right.

Q. Let's go back to page 1, Item 1, I, how did you arrive at the figure of $400? A. Just approximate value.

Q. Have you any detailed statement showing how you arrived at that figure? A. No.

Q. You have no idea of how many yards of material are in there? A. No.

Q. Did anyone give you that figure? A. No. It is an approximate figure.

Q. No mechanic or mason? A. No.

Q. Going back to J of Item 1 of your list, I show you Exhibit D-62 which purports to be a detail drawing of cornices and so forth in this building, which we allege was made for the architect after he had been shown a sample, and ask you if the building is not complete as the design set forth in that detail drawing? A. This is a detail for the book cases in the doctor's office.

Q. And the ceiling? A. The ceiling where the room is shown but not the hall.

Q. Is it not the way it is now finished? A. The cornices? Yes, it is finished as this is.

Q. And, is not that the manner in which the work is finished throughout the hall? A. That's right. But it should have been as shown on the other plan.

By Mr. Bianchi: I ask that the latter part of his answer be stricken out.

By the Master: It will be stricken out.

By the Master:

Q. Why do you say that the cornice should have been any different than it is shown and set forth on Exhibit D-62? A. This is a detail of the coves in the apartment but not in the hall. I have reference to the hall in that item. It says plaster coves in each hall.

By Mr. Bianchi:

Q. This detail shows how it is finished throughout at the present time, doesn't it? A. In some of the apartments, but not in the hall.

Q. It is similar to the one in the hall and in the apartment? A. That's right.

Q. There is a cornice finish throughout the building, isn't there? A. In certain rooms only. Not in all rooms.

Q. Did you see an ornamental cornice in the living room? A. Yes.

Q. Dining room? A. Yes.

Q. Entrance foyers? A. I do not recall the entrance foyers to the apartment.

Q. You would not say that there was not any? A. I would not say one or the other way until I saw it.

Q. Where in the plans and specifications does it call for the contractor to put an ornamental cornice in these three rooms?

By Mr. Platoff: He is not charging for that, he is charging for cornices in the hall.

By the Master: I think it is right.

By Mr. Bianchi: I show it was done more than in just the hall.

Q. From the second floor up, isn't it a fact that we have cornices in there? A. Yes.

Q. I call your attention to Item 2, A, cabinet trim $1750. I ask you how you arrived at the figures given? A. Just an approximate valuation from experience.

Q. Have you no detailed figures from which you can enlighten the Court as to how you arrive at your figures? A. No. That would take some time as to which item in way of trim.

Q. Did you secure any estimate from anyone? A. No.

Q. Did you ask the mill man? A. Couldn't ask the mill unless you gave them the plans.

Q. Have you ever been in mill work? A. I have taken estimates.

Q. Have you ever done any mill work yourself? A. Manufacture it myself, no.

Q. Make any trim yourself? A. No.

Q. Do you know how many feet of lumber you would have to use? A. No.

Q. Where did you form the conclusion in your mind that it was worth about $1750 to do what

you think should be done there? A. An architect's approximate value.

Q. Where did you get it from? A. Experience.

Q. An architect, in making up an approximate cost of something uses some certain figures as a base, doesn't he? A. No, he does not.

Q. You mean to say that architects go on opinions? A. They certainly do, to certain extent.

Q. Is that what you are doing? A. That's what we do. Approximate valuation of the building.

Q. What you are doing now is not a definite detail? A. No.

Q. Can you give us one single item that you used on arriving at the figure of $1750? A. No single item.

Q. You don't know the number of feet, do you? A. No.

Q. The number of yards? A. I know the approximate number of feet.

Q. Did you make a detailed drawing of it? A. No, I did not.

Q. Now, in a practical sense, isn't it a fact that the only difference between the trim that is in that building and what you allege should have been used in there under the specification is a matter of setting it into the building such as the mitre? A. It is not.

Q. And the putting of it on? A. It is not.

Q. You claim this should have been glued at the mill? A. And finished at the mill.

Q. Instead of getting the lumber and putting it on at the job? A. That's right.

By the Master:

Q. Is that provided in the specification? A. Specification provides for glueing and finishing at the factory.

By Mr. Bianchi:

Q. How many joints have to be set and glued? A. Any number of them.

Q. How many sets of trim? A. I don't know how many sets.

By the Master:

Q. How do you know that these cabinets were not glued and finished at the mill? A. It is evident they were not.

By Mr. Bianchi:

Q. But you gave him no credit for the work that has been done on the job? A. All that I have done in this is putting in originally and not giving any credit.

Q. In other words, if he had had it done at the mill it would cost him $1750? A. Probably more.

Q. What is actually in there and now in use, for which you have given no credit? A. No.

Q. And you don't know what that cost to put in what is in there now? A. No.

Q. I call your attention to B, Item 2, book cases and instrument cases omitted in Doctor's apartment, $400. How did you arrive at $400? A. Same way as I arrived at the other figures.

Q. You know what was put in there? A. Another instrument case there which the Doctor informed me he paid for.

Q. And there are book cases there? A. Yes.

Q. Did you give any credit for what was actually in there? A. No.

By the Master:

Q. In making your inspection of the book cases

and instrument case you spoke to Doctor MacDonnell, did you not? A. Yes, sir.

Q. And did Doctor MacDonnell say that the book cases and instrument cases were put in the way he wanted them or not? A. He said he had furnished them.

Q. Did he say whether that was what he wanted or did not want? A. The specification calls for the contractor to put this in. To furnish and install and all labor necessary for them.

Q. Are these in there different from the specification? A. The specifications do not give a description. I think there is another detail.

Q. You didn't mean that when you made the inspection that the instrument cases were omitted and not put in by the contractor. All you know is that Dr. MacDonnell told you that the cases and instrument cases put in there are by him? A. Yes.

By Mr. Bianchi:

Q. I call your attention to these figures. If these book cases are three feet nine inches by seven feet high, what would they be worth? Containing 26 square feet? A. How do you mean book cases with square feet?

Q. Completed, would you say that $2 a square foot is reasonable? A. That is no way to figure a book case.

Q. How would you figure it? A. Each piece separately.

Q. As an architect, you have been doing everything approximately. You say you figure everything approximately, which is you say, customary. What would be the customary way to figure, per square foot? A. I have not figured it.

Q. You don't say that that is not a fair price? A. I don't say that. I don't know how you could figure square feet.

Q. Partitions are all figured in square feet, aren't they (referring to the law book cases)? A. Partitions, but not this kind of work.

Q. How did you figure it? How did you arrive at the figures $1,000, Item 2, C? A. That was arrived at as an approximate figure from past experience in these matters.

Q. How did you make up $1,000? A. There were so many dressers and the value would be about $1,000.

Q. You know the contractors have allowed him $400 for these dressers? A. I don't.

Q. You say this is unreasonable? A. You mean labor and material?

Q. Yes? A. It is unreasonable.

Q. Why? A. It is worth more than that.

Q. How do you figure? A. From past experience.

Q. Did you get any bids on these dressers? A. No.

Q. Can you tell us any figures that were used by you as to calculations? A. Just approximate. So many apartments and so I figured an approximate value.

Q. You have not any way of arriving at your figures? A. No.

Q. Just guess work? A. Approximation.

Q. Did you make any allowance for the Kitchen-Maid cabinets which were installed by the contractor? A. No.

Q. In arriving at your figure of $1,000 you made no allowance for Kitchen-Maid cabinets? A. No.

Q. Did you make any allowance for the fitting

and trim and placing of trim around the Kitchen-Maid cabinets? A. Which trim?

Q. Molding, etc., after the Kitchen-Maid cabinets are installed there must be trimming. A. Usually put in by Kitchen-Maid people.

Q. Did you make any allowance for that? A. No.

Q. I call your attention now to Item 2, D, in which you state that oak floor in No. 1 quality wood oak was not put in, you charge a difference of $500?

Q. Are you familiar with the grain rules of manufacturing of flooring? A. Yes.

Q. Are you able to distinguish the different characters of wood when you see it? A. To a certain extent.

Q. Are you able to tell the grains of these three samples of flooring that I show you? A. There are various associations for oak. Which association have you reference to? Is it Appalachian?

Q. Which did you have reference to? A. Number One Oak.

Q. And, you testified that this was number one common? A. Generally.

Q. What kind was used? A. It was either No. 3 or No. 4.

Q. What? A. No. 3 or 4 oak.

Q. Quality white oak? A. Yes.

Q. What manufacturing rules did you use when you called it No. 3 or 4? A. Appalachian.

Q. Have you a copy of the rules here? A. No. If there is a catalog here I will show them to you.

Q. Can you tell me by looking at that wood what it is? A. It is probably No. 3.

By the Master: This sample is marked Exhibit D-65 for identification.

Q. Tell us what this is (handing a sample of wood to witness)? A. Same grade.

By the Master: Same is marked Exhibit D-66 for identification.

Q. What is this one (handing another sample to witness)? A. Difference in strength in these two is a difference in grain.

By the Master: This sample is marked Exhibit D-67 for identification. As I understand it, you say there is a difference between D-66 and D-67 and that D-67, which was the last one, you say it is probably stronger.

Q. And, they are all No. 3? A. I would not say that the last is Number 3.

Q. What would you call the last one? A. That may be number 2.

Q. Then when you said that these two first pieces were number 3 or 4, that is the quality of the lumber that in your opinion is now in the building? A. Yes.

Q. And, how did you arrive at the figures of $500? A. Approximation.

Q. Did you get any figures from any floor layer? A. No.

Q. What is this, this $500 difference? A. Cost of putting in the floors, labor, material and workmanship.

Q. And no allowance for what is in there now? A. No.

Q. And, you have nothing to give in line of a detailed statement on it? A. No.

Q. Can you tell by looking at this the finish of

it without looking at the back of it, and how that compares with the lumber which is called for in the specifications (handing witness a sample of wood)? A. Well, I cannot tell as to the grain but as to specifications this would be, just off-hand, a No. 1 white oak.

By the Master: The one last shown the witness is marked Exhibit D-68 for identification. This is A Select White.

Q. In your opinion, Exhibits D-68 and D-66 represent what should have been used and what you claim was actually used? A. This should have been the one used, D-68.

Q. And, you allege D-66 was used? A. Something of that sort.

Q. You are certain that D-68 is not used? A. Positive of that.

Q. And if you are told that that piece is actually a piece of lumber used on there, would you say that the person saying that was wrong? A. No.

Q. How much flooring did you inspect? A. Two apartments.

Q. What two apartments? A. One vacant one, 2B I think it is, and I also inspected the janitor's apartment and one on the fourth floor.

Q. You did not go through the whole building? A. No.

Q. In drawing your conclusions as to whether this was No. 3 or No. 1 you are not drawing your conclusions from what you found in the janitor's apartment, are you? A. No. I am using these apartments that I inspected.

Q. Not solely on what you found in the janitor's apartment? A. No.

Q. And the janitor got just as good a flooring as the other fellow? A. Just as bad as the other fellow.

Q. How many square feet of flooring was put in that building, do you know? A. I don't know.

Q. You did not use these figures in arriving at this figure, did you, or any figure? A. No.

Q. Did you figure so much a room, so much a square foot, or how did you figure? A. So much an apartment.

Q. Flooring, as a matter of fact, is sold by square foot is it not? A. Yes.

Q. The floor layer will say 15¢ or 25¢ a square foot? A. In speculative work they give you a lump sum.

Q. Did he use square feet as a basis? A. Yes.

Q. And you did not do that? A. Just approximated.

Q. You did not cut a hole in any floor and get a figure from him or figure of $500 on a per square foot basis, did you? A. No.

Q. I call your attention to B under Item 3 and ask you how you arrive at the figure of $350 on that, for what you claim as omissions of cheek pieces? A. I just had a similar experience on one of my own jobs and that is the approximate value.

Q. Use any particular figures on that? A. No.

Q. Get any estimates? A. No.

Q. No estimates from anyone? A. No.

Q. Did you measure it up? A. No. Just approximately by eye.

Q. How long did it take you to make up these figures; twenty minutes or just the time it took to run them off the typewriter? A. Two days.

Q. And you spent two days in making up these

figures. How is it that you were able to do it without measuring it all off? A. I took the whole thing approximately.

Q. How many hours in a day? A. Architects? 24 hours a day.

Q. How many hours in this day? A. I don't know. I did other work in between time.

Q. Did you use that day for inspection of the building or just making up figures? A. The inspection took two days and making up of figures two days. That is, not solid days.

Q. If you spent all this time on this building, why is it you have not any detailed statement of your figures? A. It would take more than one man to get an itemized detailed report, it would take the various tradesmen and they would have to spend a week on it.

Q. You gave figures here? A. As a registered architect.

Q. Not as an expert? A. As an architect.

Q. In my opinion, you are supposed to be testifying as one who has had experience in the buying, selling and doing of work and designing and construction of work for which you have given figures. A. That's right.

Q. You have no figures of any kind? A. No.

Q. None in your office? A. No.

Q. I call your attention to the first floor drawing, part of Exhibit D-53, and ask you whether (pointing to cheek pieces) that is which you alleged is omitted? A. That which you point out are the cheek pieces which I have reference to.

Q. By reason of the omission of these cheek pieces, it was necessary to cover the space that they left with marble wainscoating? A. I don't know what you mean by necessary.

Q. By leaving out the cheek pieces spaces were left there, weren't there? A. On the wall there is wainscoating.

Q. Marble wainscoating? A. Thats right.

Q. And, the stair treads were made longer to take the place of the cheek pieces? A. I don't know, I did not measure the exact dimension as to what is actually there. The stairs run to the wall.

Q. And the risers run to the wall? A. Yes.

Q. And there are marble stringers along side of that? A. (No answer.)

Q. In giving your figures here did you take into consideration the fact that the vestibule was changed in design and made four feet longer? A. I did not take that into consideration.

By the Master:

Q. Do you know whether that is a fact or not? A. No.

Q. Can you tell by looking at the plan? A. I cannot tell.

By Mr. Bianchi:

Q. I call your attention, and ask you if you did not see the two doors in there and the partition in the vestibule? A. There are two doors at the point you say.

Q. The two doors in the vestibule? A. This opening here (indicating on plan) has been shifted to this point.

Q. And this made the change of four feet longer? A. I don't know. It may be that on the plan, but what is it on the job?

Q. The vestibule has a growing ceiling or archway? A. Growing ceiling.

Q. Which is not called for by the plans? A. There isn't a detail of the ceiling on this plan.

Q. By making the vestibule longer it would be necessary to make that growing ceiling longer, right? A. Yes.

Q. It cost more money? A. To make more growing, yes.

Q. And, the marble base and finish had to be longer in the vestibule? A. Not necessarily.

Q. It is not the same marble in there? A. No.

Q. What is in the vestibule that is different? A.—

Q. The side walls of the vestibule are plastered with imitation travertine? A. Finish? Yes.

Q. That's the way it is installed now, isn't it? A. Yes.

Q. And if that vestibule was made four feet longer it cost that much to travertine this four feet? A. It cost a certain amount of money to do away with one side the wall.

Q. Travertine is more expensive though, isn't it? A. Not much more; very little.

Q. Sand wall is a rough finish, is it not? A. No.

Q. Travertine is imitation marble? A. No.

Q. Isn't it an imitation of an Italian marble? A. No, no longer. They have gone so far from it.

Q. Is it a trade name? A. General name for that kind of finish.

Q. Sand is a rough finish? A. There are all kinds.

Q. In making your charge for the omission did you give the contractor credit or allowance for all these changes? A. No.

Q. You did not? A. No.

Q. You did not take that into consideration at all? A. No.

Q. Is that true? A. That's true.

State of New Jersey, }
County of Hudson, } ss.:

DAVID M. ACH, witness produced on behalf of the complainant, being duly sworn according to law, on his oath deposes and testifies:

Direct Examination by Mr. Platoff:

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

Q. Are you a registered architect of the State of New York? A. Yes, sir.

Q. How long are you a registered architect? A. Thirty years.

Q. You have drawn plans and supervised the construction of many buildings, have you not? A. I have.

Q. Your office is in New York City? A. Yes.

Q. And where is your residence? A. South Orange, New Jersey.

Q. You are the architect involved in this job of Dr. MacDonnell's in Woodcliff, New Jersey? A. Yes.

Q. You drew the plans and specifications for that job? A. I did.

Q. After you prepared the plans and specifications, did you endeavor to procure estimates? A. I did.

Q. Did you receive an estimate or bid from Vitille, Kinsella & Cunhy? A. I did.

Q. I show you the plans and specifications marked Exhibits D-52 and D-53, and the contract, Exhibit D-51, and I ask you whether the contractor had a copy of these plans and specifications at the time they submitted their estimate for this work? A. They did.

Q. As a result of their having these plans and specifications in their possession, the contract Exhibit D-51 was made by them? A. Yes.

Q. The contract price was $98,000? A. Yes, $98,000.

Q. The contract calls for completion by April 15th, 1927, right? A. Right.

Q. After they got this contract, they then proceeded to do this work? A. Yes, sir.

Q. You supervised the construction of this building? A. I did.

Q. Did you issue certificates from time to time? A. Yes, sir.

Q. What percentage of the work done was called for before you gave certificates for it? A. About 85%.

Q. You never issued a final certificate on this work, did you? A. No.

Q. Why not? A. The work was not completed according to plans and specifications.

Q. I show you a list and ask you whether or not that is a list of the work not completed according to plans and specifications? A. Yes, sir.

By Mr. Platoff: (Witness testifying from memorandum produced by prior witness, Mr. Shilowitz.) Which memorandum I ask be marked for identification.

By the Master: The memorandum will be marked C-3 for Identification.

By Mr. Bianchi: I object to its being used because it is only a memorandum for them to go by and not any record of this case by which they can make a part of the items of legal evidence here. In other words, it is not anything that has been

served or used at any time but simply a memorandum made for the purpose of using it to testify from. This is simply a personal memorandum that the prior witness used for the purpose of refreshing his memory and that is all it is good for.

By the Master: As I understand it, they are only asking for some paper to be marked for identification. It seems to me that the paper could be marked for identification and then if you desired question the witness as to whether the matter set forth on that memorandum were omitted. You can insist on Mr. Ach testifying personally as to each respective item refreshing his recollection by this memorandum.

By Mr. Bianchi: I am willing to let him use it to refresh his memory, but not for any other purpose. This man says "I made this up." He did not make it up. The man who testified before made it up. I do not want that to go into the record and become something binding.

By the Master: I get exactly the idea that Mr. Bianchi states and I am going to say that along that line I am going to protect him to the fullest extent. This memorandum up to date has no evidential value at all. The only real evidence of Mr. Shilowitz's testifying to it is what his testimony actually says.

By Mr. Platoff:

Q. Have you ever seen this statement or the original of this statement Exhibit C-3? A. Yes.

Q. Did you talk to Mr. Shilowitz about this building, etc.? A. Yes.

By the Master:

Q. Did you examine the building with Mr. Shilowitz in picking our these omissions? A. No.

Q. Did you give any of the items of omissions that are on the statement that you knew of your own knowledge to Mr. Shilowitz? A. Yes, sir.

Q. Did you give them, all of them, to him? A. No.

Q. Where did you get the information that you did give to him? A. From my personal knowledge of the condition of the work.

Q. Do you state from your memory? A. Yes, sir.

By the Master: I think, Mr. Platoff, that the witness should first be questioned as to his personal knowledge as to omissions before resorting to the paper.

By Mr. Platoff:

Q. From your personal knowledge and your information and your records, Mr. Ach, what work was there omitted or not performed according to plans and specifications and contract? A. Omission of fireproofing of steel beams and girders of floors (page 3 of specifications).

By the Master: It will be noted that Mr. Ach is referring to the specifications that were marked in evidence and the page numbers may conflict slightly from the page numbers of the specifications of Mr. Shilo-

witz, who read from the photostatic copy of the specifications on file.

(Witness continues answer): Omission of fire brick lining in flue.

By Mr. Platoff: I think I can qualify Mr. Ach so he can testify from the memorandum.

Q. I ask your attention to Exhibit C-3 for identification. Have you seen this or a copy of this before? A. Yes, sir.

Q. Have you examined this building? A. Yes, sir.

Q. Have you read over all the items on that memorandum? A. Yes.

Q. Have you compared that with the building and with your knowledge of the building so you could say whether or not these items are omitted or not? A. I can.

By Mr. Bianchi: He testifies from something made up by somebody else as a memorandum to refresh his memory. The differences in the case is that the work was omitted; that it was not properly done. Why should he testify from some one else's memorandum? The man who made that memorandum testified Mr. Ach was not even there.

By Mr. Platoff: He knows from his own knowledge that the items set forth on that memorandum are those omitted. Why should he not be permitted to use it? He is qualified to use it.

By the Master: There is no doubt in my

mind that after even Mr. Ach testified from his personal recollection about a lot of omissions and left out certain omissions that are on that list that it could not possibly be expected that Mr. Ach could remember for a period of two years every omission and if Mr. Ach swears under oath that he has taken that particular list and checked it up with the building that he would be able to testify that these were omissions and that he could testify that the omissions on that list went in. We have to end this thing some time. Particularly, for that fact that I understand the building has been examined and there will be given testimony in respect to particular items which evidence will determine very clearly, I think, as to whether or not any items are omitted or not and the real question that will come in for decision will be whether there is variation of opinion and not whether something is in there or something is not in there, as I do not believe so far as these facts are concerned there can be much question but whether or not there is some reason whether they are there or not there. I am going to let him testify and I will allow Judge Bianchi the exception.

By Mr. Bianchi: I think we ought to be allowed to state on record that Mr. Ach has been allowed about seventeen minutes to find various items from his records.

By the Master: I am perfectly willing to put on the record that when Mr. Ach was asked to testify from his personal recollec- that he apparently did not have any concrete

list of his own made up and that the statement made by Judge Bianchi is an actual statement of the fact. However, as stated before, I don't believe that Mr. Ach could, except in a general way without the use of memorandum, testify to the omissions in any detail as I assume he has other business in the last two years. I think that will protect Judge Bianchi and I think that Judge Bianchi's cross examination will probably be as long as it was with Mr. Shilowitz and will bring out just where and what are omitted and what is not omitted. However, I do not think that Mr. Ach is entitled in any way to use any of the figures that are on that memorandum as to what the cost or what not of each item is.

By Mr. Marcus: In behalf of my clients I want to join in the objection by Judge Bianchi and pray for exception.

By Mr. Platoff: After getting the specification in order, Mr. Ach began to testify and gave the first two items.

By the Master: I think that enough has been said to protect everybody and I am going to let him testify if he will testify that he has checked that list up with the building and testify that these things are omitted, from his own knowledge.

By Mr. Platoff:

Q. Do you know from your own knowledge, Mr. Ach, whether or not these items on Exhibit C-3 are omitted from the building? A. I do.

Q. Please, using the list if you wish, state to the Court what work was omitted without any reference to price or value.

By the Master: Do I understand that his answer is going to be that all these items were omitted?

By Mr. Platoff: I am going to have him read them item for item.

By the Master: I will not let him to read it item for item. If he is going to do that, he will have to testify from his personal recollection. Exhibit C-3 will be returned with the report and reference be made to all of those items.

By Mr. Platoff:

Q. Mr. Ach, do I understand you to say that all the items set forth in Exhibit C-3 were omitted? A. Yes, sir.

By Mr. Bianchi: I think that we are getting into something that is very unfair; the purpose of which was allowed to be used by the witness, Shilowitz, for the purpose of refreshing his memory. He made up that list. Another witness is going to use it for the same purpose. I don't think it should be made a part of this record at all.

By the Master: I might state that I understand and I am quite sure the Court will understand that the only use that that list has is that, in connection with the testimony of Mr. Ach that he took that list, checked the list up with the building and that he can swear that the items on that list were omitted in accordance with the plans and specifications, in his opinion. That is the fullest extent that that list can go to and has no evidential value whatever.

David M. Ach—Direct Examination.

By Mr. Platoff:

Q. When did you make your examination Mr. Ach with this list? A. About four weeks ago.

Q. You conferred with Mr. Shilowitz about this building, have you not? A. Yes, sir.

By the Master:

Q. In your opinion, was this building substantially completed by the contractors? A. I would say it was. Tenants occupied it. That's substantial completion.

Q. You said that you refused to grant the final certificate? A. Yes, sir.

Q. Have you granted certificates up to the final certificate? A. Yes, sir.

Q. In your own judgment, that amounted to about 85% of the work? A. Probably a little less.

Q. Was there any provision for a retained percentage? A. Yes, sir, 15%.

Q. When you say 85% you mean not taking off 15%, but 85% of the work you certified, irrespective of the 15%? That just happens to be the difference between 85% and 100%. A. Yes, sir.

Q. There is no doubt that there were several changes with your order and the order of Dr. MacDonnell in respect to these plans and specifications? A. Yes, there were changes made.

Q. Did these changes cover certain omissions as well as certain changes in material and so forth? A. Yes. Among the omissions were the omission of the kitchen dressers throughout the house and the substitution of another factory dresser, and there were other changes made.

Dentist apartment was put in and the apartment in the first floor in the southeast corner was changed—the arrangement of the rooms. The basement, janitor's apartment, was changed, and the laundry was omitted, and a few other changes were made.

Q. How about the plumbing in the bathroom? A. Yes, the location of the plumbing was changed.

By Mr. Platoff:

Q. Mr. Ach, what changes were made by you in these specifications? A. A change made in the plumbing specification prior to the signing of the contract. Mr. Cadel submitted an alternate specification which was finally embodied into the contract.

By the Master:

Q. Was the plumbing work that was done by Mr. Cadel, was that performed in accordance with those alternate specifications that were submitted or put into the contract? A. Yes, sir.

By Mr. Platoff:

Q. Did you submit those proposed changes in specification or alternate specification to Dr. MacDonnell? A. I think that was a portion of the contract.

Q. The alternate specification actually became a part of the contract? A. Yes, before signing.

Q. What was the next change made in the plans and specifications? A. The electrical specification was changed after the contract was signed.

Q. Was that changed specification submitted to Dr. MacDonnell? A. No, it was not.

By the Master:

Q. Why not? A. The intent of that specification was to simplify the telephone system and to substitute the make of a letter box to another make which in my opinion was as good a letter box.

By Mr. Platoff:

Q. What was the next change, Mr. Ach? A. There were no other changes made then in specifications, and the next change in the plan was as I recall, the changing of the arrangement of the rooms in the basement, that was the janitor's apartment, and the laundry.

Q. Was there a substitution of any kind? Was there any kind of specification prepared? A. There was a new plan made showing the location of the rooms and a rearrangement of the basement.

Q. Was that submitted to Dr. MacDonnell? A. Yes.

Q. Before the work was given out or after? A. Before.

Q. Was a written order given for that work? A. I don't think so.

By the Master:

Q. Was the work done in that manner? A. Yes, sir.

By Mr. Platoff:

Q. Is there a charge for extra work for that work in the basement apartment to which you just testified? A. Yes, there was an extra charge.

By the Master:

Q. Is the extra charge included in the statement of Mr. Vitille the contractor? A. Yes, sir.

By Mr. Platoff:

Q. Was there any written order for this extra work? A. No.

Q. What is the next change in the specifications? A. There was a change made in the first floor, southeast apartment, rearrangement.

Q. Was that change submitted to the doctor before the change was made? A. Yes.

Q. Is that the subject of a charge for any extra work? A. Yes.

Q. Was that change authorized or ordered in writing? A. I am not sure.

By the Master:

Q. Mr. Ach, as I understand it, some changes were ordered by writing and some verbally by you, right? A. I believe that is correct.

By Mr. Platoff:

Q. What is the next change? A. Change in the ward of the doctor's office. Changes in the toilet room between the two examination rooms.

Q. Going back to the change in the ward room. Was that change submitted to the doctor before it was made? A. Yes.

Q. Is that the subject of any written order? A. I don't think so.

Q. Is it the subject of any charge for extra work? A. I don't think so. I don't think it was the subject of any extra charge.

Q. The next change in the toilet in the doctor's office. A. Yes.

Q. Was this change submitted to the doctor? A. Yes.

Q. The toilet was omitted? A. Yes.

Q. Was that work authorized in writing? A. I think it was.

Q. Was any allowance made for it? A. I don't think so.

Q. What is your next change? A. The rearrangement of the closets in the doctor's apartment before any partitions were erected.

Q. Was that change submitted to the doctor before it was ordered? A. Yes.

Q. Order in writing or any understanding in writing? A. No.

Q. What was the next change? A. Windows in the light court were changed from wooden to kalamien.

Q. Was that submitted to the Doctor before the change was ordered? A. I believe it was.

Q. Was there any written memorandum for that change? A. I don't think so.

Q. Any charge for extra work for it? A. Yes.

Q. What was the next change? A. The vestibule doors were moved back to the line of the north base of the elevator shaft.

Q. Was there a modification submitted? A. I don't think so.

Q. Was the order in writing? A. No.

Q. Any charge made for extra work in connection with that? A. I don't think so.

Q. Next change? A. On the second floor in the southwest apartment the apartment was changed to a dentist's office.

Q. Was that change submitted to the Doctor

before it was ordered? A. I don't think so. I think he was away at the time.

Q. Was the order in writing given? A. By phone.

Q. Charge for extra work for that? A. Yes.

By the Master:

Q. Mr. Ach, you would not make a change, a very material change, changing an apartment from an ordinary apartment to a dentist's apartment without the knowledge or order of the owner, would you? A. No, sir.

Q. Did you have such an order? A. Yes, I considered I had. Prior to the Doctor's departure he told me to get in touch with Dr. Fisher, the dentist, and arrange the apartment to suit the dentist's convenience.

Q. You mean Dr. MacDonnell expressly authorized you to change the apartment to suit the dentist's convenience? A. This was an express order.

Q. Then you mean that the change was not submitted; that after seeing the dentist, you did not actually submit the plan to the owner, is that right? A. No. When the owner returned the work was completed.

Q. So far as these other changes were concerned did you mean they were not submitted to the owner, that the actual plans were not submitted to the owner, or did you mean that the owner had no knowledge that the changes were going on, or going to be made? For instance, did the owner have any knowledge that the windows in the court were going to be changed or did you go ahead and had that done on your own? A. I am not sure of that.

Q. How about those vestibule doors? A. He knew about that. He did not know about the electrical work.

Q. Is that about the only work that he did not know about? A. I should say one or two other items.

By Mr. Platoff:

Q. What is the next change after the dentist apartment? A. There were doors put in all the openings between the living room and dining room on all floors.

Q. Did the doctor have knowledge of that before it was done? A. Yes.

Q. Was there a written order given for that work? A. I think there was.

Q. By whom? A. I think an order by Doctor MacDonnell to Mr. Vitille.

Q. In writing? A. I think it was in writing.

Q. What is the next change? A. The kitchen dressers were omitted and built-in dressers were substituted.

Q. That was with the doctor's knowledge prior to the order being given? A. Yes.

Q. Did you give that order or the Doctor give that order? A. I think the Doctor gave that order.

Q. You don't know whether he gave it in writing or not? A. No.

Q. What is the next change? A. There was an order given for deafening the partitions between the front and rear apartments.

Q. You gave that order? A. No. The doctor.

Q. You don't know whether the Doctor gave it in writing or not? A. No, I do not.

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Q. What was the next change? A. Flax linum was laid on all floors.

Q. That was additional work or a change? A. Additional work.

Q. Who ordered that? A. The doctor.

Q. You do not know whether he ordered it in writing or not? A. I am not sure.

Q. What was next? A. There was a change in the roof covering.

Q. What was that change? A. The Barrett Specification for the roof called for one thing and regular tar felt roof was laid instead.

Q. Did the doctor know of that change before it was made? A. He did not.

Q. You ordered that work, did you not? A. I did not.

By the Master:

Q. As I understand it, Mr. Ach, I understand you are supposed to be testifying to work changed upon your order or the doctor's order.

By Mr. Platoff:

Q. There was no order for this work? A. That's the only one that was done without my knowledge.

Q. This change was made without your instructions? A. And against my instructions.

By the Master:

Q. What do you mean by that, Mr. Ach? A. When Mr. Diffenbach, the roofer, came to see me about this contract in the office on the job, I asked him whether he was a licensed Barrett

Specification Roofer and he said he was not and I said then he better not take the contract because we were going to insist upon the roof being laid on the Barrett Bonded Specification and he said that would be alright. He would be licensed by that time and would be able to produce the bond.

By Mr. Platoff:

Q. The bond has never been produced? A. No, and the roof has been leaking for over a year.

Q. What other changes were made with your order or permission? A. We found rock in the excavation and had to blast it out.

Q. That was not specified? A. Not specified.

Q. Did the doctor have knowledge of that blasting required before you order the contractor to do it? A. Yes.

Q. Was there an agreement in writing for the price? A. I think a memorandum on a slip of paper was given or maybe it was a telephone call.

Q. That's the $1,212? A. Yes.

Q. That was included by you in the first certificate? A. Right.

Q. What else? A. There was another item of rock that had to be removed. When the contractor did not excavate deep enough, it had to be blasted out again.

Q. Was that with the doctor's knowledge? A. Yes.

Q. Was the charge made for extra work for that? A. Yes.

Q. Was there a written order given by you or Dr. MacDonnell? A. No.

By the Master:

Q. How much was the charge? A. $377.

Q. Was that included in any certificate paid? A. Not yet.

By Mr. Platoff:

Q. Was that the price agreed upon? A. Same basis as the original.

Q. What was next? A. The walls were furred out for the frigidaire pipes.

Q. That was with the Doctor's knowledge? A. Yes; and the frigidaires were erected when half of the building was practically erected.

Q. You know whether or not there was a written order given for that work? A. I am not sure.

Q. Do you know whether or not there was a price agreed for that work? A. No agreed price. Then there were partitions put in the therapeutic room—small booths like little retiring rooms, of Alpine lumber.

Q. The doctor knew when the order was given? A. Yes.

Q. Next change? A. There was a small linen closet built in the Doctor's apartment.

Q. The Doctor ordered that too? A. Yes.

Q. What's next? A. Panel moldings were put on the wall in all apartments.

Q. Did the doctor know about that before it was done? A. I think he ordered that himself.

Q. What's next? A. I think that's all except the electrical work.

Q. I ask you whether any of the changes authorized by you or Dr. MacDonnell eliminated any of the items which you say were omitted on Exhibit C-3? A. The changes did not contemplate the omissions or any of the omissions that are on Exhibit C-3.

Q. Mr. Ach, you testified in response to the Master's questions a little while ago, you thought this building was substantially completed. In your opinion what percentage of the building is completed? A. About 80% or 85%.

By the Master:

Q. Mr. Ach, can you tell from your records what was the date of the last certificate that you issued? A. The 8th payment was the last certificate and it was issued under date of August 20, 1927.

Q. Have you that certificate? A. Yes, sir.

Q. After the issuance of that certificate, was any work at all done by the contractors on this apartment? A. Yes.

Q. How much about? A. That was practically the end of the job. There was some painting done; flooring work; I think most of it was painting and the finishing up.

Q. The building was completed when did you say, when it was occupied? A. I think they started to occupy it around the first of September and October, 1927.

By Mr. Platoff:

Q. Did you know Dr. MacDonnell before you took this job? A. No.

Q. How did you meet him? A. I was introduced to him by a friend of mine, Mr. Hart.

Q. That was shortly before this job was arranged for? A. Just prior to the starting of these plans.

Q. Did the Doctor tell you what kind of a building he wanted? A. Yes.

Q. What did he tell you as to the nature of a building he wanted?

By Mr. Bianchi: I object to that sort of testimony. It is not at all material.

By Mr. Platoff: I want to show it was intended to be a substantial building. We assume he wanted a good building.

By Mr. Bianchi: We admit he wanted a good building and we admit we gave him one.

Q. Did you advertise for bids on this job? A. We called for bids.

Q. You did not advertise or publish for bids? A. No, we called.

Q. How did those contractors, Vitille, Kinsella & Cunhy happen to come along?

By Mr. Bianchi: I object to that. Here is a contract formed as a result of bids. We are talking about that contract. Why talk about the other bids?

By the Master: I will allow it.

A. I asked them to bid.

Q. I call your attention to the bill for extra work rendered by these contractors, Exhibit D-56, and I ask you first whether any of these extras were ordered in writing by you? A. I think there might have been some ordered in writing. I am not sure of that.

Q. Could you identify those items that were ordered by you in writing? A. The substitution of the plumbing specifications was ordered.

Q. Was that the subject of any charge for extra work? A. No.

Q. I am only talking about the extra items and ask you which of those if any were ordered in writing by you? A. Subject to correction, I am unable to find any just at the moment looking through my papers, I may find some later.

Q. Did you receive any estimate from the contractor or any prices in writing before any extra work was done? A. Yes.

Q. For what work? A.—

By the Master:

Q. You of course have gone over that bill for extras of the contractor? A. Yes.

Q. Are there any items on that bill that are correct and if so won't you please tell us which ones? A.—

By Mr. Platoff:

Q. Will you please tell us what the reasonable value of any extra work on Exhibit D-56 is? A. I marked the first item.

By Mr. Bianchi: I think he ought to qualify.

By Mr. Platoff: He has qualified as an architect for 30 years.

By Mr. Bianchi: Qualifying as an architect is not qualifying as being qualified for giving of cost of material and cost of labor and time required of any work. A man might be an architect and yet not know the cost of material and cost of labor as I proved with one man here who admitted he did not know.

By the Master: I think that I will permit him to testify as to these things for what they are worth, and subject to cross examination as to any of the particular items which I think will bring out the fact as with Mr. Shilowitz, it seems to me we have to start somewheres.

A. You want me to tell why I am and why I am not allowing it?

Q. Certainly. Tell your story. A. Item No. 1, I do not allow the sixty boxes of lumnite cement. This contract was signed on October 13, 1926. The contractor was instructed to make provisions to keep all cement and sand to a temperature of 70 degrees before mixing same as specified on page 3 of the specification, first paragraph of general instructions to the contractor. As the contractor did not provide facilities for heating materials, two months after the signing of the contract it was expedient to use Lumnite cement to prevent freezing and I claim that if he had had the proper equipment it would not have been necessary. That was a very cold winter.

Item No. 2, which is the rock excavation was already approved.

Item No. 3, which covers the white cement. The buff mortar was called for and in my opinion there was no difference in cost.

By the Master:

Q. Do you mean by that that they used white cement but it was not more expensive than Portland cement? A. It was no more expensive than the buff mortar joints. It is more expensive, but I

have never had to pay any difference for either one or the other.

Item 4 was elevator shafts. There is nothing additional put in this building than was shown on the plan. The contractor backfilled with cement. That was not called for and was not necessary. In order to save one side of the form he put a cement in up to the base of the line to save himself the backfilling. Backfill is provided by the contract and we would have been satisfied with backfill.

By the Master:

Q. Then you say he did that on his own? A. Yes, in order to save building a form.

Q. Did he talk to you about it? A. No.

Q. Did he say anything to him about it when you saw him doing it? A. No. Didn't expect to get a bill for it either. There were several rods put in the shafts and waterproofing put in the cement. He should be paid for the rods and for the waterproofing.

Q. How much? A. $92.82.

Item No. 5, deafening of the south dividing walls. That was done. The charges are $178.37.

Q. That is what it should be? A. I figured it out $170.27.

Item No. 6, not allowed.

Q. Why? A. We really should have had a credit for that. It was not the same brick that was used in the building that they were told to copy from. I have allowed $687.39 on the $720.11 item, and $170.27 on the $178.37 item.

Item No. 6 is not allowed, about the 3,000 face bricks.

Item No. 7—3 bbl. white sand. That covers an

item of sand finish in the halls. Specifications call for monumental plaster to be finished with sand finish. We ought to have a credit for that.

Q. How much credit? A. I never figured it out.

Q. You are referring to the item of $267.65? A. Yes, sir. The whole item.

The item of erecting the vestibule door, which I call No. 8, $108.90, I do not allow that.

Q. Why? A. It is called for in the specifications.

Q. You say that should not be allowed? A. No. Iron doors were specified and we should have a credit on that.

No. 9, Kalamine frames and sash in vent shaft, $139.15. I have allowed the charge of $115, which was the subcontractor's bill.

Q. Was the contractor entitled in your opinion to any overhead charge? A. Yes, sir.

Q. How much? A. 5%.

Q. Not 10%? A. Well, he told me that he wanted 5%.

By Mr. Platoff:

Q. I show you what purports to be an estimate of Vitille, Kinsella & Cunhy for some kind of brick and ask you whether you recognize that? A. No. I did not see that.

Item No. 10, flax linum. I think there was an agreed price on that.

Q. Have you any comments to make on Item 10, flax linum? A. My understanding of that was that the amount of the flax linum was $707.29. My understanding was that there was no charge for the laying.

Q. Did you hear the floor layer testify in this proceeding? A. Yes.

Q. Did you hear him testify that he made no charge for laying? A. Yes.

Q. When was the flax linum ordered, before or after the contract was made? A. After.

By Mr. Marcus:

Q. After what contract was made? We have a contract too. A. After the general contract was made.

(Witness): No. 11. Removal of window frame in small toilet. Cutting wall and putting it back in again, $47.42. I figured the cost of it but I have not allowed it.

No. 12, install kitchen maid cabinets. We have not allowed that because we have not been credited for the erection of the other cabinets.

By the Master:

Q. Have you figured up whether or not the price charged is the correct price charged and whether it should be allowed?

$171.60, but could not allow it because they made no allowance for labor and material of substituted cabinets.

No. 13 is the rock excavation, $598.95. The amount of that rock excavation should be $377.00. 56 yards of rock taken out instead of 66 yards, at $7.50 a yard, allowing a credit of earth excavation of $1.50 a yard, I figured my price would be $6.00 a yard. 56 yards at $6.00 a yard, plus 5 plus 10.

By the Master:

Q. In other words you claim they did not give you credit for some excavation which you would

have to remove even if the rock was not there? A. Yes.

Q. In figuring all of these extras you disagree with the contractor on the figure of 10% overhead and you say it should be only 5% overhead on all of your figures, is that right? A. Yes.

Q. That they were not entitled to 10% overhead on extras only 5%? A. Yes, that's right.

Q. You allow that for what amount, that last item? A. $377.00.

(Witness) : No. 14 is an item of $101.72. That's removing partition in janitor's apartment, as he calls it, new location in janitor's apartment. I have allowed $92.88.

No. 15 is taking down partition in three room apartment he charges $155.48. I have allowed $105.79.

No. 16, furring walls for frigidaire. The charge is $100.44. The correct charge should be $95.90.

Q. On that particular item is that 5% overhead the difference? A. Yes.

No. 17 is the additional charge of the coal bin to the ceiling. We are not allowing that.

Q. Why not? A. It was not carried up to the ceiling as the bill calls for.

Q. Was the actual bin built? A. It was built. The actual bin showed on the plan in building—it is not built exactly as shown on plan.

Q. Was the bin an extra? A. No. He is charging for some corrections he made in the coal bin. The coal bin—the real trouble there was that they put the coal bin around the meter and the Public Service and the Water company compelled them to make a passage way to the meter.

No. 18 is work in Therapeutic Room. There is a charge of $166.98, and I allowed $110.88.

No. 19, erecting linen closet in hall, charge of $50.80. $27.72 was allowed.

No. 20, cutting floors and walls in Dr. Fisher's office. Charge for that was $390.83. $172.33 was allowed.

No. 21, erecting partition around frigidaire. We did not have anything to do with that. I think the janitor or someone else ordered that.

Q. Did they do the work? A. They did the work.

Q. Did you see them doing it? A. No.

Q. When did you first know they had done it? A. The day after I came on the job.

Q. You asked them about it? A. Yes.

Q. What did they say? A. They said the janitor, the superintendent ordered it.

Q. Did you tell them then you would not allow it? A. I don't think I said anything about it.

Testimony of Mr. Ach.

Examination by Mr. Platoff:

Item No. 22:

It was an extra book case put in Doctor MacDonnell's office. There were other book cases left out, omitted. I am not allowing that.

By the Master: That was done at your direction?

A. Yes.

Was anything said about the cost at the time that it was ordered?

A. No, the other case not erected yet and we put the book case in a niche.

Did you tell them that they would have to put in the other book case without charge?

A. No, I did not.

Did you tell them they would have to give you credit for not putting in the book case that you say was left out?

A. Yes.

How much credit?

A. We did not think of credit then.

Item No. 23:

Extra shelving supplied by defendant. I don't know where it is. I never found it and therefore disallowed it.

By the Master: Does that item in your opinion have anything to do with changes that were made in the closets that you speak about?

A. No.

Item No. 24:

New door to coat room. There was no new door furnished her; door was moved from another location and same amount of work was done.

Item No. 25:

Had been charged on Item 18; that is not allowed.

Item No. 26:

Building of bench for screens in cellar. I did not order that either.

By the Master: Did you know it was being built?

A. No.

When did you first know it was built?

A. When the screen was put around the ice machine.

What would have been a fair charge if it had been ordered?

A. $10.89.

Item No. 27:

Dark room; I did not order that either.

By Mr. Platoff:

Q. In your opinion a fair allowance would be? A. $50.82.

By the Master: Where was this dark room put?

A. In the cellar under the X-ray room.

And that was a dark room that would naturally be expected to be used in connection with a doctor's work?

A. I assume that was what it was put in there for.

And you have been into the building recently and gone over the building?

A. It was built while I was inspecting the work.

What is it being used for now?

A. I don't know. It is a wooden partition around the space under the X-ray room. It is about six feet from the door filling a corner 7 or 8 feet long and is of plaster boards.

Is it fire proof?

A. Well, semi-fireproof.

Do you know if the charge for a carpenter $1.50 per hour is a proper charge?

A. I have been assuming that it was from the price Mr. Vitille gave me.

You don't know whether Dr. MacDonnell ordered this himself, do you?

A. I was under the impression that the man who was going to wire the X-ray apparatus ordered it.

You were under the impression that somebody ordered it put there and that Mr. Vitille did not put it there on his own volition?

A. Yes.

Did you ask Vitille who told him to build it?

A. Yes; he said the man who was selling the X-ray.

Didn't you go to Dr. MacDonnell and ask him if he ordered it?

A. No, that was put in when the doctor was away.

Did you see them building the room? Did you tell them not to build it?

A. No, I thought it was proper for them to build it if it was ordered by someone.

Did you expect somebody outside was going to pay for it?

A. The building was practically completed; I did not know whether the doctor had ordered it.

You say that a proper price would be $50.52.

A. Yes.

How do you figure that as I understand you use the same basic figure for carpentry?

A. He had charged us for 56 hours, seven days and from my list of time I noticed the man worked I figured that it was twice the time that they have been taking for the work.

Item No. 28:

Install instrument cases called for in our contract. The contract was to supply two instrument cases in the hall of the Doctor's apartment and these were omitted; that is the wooden cases

and glass cases were omitted and the doctor purchased steel equipment and this is a charge for installing steel ones and they would have had to install the two wooden ones.

Does it cost more to install steel cases than wooden cases that were supposed to be put in?

A. No, it is about the same.

Was that a different molding than was supposed to be put around the wooden cases?

A. No. We should have credit for the wooden cases.

Were they to furnish wooden cases.

A. Yes.

Examination of Mr. Ach Continued:

(Witness) No. 29, table in doctor's kitchenette and putting on patent locks and building up bench for telephone books, etc. These items amounting to $12 and $6 are correct items and I allowed them.

No. 30, installing book cases in doctor's office. Disallowed because called for on plans and specifications.

By Mr. Platoff:

Q. How about the charge if it should be allowed, or have you not figured it? A. I have not figured it.

Item No. 31, putting moldings around the Kitchen-Maid cabinets. I did not allow that. We had to put moldings around our own cabinets.

No. 32, 1 piece of birch veneer for kitchen maid cabinets, $3.72. That is allowed.

Item No. 33, furnishing and hang with hardware french doors, charge, $980.10, and $70 for hanging three pairs and furnished doors by North Hudson Manufacturing Co. I think there was an agreed price with the doctor and Mr. Vitille and that item should be allowed if it agrees with the price.

Q. You know the work was done? A. Yes, the work was done.

No. 34, DeForge. Mr. Vitille told me that he had an agreement with the doctor and to pay one-half of that, but I do not know anything about that. The stucco was called for and was put up and was not satisfactory and had to be stuccoed again. The color was not satisfactory. It was condemned work.

By the Master:

Q. You say Mr. Ach that Mr. Vitille told you the doctor had agreed to pay one-half of the cost. Now do you know whether the contract of DeForge was for $800 or $400? A. $400.00.

Q. You know that it was $400? A. Yes.

Q. You say that as far as you know, that you were told by the contractor that he should be allowed $200? A. $200 is right. As far as I am concerned, this was merely doing over imperfect work and there should be no allowance.

No. 35, $775.43, North Hudson Manufacturing Company. My memorandum is here, ordered by others. I am not familiar with that. I have not been able to find out what that was for.

Q. Do you mean, Mr. Ach, that you don't know what the charge relates to, to what actual work it was, or that you are not familiar as to who ordered it? A. I am not familiar as to who ordered it. I am under the impression that the North Hudson Manufacturing Company did not complete their contract, or the contract was not complete with Mr. Vitille, and this work was ordered to complete the contract.

Q. Do you know what work it is? A. No, I do not.

No. 36, John G. Keller Co., extra for $140.00. That work was done and should be paid.

No. 37, S. & S. Supply Co., $3,243.70. I think that is the lighting fixtures, if I remember right now, and some work in Dr. Fisher's office and had nothing to do with the lighting fixtures we paid.

Q. Have you figured out the value of the work that was done in Dr. Fisher's office? A. I did.

Q. You have not approved of that item because you don't know about it? A. No. That's right.

Cadel Bros., No. 38,—All this on this sheet here are items that were taken up by the doctor. This includes Mr. Cadel's faucets and alteration, sink in the operating room and some other items which Mr. Cadel took up with the doctor.

Q. In other words, these items that you say you did not order they were extras that were done as the building was being completed, and the owner himself said that he ordered some things additional from the plans to put in? A. That's right.

No. 39, G. M. Crocetti, $195.00 for tiling the ward in the doctor's apartment. That was a change from oak floor to tile floor.

Q. You know that the work was done? A. Yes.

Q. Did you order it or the doctor order it? A. I did not.

Item No. 40, there is an extra on Foscale Iron Works, amounting to $159.57. I do not allow that.

Q. Why not? A. It was for elevator guides that were called for in specifications. Foscale did not complete his contract. We are entitled to a credit for an iron door.

Cross Examination of Mr. Ach, by Mr. Bianchi:

Q. How did you figure that 5% overhead as an amount to charge instead of 10%, 15% or 20% for an overhead? A. I did not figure it. Mr. Vitille told me that that was his charge.

Q. Did you ever hear of anybody ever charging 5% overhead? A. Yes.

Q. Isn't it a fact that 15% and 20% is the regular overhead? A. No.

Q. Doesn't the insurance run up to over than 5% overhead? A. It does.

Q. Then you did not really mean to say that 5% is all he told you he was going to charge? A. —.

Q. Overhead covers everything that a man has who is carrying on the job? A. Yes.

Q. It covers insurance, plant, equipment, scaffolding, etc.? A. Yes.

Q. Don't they generally charge 15% or 20%? A. Generally charge ten and some charge fifteen.

Q. So that 10% overhead is a reasonable charge, isn't it? A. I don't think so on this job.

Q. On any job? A. No, I don't think on any job, some specific jobs, yes.

Q. If he had to pay more than 5% insurance, why should he charge less than what he had to

pay? A. He was not paying the insurance on subcontractors.

Q. On this extra work, he was paying it? A. Yes.

Q. Well, why should not he pay the insurance? A. I don't know—

Q. He did pay insurance as far as you know? A. Yes. I don't know that, but I think he has to by law.

Q. Your contract specified what the overhead consists of, doesn't it? A. I don't know.

Q. Isn't this a standard form of contract? A. Yes.

Q. Aren't you familiar with the standard form of contract of the American Institution, general conditions? A. You want me to read from the contract? Article 27, the contractor shall maintain such insurance as will protect him under the workmen's compensation and for personal injury which may result from operation under this contract whether such operation be by himself or by any subcontractor or anyone directly or indirectly, etc. etc. I would not know what the charge of insurance would be, I never insured anyone.

Q. Does the overhead also include shop drawings? Does it include protection of work and property? A. In this case—

Q. In any case? A. He did not make any shop drawings. He didn't do anything. The subcontractors made the shop drawings that were submitted.

Q. Who protected the work? A. Some of it was never protected.

Q. That which was protected, who protected it? A. I don't know.

Q. Isn't that part of the overhead? A. I suppose so. Some parts were never protected, though.

Q. As a matter of fact, outside of making these drawings, did you ever do any work on this job? A. Of course I did.

Q. Will you tell me if ever you submitted any list that you made of the work omitted on this building? A. I have portions of it in a list.

Q. You were given an opportunity to offer to produce it, were you not? A. Yes.

Q. Have you any list showing this extra work that we were speaking of today outside of what this contractor has made up and produced? A. Yes.

Q. Why didn't you testify from that list this morning without asking permission to testify from the list made up by Mr. Vitille? A. I was testifying from this list this morning. This is my memorandum. I had to compare it with Mr. Vitille's bill.

By the Master: I understand, and I was watching Mr. Ach when he was testifying, and he had before him the Exhibit D-56 which was the contractor's statement and was looking and using in conjunction with that a paper that looks like this paper that he now says are his own notes and he was simply using it to keep it in chronological order.

Q. So that the majority of the work that this contractor claims is correct?

By Mr. Platoff: I object. The testimony speaks for itself.

By Mr. Bianchi: This is cross examination.

By the Master: It is proper cross examination.

A. I cannot say whether it was more or less, but what I said was extra work was extra work.

Q. You have compared your own items with that list submitted by the contractor and as a result of that comparison could you not tell if that work is correct or not? A. Not without tabulating it.

Q. Have you tabulated it? A. No.

Q. Did you ever offer to the contractor a final certificate covering the extra work that he did do? A. No.

Q. You had different conversations with Mr. Vitille with reference to the final payment on this job, did you not? A. Yes.

Q. And you never refused him a final certificate, did you? A. I never gave him one.

Q. You never refused him one, I said. A. I did not give him one so I must have refused it.

Q. No. Isn't it a fact that you always told him you would give him a certificate? A. Yes.

Q. And you told Mr. Keller that too? A. Yes.

Q. You wrote a letter to Mr. Vitille on October 21, 1928 and said "My dear Mr. Vitille: I expect to be finished with your certificate surely by Friday this week"? A. Yes.

Q. And you never gave him any list of work which you deemed absolutely necessary to be done before he could get that certificate? A. Yes.

Q. Have you such a list? A. Yes. I have a list all through the whole job.

Q. I am asking if you gave him a list on or about October 21st, 1928? A. No; I have nothing of that date.

Q. Did you tell him that before you would give a certificate he would have to do certain work, otherwise known among architects as a list of exceptions? A. Yes.

Q. On December 12, 1927 you wrote a letter to Mr. Vitille calling his attention to certain work that had to be done on the job? A. Yes.

Q. And did Mr. Vitille do that work mentioned in that letter? A. Not all of it.

By Mr. Flatoff: I object to any question in regards to the contents of that letter.

By the Master: He can ask him a general question as to whether he did all the work in that letter.

Q. After you called his attention to that work, he did some of the work? A. Yes.

Q. Did you ever send him any other letter after that, that he had not fully completed the work that you mentioned in that letter? A. No.

Q. So that in October 21st, 1928 when you said to Mr. Vitille "I expect to be finished with your certificate surely by Friday of this week" you intended to give him a certificate? A. Yes.

Q. There were to be nine payments in all?

Q. At the time that you made the 8th payment, the total amount paid would have been about $83,290.00? A. About $88,000.00.

Q. You actually did not pay out that money in cash? A. I did not pay any money.

Q. The total contract was about $98,000.00? A. Yes.

Q. There was 85% of the value of the work was what you were supposed to pay out? A. Correct.

Q. So that when you paid these eight payments, you paid dollar for dollar what was in the job? A. Practically.

Q. If this job contained so many omissions that have been testified to here by you and your assistant, why is it you paid dollar for dollar? A. It

was necessary to pay Mr. Vitille as he went along in order for him to pay his subcontractors because it came up in the course of operation that he had absolutely no money at all.

Q. Why did you pay him for this work if it was not all satisfactory or all completed? A. Because it was expedient.

Q. You certified that that was the amount of work that was done? A. Correct.

Q. And you made no deductions for those omis sions that you now speak of? A. Not at that time.

Q. And there was never any deduction you have made for incomplete work? A. The building was never completed.

Q. This work that you speak of as omissions was work that should have been done, if your statement is true, long before this eighth payment was made? A. Correct.

Q. Now, as a matter of fact, isn't it true that these omissions that you now speak of, were simply questions of opinion as between you and the contractor, and the owner, as to what would be the best course to pursue and that what as followed in the building of this particular apartment was the best and that is why you never made any deductions or any list of omissions to show the omissions that you now speak of today? A. No.

Q. Because of the change of opinion of the owner, the contractor or the architect, changes are made in buildings, isn't that true? A. Yes.

Q. And is it not what happened here because there were changes made because of change of opinion? A. Some were made for that reason and others were made arbitrarily.

Q. And you never submitted to Mr. Vitille an itemized bill or an itemized claim asking him to

allow the owner a certain amount of money for the so-called omissions that you now speak of, did you? A. No.

Q. He and you and the owner and his lawyers had different meetings at which you attempted to adjust this matter. A. Not that I know.

Q. Were you ever told that adjustments were contemplated? A. Yes.

Q. There were several meetings made, weren't there? A. There were several meetings and I attended these meetings for the purpose of adjusting these things but they never were consummated.

Q. At any of these meetings did you submit a list? A. We never had a list. We simply went to the lawyers' office.

Q. At the lawyer's office did you ever submit any list of the value of the omissions if there were any such omissions? A. No.

Q. You never gave the attorneys any paper or claim of the value of the so-called omissions? A. No; they had a memorandum of what was omitted.

Q. The only list of omissions that was produced in this case up to the present time was the list of omissions that was prepared four or five weeks ago during the course of this trial. A. That was made up some five weeks ago, yes.

Q. And that is the only list that there is here today? A. That's the only list? I don't know about that. I can't testify.

By the Master:

Q. Is that the only list that you have? A. That's not the only memorandum I have.

By Mr. Bianchi:

Q. You were asked this morning if you had anything from which you could testify? A. Yes.

Q. And there was a seventeen minute delay while you were looking for memorandums? A. Yes.

Q. You never fixed any prices for any omissions for this case? A. No.

Q. You haven't any detailed cost of the so called omissions, have you? A. No.

Q. As a matter of fact, the reason why you have no detailed cost; the reason why you never had any list of the alleged omissions, was because of the fact that it was agreed between you and the owner and the contractor that they were to be done in a different manner, isn't that true? A. Yes.

Q. Is that the only answer that you have for paying this man dollar for dollar up to the eighth payment? A. No, that's not the only answer I have.

Q. You know that the last payment of the last certificate was dated August 20, 1927? A. Yes.

Q. Don't you know that shortly thereafter, about the first of September, tenants started to move into the building? A. Yes.

Q. And, yet up to October 31, 1928, you did not issue your certificate? A. No.

Q. And between the time that these tenants moved in and the writing of this letter in October, 1928, more than a year later, you never submitted to him a list of exceptions to the work? A. Yes, I said I did.

Q. Have you that list? A. I have portions of it in form of memorandum, which I have given to Mr. Vitille.

Q. Isn't it a fact that the order which you submitted was a statement made in December, on the 12th, in 1927? A. No. I have one memorandum here, a letter of December 12th. I called his attention to the old list on September 6th, 1928, I was still giving him instructions a year later.

Q. I show you a letter dated December 12th, 1927, and ask you if this is your signature on that letter? A. No.

Q. Is that letter from your office? A. On my stationery.

Q. Was it dictated by you? A. It went from my office.

Q. Was that sent out at your direction? A. I believe it was.

Q. I ask you whether that is the last letter which you sent to Mr. Vitille, speaking of this job as to what might or might not have to be done on there, prior to October 1928? A. I have given him memorandum since then.

By Mr. Bianchi: I offer that letter in evidence.

By the Master: Same is marked Exhibit D-73.

Q. Have you a copy of this alleged memorandum that you speak of, with the dates of them? A. I have one of them; I have more of them.

By Mr. Bianchi: I offer this in evidence.

By the Master: The memorandum, dated September 6th, 1928, will be marked Exhibit D-74.

Q. In your letter of December, 1928, and in your memorandum of September 6th, 1928, there

is nothing in there of a substantial nature, except minor details he had to tend to? A. Not in this.

Q. You, at no time, sent him a list on or about that time, showing a non-substantial compliance with the contract? A. I gave Mr. Vitille a memorandum almost every week.

Q. So that when you made the statement that the building was substantially completed you meant it? A. Yes.

By the Master:

Q. Mr. Ach, at the time you wrote this letter, Exhibit D-73, why didn't you call Mr. Vitille's attention to these alleged omissions? A. I have spoken to him a number of times about it and I was really trying to help this man as much as I could; tried to keep out of records all I possibly could.

Q. Some of these omissions, as a matter of fact, a large portion of them, you knew were omitted before you issued the eighth certificate, did you not? A. Yes.

By Mr. Bianchi:

Q. I call your attention to the extra charge made by the plumber, didn't you know that the Doctor received their figures from other plumbers for this extra work before the plumber was authorized to go ahead? A. What item of the extra work is that?

Q. You testified to it—Mr. Cadel? A. Additional faucets? No, I don't know whether he received estimates on it or not.

Q. You don't know? A. No. I cannot see how he could put another plumber in while the work was going on, what one plumber did.

Q. Certainly, Mr. Ach, if the work, the 85% of the work for which you issued certificates during the course of construction, if it was not done according to plans and specifications, you certainly would not have issued these certificates? A. When I issued these certificates there was a reservation on that that this payment was not an acceptance of the work done until a final payment was made, etc.

Q. Were you on the job from day to day? A. No.

Q. How often were you on the job? A. Sometimes twice a week.

Q. Were you familiar enough with the plans and specifications to tell when extra work was and wasn't being done? A. Yes.

Q. When you saw extra work going on there that the contractors were engaged in, you took it for granted that the Doctor had it ordered? A. I did not see the Doctor very often. I would take it up with Mr. Vitille and Mr. Vitille would tell me that for instance, that Mr. Cadel had extra for it, and I knew that the kitchen-maid cabinets were ordered, I saw the salesman. I knew that Mr. Cadel had some work on there that he was told to do.

Q. You would not stop the work, the extra work, would you? A. No.

Q. Did you see the roof going on? A. Yes.

Q. Did you stop the roof from going on? A. I complained about it everytime I saw him working and asked him to get his license.

Q. The roof was put on when the walls were on, right? A. He was rather slow.

Q. When was this roof put up? A. When the walls were up.

Q. That's put up before the partitions? A. I believe there they were.

Q. That's the usual course of putting the roof on; when the walls go up? A. Yes.

Q. To cover it, so to speak? A. Yes.

Q. How many rolls of paper are used on a roof, do you know? A. No.

Q. The only difference between a Barrett Roof and any other roof is that the name Barrett is used, isn't that so? A. Yes—if it is a Barrett roof it is constructed according to the Barrett specification.

By Mr. Marcus:

Q. You remember the time that Mr. Diffenbach met you, that he wasn't a licensed Barrett Roofer? A. Yes.

Q. The only complaint that you had about Mr. Diffenbach was that he did not have his license? A. Exactly that, at that time.

Q. At the time that he did this work, laying of the roof? A. There were complaints.

Q. As to what? A. As to flashing, copper work and work along the edges.

Q. Did you ever write a letter to Mr. Diffenbach or Mr. Vitille—a letter of complaint? A. It was unnecessary. They were there.

Q. Did you see him complete his roof? A. Yes.

Q. Did you ever raise any question as to specifications not coming up to the Barrett standard? A. Specifically, not. I just told him that he would have to have his roof approved. I even told him he would have to cut a square out and have the Barrett people approve it.

Q. You were supervising this job? A. Yes.

Q. How many times a week were you on the job? A. Once or twice.

Q. How long did it take the roofer to put up his roof? A. I don't know.

Q. Did you, at any time, take up a part of the roof to determine whether or not the roof was in compliance with the Barrett specification? A. No.

Q. You don't know whether it does or does not comply with the Barrett specification? A. He has no certificate.

Q. Well, do you know whether it complies with the Barrett specification? A. No, I don't.

Q. In what respect doesn't it comply with your specification? A. We have no guaranty from the Barrett Company.

Q. As far as the guaranty is concerned, did you ever have any conversation with Mr. Diffenbach about obtaining the guaranty? A. I did.

Q. Did you ever tell Mr. Diffenbach in the presence of Mr. Vitille and the Sheet Metal Company that as long as the Barrett specifications have been complied with, the bond was not necessary? A. I did not.

Q. The roof was completed on August 20th, 1927, when you issued your certificate, wasn't it? A. Yes.

Q. Did you at that time make any complaints to the roofer not having furnished you a Barrett guaranty? A. Not at that time.

Q. Now, that certificate of August 20th included the full payment as far as the roof was concerned, didn't it? A. I would not be able to tell offhand, I assume it would cover 85% of it.

Q. As a matter of fact, didn't you testify that the payments made up to date included dollar for dollar for the work done? A. Practically.

Q. Now, Mr. Ach, did you at any time, make any other complaints about this roof except that he did not have a license? A. Yes.

Q. When? A. After a period of about six months after the roof was completed.

Q. How? A. To Mr. Vitille.

Q. In writing? A. On the phone and in person.

Q. As a matter of fact, in August, 1927, you wrote a letter in which you said that you did not feel that the water was coming through the roof. You thought it was coming through the parapet work? A. I did.

Q. I show you this letter of August, 1927, and ask you whether you mailed that? A. I did.

Q. Is that your signature? A. Yes.

Q. At that time you had a fixed opinion as to what caused the leaks? A. I thought I had found it, but I didn't.

Q. Now, Mr. Ach, you are an architect of thirty years' experience? A. Yes.

Q. You have fixed definitely different opinions of buildings? A. Yes.

Q. Or you should have by reason of your experience. And you wrote a letter of your opinion as an architect. Isn't that so? A. I did to the best of my ability.

By Mr. Marcus: I offer this letter in evidence.

By the Master: Same is marked Exhibit D-75.

Q. Now isn't it a fact Mr. Ach that after you wrote your letter of October, 1927, the contractor waterproofed the walls and didn't charge you for it? A. Yes.

Q. And did about $350 worth of work? A. Yes.

Q. In order to satisfy that the leaks would not come in through the building? A. Yes.

Q. You haven't made any complaint since that time about that roof, have you? A. Yes, since the wall was fixed.

Q. Have you any of these complaints in writing after October, 1927? A. Yes, I have, October 12, 1928.

Q. That was the time when Mr. Vitille did the waterproofing on the walls, isn't that so? A. About that time.

Q. So that Mr. Vitille waterproofed the walls after your letter of October, 1928? A. Yes, and waterproofed the copings too.

Q. And have you made any complaints since that time? A. I don't think so.

By Mr. Platoff:

Q. As a result of your further experience with this roof and leaking of the roof, you know now why that roof leaks?

By Mr. Marcus: I object. The testimony is clear, and he showed by his own correspondence that the roof never leaked and that it was the walls that leaked. His experience as an architect was that the leakage was of the walls not the roof.

By the Master: I will allow the question and allow an exception to Mr. Marcus.

A. I subsequently found that the flashings through the wall were omitted.

By Mr. Marcus: The contract speaks for itself.

Q. Now, Mr. Ach, I show you Exhibit D-14, contract of C. F. Diffenbach, general contract, and ask you to show me that portion of it which provides for construction of flashings? A. Section 2 provides for the contractor to do it.

Q. Isn't it a fact that this roof leaked for a couple of years? A. I understand it is leaking yet, up to a short time ago.

Q. Weren't you in that apartment a number of times and made inspection after water came in and damaged the apartments? A. I was.

Q. Isn't it a fact that you many times asked for the guaranty of this roof? A. I did.

Q. Isn't it a fact that you wrote a letter to Diffenbach—did you do anything with Diffenbach about the guaranty? A. I did.

Q. Do you know whether Dr. MacDonnell has employed other roofers to make repairs?

By Mr. Marcus: I object to it on the ground that it has no concern with this particular defendant.

By the Master: I will admit it.

A. I don't know of my own knowledge.

Q. Mr. Ach, you were cross-examined on the question as to whether or not you furnished a list or memorandum or made complaints either verbal or written to these contractors in reference to incomplete or omitted work? A. Yes.

Q. What records have you showing written complaints of any kind or have you such records?

By Mr. Bianchi: I object to it because he was only examined as to complaints after October, 1928.

By Mr. Platoff: There is in evidence offered by the contractor a letter of 1927.

By the Master: Whether it is proper re-direct or not I will allow it. What we really want to get at here are the facts. I also think that it is most important to find out just what writings did pass back and forth because according to the writings that were put in evidence did not go back and forth to any extent.

Q. Have you records of memorandum and complaints that you sent to the contractors? A. I have but I have not all of them here.

Q. Now, in addition to any written complaints, you gave them, did you ever speak to them about complaints? A. Yes.

Q. How often? A. Every time I met them.

Q. Have you a record of the telephone calls you made about complaints? A. Yes.

Q. Will you produce that next time together with your other records? A. Yes.

Q. Now, you once gave him a list of omitted work, did you not Mr. Ach? A. I did.

Q. Remember approximately when that was? A. No, I can't say.

Q. Say what year, 1928 or 1929 or 1930? A. 1929.

Q. Now, Mr. Ach, you certified to approximately 85% of the work completed from time to time? A. Yes.

Q. In your certification did you certify any work which was not billed? A. The question of rock excavation.

Q. The $1212 item? A. Yes.

Q. While you advanced approximately 85% of the value of the work done, you made no allowances on any extra work done except that $1212? A. No.

Q. Now Mr. Ach, isn't it a fact that you are a friend of Vitille's; that you got him this job? A. Yes.

Q. And isn't it a fact that you tried to help him all you possibly could? A. Yes.

Q. Isn't it a fact that you gave him as much money as you could? A. Yes.

Q. Isn't it a fact that you did not report any omissions except what you had to? A. I did.

Q. Isn't it a fact that until Dr. MacDonnell made complaints to you, you didn't make or register any complaints? A. Not to any extent.

Q. Isn't it a fact that the electrical contractor, Mr. Sieb, is a friend of yours? A. Yes.

By Mr. Bianchi:

Q. You knew that Mr. Vitille was a good mechanic and knew his work and that was why you wanted him to get the contract? A. I thought he was.

Q. And Mr. Vitille went under bond for $50,000 in order to insure Dr. MacDonnell's getting his money? A. I don't really know what he did.

Q. Don't you know Vitille had to go on the Doctor's bond for $50,000 in order to help the Doctor get money to carry on this work? A. I don't know.

Q. Weren't you with him at the time when the bond was signed? A. I thought that was a release. I didn't know the nature of that.

Q. Don't you remember you took him up here to get him to sign the bond? A. My impression was that he signed a paper not to file a lien against the building. Isn't that what it was?

By the Master:

Q. Mr. Ach, did you ever send any written

notice to Mr. Vitille to the effect that he had omitted the fireproofing around the columns and beams? A. No, I told him that.

Q. Well, how early in the progress of the job did you know that he had omitted this fireproofing? A. When they were laying the floors.

Q. That was before the eighth payment? A. Yes.

Q. Was it before the 7th payment? A. I should judge about the seventh or eighth payment.

Q. Did you ever give him any written notice about omitting the gypsum block in the floors and ceiling of the Doctor's apartment? A. I don't know whether there was a written notice or not. I would not be able to tell. I know there was some discussion.

Q. Did you know something else was substituted for the gypsum block? A. Yes.

Q. Did you ever give him any written notice respecting the Kitchen-Maid cabinet trim being omitted? A. I did not—I don't recall whether I gave him written notice, but I went down to the North Hudson Company about it.

Q. Then what happened? A. North Hudson said they had a contract that was not in accordance with our specifications and we had to go ahead with the building and I came back and told the Doctor what they said and he was anxious to get there. The North Hudson submitted a piece of trim that hung in the tool house for probably two or three months before we came to the point of trimming the house. That was the sample that was to go in the house, that was a mitre trim, put together and a section of it was cut open and hung on the wall and showing how the joint of the mitre was laid and that was the sample of trim that was submitted.

Q. Was that the sample of trim that was put in? A. No.

Q. Did you ever give him any written notice in reference to the marble stringers being omitted? A. No. I spoke to him about it.

Q. Did you ever give him any written notice about wires not being concealed in conduits? A. No.

Q. Did you ever give him any written notice about there being no grounds for picture trim or about the window trim? A. No.

By Mr. Bianchi:

Q. Mr. Ach, on this question of trim, you didn't follow the specifications but you did use the same trim that was used in Tudor Hall? A. I went up with Mr. Vitille to Tudor Hall to look at the brick on the outside and went into the inside. When we were inside I told him he could work up his trim similar to that in Tudor Hall.

Q. That was a high class apartment house? A. Yes.

Q. And that was what the Doctor got in his apartment house? A. They did not get cabinet trim.

Q. Has Tudor Hall got cabinet trim? A. Sure.

Q. Are you sure? A. I am certain.

Q. By looking at the trim in that building and the trim in Tudor Hall, do they look alike? A. Very much, but are not alike.

Q. If I were to tell you as a fact that Tudor Hall did not have cabinet trim, would you say I am wrong? A. I don't think so. I am not certain, that if you were to tell me I would not be certain enough to say you were wrong.

Q. As a matter of fact, good trim is in Tudor Hall? A. Yes.

Q. Nice trim? A. Very nice.

That's all.

State of New Jersey, } ss.:
County of Hudson, }

EDWARD A. KEELER, witness produced on behalf of defendant, being duly sworn according to law, on his oath deposes and testifies as follows:

Direct Examination by Mr. Bianchi:

Q. Where do you reside, Mr. Keeler? A. 24 Howell Avenue, Larchmont, New York.

Q. What is your business? A. Real Estate, Insurance, Building Supervision, Preparation of Estimates.

Q. Prior to your present occupation, what was your experience in construction? A. I was a general contractor associated with my father, the Peter Keeler Building Company in Albany, N. Y., where we were in the general contracting business for twenty-two years, during which time we constructed buildings throughout the eastern portion of the country. I learned the carpentry trade.

Q. What is the nature of your business in connection with the building trade? A. Preparing estimates for Surety Companies and Insurance Companies; doing special work in connection with the completion of buildings which are under de-

fault and rearrangement of defaulting contracts.

Q. Do you operate real estate business yourself? A. I do.

Q. How long have you known Mr. Vitille, and in what capacity? A. I have known him for twenty-two years. I knew him first as a foreman of laborers; then as a foreman of concrete workers, and later as assistant superintendent of construction.

Q. Are you familiar with blue prints and specifications? A. I am.

Q. Have you examined the plans and specifications for the construction of the building for Dr. MacDonnell in Woodcliff, N. J.? A. Yes, sir.

Q. Have you made an inspection of the building? A. I have.

Q. Have you prepared estimates of work in connection therewith? A. I have.

Q. I show you a statement made by Mr. Vitille which is a statement of extra work alleged to have been performed by him in connection with the apartment house in question and I ask you if you have made an examination of that statement? A. I did.

Q. Did you make a check-up of the items called for in that statement? A. I did.

Q. Did you check the materials in quantity charged in connection with that extra work? A. I did.

Q. Were the prices for the labor and materials reasonable—

By Mr. Platoff: I object. The witness is not qualified to answer this question.

By the Master: I will permit Mr. Platoff to examine the witness as to his qualifications if he desires to.

Edward A. Keeler—Direct Examination.

By Mr. Platoff:

Q. Mr. Keeler, are you an architect? A. No, not registered.

Q. Have you ever built a building in New Jersey? A. Yes.

Q. Where? A. Supervised the construction of the Asbury Park High School.

Q. When? A. Finished about two years ago.

Q. Any other building? A. Yes. We constructed a private residence in Montclair, New Jersey.

Q. When? A. That was a number of years ago; about 15 years ago.

Q. Are these two jobs you have spoken of, are they the only two jobs you have had any connection with in fifteen years? A. I supervised the construction of an apartment house at Camden.

Q. When? A. Finished it about three months ago. We are now supervising the construction of an apartment house in the City of Trenton for the National Surety Company.

Q. Who are "we"? A. Keeler, Inc.

Q. I am asking about you personally? A. I am president of the corporation and I personally supervise this work.

Q. Are these jobs you speak about as having supervised for the various surety companies defaultive jobs? A. No.

Q. New jobs? A. Some are defaultive and some are new.

Q. How about this Asbury Park High School? A. It was new from the ground up but it was defaultive when the excavation was completed.

Q. When did you take charge of it personally? A. When the foundations had been installed, the first story up and portion of the exterior work completed.

Q. Have you ever built a house in New Jersey outside of this one in Montclair? A. With my own money? No.

Q. Mr. Keeler, have you bought or sold building materials in New Jersey in the last five years?

By Mr. Bianchi: I object, it is not requisite.

By the Master: I will allow him to answer it.

Q. Yes.

A. Yes.

Q. Did you buy building materials in New Jersey in 1927? A. Yes.

Q. Where? A. Asbury Park.

Q. Do you know the prices of various building materials sold at that time? A. I am familiar with the prices of the building materials in the State of New Jersey.

Q. Year 1927? A. Years.

Q. How much did a 2″ slab gypsum sell per square foot in New Jersey in 1926? A. On the job, at the factory, f.o.b. cars?

Q. Delivered? A. Delivered on the job? A fair price would be about 12¢ per square foot.

By Mr. Bianchi: I object to this line of examination because that was not the qualifications that this Court deemed necessary to qualify Mr. Shilowitz.

By Mr. Platoff: Mr. Shilowitz is a registered architect, who is actually practicing in New Jersey.

By the Master: I will allow the examination.

Q. What would be the market price of 3″ hollow gypsum partition per square foot in 1927

delivered to the job? A. About 13¢ per square foot.

Q. Mr. Keeler, I understand you are in the business of procuring surety bonds? A. Yes.

Q. And general insurance? A. Yes.

Q. And claim adjusting? A. Yes.

Q. Arbitration? A. Yes.

Q. Real estate? A. Yes.

Q. You are the whole Keeler, Inc? A. No.

Q. Do your own estimating? A. Yes, in some cases.

Q. Without any outside assistance? A. Yes, if I estimate a job I do it without outside assistance.

Q. Isn't it a fact Mr. Keeler, that a Surety Company, on defaultive jobs, award the contract to the lowest bidder and insist upon the performance of the contract by that contractor? A. It isn't.

Q. You actually build these buildings yourself? A. Hire the men, purchase the material, make the payrolls and pay the men.

Q. Buy all your material? Don't produce any of your material? A. Not at present.

Q. You know the difference between cabinet trim and knock down trim? A. I most certainly do.

Q. What was the value of cabinet trim in Hudson County in 1927? A. No way to answer that question.

Q. How much per foot? A. Not measured by a foot.

Q. How is it measured? A. In different ways. Door casing is measured by the fact that the door casing is placed of coping, mitre cope or whatever may be required by the details of the architect, is done on the job, or whether it is done at the mill, and then whether it be put together with gouls, glue, hot or cold; whether it be

soldered or veneered; whether it be built up; whether it be laminated. The question must be answered with regard to which piece of cabinet, and each piece of trim.

Q. Mr. Keeler, you spend a great deal of time testifying, do you not? A. Yes.

Q. When you come to testify you bring with you a schedule of questions which you deem necessary to prove your testimony? A. Not always.

Q. You have in this case? A. In this case I have prepared with the attorney.

Q. Who prepared the list, you or the attorney? A. I prepared it after conference with the attorney.

Q. You testify professionally a great deal, do you not? A. I do.

Q. Three-quarters of your time? A. Hardly.

Q. One-half? A. Hardly.

Q. What percent of your time is given to testifying? A. Perhaps 20%.

By Mr. Platoff: I still feel this witness is not qualified to testify.

By the Master: I am going to take the testimony and then his knowledge can be brought out upon cross-examination as it becomes necessary.

By Mr. Bianchi:

Q. What sort of work has been going on at the Asbury High School? A. Excavation, masonry, reinforced concrete, plain concrete, form work, reinforced concrete, floor construction, structural steel, face brick work, hollow tile, brick work, hollow tile and gypsum block partition work, hardwood flooring, interior brick work, Barrett Speci-

fication roof, plastering, scagliola marble, terrazzo, tile, cabinets, special floor construction, marble treads, steam heating, system plumbing, system electrical, steam vacuum cleaning system, ordinary ventilating system, ornamental plastering.

Q. Have you verified all that kind of work in that building? A. Yes, sir.

Q. What is the value of the job there? A. I think it cost us about one million dollars to complete the job.

Q. Have you got any other jobs in any city outside of New Jersey; other apartment houses outside of New Jersey? A. Yes.

Q. How many? A. Dozens of them.

Q. Any hotels? A. Yes.

Q. How many? A. I recently finished the DeWitt Clinton Hotel in Albany.

Q. Any other? A. Park Chambers at Sixth Avenue, New York City.

Q. Were the prices charged for the labor and materials entering into the performance of this additional work mentioned on that list of extra work charged at a fair and reasonable value, being the fair market value of said work during the years 1926 and 1927?

By Mr. Platoff: I object on the ground that the question is general. Here are 35 or 40 items.

By the Master: I am inclined to think that his general testimony would not be worth an awful lot. I will overrule the question.

Q. What is the customary usual builder's profit? A. 10%.

Q. Is that a reasonable amount to charge for overhead? A. —.

Q. Is that a reasonable percentage; a fair profit? A. It is.

Q. What is a reasonable amount to charge for overhead? A. 10%.

Q. What would that include? A. Compensation insurance, public liability insurance, liability insurance on subcontractors workers, scaffolding, plant, tools, job telephone, temporary telephone and telegram expenses, superintendent, night watchman or day watchman if one was employed, cleaning and removal of rubbish, traveling expenses, expenses for the expedition of delivery of materials to jobs, time-keepers time, cost of water, cost of temporary light, cost of temporary heat.

Q. Have you a list of the extra work alleged to have been done at this job? A. I have.

Q. Will you look at Item No. 1 on your list?

By the Master: It might be well to state that the paper he is referring to is a copy of Exhibit D-56.

Q. Can you tell from the plans and specifications and from your inspection made of the job, whether these extras were or were not necessary in the building?

By Mr. Platoff: I object because it is immaterial.

By the Master: I will allow it.

Q. Or whether there has been such work done on the job? A. I cannot tell where materials were actually placed in the walls.

Q. Can you go on to Item Number 2, if 60 bags

of lumnite cement had been placed in there? Could you tell us whether $2.50 is a reasonable and fair market price?

By Mr. Platoff: I object. The witness has testified he cannot tell whether this material was put in there or not.

By the Master: I will permit him to answer the question of price.

Q. Is $2.50 a reasonable price of lumnite cement? A. It is.

Q. Per bag? A. Yes, minus credit for the bags of Portland cement.

Q. Is the credit a fair credit? A. It is.

Q. Can you tell whether white cement was used on this particular job? A. Yes.

Q. What was supposed to be used there? A. Specifications call for a buff joint. The specifications for the mixture of the mortar require a mortar of a face brick work to be mixed separately and of a separate character and color.

Q. You know what happened in the elevator shaft waterproofing? A. I examined the elevator and elevator shaft and I examined the detail of the construction which I checked with the work included in the contract, and the work is installed on the building.

By Mr. Platoff: I object to the use of any detail unless the witness testifies he actually made up the detail himself.

A. I did not make this detail.

By Mr. Platoff: I object to its use.

Q. What can you tell us— A. (Witness is look-

ing at the memorandum) I checked that detail with the work that was done.

By Mr. Platoff: The witness is still using that detail.

By the Master: He can testify from it if he checked it.

Q. What happened there? A. I have checked the quantities and the work as indicated by this detail and by this itemized statement and I find that the work checks with the items indicated herein and that the prices are the fair and reasonable prices for that work and that the prices of $100.17 fairly represents the value of that work without the addition of profit or overhead.

By the Master:

Q. Mr. Keeler, in reference to this extra and the items included in that $100.17 item in reference to the elevator shaft, is all of that extra work or was any part of that included in the plans and specifications? A. There is no part of that included in the plans and specifications.

Q. I show you Exhibit D-56 and ask you whether or not you have gone over that in detail? A. I have.

Q. And that exhibit purports to be a statement of extras? A. It does.

Q. Can you look at that exhibit and tell me what items in addition to the Lumnite cement, that you cannot personally testify to, was put into this building from your inspection because you could not see it and also the quantity? A. The actual amount of white cement that entered into the mixture of the mortar, the amount of the item being

$267.75. Building table in Doctor's kitchenette, item totaling $12, I don't know, I didn't look at that table. Putting padlock on bench for telephone books, total amounting to $6. Placing one pair birch veneer amounting to $3.72. That's all.

Q. The rest, from your inspection, you can tell were put into this building? A. Yes.

Q. Did you measure the quantities in square feet or lineal feet? A. Yes.

By Mr. Bianchi:

Q. You have formed opinions as to the cost of the same? A. I have.

Q. And you have compared them with the plans and specifications to see whether they were or were not extras? A. I did.

Q. Were the prices charged for the labor and materials entering into the performance of this additional work charged on a fair and reasonable market value during the years 1926 and 1927? A. They were.

By the Master:

Q. From your experience and examination of this building and specifications, do you say that these are properly chargeable items confining yourself, of course, to the items that you personally saw were put into the building, for extra charge under this contract? A. They were.

Q. Can you tell whether the contract has been substantially complied with from the character of the building as you find it on your inspection? A. Yes.

Q. Do you think that the work had been done in a good workmanlike manner? A. It has.

Q. Would you say that all the work that you have found there with the exception of these extras, was that done in keeping with the plans and specifications? A. No, it is not done in accordance with the plans and specifications. There are many changes.

Q. Have you seen some of the revised plans here? A. Yes.

Q. Know some of these revised plans were worked on in the construction of this building? A. Yes.

Q. Have you gone over this list of omissions or were you present at the time of the examination on the omissions? A. I did go over it and was present.

By Mr. Bianchi:

Q. Would you say these omissions were true? A. I should have to take each one separately.

Q. Item No. 1, mason work, fireproofing around columns and beams omitted. What have you to say about that? A. Fireproofing around the steel columns of the basement was omitted. The fireproofing of the steel columns above the basement was done in a different manner. Fireproofing of the steel beams in connection with the steel construction of the building was done in accordance with the specifications in some cases and in a different manner in other cases.

Q. How did the cost of the work as done compare with the work as specified? A. Aside from the value of the omission of the fireproofing of the steel columns in the basement, the value is the same and in the case of the fireproofing of the steel columns in the basement, there was a saving to the contractor.

Q. Of how much, if you know, about? A. $118.10.

Q. Have you itemized that? A. I have.

Item One, B, of this list, do you know anything about the question of this brick that was supposed to match another brick on this building? A. I do not.

Q. There is nothing in the plans and specifications to show that this shall match up with another building, is there? A. No.

By the Master:

Q. Is the face brick on this building of good quality? A. It is.

Q. Does the face brick, in your opinion, compare with the specifications? A. It compares with the specifications.

Q. It is in accordance with the specifications? A. The design as stipulated by the specification has been changed, but the character of the brick as installed is in accordance with the specifications.

Item C. What sort of a joints are on the brick? A. On the face brick?

Q. Yes. A. Constructed of white sand, white cement, with mixture of either yellow or ochre coloring or yellow sand.

Q. Would that or would it not, cost more to make it of buff than white? A. More.

Q. As it is now finished, would it cost more than that called for in the specifications? A. More.

By the Master:

Q. Might I ask as to whether or not there has been any extra charge included in the extras re-

lating to that item, and which item is that? A. Item of $191.25. There has been a charge.

Q. Do you say that that is a fair price for the difference in the value or cost of what was put in? A. It is.

Q. And that what was called for in the specifications? A. It is.

By Mr. Bianchi:

Q. Item D, the question of coping. What sort of coping did you find? A. I found the coping as installed on the building was of concrete or cast cement, laid practically continuous in application. Q. Was it constructed of a good quality material, in your observation? A. It was.

Q. Was it put on in good workmanlike manner? A. Yes.

Q. Does it or does it not make a better job than a cast stone? A. Yes, it does.

By Mr. Platoff: I object because it is immaterial.

By the Master: I will allow it, and the reason that I allow it is because it may be in the testimony that it was ordered by the architect or the owner.

Q. What did you say about that? A. It makes a better job because cast continuous rather than in pieces.

Q. One is put in pieces and the cement is one long piece, is that what you mean? A. Yes. The cement is cast in place on the wall.

Q. Fitting tight? A. Correct.

By the Master:

Q. What is the difference in one way or the

other, in cost? A. It would depend upon the question of finish on the cast stone. If it were a plain precast stone, the difference in value of the two materials, not counting clamps, there would be no difference.

By Mr. Bianchi:

Q. Did you read the specifications? A. I did.

Q. And from the work as you found it there and the specifications would you or would you not say that you whether this work that was done there was cheaper or of less value than that called for in the specifications? A. The specifications call for cast cement coping. The work was of the same value, but where the specifications call for vitrified tile work, the work as installed is of greater value.

By the Master:

Q. Is there any charge made in the extras on that item? A. There is not.

By Mr. Bianchi:

Q. Next item—chimney fire brick omitted. What did you find? A. I found the chimney lined with the requirements exactly as stipulated in the specification, namely, fire clay lining, same being a round flue lining pre-cast and set in position to form a flue. The plan, however, shows this chimney built with a square flue. It is installed with a round flue.

Q. Is the chimney constructed in good workmanlike manner? A. It is.

By the Master:

Q. What was the difference in cost, if any, be-

tween the chimney fire brick in accordance with the plans and the way it was put in? A. I failed to find the requirement for fire brick, so I could not estimate that item, but I can give you the estimate of the value of the flue line as installed, 64 lineal feet at $2.48 per lineal foot, $159.72, plus the labor and installation at $1.00 per lineal foot or $64. Grand total of $233.72, without the addition of overhead or profit.

Q. So you would say that the cost was at least the amount that Mr. Shilowitz has down here for the chimney fire brick of $250? A. Cost would be more because in addition to that the round flue lining requires greater brick work. The corners had to be filled in the brick work.

Q. Well, what cost more? A. If it had been done in fire brick.

Q. It cost more to do it this way than if you had used fire brick? A. Cost more to do it this way than if you had used a square flue.

Q. Then there is no credit due to the owner on account of this change? A. I cannot find in this specification or plans anything providing fire brick anywhere.

Q. So there is no credit due to the owner on this item in your opinion? A. There is no credit due.

Q. On that item, was there any extra charges made? A. No.

By Mr. Bianchi:

Q. Down to Item F, on the question of lath in shafts, what did you find? A. I examined the elevator shaft and found no wood lath installed in that shaft but I did find the shaft plastered directly on the fireproof walls of the elevator shaft.

I examined the shafts of the dumbwaiters, and in these shafts neither wood, lath nor plastering was applied.

Q. What did you say, would it have been practically used and are lath used in shafts?

By Mr. Platoff: I object. It is immaterial.

By Master: I will let him answer it.

A. Would it be practical to use wooden lath in the elevator shaft? A. Not wooden lath.

Q. Is it permitted? A. Against the Underwriters.

Q. In the dumbwaiter shaft, what did you find? A. I found the dumbwaiter shaft constructed of gypsum block painted on the interior.

Q. Is that a good workmanlike manner job? A. It is.

Q. Is there anything there that would indicate to you that that should have been plastered with cement on lath? A. No.

By the Master:

Q. Was there anything in the plans and specifications that they should have been plastered? A. Not in the dumbwaiter shaft. The elevator shaft to have wooden lath. The word "shaft" is used in the specification. It is a question of interpretation whether that includes one or more shafts.

By Mr. Bianchi:

Q. Isn't it a fact that wooden lath are not allowed in elevator shafts because of fire, vermin and rats?

By Mr. Platoff: I object to that. It is a leading question.

By the Master: I will allow the answer.

A. Because wooden lath installed in a shaft which is built on fireproof walls must have a nailing support. It is necessary in order to install this lath, to install first wood furring strips and this provides an open space or flue back of the plastering between the lath and the hollow tile block.

By the Master:

Q. What would you say, that that elevator shaft as it is constructed, is fireproof or semi-fireproof. A. It is now a fireproof elevator shaft.

Q. Would it be a fireproof elevator shaft if this wooden lath were put in there? A. Certainly would not.

Q. What about the difference in cost, or was there any saving to the contractor by not putting in a wooden lath? A. No, there was no saving. He applied his plaster directly to the gypsum block in the elevator shaft only.

By Mr. Bianchi:

Q. Item G. What have you to say about gypsum block that is called for in that item? A. The gypsum block fireproofing was not installed in accordance with the specifications. Here is a case where you have an offsetting extra charge.

Q. What was done? A. The floors and ceilings were of the specified area, were sound proofed and sound resisting by the use of flax linum and thermofill, and the thermofill in the floors was

placed between the wood joist, directly over the plaster-board, which was applied on the basement ceiling and the flax linum apparently was installed. I did not take up the floor. I measured the area between the under and upper floors.

Q. What was the extra charge on this work? A. Deafening three room apartment, first floor, aggregating $720.11. Deafening the south dividing walls, aggregating $178.37.

Q. Is gypsum block a sound resistant? A. To an extent.

Q. Is that what it is used for? A. No.

Q. What is it used for? A. Partition work.

By the Master:

Q. What would it have cost to put the gypsum block in the floors and ceiling of the Doctor's apartment, if you know? A. $865.20, including an allowance of 10% for overhead and 10% for profit.

Q. Was that amount saved by the contractor by not putting gypsum block in, in your opinion? A. Yes.

Q. Therefore, instead of doing that, he put in these extras, thermofill and flax linum. Am I correct in that? A. Yes.

Q. Would you say that the amount should be to offset the credit that was saved against the cost of putting flax linum or do you say that the extras that are charged are after giving the credit for the $800 saving? A. Not considering the fact that the method indicated in the specification could not be done because it was impractical and not considering any other offsetting item or any other item of extra work done for which a charge has not been made, I should say that one item

would offset the other, or whatever the difference is.

By the Master: So that counsel may know, what I take from this testimony is that something was substituted for the gypsum block; that the contractor has charged the entire cost of the substitution as an extra without in any wise allowing any credit for the omitted material, or the saving to him, and my understanding from this testimony is that if he is allowed the extra cost the owner is entited to the credit for the omitted material.

Q. Was there any other item to offset? A. There were. That's something else.

By Mr. Bianchi:

Q. What about the cellar? (Item H). A. The specifications provide that the cellar ceiling is to have three coats of plaster. That is not the construction installed. Instead there is installed the sackets or plasterboard, which, under the Doctor's apartment, was reinforced and specially nailed to take the load of the thermofill installed on the top of it, and in all cases these sackets or plaster-boards were covered with one coat of plaster, which was in effect, a combination of a scratch and brown coat, or in other words, having the effect of having about one and one-half coats of plaster over the plaster-board.

Q. Did the contractor save any money, or did it cost him more? A. He probably saved a little money in doing the job as it is now finished.

Q. Was it necessary to have the plaster board

there to have the thermofill there? A. Yes, and it was specified.

Q. How much do you think he may have saved, if anything? A. I recall that it was approximately 300 yards. The saving on the work as performed would have been approximately 40¢ a yard, or $120.

Q. Item I. Stair Soffets. A. The specifications call for the stair soffets to be plastered, plastering to be applied to wall board, I believe. The plans do not show stair soffets. The work as installed is a fireproof stair case with open finished underside, or soffet.

Q. Is there any credit due to the owner on this item? A. There is not. It is not an omission.

Q. Didn't omit anything? A. No.

By the Master:

Q. Did you say that the stair soffets are constructed in accordance with the specifications? A. And the plans.

Q. Is there any difference between the specifications and the plans respecting the stair soffets? A. Not the way I interpret them.

By Mr. Bianchi:

Q. Item J. Tell us about the proposition of the cornices. A. The plastered cornices in the halls are installed in accordance with a design that is indicated on Sheet No. 8 of the contract drawings.

Q. So that the contractor did not save any money on the cornice work? A. He did not.

Q. Go down to Item K. Know anything about the garbage receptacles? A. Yes. Some of them are missing. Where they are missing they were

taken out to make room for the installation of the kitchen-maid.

Q. Any credit due to the owner? A. They should have been a charge. The brick work had to be rebuilt after the receptacles were taken out.

Q. You mean the contractor should have charged for it? A. Should have, yes.

Q. Go down to carpentry and cabinet trim. I want to ask you at this time if you ever had been engaged in the actual making of millwork? A. Yes, sir. I was doing it myself with my own hands.

Q. What do you know about this cabinet trim proposition, we were talking about? A. The trim as installed in the building does not comply with the plans or specifications. It is different in application, difference in size and workmanship. It is the called for cabinet trim excepting the places where the joints are made in the casings of the door opening, and the window casing. The trim as installed is both mitre and coped. While as specified it would have been put together with dowls and glue at the mill.

Q. Do you know the Tudor Hall apartment job? A. Yes; in Englewood.

Q. Do you know whether this trim in this building compares with that and how? A. In character it is equivalent.

By Mr. Platoff: I object to any comparison of trim with Tudor Hall. There was no testimony from anybody that the trim there was to be like Tudor Hall trim. The only testimony was as to brick work in Tudor Hall.

By the Master: I am uncertain as to whether there was any testimony respecting Tudor Hall excepting the face brick. I have a recollection of Mr. Ach being examined, I thought, in reference to cabinet trim in Tudor Hall and here, or it may have been that this witness testified as to brick work. However, I am going to admit the testimony subject of course, to its being or having been already connected up.

A. It is of the same general character, but I did not check the design in detail.

By the Master:

Q. What have you to say when you say "general character", what have you to say from inspection as to difference in cost of the Tudor Hall trim and this trim? A. No difference.

Q. What difference is there between the cost of putting in trim that is in this building and the cabinet trim that is specified in the specifications? A. Without the addition of any allowances for overhead or profit, $260. That's the unit.

By Mr. Bianchi:

Q. Book cases and instrument cases in the Doctor's apartment. What have you to say as to this item? A. There is an exhibit here showing the book cases and instrument cases and I examined that. I understand and I am not attempting to testify on any changes in connection with the value of these book cases, but the value of the book cases as shown on this Exhibit is $166 without the above mentioned addition of any overhead or profit.

Q. You don't know whether the others were taken out or not? A. I don't know.

Q. Kitchen dressers. The contractor allowed $400. Is that a fair allowance? A. In making my answer, I am not taking into consideration any charge that he may have made for the installation of the Kitchen Maid equipment or for any work that he did in placing the moldings or strips around the Kitchen Maid equipment; for the case itself, delivered and set in the building, an allowance of $20 to $25 per case is fair. It would depend upon the detail, and I saw no detail that was ever prepared for the case and there are 20 kitchenettes with 20 cases, which would mean from $400 to $500.

By Mr. Platoff:

Q. How much labor cost to install them? A. These cabinets would come probably ready to set against the wall. I presume, two carpenters working together could take one of these cases and set it in possibly about two or three hours.

By the Master:

Q. How about the trim? A. The trim would be a part of the case.

Q. So that it would be a finished job in two or three hours, right? A. Yes.

By Mr. Platoff:

Q. That would be $6 a piece? A. Yes.

Q. Isn't it a fact that these do not come assembled; that they are reassembled on the job? A. Depends on the detail.

Q. They come assembled? A. Yes. You would have to hang the doors.

Q. Kitchen cabinets are ready assembled at the mill for $20 a piece? A. From $20 to $25, depending upon the detail.

By the Master:

Q. What have you to say as to the item of $1,,000 which Mr. Shilowitz testified to? You think that is high? A. Yes.

Q. You think that should be one-half of that? A. About one-half of that would be right.

Q. Are you including the labor in that one-half price? A. My figure, $20 to $25, passed upon the detail, includes these cases set in places.

Q. Including the labor? A. Yes.

Q. D—Oak floors. What do you know about that? A. The specifications call for No. 1 quality white oak. There is not now and there was not at the time this specification was written such a grade—white oak floor. Grading rules for white oak flooring are established by the oak flooring manufacturing association. The rules were changed on the 6th day of October, 1927. I cannot tell whether the floor as installed was purchased from the preceding rules or from the new rules, but the pamphlet containing these rules, which are known to the trade, grade the new grade with the old grades marked in quotations. The nearest grade that I can find that was in effect or in use prior to October 6, 1927, was known as "clear" which is stipulated in the Grading Rules to have one face practically free of defects, except 3/8 of an inch of pryed sap, the question of color shall not be considered. That grade of flooring is now known as "first grade" and it

is highest grade of flooring by the association excepting that there is a grade not listed in these rules known among the trade as "Selected for Color" which means the exception of all pieces that do not match up in color. The flooring there, as specified and as installed in this building, is what is now known as "first grade" and prior to October, 1927, was known as "clear oak flooring" and is the highest grade of oak flooring manufactured.

Q. From your experience of construction of flooring, would you say this flooring you found in this building is good floor used? A. Yes.

Q. The workmanship is good workmanship? A. Excellent.

By the Master:

Q. Would you say it is the highest grade except this higher quality of select color? A. Except that, yes.

Q. Would you say this was a good job? A. First class job.

By Mr. Platoff:

Q. Would you say that there was a saving to the contractor by using something cheaper than what was specified in the specifications? A. He has used what is specified in the specifications.

Q. The next item, milk cabinets in the basement. A. There are none there that I could find.

By the Master:

Q. Are milk cabinets specified? A. Yes.

Q. Was there any saving by not putting them in? A. Yes.

Q. How much? A. These were 6″ x 6″. 10″ x 10″, and assuming that the detail would call for them to be built consecutively not individually, they would be worth $20 with no allowances for overhead or profit.

Q. Is there any detail given here? A. No.

By Mr. Platoff:

Q. Item F—Platforms for laundry. What is that? A. The plans did not call for a laundry and there is not now installed in the building a laundry, but there are installed the one combination of wash trays in a corner of the building.

Q. Was it necessary that you have to have a platform for every tub? A. No.

Q. Does it specify such? A. Yes.

By the Master:

Q. Was there any saving by not putting them in? A. Yes.

Q. How much? A. $15.

Q. That platform simply consists of rough flooring, 2 x 4? A. It could be that or 1″ x 2″ cleats.

By Mr. Platoff:

Q. Door checks. A. Every fireproof door that was specified to have a door check has either a door check or self closing spring hinges.

By the Master:

Q. Any saving on this item? A. No.

By Mr. Marcus:

Q. Item No. 9—Roofing and sheet metal work. Duct omitted. What have you to say about that?

A. The plans show a duct and there is no duct installed in the basement, but I cannot say whether it is omitted from the metal and sheet work or what it is made from.

Q. I show you the contract Exhibit D-4. A. It is not in the roof contract.

Q. You have examined the roofing contract? A. Yes, and the specifications.

By the Master:

Q. What saving was it to the contractor in not having a duct? A. It would depend upon the detail. $150 may be a fair price.

Q. Is the roof a Barrett roof? A. I cannot answer that question.

Q. You know what a Barrett roof is, don't you? A. I do.

Q. You examined it? A. I did.

Q. What have you to say with its comparison with a roof in accordance to the Barrett specification? A. Aside of the fact that it was not installed by a licensed Barrett roofer and aside from the fact that no bond guaranteeing against defects in workmanship is furnished, it is installed in accordance with the requirements of the Barrett specifications so far as I can see from an examination of the roof, which did not include cutting through.

Q. You know the Barrett bond don't you? A. I know the form of bond, yes.

By Mr. Marcus:

Q. That Barrett Bond is simply a guaranty against poor material and poor workmanship not a guaranty that the roof will last any length

of time? A. It is a guaranty for a period of twenty years.

Q. But not that the roof will not leak in twenty years? A. No. If the roof is misused, broken or in any way damaged by cutting through, it is my understanding of the form of bond is that it will not guarantee.

Q. If the contractor made a contract for this roof that was placed on the building at the cost of $1,800, would you say that he saved anything by having the roof that was put on put there, over what it would cost for a Barrett roof? A. He did not, no.

By the Master:

Q. Would you say that the roof that was placed there was placed in accordance with the plans and specifications? A. —

Q. What about the last item for roofing—copper flashing around parapet. Is that in the roofing specification? A. Yes.

Q. Are there copper flashings around the parapet or have you examined into that? A. There are flashings around the parapets but I did not examine the exact nature of these flashings.

Q. From these flashings that are around the parapet that you looked at, could you state whether or not there was any saving by the contractor in putting the flashings he did put there? A. In my opinion there was no saving.

Continuation of testimony of MR. KEELER, previously sworn.

By Mr. Bianchi:

Q. Do the plans show a ventilating duct in the basement? A. They do.

Q. Is this covered by the specification? A. It is not.

Q. Under what special contract, if any, do trade customs require where such duct be specified?

By Mr. Platoff: I object on the grounds that it is immaterial.

By the Master: I will allow the answer.

A. Heading of roofing and sheet metal contract.

Q. In other words, the fact that it is shown on the plans and is not specified would leave a doubt whether it would be a part of the roofer's contract, the plumber's contract, or the heating contract? A. That's right.

(All taken subject to Mr. Platoff's objection).

By the Master: It is stipulated that the Item No. 9, A, ventilating duct omitted is a duct that is shown on the plans to be built in the basement.

By Mr. Bianchi:

Q. There has been testimony taken to the effect that this duct might have been worth about $150. Is that right? A. That's about right.

Q. Would you be giving credit for any work that was done in lieu of this duct? A. No.

By the Master:

Q. Was there any work done that you could observe in lieu of this duct? A. A lot of work done, in addition to the specification and for which no charge has been made.

Q. Anything that you particularly could point out as something put in instead of the duct? A. No, sir.

By Mr. Bianchi:

Q. Did you examine the roof? A. I did.

Q. Did you open any portion of the roof? A. I did not.

Q. Was it raining while you were examining it? A. Sure, it was.

Q. Did you examine the roof in reference to leaks? A. did.

Q. Did you ask anyone to point out the leaks—the location of the leaks? A. I did. I asked the janitor.

Q. Did you see any leaks? A. No.

Q. And he pointed out to you where leaks had occurred? A. No. I asked him to point out to me where leaks had occurred.

Q. What is the character of the construction of the walls exterior? A. Built of hollow cinder concrete block with the exterior of the wall faced with face brick or stucco and the interior face of the walls have been rough line faced with common brick.

Q. And the walls themselves are simply ordinary cement block and one layer of brick? A. Generally. A parapet wall faced on the inside with common brick.

Q. Parapet wall is that part of the wall that extends to the roof? A. To the coping.

Q. The coping is what finishes off the top part of the wall which starts at the wall and runs to the top of the building? A. Yes.

Q. How high is this parapet wall? A. It aver-

ages about three feet but it divers with the pitch of the roof and the elevations of the coping.

Q. Is a wall constructed of hollow cement block waterproof? A. It is not.

Q. Would such a wall keep out seepage where that might strike on the outside of the face of the brick work? A. It would not.

Q. Isn't it a fact that such a construction invites seepage? A. It does.

Q. How can it be prevented? A. Either by waterproofing the exterior face of the wall or waterproofing the interior face of the wall.

Q. Did this contract specify such waterproofing work? A. It did not.

Q. Did the contractor go back and waterproof it? A. He did.

Q. You know how much money he spent doing that? A. I prepared an estimate.

Q. About how much? A. $1,061 including 10% overhead and 10% profit.

By the Master:

Q. Is that included in the extras? A. It is not.

By Mr. Bianchi:

Q. In your opinion does the roof itself that was covered with was that on the roof in compliance with the plans and specifications outside of the question of securing a bond? A. It does.

Q. Now, what would be an effect of water striking against this parapet wall without the waterproofing that was put on there? A. It would go through the mortar joints of the brick work, strike the cinder concrete block and there absorbed by the block or run down through the hollow grooves through the block.

Q. When you say cinder, do you mean porous block? A. Porous block.

By the Master:

Q. Does that cinder block comply with the specifications? A. It does.

By Mr. Bianchi:

Q. And in your opinion this water simply hits up against the wall composed of brick and cinder block and went through into the building? A. No doubt about it.

Q. And that caused the leak? A. No doubt.

Q. You know after this waterproofing was done whether there was further leakage? A. I failed to find any leaks in evidence of any leaks and questioning the tenants in the top floor where the janitor stated that the leaks had last occurred, she stated that no leaks had been observed since the waterproofing had been done.

By the Master:

Q. Did you know when the waterproofing was done? A. About the—a little over a year ago, or thereabouts.

Q. Where the janitor pointed out any places that had been leaks, the plaster had been fixed up if there had been leaks? A. The walls were repainted.

Q. Could you tell from looking at the walls whether there had been leaks or not? A. No.

Q. Were these leaks on the ceiling or side walls? A. They were on side walls. And down above the heads of the windows on the top.

By Mr. Bianchi:

Q. (Referring to the question of the flooring referred to in Item 2-B.) There has been some testimony that the finished floors in the building were wet, rough and warped. Did you find any such condition? A. I did.

Q. Where? A. In the basement of the janitors' quarters.

Q. Describe if you can the cause of this condition? A. Dampness from the cellar bottom soaked into the wood sleepers upon which the flooring was laid and this dampness alternately drying out caused dry rot of the supportion sleepers, which caused the finished floor to warp and twist.

Q. Did you look at the flooring above the basement? A. I did.

Q. Did you find any of these floors warped or twisted? A. I did not.

By the Master:

Q. Would the flooring in the basement be warped by these same causes whether a number one or some inferior quality was used or not? A. It would make no difference. It would warp just the same.

By Mr. Bianchi:

Q. Item No. 3, tile and marble. Was the marble Tennessee Pink Marble? A. It was.

Q. Does the color of the marble make any difference in the cost? A. Very little.

Q. Did you measure the thickness of stair treads? A. 1¼" full.

Q. There has been some testimony to the effect

that grounds were omitted. Is that true? A. You cannot tell that from just general observation. I cannot answer the question as to whether they were or not omitted.

By the Master:

Q. Could Mr. Shilowitz from an examination such as you made, determine whether the grounds were omitted or not? A. I don't think he could without tearing the building apart.

By Mr. Bianchi:

Q. What is the general purpose of the grounds? A. Two purposes. One to secure the nailing of the installation on wood work or wood trim; the other to create a straight edge to which the plasterer will finish his plastering, so that the trim when later installed, will form a clean cut joint with the plaster.

Q. Do you know whether or not there was a ground installed? A. I do not.

Q. Is it impossible to tell from inspecting the building? A. It is.

By the Master:

Q. From your examination of the plaster of the wall, could you tell any unfinished work that would be caused by the grounds being omitted? A. There was no unfinished work.

Q. Was there any evidence there from your examination that the grounds were omitted? A. There was no evidence.

Q. What would be the evidence? A. The base tread would not fit tightly to the plastering or would not be properly nailed in position.

Q. Did you find that the base tread did not fit tightly? A. They did fit tightly.

By Mr. Bianchi:

Q. From your experience as a builder, and your inspection of this work, would you say that the woodwork was properly backed with the nailing pieces? A. It is so properly installed.

Q. Did you examine the bath room floors? A. I did.

Q. Did you note whether the floors were deafened according to the specifications? A. —

Q. How many bath room floors did you examine? A. I was in a half dozen bath room floors in different parts of the building.

Q. Can you tell from the finished flooring was put in in good workmanlike manner? A. They were.

Q. Referring to page 9 of the specification, I ask you what method you would use to comply with this specification? A. The proper way to comply with this specification which calls for the contractor to prepare all foundation work for tile marble and terrazzo floors, would be to nail furring strips on the sides of the timber, approximately 3″ below the top of the timber laying either on one inch rough floor and adz the top edges of the joist or timber to a point and fill with a cinder concrete bed or deafening.

Q. If this particular flooring in the bath room would not have been properly laid, what would have happened to it? A. The tile would have come up.

Q. (Referring to the question of speculative building.) You have heard the words "speculative building" used in this proceedings. Are you fami-

liar with the type of building known as "speculation" and the type of building known as "investment building"? Is there any difference? A. There is not, except in the case of a private residence being built for private use.

Q. Can you ordinarily during the progress of the work, tell whether buildings are being put up to sell or to keep? A. Not an apartment house.

Q. You say in case of a private house it would be considered non-speculative? A. Case of private residence, built for private owner, the type of the job would be better.

Q. In forming your estimates as to the value of this work, as you have testified to, what method did you employ? A. I took the plans and specifications; examined them; examined the building as now completed and measured from the plans the various items, quantities and materials required to make up the items and then I took the bills, which were rendered for the materials furnished to this operation, and checked quantities charged on the bills with my estimated quantities and checked prices with my estimated prices.

Q. (Referring to final certificate.) Did Mr. Vitille see you in reference to this building in reference to construction while he was working on it or shortly thereafter? A. After it was completed.

Q. Did you have any conversation with Mr. Ach the architect on this particular job on or about September, 1928? A. I did.

Q. In reference to the final certificate? A. I did.

Q. What was that conversation?

By Mr. Platoff: I object on the ground that it is hearsay.

By the Master: I will admit it in evidence on the ground that Mr. Ach is the

agent of the owner. As to its probative source, of course, I will determine that later. All of this testimony is subject to Mr. Platoff's objection.

Q. What was the conversation between you and Mr. Ach? A. I told him that Mr. Vitille came to see me with regard to the issuance of a final certificate on the McDonnell apartment house. I told him that I had gone over the matter with Mr. Vitille and could see no reason why the certificate should not be issued. Mr. Ach stated that he had been very busy in his office and had not found the time to complete the certificate. I asked him whether there was any question with regard to the work being incompleted. He said it was. I asked him when we could expect the final certificate and he promised on a certain day, I think it was either the following Tuesday or within a week.

Q. Then, his excuse was the fact that he was busy on other work? A. Right.

By the Master:

Q. In your conversation with Mr. Ach did you question him in reference to the extras or wasn't it taken up at all? A. I asked him if there was any question about the job aside from his being unable to get around to get the final certificate and he said there was none.

Q. Had you, at that time, gone over the extras charged by the contractor? A. I had looked over the bill but I had not checked the bill.

Q. Was the bill the same as the bill is now? Same as the bill produced at this proceeding? A. It was.

By Mr. Bianchi:

Q. This bill for extras, that was prepared by whom? A. By Vitille.

Q. That was not prepared by you, was it? A. No.

Q. These bills that he has presented here as being made up by him, did you make them up? A. I did not.

Q. Whatever you made up or testified here, was made after your examination of the building for today's testimony? A. Correct.

Q. From going over these specifications that had been put in evidence as part of this contract, can you or cannot you tell whether these specifications were made for this particular job or not?

By Mr. Platoff: I object because it is immaterial.

By the Master: I will permit the question to be answered subject to the objection of Mr. Platoff.

Not for any purpose showing that these were not the specification for this particular job according to contract, but for the purpose of disclosing that these were what we might term, general specifications, that were used on any number of different jobs.

A. The specifications are general in form in some instances and call for a number of things that are not required in there.

Q. You mean in this particular job, this particular building? A. This particular building.

By the Master:

Q. By that what do you mean? Is it something

inconsistent? A. Inconsistent. The specifications refer to the balcony and refer to certain work in connection with that balcony but there is no balcony there, inside or outside of this building.

By Mr. Bianchi:

Q. Any other places, do you know? A. There are several other places.

By the Master:

Q. But so far as the general construction work or general job of construction work of what was to go into this building; the building can be built according to these specifications? A. Yes, sir.

By Mr. Bianchi:

Q. Now, in going over the bill of extras which you testified and which has been offered at this trial, could you say whether this bill of extras covers all of the items of extra work that were actually performed on this building? A. I can.

Q. Do they cover all the extra work on the building? A. They do not.

Q. What were the other additional items of extra work? A. I have to refer to a memorandum that I made.

Q. In your writing? A. Yes.

(a) The waterproofing of the inside of the parapet walls. The waterproofing of the exterior of the rear walls and the waterproofing of the exterior of the court walls, the value of which I estimate at $1,061. In all these figures I include 10% overhead and 10% profit.

(b) Plastering the interior of the main elevator shaft, the value of which I estimate at $237.00.

(c) The installation of ornamental plaster cornices above the first stair, in the living rooms, dining rooms and foyers, the value of which I estimate at $3,249.00.

(d) The removal of garbage receptacles and patching and for the change of location of kitchen, the value of which I estimate at $30.

(e) The enlargement of the front vestibule inclusive of the change of the design thereof, the value of which I estimate at $242.

(f) Placing of wall panels moldings on the side walls generally in the living rooms and dining rooms above the first floor, the value of which, not including the value of the material, I estimate at $554.00. The material is listed in the bill of extra submitted by the mill man.

(g) The finishing of the painted walls in two tones by reason of the installations of these wall moldings the value of which I estimate at $320.00.

(h) The installation of certain diamond design brick work, the value of which I estimate at $350.00.

Q. In other words, the contractor put in a different design than that called for? A. Correct.

Q. Took more work to put in this different design? A. Correct (witness continues.)

Changes in the location of five bath room partitions in the rear of the building reset

in order to provide room for plumbing pipes in connection with artificial refrigeration and/or plumbing spaces in the bath room, the value of which I estimate at $100.00.

Changes in the design of the front elevation of the building whereby certain cut stone copings were installed, the value of which I estimate at $123.00.

The cutting down of 18 or 20 doors (there seems to be some discussion as to whether it was 18 or 20), 18 at $3.00 a piece would be $54.00.

Q. Why were these doors cut down? A. They were designed on the plans for a width wider than the opening and wider than it was possible to install, and wider than the metal and other jambs installed.

Q. Is that an error in the plans? A. It is.

By the Master:

Q. You spoke about the taking out of garbage receptacles that was rendered necessary by the installation of the kitchen equipment or cabinets. Did the fact that the kitchen cabinets were put in there make it necessary not to put the garbage receptacles in? A. Correct.

Q. Were all of these extras actually in addition to what is either on the plans or specifications? A. They are.

By Mr. Bianchi:

Q. And, in addition to what has actually been charged hereby Mr. Vitille as extras? A. Correct.

By the Master:

Q. Do those figures that you have given for the

extras not charged for, take into consideration any allowances for work that was omitted? A. Wherever there is an offsetting item on the particular item to which I have testified, there the allowance has been made, but no allowance has been made for any omission which I have previously testified as having been actually omitted from the work.

By Mr. Bianchi:

Q. There has been some talk here about this flax linum. Are you familiar with the use of it? A. I am.

Q. What is its deadening qualities? A. From tests which I have made of the comparative deadening qualities as between gypsum block, cinder concrete fill, celotex and flax linum, the latter is and has the best sound resisting qualities.

Q. What has? A. Flax linum.

Q. Going down to the basement, did you notice the sewer pipe or waste pipe exposed or partly exposed? A. Partly exposed.

Q. Do you know whether that laid on solid rock or not? A. It did.

Q. If the pipe had been completely put out of sight, would it have cost more to blast or to remove the block in the excavation to hide this pipe? A. Trench would have to be blasted in the block to cover the pipe.

Q. Would that have cost more? A. It was not included in the contract.

Q. And thereby would have added the cost to the owner? A. It would.

Q. Outside of the fact that this pipe is exposed, has it done any harm? A. None whatever.

Q. It might even help in case the pipe become

clogged—it can be opened—reached easier? A. Well, that's a question.

Q. To dig a trench for this pipe would be an added expense? A. It would.

Q. And this rock excavation was not covered by the contract or specifications? A. It was not.

Q. Did you examine the revised specifications for electrical work? A. I did.

Q. Did you, in this revised specification, find that it required wires of bells to be concealed in conduits? A. I did not.

Q. Did they call for any conduits? A. No.

Q. By whom was the revised specification (electrical) made? A. I understand by Mr. Ach.

Q. From your examination of the building and from what you were able to see of the electrical wiring system, would you say that it was a good job? A. In this type of building?

By the Master:

Q. Did that comply with the specifications? A. So far as I could see. I judge the character of the job from the small portions that are exposed.

By Mr. Bianchi:

Q. Was there some change in the toilet bowls as to the matter of flushing? A. There was.

Q. They are now flushed how? A. They are now installed with flushometer.

Q. Is it not necessary to have a high main for supply pipe for such an installation? A. It is.

Q. Did you ever try any of the flushing system, or flushometers to see if they worked? A. I did.

Q. Are they of sufficient size? A. Have to be.

Q. And were they larger than what the con-

tract called for? A. They would have to be or it would not work.

Q. The original contract did not call for flushometers? A. Did not.

Q. Is that more expensive? A. It is.

Q. Is it included in the extras? A. It is included in the extra bill rendered by the plumber.

Q. Did Mr. Vitille submit any extra bill for that, do you know? A. Yes, in the plumber's extra bill.

Q. The question was that it required a high supply pipe? A. And the different bowl. The whole system is changed. Installation is different.

Q. What is a kalamien door? A. A kalamien door is a door constructed with a solid wood core over which there is drawn and attached metal, either tin, copper or some other pliable metal, making it fire-resisting and sometimes called "fireproof."

Q. Can you alter the size of a kalamien door after it is installed? A. Yes.

Q. To what extent? A. Very little. It is built to fit.

Q. Is a kalamien door loose fitting or tight fitting? A. Must be loose.

Q. Why? A. Because the edges of the door would otherwise bend in. In fact, a kalamien door is not a fireproof door but a cheap fireproof substitution. A fireproof door is an all steel door. That is the only fireproof door there is.

Q. Did this set back on the jamb bucks? A. Yes.

Q. And therefore there is a possible space through which fire can go through? A. Smoke only can pass there.

Q. In other words, it being metal you cannot have it tight? A. No.

Q. It is generally a least bit rough? A. Yes.

Q. The edges are rough? A. This is a cheap door.

Q. And it also easily becomes marred? A. It scars just like a wood door.

By the Master:

Q. This door usually opens only one way? A. There are kalamien doors in the apartment. Yes, they are the entrance doors to the various apartments and by law they must be fire resisting doors.

Q. I mean, they swing only one way? A. Correct.

Q. And go back against a set-back? A. And that set-back is steel.

By Mr. Bianchi:

Q. Do you know there is a laundry in the building? A. There is no laundry.

Q. What is actually installed? A. Combination tubs, one set.

Q. Going back to the trim, there was some discussion as to how it was painted. Do you know whether it was back painted? A. Impossible to tell.

Q. Without taking the trim off you cannot tell? A. No.

Q. When you say "back-trim" do you mean it is painted in the back before it is nailed down? A. Correct.

Q. This is the item referred to in Item 10-A on Exhibit C-3. You are certain that you cannot tell whether they were back painted without taking them off? A. There is no evidence that it was or wasn't.

By the Master:

Q. From looking at it from the outside, could you not examine the interior trim whether there was any difference in it, or different in condition, which would be caused by the back of it not being painted? A. There was not.

By Mr. Bianchi:

Q. Where is the trim usually back painted, all the trim in the building or just that exposed—outside wall.

By Mr. Platoff: It is immaterial. The specifications call for it, that's all.

A. Around the window or the door, the back side of the base.

By the Master:

Q. Did the specifications call for back paint? A. Yes, it does.

Q. Assuming that this trim was not back pianted, what would you say would have been a reasonable cost to back paint it? A. Including 10% overhead and 10% profit, $231.00.

Q. In making that estimate you do not take into consideration any of the extra work which the contractor may have done in lieu of the painting of this trim? A. I do not.

Q. Did he do any specific extra work that you would call in lieu of back paint of trim? A. No.

By Mr. Bianchi:

Q. The fact that the trim was not back painted,

would you say that it made the job any poorer? Would you say there is a change in workmanship? A. No. The trim as installed is a first class job.

Cross Examination by Mr. Platoff:

Q. Mr. Keeler, how long do you know Mr. Vitille? A. About 22 years.

Q. And your relations with him always have been friendly? A. Yes.

Q. And you are here on his behalf as a friend, are you not? A. I am here on his behalf as a friend and in behalf of the case as an expert witness.

Q. And Mr. Vitille came to you sometime in 1928 to speak to you in regard to his final certificate? He came to you as a friend? A. No.

Q. He came to you as a professional? A. That is one of my items of my business—to give advice to contractors.

Q. But he came to you professionally at that time? A. Yes.

Q. Did he tell you that Mr. Ach is an old friend of his? A. No.

Q. When you talked to Mr. Ach, did you get the impression that Mr. Ach was friendly? A. He was very nice over the telephone.

Q. Did you know the fact that Mr. Ach and Mr. Vitille were very friendly? A. I did not. I did not know.

Q. Did Mr. Ach tell you that he was trying to help Mr. Vitille as much as he could? A. No.

Q. What was this hotel did you say, you built? A. DeWitt Clinton.

Q. You say that the workmanship in this building was first class? A. Yes, sir.

Q. How does it compare with DeWitt Clinton Hotel? A. No comparison.

Q. You mean yours was built for investment, and this for speculation? A. No.

Q. What is the difference in character? A. The building in Woodcliff is a non-fireproof or a semi-fireproof building. The building is on a rock foundation. The building in Albany with a steel frame, it is an all fireproof building in every way, shape and manner.

Q. The fact that it is fireproof, doesn't mean that the workmanship is better, does it? A. In some cases, yes.

Q. What is the comparison of the trim work in this building? A. Insofar as the trim in the living rooms is concerned, I would say that the trim in the DeWitt Clinton Hotel, are equal. Insofar as the foyers are concerned there is no comparison.

Q. I am talking about the workmanship? A. Equally generally, equal.

Q. What would you say the comparison of the workmanship of the brick work and this building? A. For their respective designs, one is as good as the other.

Q. You mean to say that the brick work is of as high character as DeWitt Clinton Hotel? A. Not the same brick work.

Q. The DeWitt Clinton had better workmanship? A. Better design.

Q. You mean to say the workmanship on the DeWitt Clinton is not a better job? A. Only the design is better. This building at Woodcliff has a rough cast and the building at Albany has a smoother cast. The building at Woodcliff has different color of brick, different color of mortar; it is trimmed in stucco, where the Albany building is trimmed with Indianna Limestone Granite. There is no comparison with the job.

Q. You want us to believe that the DeWitt Clinton Hotel is far superior? A. In cast, far superior.

Q. In workmanship? A. Not as compared with the character of the design.

Q. What kind of trim have you up there, cabinet trim? A. Only in the foyers.

Q. Do you request or specify cabinet trim in the foyers? A. Yes.

Q. It is superior to the ordinary trim? A. Yes.

Q. And that is why you specify it? A. Yes.

Q. And, it is more expensive? A. Yes.

Q. And the reason you did not specify it in the other buildings is because you did not want the additional expense, isn't it? A. No.

Q. Why didn't you specify it? A. I don't know what the architect had in mind.

Q. It is an undeniable fact that cabinet trim is more expensive than mill trim? A. Yes.

Q. It is a fact that the MacDonnell job was done with mill trim? A. It was entirely different than the specification.

Q. You mean the specification called for cabinet trim and the trim finished was a mill trim? A. True.

Q. Mr. Keeler, you on your direct examination gave us the items which made up overhead and I assume that in giving us these items you included every possible item of overhead that could be included? A. No.

Q. No? A. It depends on the character of job.

Q. Do you mean to say that you only included items in the overhead that would be particular to this job? A. Approximately.

Q. You have examined Mr. Vitille's books in connection with this job, haven't you? A. No.

Q. Haven't you gone over his books in reference to the extra items? A. No. I went over the plans and specifications and the invoices rendered.

Q. Do you know what his overhead is for this job? A. No.

Q. You said, nevertheless, in your opinion 10% overhead was a proper charge to make for this job? A. Yes. The insurance would eat up more than one-half of it.

Q. How much, in your opinion, is insurance on this job? A. Approximately 5% of the cost of the labor.

Q. How much is that a month? A. I can't figure it out.

Q. You say his overhead on this job is 10%, and his insurance is one-half, on which approximately, in your opinion, his overhead is about $12,000? A. Correct.

Q. Approximately. I am taking an average now for the extra work. A. Yes.

Q. Now, if $12,000 was approximately the total overhead, what portion of that would be insurance? A. 5% of the labor cost.

Q. How much is that in money, approximately? A. I don't know.

Q. I am asking you now to justify your statement that one-half of the overhead would be consumed for insurance? A. There would be a way at getting at it.

Q. Then, if your approximate overhead on this job is $12,000, and the cost of insurance equals approximately one-half of that? A. I said it would be about one-half of it on labor items.

Q. Lets not split hairs about it. A. I can explain it.

Q. I want to justify your statements if we can. A. The labor on the job is what it depends upon —the amount of the labor.

MR. KEELER, on cross examination by Mr. Platoff.

Q. Will you please give me item by item what you estimate the overhead on this job? A. That is impossible. I can give you items that go to make the overhead but I can't apportion fractions of cents.

Q. But you said 10% was a fair charge for overhead. On what do you base that? A. On the prevailing trade custom and on the experience of 22 years as a contractor keeping exact account of overhead on the jobs that I did.

Q. I understand that you were testifying to the reasonable charge of 10% for overhead on this job not based on custom on other jobs but in your opinion what the actual approximate overhead was on this job? A. Correct.

Q. If that is correct, will you give me the items of overhead and approximate items of overhead which were borne by this contractor on this job? A. The items and the amounts?

Q. Yes. A. That is impossible without an examination of the books.

Q. Will you tell me approximately what insurance cost on this job which you claim to be the largest cost on this job? A. Yes, I can tell about what insurance will cost. Compensation and public liability insurance on this job would probably cost about $2,000.

Q. Are you making allowance for the fact that part of this work was sublet to contractors who insured their own work? A. Yes.

Q. You are giving me now the contractor's insurance item? A. Vitille's insurance item.

Q. What other items of overhead are there here? A. One of the principal items is the em-

ployment of a resident superintendent in charge of the work.

Q. Do you know whether or not such a workman was employed on this job? A. I don't know whether there was one or not.

Q. I ask you do you know whether a resident superintendent was employed on this job? A. No.

Q. If such a superintendent has been employed, what would his cost have been? A. About $100 a week for the life of the job.

Q. How many weeks does a job take, do you know? A. I would say a fair allowance for superintendent's time on that job would be about 40 weeks.

Q. You have observed that the contract provided for the complete performance in six months, did you not? A. Yes. Nevertheless, forty weeks is a fair time to do the job.

By the Master: Would the question of the changes having been made in the specifications and in plans have anything to do with extending the time necessary to complete the job in your opinion?

A. I certainly would.

How much time, in your opinion, after going over all these changes that have been suggested?

A. At least three months.

Q. A fair compensation for a superintendent on a job all this time is $100? A. Yes.

Q. What would his duties be beside residing on the job? A. To lay out the work, take the levels and elevations, issue instructions to the sub-con-

tractors, co-ordinate the work of the various sub-contractors, check the work in connection with the completion as per plans and specifications.

Q. You know, do you not, that the contractor here consists of a partnership of three men, all mechanics? A. No, I don't know.

Q. Don't you know as a fact that Mr. Vitille acted as resident superintendent on this job and came in from Newark every day? A. I don't know.

Q. If Mr. Vitille did as I stated to you, there would then be no necessity of employing a superintendent? A. Yes, he would be superintendent.

Q. What else would be overhead? A. Watchman, if one was employed.

Q. Do you know if one was employed? A. No.

Q. If one was employed, how much would his compensation be? A. About $30 a week.

Q. What else? A. Telephone on the job.

Q. How much would that cost approximately? A. About $100.

Q. What else? A. Temporary office and shed for the storage of material on the job.

Q. How much would that cost approximately? A. About $500.

Q. What else? A. Cleaning and removing all rubbish.

Q. How much? A. About $1,000.

Q. $1,000 to clean and remove the rubbish? A. Yes.

Q. Don't you know upon examination of this contract that each sub-contractor was to do his own cleaning, removing, etc.? A. I don't know; it would not make any difference if I did.

Q. Isn't it a fact that the contract requires cleaning and removal of rubbish as part of the contract work itself and therefore should not be

charges for as an overhead item? A. It is part of overhead.

Q. Isn't it a fact that these sub-contractors should do their own cleaning as far as their own sub-contract is concerned? A. I have not examined a sub-contract.

Q. It is customary for sub-contractors to provide that? A. It is customary for sub-contractors to provide it.

Q. What else besides cleaning? A. Cleaning of windows.

Q. What would that cost? A. About $100.

Q. What else? A. Protection of work including shed before the lumber was installed, I should say approximately $300.

Q. Anything else? A. Timekeeper if there was one on the work.

Q. If there was a resident superintendent, would you need a timekeeper? A. No, but that would not affect the cost.

Q. If you did not have a timekeeper, you would not have to pay him? A. If he works for nothing, then they wouldn't.

Q. Anything else? A. Plant and equipment.

Q. What kind of plant and equipment? A. Mortar boxes, scaffolding, hose, hoes, wheel barrows, shovels.

Q. Isn't it a fact that each sub-contractor furnishes his own tools and equipment? A. For his particular work, yes.

Q. With all the sub-contractors on this job, what would be a reasonable charge for this plant and equipment? A. I should say approximately $500 to $600.

Q. Anything else? A. Any incidental traveling expenses or expenditures on delivery of materials and telegrams, long distance telephone calls.

Q. Wouldn't you include that in the $100 for telephone? A. No, that is merely for local calls and installation. Temporary light in order to permit workmen to see on dark days. Temporary heat in order to keep building warm in cold weather. Removal of ashes in connection with temporary heat.

Q. How much would that cost? A. I couldn't tell how long the boilers were going. That is included in the general average for any job.

Q. Would you say $200 would cover that? A. Oh, no.

Q. Light and heat would cost more than $200? A. Yes, you would have to keep a superintendent on it in three shifts.

Q. Do you know whether Mr. Vitille did that? A. If he had temporary heat that is what he would have to do.

Q. Do you know whether he had any? A. I don't know.

Q. No contractor should make a profit on overhead? A. Decidedly yes, that is part of the cost of his work as well as any other cost of work.

Q. This item of overhead amounts to 5%; there is no justification for him charging 10% for overhead? A. Yes, because 5% is insufficient.

Q. If it amounted to 5% there is no justification for charging 10%? A. Yes, 10% for overhead is an average for all jobs, including all contingent items regardless of the actual final amounts.

Q. If I show you the contractor's estimate showing a charge of 5% for overhead, what would you say? A. I would say he was giving you about 50% of its value.

Q. Have you ever seen a job where the overhead was charged on the basis of cost plus 5% overhead? A. No.

Q. In 22 years of experience you never saw a job where 5% was. A. I cannot say; before we had compensation insurance or before we had the workmen's compensation act 5% may have been sufficient to cover it but since 1914 I never recall an estimate for doing a job of 5% or lower.

Q. How long have you known Mr. Ach? A. The first time I knew him to talk to him was that day I had a telephone conversation with him.

Q. Mr. Keeler, taking all these items you have given me except superintendency, I have a total here of $5,700. A. Temporary heat and light in there?

Q. Except superintendency and I have not included any temporary light and heat because you have not been able to tell me any amount; that represents less than 5% of the cost of the building. A. Inadequate.

Q. I was leaving out any allowance for time-keeping but I have included the watchman. Would your compensation from the contractor in this case depend on the amount of money recovery he may obtain here? A. No, absolutely.

Q. Would your compensation depend in any case on the success or failure of the contractor in this case? A. It does not.

Q. Mr. Kieler, did you examine the roofing specifications and the roof? A. Yes.

Q. Does the roofing specification call for copper flashing? A. Yes.

Q. Is it there? A. No.

Q. Isn't it a fact that probably the reason why water came through that roof is because the copper flashing wasn't there? A. Water did not come through the roof.

Q. How do you know? A. From examination of the building and from statements made to me

by the janitor and tenants where the water appeared.

Q. Did you ask the janitor how long he had known it? A. No.

Q. Did you ask the tenant how long she lived there? A. Yes, she said she was living there while the water came through the wall.

Q. Is it your opinion that the water came through the wall? A. There is absolutely no question about it in my opinion.

Q. If that is so, why didn't the water come through in the corresponding place on the top floor? A. Because the building is more protected as you go down by neighboring buildings.

Q. This is a building on the corner without any protection. A. The funny part of it was that the water came through on the interior wall where the driving rain beat against the walls.

Q. There was no protection on the interior, is there? A. And did not go below on one side where the most water came in, yes.

Q. There is no building higher than a one family house in that neighborhood? A. I don't know. I stood in the court and I did not get the height of the buildings.

Q. This water came in the top floor, didn't it? A. Yes.

Q. With your experience and your background are you willing to say if copper flashing had been there it would not have protected the leaking of water? A. It would make absolutely no difference. The finishing as installed is adequate to keep out the water.

Q. Isn't it a fact that there is more possibility of water coming through lower section of the building because all the water from the top comes down to the lower sections of the building? A. On

the contrary running down the wall it soaks in and disappears as it comes down.

Q. What percentage of water is absorbed by the brick? A. I could not answer that question.

Q. Isn't it a fact that 40% is absorbed and 60% flows off. Not necessarily.

Q. Where was this flashing supposed to lap according to specifications? A. In the walls.

Q. On these plans and specifications where is it laid? A. Cap flashing is laid in the walls usually.

Q. Which wall? A. Outside brick wall.

Q. Connected with the roof? A. It would be improper to make a complete connection because of expense of construction. The cap flashing turns down over the roof and the flashing comes up to the cap flashing.

Q. The roof flashing and cap flashing overlap? A. They should.

Q. That flashing was not installed on this job. A. I could see no copper flashing.

Q. If this copper flashing had been installed, why wouldn't it protect the roof from leaking? A. Several reasons. The copper flashing would only extend into the parapet walls 4″ but the walls are 12″ thick. The flashing would not prevent the water from coming in over the top of the flashing and seeping around the flashing itself, nor would the flashing prevent any soakage of water by reason of water coming through the walls below the levels at which the flashing was installed.

Q. Does this wall compare with the specifications? A. So far as I could see without cutting a section out of the roof.

Q. You can't tell what this roof is composed of? A. Nor can anyone else tell.

Q. And why have you testified here that this roof does conform with the specifications? A. I testified by the comparing it generally with specifications the material used and material specified with the specifications and the copper cap flashings. The inspection was made upon a day when it was pouring rain and there was no evidence whatsoever of any leakage in that building.

Q. The mere fact that the roof did not leak that day it does not show that they follow the specifications. A. Yes, it would have some bearing on it.

Q. You did not examine the character of the material, did you? A. No, I could see it without cutting through the roof?

Q. But you were aware that a section has been cut from the roof? A. I did not notice.

Q. But didn't you go through the entire building? A. I made a pretty general inspection of the entire building, yes.

Q. How many apartments did you see? A. I saw about ten different apartments. I went through the entire basement and through all of the staircase halls, rode in the elevators, went through the penthouse upon the roof and went around the exterior walls of the building stepping inside the doctor's apartment and examined the janitor's apartment in the basement.

Q. How many apartments are there in this building? A. I do not know; I think about 24.

Q. Was Dr. MacDonnell there when you made your inspection? A. Part of the time.

Q. Did he endeavor to call your attention to certain defects? A. What he considered defects.

Q. Did you examine them? A. Yes.

Q. Did you consider them defects? A. I don't recall anything that he drew to my attention that I consider a defect.

Q. Do you remember if you examined everything he called to your attention? A. Yes, generally yes.

Q. What do you mean by generally? A. Well, there were some things he said that I paid very little attention to.

Q. Isn't it a fact that you paid very little attention to all defects he called to your attention? A. I listened to all that he had to say and looked at all he showed him.

Q. Now, going back to your schedule, item No. 1, stair soffets were to be plastered; were they plastered? A. No, didn't call for it.

Q. I call your attention to Item No. 7 of the specifications under lathing and plaster which reads as follows: "The stair partitions, ceilings walls and soffets and the cellar ceiling will be covered with Sackett's Plaster Boards, neatly pointed with plaster Paris. All work will be three coat work, brown scratch and white." Does that provide for plaster on the stair soffets? A. It does not.

Q. What does it call for? A. That is one of the general specification requirements that does not affect the design of this job. The design differs from the specifications.

Q. But the specifications require plaster on the stair case? A. I testified generally speaking that is what it says, but the contract drawings provide otherwise.

Q. Have you the contract drawing to which you refer which you say shows otherwise. A. Sheet No. 8 shows the transverse section of the building.

Q. That refers to the work to be done by the iron contractor and plasterer? A. No, that refers

to everything in the building although every item in the building is affected.

Q. That sheet only shows the general work and no detail, does it not? A. It is the one sheet of the drawing that does show detail.

By the Master: I notice Mr. Keeler that the sheet you are looking at is Sheet No. 3 of Exhibit D-53.

A. I think you called it sheet No. 3 but I referred to it as the architect's designation at the foot of the sheet. It is the sheet that you have marked No. 3.

Q. Does sheet No. 3 show detail for stair? A. Yes.

Q. Where? A. Witness indicates stairs shown on the sheet.

Q. Does it show the anchors for the stairs? A. No.

Q. Does it show material for stairs? A. No.

Q. Does it show whether or not plaster is required? A. Yes.

Q. Where? A. It does not show any plaster. It shows the stairs in accordance with requirements of sheet No. 16 or No. 15 of the specifications which indicates that this stair construction is an open work fire proof steel construction without soffets.

Q. Does that sheet No. 3 of Exhibit D-53 that you are looking at show a closed or open stringer? A. Shows an open stringer.

Q. What kind of construction is on the job? A. Closed stringers.

Q. Do you know why the contractor did not follow the detail as shown on that sheet? A. He submitted shop drawings required by specifica-

tions and shop drawings as submitted and approved by architect call for entirely different construction.

Q. Do you know who submitted the shop drawing? A. The iron man.

Q. Isn't it a fact that iron men in preparing that drawing made it different from the plans and specifications? A. In some respects yes, in other respects, no.

Q. Isn't it a fact that the iron man had nothing to do with plastering; did not have anything to do with plastering of walls and for that reason the shop drawing prepared by the iron man did not show any plaster? A. No, it is not a fact because the shop drawing for iron stairs would have to provide for different construction if the soffets were to have been plastered.

Q. Isn't it a fact that in order to provide for plaster on the soffets the shop drawing of the iron contractor would have been required to show anchors to hold this plaster? A. Not necessarily. There was nothing in the specification to hold the plaster; it could have been anchors and it could have been wood. It could have been several forms of construction but nothing was specified to hold plaster.

Q. Are you familiar with the requirements of the tenement house commission of the State of New Jersey? A. I am.

Q. Do you know whether or not the tenement house board requirements permit construction of wood underneath stairs? A. Well, I don't think they do.

Q. Isn't it a fact that these stairs would have need to have been also uncovered if they were all plastered? A. No, they need not be plastered.

It is a much better job open and a much more expensive job.

Q. I understand the only justification you have for the contractor having omitted plaster on the stairs is that the drawing of the iron workmen does not provide for plaster. A. Not at all. The contract drawings and specifications conflict. In one place the specifications call for the soffets to be plastered; in another place it does not call for them to be plastered. The contract drawing does not show the soffets plastered and there is no provision either in the specifications or on the contract drawings for holding the plaster in place if you were to have done it.

Q. What would it have cost to plaster the stair soffets? A. I don't seem to have made up a figure here. I think it could take off the plans on direct examination but I did not keep a copy of the record. I can take it off again if you wish.

Q. Would you say $200 was a fair price for that? A. Yes, not including the furring that is necessary to hold it in place. I say it would cost all of $200.

Q. Item 1-H cellar ceiling was to have three coats of plaster. You have testified that the difference in value between what was constructed and what should have been constructed was $120 based on 40c a square yard. A. Yes, that is a difference.

Q. Exactly what was constructed there? A. The plaster board was attached to the cellar ceiling as specified excepting that wherever this plaster board occurred under the doctor's apartment which was approximately 40% of the area special care was taken in strengthening the board to support thermofil installed directly over the

plaster board and then there was applied a heavy coat of plaster consisting of a combination of rough and finished plaster.

Q. How do you arrive at 40c a square yard for the difference? A. $1.50 a yard.

Q. How much would it have cost to have done it as contractor did? A. $1.10 a yard.

Q. Are you basing all your calculations on basis of calculations specified by contract? A. On my calculations.

Q. Have you those calculations here? A. I don't know whether I made that or not; 368 yards in the cellar ceiling exactly.

Q. How much a yard does plaster board cost? A. I am not figuring it that way. $1.10 is a unit price.

Q. Are you guessing at the unit price? A. No, it is from experience.

Q. Are you guessing from experience? A. No.

Q. How much was plaster board worth at the time this building was put up? A. This plaster board installed in the job at the time was worth about 50c a square yard.

Q. How much for material? A. I can't answer that.

Q. How much was plaster board at that time? A. I cannot tell you from memory; I would have to look at the price list. It is all a matter of the list price which I do not atempt to keep in my memory.

Q. Did you have a price list before you when you made your calculations? A. Yes, as all prices of every material used in building and in making up this estimate where I did not recall the price I referred to this price list and then checked with bills by building men on this building.

Q. When did you make up these figures that you arrived at $1.10 a unit? A. After an inspection of the building.

Q. About how long after? A. I think I made the inspection of the building about one month ago.

Q. And you had 22 years of building business? A. Yes.

Q. And plaster board is used in large quantities in almost every building? A. No.

Q. Isn't plaster board a common item in this section. A. Not in this section.

Q. You want us to understand that you don't know plaster board without looking at the catalog? A. It depends on thickness and make.

Q. You know what plaster board was priced for this job? A. Yes, it is worth 50c a square yard.

Q. How much for labor? A. I cannot answer that.

Q. How much for material? A. I cannot answer that.

Q. Isn't it a fact in arriving at this estimate of $1.10 a unit you are guessing? A. No, it is not a fact.

Q. Then tell us how you make up $1.10? A. By applying the unit of $1.10 a yard based on that includes scaffolding, labor, material, nails, lath, the erection of scaffolding.

Q. You want us to assume from your testimony that you did not know what plaster board was worth per square yard for foot? A. I don't recall the figure now without looking at the same price list you are looking at.

Q. You say 50c a square foot? A. A square yard for plaster board applied including nails and labor of the architect, the scaffolding.

Q. Did you ever buy any? A. Yes.

Q. Do you know whether it is 3¼ a square foot? A. It depends on the thickness.

Q. I am not trying to pin you down to any exact figure but approximately how much is plaster board worth? A. 50c a square yard including nails and labor.

Q. You mean to tell us with all the experience you have had and all expert testimony you have given here without hesitation you can't tell us now what the price of plaster board within 10c a square yard? A. No, and there are thousands of other prices I could not refer to without the price list that you are referring to.

Q. Now if this unit is worth 50c, why do you say you are entitled to $1.10 a unit? A. Because added to this is 60c per yard for putting plaster on.

Q. And 60c a square yard for plaster; how much do you estimate for labor? A. Don't estimate it that way although 50% of plaster job goes for labor.

Q. How do you estimate a job? A. I measure the number of yards and I know what it is worth to put plaster on from experience and it is worth 60c a yard.

Q. Do you know how that 60c should be divided between labor and material? A. Labor would be probably half and in excess of half of that cost.

Q. Isn't it a fact that now in this testimony you are guessing as Mr. Shilowitz was guessing in his testimony? A. Absolutely no, it is not a fact. I have taken off quantities after examining the building and I have either applied prices and units that are applicable to the work and details

of units that are applicable to the work in general.

Q. You are giving your testimony in the methods of an architect and you cannot estimate the cost of these materials A. No, if I were an architect I would not know anything about prices.

Q. As to this plaster board, you say you do not know anything about the cost? A. Yes, I do.

Q. But you don't know within 25% what the cost of plaster board is? A. I know exactly what this job is worth.

Q. I am talking about plaster board? A. 50c including labor and applying.

Q. How many men would it take to erect 368 yards of plaster? A. I can't say. The estimate price would cover the work and it will vary.

Q. If it will vary you must have some schedule on which to base your prices? A. Absolutely.

Q. To arrive at that you must have taken material and labor separately? A. No. You arrive at it by checking the cost of other jobs and checking the experience that you have had over a period of years which enables you to arrive at a unit to apply to this work.

Q. Did I understand you to say that Item 3-A marble stringers of Tennessee pink marble from first floor to roof omitted is in fact omitted? A. No, that is another conflict between specifications.

Q. That is not what I asked. A. Not called for.

Q. I am asking is it omitted or installed? A.

By Mr. Bianchi: I object. He has said it is not called for.

A. It is not there.

Q. It has not been installed in the building? A. That is different. Yes, it is installed in some places but it is not installed on these iron stairs to which you are referring.

Q. I thought my question was a simple one and could be answered without difficulty. A. They are installed.

By Mr. Bianchi: I object unless contract and specifications show an item to be installed.

By the Master: I will let him answer it subject to objections.

A. Marble stringers are installed in vestibule. There are no marble stringers installed on the iron stair case.

Q. Are the marble cheeks referred to in Item 3-B installed in the vestibule. A. There are no marble cheeks installed in the vestibule now excepting a string in the entrance.

Q. Did you measure the thickness of the marble? A. Yes.

Q. How thick is it? A. I measured the marble on the stairs which comprises the greater part of the marble in the building and they are 1¼" thick and thicker. It is impossible to measure the exact thickness of the marble installed in the wainscoting of the vestibule without taking it down.

Q. Did you measure the thickness of the pieces? A. You couldn't tell the exact thickness of the pieces without taking it down.

Q. You couldn't scrape a little section for that purpose? A. I did not go there for that purpose.

Q. Then the only marble which thickness you measured was the marble treads? A. Wherever I could see.

Q. Where else did you measure? A. The treads in the vestibule.

Q. Does the trim in the vestibule as constructed run to the floor? A. Yes.

Q. You examined that yourself? A. Yes.

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

Q. And towel bars are installed in the bathrooms? A. Yes.

Q. Did you see them yourself? A. Yes.

Q. How many are called for in each bathroom, according to specification? A. Two.

Q. Did you see two? A. No, I saw one.

Q. Would you say that one towel bar was omitted? A. Without giving consideration that something else was substituted, one was omitted.

Q. Did you notice the bathroom floor where it is 1½" higher than the other floors? A. On the contrary I did not notice anything of the sort. That was one of the pet items of Dr. MacDonnell.

Q. What do you say as to the level of the bathroom as compared with other floors? A. Slightly higher.

Q. Which are slightly higher? A. The bathroom floors are slightly higher.

Q. How much would that be in your opinion? A. Perhaps half an inch, not any more than was taken up by the marble saddle between the two rooms under the door.

Q. Did you examine the bathroom floors to see if they were deafened or not? A. That is impossible without tearing up the floors.

Q. Did you examine them? A. No, the face of it would indicate they are deadened, as you call it.

Q. How can you tell from the face of the bathroom floor whether they are deadened or not? A.

Because the tile floors being solid and intact must be deadened or beaded.

Q. Would it not be possible to lay first a floor of wood and then cement and then the tile? A. Yes, that is possible but it is not practical.

Q. But that would not have deadened the floors, would it? A. Yes.

Q. Would it have then been a deadened floor according to the specifications and plans? A. Yes.

Q. Does the specification call for cinder fill? A. I don't think that it does but if it does they need to have a full description.

Q. You don't know exactly what the bathroom floor consists of? A. I have a pretty good idea.

Q. How did you get that idea? A. From the face of the floor, that indicate what is under it.

Q. Does the floor from its face indicate chicken wire under it? A. It does not indicate that there is no chicken wire there.

Q. There is chicken wire in that floor? A. There might be and there might not.

Q. What else went into that floor? A. I know that floor has a concrete bed under it and I know that concrete bed is installed on timber construction and I know that concrete bed to be installed on timber construction must have a temporary floor of some kind to hold it up and I know that the tile floor is bedded in Portland cement mortar and properly bedded and I know that it cannot be tight and properly bedded unless the bed under the tile is from 2″ to 3″ thick or unless it is laid in what is known as Placara cement and the face of the tile shows that it is not laid in Placara cement; that is evident from an examination of the mortar between the tiles.

Cross Examination of Mr. Keeler, by Mr. Platoff continued.

By Mr. Platoff:

Q. Mr. Keeler, of what thickness of iron are the balusters required to be? A. The specifications provide for 1 x 1" bars. The approved shop drawings, however, provide for 1/8 x 5/8" stock.

Q. What is installed there? A. 1/8 x 5/8".

Q. Would the difference in stock come to $100? A. No, not as installed.

Q. What would the difference be in money value? A. No difference. The 1 x 1" bars shown on this sheet 3 of this Exhibit D-53 to be straight bars. The bars installed are scroll work. The designs are changed entirely so far as bars are concerned.

Q. You say no difference in value? A. A 1 x 1 piece of bar as compared with a 1/8" x 5/8" piece of bar, the 1 x 1" is more expensive, but as installed, the price is the same.

Q. Isn't it a fact that the iron doors in the vestibule are omitted? A. No, it is not.

Q. Are they installed? A. They are.

Q. Are these doors, as installed in the vestibule, iron or kalamien? A. There are two door in the vestibule. There is a kalamien door and there is an iron door.

Q. Don't the plans and specifications call for two sets of iron doors? A. No, sir.

Q. Will you refer to the specification and show me where it calls for kalamien doors? A. Does not call for kalamien, calls for an opening without a door.

Q. Isn't it a fact that the specifications call for iron door? A. Referring to Sheet No. 6 of Exhibit

D-53, the kalamien door is installed along this line here (indicating) which I will mark "X", while the plan shows the partition where I have marked "R", the plan shows only an opening, no doors being indicated. Down at the front entrance, where I have marked "S" there the opening is shown on the plan, but no door is shown on the plan, but by reference to another drawing, the same being elevation marked Exhibit D-53, Sheet No. 4, clearly shows a set of iron doors and they are installed that way.

Q. You mean to say there are two iron doors, one of iron and one of kalamien? A. Exactly.

Q. Doesn't the specification call for two iron doors? A. No.

Q. I call your attention to page 15 of the specification "Front Vestibule Entrance Doors, Trim, etc." Dosen't that read "the front entrance vestibule doors and transoms will be of iron and made 2″ thick, etc." and so forth? A. Correct.

Q. And I call your attention to page 28, hardware specification One Pair Iron Entrance Door etc., and ask you whether that does not provide for the two sets of iron and one set of kalamien as installed? A. Under the hardware specification the heading over the specification refers to two pair of iron doors but the specification itself does not refer to two iron doors.

Q. On page 15? A. It does not. It calls for the front entrance vestibule doors, side leads and transoms will be of iron and it is.

Q. Is a kalamien door an iron door? A. That's not in the front entrance. That's set back of the entrance.

Q. This calls for front entrance vestibule, etc. A. You probably mean that the front entrance is one door and the vestibule door is a second door.

That's all one sentence. It is not shown on the drawings.

Q. I am talking about the specifications. A. Not specified.

Q. You interpret that to mean one set of iron and one set of kalamien doors? A. I interpret that to be one set of iron and no kalamien. Kalamein doors were installed as an extra.

By the Master:

Q. Are they charged for as an extra? A. Yes, sir.

By Mr. Platoff:

Q. In your opinion, what would be a fair difference in value between kalamien and iron doors? A. You cannot make an estimate.

By Mr. Bianchi: I object to it except if he asked whether it does state or does not state so in the plans and specifications.

By Mr. Platoff: This is cross-examination of an expert witness.

By the Master: I would admit it in order to see what his estimate is of value in comparison to what the other expert claims.

By Mr. Platoff: I will withdraw the question.

Q. What would be the cost of two iron doors in the vestibule where there are now one kalamien and one iron? A. They would be somewhat expensive than kalamien doors.

Q. How much would they cost? A. I have to guess, unless I can look at some notes I have.

Q. Alright. A. I should say those doors should be worth $75 or $100 more than kalamien doors.

By the Master:

Q. You are talking about one pair? A. Yes.

By Mr. Platoff:

Q. Approximately, how much would a set of iron doors cost, making no allowance for kalamien doors? A. Assuming that I employ the design that might be employed there, they might cost anything from $150 to $300.

Q. As you interpret the specification, you would say that the dumbwaiter doors be sliding or what? A. The specification calls for them to be sliding.

Q. How are they installed? A. Self closing and on hinges.

Q. What would be a reasonable value of installing there sliding dumbwaiter doors? A. In comparison with those that are there, I shouldn't say that there would be any material difference.

Q. You mean that sliding self closing doors do not cost any more? A. They are not self closing. That's why they were not put in.

Q. Isn't it a fact, in accordance with the tenement house rules, doors on dumbwaiters must be self closing? A. Yes indeed. There could be no sliding self closing door in these dumbwaiters though.

Q. Why not? A. Because the shaft is too small. The door as installed is self closing.

Q. Isn't it a fact that the twenty-one kalamien doors referred to in Item 5, B, are loose on the bottom? A. The kalamien doors fit loosely. No doubt about that.

Q. Isn't it a fact that they do not fit properly? A. I should say a few of them do not fit properly.

Q. Do you know whether or not in Item 6, A, the water-closet in the Doctor's apartment was omitted or not? A. Not of my own knowledge.

Q. Did you inspect it? A. No, excepting to be inside of the corridor—the entrance.

Q. Are the refrigeration pans and drain pipes omitted (referring to Item 6, C)? A. Yes.

Q. Have you there the electrical specification? A. Yes, I have the original specification which includes the original electrical specification. Page 45 of the copy of the specifications that I have.

Q. And that requires that all wires for bells shall be concealed in conduits?

By Mr. Bianchi: I object. This job was not done under this specification, but under a revised specification given by the architect.

By the Master: In order to save time, that, I understand is the testimony, although there has been some contention that it has not been brought home to the owner by the architect. I am going to take the testimony subject to your objection.

It is stipulated by counsel for the contractor and the complainant that the electrical specification as contained in the original specification require all wires for bells, etc., to be concealed in conduits. It is further stipulated by Mr. Bianchi that the wires for the bells are not enclosed in conduits, and that the other wires are B. X. Conduits.

By the Master:

Q. Are you qualified to state what it would

cost to put the wires for the bells in conduits? A. I have such an estimate here, but I did not prepare it alone and the man who helped me prepare it is not here. But I have the answer.

By the Master: Mr. Platoff, could you tell me whether this Item of $3,000 on the 2nd page of Exhibit C-3 includes both A and B of Item No. 2?

Answer—Yes.

By Mr. Platoff:

Q. I call your attention now to Item 10 B referring to the painting and enameling of radiators and I ask you what specification provide for that? A. All radiators, exposed pipes, etc. are to receive one coat of priming and two coats of finish of American Radiator Company enamel, colors selected.

Q. Do you know what kind of painting or enameling was done? A. I cannot be sure. Some of them were done over.

Q. Did you see any there that were done in accordance with the specifications? A. No.

Q. What, in your opinion, would have been a fair cost to finish the radiators in accordance with the specification? A. I did not make up an estimate on that.

Q. Can you give us an idea? A. I can say that the difference in finishing the radiators with an enameled finish rather than that with a painted finish would approximate 50¢ to 75¢ a radiator. The cost of the cleaning of the radiators in either case is exactly the same. It is only the question of the difference in the final application.

By the Master: Can we stipulate how many radiators are in there?

By the Master:

Q. Would $350 be excessive? A. Yes, that might be alright. 75 radiators. There are about 100 radiators.

Q. If there are 100 radiators—— A. They probably would be worth about three dollars a piece to clean and finish.

By Mr. Platoff:

Q. Isn't it a fact that American Radiator Company has a fixed charge for this kind of work? A. I do not know.

Q. Haven't you in your experience come across the radiator charge of $4 a piece? A. I have never had them do the work. It has always been done by painter or steam fitters.

Q. The specification referred to in Item 10, C, provides for woodwork, walls, etc.? A. Yes.

Q. Can you say whether it was done? A. In the floors it was done. I cannot tell what was done on the woodwork excepting from the finish that is now applied, which has been changed in a number of instances. The woodwork is in proper shape to receive the painting.

By the Master:

Q. When you say "in proper shape to receive painting" what do you mean? A. It is smooth, not rough.

Q. And has been sandpapered? A. It is usually done by machines at the mill. It is sanded at the mill by running it through the machine and when the woodwork gets on the job, the usual practice is, that where the machine has skipped over at places, it is done by hand.

Q. To sandpaper and pumice the woodwork floors and walls, what have you to say as a price of $400 for doing that? Is that reasonable? A. I should say that would be a fair price.

Q. What proportion of that would go for the floors? A. About 25%.

By Mr. Platoff:

Q. Do you know whether or not the living quarters in the basement are painted? A. The woodwork is painted. I did not notice the walls in particular.

Q. The specification calls for three coats lead in this section, do they not? A. I did not notice.

Q. You do not know? A. No.

Q. Are the unfinished portions of the basement painted? A. I did not make particular examination excepting as to the columns. They are not painted—no, I think not.

Q. Doesn't the specification call for painting? A. All unfinished portions of the cellar to receive two coats of Boynton or equal cold water paint.

Q. What do you say would be a reasonable cost for that work? A. I have not estimated that.

Q. Give us some idea, can't you? A. That's a difficult thing to do without inspecting the building and taking it off.

Q. Without measuring it out, can you give us an idea? A. You mean make an average guess at it? I suppose $100.

Q. Do you know the cost of a Sedgwick dumbwaiter? A. Not this particular dumbwaiter.

Q. What kind of a dumbwaiter? A. Gorenson.

Q. Know the cost of a Gorenson dumbwaiter? A. The cost? No, I do not. They differ in size, height and so forth.

Q. How much more would a Sedgwick cost than the Gorenson? A. I think that the dumbwaiter as installed, if it had been a Sedgwick, might have cost $25 per unit more.

Q. How many units are there? A. Four.

Q. $100. A. Approximately.

Q. The specification calls for a sedgwick, doesn't it? A. It does.

Q. Do you know whether or not any grounds were constructed for the base and picture wall panels and window trim? A. The building has the appearance of grounds having been installed for the base. The finished building has the appearance of grounds having been installed for the window trim. Grounds for picture molding would not be used.

Q. Are the walls constructed in these rooms in a good workmanlike manner? A. They are a good job for this kind of a job. I did not apply a plumb but think from casual observation, I should say that the walls were done in a good workmanlike manner.

Q. What size base is required for these rooms according to plans and specifications? A. 10″ base.

Q. What kind is installed? A. Not a 10″. It is entirely different than the specification.

Q. Is it a 6″ base? A. It is made up of members and I should say that the size of the base as installed were in total something like 7″ in height or thereabout.

Q. How many running feet of base were built? A. I did not take that off. I have it by room.

Q. Give us the lump sum, what you consider the cost of 10″ base as required by the specification? A. The cost of the base as required by the specification?

Q. First give me the gross cost? A. With the labor or without the labor?

Q. With the labor, of course. A. The labor for installing and the furnishing of the base specified would be about 25¢ a lineal foot.

Q. How much in money on this job, about? A. I would say that there are about five thousand feet of wood base. That would be $1250. That's the nearest approximate figure.

Q. What do you say the 6″ base or 7″ base would be worth? A. 25¢ a lineal foot.

Q. The difference in value would be what? A. No difference.

Q. You say there would be no difference in value? A. No. But this 6″ is a different molding, a different design.

Q. What kind of a design? A. Yes. It consists of a pieced coped molding, combination of members built up.

Q. What kind of base was called for according to the specification? A. 10″ high consisting of 1-⅛″ x 6″ molded plinth, 2″ x ⅞″ and ⅞″ x 2″ mold throughout where not otherwise provided. Now, that's a built up base and specifies the character of plinth, that goes with it. The base as installed is an equal—has an equal number of members, and the installation, regardless of size, is more than the labor of installation of the three member base. If the actual of this base would be 2″ less, it would be worth about 2¢ per lineal foot. The labor of installation of the extra piece would more than eliminate that 2¢ per lineal foot, so that on the whole, the price of the piece as compared would be the same or approximately the same.

Q. How many pieces are there in the 6″ base

as installed? A. Including the floor molding, there would be four.

Q. All four of a ten inch base? A. No, because the 10″ base does not call for a floor mold.

Q. Outside of this, difference between a 6″ base and a 10″ base would be how much? A. About 2¢ a foot for the cost of the material.

Q. That's all? A. That's all.

Q. How many feet did I understand you to say were there? A. About five thousand feet, approximately.

Q. That's about $100? A. In the value of the material itself.

Q. Not making any allowance for the value of this 10″ base as specified would be about $1250? A. Well, when I say $1250 I am not making any allowance for what he installed.

Q. What, in your opinion, would have been the fair value of copper flashing around the parapet as required by specification? A. I did not make an estimate of that.

By the Master:

Q. Would $160 be out of the way? A. I would not say that that was out of the way. I would say that is about right. Metal flashing, however, covered with a tar composition which composition was installed after as part of this attempt to waterproof the wall. I did not lift it. I cannot say it is copper.

Q. You can't say that it is anything else? A. I can't say it is anything else.

Q. What would be the difference in value if we say this flashing is not copper, what do you think would be the cost as to the material between the two? A. I have not taken the lineal feet off. The

difference then would be only the value of the material which might be $50.

Q. Is the flashing itself properly installed? A. Appearance is that the flashing is properly installed.

Q. Between the bricks, etc.? A. Between the bricks and right up the roof.

Q. The only question is of what material it may be? A. Right.

Q. Would you say that the tar on it might make a good job? A. The flashing makes a good job as it is installed.

By Mr. Platoff:

Q. Doesn't the specification require the copper flashing to be carried on over the parapet? A. It calls for the walls of the dumbwaiter and elevator shafts and stair enclosures to be covered with copper and under flashing it says that the copper flashing shall be not less than 16 ounces and shall extend out on the felted portion of the roof and up the sides of the wall not less than 8″ and into a joint of the wall.

Q. I want to call your attention to that portion of the roofing and sheet metal specification which calls for cap flashing is to extend across the coping walls, turn down one inch on the outside and three inches or more on the inside of wall, over the base flashing to provide the expansion of the same. See that section? A. Yes. That's a different flashing than what you are now talking about.

Q. Isn't that the flashing in connection with the roof? A. No. This was a cap flashing that is specified to extend through the parapet wall, which he calls coping wall here. Now, such a

flashing extending through the wall at the level of the cap flashing would destroy the continuity. But, if the copper flashing is intended to be in the coping which coping is the very top of this wall, then it would be possible to put that flashing in there. I cannot tell whether that flashing is in there or not. I made no examination of that.

Q. Is the brick exposed on the parapet? A. Yes, above the flashing.

Q. This flashing was made to extend across the coping as provided for in the specification, then the brick would not be exposed? A. There would not be any brick on top of the parapet.

Q. Now there is? A. No. The flashing would be on top of the brick.

Q. Then the brick were exposed? A. Yes.

Q. It would be exposed if the flashing were on top of it? A. The wall has a top and on that top you put a coping. There has been some question whether it should be stone, cement or vitrified tile, at least a coping should go on top of that top. These specifications for this coping flashing requires that on top of this wall before this coping be put on top that wall, turn out on the side and therefore the wall under it would be exposed. Now, if this flashing went through below the copper wall, then the brick work on top of the flashing would not be pointed to the walls below the flashing. In other words, it would be separated and you can put your foot against that wall and kick it off.

By Mr. Bianchi:

Q. It would not be a good workmanlike job? A. It is not practical.

By Mr. Platoff:

Q. Isn't it a fact that a cap flashing is the usual specification in gout work on gout buildings? A. When you are talking about cap flashings there are two different things: one cap flashing to go under the coping is not usual.

Q. Why is cap flashing usually the top? A. Cap flashing is applied in connection with a roofing construction for the purpose of
with a finished roof by building into the brick wall a cap flashing. This when the roof is installed, the actual roof flashing is carried along the roof and up the side of the wall underneath the cap flashing, and that is not connected in order to provide for expansion and contraction and shrinkage of the roof itself so that the lower flashing may work up and join in the cap flashing without causing a break.

Q. That is what is specified here? A. Yes.

Q. And it was not done? A. It was done most assuredly.

By the Master:

Q. Is the only question relating to this flashing the question as to whether it is copper or not copper? A. Or whether it should pass through the wall or not.

By Mr. Platoff:

Q. Mr. Keeler, when was the first time you saw this list of extras that are being charged for? A. About November, 1929.

Q. That is the first time? A. That is the first time that I examined the extra bills.

Q. And the first time you saw this bill for extra work? A. The first time I actually saw it was the day that I talked with Mr. Ach over the telephone.

Q. When was that? A. In September of 1928.

Q. That's the time Mr. Vitille consulted you because he was in trouble on the job? A. No. He asked me for advice on his inability to get the architect to either give him a certificate or a list of exceptions.

Q. At that time did you examine the bill of extras? A. Just looked at it. I examined it in detail in November, 1929.

Q. Do you know when he waterproofed the walls of this building? A. They were waterproofed when he talked to me in September, 1928.

Q. How do you know? A. Because about two months later he told me in response to my question that Mr. Ach had now raised the point that the building was incomplete because water came through the roof.

Q. Do you know when he plastered the elevator shaft? A. No.

Q. Do you know whether or not he waterproofed the walls to prevent water from going through after complaint was made? A. Yes.

Q. And, of course, if water came through, this job would not have been a workmanlike job? A. Yes.

Q. It would? A. The fault of the specification. Material specified was used on the job.

Q. And still in your opinion, the water came through because material was different? A. The reason water came through there was because the cinder concrete block construction of the wall is

absorbent, has hollow spaces in it and provides a runway and is an attraction for water.

Q. This material is a common usage in construction of buildings, is it not? A. No, it is not.

Q. Do you know whether or not the walls were furred out in accordance with the plans? A. They were furred out.

Q. Notwithstanding that, you say water came through? A. Yes.

Q. In large quantities? A. When I saw the job, the only place I saw was frosted water. There was no water going through the walls when I saw it.

Q. Do you know approximately when the waterproofing was done on the walls? A. Well, I didn't see it done but I can only tell what has been told me.

Q. Approximately? A. I understand that he did it sometime in 1929; sometime last year, but I don't know. I know it is done.

Q. Do you know when he plastered the elevator shaft? A. No, it must have been plastered over before the building was completed.

Q. How does the ornamental plaster cornices differ from this specification? A. There are no cornices specified.

Q. What kind of cornices did he construct in these rooms? A. He constructed a cornice in the rooms which was practically the same in design as the cornices in the halls.

Q. Just a cove in the room? A. No. An ornamental cornice.

Q. In every room. In every apartment? A. Yes. In every apartment that I saw.

Q. Isn't it a fact that specification call for a plaster cove in each room? A. The specification

says that all foyers, living rooms, dining rooms and corridors and Doctor's office shall have cove with two flat members on ceiling. Vestibule to have ornamental work.

Q. Did he construct that that way? A. No. There is an ornamental cornice there which is made in accordance with a design.

Q. And that is substantially the cove, isn't it? A. Well, if there is a design here—

Q. Isn't it substantially a cove of the two flat members? A. It's a cove in effect but it runs down to picture molding.

Q. The difference between the other and what he put in there actually, you say he is entitled to $3,249? A. I figure the $3,249, but in addition to the cost of any cove that might be required by the plans and specifications.

Q. Isn't it a fact that in all these rooms are coves, not ornamental work at all? A. Well, they have a combination of cove and of ornamental plaster.

Q. Now, if you made a proper allowance for the cove and the two flat members against this $3,249, would there then be anything due the contractor by way of extra work? A. I would like to look at the detail of this.

Q. Aren't you familiar with that? You said here that that was worth $3,249? A. Referring to Exhibit D-53, Sheet No. 13, which is a detail of ornamental plaster cornice in the Doctor's office, and this detail is the detail that was used and followed in the installation of the cornices in the rooms above the first story.

Q. And is it based upon that detail that you say the contractor is entitled to $3,249 for extra? A. That is the fact that somewhere in these

specifications it calls for the ornamental cornice only on the first story.

Q. Didn't you just read from the specification that a cove and two flat members are required? A. Yes, but I am trying to find the conflicting part. I seemed to overlook that. By referring to the blue prints specification which you have and which is a photostatic copy of the specification on file with the County Clerk, by referring to the specification in evidence, Exhibit D-52 in making this estimate, I saw a specification which was given to me by Mr. Vitille in which the word "and" was "in." If you read "and" and then change it from "and" to "in," the specification reads: "All the foyers, living rooms, dining rooms and corridors and Doctor's office—," while the specification upon which I base my estimate, which was shown to me by Mr. Vitille—which was not this copy here, read "All the foyers, living rooms, dining rooms and corridors in Doctor's office to have fit cove with two flat members." Now, the change from in to and would extend that specification in my opinion, over the entire building.

Q. You now say that that item of $3,249 you wish to withdraw? A. Excepting that the cove as installed than the cove that might be specified, but by changed the word and using this official specification marked Exhibit D-52, I have now to testify or change my testimony to the effect that finish cornices are specified in these rooms.

Q. Therefore you eliminate the item of $3,249? A. I would eliminate it as a whole but the cornice that is installed there now or the combination of cove and member is about 8″ in depth from the ceiling down the side of the wall, and extends

from the base of the wall out to the ceiling about 6″. The specification would call for a net cove with two flat members on the ceiling. There is no detail of the cove and I presume it would be a question of what the cove would consist.

Q. Then you say the reason is because you misread the word and as in? A. —

Q. The first line of that paragraph, however, refers to all foyers, living rooms, dining rooms and corridors in Doctor's office? A. That's the way I read it.

Q. How many foyers were there in the doctor's office? A. One.

Q. How many living rooms? A. One.

Q. How many dining rooms? A Perhaps one. I did not go there at all.

Q. So, if you had read the plural as it appears from the copy that you read, you also would not have made the mistake that you did? A. No. I interpret the specification to mean this room or these rooms in the doctor's quarters.

Q. You don't know, do you, whether there are any living rooms in the doctor's office? A. I did not go through the doctor's quarters excepting to look at them in the plan.

By the Master:

Q. You cover this item of $3,249 representing cornices in the foyers, living rooms and dining rooms on all of the apartments of the building? A. Excepting in the Doctor's quarters.

Q. Now, do coves mean cornices? A. A cove is in effect almost the cornice, yes.

Q. How do the cornices that are in these rooms throughout the building compare in your judgment with the provision of the specification for coves? A. They are larger.

Q. And if they were coves, could there be any cornice? A. No.

Q. If coves mean anything different than cornices, there are these cornices instead of coves? A. Altho the cornices have a large cove member in them, it is difficult to tell whether it is a heavy cove cornice or a cove as specified.

Q. Mr. Platoff, is there any contention made on behalf of the owner that this specification respecting coves has not been complied with?

By Mr. Platoff: No, except so far as it refers to plaster cornices in each hall.

By the Master. How much—

By Mr. Platoff: $400.

By the Master: I see. But your contention is that the cornices are the coves and they are really not something extra that contractor put in and made no charge for it—they were included in the contract price?

By Mr. Platoff: Yes.

By the Master:

Q. You say garbage receptacles were removed and cost of removal should have been $30. Were they replaced anywhere? A. No.

Q. So the contractor saved the cost of the receptacles? A. They were in and taken out. There was some change. They had some junk left, I suppose.

By Mr. Platoff:

Q. You say there should have been a charge made for placing panel moldings. Do you mean

all through the building? A. Above the first story. I think the specification calls for them in the first story.

Q. Do you know whether or not they were installed in the first story? A. No, I did not look to see. I did not look to see if they were installed in the Doctor's apartment.

Q. Did you look in the other apartments on the first floor? A. No, I did not. I inspected about ten.

Q. Did you notice whether the panel moldings were in on the first floor? A. I do not recall.

Q. Did you inspect the building above the first floor for panel molding? A. Yes.

Q. Every apartment? A. No. But they were in every apartment I went in.

Q. What was it put in place of? A. It was in addition and in place of nothing.

Q. No substitution— A. No, sir.

Q. Now, you say laying diamond brick is more expensive than flemish bond design brick? A. This brick work as installed consists of the design on the base of the made out of brick, all of selected color and character, and it required additional labor in order to lay out this brick work and to get the proper into it, to set these pieces for the purpose of carrying out this design. The design is diamond shaped.

Q. Did you examine or inspect the brick work on Tudor Hall? A. I did not. I only compared this work with the elevations on contract drawing.

Q. This diamond brick design only appears on the column on one side of the building? A. Yes.

Q. You have an item here to change the location of bath room partitions. Do you know whether these

changes were made after or before the partitions were up? A. They were changed by actual measurement at the building and I did not see them changed.

Q. If they were changed before construction there would not be any extra cost or charge? A. If the location of the partitions were changed before any work was done on the partition, then the only extra charge that would be charged would be the furring around the beam which would be exposed by shifting.

Q. No more costly whether the furring had to be made a foot one side or another. A. It would.

Q. Why? A. Because the plan showed the partition directly under the steel beam and no furring would have been necessary. That's why the partition had to be moved.

Q. Do you know why this change in partitions was made? A. Because the plumbing laid out for the bathroom were changed, and by rearranging the plumbing in the bathroom, the pipe having to be placed differently and also to be concealed in the partition, and it was necessary to either move the girder or the partition.

Q. Then clearly, the plumbing must have been installed there before any partitions were built. Isn't that so? A. Not necessarily.

Q. Doesn't the plumbing go in a building of this kind before the partitions are set? A. No.

Q. Isn't that customary? A. No, on the contrary.

Q. You mean the rough plumbing does not go in before the partition? A. You are now talking about a building with wooden stud partitions.

Q. Mr. Keeler, you have examined the electrical part of Exhibit D-52 and you have also

examined a so-called revised electrical specification? A. I have given very little examination to the specification which is a part of Exhibit D-52, but I have examined specifications known as revised specifications.

Q. Can you give me your opinion the difference of the reasonable value in Exhibit D-52 and so-called revised specifications? A. No, sir, I cannot.

Q. In your opinion, what would it cost to conceal all wires, bell wires, and electrical wires, in rigid metal conduits? A. My opinion as to the difference in cost between the wiring and conduit as installed, namely B. X., other than for the low tension work and the bell wire is $300 without any addition of overhead or profit, or $363 with the addition of overhead and profit.

Q. On this entire job you mean rigid conduit instead of B. X. you say is additional or cost? A. In the entire job you use rigid conduit in place of B. X. conduit excepting for the bell wires and excepting for the low tension wires and excepting for the wires in the sleeves which must be installed in the conduits, to be installed the difference is $360.00.

Q. How much would it cost to do this work in rigid conduits? A. I am referring to an estimate that I prepared with my engineer.

By Mr. Platoff: I move that his testimony respecting estimate as to electrical wiring and the difference in cost of conduits be stricken out.

By the Master: I will rule upon it later. That's all.

DR. MARTIN J. MACDONNELL, the complainant, being previously sworn, testified as follows:

Direct Examination by Mr. Platoff:

Q. Your full name is Dr. Martin J. MacDonnell, and you are the complainant are you not? A. Yes.

Q. By occupation you are a physician? A. Yes, sir.

Q. How long? A. Six years.

Q. I understand you are specializing in tonsil and throat troubles? A. Yes; I am in general practice.

Q. How long have you resided in Woodcliff, N. J.? A. Six years.

Q. You now reside in this building? (meaning apartment house in Woodcliff, N. J., involved in this proceeding). A. Yes.

Q. Where did you reside before? A. 100 31st Street, Woodcliff—just across the way from the apartment.

Q. When did you purchase the land upon which this building is erected? A. About? A. I think it was 1925.

Q. How long thereafter did you decide to build a building on this land? A. About two years.

Q. What kind of building did you first decide to build there? A. I first decided to build an office and home.

Q. A one family home? A. Yes.

Br. Mr. Bianchi: I object to that. It is not material.

By the Master: I don't see of what materiality it is, either.

Q. When did you first meet Mr. David M. Ach? A. Why, I think it was in Spring of 1926.

Q. And, did you meet him then for the first time? A. Yes.

Q. And that meeting was for the purpose of having plans prepared for this apartment house? A. Yes.

Q. You never knew him before that? A. No.

Q. Did you give him instructions? A. I explained to him how I wanted my office laid out and I told him I wanted the office to be soundproof and I gave him details on how I would like to have it built.

Q. And, did he prepare a set of plans and specifications? A. Yes.

Q. Did he submit them to you? A. Yes.

Q. And, are these the plans and specifications that are part of Exhibit D-52, the specification, and D-53 the plan? A. Yes, they are the original plans and specifications.

Q. Have you ever had any other building experience outside of this building? A. No.

Q. Did you approve the plans and specifications? A. Yes.

Q. Did you then proceed to get bids for the construction of this building? A. Yes.

Q. And, did you ever know Mr. Vitille or Mr. Kinsella or Mr. Cunhy before you met them in connection with this building? A. No, I did not.

Q. Who introduced you to them? A. Mr. Ach.

Q. Did he say anything to you about them? A. He said they were reliable contractors and I could rely upon them to do as good work as any other contractors.

Q. And in pursuance with your introduction you went into an contract, Exhibit D-51, with Vitille, Kinsella & Cunhy? A. Yes.

Q. How soon after the contract was executed

was construction commenced on this building? A. It was agreed that it should begin—the contract was signed on a Friday and it was agreed that the work should begin on Monday, but I think it was about two months after.

Q. What day was it on, Friday, October the what? A. Friday, October 13th, 1926.

Q. How long after the execution of the contract was it before any work was started on this building? A. I think it was about two months. I went on my vacation after the contract was signed and I was away for three weeks and there was no work done when I came back and I think it was about a month later when they finally started to work.

Q. Started to work about the middle of December? A. Something like that.

Q. Doctor, did you have any knowledge of any change in any specification for plumbing and heating? A. No.

Q. Did you have any knowledge of any change in any specification for the electrical work? A. No.

Q. Did you know from observation that any changes were being made in the plumbing or electrical specifications? A. No, I did not notice.

Q. You were actually engaged in your practice while this building was being constructed? A. Yes.

Q. Did you order any extra work? A. Yes, I did.

Q. What extra work did you order and from whom? A. I ordered some extra work from Vitille—electrical work. I ordered some work in regard to the deafening of partitions in the walls and deafening of the floors.

Q. Doctor, when you ordered your first extra work from these contractors did you have any talk with him as to the method in which they would charge you for this extra work? A. No, I did not.

Q. Now, I show you an estimate on the letterhead of Vitille, Kinsella & Cunhy, on which I see the item of 5%. Will you tell me what that is? A. This is in regard to the gypsum block in parting walls.

Q. Is this an estimate or a bill? A. An estimate.

Q. What is this 5%? A. He couldn't say.

Q. Couldn't say whether that was overhead or not? A. No.

Q. Who gave you this? A. Mr. Kinsella.

Q. What agreement did you have, if any, with the contractor with reference to this extra work, by way of gypsum block in the partitions? A. I asked him to place gypsum block deafening in the partitions and it was agreed that they would cement them together and I asked them for an estimate and that is what they gave me.

Q. Did you tell them why you wanted deafening? A. Yes; just for quieting the place.

Q. Did you also say anything about deafening in your contract? A. Yes, that was a special deafening. That was in the original plans and specifications.

Q. Doctor, did you have any other agreement regarding any other extra work beside this? A. That's the only written agreement I have.

Q. The first we have is this deafening in partitions for which you have a written contract.

By Mr. Bianchi: I object to it unless its in evidence.

Q. Who gave you this paper? A. Mr. Kinsella.

Q. A member of the contractors' firm? A. Yes.

Q. That was given to you in respect to your request for extra work? A. Yes.

Q. When you asked him what it would cost he gave you the paper? A. Yes.

By Mr. Bianchi: I object on the ground that the handwriting is not proved; the source is not proved.

By Mr. Platoff: I have proven that the partner of the contractors gave him this paper.

Q. And did he hand you this paper personally? A. Yes.

Q. Is this paper in the same condition it was in at the time he gave it to you? A. Yes.

Q. Can you tell when he handed you this paper? A. Not the date, but it was the time when the partitions were being erected.

Q. What partitions? A. The rooms.

Q. When about? A. In the spring of 1927.

Q. Where was it handed to you? A. In the apartment house.

By Mr. Platoff: I offer this in evidence.

By Master: It will be marked Exhibit C-4 for whatever it is worth.

Q. Where was Mr. Vitille at this time? A. He was not on the job at that time.

Q. How long was he off the job? A. Four or six months.

Q. Did you ever know why he was off the job? A. I heard he wasn't well.

Q. Did you know anything about the nature of

his illness? A. They said he had something the trouble.

Q. Well, he wasn't on the job. Who was in charge of the job during his absence? A. Mr. Kinsella.

Q. Was Mr. Cunhy ever there? A. Mr. Cunhy came there when they were starting the carpentry work.

Q. What kind of work did Mr. Kinsella do? A. He supervised.

Q. What kind of work did Mr. Vitille do? A. Supervising.

Q. What kind of work did Mr. Cunhy do? A. I cannot say. I think he helped to work with the carpenters.

Q. As mechanic? A. Yes.

Q. Do you know whether or not the contractor ever employed a superintendent on that job? A. I know he had a superintendent for the mason work.

Q. He had no other superintendents? A. No.

Q. Did he ever have any watchman? A. Yes.

Q. At night? A. Yes.

Q. Do you know whether he had any time-keeper? A. I don't think so.

Q. This first extra work that you had any dealings with him about was this deafening of the partitions? A. No. First extra work was in regard to some extra electrical work.

Q. Did that come in discussion before the deafening of the partitions? A. Yes.

Q. Did you employ him to furnish you with additional base plugs? A. Yes. He sent an estimate to me and I sent it to the architect.

Q. Were they to have billed you? A. No. I think that's on his extras.

Q. What was the next extra work? A. There was a change in the outlet of three room apartments.

Q. Did you have any estimate from him either in writing or verbal? A. No, I did not.

Q. Did you have any idea on what basis he would charge you for it? A. At that particular time I asked the architect to get an estimate and he said it was such a minor affair he did not think it was worth while. They had the partitions up but did not have the lath on.

Q. What did they do—knock down the partitions? A. Changed the partitions.

Q. You say there was no lath on the partitions at the time the change was made? A. No lath.

Q. What was the next item of extra? A. Flax linum came later.

Q. Just how did you handle the transaction in reference to flax linum? A. We were looking for a deafening material to put in the floors and Mr. Vitille and I went down to Thomas Henry, Inc., to look over their material and I wasn't satisfied with what they had and they send up a salesman with flax linum and he gave us a price for flax linum and we decided to take that.

Q. The price was given to you by the salesman of the company? A. Yes.

Q. Did you buy or pay for that flax linum? A. No. They would bill it through Thomas Henry to the contractor.

Q. You remember what the price was? A. I think it was about $900.00.

Q. Did that include any price for laying it? A. No.

Q. Did you have any talk with Mr. Vitille about cost for laying it? A. I did not have any talk

with him but I spoke to the men who laid the floors. You see, originally they had to be put in with a sort of paper and they put this instead.

Q. This flax linum is in the form of paper, isn't it? A. Rolls out like a paper.

Q. What was the next item of extra? A. I think you would have to mention it to remind me.

Q. I show you on this bill of extras furnished by the contractor Item No. 5, deafening three room apartments, first floor, east and west apartments, and I ask you whether that is the item after which you have this estimate, Exhibit C-4? A. Yes. There are four partitions that isn't included here. This estimate includes here furred and lath partitions in foyers, and after they decided—partition walls between four bed rooms,—that is bed room on each foyer.

Q. Are they included on Item 5, bill of extras? I call your attenion to the fact that on the bill of extras, Item 5 they charged $720.11, while the estimate is $560.60, and ask you whether that's the same work intended to be covered by the estimate?

By Mr. Bianchi: I object to that word "intended" because he has just testified himself that there are other items that are not even included.

A. The south walls, 2, 3, 4 and 5 are not included in this estimate.

Q. Then do you say the $560.60 estimate is for the work which is charged on the bill for $720.11? A. Yes, it is.

Q. Did you have any written estimate, or verbal estimate, for the deafening in the south dividing wall? A. That was to be done on the same basis.

Q. Did you order the extra kitchen cabinets? A. I ordered the kitchen cabinets.

Q. Was there any price agreed upon? A. Just installing. No price agreed upon.

Q. I show you a bill of Wasmuth-Endicott Company, June 1st, 1927, made out to you for $1,531 for kitchen-maid cabinets including moldings and ask you whether that's the bill? A. Yes, sir.

Q. Did you pay that bill? A. I did.

Q. What's the extra charge on the Exhibit for that item?

By Mr. Bianchi: I object. We did not charge him for that. We charged for labor, only, not for material.

By Mr. Platoff: No, for molding.

Q. Did you have any agreement regarding the price that he would charge? A. No.

Q. What's the next item after setting kitchen cabinets? A. Changing all partitions in janitor's apartments. That is partition between a bedroom and a laundry room which makes the laundry smaller and the bedroom bigger.

Q. Did you have any agreement with him for the cost of that? A. No.

Q. What was next? A. There is erecting baths in electrical therapeutic room.

Q. Any agreement as to charge? A. No, sir.

Q. Next item? A. Furnishing doors was next.

Q. Any estimate or agreement on the cost of this? A. No. Plumbing fixtures installed instead of those called for in the specifications was next.

Q. You mean you ordered some other faucets for the sinks other than were specified? A. Yes.

Q. Did you have any agreement or talk with anybody? A. No, excepting the salesman. He wanted to charge me $15 each for them and I asked Cadel if he would buy them for me and get a plumber's discount and he said he would.

Q. How many fixtures were there? A. Nineteen.

Q. And the retail price quoted to you by the plumbing salesman was $15 a piece? A. Yes, and he would install them.

Q. You know what the charge on Exhibit D-56 is? A. $252.

Q. Now, at the time you made this substitution had the other faucets been installed? A. No, they had not.

Q. Did you have any extra work—any extra tile work done? A. Not that I know of.

Q. Did you order any extra work from Crocetti? A. I had a special agreement to change the walls of the operating room. I paid him for that.

Q. That had nothing to do with this contract? A. No.

Q. Did you order any other item of extra work except these you just stated? A. That's all I remember.

Q. Did you authorize Mr. Ach or anyone else to order any other extra work except these you testified to? A. We did make some changes in my office lay-out. Some changes in the dressing rooms. Whether that's an extra or not, I don't know.

Q. What else? A. Item No. 19, erecting a closet in the hall. That's extra we ordered.

Q. Did you have any estimate on that? A. No.

Q. Is there anything else you see now? A.

There's another item, No. 18, erecting a dressing room. We ordered that.

Q. And—. A. And the work in Dr. Fisher's office, we ordered that. We could not get an estimate on that. He would not give an estimate.

Q. Then there is the rock, is that extra? A. Yes.

By the Master: Do I understand there is no question about the rock excavation.

By Mr. Platoff: No question because that was included in the first certificate.

Q. Anything else? A. That's all I see here.

Q. Did you authorize Mr. Ach or anybody else to order any other extra items besides these you testified to? A. No, I never authorized Mr. Ach to order extras or make changes.

Q. Did you authorize Mr. Ach to make changes in the specification as to plumbing or electric work? A. No, I did not.

Q. Did you authorize Mr. Ach to make any deviations in the specifications? A. Beside these I mentioned? No.

Q. Doctor, there was omitted from your apartment a cabinet which you purchased yourself? A. Yes, that's right.

Q. I show you a bill of Frank Betz, made out to you under date of November 17, 1926, for $300 and ask if that's the bill you received and paid for? A. Yes.

Q. When did the contractor go off this job? The general contractor? A. We rented the apartments in October, 1927, but the builder was back and forth on the job for the next year.

Q. What was the first time you had any talk with the builder about extra work or the cost for

extra work? A. Sometime after the building was completed. Might have been in November or later than that. They held a meeting in Mr. Sheridan's office and the builder was anxious to get his money.

Q. Who was there at that meeting? A. Mr. Vitille, Mr. Ach and lawyers representing the sub-contractors and Mr. Sheridan. At that meeting Mr. Vitille got up and said that the amount of his extras was $5,000 and I asked for a bill—an itemized statement—of these extras, and I asked the architect and Mr. Vitille for it. I think it was at least six months later before I could get any kind of statement of extras. I felt that that was more than I expected and I was upset about it.

Q. Did you tell that to Mr. Vitille? A. Yes, and I demanded of the architect and Mr. Vitille that I wanted to know what the charges were for.

Q. And what did Mr. Vitille say? A. They said they would itemize and tell me.

Q. Did you make any other requisitions for a bill after that? A. Mr. Vitille was on the building very often after that and I asked him every time I saw him and called up the architect to see if I could get any evidence of what they did or what the work they charged for was.

Q. When you had this meeting at Mr. Sheridan's office, you said that the builder was anxious to get his money? A. Well, the architect had not given any requisition so, naturally, he could not get his money.

Q. You live in this building since 1927? A. Yes.

Q. You are familiar with the condition of it? A. Yes, I am.

Q. Did you have any trouble with it? A. Well, at the time the roof was put on, about 18 months it was continual leakage, but there was hardly a time when we had a heavy rain that there was no leakage.

Q. Did that cause you any damage or tenants? A. I lost tenants, and I had to renovate apartments and I had to make concessions in the rents, and I lost, estimating, more than $1,000.

Q. Did you pay for any reparis to the apartments or building? A. I had to repair the roof and the apartments damaged by leakage; I had to refinish furniture that was damaged by the leakage, and I had lost several tenants, which meant vacancies.

Q. Did you have any other repairs to make outside of roof repairs? A. The electrical work. The bells were always out of order. The electricians fixed the bells two or three days later the bells were out of order. They never worked properly. I was told the only way to do it was to put in a new system.

By Mr. Bianchi: I object to what he was told.

Q. Have you put in a new electrical or bell system? A. I have so far as bells are concerned. New wires run up to dumbwaiters. Of course, since we did that we have not had so much trouble.

Q. Did you have any trouble with painting? A. Well, we had all kinds of trouble with painting. There were some of the floors that were not painted at all. There was one of the floors in particular. I brought the architect and showed him that the papers were on the floor and when

the tenants moved in there was no paint on the floor. It just had been scraped.

Q. Who tended to that painting after you made the complaint? A. I brought in a local painter.

Q. And who paid him? A. I did. In regard to the floors, when the first years lease was up, it was necessary to renovate the floors. I brought in the painters and they gave me an estimate on it and I had several painters come in and they said they could not——

By Mr. Bianchi: I object to what they said.

By the Master: I don't think he can testify to what they said.

Q. Was there any other trouble in the building that you had, if any? A. I had trouble with the heating. In the morning when they started the fire the radiators would knock and there were certain radiators that would not heat at all.

Q. How about plumbing? A. In regard to the plumbing, there was leakage from some of the bathrooms so I brought in a plumber to repair the leakage and there was no way in which they could get at the connections. There were no inlets so they had to tear the wall down in order to get at the work. I gave the the specifications at that time and I understand that the specifications call for openings that would lead to the bathroom connections.

Q. There were no such openings there? A. No.

Q. Doctor, have you kept a record of what you had to pay to mechanics to repair various work in the building? A. I have my check book and vouchers.

Q. Have you got them with you? A. No.

Q. You gave me a memorandum here of what you paid for roof repairs. Is that what you made yourself from your records? A. Yes.

By Mr. Bianchi: I object to his testifying as to what he paid out unless there is proof here by the men who made the repairs or changes on that roof. The damage might have been the result of the manner or neglect on somebody's part. The roof may have been damaged in a thousand and one ways.

By Mr. Platoff: The specifications call for a twenty year guaranty.

By the Master: My recollection of the testimony in relation to the twenty year guaranty is that it is a twenty year guaranty that the roof was properly put on and against any unworkmanlike work.

By Mr. Bianchi: That's the guaranty, yes.

By the Master: It is not a twenty year guaranty that the roof will not leak or that it will last twenty years.

Q. Did you ever receive the bond in connection with a roof guaranty?

By the Master: It is admitted in previous testimony that there was no bond given.

A. I felt this way about it, that according to specifications I am entitled to a bond and I am entitled to a Barrett Specification roof. If the builder had put on a Barrett roof and had furnished me with a bond and these things would happen I would not have to go to the builder.

By the Master:

Q. Were you up there at the time with Mr. Keeler, when he made an inspection of this building? A. Yes.

Q. Did you talk to Mr. Keeler? A. I did.

Q. Did you personally show Mr. Keeler through the building? A. No.

Q. Did you show him any places where there were any leaks, personally, yourself? A. No.

Q. Was it raining that day? A. The day that I saw him there it was not raining.

Q. Was that on a Saturday? A. I am not sure what day it was.

By Mr. Bianchi:

Q. Don't you remember we had snow and rain that day? A. I can't say. It might have been so.

By Mr. Platoff:

Q. The day Mr. Keeler was there, did you offer to show him what you considered defects in the building? A. I showed him a number of defects.

By the Master:

Q. Which ones did you show him? A. The kitchen lay-out was a defect.

Q. By that do you mean the kitchens of all the apartments, or your own apartment? A. The kitchens of five apartments.

Q. What had been changed? A. They changed the partition in the kitchen, between the kitchen and the bathroom and that changed the dimensions of the kitchen.

Q. Well, now, weren't you around the building while it was being built? A. Yes.

Q. Did you see it as it was being built? A. I did.

Q. Didn't you see these kitchens, how they were being built? A. I couldn't tell when they made a slight change.

Q. Was it a slight or a large change? A. It was large enough. The fixtures did not fit in, so it was large enough.

Q. You recall they had trouble fitting fixtures in the bathroom? A. Yes.

Q. Would that have anything to do with the changing of the partitions in the kitchen? A. I don't know.

Q. When there was this trouble in the bathroom, did you take it up with the architect or did the architect take it up with you? How was it fixed up? A. For the most part, these conditions were never mentioned to me.

Q. Did you know, at that time, that there was some change being made so far as the fixtures in the bathroom were concerned? A. In the bathroom, that the radiator was so close to the bowl that there was danger of being burnt.

Q. And, therefore, they had to be shifted around? A. He did not change them.

Q. Didn't you know that that was because of the layout of the room? That there was some mistake in the plans? A. Yes.

Q. Now, did you know that the plumber had submitted specifications to Mr. Ach, the architect, covering that matter, or did you have any talk with the architect as to how that condition could be changed or alleviated? A. When I noticed that the building was completed, or substantially completed, the same thing applies to

the kitchen, I did not know that they made any change in the dimensions of the kitchen.

Q. Well, now, when you found the lay-out was changed, did you talk to Mr. Ach about it? A. Yes.

Q. What did he say? A. I did not know at that time that they made changes in the dimensions of the kitchen, but when I came into the kitchen I saw the fixtures were not in the location as shown on the plans, because on the plans it was shown that they set in the corners and when I came into the kitchen the fixtures were placed in the middle of the floor, so I called up the architect and I told him that I wanted them placed where it was called for, and the architect and the builder talked things over and we arranged the fixtures to be placed where they should be and that's where the extra charge came in. Even then, they didn't improve much on them.

Q. How fully rented is the building now? A. I have two vacancies.

Q. And, has the building ever been completely filled. A. Yes. When it was first put up it was completely filled.

By Mr. Platoff:

Q. How long was it completely filled? A. From October to February.

By the Master:

Q. And then what happened? A. And then one tenant broke the lease and moved out because of the leakage.

Q. Was that a tenant on the top floor? A. Yes.

Q. Was that leak on the wall or the ceiling?

A. Well, we never had any trouble of leakage on the side walls.

Q. There were leaks over the tops of the windows, between the ceiling and tops of the windows? A. Yes.

Q. In how many apartments? A. In all apartments on the top floor.

Q. All of them? A. Yes.

Q. What did you do to correct that, if anything? A. We called up the architect and he sent the builder over and tried to make repairs.

Q. Did you know that the builder did waterproofing on the outside of the wall? A. I heard them talk about it.

Q. And after that waterproofing was put outside of the wall, was the condition improved? A. Yes, it was improved, I think.

Q. That's about a year ago? A. Yes.

By Mr. Platoff:

Q. Were there any leaks since the waterproofing was done? A. A. Yes.

Q. When was the last leak? A. In may, 1929.

Q. How bad was that leak? A. A very bad leak. It even went down three floors. It damaged furniture of top floors, leaked through the floor on the third floor, and even damaged the stuff down there.

By the Master:

Q. Prior to May, 1929, when was the leak you had before that? A. A period of six months or so before that, there was no leak.

By Mr. Bianchi:

Q. You lived before moving into this apart-

ment across the street and you were at this apartment almost every day during its construction? A. Not every day.

Q. Now, you remember Mr. Vitille going on the roof and flooding the roof to find the leaks? A. That was done while I was living there.

Q. And isn't it a fact that the only water that was discovered was that coming through the bulk? A. I can't say.

Q. You saw him flooding the roof to discover where the water came in so as to know what to repair? A. Yes.

Q. And you were told that the cinder block is what caused your trouble, isn't that true? A. No.

Q. What was told you? A. I don't think he mentioned cinder block as being positive trouble.

Q. And the fact that after he put this so-called waterproofing around the parapet wall, you had no more trouble. Isn't that so? A. That waterproofing was put there, I think, in winter of 1928.

Q. Around the parapet wall? A. Yes.

Q. And that stopped the leaking? A. No. We had leakage long after that.

Q. Last year, this man came back and put some— A. He wasn't there last year.

Q. When was this waterproofing put on by him? A. About six months after the building was occupied.

Q. Along side the parapet wall? A. I didn't watch him to see what he was doing.

By the Master:

Q. Did you know whether or not he was going to make any charge for that? A. He did not say so.

By Mr. Bianchi:

Q. They were up there quite some time doing it? A. I don't know.

Q. How many days were they doing it? A. I can't say.

By the Master:

Q. You knew that Mr. Ach was the architect on this building and that he was attending to supervising this building for you? A. Yes.

Q. Did you ever remonstrate with Mr. Ach about any work that he had ordered or any change that was made? A. No.

Q. The change in the vestibule was not made with your directions or acquiesence? A. Was not mentioned to me.

Q. You saw them doing it, tho? A. I didn't know what was originally called for. I am not very familiar with plans.

By Mr. Bianchi:

Q. But you wanted a certain building and a certain kind of a construction and you studied your plans? A. Just where that door went, I don't know.

Q. But you were very much interested, and it was a very large undertaking and you were very much interested in having this building constructed in just your specific manner. A. Yes.

Q. And, isn't it a fact that when the tenants moved into that building they started to put up aerials? A. Yes.

Q. Did you stop them from putting them up there? A. No.

Q. They still do put them up, don't they? A. Yes.

Q. Did you rent any of your apartments in September, 1927? A. I think one moved in in October.

Q. Did you see who went up to help these tenants to put the first aerial up? A. I don't remember when the first aerial was put up.

Q. Remember when he fastened it? A. No.

By the Master:

Q. Have you a radio yourself? A. Yes.

Q. Have you an aerial? A. Yes.

Q. Did you put it up? A. I had an electrician do it.

By Mr. Bianchi:

Q. And of all the leaks that were up there, you have not been up there? A. I think I can very plainly say that the leaks are not due to the aerials.

Q. But so far as you know, these aerials might cause the leaking? A. Yes.

By Mr. Platoff:

Q. You had a roofer there last May? A. Yes.

Q. And he has fixed that roof? A. Yes.

Q. Who is the roofer you had? What is his name? A. I think his name is Schrozk.

By Mr. Bianchi:

Q. Did he put a new roof cover on there? A. No.

Q. How much did he charge you? A. $40.

Q. Isn't it a fact that what this man did was that he patched it up? A. Yes.

Q. That's what you paid him $40 for? A. Yes.

Q. Did he tell you why he had to repair it? A. He, he did not explain to me why.

Q. Didn't you know that he had to make repairs where somebody damaged it by usage? A. I could find that out easily.

Q. But you paid him $40, that was all? A. Yes.

Q. I don't think the tenants would like it very much if you prevented them from putting aerials up there? A. I never asked them.

Q. As a matter of fact, you would not want to ask them. A. If I knew they had anything to do with the leakage.

By Mr. Platoff:

Q. If you were in that building every day could you tell whether extra work was being done or deviations were being made? A. Ordinarily I have been over there as a matter of interest not to check.

Q. Have you the knowledge of a builder? You going into a building under construction, could you tell whether changes were being made from the plans and specifications? A. No.

By the Master:

Q. You say they did not start to work on the building for a period of about two months? A. Yes.

Q. What did you do when you came back and found they were not working? A. I called up the architect and wanted to know why and he said he thought they were on the job already.

Q. Anything else? A. I called them again and told him we thought we ought to take the contract away, so Monday he put the men in there to excavate.

Q. At any time, did you take the contract away? A. No.

Q. When you knew that would delay the finishing and the eventual renting, what did you do? A. I tried as much as I could to urge them to start the job.

Q. You knew that the renting season was really the first of October? A. Yes, Spring and Fall.

Q. The Spring. If you waited two months before you started you would have to carry it until Spring? A. Yes.

Q. The next real renting season for apartments was October first, was that right? A. Yes.

Q. And, you were very much interested in getting the building up so as to be able to rent it October first? A. Yes.

Q. You spoke to the architect about the final requisition, as you call it, your certificate? A. Yes.

Q. When the contractors came to you for their money and you told them they couldn't get it until they got the certificate? A. Yes.

Q. Did you see the architect? A. Yes.

Q. What did he tell you? A. He said there were a lot of things they had to straighten out.

Q. What things? A. He mentioned the doors —checks for the doors, kalamien doors were not fit—

Q. Check for the doors. You saw the doors being put up, didn't you? A. Yes.

Q. Did they have hinges or some appliances on them instead of checks? A. A check is used for a different purpose.

Q. You mean something to prevent it from striking? A. I don't know what a check is.

By Mr. Bianchi:

Q. Doctor, the time you started this or contemplated the starting of this building, was the season when a lot of building was going on, in 1926? A. Yes.

Q. And, didn't you know, Doctor, that the delay that occurred in the starting of this work was because of the fact that it was impossible to get men or contractors to do the blasting? A. No, I didn't know that.

Q. Well, you complained to Mr. Ach about starting the work? A. Yes.

Q. And he told you that they were unable to get men to come up there to do the blasting? A. They didn't know. They had to do blasting until they got started.

Q. Didn't you know that the reason they could not start was because they could not get the men? A. No, I didn't know that.

By the Master:

Q. Were you told that? A. No. They were always putting it off a few days. I called up the architect and he would call back and had got in touch with them. They would start in two or three days was always the answer.

MR. JOHN H. SHERIDAN, witness on behalf of complainant, being previously sworn, recalled.

Examination by Mr. Platoff:

Q. Mr. Sheridan, did you prepare, or have anything to do with the preparation of the contract

between the owner, Dr. Michael MacDonnell and the general contractor, in this cause, marked Exhibit D-51? A. I was there when it was signed, and I think there were some changes made at the time.

Q. Was it signed in your office? A. In the Doctor's office.

Q. In the Doctor's office? A. Yes.

Q. I show you Exhibit D-51 and ask you to identify the contract? A. I believe that is the contract.

Q. Is there anything on that contract in your handwriting? A. I don't think so.

Q. Will you look it through, please? A. (Witness examines contract). Page 3, I think the words, "the preceding," striking out the word "that" and the words "the preceding," in Article 4, line 6, are in my handwriting. That is the only place where my handwriting appears.

Q. Is it a fact that you examined this contract before its execution? A. Yes, I went over it.

Q. Did you also have the specifications that were part of that contract? A. The specifications were there, Mr. Platoff, but I don't think I examined them word for word.

Q. Prior to, or about the time of execution of this contract, was there any discussion about changing any of this specification? A. I think that the changes were discussed, and I don't recall now whether the changes in the specifications on the last page of the contract were made then or had been made previously. My best recollection is that they were made at that time and I think, by Mr. Ach.

Q. Were any changes discussed or made prior to the execution of the contract except these referred to on page 4?

By Mr. Bianchi: I object because the contract and specifications speak for themselves, and I do not see how we can vary them in anywise.

By the Master: I will take the testimony subject to Mr. Bianchi's objection. I think he will agree that the matter of what the specifications are won't be changed much by this testimony if the testimony is incompetent and the rule is upheld, and the documents speak for themselves.

Q. Was there any discussion at the time of the execution of the contract concerning the revised plumbing specification? A. I am quite sure there was not. If there had been, I would have noted it.

Q. Was there any discussion at that time concerning a revised electrical specification? A. No, I don't think there was. I am pretty sure there was not. In fact, I never heard of it.

Q. Sometime in October, 1927, was there a conference held at your office, which was attended by Mr. Vitille, Dr. MacDonnell and several other subcontractors? A. There were two conferences held at my office, but not as early as that. The first one was sometime after that. At that conference there were a number of creditors of Vitille's and the Doctor and, I think, Mr. Vitille and Mr. Ach. But that was sometime after October.

Q. At that conference, was there any discussion about extra work? A. Yes, I think there was. I think there was at both times. That was the time that the Doctor and somebody else there had quite an argument about extras. I think the Doctor disputed with the architect as to the Doctor having ordered some extras.

Q. Do you remember which specific extras were disputed? A. No, but some of the extras were in the cellar, or the cabinets. I don't recall what it was.

Q. Did you hear the Doctor ask Mr. Vitille what his extra work would cost? A. There was some discussion. As I recall it, there was some discussion, some question at that time as to the amount the Doctor had paid to the contractor and I don't think the contractor at that time was certain himself as to the amount he had received, and there was some talk about the amount of extras. There were no claims put in at that time, at least, I did not have them. The amount of the extras mentioned by Mr. Vitille was very small, I think, around $5,000. As I recall it, that was the amount. I think he claimed $15,000 was due on the contract at that time. I think, if I recall rightly, claims that I had knowledge of at that time, as something like $20,000, and my recollection is that I thought that the matter could be adjusted very well, because that $15,000 which Vitille claims, and the small amount of his extras, it would almost amount to the amount of the claim.

Q. You say Vitille claimed about $5,000? A. About that.

Q. For his extras? A. Yes.

Q. And that the amount of claim for extras plus the amount he claimed on the contract equalled— A. Little bit less. That is what I knew of at that time.

By the Master:

Q. Did you know at that time of all those who had come in since, or have there been any since?

A. I don't know. The Doctor never gave me all of the stop-notices.

Q. What is your recollection as to the aggregate amount of the stop-notices or the amounts due from the contractor to the subcontractors at that time—about? A. Only a few thousand dollars over the $20,000 which they said was due.

Q. That is, $15,000 on the amount—contract—and approximately $5,000 for extras, making $20,000? A. Yes.

Q. And your recollection is that the amount they owed was a few thousand more than that discussed? A. Yes.

By Mr. Platoff:

Q. Did Mr. Vitille submit a regular bill for extras at that time, or did he merely say his extras would amount to approximately that amount? A. Yes, he merely got up and said that would be the amount.

By the Master:

Q. Mr. Sheridan, I call your attention to Exhibit C-2, bearing the date of November 22, 1927. Would you say that this conference was before November 22, 1927, or after that date? A. This is the first I ever saw of this detailed statement.

Q. Did you ever see a detailed statement furnished by Vitille? A. Yes, between that conference and a later conference. I think he came in to see me and then at the later conference he had a detailed statement. It was a little bit different from this. Set up differently.

Q. In what particular, as far as your recollection goes? A. I think he had the different items arranged—

Q. Do you recollect, according to that statement that he had up there, as to what amounts that he claimed on that were? A. Around $14,000 or $15,000 for his extras.

Q. In other words, as I understand it, at the first conference you had, Mr. Vitille did not have any itemized statement or anything of that kind and in general talk he said there was about $15,000 due on the original contract and about $5,000 for extras, and I assume that it was suggested that there be another conference and that he should bring a statement? A. I think I said no money would be paid out until the architect signed the certificate, and the architect wanted to check up on it. I suggested that the contractor get together with the architect to have the extras agreed on.

Q. And, then they came in on the second conference and the contractor produced a statement, which showed about $15,000 on the original contract and $1,500.00 extras, which was about $10,000 more than was discussed in the previous general discussion? A. Yes. The total was about $29,000 together.

Q. I see, $9,000 extras. When he came in with this statement which showed about $9,000 more than what was said at the previous discussion, what was said about that addition? Did it create any surprise? A. The Doctor was not there. The architect was not there.

Q. Well, what did Vitille say? A. He said they were not ready but he wanted to check up on them again. He said he had not gotten all the bills, and I have one of the bills he had not gotten. It was the North Hudson Manufacturing Company's bill.

Q. Any other one in particular that you remember? A. That's the particular case, because I had to run around the North Hudson to get the bill.

Q. I call your attention to the fact that the North Hudson Manufacturing Company's extra is only $769. Is there any other one you recall? A. No. I think the architect said he had most of them, and he was getting them.

Q. Mr. Sheridan, at the first conference there were quite a number of the creditors or subcontractors of Vitille's present, were there not? A. Yes.

Q. Now, I call your attention to the fact that in this Exhibit C-2 the amount of extras due to the subcontractors for work done by the subcontractors is approximately $5,800. Would you say that when the sum of $5,000 was mentioned at the first conference that they related to the extras that had been done by these subcontractors? A. I don't think so, Mr. Lane.

Q. You think it included all the extras no matter whether done by subcontractors or not? A. I think so. As I recollect it, he did not have any of his figures down on paper.

Q. Referring to page 4 of the contract, Exhibit D-51, do you know in whose handwriting these changes in specifications are? A. To the best of my recollection, in Mr. Ach's handwriting.

Q. And, were these changes in the contract when the contract was brought to your office, or put in the contract at your office? A. It was signed in the Doctor's office in the evening. I was up there when it was signed.

Q. When you were up at the Doctor's office, where the contract was signed, and saw the contract, were these changes on page four, if you

know, in the contract when it was presented to you, or were they put in there up at the Doctor's office? A. To the best of my recollection, they were put in there while I was there.

Q. Were these changes in the specifications made because of any suggested changes in the specifications suggested by you or were you simply looking over the contract from a legal standpoint? A. Legal standpoint.

Q. And of course, you did not attempt to suggest any changes in the specifications? A. Not to the best of my recollection. I think our principal discussion at the time was as to the method of payment. I suggested, if I recall right, that there should be a lump sum payment as the work progressed, and the architect suggested monthly payments.

Q. In other words, you did not have very much to do with the actual detail of the changes in the specifications? A. Except that I made sure that all the changes we discussed were put in the specification.

Q. Mr. Sheridan, after this contract had been executed and the changes made, when next did you have anything to do with the contract, or what I will call the "MacDonnell job"? A. Well, outside of seeing him once in a while and asking how the job was getting along, I did not have much to do with it until about the time he was applying for his first mortgage.

Q. When would you say that was about? Sometime in the summer? A. Sometime in the following spring after this signing.

Q. Did you have anything to do with the advising the Doctor about any changes that were made in the building, like the changes that were made in the Doctor's apartment, or any other

details of changes that might have been made in the specification, as for instance, the changes in the bath room so the fixtures could get in there? Did you have anything to do with that at all? Know anything about it at the time? A. At the time, I don't think so. It might have been discussed at some of the times I saw him, but I don't know. Sometime I may have found fault with the size of the bathroom——

By Mr. Platoff: During construction?

A. Before the construction.

Q. On the plans? A. Yes. Whether that was before or after the changes, I don't know.

By the Master:

Q. Did you know that the plans were changed as far as the fixtures are concerned? A. No.

Q. You saw Dr. MacDonnell once in a while in a social way, didn't you, and this was one of the main projects of Dr. MacDonnell—a new adventure—and he talked with you about it? A. Yes, that's right.

By Mr. Platoff:

Q. At the first conference, Mr. Sheridan, when Mr. Vitille for the first time stated the approximate amount for his extra work, did Dr. MacDonnell make any request for a detailed statement? A. I think so. If I recollect right, he disputed any extras. He said there were very few extras he ordered and he wanted to know how it was made up. I don't think he said "I want a detailed statement" though.

By the Master:

Q. At that time you knew that there were a number of changes made by the Doctor in his own apartment, did you not? A. In a general way.

Q. And, you knew also that there had been a number of changes made in the dentist's apartment, didn't you? A. I think the only one I knew of was that Cadel bill for extra was for some work done on the dentist's apartment.

Q. And, you knew that there were changes made in the bathrooms? A. No, I don't think so.

Q. And, what other changes that you knew of were covered by the extras at that time? A. At that time, just before that, during the summer, the Doctor had taken me upstairs and shown me some of the extra things he put in, like frigidare and kitchen-maid cabinets, and the french doors he put in.

Q. How about the change in the vestibule? A. I don't think I ever heard about that.

By Mr. Platoff:

Q. Do you know, Mr. Sheridan, whether or not the frigidaires and kitchen-maid cabinets were supplied by the general contractors or whether they were purchased directly by Dr. MacDonnell? A. Nothing except what the Doctor told me.

Q. Mr. Sheridan, can you now say definitely whether or not the first conference was held before or after November 22, 1927? A. I am quite sure, Mr. Platoff, it was held after. My recollection is that there was some time lapsed from the time of the signing.

By the Master:

Q. Mr. Sheridan, some question is raised as to whether or not the first conference was not in January, 1928. What is your best recollection as to when it was held? A. It may have been January because as I say, it was quite some time from the time stop notices were in and the time that we had this conference—

Q. When you say, some time, would that be a month or two months? A. A month, two or three months.

By Mr. Platoff:

Q. How long after that was the second conference held? A. The second conference was sometime after the first.

By Mr. Platoff: I now call upon the defendant to produce the letters he has arranging for this conference, giving the day etc.

By Mr. Bianchi: Here are carbon copies of the letters sent out by the contractor to all of the creditors to meet at Mr. William Burke's office on Saturday, April 21st, 1928, at two p. m. This the second conference.

Cross Examination by Mr. Bianchi:

Q. I call your attention to an itemized statement made by Vitille, Kinsella & Cunhy for Dr. MacDonnell's job and ask you whether you recognize the notes "B, B, B," do you recognize the handwriting of Mr. Ach, the architect? A. No, I do not.

New Jersey State Library

Q. Don't you know that Mr. Ach at that particuar conference asked Mr. Vitille to bring the bills for the claims as presented? A. Yes, he said he wanted to check upon the extras.

Q. And, don't you know that Mr. Ach put a "b" after each one that he wanted? A. No.

Q. Did you know, or do you remember that an itemized statement at that time was presented by the contractor? A. At the second conference? Yes.

Q. First one was very informal? A. Yes. There were only half of the creditors.

Q. At the second one you had a big representation? A. Yes.

Q. And they came there in compliance with a request by the general contractor? A. Yes. We had numerous conferences after that, too.

By the Master: I desire to state that I have looked up, and April 21st, 1928, was a Saturday, and Mr. Sheridan's recollection is that the second conference was held on a Saturday afternoon, or as a matter of fact, both conferences were held on Saturday afternoons.

By Mr. Platoff:

Q. Are you sure that at the first conference held in your office sometime in January or February, 1928, there was not produced any itemized bill by the contractor for the balance of his contract or extra? A. I am positive of it. One reason is that by the time the second conference had come along I had then ascertained the total amount jumped up into the neighborhood of $30,000.

Q. And in the first conference, you were under

the impression that it was $20,000? A. It surprised me that the extras had grown so high.

Q. Are you sure that at the second conference there was submitted by the contractor an itemized bill of some kind covering the balance of his contract and the extras? A. A few days before. As I recall it, he came in to see me. I mean Mr. Vitille, and I suggested that he call a conference and I think, at that time, whether it was the time of the conference or a few days before, he came in to see me. That was the first time I saw a bill of extras.

By the Master: Mr. Platoff, do I understand that the purport of Mr. Sheridan's testimony is directed to an attempt to show that the contractor, when the first conference was held, and Mr. Sheridan testified that the amounts suggested was about $20,000, the balance due on contract, and extras, that in between that time and the second conference some months later, that the contractor attempted to, as you might call it, "pad" the extras having found out in the meantime that he really owed to sub-contractors on this job something in the neighborhood of $30,000 and therefore was attempting to get amount of extras up so that the extras might be sufficient to satisfy these contractors? The reason I ask that at this time is that I assume that if that is your purport, that when the entire case is in, you would probably argue that, and I want Judge Bianchi to know what your purport is. Having that in mind, I cannot see any other real ground for putting in Mr. Sheridan's testimony.

By Mr. Platoff: We will argue further that in January or February, at the time of this first conference, the contractor already knew by virtue of Exhibit C-1, which is dated November 22nd, or should have known, of any extras on this job. I contend that he knew or should have known the amount due on his claim. He said his claim was $5,000 and some odd dollars. At that time, the total amount required to pay the contractors was about $20,000, but by the time the second conference was held, the amount due to subcontractors and extras grew to $30,000, and then he produced a statement dated even prior to the first conference, amounting to $30,000. The inference to be drawn is that that Exhibit C-2 was not really or has not really been prepared November 22, 1927, but was prepared after the first conference.

By Mr. Platoff:

Q. Mr. Sheridan, I show you Exhibit C-2 and ask you to look at it and ask you whether that is similar to the statement or bill that was rendered by the contractor at the conference held in your office? A. It does not resemble the one that I saw at that time. I am trying to place in my mind the dissimilarity. The papers are about the same. It was arranged differently. It is running in my head that the 10% overhead and 10% profit was annexed to each item. That's the shape that was in, if I recall right, at that time.

By Mr. Bianchi:

Q. The first meeting was very informal? A. Yes.

Dr. Martin J. MacDonnell—Recalled, direct.

Q. It took about twenty minutes? A. Oh, longer than that.

Q. Half hour? A. Longer. I had prepared nothing for it. Neither had anyone. So it took longer.

Q. Nobody else prepared anything for it? A. No.

By Mr. Platoff:

Q. Do you know whether Mr. Vitille had any books or anything that he may have read the amounts of his claims from at the first conference? A. I do not recall.

DR. MARTIN J. MACDONNELL, the complainant, being recalled:

Examination by Mr. Platoff:

Q. Were you present at the first conference held in Mr. Sheridan's office? A. Yes.

Q. When was that held, approximately? A. I think it was in January or February, 1928.

Q. Who was present outside of Mr. Sheridan, yourself and Mr. Vitille? A. A number of subcontractors and some lawyers representing them.

Q. Was Mr. Ach there? A. Yes.

Q. Did anybody ask Mr. Vitille if he had any extras? A. The extras were discussed at that time and Mr. Vitille said his extras were about $5,000. He mentioned $5,000 and some odd.

Q. You mean he mentioned a specific amount? A. He mentioned the amount of his extras at that time, as being $5,000 and something.

Q. What did you say? A. I was rather sur-

prised to think that they were so high, and asked the architect if that was true that they were so high, and he said that he had not checked up on them. So I told them I wanted a statement of the extras exactly why they were so high—$5,000 and some odd.

By the Master:

Q. Did you understand that the extra amount of $5,000 and some odd was in addition to the extras that you knew about? A. No.

Q. For instance, you had part-paid one extra for rock excavation. Right? A. Yes.

Q. Did you understand that the amount of five thousand and some odd dollars included that $1,200? A. Some in excess.

Q. In case of that, you knew about and paid that one? A. Yes.

By Mr. Platoff:

Q. Did you make any statement to Mr. Vitille as to what particular work that extra took in? A. No. I wanted to know why they were so high. I talked to the architect and Vitille at that time and I wanted to know just the amount of the extras and the different items that were included in those extras.

Q. How soon after this conference were you furnished with a bill for extras? A. About six months later.

Q. Did you make any other request for an itemized bill besides at the first conference? A. There was hardly a time when I saw Mr. Vitille on the job that I did not ask him for a statement of the extras.

Dr. Martin J. MacDonnell—Recalled, cross.

Q. I show you what purports to be a number of architect's certificates and ask you whether these are the certificates which Mr. Ach furnished to you upon which you made your payments from time to time? A. Yes.

By Mr. Platoff: I offer this in evidence.

By the Master: The certificates will be marked Exhibit C-101, consisting of seven pages of white paper and one sheet of yellow.

Q. Doctor, will you prepare and furnish an itemized statement showing the payments you made or advanced on these certificates? A. I will.

By the Master: I want to suggest at this time that arrangements be made that someone representing Mr. Vitille, or Mr. Vitille, go over with Dr. MacDonnell the payments that have been made, and that after, if there is any dispute as to the payments, it will be necessary for the Doctor to produce his checks if he has them, or the best evidence that he has, of any payment of any disputed item.

Cross Examination by Mr. Bianchi:

Q. At one time, Mr. Vitille went on the bond with you to borrow some money, didn't he? He signed a bond in connection with a mortgage?

By Mr. Platoff: What kind of a bond should be specified in the question.

Q. Did you borrow $50,000 on the job? A. I did.

Dr. Martin J. MacDonnell—Recalled, cross.

Q. Did Mr. Vitille have to go on the bond? A. I don't know. I know Mr. Vitille had to be with me and they asked him some questions.

Q. Didn't that come up at one of these creditors' meetings? A. No.

Q. You did see an itemized amount or statement of this character (showing witness Exhibit D-151)? A. I was not at the second meeting.

Q. Mr. Ach represented you and your attorney represented you. A. I was never told of it.

Q. Never heard of it in April, 1928? A. Never knew.

By the Master:

Q. When did you first hear of it? A. Just now.

By Mr. Bianchi:

Q. Don't you know that a letter had been sent out to all the creditors to be at this meeting on April 21st? A. No. Probably I was not a creditor and I did not receive one.

That's all.

By Mr. Platoff:

Q. At this first conference held at Mr. Sheridan's office, at which you were present, do you know whether or not Mr. Vitille had any records from which he stated his claims? A. Mr. Vitille got up and read a statement off a paper and said the amount due was so much and extras were so much, and then when I asked him to detail he could not give me the details, but gave me the total amounts.

That's all.

Michael Vitille—Recalled, direct.

MR. MICHAEL VITILLE, defendant, being recalled, on contractor's case.

Examination by Mr. Bianchi:

Q. At the first conference held toward settling the Dr. MacDonnell job, were all the creditors there? A. No.

Q. Did you know what your extras amounted to at that time? A. Yes.

Q. Did you tell anyone at that time or say at the conference that you had about five thousand dollars worth of extras? A. We never mentioned it.

Q. Did you say, "I have about $5,000 worth of extras"? A. No.

Q. There had been no formal arrangement of the meeting? A. No.

Q. How much did you say was due to you, if anything? A. The first conference, we went over there and the architect was going to bring over the final certificate and to check up the payment which, the check would be made directly to the creditors.

Q. What happened? A. The architect said he did not have the time to check up his bill and all the papers and could not have the certificate ready, but he will have it in a few days, and he asked me to go to his office and we were supposed to check up the statement, which I rendered first on November 22nd, 1927, and a few days afterwards I went over to Ach's office, the way he told me, and he told me he would put a B after anything that he wanted a regular statement to show how it is arrived at—that total of money due to me—and I went back home and I made a regular statement and then mailed it to Ach, and

another one to Dr. MacDonnell. Then there was a second conference at Mr. Sheridan's office in April, 1928. We were there—all the creditors which I called up—I don't recall exactly if it was Mr. Ach or Mr. Sheridan who told me to notify all the creditors and have them over Mr. Sheridan's office, and have it straightened out with everybody, so everybody was going to get paid. I wrote a letter to each subcontractor which I kept a carbon copy of, and I notified them to be at the time they told me to be down. After, we were at the conference, Mr. Ach came in and he said he did not have much time to check up all his papers and there were a few bills which he did not have from the subcontractors, but he was going to write them a letter and ask them to send him a bill and also he was going to ask me to send him a bill and that day, after we had this discussion we checked up all of the credits, and they all corresponded with the same I had with them, and Mr. Ach said it was alright and the final certificate would be ready in a short time and the conference was put off, and he said all the subcontractors would be paid in full and that was all.

Q. Now, I show you a statement from Vitille, Kinsella & Cunhy, dated Nov. 22, 1927, as being a statement of Dr. MacDonnell's apartment job on Park Avenue and 30th Street, in Woodcliff, and ask you whether the notes in lead pencil on there were made by you or by someone else, consisting of a check mark and the letter "b"? A. The letter "b" by the architect, Mr. Ach.

Q. How about the check mark? A. I think it was by me.

Q. I see a "b" put there—

Michael Vitille—Recalled, direct.

By Mr. Platoff: I object to this kind of testimony.

By the Master:

Q. I understand that he told you he was putting the "b" there. Why—did he tell you why? A. He said it was not clear enough for him to read that statement. He wanted a regular itemized statement with the bill.

Q. I call your attention to the last page of the statement and ask you in whose handwriting, if you know, the lead pencil memorandum is? A. This lead pencil memorandum? That's mine.

Q. When did you put that on? A. After we went over with Ach—when he put that "b" on there.

Q. Did you put that on at Mr. Ach's office? A. Yes.

Q. In his presence? A. Yes.

Q. I call your attention to the Thomas Henry, Inc., account—the change in the figures—was that made at Mr. Ach's office? A. Yes.

Q. What for? A. Because we had a separate bill. The bill was not rendered when I made the statement. That's for extra material after the statement was made.

Q. There is put on here "reduction cinder brick company". How did that come to be put on there? A. Well, when I was over there, I went over the bill and we found the mistake and put that down.

By Mr. Bianchi:

Q. That was down in Mr. Ach's office? A. Yes.

Q. Did you put these check marks on in lead

pencil? A. I don't remember if we put it together there, but it was at the time we were together.

Q. Do you know why these check marks are put on there? A. I believe to check up the total.

By the Master: The paper just referred to is offered in evidence and marked Exhibit D-151 (consisting of 3 sheets).

By the Master:

Q. Was this meeting in Mr. Ach's office at which these notes were put on this Exhibit D-151, was this before or after the second conference at Mr. Sheridan's office? A. Before.

Q. Before the second conference? A. Yes.

Q. How soon after the first conference would you say it was? A. Well, I think it was a very short time.

Q. Did you have at the secend conference that statement, Exhibit D-151 with you? A. Yes.

Q. At the second conference? A. Yes.

Q. Did you have any other statement with you? A. Yes, the statement that was dated March 15.

Q. Is that the statement you have pasted in your book? A. Yes.

Q. Why did you have the two statements with you? A. Because some were in my book. I had all my papers I had at that time.

Q. At the first conference did you have a piece of paper with you from which you read the amounts due to you? A. I had the same statement I have now, Exhibit D-151.

Q. And you had that at the first conference? A. Yes.

Q. At that time, it did not have the lead pencil notes on it? A. No.

Q. "b" was not on it? A. No.

Michael Vitille—Recalled, direct.

By Mr. Bianchi:

Q. Was there much done at that first conference? A. Not much.

Q. Why? A. Because everybody was not there. Mr. Ach was doing all the talking why he did not have the certificate ready.

Q. So the discussion was because the architect was not ready? A. Yes.

By Mr. Platoff:

Q. Mr. Vitille, did I understand you that Mr. Ach told you that he wanted this letter "b" alongside these items because he wanted you to furnish bills? A. Itemized statement.

Q. On the first page of Exhibit D-151 the first "b"—the item "filling in between stud for deafening in East and West apartments, $580.00" is followed by a pencil letter "b", you mean to say that Mr. Ach wanted you to furnish a bill for that? A. Yes.

Q. Whose bill? A. To show how that was arrived at. The amount of the money. That's what he told me.

Q. I notice these letters "b" are after the extra work which you did yourself and not by the subcontractors. A. Yes. The subcontractors on the next page.

Q. And, for all these items Mr. Ach wrote letter "b" and wanted you to give him an itemized bill for your work? A. Yes.

By the Master:

Q. When you say "an itemized bill" what do you mean? A. I mean just make the detailed bill the way it is pasted in the book.

Q. In other words, to show how you arrive at that item for that extra work. Is that right? A. Yes.

Q. If it was cement, how much cement you used and how many hours of labor and that kind of stuff? A. Yes.

By Mr. Platoff:

Q. In other words, you were supposed to show in detail the time and material? A. Material bill.

Q. You don't mean to say that the material for the fill in between studs for deafening the east and west apartments is billed separate? A. That bill for labor and material I made.

Q. Now, show me where else on this statement or anywhere else in your record you have a separate charge for the material for filling in between stud for deafening in east and west apartments. A. (No answer.)

Q. Are you sure that's the item in your book (referring to p. 80)? Are you sure it is the same item that appears on this Exhibit D-151—filling in between stud for deafening in East and West apartments? A. Yes.

Q. Then why is it dated April 12 and June 20 on D-151? A. June 20 is Rock Excavation.

Q. June 20th—this one here (indicating)? A. Where? There's no date in here. Just the date of this rock excavation.

By the Master:

Q. I call your attention to the fact that in your item on page 80 on the bill set forth on that page under April 12th, the total amount that you have charged for this work is $595.14, to which

you have added 10% overhead and profit. On the statement, Exhibit D-151 the amount is $580. How do you explain that difference? A. Because I have overhead and profit on the last page.

Q. How do you explain the difference between the $580 and $595.14, which does not include any overhead or profit? A. $580 and $595.14? Because this is more in detail. Just the way it was on the job.

By Mr. Platoff:

Q. Isn't Exhibit D-151 accurate and correct? A. This is not exactly correct. The way this one is correct.

Q. Why not? A. Because when I made this I did not go down and find out everything, and I did more work than I charged for.

Q. And that is exactly the reason why you made this correction on this statement on Thomas Henry bill. A. For extra material.

Q. When was this statement made? A. November, 1927.

Q. Even your final bill you have Thomas Henry $5,764.43, which is entirely different from either of the items of Exhibit D-151. Can you explain that in any way? A. That was the different material on some other building which was so mixed up. Then I and Thomas Henry checked up on the slips or tickets the way they sent the material up.

Q. I show you an item on Exhibit D-151, "Laying floor, installing shelving, patching plaster, building partition around refrigerating machine in cellar, $146.00," which is followed by the letter "b." Will you show us that item in your book?

A. There might be some variation because it was a different date it was put in and that was in one place and this was the way I had them, day by day, and put them in here.

Q. September 15th is the date. A. You see (indicating in book) September 8th is the first and September 15th. There is two dates.

Q. That's different work isn't it? A. This is the 15th and 22nd and 29th, and October 5th different work we were working on.

Q. Your book does not agree with this statement? A. No.

Q. What day did you make up the first statement, D-151? From what—your records in your book? A. Exhibit D-151?

Q. Yes. From what information? A. By referring to the scraps of paper that we had on the job every day.

Q. When did you make up this book (cash book)? A. This book was started in 1925.

Q. When were the entries made on this job—as it went ahead? A. This entry for this job was made after I had the whole statement made out and then a copy was pasted in the book on pages 80, etc.

Q. Where are the records from which you made up your records, your statement, Exhibit D-151? A. I have not them here. They were scraps of paper by days.

Q. Where are they? A. Three or four years ago since that time. I cannot keep scraps of paper so long.

Q. Did you keep no books while the job was going on? A. Sure, there's the book.

Q. Didn't you make any entires in the book while the job was progressing? A. What kind of entries do you mean?

Q. For extra work? A. When the job was completed we made a full statement.

Q. You started this job when? A. October, 1926.

Q. And you made no entries on this job in your books until April, 1927? A. Not for extra work.

Q. When was the first time you made any entry of any kind in any book for extra work on this job? A. After the job was completed.

Q. When was that, approximately? A. The job was completed with extra work in September, 1927.

Q. You made this statement, D-151, up on November 27, 1927? A. Yes.

Q. And at that time you had no records of any kind in your books? A. Not in books but in scraps of paper day by day from the construction.

Q. What did you do with those papers? A. After I made a regular statement, those papers were thrown away.

Q. After these papers were thrown away you made a claim with Dr. MacDonnell, didn't you? A. I never had a dispute with Dr. MacDonnell.

By the Master:

Q. When did you first know that there was any dispute made by Dr. MacDonnell? A. I never thought of a dispute. I never heard of that dispute with Dr. MacDonnell.

Q. Well, you knew he was questioning some of your items for extra at the first conference in Mr. Sheridan's office in 1928, didn't you? A. We never talked about the extra in Mr. Sheridan's office.

Q. Well, you knew that he had a dispute with

you when he filed his bill of complaint in Court of Chancery, didn't you? A. Yes.

Q. Well, you knew before that that he was disputing your bill, didn't you? A. No dispute about the bill.

Q. Why did he tell you he would not pay you? A. He was waiting for the final certificate.

Q. Up until the time he filed his bill of complaint you say you did not know that he disputed your bill? A. No. Before he started a suit, I think it was a week or two weeks, I went over the Doctor's place to get a check for Mamolite & Ricciardi note which the Doctor was paying $100 a month, and I asked the Doctor when we were going to settle up this job and he said we settle up as soon as the architect furnishes us the final certificate. I told the Doctor we could settle up without the architect's certificate and he says how. I told him to get the third party, one for each one and let the other two appoint another party which will get three men and make an arbitrary and give him the plans and specifications and let him go through the building, check up the work, check up the extras, and after these three men decide what to do, if we were not satisfied, that's the time we do something else, but before we take any legal steps, I urged to go through this way and get things straightened out, I have no money to throw away. The Doctor promised to take it up with the lawyer and about a week or two later we received a letter that the Doctor started action against us and we filed an answer.

By Mr. Platoff:

Q. When did the first subcontractor bring suit against you? A. I don't know.

Q. Were you sued in the year 1927? A. Not that I know of.

Q. Were you sued in the year 1928? A. Not that I know of.

Q. When were you first sued?

By Mr. Bianchi: I don't think it is material.

By the Master: I will let him answer it.

Q. When were you first sued? A. One suit that I know of, that was Cable in 1929.

Q. When were you first sued by any material man for material used on this job? A. Never had any suit.

Q. Isn't is a fact that there are a half dozen judgments against you by subcontractors who furnished material? A. No.

Q. You say no judgments against you? A. None that I know of except Cable. I don't even know that.

Q. Why did you destroy all your original records when you knew you were having trouble with Dr. MacDonnell? A. The architect never refused to give a final certificate. He was putting it off time to time and said he did not have time to do it, and I went and threw these papers away when I made this correct itemized statement (referring to statement in Cash Book, p. 80), and then this was just the way the work was done and then I destroyed all the scrap paper. The architect never refused.

Q. As a matter of fact, the amount that you claim to be due you does not agree with your statement, Exhibit D-151. A. Oh, I think it does.

Michael Vitille—Recalled, direct.

Q. Didn't you just say yourself that the three items did not agree with your books? A. If you told me item by item—

Q. Who made that statement for you? A. I did.

Q. All by yourself? A. Yes, sir.

Q. Who made this? A. I did.

Q. Anybody help? A. No.

Q. You want us to believe that you destroyed all original books and records? A. I just destroyed the scrap paper.

Q. Did you ever furnish any itemized statement to Dr. MacDonnell or the architect which are followed by letter "b" on D-151? A. I furnished the architect and the owner just the way you got them there, and just the way I got them there.

Q. When did you furnish itemized statements to the architect and owner for these items marked by letter "b"? A. After March 15th.

Q. Was it before the second conference or after? A. After.

Q. After the second conference? A. No, before the second conference.

Q. Didn't you know at the second conference that you were having trouble on this job? A. No.

Q. The second conference was held about six months after you say you were finished with the job, was it not? A. I believe yes.

Q. And up to that time you haven't received your final certificate or final payment? A. No.

Q. Or any payment for extra work? A. No.

Q. And, still you did not know you were having trouble on this job at that time? A. No.

Q. When was it you put these records in your cash book? A. After I made them.

Q. When was that? A. After March 15th.

Q. How long after March 15th? A. I don't know just exactly a day or two days or a week.

Q. Was it July, 1928? A. It was not.

Q. Was that posted in your cash book as it now appears before the second conference that was held in April, 1928? A. Yes, before.

Q. Did you have that book with you at the second conference? A. Yes.

Q. Did you have Exhibit D-151 with you at the second conference? A. Yes, all the papers I had in my bag.

Q. Were your book and Exhibit D-151 exhibited at the second conference? A. Yes.

Q. Did anybody go over it with you? A. Nobody. Just the bills we checked up with it.

Q. Mr. Vitille, I understand you to say that you made no entries in your cash book about the MacDonnell job until after the job was finished? A. I mean for the extra work.

Q. Did you employ a bookkeeper while this work was going on? A. Yes, sir.

Q. Didn't the bookkeeper make up this statement which you posted in your book? A. No, sir.

Q. This statement that is pasted on page 80 is only for extra work? A. Yes, sir.

Q. Then this statement which you pasted in your cash book on page 80 includes nothing which you claim to be due you on general contract? A. Some of the credits I gave to—

Q. I asked you whether it contains any claims or any items due you on the general contract? A. Part of the items are due on general contract, but I gave him credit for it.

Q. Isn't it a fact that you employed a bookkeeper and he made entries in the permanent books? A. Yes.

Michael Vitille—Recalled, direct.

Q. And, why didn't you make any entries for your regular entries for extra work? A. After the job was completed we billed for extra work.

Q. You mean to say you could not make a record in your books until sometime in April, 1927? A. We never do because it is too much work.

Q. Now, I call your attention to the Cash Book beginning November, 1926. I show you what apparently are entries on the Woodcliff job and tsk you whether that is not the MacDonnell job (referred to p. 43)? A. I am talking about the extra work. These entries have all been made for bill and cash and has nothing to do with the extra work.

Q. Did you have your bookkeeper make regular entires from day to day in your cash book as to items in connection with Dr. MacDonnell's job? A. Not for extra work.

Q. Did you for anything? A. For the bills we received from the material people and money we paid out.

By the Master:

Q. You put that in the book? A. Yes.

By Mr. Platoff:

Q. Now, I call your attention to page 39 of your Cash Book for the month of November, 1926, and ask you whether the column marked "Woodcliff" refers to the MacDonnell job? A. Yes.

Q. And isn't it a fact that the entries made there from time to time— A. The money we received and money we paid out.

Q. No, I show you the following pages running continuously to page 69 and I ask you whether it

is not a fact that your bookkeeper in the regular course of business made entries from time to time? A. Yes, money we paid out and money that comes in.

Q. Now, you had another book besides the Cash Book that you were running at that time? A. Yes.

Q. Let me see—where is this MacDonnell job in your book?

Witness produces a loose leaf ledger and points to an account of work on "Dr. MacDonnell's job, Woodcliff, N. J."

Q. Is there any other record in this ledger which in any way refers to the MacDonnell job besides this page I indicate? A. That is not the only page. It goes on to the finish.

Q. Six sheets? A. Yes.

Q. Did you make these entries? Who made them? A. I did.

Q. Didn't you employ a bookkeeper at the time? A. Yes.

Q. Didn't the bookkeeper make the entries? A. He came over once a week or once a month so I could not wait and I had to write in myself.

Q. When did you write this up, pages 1 to 6 in the ledger? A. As I got the bills.

Q. From time to time or all at one time? A. Time to time.

Q. Are there any entries for extra work in these pages? A. No.

Q. What is this I show you on page 6, March 13th, extra, John G. Keller, $140? A. That's the same that I got in there for subcontractor, a separate contract.

Q. Now, Mr. Vitille, isn't it a fact that you employed a bookkeeper during the period this job was going on? A. Yes.

Michael Vitille—Recalled, direct.

Q. I call your attention to another sheet in this book or ledger entitled "79 Bloomfield Avenue" and the dates begin December 1st to December 21st. Who made these entries, you or the bookkeeper? A. The bookkeeper.

Q. Why didn't the bookkeeper make a single entry on the MacDonnell job? A. Because he did not work every day. The MacDonnell job I supervised myself.

Q. What has that to do with the bookkeeper? A. It takes me twice the time to dictate it so I write it myself.

Q. Who was supervising the Bloomfield Avenue job? A. Mr. Cunhy.

Q. Notwithstanding that, the bookkeeper made the entry? A. Yes, sir.

Q. Isn't it a fact that the bookkeeper made the entries on all the jobs except the MacDonnell job? A. Yes. Mr. Kinsella made these (indicating). I made this (referring to page entitled Domenico Defurio).

Q. Did you have any trouble with that job? A. No, sir.

Q. Did you collect your money on that job? A. Yes, sir.

Q. Bring any suit for it? A. No, sir.

Q. File a lien claim? A. No, sir. That's my writing (referring to Gus Meyer). This was mine (referring to Antonio Andrel).

Q. Isn't it a fact, Mr. Vitille, that you made all the entries in the ledger on the MacDonnell job after the job was finished and all at one time? A. No, sir.

Q. Where did you get the information from which you made your entry in the ledger of November 8, 1928? A. From the checks we paid. The cash we got and the bills we received.

Michael Vitille—Recalled, direct.

Q. Where's the bill? A. From the mason material bill.

Q. Where is the bill? A. Some are here and some home.

Q. Isn't it a fact you got the information from your cash book? A. Not this here.

By the Master:

Q. On page 39 there is an item "treasurer of North Bergen, $10," isn't that cash book the place where you got the information from for this entry? A. Not all.

Q. Do you know what the item for $10 was for? A. For bill we paid to the North Bergen for water or permit or something.

By Mr. Platoff:

Q. Have you anywhere in this ledger an account against Dr. MacDonnell for extra work? A. No.

Q. This is your general ledger, isn't it? A. Yes.

Q. You have all your bills in here for extra work? A. Yes.

Q. When did you make these entries in the general ledger to which we have just referred to on the MacDonnell job? A. Day by day when we got the bills.

Q. When did you get the totals? A. When the page was finished.

Q. These records include charges against you by subcontractors for extra work, do they not? A. Yes.

Q. Did you have a somewhat permanent record of the extra work? A. When I received the statement from them, then I put it in here, in the book.

Q. When did you first render any kind of a bill

for extra work to the owner of the job? A. November, 1927.

Q. Did you give him the bill in 1927? A. Yes, sir.

Q. Is this a copy of the bill you gave him in November, 1927? A. Yes.

Q. How did you give it to him? A. Mail.

Q. To Dr . MacDonnell? A. Yes.

Q. The first conference was held two or three months after that? A. Yes.

Q. By that time you had already rendered the bill? Sure you did? A. Yes.

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

By the Master:

Q. And you had already sent one to Mr. Ach by mail. Is that right? A. Yes.

By Mr. Platoff:

Q. But you and Mr. Ach never sat down to go over this bill of extras until after the first conference? A. That's right.

Q. Never before the first conference? A. No.

Q. When did you furnish Mr. Ach with an itemized statement on this item marked "b"? A. After March 15th.

Q. After the first and before the second conference? A. Yes.

Q. If the letter "b" means a request for itemized statement of labor and material, I show you an item on page 2, "Furring walls to cover frigidaire pipes, etc., $100," and after this is written "time and material." What does that mean? A. The time and material—that's the way he wants the bill to be made up of $100. It is marked "b" and

that's the one he wants me to make the bill to show him labor and material for the $100.

Q. Did he want you to furnish the same thing on the one marked 'material' and the ones marked "b"? A. He said he wants an itemized statement —a bill to show how I arrive at $100.

Q. What did he want on the other ones which he marked "b"? A. The same thing.

Q. Who made the check marks? A. I don't remember.

Q. On page 3 of Exhibit D-151 I see you have an item "Reduction Cinder Brick Co." Is that a credit? A. No, sir. That's a mistake in the bill.

Q. It is a credit. You took it off, didn't you? A. Yes. Those were two bills for the one concern for two different bills.

Q. Did you take it off the total? A. Yes.

Q. And that reduces your claim for $250.00? A. Yes.

Q. Have you given credit for that on your final claim? A. Credit to whom?

Q. The Doctor? A. He doesn't get any credit because it was not on the bill that Dr. MacDonnell had for it—that's a bill to him.

Q. Then you are reducing the bill to Dr. MacDonnell to the amount you reduced the material bill? A. Not the material. That's no extra work.

Q. When were these lead pencil marks, this writing, written on this statement? A. Mr. Ach—when he put the letter "b" on?

Q. In your handwriting, are they not? A. Yes, sir. At the bottom of the statement, that's my handwriting.

That's all.

By Mr. Bianchi:

Q. Did you ever institute suit against Dr. MacDonnell? A. No.

Q. Did you ever file a mechanic's lilen? A. No.

Q. Why not? A. Because I did not expect to get into trouble and I thought everything would be settled up.

Q. Well, did they promise to settle up? A. Yes.

Q. Mr. Ach held off the final certificate, is that right? A. Yes.

By Mr. Platoff:

Q. A large number of stop notices were served in November, 1926, were there not? A. I never knew anything about stop notices.

Q. When did you first find out that the stop notices were served? A. (None.)

Q. When you came to this conference you did not know the stop notices were served? A. No, sir.

State of New Jersey, } ss.:
County of Hudson, }

CHARLES SCHEIDEKER, of full age, on behalf of the complainant, being duly sworn according to law, on his oath deposes and testifies:

By Mr. Platoff (Direct):

Q. Mr. Scheideker, what is your business? A. Construction business—general superintendent.

Q. How long have you been in that business? A. As a superintendent, I would say, 15 years.

Q. Before that, were you also engaged in the building trade directly? A. Yes.

Q. Are you ascociated with James Mitchell, Inc., of this city? A. Yes.

Q. How long have you been with that company? A. 19 years.

Q. And, you are the Vice President and superintendent of that concern? A. Yes.

Q. And, have charge of all construction? A. Yes.

Q. Do you supervise the estimating of the jobs of this company? A. I do.

Q. Have you inspected this job of Dr. MacDonnell's on Park Avenue and 30th Street, Woodcliff? A. I did.

Q. Did you inspect it with Mr. Shilowitz? A. I did.

Q. Have you also examined the plans and specifications for that job? A. I have.

Q. As a result of your examination of the building and of the plans and specifications, could you say whether or not any work specified has been omitted? A. Yes.

Q. As a result of your examination of the building and of the plans and specifications, have you prepared your own written report? A. This report—yes.

Q. Can you remember Mr. Scheideker exactly what details were omitted in these plans and specifications? A. (No answer).

Q. Did you find any omissions, Mr. Scheideker? A. Yes, I did.

Q. Were there many omissions? A. Quite a few.

Q. In this paper, which you have before you, entitled "Report", does that contain a list of all the omissions? A. All that I could see.

Q. Does it also contain what in your opinion is a reasonable value of the omitted work? A. It does.

Q. Is it also such that it shows in detail how you arrive at your valuation? A. It is.

Q. Can you remember any of these omissions without looking at this paper? A. Quite a few of them, yes.

By the Master:

Q. Will you state just in a general way what omissions, as near as you can remember, you found? A. First Omission, which is a very big omission was the omission of the fireproofing of beams and columns throughout the building. By fire proofing I mean furred and concreted. None of this work, in fact none of the steel beams or any of the columns in the building have been fireproofed.

Second Omission is an item of mason work. The specification calls for a certain kind of brick called "claytex". The brick there is not claytex brick. Also the mortar joint, which clearly and distinctly in the specifications is called for to be struck and these joints are rough cut, which in my opinion is a very poor job, but the way it was specified is very good, and the joints struck cost a good deal more money than the joints as they are—rough cut.

Third Omission is a big item and is the mill work in the job. Specification calls for cabinet trim throughout the entire building. There is mill work in there, bought from an ordinary mill, cut on the job, while cabinet work is made in a cabinet shop and not in a mill, and comes to the job all assembled, glued, mitred. There should

be absolutely no handling on the job. That is specified.

Fourth Omission is in the electrical specification. Specification calls for conduits. That all bell wiring, electrical wiring be run in conduits. Everything throughout the building is "BX", and the bell wire does not run in anything. "BX" is cable and not conduit.

Q. Mr. Scheideker, in making your inspection you simply had before you the original specification, did you not? A. That's all.

Q. You didn't have any revised electrical specifications? A. I did not.

Q. Did anybody tell you that there were revised specifications for the electric work? A. No. I was only handed the specifications and plans.

Q. So in all your testimony you of course only take into consideration the original plans and specifications and do not consider any changes or alterations that may have been made because of revised plans or specifications? A. Absolutely not.

Q. Alright. Now continue with the omissions. A. (Fifth Omission) Another item in the carpentry work, grounds are specified and apply to all walls for picture molding, panel molding and everywhere where trim is to be applied to the walls. In my investigation I found there were no grounds ever put anywhere in the building. That is the cause of the trim work and panel walls not being in true line and the plaster walls not being straight. If grounds were installed the plaster has a method of scrowling the walls, and if they are not installed, he's just guessing at it. It would cost considerable more money to put in the grounds on this job.

(Sixth Omission) In reference to the roof, I

inquired if the owner had a guarantee from the Barrett Company, which is specified and which is the protection to the owner for twenty years. The owner said he has no guarantee. Of course, that a guaranteed Barrett Specification roof costs a little more is true, naturally, because of the cost of the bond. That's a big item for the owner's protection, and I would say that the roof on there was not a good roof because—

By the Master:

Q. As I understand your testimony, the only fault that you found with the roof was that it was not bonded by the Barrett Company? A. Not a bonded specification roof.

Q. Do you know what the cost of a bond is, from your own experience? A. It is taken in in the cost of the roof. You don't pay for a bond but the authorized agent of the Barrett Company has to install the roof under the Barrett Company specification. A Barrett Company roof is a guaranteed roof and it costs a few cents more per square foot, which takes care of the bond and the guaranty.

Q. Mr. Shilowitz testified, I think, that the Barrett roof would cost with the flashing $1,500. How much additional would you say on that amount, approximately, that it would cost to have the Barrett Bond Guaranty? A. About 8 per cent.

Q. Eight per cent. you think it amounts to? A. Absolutely.

(Witness) Also on the copings. Specification calls for cast cement copings. The coping in the walls are now cement copings cast in place. Cast cement coping is worth a good deal more money that cement coping cast in place.

Also the flashings, the specification calls for copper flashing to run up the walls and extend outside the brick work. This flashing is merely a raglet joint now.

Going back to the mill work or carpentry work. The flooring for the job is specified as clear white oak. My contention is that this is not clear white oak.

Q. What is it? A. A mixture of red oak. I would say, mostly red oak.

(Witness) In the bathrooms, deafening is called for. By lifting up an escutheon of one of the risers I could see that the deafening is omitted. By omitting this deafening and applying the tile floor on the rough floor brings the elevation on all bathrooms about an inch and a half higher in the corridor leading to the bathroom. There is a step there about 1½″ higher which is a stumbling block. Not according to specifications.

There's an item in the specifications on marble, calls for marble stringer on two sides of the stair. There's a marble stringer on one side and is omitted on the other side. Specification calls for 1¼″ marble to be used and the marble base throughout the corridors is ⅞″ thick. The ornamentation in the main halls and lobbies—the plan shows about four molded member or five molded member for cornice. There is nothing but a plain cornice. This may have been approved by the architect, but I don't know. The kalamine work throughout the job. The doors do not fit in the bucks. I myself, opened doors that were locked by just pushing against them. In other words, the bucks were not set through and doors do not fit the openings. That about covers all.

By the Master:

Q. When you went up to this apartment house

you found an apartment that looked as if it was a completed apartment, did you not? A. I did, yes.

Q The majority of the apartments were occupied, were they not? A. That is correct.

Q. Your inspection was made about when? A. In January, around the first part of January, 1930.

By Mr. Platoff:

Q. Now, Mr. Scheideker, did you make a calculation of what in your opinion was the reasonable value of this omitted work? A. I did.

Q. Is that in detail? A. Yes.

Q. Have you a copy of that record that you made with you? A. I have.

Q. Kindly refer to it and tell us what the reasonable value of these various items was?

By the Master:

Q. Who actually dictated this paper which you are referring to? A. I imagine Mr. Shilowitz dictated to the girl who wrote it.

Q. What did you give Mr. Shilowitz? A. I took these quantities, most of them, and priced them for Mr. Shilowitz.

Q. Where is your original memorandum that you made up of these figures and prices? A. I imagine Mr. Shilowitz has it.

Q. Mr. Sheidecker, can you refer to these yellow sheets which I understand you say were written at a time when Mr. Shilowitz and you were inspecting this building? A. Not at that time. Written a few days after.

Q. Were they writen in your presence? A. Absolutely—in Mr. Shilowitz' home.

Q. And, which represents the combined work of you and Mr. Shilowitz, as I understand. Is that right? A. Yes, that is correct.

Q. I notice on a lot of these items that there are no figures given, in fact, in a majority of them, and the figures as to the cost or the value of the work, we will say, that was omitted or substituted. Have you nothing to refer to outside of these yellow sheets that you have written yourself? A. No, absolutely not that I have written myself.

By Mr. Platoff:

Q. Mr. Scheideker, have you any records with you from which you can tell us what in your opinion was the reasonable value of the omitted mason work, Item No. 1, this sheet (referring to the typewritten schedule)?

By the Master: I rule that he cannot refer to it.

By Mr. Platoff: We will have to ask for an adjournment until he brings his records in that case.

By the Master:

Q. Mr. Scheideker, one of the items you mentioned was that the fireproofing around columns and beams had been omitted entirely throughout the building, right? A. Yes.

Q. Have you made any estimate as to the value of that fireproofing work, and what the cost would have been to put it in? A. Yes.

Q. And, can you state the value approximately? A. I can. I figured the lineal feet of columns

and beams; figured what form work was worth, which I based at 16¢ per foot, and I based cinder concrete which is the usual fireproofing, at $8.60 per cubic yard.

Q. What about forms for beams? A. Forms for beams are worth 16¢ per square foot area.

Q. Forms for columns? A. Worth about 23¢ per square foot of area.

Q. Now, did you measure the beams? A. Did I measure the beams in the building? No. I took the steel plan and took the beam measurements from that.

Q. Did you measure the lineal feet of beams from the steel plan? A. I did.

Q. Did you measure the lineal feet of columns from the steel plan? A. I did.

Q. And, when you measured them, where did you put them down, that is, number of lineal feet you found? A. On an estimating paper.

Q. Where is that estimating paper? A. I don't know.

Q. Well, what did you do with it? A. I gave it to Mr. Shilowitz to copy it down on the yellow paper, which was transferred to typewritten copy.

Q. Have you that yellow paper here? A. Yes.

Q. Will you refer to the yellow paper and tell me the number of lineal feet?

By Mr. Bianchi: He says it is not his. These yellow sheets are not written up by him.

A. In the columns there are 2,160 lineal feet.

By Mr. Bianchi: I object to his testifying from papers not written up by him.

By Mr. Platoff: It is proper testimony.

This man made an inspection of the building and of the plans and prepared the records, which unfortunately are not in his own handwriting.

By the Master: Even if he did, I would not take it in evidence.

By Mr. Platoff: He will take the same plan and calculations and come down here. Certainly, this man is a competent witness.

By the Master: I will let him use that so far as these lineal feet are concerned.

By the Master:

Q. What about beams? A. 2,350.

Q. Is that all the beams? A. No, there's basement which was not included.

Q. How much? A. 770 square feet.

Q. Using the price that you have mentioned, have you figured the amount that this fireproofing would cost? A. I have figured it.

By Mr. Bianchi: I object to that—to his using the memorandum.

By the Master: It is now a mathematical proposition as far as I am going.

By the Master: I will state on the record that multiplying the square feet of these items by the prices given by Mr. Scheideker will give the total figure of $2,255.60.

Q. Do you know whether or not anything was substituted for this fireproofing? A. Nothing has been substituted.

By Mr. Platoff:

Q. You testified that specifications call for

Clayton Colonial brick and that a rough cut brick was substituted instead of that? A. Yes.

Q. Do you know how many bricks, or the value of the difference to the building caused by this substitution? A. $3 a thousand would be a fair estimate.

Q. What would be the total in money for that difference? A. Approximately $210 for face brick.

By the Master:

Q. Do you know Tudor Hall in Englewood? A. I don't know. I know where it is.

Q. Did you inquire, or ever hear the contractor being directed to use face brick similar to Tudor Hall? A. I heard that when I was here before, in the testimony, but I did not see anything in the specifications.

By Mr. Platoff:

Q. Now, you testified that the specifications call for struck joints, and that the job is rough cut. Can you give us the difference in reasonable value to the building caused by that substitution? A. Yes. Costs $5.00 a thousand more to strike.

Q. How much? A. $5 a thousand—70,000—would be $350.00.

Q. You said the specifications call for mortar joints of buff pigment, and that in fact, was constructed there in common mortar. What is the difference in reasonable value between the buff pigment and common mortar.

By Mr. Bianchi: I object to it because it has been admitted here by the architect that five samples were made and that they

agreed on the design and the manner in which the work was done.

A. When I first testified, naturally, about the original plans and specifications.

By the Master: I will take the testimony subject to the objection.

By Mr. Platoff:

Q. Now, you testified that the specifications call for member cast stone and limestone finish and that this has been substituted with a cement coping cast directly in one piece. In your opinion, what was the difference in value? A. Member cast stone coping, limestone finish, in that particular coping, width and height, worth about $2.00 per lineal foot.

Q. Do you remember about how many feet were involved? A. I can't say.

By the Master:

Q. Did you measure it? A. On plans; not on the job. Approximately 275 lineal feet.

Q. Is that 5″ width? A. 5″ high. That is what is in place now.

By Mr. Platoff:

Q. At $2.00 a foot that would be about $550.00? A. Some on the front of the building has a limestone coping on it so you would deduct that.

Q. What would you say the net value of the omission, giving credit for the front limestone finished, would be? A. About $400.00.

By the Master:

Q. Assuming that gypsum block in the floors and ceilings of Doctor MacDonnell's apartment was omitted, what would be the value of the gypsum block? A. In ceiling? A little difference in ceiling and floor.

Q. In both? A. If I would estimate the job and I saw there was gypsum block to go on the ceiling I would figure in price for it, but I never saw it done.

Q. Never saw what done? A. Gypsum block suspended from the ceiling.

Q. It is impractical to suspend block from the ceiling in accordance within the specifications. Is that right? A. Absolutely.

By Mr. Platoff:

Q. Notwithstanding that, Mr. Scheideker, what in your opinion was the reasonable value of the gypsum block? A. I would price it around 40¢ a square foot, but there is absolutely no detail of how it should be built and it could make you do almost anything.

By the Master:

Q. So you are really quite critical of the specification as to the gypsum block in this building, and when you say 40¢ per square foot you are giving a figure that would cover you no matter how the architect insisted that you do the job? A. That's right.

By Mr. Platoff:

Q. With that in mind, how much in money have

you estimated the reasonable value for the omission? A. Forty cents.

Q. Do you know how many square feet there were? A. Not off-hand.

By the Master:

Q. I will tell you that there are 3,456 square feet in the ceiling and the floor, which figure is subject to being corrected or questioned by the contractor, but he will have to draw my attention to it if there is any error in it, so would you say that you are referring to this at 40¢ a square foot? A. Yes, or approximately $1,400.

By Mr. Platoff:

Q. I understand you to say that the specifications call for three inches of plaster on top of plaster board. Do you know whether or not this has been done? A. I could only see one coat of plaster on the plaster board.

Q. In your opinion, what would be the reasonable value of the omitted work? A. Ninety cents per square yard of plaster.

Q. Do you know how many square yards there are? A. Not off-hand, I don't know.

By the Master:

Q. Mr. Scheideker, assuming that you had been the contractor on this job, and when you came to build a building and to put in the gypsum block in the ceiling of the Doctor's rooms and it was pointed out to you to put it in and you did not put it in, and you had bid a certain contract price for this building, would you allow 40¢ per square

foot off your price? A. If I had figured 40¢ I would.

Q. If you had not figured 40¢, what would you allow? A. Exactly what I figured.

By Mr. Platoff:

Q. Assuming that that three thousand square feet of plaster at 90¢ a square yard, what the total be, approximately $3,000? A. Yes.

Q. Do you recall whether or not the specification calls for stair soffets or not? A. It does call for all stair soffets to be plastered.

Q. Have they been plastered? A. No.

Q. In your opinion what is the reasonable value of this omission? A. The furring and lathing is worth about $1.50 a yard, including furring and lathing and the plaster, and about $1.10 for work—finished. A total of $2.60 a yard.

By the Master:

Q. You examined these stairs, did you not? A. I did.

Q. The stairs as they stand, are a good job, are they not? A. They are.

Q. And, there has been testimony here that—I don't know whether it covers soffets or something else about the stairs—that the stairs are a better job made the way they are, than if they had been closed? A. That is merely a matter of opinion.

Q. What is your opinion? A. My opinion is that apartment houses in this City are very rarely plastered.

Q. And the manner in which the stairs are con-

structed is the manner in which stairs generally in apartments in this City are constructed? A. Absolutely.

Q. Do you say that it cost less to construct the stairs in the manner they are constructed than the manner which the specification calls for? A. Yes.

By Mr. Platoff:

Q. Would you say the difference on these stair soffets is $130? A. Right. This plastering of the soffets has nothing much to do with the stairs and merely that you have no plaster there.

By the Master:

Q. Did you examine this building for extra work? A. I did not.

Q. So far as the stairs are concerned, can you tell whether there is any extra work on these stairs to take the place of that omission? A. I did not see. The omission of the marble is a part of the stair.

Q. What was put in place of the marble? A. Ornamental stone.

Q. Was that in the specifications? A. Nothing in the specification except the balusters, which are specified to be 1″ x 1″ square bars. There are scroll balusters which are there now.

By Mr. Platoff:

Q. The plans indicated the plaster cornice. Do you recall whether that was installed or not? A. Plaster cornice? Looking at the plan and what is now in place does not conform. The plaster

cornice that is run there is very simple. The plan shows at lest four or five members.

Q. Any difference in the expense? A. The more members in the cornice the more expensive it is.

Q. Can you tell us approximately the value? A. $1.00 a foot.

Q. If there were 405 lineal feet, that would be $405? A. Correct.

Q. Now, the specifications call for garbage receptacles in the kitchen. Are these all there or some missing? A. Some are missing.

Q. In your opinion, is the owner entitled to any credit for missing receptables? A. They are not entitled to any credit, but he is entitled to the ones that were left out. It is his property.

Q. You testified before as to carpentry and trim—that the specifications called for cabinet trim and the kind installed is so-called "knock down trim." In your opinion, is there any difference in value of what is specified and installed? A. Good deal.

Q. What is the reasonable allowance? A. Very reasonable allowance $1,500 to $2,000, I would say. I wish to add that I have yet to see an apartment house with cabinet trim.

By the Master:

Q. As a general rule, an apartment house does not have cabinet trim? A. They don't, no.

Q. So far as the construction of the trim is concerned in this apartment house, have you any criticism to make of it as compared with other apartment houses? A. No, I have not.

By Mr. Platoff:

Q. Is there a difference between apartment

house buildings—built for speculation and this building built for investment? A. Absolutely.

Q. Now, after reading the specifications for the MacDonnell job, is it your opinion that this house was built for speculation or investment? A. Investment.

By the Master:

Q. After looking at the job, would you say that the apartment house is constructed for speculation or investment? A. I do not care to answer that. I don't think I should. I am not testifying as to workmanship. If I read the specification, I would say it was intended to be built for a man to keep it and built it to make his home in it and live there.

By the Master: I am concluding from that answer that the house looks as if it was for investment.

By Mr. Platoff: Then I think you draw the wrong conclusion.

By the Master: He said that so far as the stairs are concerned it looks like a good job.

By Mr. Platoff: It is a good job for what was done there.

By the Master: I am taking the attitude that it is just as good, or even better, although there was a saving to the contractor.

By Mr. Platoff:

Q. Mr. Scheideker, referring to these stairs, are they built as in a house for speculation or

investment? A. The way the stairs are now they are built the way of speculators building stairs.

Q. Mr. Scheideker, if you were informed that Dr. MacDonnell desired to build this building as a permanent residence for himself and for his office for the practice of medicine, would you then say that this building is built to suit his purpose or not? A. I would say if built according to specifications, yes.

Q. But as it is built, what would you say? A. I would say yes also. That's a matter of opinion.

Q. Would this building be a better building if it had been built according to the specifications? A. Absolutely. More value would be there.

Q. It would be a better building? A. Absolutely.

Q. Would wear better? A. Absolutely.

Q. Would require less expenditure for upkeep? A. Absolutely.

By the Master:

Q. How about the gypsum block Mr. Scheideker? Should that have been put in the building? A. I don't think so.

Q. What other things in these specifications are there that should not have been put in the building? A. Cabinet trim.

Q. What else? A. Plastering of stair soffets.

By Mr. Platoff:

Q. What advantage would that gypsum block have been to the building? Would it have made it more soundproof? A. No. Gypsum block is not sound proof. When we build sound-proof partitions, we use it in addition. It helps. It

is better than stub partition but it is not soundproof.

By the Master:

Q. Was there anything provided in the specifications in addition to the gypsum block? A. Not to my knowledge—not reading the specification.

By Mr. Platoff:

Q. Now, the specifications call for instrment cases in the doctor's apartment. Do you know whether or not these have been omitted? A. I know they have been omitted.

Q. You know what the reasonable value of these would be? A. Judging what an ordinary doctor's instrument case generally costs—when you figure instrument cases there is a detail accompanying the plans and I have none with this—I would say from $100 to $150 a piece.

By the Master:

Q. How much in money for the whole thing? A. $400.

By Mr. Platoff:

Q. The specifications call for kitchen dressers? A. Yes.

Q. What in your opinion is the difference in value of these omitted kitchen dressers? A. From $20 to $25 a piece.

Q. About $400 or $500? A. That's about right.

Q. The specifications call for clear white oak, 1st quality, for all flooring. Do you know whether

or not that requirement was complied with? A. It is not clear white oak.

Q. What condition are the floors in? A. Not in the best of condition.

Q. Are they warped? A. Yes.

By the Master:

Q. Can you state that the warping is caused by the quality of the wood used? A. Absolutely not.

By Mr. Platoff:

Q. Could you state what the reason for it is? A. Many reasons. First reason—groove between floor beams and they shrink.

By the Master:

Q. Do you know whether that is the reason for this? A. I do not know.

Q. And you don't know what the real reason is? A. No.

By Mr. Platoff:

Q. What in your opinion is the difference in value between the white oak flooring specified and that which was used? A. I would have to get the square feet of that. I cannot tell you off-hand. I am not questioning the quality of flooring in there. I am only saying that it is not white oak and there is a difference in cost to the benefit of the contractor.

Q. What is the difference per foot? A. Two cents per square foot is the difference in price.

Q. About how many square feet are there—total—about? A. I cannot say without figuring the plans.

By the Master:

Q. About ten thousand feet? A. You have to take off all your openings. This would be an approximate estimate—not to the exact square foot.

Q. Would you say there were about twenty-five thousand square feet of flooring? A. I cannot answer that until I take the openings of the building. It seems about reasonable.

Q. Would you say that there was probably at least twenty thousand square feet? A. Yes.

Q. At two cents, the difference would be from four to five hundred dollars? A. Right.

By Mr. Platoff:

Q. Do you know whether milk cabinets are placed in the basement? A. No.

Q. What is their value? A. About $75 or $100.

Q. Is there a platform in the laundry? A. There is not.

Q. Reasonable value? A. $25.00.

Q. As you said before, the specifications call for grounds and this had been omitted. Now, in your opinion, what is the reasonable value of the omitted grounds? A. The ground in place is worth ten cents per lineal foot.

Q. Now, assuming there are 1140 lineal feet, what would you say the total difference would be? A. $114.00.

Q. Now, the specifications call for deafening

in bath rooms? A. According to the specifications; the deafening is not placed according to specification. I cannot find any deafening in the bath rooms.

Q. What would you say the value of deafening in the bathrooms would amount to? A. Eight cents per square foot.

Q. Making a total of about $100? A. About that.

Q. Now, the specifications call for marble stringers, right? A. Yes. Omitted on the stair, one side.

Q. What would you say the value of that would be? A. Put in an inch and a quarter marble—about two or two and one-half dollars per lineal foot.

Q. Making a total of about $700? A. Right.

Q. Now, going back again, the specifications call for a ten inch base—I suppose that is a wood base—and in place of six inch base, and what would you say was the reasonable value of this substitution? A. Merely the cost of material. The labor would not be any more.

Q. About $460.00? A. About that.

Q. Now, the specifications call for plinth blocks? A. Not placed.

Q. Value? A. $35 to $40.

Q. Specifications call for vestibule entrance trim to run to floor. I understand this only runs to top of wainscoting? A. Yes.

Q. Is the difference in money about $35.00? A. $35.00.

By the Master:

Q. You examined the vestibules, did you not? A. I did.

Q. And you noticed immediately of course, that the vestibule was not constructed in accordance with the plans and specifications. By that I mean that the partition had been pushed back? A. Correct.

By Mr. Platoff:

Q. Now, referring to ornamental iron, the specification call for a baluster 1 x 1 bars. I understand it was substituted by 5/8 x 5/8 stock? A. That's correct.

Q. Have you any idea of how many lineal feet there are? A. I have not.

Q. Would 75 be about right? A. Yes.

Q. About $262.50? A. That's correct.

Q. Now, the specifications call for iron doors in vestibule? A. Omitted.

Q. What is the reasonable value of these iron doors? A. Mostly anything. As there is no detail of the doors, I would say about $200.00.

By the Master:

Q. What is placed in substitution for those doors? A. In the front, Kalamine doors.

By Mr. Platoff:

Q. Now, the specifications call for dumbwaiter doors to be sliding and self-closing. Have these been substituted? A. Substituted.

Q. What is the difference in value? A. About $15 or $20 per self-closing slide-up door.

Q. A total of about $250? A. Yes.

By the Master:

Q. Do I understand in reference to these doors,

that you are giving the value of the cost of the door that has been omitted or that you are giving the difference between the value of the door that is in there and the door according to specifications? A. The door according to the specifications.

Q. And not allowing anything for the other doors in there? A. No.

By Mr. Platoff:

Q. Now, you said that twenty-one kalamine doors were not set properly and should all be reset? A. Yes.

Q. In your opinion, what would be the value of setting these doors? A. I would say $300. These doors, you could not make them fit properly on the job. They would have to go back to the factory.

Q. In the plumbing, I understand there is a question of omission? A. Yes.

Q. Sewerage pipe has been left running above the earth. A. That's a question. I saw the sewerage pipe and it should be under the floor. The amount of money saved by putting it above the floor is absolutely nothing. But they should be under the floor. I imagine it is a question of rock. I do not know.

Q. Have the refrigeration pans and drain pipes and cellar sinks been installed? A. No.

Q. In your opinion, what would be the reasonable value of this plumbing? A. Throughout the whole thing, I would say about $400.

Q. In electrical work, referring now to the original specifications, which I understand you examined. They call for conduit for bells and all other wiring? A. It does.

Q. Has conduit been installed? A. It has not.

By Mr. Bianchi: I object because it has been proven here amply that we used the revised specifications.

By the Master: My understanding is that there was a separate electrical specification, but some question has been raised about it by Mr. Platoff so I will take the testimony. Of course, if the substituted electrical specifications are the proper ones, his testimony on this feature would have no weight whatever.

Q. The contractor has substituted BX for conduit? A. Yes.

Q. Is that conduit? A. It is not.

Q. It is a cable? A. Cable.

Q. What would you say would be the reasonable value for electrical work under the specifications? A. From my own qualifications I cannot testify. I had estimates on the job and they run from $1,500 or more, but I am not qualified to—

By Mr. Bianchi: I think it ought to be stricken out as merely hearsay.

By the Master: I will have to strike it out.

By the Master:

Q. Metal duct in the basement, is that omitted? A. Yes.

Q. How much is it worth? A. $75.00.

Q. Now, the bonded Barrett roof. The bond is omitted? A. Yes.

Q. What do you estimate to be the difference

in value to the owner between the roof that he received and the bonded Barrett roof? A. That could be almost anything because the owner is without a guaranty for 20 years and if he has serious leaks in the roof, he has to go to the expense of having it fixed himself, whereas if he had a guaranty he would have not repairs to make or any worry.

By the Master:

Q. Do I understand that when you have a Barrett roof guaranty that they will repair that roof if there is a leak, no matter what the cause of the leak is? A. Absolutely not.

Q. What is the bond for then? A. Reasonable use.

Q. And it is a guaranty, so far as the material is concerned and the workmanship only, isn't that right? A. Yes.

Q. Did you examine the roof? A. I did.

Q. What condition did you find it in? A. Very good.

Witness: I examined it with a Barrett roof man and it is a very good roof.

By Mr. Platoff:

Q. The specification calls for flashing precast on the outside wall and inside wall and over the roof? A. Omitted.

Q. In your opinion what is the reasonable value of this? A. A dollar or so per foot.

Q. About $348.00? A. That's about right.

Q. About the painting, did you find any evidence of any backpainting as called for in the specifications? A. I don't know. I did not.

Q. What is the reasonable value of this? A. $300.00.

Q. The radiators, as called for in the specifications, were to have one coat of prime and two coats of American Radiator Co.'s enamel. How are they finished? A. Not that enamel at all. Aluminum silver was used.

Q. Would you say value of $240? A. Yes.

By the Master:

Q. Amount without allowing for the manner in which they are done? A. That's correct.

By Mr. Platoff:

Q. Now, the specifications call for a Sedgwick Dumbwaiter, which I understand are replaced by Gorenson. What would you say the reasonable value would be? About $150? A. Yes.

Q. In your opinion, is Sedgwick a better dumbwaiter than the Gorenson? A. It is.

Q. Mr. Scheidecker, if you were to be informed now that the roof of that building had many times leaked, since a few months after the roof was installed and leaked almost continuedly from that time, would you say that the Barrett Company would have repaired that? A. Not themselves. Their authorized agent would.

Q. But the bond would be made good? A. Yes.

Cross Examination by Mr. Bianchi:

Q. Provided that no one had put aerials there or walked there, on the roof? A. The Barrett man, when he inspects the roof, has to look well and he calls the owner and shows him the causes

and what they are from, and if there is a nail driven in it, the owner pays for it, but if it is due to the materials or the way it was put up, they certainly will make good.

Q. The guaranty simply covers—guaranties that the material itself is such that the sun and ordinary heat will not affect it? A. That it will hold out for 20 years.

Q. But not if anything else might happen to the building; if tenants put aerials up there and walk on the roof? A. That's where they are having a lot of trouble.

Q. Or if children play on roofs? A. Not so much for that—

Q. For ordinary wear and tear, but slag is not there for the purpose of having chairs or other furniture there? A. Chairs are not supposed to be on the roof.

Q. Now, referring to the back of this trim that is supposed to be painted, is it or is it not very unusual to paint the trim? A. Very usual to back paint trim.

Q. Isnt it usually applied where it is on the outside wall? A. Usually all over because the timbers are never out of place when trim is applied. It is the dampness that—

Q. Isn't it usually put where the dampness exists on the outside? A. Dampness exists on all walls.

Q. Now, B. X. cable—isn't that approved by the underwriters? A. Absolutely.

Q. Isn't that what is generally used in apartment houses? A. Yes.

Q. And in the ordinary wiring, B.X. is used? A. Yes.

Q. And is thoroughly approved without any

question by the underwriters, when properly installed? A. That's correct.

Q. And this particular building had the approval of the power electric company, which would not be so if it had not been properly installed? A. It would not.

Q. It has been testified here by electrical experts that B.X. is considered a conduit. Do you know whether or not the word "B.X." is also used to cover the word "conduit"? A. Never used to cover it. If you order a thousand feet of conduit, they would not send you B.X.

Q. But isn't the word "conduit" generally called to cover "B.X."? A. Never. It is called cable.

Q. Have you any specifications in your possession showing that difference? A. None whatsoever.

Q. This job was a B.X., wasn't it? A. All B.X. with the exception of the cellar, which is not B.X.

Q. There is nothing on that job to indicate that it was ever intended to have conduit put in there, is there? A. Only the specifications. Electrical work is never shown on plans other than outlines.

Q. Was there anything to show that they intended to use anything but B.X.? A. There is this conduit.

Q. It was not started one way and then dropped to another, as far as you could see what was exposed? A. No.

Q. What is your meaning of the word "conduit"? A. Round pipe.

Q. And inside of that round pipe would be what sort of a wire? A. Stock sufficient to carry a load.

Q. Inside of this B.X. is the same thing, is it not? A. Absolutely.

Q. B.X. is a heavy metal which covers this wire? A. Which cannot be repaired.

Q. And the conduit—you have to take the conduit down just the same? A. No, you don't. You pull the wire through and B.X. you cannot.

Q. The average building or home, say more than 90% of all buildings use B.X., isn't that so? A. What type of building?

Q. I am talking about the ordinary apartment house? A. Apartment house—semi-fireproof?

Q. An ordinary private house? A. Yes.

Q. This was not a fireproof building either by specifications, plans or in any other way. A. Semi-fireproof.

Q. There was something put around those beams—a metal lath was wrapped around the beams? A. Correct.

Q. And isn't it considered fireproof when covered with proper amount of plaster? A. What do you call a proper amount of plaster.

Q. A couple of rough coats. A. It is not. Use two inches of cement plaster.

Q. Wasn't there cement plaster put around this wire lath? A. No, sir.

Q. Wire lath with plaster on it makes it fireproof. A. No.

Q. It has been approved as fireproof when properly embodied with plaster. A. Not fireproof.

By the Master:

Q. Would an expert like an architect know while the work is being done, that the fireproofing that was being put on there was this wire lathing plastered? A. The architect reads the

specifications, he would know that the work was not going on according to the specifications and he would know that it was not fireproofing.

Q. If he agreed with your code or your understanding of the work, he would say it is not fireproof? A. Yes.

By Mr. Bianchi:

Q. There is a question of fireproofing being a matter of workmanship between various builders? A. Between builders but not between building departments and codes. Steel has to be protected with cement plaster.

Q. But builders themselves do not always agree? A. Not on apartment houses. I have never seen beams fireproofed on apartments unless it was entirely fireprof.

Q. In an entire fireproof building, everything is embedded in cement? A. Yes.

Q. It cannot warp; it cannot twist; it is solid mass? A. Right.

Q. It is poured? A. Poured in place.

Q. The beams are placed in from end to end and then poured right in? A. Yes.

Q. And these particular beams were laid in the average manner? A. Yes.

Q. Isn't it a fact that throughout the specification there are many unusual requests or designations that are not generally used for apartment houses? A. There are in this particular specifications.

Q. Is this building in your opinion substantially completed? A. Not according to original specifications, it is not.

Q. But in comparison with other apartment

houses, it is substantially completed? A. Absolutely A speculative apartment—this apartment is just as good but not according to specifications.

By Mr. Platoff: It is immaterial what other apartments are. This job is—

By the Master: I will let him answer that question.

Q. This building is substantially completed, is it not? A. As a speculative apartment, it is just as good, but it is not according to the specifications.

By the Master:

Q. You know that there were numerous changes made from what you hear? A. Merely from what I hear. I was here before.

Q. And you did not go to the architect or to the owner to ascertain what changes they had conceded, were you, and then see whether or not the building had been constructed in such manner? A. I do not.

By Mr. Bianchi:

Q. But is this building substantially completed with the exception of these particulars that you have mentioned in your direct examination? A. Yes.

Q. During the years of 1926 and 1927, the demand for timber from lumber yards was usually great, wasn't it? A. Correct.

Q. The condition which you found in these rooms relative to the flooring, is that or it is not a common occurrence in buildings, especially dur-

ing the last four or five years? A. Absolutely, because the timber work has to be cut in accordance to code and if the building is started, it cannot go up any other way. It must have timber.

Q. But as to whether it was thoroughly dry or not? A. I know it was not.

Q. It was impossible to buy any other kind? A. You could not buy it.

Q. It is a common experience to refinish floors after the first two years, is it not? A. What do you mean "it is a common experience"? Of course, every time a tenant moves out, it is usual to refinish the floors for the new tenant who moves in.

Q. I mean that for ordinary use—ordinary floors—every couple of years, isn't it necessary to refinish them? A. If people have carpets on floors, only frame work and touching up is necessary. That is a very hard question to answer. It all depends on the particular usage.

Q. Might effect one room and not another? A. Right.

Q. Settling of building and so forth? A. Absolutely.

Q. Some of the flashing was put on the brick under the copying? A. Yes, as I said, all in the raglet in the brick wall.

Q. In between the bricks? A. That's correct.

Q. And that is generally the way it is put in? A. No, it is not. It is very poor construction. The way it is specified is the correct way to put it in.

Q. You examined this particular building after you had been called to testify? A. Yes.

Q. And then you went back and made the examination? A. I made one examination.

Q. After this litigation was started? A. Yes.

Q. And when you were paid to testify here as an expert? A. Correct.

Q. Are you fixing the value of these various items that you are giving now as of 1926 and 1927? A. As of 1926 and 1927.

Q. Isn't it quite impossible to tell whether this floor was of red oak or white oak on account of the number of times that it has been refinished? A. I don't believe any stain has been put on the floor. It is painted.

Q. Painted and shellacked? A. Naturally—shellacked and finished.

Q. Do you mean to say that this is a darker color than the white oak? A. Yes.

Q. If you were told that this was No. 1 oak, would that change your testimony? A. A1 oak is not clear oak.

Q. Might be good flooring but still not white oak? A. Absolutely. It might be the best flooring in the world.

Q. Simply a question of whether it is red or white oak? A. Color, and white oak is more expensive because it is more scarce.

Q. Most apartment houses have pine. At least in comparison with most apartments, this has very good flooring? A. Yes, I would say so.

Q. You do not know anything about this question of changing the design on the face brick? A. No, I don't know.

Q. If you were informed of the fact that there had been five samples of face brick and that it was then finished in accordance with one of the samples, would you say that that brick was then put up in good, workmanlike manner? A. In as good as sample.

Q. Isn't it a fact that face brick and designs

and colors are usually gotten together with the other people involved, that is, the masons, etc. and then agreed upon? A. Always agreed upon between the contractor, owner and architect.

That's all.

By the Master:

Q. Did you read these specifications in relation to any changes or alterations to be made? A. I did, yes.

Q. And according to the specifications, what is your recollection of what it provided? A. If I recollect correctly, it says that there shall be no extras, and if so, they shall be in written consent and written authority.

Q. And in specifications of that kind, in your general practice—in doing business in Hudson County and elsewhere, is it your custom to take the directions of the architect or do you insist upon getting both the owner and the architect? A. An architect's approval is o. k. provided it is in writing.

Q. You would take that even on these specifications? A. That's the man you do business with, provided he has inspection included.

By Mr. Bianchi:

Q. If an architect on a job told you to make a certain change and you knew he had inspection of the building, would you make the change? A. We would not.

Q. I mean outside of a public building—on an ordinary small job? A. No, absolutely not. Only in writing.

Q. I mean before you had this experience where people made a liar out of you? A. We did do it, yes.

Q. I mean, if it were not for the experiences you had in Hudson County and other counties, you would have ordinarily taken those kind of orders? A. Yes.

Q. The architect is considered the supervisor? I mean, an ordinary contractor, forgetting yourself and this experience you had, would follow the request of the architect? A. Yes. From what I hear from fellows trying to collect money, I suppose they do.

Redirect by Mr. Flatoff:

Q. Mr. Scheidecker, what would you say would have been a reasonable charge for the contractor to have added to this job for overhead and profit? A. Anything he could get.

Q. Well, what would you say would be reasonable? A. If you ask what we do, we always have 5% overhead and 10% profit. That's our standard.

Q. And that's the general practice of high class contractors? A. Yes.

By the Master:

Q. Mr. Scheidecker, there was some testimony here, I think, that the 5% overhead was probably only enough to pay the insurance. Is that about right? A. Yes. Insurance costs you four percent.

Q. Then what other items would go to the overhead? A. Office expense, timekeeper, etc.

Q. Would not that be more than an additional

1%? A. No, it would not, because your insurance does not really run 4%. It may run 3¾% or 3½%. Average of 4% through a job, though.

Q. Does it make a difference in the manner in which you would charge the overhead and profit percentage as to whether or not the extras are on a large job and amount to a large amount, or whether they were on a small job, building apartment house of this size? A. Building an apartment house of this size, I think all extras should be charged five and ten. That's what we do. It means that the owner or architect has forgotten something and it does not cause the owner to pay any more for it. It is our practice to always try to help the owner and architect.

By Mr. Platoff:

Q. That five and ten, would have been to subcontractors. A. If you have a subcontractor, he adds his ten per cent, which they generally do.

That's all.

By Mr. Platoff: Dr. MacDonnell and Mr. Vitille went over the requisitions and payments and they do not agree.

(Counsel and complainant and defendant go over records together, agreeing on amounts.)

By the Master:

IT IS STIPULATED AND AGREED by counsel that there have been payments made on account to or for the contractors by the owner, Dr. MacDonnell, of the sum of $84,190.20 instead of

the sum of $82,320.20 shown on Exhibit C-2, and the sum of $83,740.20 shown on Exhibit D-54. These payments were all by checks with the exception of $300.00, which was paid in cash and are in addition to any credits to which Dr. MacDonnell is entitled including the $400.00 allowance made by the contractor for kitchen cabinets, and in addition the sum of $3,243.70, being the amount shown on Exhibit C-2 for extra work for electrical work furnished by S. & S. Supply Company, the S. & S. Supply Company not having filed any stop notice or claiming any of the moneys in this suit. This electrical work was the result of direct contract between the owner and S. & S. Supply Company.

I understand that the case, so far as the taking of testimony, is now closed. The matter will be set down for argument on Thursday, April 10th, 1930, at two o'clock.

Exhibit D-10.

GUIDO M. CROCETTI
TILE CONTRACTOR
527 West Broadway
New York

Dr. N. J. McDonnell,
30th St. & Park Ave.,
Woodcliff-on-Hudson, N. J.

Dear Sir:

You are hereby notified that Vitelle, Kinselle & Cunhy, General Contractors of New York, N. Y.

Exhibit D-10.

and Newark, N. J. are justly indebted to me for the sum of ONE THOUSAND SIX HUNDRED DOLLARS ($1,600) balance due on contract and One hundred and fifty-five dollars, amount of extra work, as per instructions received from Architect and General Contractors, a total sum of ONE THOUSAND SEVEN HUNDRED AND FIFTY-FIVE ($1,755.00) Dollars, which amount is due for materials and labor furnished by me to them and used in the erection of the building situated on Park Avenue and 30th St., Woodcliff-on-Hudson, New Jersey, pursuant to the written contract made between you and them and on file in the County Clerk's office: and you are further notified, that we have demanded payment from said Vitelle, Kinsella & Cunhy of the said sum of money, so due and owing to me and that they have refused to pay the same or any part thereof: and you are, therefore, required to retain the said sum of money out of the amount owing by you on said contract, or that may hereafter become due and owing from you on said contract, and pay the same to me;

GUIDO M. CROCETTI,

(S) GUIDO M. CROCETTI,
Tile Contractor.

GUIDO M. CROCETTI.

Dated: October 18, 1927.

Sworn and subscribed to before me
this 18th day of October, 1927.

LOUIE C. TARRANT,
a Notary Public of
New Jersey.

(Seal)

Exhibit D-23.

STATEMENT

Harry J. H. Ruhle, Pres. & Treas. — Carl Widmann, Vice-Pres. — Wilber T. Gowen, Secretary

Weehawken P. O., N. J., October 20th, 1927.

Messrs. Vitille Kinsella & Cunhy,

To NORTH HUDSON MANUFACTURING CO., Dr.
Dealers in and Manufacturers of
Doors, Sash and Mill Work
620 Main Street, North Bergen, N. J.

Hudson County Distributors
of
Asbestors "Century"
Shingles

As per mill contract #1438			6,300.00
Extras for contractors			889.25
Extras not in contract			592.38
			7,781.63
Credits.			
	20 dressers	400.00	
1927			
Feb. 19	By check	130.00	
Mar. 21	"	200.00	
May 6	"	486.20	
30	"	1,000.00	
June 30	"	1,400.00	
Sept. 9	"	1,850.00	5,466.20
			$2,315.43

Exhibit D-23.

Ticket No.	*Date*	*Description*	*Amount*	*Total*	
M-29711	June 10	128 ft. 1 x 12 shelving	12.80		
		128 ft. hookstrip	3.84	16.64	
M-22750	24	1548 sq. ft. 4 x 9 celotex.....	85.14		
		15 lbs. 1¼ galv. nails	1.50	86.64	
	July 19	96 lin. ft. 12″ shelving		9.60	10
#-13009	27	396 sq. ft. celotex		21.78	
M-29655	June 7	5700 lin. ft. panel moulding	114.00		
		trim jambs mouldings for drs. with sidelts.	55.05	169.05	
M-1015	Aug. 9	8 pcs. beaverboard 4-0 x 6-0	8.97		
		4 pcs. 1⅛ x 4 x 16-0 cypress....	3.84		
		4 pcs. 1⅛ x 2 x 16-0 cypress....	1.60		
		80 ft. 6″ base chestnut	7.20		
		2 pcs. shelving 1 x 12 x 16-0....	3.20		
		doors not charged, returned		24.81	20
M-1049	10	10 pcs. beaverboard 4-0 x 6-0....		11.40	
#-13190	10	164 lin. ft. 1 x 2 furring strip....	1.64		
		164 lin. ft. 1¼ x 3 bridging.....	3.28	4.92	
M-1070	10	16 ft. 6″ worked base	1.08		
		88 ft. base moulding	2.20		
		64 ft. wall moulding	.80		
		22 ft. 1⅜ stops	.44	4.52	
H-10606	16	3 Staniors	5.10		
		3 pr. hinges	11.25	16.35	
H-10626	18	2 prs. 4 x 4 butts	.56		30
		2 nickel flanges	3.40	3.96	
M-2175	19	3 drs. 2-6 x 5-6		15.00	
M-905		1 pr. drs. 4-0 x 7-0 1½ 10 lts. clear glass	20.00		
		2 side lts. 1-4 x 7-0 1½ 5 lts. clear glass	10.00		
		1 pr. drs. 4-0 x 7-0 1½ 10 lts. flor	20.00		
		2 sidelts. 1-4 x 7-0 1½ 5 lts. flor	10.00		
		2 x 4 mull. 4/7-1	3.50		
		1 ⅝ stops 12/6-9 2/4-1 4/1-5....	2.00		40

Exhibit D-23.

Ticket No.	*Date*	*Description*	*Amount*	*Total*
		3 astrigals	.75	
		1 pr. drs. 4-0 x 7-0 1¾ 10 lts.	22.00	
		1 hd. lt. 4-0 x 1-2	2.50	
		1 jamb and trim 4-0 x 8-4	8.00	
		1 single sash 4-0 x 2-6 8 lts. complete with trim	10.00	
		8 hd. lts. and trim	32.00	
		50 ft. 2″ bed moulding	1.25	
		5 pcs. 1¼ x 4 x 12-0 cypress	3.90	
		20 pcs. 1 x 2 x 14-0	7.00	
		220 ft. wall moulding	2.78	155.65
		2		
		1 circle head closet 2-7½ x 8-0	16.00	
		2 ends #1		
		6 shelves 1 x 12 x 2-8 w. w.	1.50	17.50
H-10704	26	1 block plate	2.20	
		12 friction catches	2.40	
		7 brass knobs	1.40	
		4 pr. butts 2 x 1½	.56	6.56
H-10901	Sept. 21	2 pr. butts 2 x 2 brass		.30
M-2140	29	20 pcs. 2 x 2 x 8-0	4.80	
		4 pcs. 1 x 14 shelving 14-0	8.40	
		1 door 2-4 x 6-8 1½ 2 pls. fir	4.00	17.20
M-2277	Oct. 4	3 pcs. 1 x 14 x 12-0 shelving		4.20
M-2368	6	1 pc. ⅞ x 28 x 3-6 w. w.	1.40	
		2 pcs. 1⅜ x 1⅜ x 2-6 w. w.	.24	
		1 pc. 13/16 x 4 x 5-0 w. w.	.30	1.94
H-11081	Oct. 5	4 pr. butterfly hinges	.64	
		2 cup turns	.20	
		25 sets pole sockets 1″	2.50	
		1 pr. 6″ tee hinges (light)	.22	3.56
H-11232	20	1 refrigerator catch		.80
				592.38

Exhibit D-51.

THIS AGREEMENT made the thirteenth (13) day of October in the year Nineteen Hundred and Twenty-six by and between Vitille, Kinsella & Cunhy, 64 Summer Ave., Newark, N. J., hereinafter called the Contractor, and Martin J. MacDonnell, 100—30th St., Woodcliff, N. J., hereinafter called the Owner,

WITNESSETH, that the Contractor and the Owner for the considerations hereinafter named agree as follows:

ARTICLE 1. SCOPE OF THE WORK—The Contractor shall furnish all of the materials and perform all of the work shown on the Drawings and described in the Specifications entitled Apartment for Dr. M. J. MacDonnell, North East Cor. 30th St. & Park Ave., Woodcliff, N. J., prepared by David M. Ach, Architect, 1 Madison Ave., New York, acting as and in these Contract Documents entitled the Architect; and shall do everything required by this Agreement, the General Conditions of the Contract, the Specifications and the Drawings.

ARTICLE 2. TIME OF COMPLETION—The work to be performed under this Contract shall be commenced at once and shall be substantially completed on the fifteenth day of April, Nineteen hundred and twenty-seven.

ARTICLE 3. THE CONTRACT SUM—The owner shall pay the Contractor for the performance of the Contract, subject to additions and deductions provided therein, in current funds as follows: Ninety-eight thousand ($98,000.00) Dollars.

Exhibit D-51.

Where the quantities originally contemplated are so changed that application of the agreed unit price to the quantity of work performed is shown to create a hardship to the Owner or the Contractor, there shall be an equitable adjustment of the Contract to prevent such hardship.

ARTICLE 4. PROGRESS PAYMENTS—The Owner shall make payments on account of the Contract as provided therein, as follows:

On or about the first day of each month 85% of the value, based on the value, based on the Contract prices, of labor and materials incorporated in the work and of materials suitably stored at the site thereof up to the 20th day of the preceding month, as estimated by the Architect, less the aggregate of previous payments; and upon substantial completion of the entire work, a sum sufficient to increase the total payments to 90% of the contract price.

ARTICLE 5. ACCEPTANCE AND FINAL PAYMENT—Final payment shall be due 30 days after substantial completion of the work provided the work be then fully completed and the Contract fully performed.

Upon receipt of written notice that the work is ready for final inspection and acceptance, the Architect shall promptly make such inspection, and when he finds the work acceptable under the Contract and the Contract fully performed he shall promptly issue a final certificate, over his own signature, stating that the work provided for in this Contract has been completed and is accepted by him under the terms and conditions thereof, and that the entire balance found to be

due the Contractor, and noted in said final certificate, is due and payable.

Before issuance of final certificate the Contractor shall submit evidence satisfactory to the Architect that all payrolls, material bills, and other indebtedness connected with the work have been paid.

If after the work has been substantially completed, full completion thereof is materially delayed through no fault of the Contractor, and the Architect so certifies, the Owner shall, upon certificate of the Architect, and without terminating the Contract, make payment of the balance due for that portion of the work fully completed and accepted. Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

ARTICLE 6. THE CONTRACT DOCUMENTS—The General Conditions of the Contract, the Specifications and the Drawings, together with this Agreement, form the Contract, and they are as fully a part of the Contract as if hereto attached or herein repeated. The following is an enumeration of the Specifications and Drawings:

Specification pages 1 to 57.

3 pages of instructions to contractors not numbered.

Survey.

Drawings No. 1, 1a, 2, 2a, 2b, 3, 4, 5—6 revised 6, 7 revised 7, 8.

Change where tile is specified cinder may be used, use cinder block for backing.

Change brick, to brick to cost $30.00 per M, two top stories shown as stucco, to be over cinder blocks.

Exhibit D-51.

Roof exposed to street fronts to be varigated slate.

Hardware on page 18 furnished by contractor.

IN WITNESS WHEREOF the parties hereto have executed this Agreement, the day and year first above written.

VITILLE, KINSELLA & CUNHY,
By J. J. KINSELLA.

MARTIN J. MACDONNELL.

DAVID M. ACH.

THE GENERAL CONDITIONS OF THE CONTRACT FOR THE CONSTRUCTION OF BUILDINGS

ART. 1. DEFINITION.

(a) The Contract Documents consist of the Agreement, the General Conditions of the Contract, the Drawings and Specifications, including all modifications thereof incorporated in the documents before their execution. These form the Contract.

(b) The Owner, the Contractor and the Architect are those mentioned as such in the Agreement. They are treated throughout the Contract Documents as if each were of the singular number and masculine gender.

(c) The term Subcontractor, as employed herein, includes only those having a direct con-

tract with the Contractor and it includes one who furnishes material worked to a special design according to the plans or specifications of this work, but does not include one who merely furnishes material not so worked.

(d) Written notice shall be deemed to have been duly served if delivered in person to the individual or to a member of the firm or to an officer of the corporation for whom it is intended, or if delivered at or sent by registered mail to the last business address known to him who gives the notice.

(e) The term "work" of the Contractor or Subcontractor includes labor or materials or both.

(f) All time limits stated in the Contract Documents are of the essence of the Contract.

(g) The law of the place of building shall govern the construction of this Contract.

ART. 2. EXECUTION, CORRELATION AND INTENT OF DOCUMENTS.—The Contract Documents shall be signed in duplicate by the Owner and the Contractor. In case the Owner and the Contractor fail to sign the General Conditions, Drawings or Specifications, the Architect shall identify them.

The Contract Documents are complementary, and what is called for by any one shall be as binding as if called for by all. The intention of the documents is to include all labor and materials, equipment and transportation necessary for

the proper execution of the work. It is not intended, however, that materials or work not covered by or properly inferable from any heading, branch, class or trade of the specifications shall be supplied unless distinctly so noted on the drawings. Materials or work described in words which so applied have a well known technical or trade meaning shall be held to refer to such recognized standards.

ART. 3. DETAIL DRAWINGS AND INSTRUCTIONS.—The Architect shall furnish with reasonable promptness, additional instructions, by means of drawings or otherwise, necessary for the proper execution of the work. All such drawings and instructions shall be consistent with the Contract Documents, true developments thereof, and reasonably inferable therefrom. The work shall be executed in conformity therewith and the Contractor shall do no work without proper drawings and instructions.

The Contractor and the Architect, if either so requests, shall jointly prepare a schedule, subject to change from time to time in accordance with the progress of the work, fixing the dates at which the various detail drawings will be required, and the Architect shall furnish them in accordance with that schedule. Under like conditions, a schedule shall be prepared, fixing the dates for the submission of shop drawings, for the beginning of manufacture and installation of materials and for the completion of the various parts of the work.

ART. 4. COPIES FURNISHED.—Unless otherwise provided in the Contract Documents the Architect will furnish to the Contractor, free of charge, all

copies of drawings and specifications reasonably necessary for the execution of the work.

ART. 5. SHOP DRAWINGS.—The Contractor shall submit with such promptness as to cause no delay in his own work or in that of any other Contractor, two copies of all shop or setting drawings and schedules required for the work of the various trades, and the Architect shall pass upon them with reasonable promptness. The Contractor shall make any corrections required by the Architect, file with him two corrected copies and furnish such other copies as may be needed. The Architect's approval of such drawings or schedules shall not relieve the Contractor from responsibility for deviations from drawings or specifications, unless he has in writing called the Architect's attention to such deviations at the time of submission, nor shall it relieve him from responsibility for errors of any sort in shop drawings or schedules.

ART. 6. DRAWINGS AND SPECIFICATIONS ON THE WORK.—The Contractor shall keep one copy of all drawings and specifications on the work, in good order, available to the Architect and to his representatives.

ART. 7. OWNERSHIP OF DRAWINGS AND MODELS.—All drawings, specifications and copies thereof furnished by the Architect are his property. They are not to be used on other work and, with the exception of the signed Contract set, are to be returned to him on request, at the completion of the work. All models are the property of the Owner.

ART. 8. SAMPLES.—The Contractor shall furnish for approval all samples as directed. The

work shall be in accordance with approved samples.

ART. 9. MATERIALS, APPLIANCES, EMPLOYES.—Unless otherwise stipulated, the Contractor shall provide and pay for all materials, labor, water, tools, equipment, light, power, transportation and other facilities necessary for the execution and completion of the work.

Unless otherwise specified, all materials shall be new and both workmanship and materials shall be of good quality. The Contractor shall, if required, furnish satisfactory evidence as to the kind and quality of materials.

The Contractor shall at all times enforce strict discipline and good order among his employes, and shall not employ on the work any unfit person or any one not skilled in the work assigned to him.

ART. 10. ROYALTIES AND PATENTS.—The Contractor shall pay all royalties and license fees. He shall defend all suits or claims for infringement of any patent rights and shall save the Owner harmless from loss on account thereof, except that the Owner shall be responsible for all such loss when a particular process or the product of a particular manufacturer or manufacturers is specified, but if the Contractor has information that the process or article specified is an infringement of a patent he shall be responsible for such loss unless he promptly gives such information to the Architect or Owner.

ART. 11. SURVEYS, PERMITS AND REGULATIONS.—The Owner shall furnish all surveys unless otherwise specified. Permits and licenses of a tempo-

rary nature necessary for the prosecution of the work shall be secured and paid for by the Contractor. Permits, licenses and easements for permanent structures or permanent changes in existing facilities shall be secured and paid for by the Owner, unless otherwise specified.

The Contractor shall give all notices and comply with all laws, ordinances, rules and regulations bearing on the conduct of the work as drawn and specified. If the Contractor observes that the drawings and specifications are at variance therewith, he shall promptly notify the Architect in writing, and any necessary changes shall be adjusted as provided in the Contract for changes in the work. If the Contractor performs any work knowing it to be contrary to such laws, ordinances, rules and regulations, and without such notice to the Architect, he shall bear all costs arising therefrom.

ART. 12. PROTECTION OF WORK AND PROPERTY.—The Contractor shall continuously maintain adequate protection of all his work from damage and shall protect the Owner's property from injury or loss arising in connection with this Contract. He shall make good any such damage, injury or loss, except such as may be directly due to errors in the Contract Documents or caused by agents or employes of the Owner. He shall adequately protect adjacent property as provided by law and the Contract Documents. He shall provide and maintain all passage ways, guard fences, lights and other facilities for protection required by public authority or local conditions.

In an emergency affecting the safety of life or of the work or of adjoining property, the Contrac-

tor, without special instruction or authorization from the Architect or Owner, is hereby permitted to act, at his discretion, to prevent such threatened loss or injury, and he shall so act, without appeal, if so instructed or authorized. Any compensation, claimed by the Contractor on account of emergency work, shall be determined by agreement or Arbitration.

ART. 13. INSPECTION OF WORK.—The Architect and his representatives shall at all times have access to the work wherever it is in preparation or progress and the Contractor shall provide proper facilities for such access and for inspection.

If the specifications, the Architect's instructions, laws, ordinances or any public authority require any work to be specially tested or approved, the Contractor shall give the Architect timely notice of its readiness for inspection, and if the inspection is by another authority than the Architect, of the date fixed for such inspection. Inspections by the Architect shall be promptly made, and where practicable at the source of supply. If any work should be covered up without approval or consent of the Architect, it must, if required by the Architect, be uncovered for examination at the Contractor's expense.

Re-examination of questioned work may be ordered by the Architect and if so ordered the work must be uncovered by the Contractor. If such work be found in accordance with the Contract Documents the Owner shall pay the cost of re-examination and replacement. If such work be found not in accordance with the Contract Documents the Contractor shall pay such cost, unless

he shall show that the defect in the work was caused by another Contractor, and in that event the Owner shall pay such cost.

ART. 14. SUPERINTENDENCE: SUPERVISION.—The Contractor shall keep on his work, during its progress, a competent superintendent and any necessary assistants, all satisfactory to the Architect. The superintendent shall not be changed except with the consent of the Architect, unless the superintendent proves to be unsatisfactory to the Contractor and ceases to be in his employ. The superintendent shall represent the Contractor in his absence and all directions given to him shall be as binding as if given to the Contractor. Important directions shall be confirmed in writing to the Contractor. Other directions shall be so confirmed on written request in each case.

The Contractor shall give efficient supervision to the work using his best skill and attention. He shall carefully study and compare all drawings, specifications and other instructions and shall at once report to the Architect any error, inconsistency or omission which he may discover, but he shall not be held responsible for their existence or discovery.

ART. 15. CHANGES IN THE WORK.—The Owner, without invalidating the Contract, may order extra work or make changes by altering, adding to or deducting from the work, the Contract Sum being adjusted accordingly. All such work shall be executed under the conditions of the original contract except that any claim for extension of time caused thereby shall be adjusted at the time of ordering such change.

Exhibit D-51.

In giving instructions, the Architect shall have authority to make minor changes in the work, not involving extra cost, and not inconsistent with the purposes of the building, but otherwise, except in an emergency endangering life or property, no extra work or change shall be made unless in pursuance of a written order from the Owner signed or countersigned by the Achritect, or a written order from the Architect stating that the Owner has authorized the extra work or change, and no claim for an addition to the contract sum shall be valid unless so ordered.

The value of any such extra work or change shall be determined in one or more of the following ways:

(a) By estimate and acceptance in a lump sum.

(b) By unit prices named in the contract or subsequently agreed upon.

(c) By cost and percentage or by cost and a fixed fee.

If none of the above methods is agreed upon, the Contractor, provided he receives an order as above, shall proceed with the work. In such case and also under case (c), he shall keep and present in such form as the Architect may direct, a correct account of the net cost of labor and materials, together with vouchers. In any case, the Architect shall certify to the amount, including reasonable allowance for overhead and profit, due to the Contractor. Pending final determination of value, payments on account of changes shall be made on the Architect's certificate.

ART. 16. CLAIMS FOR EXTRA COST.—If the Contractor claims that any instructions by drawings

or otherwise involve extra cost under this contract, he shall give the Architect written notice thereof within a reasonable time after the receipt of such instructions, and in any event before proceeding to execute the work, except in emergency endangering life or property, and the procedure shall then be as provided for changes in the work. No such claim shall be valid unless so made.

ART. 17. DEDUCTIONS FOR UNCORRECTED WORK. —If the Architect and Owner deem it inexpedient to correct work injured or done not in accordance with the Contract, an equitable deduction from the contract price shall be made therefor.

ART. 18. DELAYS AND EXTENSION OF TIME.—If the Contractor be delayed at any time in the progress of the work by any act or neglect of the Owner or the Architect, or of any employe of either, or by any other Contractor employed by the Owner, or by changes ordered in the work, or by strikes, lockouts, fire, unusual delay in transportation, unavoidable casualties or any causes beyond the Contractor's control, or by delay authorized by the Architect pending arbitration, or by any cause which the Architect shall decide to justify the delay, then the time of completion shall be extended for such reasonable time as the Architect may decide.

No such extension shall be made for delay occurring more than seven days before claim therefor is made in writing to the Architect. In the case of a continuing cause of delay, only one claim is necessary.

If no schedule or agreement stating the dates upon which drawings shall be furnished is made,

then no claim for delay shall be allowed on account of failure to furnish drawings until two weeks after demand for such drawings and not then unless such claim be reasonable.

This article does not exclude the recovery of damages for delay by either party under other provisions in the contract documents.

ART. 19. CORRECTION OF WORK BEFORE FINAL PAYMENT.—The Contractor shall promptly remove from the premises all materials condemned by the Architect as failing to conform to the Contract, whether incorporated in the work or not, and the Contractor shall promptly replace and re-execute his own work in accordance with the Contract and without expense to the Owner and shall bear the expense of making good all work of other contractors destroyed or damaged by such removal or replacement.

If the Contractor does not remove such condemned work and materials within a reasonable time, fixed by written notice, the Owner may remove them and may store the material at the expense of the Contractor. If the Contractor does not pay the expenses of such removal within ten days thereafter, the Owner may, upon ten days' written notice, sell such materials at auction or at private sale and shall account for the net proceeds thereof, after deducting all the costs and expenses that should have been borne by the Contractor.

ART. 20. CORRECTION OF WORK AFTER FINAL PAYMENT.—Neither the final certificate nor payment nor any provision in the Contract Documents shall relieve the Contractor of responsi-

bility for faulty materials or workmanship and, unless otherwise specified, he shall remedy any defects due thereto and pay for any damage to other work resulting therefrom, which shall appear within a period of one year from the date of substantial completion. The Owner shall give notice of observed defects with reasonable promptness. All questions arising under this article shall be decided by the Architect subject to arbitration.

ART. 21. THE OWNER'S RIGHT TO DO WORK.—If the Contractor should neglect to prosecute the work properly or fail to perform any provision of this contract, the Owner, after three days' written notice to the Contractor may, without prejudice to any other remedy he may have, make good such deficiencies and may deduct the cost thereof from the payment then or thereafter due the Contractor; provided, however, that the Architect shall approve both such action and the amount charged to the Contractor.

ART. 22. OWNER'S RIGHT TO TERMINATE CONTRACT.—If the Contractor should be adjudged a bankrupt, or if he should make a general assignment for the benefit of his creditors, or if a receiver should be appointed on account of his insolvency, or if he should persistently or repeatedly refuse or should fail, except in cases for which extension of time is provided, to supply enough properly skilled workmen or proper materials, or if he should fail to make prompt payment to subcontractors or for material or labor, or persistently disregard laws, ordinances or the instructions of the Architect, or otherwise be guilty of a

substantial violation of any provision of the contract, then the Owner, upon the certificate of the Architect that sufficient cause exists to justify such action, may, without prejudie to any other right or remedy and after giving the Contractor seven days' written notice, terminate the employment of the Contractor and take possession of the premises and of all materials, tools and appliances thereon and finish the work by whatever method he may deem expedient. In such case the Contractor shall not be entitled to receive any further payment until the work is finished. If the unpaid balance of the contract price shall exceed the expense of finishing the work including compensation for additional managerial and administrative services, such excess shall be paid to the Contractor. If such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expense incurred by the Owner as herein provided, and the damage incurred through the Contractor's default, shall be certified by the Architect.

ART. 23. CONTRACTOR'S RIGHT TO STOP WORK OR TERMINATE CONTRACT.—If the work should be stopped under an order of any court, or other public authority, for a period of three months, through no act or fault of the Contractor or of anyone employed by him, or if the Architect should fail to issue any certificate for payment within seven days after it is due, or if the Owner should fail to pay to the Contractor within seven days of its maturity and presentation, any sum certified by the Architect or awarded by arbitrators, then the Contractor may, upon seven days' written notice to the Owner and the Architect,

stop work or terminate this contract and recover from the Owner payment for all work executed and any loss sustained upon any plant or materials and reasonable profit and damages.

ART. 24. APPLICATIONS FOR PAYMENTS.—The Contrator shall submit to the Architect an application for each payment, and, if required, receipts or other vouchers, showing his payments for materials and labor, including payments to subcontractors as required by Art. 37.

If payments are made on valuation of work done, such application shall be submitted at least ten days before each payment falls due, and, if required, the Contractor shall, before the first application, submit to the Architect a schedule of values of the various parts of the work, including quantities, aggregating the total sum of the contract, divided so as to facilitate payments to subcontractors in accordance with Article 37 (e), made out in such form as the Architect and the Contractor may agree upon, and, if required, supported by such evidence as to its correctness as the Architect may direct. This schedule, when approved by the Architect, shall be used as a basis for certificates of payment, unless it be found to be in error. In applying for payments, the Contractor shall submit a statement based upon this schedule, and, if required, itemized in such form and supported by such evidence as the Architect may direct, showing his right to the payment claimed.

If payments are made on account of materials delivered and suitably stored at the site but not incorporated in the work, they shall, if required by the Architect, be conditional upon submission

by the Contractor of bills of sale or such other procedure as will establish the Owner's title to such material or otherwise adequately protect the Owner's interest.

ART. 25. CERTIFICATES OF PAYMENTS.—If the Contractor has made application as above, the Architect shall, not later than the date when each payment falls due, issue to the Contractor a certificate for such amount as he decides to be properly due.

No certificate issued nor payment made to the Contractor, nor partial or entire use or occupancy of the work by the Owner, shall be an acceptance of any work or materials not in accordance with this contract. The making and acceptance of the final payment shall constitute a waiver of all claims by the Owner, other than those arising from unsettled liens, from faulty work appearing after final payment or from requirement of the specifications, and of all claims by the Contractor, except those previously made and still unsettled.

Should the Owner fail to pay the sum named in any certificate of the Architect or in any award by arbitration, upon demand when due, the Contractor shall receive, in addition to the sum named in the certificate, interest thereon at the legal rate in force at the place of building.

ART. 26. PAYMENTS WITHHELD.—The Architect may withhold or, on account of subsequently discovered evidence, nullify the whole or a part of any certificate to such extent as may necessary to protect the Owner from loss on account of:

(a) Defective work not remedied.

(b) Claims filed or reasonable evidence indicating probable filing of claims.

(c) Failure of the Contractor to make payments properly to subcontractors or for material or labor.

(d) A reasonable doubt that the contract can be completed for the balance then unpaid.

(e) Damage to another Contractor.

When the above grounds are removed payment shall be made for amounts withheld because of them.

ART. 27. CONTRACTOR'S LIABILITY INSURANCE.—The Contractor shall maintain such insurance as will protect him from claims under workmen's compensation acts and from any other claims for damages for personal injury, including death, which may arise from operations under this Contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. Certificates of such insurance shall be filed with the Owner, if he so require, and shall be subject to his approval for adequacy of protection.

ART. 28. OWNER'S LIABILITY INSURANCE.—The Owner shall be responsible for and at his option may maintain such insurance as will protect him from his contingent liability for damages for personal injury, including death, which may arise from operations under this contract.

ART. 29. FIRE INSURANCE.—The Owner shall effect and maintain fire insurance upon the entire

structure on which the work of this contract is to be done and upon all materials, in or adjacent thereto and intended for use thereon, to at least eighty per cent of the insurable value thereof. The loss, if any, is to be made adjustable with and payable to the Owner as Trustee for whom it may concern.

All policies shall be open to inspection by the Contractor. If the Owner fails to show them on request, or if he fails to effect or maintain insurance as above, the Contractor may insure his own interest and charge the cost thereof to the Owner. If the Contractor is damaged by failure of the Owner to maintain such insurance, he may recover as stipulated in the contract for recovery of damages.

If required in writing by any party in interest, the Owner as Trustee shall, upon the occurrence of loss, give bond for the proper performance of his duties. He shall deposit any money received from insurance in an account separate from all his other funds and he shall distribute it in accordance with such agreement as the parties in interest may reach, or under an award of arbitrators appointed, one by the Owner, another by joint action of the other parties in interest, all other procedure being as provided elsewhere in the contract for Arbitration. If after loss no special agreement is made, replacement of injured work shall be ordered and executed as provided for changes in the work.

The Trustee shall have power to adjust and settle any loss with the insurers unless one of the Contractors interested shall object in writing within three working days of the occurrence of loss, and thereupon arbitrators shall be chosen as

above. The Trustees shall in that case make settlement with the insurers in accordance with the directions of such arbitrators, who shall also, if distribution by arbitration is required, direct such distribution.

ART. 30. GUARANTY BONDS.—The Owner shall have the right, after the signing of the Contract, to require the Contractor to furnish bond covering the faithful performance of the Contract and the payment of all obligations arising thereunder, in such form as the Owner may prescribe and with such sureties as he may approve. If such bond is required by instructions given previous to the submission of bids, the premium shall be paid by the Contractor; if subsequent thereto, it shall be paid by the Owner.

ART. 31. DAMAGES.—If either party to this Contract should suffer damage in any manner because of any wrongful act or neglect of the other party or of anyone employed by him, then he shall be reimbursed by the other party for such damage.

Claims under this clause shall be made in writing to the party liable within a reasonable time of the first observance of such damage and not later than the time of final payment, except as expressly stipulated otherwise in the case of faulty work or materials, and shall be adjusted by agreement or arbitration.

ART. 32. LIENS.—Neither the final payment nor any part of the retained percentage shall become due until the Contractor, if required, shall deliver to the Owner a complete release of all liens arising out of this Contract, or receipts in full in lieu

thereof and, if required in either case, an affidavit that so far as he has knowledge or information the releases and receipts include all the labor and material for which a lien could be filed; but the Contractor may, if any subcontractor refuses to furnish a release or receipt in full, furnish a bond satisfactory to the Owner, to indemnify him against any lien. If any lien remain unsatisfied after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging such a lien, including all costs and a reasonable attorney's fee.

ART. 33. ASSIGNMENT.—Neither party to the Contract shall assign the Contract or sublet it as a whole without the written consent of the other, nor shall the Contractor assign any moneys due or to become due to him hereunder, without the previous written consent of the Owner.

ART. 34. MUTUAL RESPONSIBILITY OF CONTRACTORS.—Should the Contractor cause damage to any other contractor on the work the Contractor agrees, upon due notice, to settle with such contractor by agreement or arbitration, if he will so settle. If such other contractor sues the Owner on account of any damage alleged to have been so sustained, the Owner shall notify the Contractor, who shall defend such proceedings at the Owner's expense and, if any judgment against the Owner arise therefrom, the Contractor shall pay or satisfy it and pay all costs incurred by the Owner.

ART. 35. SEPARATE CONTRACTS.—The Owner reserves the right to let other contracts in connec-

tion with this work. The Contractor shall afford other contractors reasonable opportunity for the introduction and storage of their materials and the execution of their work, and shall properly connect and coordinate his work with theirs.

If any part of the Contractor's work depends for proper execution or results upon the work of any other contractor, the Contractor shall inspect and promptly report to the Architect any defects in such work that render it unsuitable for such proper execution and results. His failure so to inspect and report shall constitute an acceptance of the other contractor's work as fit and proper for the reception of his work, except as to defects which may develop in the other contractor's work after the execution of his work.

To insure the proper execution of his subsequent work the Contractor shall measure work already in place and shall at once report to the Architect any discrepancy between the executed work and the drawings.

ART. 36. SUBCONTRACTS.—The Contractor shall, as soon as practicable after the signature of the contract, notify the Architect in writing of the names of subcontractors proposed for the principal parts of the work and for such others as the Architect may direct and shall not employ any that the Architect may within a reasonable time object to as incompetent or unfit.

If the Contractor has submitted before signing the contract a list of subcontractors and the change of any name on such list is required in writing by the Owner after signature of agreement, the contract price shall be increased or diminished by the difference in cost occasioned by such change.

Exhibit D-51.

The Architect shall, on request, furnish to any subcontractor, wherever practicable, evidence of the amounts certified on his account.

The Contractor agrees that he is as fully responsible to the Owner for the acts and omissions of his subcontractors and of persons either directly or indirectly employed by them, as he is for the acts and omissions of persons directly employed by him.

Nothing contained in the contract documents shall create any contractual relation between any subcontractor and the Owner.

ART. 37. RELATIONS OF CONTRACTOR AND SUBCONTRACTOR.—The Contractor agrees to bind every Subcontractor and every Subcontractor agrees to be bound by the terms of the Agreement, the General Conditions, the Drawings and Specifications as far as applicable to his work, including the following provisions of this article, unless specifically noted to the contrary in a subcontract approved in writing as adequate by the Owner or Architect.

This does not apply to minor subcontracts.

The Subcontractor agrees—

(a) To be bound to the Contractor by the terms of the Agreement, General Conditions, Drawings and Specifications, and to assume toward him all the obligations and responsibilities that he, by those documents, assumes toward the Owner.

(b) To submit to the Contractor applications for payment in such reasonable time as to enable the Contractor to apply for payment under Article 24 of the General Conditions.

Exhibit D-51.

(c) To make all claims for extras, for extensions of time and for damages for delays or otherwise, to the Contractor in the manner provided in the General Conditions for like claims by the Contractor upon the Owner, except that the time for making claims for extra cost is one week.

The Contractor agrees—

(d) To be bound to the Subcontractor by all the obligations that the Owner assumes to the Contractor under the Agreement, General Conditions, Drawings and Specifications, and by all the provisions thereof affording remedies and redress to the Contractor from the Owner.

(e) To pay the Subcontractor, upon the issuance of certificates, if issued under the schedule of values described in Article 24 of the General Conditions, the amount allowed to the Contractor on account of the Subcontractor's work to the extent of the Subcontractor's interest therein.

(f) To pay the Subcontractor, upon the issuance of certificates, if issued otherwise than as in (e), so that at all times his total payments shall be as large in proportion to the value of the work done by him as the total amount certified to the Contractor is to the value of the work done by him.

(g) To pay the Subcontractor to such extent as may be provided by the Contract Documents or the subcontract, if either of these provides for earlier or larger payments than the above.

(h) To pay the Subcontractor on demand for his work or materials as far as executed and fixed

in place, less the retained percentage, at the time the certificate should issue, even though the Architect fails to issue it for any cause not the fault of the Subcontractor.

(j) To pay the Subcontractor a just share of any fire insurance money received by him, the Contractor, under Article 29 of the General Conditions.

(k) To make no demand for liquidated damages or penalty for delay in any sum in excess of such amount as may be specifically named in the subcontract.

(l) That no claim for services rendered or materials furnished by the Contractor to the Subcontractor shall be valid unless written notice thereof is given by the Contractor to the Subcontractor during the first ten days of the calendar month following that in which the cliam originated.

(m) To give the Subcontractor an opportunity to be present and to submit evidence in any arbitration involving his rights.

(n) To name as arbitrator under arbitration proceedings as provided in the General Conditions the person nominated by the Subcontractor, if the sole cause of dispute is the work, materials, rights or responsibilities of the Subcontractor; or, if of the Subcontractor and any other subcontractor jointly, to name as such arbitrator the person upon whom they agree.

The Contractor and the Subcontractor agree that—

(o) In the matter of arbitration, their rights and obligations and all procedure shall be analogous to those set forth in this contract.

Nothing in this article shall create any obligation on the part of the Owner to pay to or to see to the payment of any sums to any Subcontractor.

ART. 38. ARCHITECT'S STATUS.—The Architect shall have general supervision and direction of the work. He is the agent of the Owner only to the extent provided in the Contract Documents and when in special instances he is authorized by the Owner so to act, and in such instances he shall, upon request, show the Contractor written authority. He has authority to stop the work whenever such stoppage may be necessary to insure the proper execution of the Contract.

As the Architect is, in the first instance, the interpreter of the conditions of the Contract and the judge of its performance, he shall side neither with the Owner nor with the Contractor, but shall use his powers under the contract to enforce its faithful performance by both.

In case of the termination of the employment of the Architect, the Owner shall appoint a capable and reputable Architect, whose status under the contract shall be that of the former Architect.

ART. 39. ARCHITECT'S DECISIONS.—The Architect shall, within a reasonable time, make decisions on all claims of the Owner or Contractor and on all other matters relating to the execution and progress of the work or the interpretation of the Contract Documents.

The Architect's decisions, in matters relating to

artistic effect, shall be final, if within the terms of the Contract Documents.

Except as above or as otherwise expressly provided in the Contract Documents, all the Architect's decisions are subject to arbitration.

ART. 40. ARBITRATION.—All questions subject to arbitration under this Contract shall be submitted to arbitration at the choice of either party to the dispute.

The Contractor shall not cause a delay of the work during any arbitration proceedings, except by agreement with the Owner.

The demand for arbitration shall be filed in writing with the Architect, in the case of an appeal from his decision, within ten days of its receipt and in any other case within a reasonable time after cause thereof and in no case later than the time of final payment, except as otherwise expressly stipulated in the Contract. If the Architect fails to make a decision within a reasonable time, an appeal to arbitration may be taken as if his decision had been rendered against the party appealing.

No one shall be nominated or act as an arbitrator who is in any way financially interested in this Contract or in the business affairs of either the Owner, Contractor or Architect.

Unless otherwise provided by controlling statutes, the parties may agree upon one arbitrator; otherwise there shall be three, one named in writing, by each party to this Contract, to the other party and to the Architect and the third chosen by these two arbitrators, or if they fail to select a third within fifteen days, then he shall be chosen by the presiding officer of the Bar Association

nearest to the location of the work. Should the party demanding arbitration fail to name an arbitrator within ten days of his demand, his right to arbitration shall lapse. Should the other party fail to choose an arbitrator within said ten days, then such presiding officer shall appoint such arbitrator. Should either party refuse or neglect to supply the arbitrators with any papers or information demanded in writing, the arbitrators are empowered by both parties to proceed ex parte.

If there be one arbitator his decision shall be binding; if three the decision of any two shall be binding. Such decision shall be a condition precedent to any right of legal action, and wherever permitted by law it may be filed in Court to carry it into effect.

The arbitrators, if they deem that the case demands it, are authorized to award to the party whose contention is sustained such sums as they shall deem proper for the time, expense and trouble incident to the appeal and, if the appeal was taken without reasonable cause, damages for delay. The arbitrators shall fix their own compensation, unless otherwise provided by agreement, and shall assess the costs and charges of the arbitration upon either or both parties.

The award of the arbitrator shall be in writing and it shall not be open to objection on account of the form of the proceeding or the award, unless otherwise provided by the controlling statutes.

In the event of such statutes providing on any matter covered by this article otherwise than as hereinbefore specified, the method of procedure throughout and the legal effect of the award shall be wholly in accordance with the said statutes, it

being intended hereby to lay down a principle of action to be followed, leaving its local application to be adapted to the legal requirements of the jurisdiction having authority over the arbitration.

ART. 41. CASH ALLOWANCES.—The Contractor shall include in the contract sum all allowances named in the Contract Documents and shall cause the work so covered to be done by such contractors and for such sums as the Architect may direct, the contract sum being adjusted in conformity therewith. The Contractor declares that the contract sum includes such sums for expenses and profit on account of cash allowances as he deems proper. No demand for expenses or profit other than those included in the contract sum shall be allowed. The Contractor shall not be required to employ for any such work persons against whom he has a reasonable objection.

ART. 42. USE OF PREMISES.—The Contractor shall confine his apparatus, the storage of materials and the operations of his workmen to limits indicated by law, ordinances, permits or directions of the Architect and shall not unreasonably encumber the premises with his materials.

The Contractor shall not load or permit any part of the structure to be loaded with a weight that will endanger its safety.

The Contractor shall enforce the Architect's instructions regarding signs, advertisements, fires and smoking.

ART. 43. CUTTING, PATCHING AND DIGGING.—The Contractor shall do all cutting, fitting or patching of his work that may be required to

make its several parts come together properly and fit it to receive or be received by work of other contractors shown upon, or reasonably implied by, the Drawings and Specifications for the completed structure, and he shall make good after them as the Architect may direct.

Any cost caused by defective or ill-timed work shall be borne by the party responsible therefor.

The Contractor shall not endanger any work by cutting, digging or otherwise, and shall not cut or alter the work of any other contractor save with the consent of the Architect.

ART. 44. CLEANING UP.—The Contractor shall at all times keep the premises free from accumulations of waste material or rubbish caused by his employes or work, and at the completion of the work he shall remove all his rubbish from and about the building and all his tools, scaffolding and surplus materials and shall leave his work "broom clean" or its equivalent, unless more exactly specified. In case of dispute the Owner may remove the rubbish and charge the cost to the several contractors as the Architect shall determine to be just.

Exhibit D-52.

SPECIFICATIONS.

RELEVANT EXCERPTS.

"Anything which is not shown on the drawings, but which is mentioned in the specifications or vice versa, or anything not expressly set forth in either, but which is reasonably implied shall be furnished and performed as though specially shown and mentioned in both."

(Second unnumbered page of Instructions to Contractors.)

"PAYMENTS

Payments shall be made by the Owner only when the Contractor accompanies its bill for work performed under contract by a certificate signed by the Architect and made out upon their regular printed form.

Partial payments shall never exceed 85% of the value of the work completed at the building. In determining the value of work executed, the judgment of the Architect shall be final. No certificates for final payment will be issued by the Architect until the drawings and specifications have been returned to his office or until they have been accounted for to his satisfaction."

(Second unnumbered page of Instructions to Contractors.)

"PROTECTION OF BEAMS AND GIRDERS

All steel work of beams and girders projecting below the beams of the arches must have concrete

fireproofing that will project 2″ outside of edges of flanges up to soffit of arches.

All columns will be protected with 2″ fireproofing, except where columns are encased in brick.

BRICK WORK

All common brick work throughout shall be hard burned brick, free from swell, pale or other imperfections, laid up full to line, plumb, level, square and true, thoroughly bonded close jointed and well anchored, laid shove joint and thoroughly flushed with cement mortar. All brick work below the top of the first tier of beams and above the roof tier of beams must be laid in Portland cement and sand. All brick work from the level of the top of first tier of beams to the top of roof tier shall be laid in Portland cement, sand and hydrated lime. All brick work shall be sprinkled before laid. All joints must be struck and bonded every fifth course in height. Nine courses of common brick should lay approximately 22½″ in height. Every starting and finishing course must be a header course. Bats shall only be permitted for closures and not for hearting walls.

Front brick work shall be Claytex, Factory 5 Colonial laid in Flemish bond with buff mortar joints struck, headers projecting as directed and stretches skinteled as directed.

Side and court walls shall be Claytex, Factory 180, Shade 02 laid in the usual running bond with white joints not exceeding 5/16″ in width. Between every four and five bricks in a course there shall be a diagonal split header binding at facing and backing."

(Pages 3 and 4).

Exhibit D-52.

"STONE WORK

All rubble stone work shown on plan to be native trap rock dressed to the approximate sizes shown on plans, except foundation work below grade which will be straight rubble work.

All ashlar, moulded work, copings, curbs, water tables, steps, balustrades, balconies, etc. to be of artificial limestone (cast Portland Cement) of an even color free from all defects and shall have a rubbed finish. Steps will be of bluestone.

All artificial stone work must be delivered in perfect condition. This contractor shall do all cutting, drilling and fitting required for the setting of the work and leave everything in a perfect condition satisfactory to the Architect.

All the cast stone work must be bonded into the walls full depth shown on drawings and details and in no case shall the bond be less than 4″. For projecting courses the bed must in all cases exceed the projection of the stone from the face of the wall. No false joints and no mitred joints will be allowed and no joint must be more than 3/16″. Copings shall have wash on top and drip underneath and shall be at least 1″ wider on each side than the wall below."

No patched, damaged, filled or discolored work will be accepted. All work shall be securely anchored into the wall. All artificial stone work shall be back painted or parged before setting. At completion clean off all artificial and real stone work, leaving all in perfect condition."

(Pages 5 and 6).

"GYPSUM BLOCK

Build dumbwaiter partitions where indicated on plans of 4″ self supporting gypsum blocks and

set gypsum block deafening in all partitions and floor and ceiling of the doctor's office where so indicated on plan. All block to be set in lime and cement mortar and all shafts to be plumb and square.

LATHING AND PLASTERING

The entire ceiling of the cellar, side walls and ceilings of Janitor's apartment in basement and the side walls and ceilings of first, second, third, fourth and fifth floors including all closets, pent house, shaft, in fact all work throughout, except stair and hall partitions will be lathed with the very best quality spruce lath.

The stair partitions, ceilings, walls and soffits and the cellar ceiling, will be covered with Sackett's Plaster Boards, neatly pointed with plaster paris. All work will be three coat work: brown, scratch and white.

All plaster work to be 'Rock Wall' or other approved plaster, using not less than twelve bags to 100 square yards, but using enough to fill out to grounds and to be well floated down, making walls straight, plumb and true and all well rodded and floated down and troweled to a smooth surface, making angles and corners after browning is perfectly hard and dry. Finish with a white trowel finish made of the best quality calcined plaster of paris and white mortar run from Rockland finishing lime and even clear white sand run through the screen with the lime. Put on and trowel down to a smooth even, plumb, enamel surface, free from trowel and brush marks. White coat all parts that have been coated brown, also plaster under all windows and plaster behind all wainscoting. White mortar to be at least three days old before being used.

Exhibit D-52.

All plastering shall be brought to true and straight surfaces and in every way done in a thoroughly workmanlike manner. Cut out and make good any cracks which may appear before the acceptance of the building and leave all in perfect condition. Also repair all plaster broken by other mechanics in the execution of their work. Run moulded cornice in halls and vestibule."

(Pages 6 and 7).

"PLASTERING ON BRICK, TILE OR DUMBWAITER AND ELEVATOR SHAFTS

All hollow tile, Gypsum block and brick walls, partitions, enclosures, etc. where marked on plan to be plastered shall be rendered with two coats of Portland Cement mortar, one half inch thick, composed of two parts of sand and one part Portland Cement finished to a true and even surface under float.

COVES

All the foyers, living rooms, dining rooms and corridors and Doctor's offices to have neat cove with two flat members on ceiling. First story entrance hall and vestibule to have moulded and ornamental work.

ORNAMENTAL WORK

The walls and ceilings of the vestibule and entire hall are to be done in Monumental or other approved patent plaster worked up under a coarse sand finish. The ornamental plaster work will be of colors approved, colors and plaster mixed at the factory and put on in such a man-

ner that no laps or variations of color will show at completion."

(Page 8).

"MARBLE

All wainscoting, cheek pieces, stair treads, stringers from entrance to roof to be of Pink Tennessee marble.

All marble shall be pumiced or hone finish. The edges of all marble to be square and bottoms flat and true and joints fine. Thickness shall be 1¼". All backs and edges to be cleaned, all material to be substantial, carefully matched so as to give a clean and harmonious effect and all work to be thoroughly cleaned at completion."

(Page 10).

"MISCELLANEOUS AND ORNAMENTAL IRON STAIRS

* * *

Balusters are to be 1 x 1" square wrought iron and same space on platforms, etc."

(Page 14).

"STEEL COVERED DOORS

* * *

All dumbwaiter doors to be double sliding type—kalamein."

(Page 16).

"ROOFING AND SHEET METAL WORK

The roof shall be applied by a roofing contractor approved by The Barrett Company. He shall furnish The Barrett Company's Surety Bond Guaranty issued by the U. S. Fidelity & Guaranty Co. of Baltimore, covering a period of twenty years from date of completion."

(Page 18).

Exhibit D-52.

"GROUNDS

Set ½" spruce grounds for all plaster openings and behind base, picture moulding, wall panels, etc."

(Page 21).

"COAL BINS

Build coal bins of 2 x 4" studs with 1 x 10" ship lap. Enclose to a height of 4'-0".

(Page 22).

"HOUSE BASE

10" high consisting of 1⅛" x 6" plain moulded plinth 2 x ⅞" and ⅞ x 2" mould, throughout where not otherwise provided for."

(Page 24).

"BOOK CASES AND INSTRUMENT CASES

Building in where shown book cases and instrument cases with 1⅛" rebated doors, ⅞" moulded movable shelves on pins, base and caps to match detail of wainscoting and to be glazed with leaded glass of neat pattern."

(Page 25).

"OAK FLOORING

Finished floor in all rooms, on all floors where marked oak flooring, to be of first quality selected white oak, 2 x ⅞" tongued and grooved, laid in long lengths.

Finished floors in kitchens and all other rooms where marked pine to be of #1 grade edge grain pine.

Exhibit D-52.

There will be no oak floor under 4'-0" in length and the average should be 8'-0". All floors shall be laid in the most substantial workmanlike manner, blind nailed and scraped at completion."

(Page 25).

"ITEMS

Furnish and set all necessary carrying shelves, pipe and cock boards neatly moulded and casing for exposed pipe screwed together all of 7/8" white pine or other wood as required. Form platforms for Plumber, also furnish at laundry tubs 2 x 4" studs and 2 x 7/8" flooring spaced 1" apart. Protect all sills, jambs, frames, etc. with boards and strips."

(Pages 25, 26).

Exhibit D-56.

VITILLE, KINSELLA & CUNHY
64 Summer Avenue,
Newark, New Jersey.

A. Statement of Dr. MacDonnell Apartment House
Woodcliffe, N. J.

Extras B.

					Item
Dec. 3, 1926	60 Bags Lumnite Cement $2.50 per Bg.	$150.00			
	Credit 60 Bgs. Pt. Cmt. 75¢ per Bg.	45.00	$ 105.00		# 1
Jan. 25, 1927	As per requisition		1,212.75		# 2
Dec. 3, 1926	10 Bags White Cement $2.00 per Bg.	20.00			
Feb. 2, 1927	8 " " " 2.00 " "	16.00			
3, "	10 " " " 2.00 " "	20.00			
8, "	10 " " " 2.00 " "	20.00			
11, "	5 " " " 2.00 " "	10.00			
16, "	50 " " " 2.00 " "	100.00			
25, "	60 " " " 2.00 " "	120.00			
	153	306.00			
	Credit 153 Bgs. Pt. Cmt. 75 per Bg.	114.75	191.25		# 3
16, "	Elevator shaft concrete & Waterproof.....		100.17		# 4
Apr. 12, "	Deafening 3 Room Apartment First Floor East & West Apartments 2-3-4 & 5 Floor				
	2834 Sq. 4" Gypsum Block 13¢ Per Sq. Ft.	368.42			
	2834 Sq. Mortar 2¢ Per Sq. Ft.	56.68			
	2834 Sq. Ft. Labor 6¢ Per Sq. Ft....	170.04			
		595.14			
	10% Overhead	59.51			
		654.65			
	10% Profit	65.46	720.11		# 5

Exhibit D-56.

					Item
Apr. 20, 1927		Deafening the South dividing Walls 2-3-4 & 5 Floor 702 Sq. Ft. 4″ Gypsum Block 13¢ Per Sq. Ft. ..	91.26		
		702 Sq. Mortar 2¢ per Sq. Ft.	14.04		
		702 Sq. Labor 6¢ Per Sq. Ft.	42.12		
			147.42		10
		10% Overhead	14.74		
			162.16		
		10 Profit	16.21	178.37	
Mar.	"	Reference to Stucco on Park Ave. Side & 30th Street Change from Stucco to Brick work.			
		3000 Face Brick $40.00 Per 1000....	120.00		
		Laying 3000 Face Brick $60.00 M...	180.00		20
			300.00		
		10% Overhead	30.00		
			330.00		
		10% Profit	33.00	363.00	# 6
May 4,	"	3 BBl White sand $1.50 Per BBl..	4.50		
23,	"	50 Bgs. White Cement 2.00 Per Bgs	100.00		
24,	"	5 Yds White Sand 5.00 Per Yds..	25.00		
June 20,	"	1 Yds White Sand 6.00 Per Yds..	6.00		
July 12,	"	2 Bgs White Cement 2.00 Per Bgs	4.00		30
18,	"	1½ Yds White Sand 6.00 Per Yds	9.00		
21,	"	3 Bgs White Cement 2.00 Per Bgs	6.00		
Aug. 11,	"	2 Bgs White Sand	1.30		
		Labor for the sand finish in Halls	180.00		
			335.80		
		Credit 27 Bgs Finish Lime 65¢ $17.55			
		1 Bbl Plaster Paris $4.50 Bbl. 4.50			
		Labor on sanf finish 46.10			
			68.15	267.65	# 7
					40

Exhibit D-56.

						Item
	Jan. 31, 1927	Kalamine Frames and sash in Vent Shaft, Cost of Subcontractor ...	115.00			
		10% Overhead	11.50			
				126.50		
10		10% Profit	12.65		139.15	# 9
	Sept. 15, "	Furnishing & erecting Kalamine & Iron Buck for vestibule Doors Not in Contract	90.00			
		10% Overhead	9.00			
				99.00		
		10% Profit	9.90		108.90	# 8
	June 29, "	1250 Sq. Ft. Flaxlinum 5½¢ Sq. Ft.	68.75			
		6000 Sq. Ft. Flaxlinum 5½¢ Sq. Ft.	330.00			
20	July 1, "	4500 Sq. Ft. Flaxlinum 5½¢ Sq. Ft.	247.50			
	29, "	360 Sq. Ft. Flaxlinum 5½¢ Sq. Ft.	36.00			
	Sept. 24, "	24 Sq. Ft. Flaxlinum 5½¢ Sq. Ft.	1.30			
				683.57		
		Credit for work included in Contract on Park Ave. side 1452 Sq. Ft. Flaxlinum 5½ Sq. Ft.	79.86			
				603.71		
		10% Overhead	60.37			
30				664.08		
		10% Profit	66.40		730.48	#10
		Laying 10682 Sq. Ft. 2½ Sq. Ft.	267.05			
		Credit 12134 Sq. Ft. Floor Paper on Park Ave. Side 004¢ Sq. Ft....	48.53			
				218.52		
		10% Overhead	21.85			
				240.37		
40		10% Profit	24.05		264.42	

Exhibit D-56.

					Item
June 29, 1927	Removing Window Frame in small Toilet on Park Ave. Side 1 Mason cutting Walls 8 hrs $1.75 per hr.	14.00			
	Laying Brick 1 Mason 10 hrs. $1.75	17.50			
	1 Labor 8½ hrs. $1.12 ½ hr.	9.56			10
		41.06			
	10% Overhead	4.10			
		45.16			
	10% Profit	4.51	49.67	#11	
July 29, "	Install Kitchen Maid Cabinets 45 hrs. To take down $1.50 per hr. Carpenter	67.50			
	2 Carpenter 59 to put up again 1.50	89.50			
		157.00			20
	10% Overhead	15.70			
		172.70			
	10% Profit	17.27	189.97	#12	
June 20, "	66 Yds Rock Excavating in The Cellar $7.50 Per Yds	495.00			
	10% Overhead	49.50			
		544.50			
	10% Profit	54.45	598.95	#13	30
June "	Removing Partition to new location in Janitor Apartment 2 Carpenter 10 hrs. $1.50 per hr.	$ 15.00			
	Erecting new partition 14½ hr.	21.75			
	274 Ft. Lumber $45.00 M.	12.33			
	1000 Lath & Labor 2¢	20.00			
	10 Yds Plaster $1.50 Per Yd.	15.00			
		84.08			
	10% Overhead	8.40			
		92.48			40
	10% Profit	9.24	101.72	#14	

Exhibit D-56.

				Item
	Taking down and re-recting new partition in Three Room Apartment Floor Destructing 2 Carpenter 16 hrs. $1.50 Per hr.	24.00		
	Re-erecting 32 hrs. $1.50 Per hr.....	48.00		
10	300 Ft. Lumber $45.00 Per M.	13.00		
	1100 Lath & Labor 2¢	22.00		
	14 Yds. Extra Plaster $1.50 Per Yd.	21.00		
		128.50		
	10% Overhead	12.85		
		141.35		
	10% Profit	14.13	155.48	#15
	Furing Walls for Frigedaire Pipes 40 Pieces 2 x 4-10-266 Ft. $45.00	11.97		
20	400 Ft. Corner Beads 3¢ Ft.	12.00		
	22 Yds. Metal Lath 32¢ Yd.	7.04		
	Labor on Corner Beads & Lath 4¢	16.00		
	Carpenter 24 hrs. $1.50 Per hr. ...	36.00		
		83.01		
	10% Overhead	8.30		
		91.31		
	10% Profit	9.13	100.44	#16
30	Addition cost of coal bin to Ceiling 137 Ft. 2 x 4 $45.00 M.	6.15		
	412 Ft. Shiplap $40.00 M.	16.48		
	Carpenter 20 hrs. $1.50 Per hr.	30.00		
		52.63		
	10% Overhead	5.26		
		57.89		
	10% Profit	5.78	67.67	#17
40				

Exhibit D-56.

					Item
Aug. 18, 1927	Erecting Dressing Room in Electric Room Therapeutic Room 2 Carpenter 92 hrs. $1.50 Per hr.....	138.00			
	10% Overhead	13.80			
		151.80			10
	10% Profit	15.18	166.98	#18	
Aug. 18, "	Erecting Linen Closet in Hall 1 Carpenter 28 hrs. $1.50 Per hr.	42.00			
	10% Overhead	4.20			
		46.20			
	10% Profit	4.60	50.80	#19	
Aug. 25, "	Cuting Floors & Walls in DR Fisher Office 2 Carpenter 48 hrs. $1.50 Per hr.	72.00			20
Sept. 8, "	Laying Floors 48 hrs. $1.50 Per hr.	72.00			
	1 Mason Plastering 24 hrs. $1.75 Per	42.00			
15, "	1 Mason Plastering 20 hrs. $1.75 Per	35.00			
	Laying Floors 56 hrs. $1.50 Per hr.	84.00			
	Tearing down closet put up 12 hrs.	12.00			
	Change the French Doors 4 hrs. ...	6.00			
		323.00			
	10% Overhead	32.30			
		355.30			30
	10% Profit	35.53	390.83	#20	
15, "	Erecting Partition Around Frigidaire Motor Room 1 Carpenter 8 hrs. $1.50	12.00			
	10% Overhead	1.20			
		13.20			
	10% Profit	1.32	14.52	#21	
					40

Exhibit D-56.

						Item
	Sept. 15, 1927		Erecting Book Case in Dr. waiting Room 1 Carpenter 32 hrs. $1.50 Per hr.	48.00		
			10% Overhead	4.80		
10				52.80		
			10% Profit	5.28	58.08	#22
	15,	"	Erecting Extra Shelving supplied by others 2 Carpenter 32 hrs. $1.50	48.00		
	22,	"	1 Carpenter 16 hrs. $1.50 Per hr.	24.00		
	29	"	1 Carpenter 40 hrs. $1.50 Per hr.	60.00		
	Oct. 6,	"	1 Carpenter 12 hrs. $1.50 Per hr.	18.00		
				150.00		
			10% Overhead	15.00		
20				165.00		
			10% Profit	16.50	181.50	#23
	June		New Door opening to ward Room 8 Pieces 2 x 4—10 $45.00 M.	2.43		
			Carpenter 6 hrs. $1.50 per hr.	9.00		
			200 Wood Lath. & Labor 2¢	4.00		
			8 Yds. Plaster Extra $1.50 Per Yd.	12.00		
				27.43		
			10% Overhead	2.74		
30				30.17		
			10% Profit	3.01	33.18	#24
	Sept. 22,	"	Erecting Dressing Room in Electric Therapeutic Room Carpenter 32 hrs.	48.00		
			10% Overhead	4.80		
				52.80		
			10% Profit	5.28	58.08	#25
40	29	"	Erecting Dark Room in Cellar 1 Carpenter 32 hrs. $1.50 Per hr.	48.00		

Exhibit D-56.

					Item
Oct. 6, 1927	1 Carpenter 24 hrs. $1.50 Per hr. ...	36.00			
		84.00			
	10% Overhead	8.40			
		92.40			10
	10% Profit	9.24	101.64	#27	
Sept. 29, "	Building up Banch for screen in Cellar 1 Carpenter 12 hrs. $1.50	18.00			
	10% Overhead	1.80			
		19.80			
	10% Profit	1.98	21.78	#26	
Oct. 6, "	Installing Instrument Case 1 Carpenter 8 hrs. $1.50 Per hr.	12.00			
Nov. 17, "	1 Carpenter 8 hrs. $1.50 Per hr.	12.00			20
		24.00			
	10% Overhead	2.40			
		26.40			
	10% Profit	2.64	29.04	#28	
Oct. 6, "	Building up Table in Dr. Kitchenette 1 Carpenter 8 hrs. $1.50 per hr.	12.00	12.00	#29	
6, "	Putting on Patent Locks and Build up Banch for Telephone Books, etc.	6.00	6.00		30
Nov. 10, "	Installing Book Cases in Dr. Office 1 Carpenter 20 hrs. $1.50 Per hr. ...	30.00			
17, "	1 Carpenter 20 hrs. $1.50 Per hr. ...	30.00			
		60.00			
	10% Overhead	6.00			
		66.00			
	10% Profit	6.60	72.60	#30	40

Exhibit D-56.

					Item
Feb. 9, 1927	Putting moulding around the Kitchen Maid Cabinets 1 Carpenter 24 hrs. $1.50		36.00		
16, "	1 Carpenter 8 hrs. $1.50 Per hr.		12.00		
			48.00		
	10% Overhead		4.80		
			52.80		
	10% Profit		5.28	58.08	#31
Sept. 30, "	1 Piece Birch Keneer for Kitchen Maid Cabinets 3-0 x 6-0		3.09		
	10% Overhead		.30		
			3.30		
	10% Profit		.33	3.72	#32
	Furnishing and hang with hardware Complete 15 sets French Doors as agreed with Dr. for the sum of $54. Each		810.00		
	10% Overhead		81.00		
			891.00		
	10% Profit		89.10	980.10	#33
	Hanging Three pairs of French Doors Supplied by North Hudson Mfg. Co. Labor and Hardware		60.00		
	10% Overhead		6.00		
			66.00		
	10% Profit		6.60	72.60	

Exhibit D-56.

VITILLE, KINSELLA & CUNHY
64 Summer Avenue,
AMOUNT DUE ON SUB-CONTRACTORS
Newark, New Jersey.

STATEMENT OF AMOUNTS DUE ON DR. MACDONNELL APARTMENT HOUSE.

	Due on Contract	*Extras*	*Total*
John G. Keller Inc.	$ 1,974.95	$ 140.00	$ 2,114.95
S. & S. Supply Co.	400.00	3,243.70	3,643.70
Cadel Bros. Inc.	1,875.82	832.00	2,707.00
G. M. Grocetti	1,580.00	195.00	1,775.00
North Hudson Mfg. Co.	1,685.50	775.43	2,460.93
Newark S. Metal Work	546.00	124.50	670.50
Norwalk Lock Co.	780.00	18.00	798.00
De Fordge Inc.	.....	400.00	400.00
Foscale Iron Works	.....	148.55	148.55
Thos. Henry Inc.	5,743.43	.....	5,743.43
Arc Rub. Products Co.	278.10	.....	278.10
Hoegger Inc.	540.00	.....	540.00
Schulstadt Co.	55.00	.....	55.00
Scagliola Mfg. Co.	275.00	.....	275.00
Cinder Bri. & Tile Co.	17.00	.....	17.00
Hudson Fireproof Block Co.	103.00	.....	103.00
C. F. Diffenbach Jr.	890.00	.....	890.00
Louis Bogorod	1,280.00	.....	1,280.00
Edward Griffith	310.43	.....	310.43
Mammolito & Ricciardi	1,588.82	.....	1,588.82
Weequahic Bldg. Supply Co.	329.96	.....	329.96
Indiana Flooring Co.	1,663.43	.....	1,663.43
Walton N. Cable	462.00	.....	462.00
Catenacci Stone Co.	190.50	.....	190.50
Tony Nigro	225.00	.....	225.00
Palmeri & Son	177.00	.....	177.00
Angelo Rich	500.00	.....	500.00
P. Goranson	320.00	.....	320.00
Reuther Bros.	40.00	.....	40.00
	$23,830.92	$5,877.18	$29,708.10

Exhibit D-56.

VITILLE, KINSELLA & CUNHY

64 Summer Avenue,

Newark, New Jersey.

EXTRAS WORK FROM SUB-CONTRACTORS.

STATEMENT OF AMOUNTS DUE ON DR. MACDONNELL APARTMENT HOUSE.

Due for Extras Work.

Extras on Heating as per Statement of John G. Keller Co.	$ 140.00	#36
Extras on Electrical work as per Statement of S. & S. Supply Co.	3,243.70	#37
Extras on Plumbing work as per Statement of Cadel Bros.	832.00	#38
Extras on Tile work as per Statement of G. M. Croccetti	195.00	#39
Extra for millwork as per North Hudson Invoices..	775.43	#35
Extras on outside stucco per Contract of Edward De Fordge Inc.	400.00	#34
Extras on Elevator shaft as per Statement of Foscale Iron Works	159.27	#40
	$5,745.40	
10% Overhead on all items	574.54	
	$6,319.94	
10% Profit on all items	631.99	
	$6,951.93	

Exhibit D-57.

VITILLE, KINSELLA & CUNHY
64 Summer Avenue,
Newark, New Jersey.

STATEMENT OF AMOUNT DUE ON DR. MACDONNELL APARTMENT HOUSE.

Amount of contract		$98,000.00
Amount of Extras		7,953.68
Amount of Extras from sub-contractors		6,951.93
		$112,905.61
Amount Paid on account	$83,290.20	
Credit 20 Dressers	400.00	83,690.20
Balance Due		$29,215.41

Exhibit D-57.

DAVID M. ACH
ARCHITECT
1 Madison Avenue
New York

October 31, 1928.

Mr. M. J. Vitille,
Vitille, Kinsella & Cunhy,
64 Summer Ave.,
Newark, N. J.

My dear Mr. Vitille:

I expect to be finished with your certificate surely by Friday of this week.

Very truly yours,

DAVID M. ACH.

Exhibit D-58.

DAVID M. ACH

ARCHITECT

1 Madison Avenue

New York

October 14, 1927.

Vitille, Kinsella & Cunhy,
64 Summer Ave.,
Newark, N. J.

Atten. Mr. Vitille.

Dear Sir:

Please order the bookcases from the North Hudson Mfg. Co. The Doctor has approved the prices and sketch.

The new Kalamein doors have not been put up at the entrance to the Doctor's office and he cannot put his name on. Please have this attended to at once.

This morning Mr. Dieffenbach has not been up to fix the roof yet. I called his office at 11:30 and the man there said you had not arrived there up to that time.

That piece of tile in the operating room has not been fixed and the small piece under the sink in the closet has not been put in. These things must be done right away.

Also meet me at Dr. MacDonnell's on Monday morning, October 17th, at 9 o'clock.

Very truly yours,

DAVID M. ACH.

Exhibit D-59.

COPY

OTIS ELEVATOR COMPANY
260 Eleventh Avenue
New York

February 17th, 1927.

D. M. Ach,
1 Madison Avenue,
New York City, N. Y.

Dr. M. J. MacDonnell, Woodcliff, N. J.

Dear Sir:

We enclose three prints of layout P-7079, prepared from information obtained at your office by our Mr. Cheesman.

You will note that a channel is to be placed across the hatchway at each floor by other contractors, between main rail and counterweight.

We figure car platform 4′ 5″ wide x 3′ 0″ front to back.

Note the size and location of door openings, the direction of swing for the doors and the location of operating car buttons.

Each door is to be set back 4″ from the clear hatch line for our electric automatic locks and in additions, doors are to be provided by others with ordinary house locks and knobs. At the bottom of each door is to be placed a bevelled toe piece to prevent the person operating the car from placing a foot on the hatch sill when trying to open the door, thus releasing the weight from the movable section of the car platform.

Exhibit D-59.

If the doors and jambs are of hollow metal, the reinforcing plates indicated on our layout must be provided for lock and latch fastening.

Machine is to be located at basement level in given motor room which is satisfactory for our requirements.

A concrete foundation is to be furnished by other Contractors, but is not to be installed until after template and bolts have been set in place by our erectors.

A pit 4′ 0″, deep and full hatchway area is to be furnished below the basement floor level.

The car will be of standard height and your attention is called to the location of sheave beam supports above top landing and the clear height of bulkhead.

Kindly advise the location of door for access to the overhead sheaves.

Please check the enclosed prints referring to the items mentioned and if the general arrangement is satisfactory, return approved copy at your earliest convenience.

Yours very truly,

(Signed) OTIS ELEVATOR COMPANY,
New York District,
E. H. WESTCOTT.

EHW:AHH
Enc.

Exhibit D-59A.

DAVID M. ACH

ARCHITECT

1 Madison Avenue

New York

March 19, 1927.

Mr. J. J. Kinsella,
Vitille, Kinsella & Cunhy,
Cor. 30th St. & Park Ave.,
Woodcliff, N. J.

Dear Sir:

Please find enclosed final approved drawings of the Otis Elevator Company.

Go over all the details covered with the Kalamein man and the iron workman.

Very truly yours,

DAVID M. ACH.

Exhibit D-60.

DAVID M. ACH

ARCHITECT

1 Madison Avenue

New York

March 30, 1927.

Mr. J. J. Kinsella,
30th St. & Park Ave.,
Woodcliff, N. J.

Dear Sir:

I am sending you herewith a copy of the revised electrical specifications.

Very truly yours,

DAVID M. ACH.

Exhibit D-61.

Mike

Do all cutting for dental work for Elec. & Plumbing.

ART

For Economy Specify TONCAN METAL

Exhibit D-63.

DAVID M. ACH

ARCHITECT

1 Madison Avenue

NEW YORK

January 27, 1927.

Mr. J. J. Kinsella,
Vitille, Kinsella & Cunhy,
N. E. Cor. Park Ave. & 30 St.,
Woodcliff, N. J.

Dear Sir:

This is to advise you that I have approved the attached specification, which modified the original specification as follows:

All iron pipes will be changed to brass.

Hot water storage tank will be of 750 gallon capacity.

No. 36 Kewanee Heater to be used instead of No. 38.

Syphon action closets to be used.

General Contractor to put in sewer instead of Plumber.

Very truly yours,

DAVID M. ACH.

Exhibit D-64.

DAVID M. ACH

ARCHITECT

1 Madison Avenue

NEW YORK

January 11, 1927.

Vitille, Kinsella & Cunhy,
64 Summer Ave.,
Newark, N. J.

Gentlemen:

I have been directed by Dr. MacDonnell to accept the substitution attached, using the Sloan Flush Valves and brass pipe instead of the wrought iron contained in your estimate of Cadel Bros., Inc., dated November 18, 1926.

Very truly yours,

DAVID M. ACH.

Exhibit D-65.

DAVID M. ACH

ARCHITECT

1 Madison Avenue

NEW YORK

February 16, 1927.

Vitille, Kinsella & Cunhy,
30th St. & Park Ave.,
Woodcliff, N. J.

Dear Sirs:

This is to advise you that I have changed the location of the plumbing fixtures on the Northeast stack and have given the plumber's foreman instructions regarding same.

At your very first opportunity see that the pier between the label moulding on the second floor Park Avenue front and the window to the West of it, has joints corresponding and horizontal and level with the rest of the jointing of the second floor. Also correct the skew back of the arch and be careful to see that the window heights are correct, especially in such locations as the kitchen, bath room, etc., so that the plumbing fixtures will not stick up above the window. The window of the kitchen in the North West corner is now too low for the tub and sink, and the sills will have to be raised.

Some one should lay out the work ahead and watch out for all these things.

Very truly yours,

DAVID M. ACH.

Exhibit D-66.

DAVID M. ACH

ARCHITECT

1 Madison Avenue

NEW YORK

May 31, 1927.

Vitille, Kinsella & Cunhy,
30th St. & Park Ave.,
Woodcliff, N. J.

Dear Sirs:

Please find enclosed two copies of the stair run from the side walk to the first floor level.

Very truly yours,

DAVID M. ACH.

P.S. I am also enclosing two copies of the revised first floor plan.

Exhibit D-73.

DAVID M. ACH

ARCHITECT

1 Madison Avenue

NEW YORK

December 12, 1927.

Vitille, Kinsella & Cunhy,
64 Summer Ave.,
Newark, N. J.

ATTENTION MR. VITILLE

Dear Sir:

I want you to take out the old list I sent you and really pay attention to it and finish everything up, among which are the following—

I want to have the hall painted where the ceiling was smoothed in the Doctor's apartment and in the main hall.

Tell Cadel to fix the sink in the operating room, the tub in the Doctor's apartment. Also tell Cadel to clean out the Alberene sink in the laboratory, as it drains too slowly.

Have the tile fixed in the operating room, which Sieb broke when they put up the switches.

Some of the wood doors in the Doctor's apartment have to be set over on the hinges so they close tighter.

There are floor plates missing in the Doctor's small toilet and also where Cadel put the drains through the Dentist's apartment.

Also see that the doors at the entrance are fitted to close properly and some of the upper doors from the hall to the apartments do not close tightly.

Exhibit D-74.

Foscale has not put the chains on yet, nor the lock, nor the plate under the brass saddle.

Tell Sieb the door openers do not work and some of the bells do not work. Some of the tube blocks are hanging loose at the entrance to the apartment. The plug in the top floor apartment (Mrs. Kelley's) has no juice in it. The bells do not fit up snugly.

In the Northwest apartment (Mrs. Kelley's) the water is still coming in on the North wall and it is coming from the parapet coping. If you lean over the roof you will see some of the brick spawlled. See that the parapet is made tight. There is also water coming down in her apartment from the window in the bulkhead on the West side, beating in where the copper does not come up close to the window frame.

Finish up the painting in the Doctor's apartment, so they can get cleaned up. These trivial matters have been hanging on for months and nothing seems to be done on your part to straighten them out.—NOW DO THESE THINGS AT ONCE.

Very truly yours,

D. M. ACH,
Per B. N.

Exhibit D-74.

MEMORANDUM FOR MR. VITILLE

Looke at the Weisman apartment 4-A.

There is no varnish on the floor. The claim is that there was one coat of shellac on it—when the paper was removed, this coat went right off.

What do you know about it?

Exhibit D-75.

DAVID M. ACH

ARCHITECT

1 Madison Avenue

NEW YORK

October 18, 1927.

Mr. M. Vitille,
Vitille, Kinsella & Cunhy,
64 Summer Ave.,
Newark, N. J.

Dear Sir:

I have been waiting all morning to hear from you.

The water is doing considerable damage over at Dr. MacDonnell's and it does not seem to be coming from the roof— It seems to be striking from the brick work above the windows. We used iron cement made in Brooklyn for the Hamilton Apartment House job in East Orange. We pointed up all coping and brick wall on the parapet and down where the water leaked in and around the windows, and it was very successful. It has been done about two years now and they have had no trouble.

You want to get right at this and see that the work is tight. It has been going too long. You should watch it yourself and see what the trouble is. It is my opinion that it is coming in through the brick work above the block, where there is no block backing.

Those other little details, which I gave you to attend to must be straightened out now too.

Very truly yours,

DAVID M. ACH.

Exhibit D-151.

VITILLE, KINSELLA & CUNHY

64 Summer Avenue

Newark, N. J.

November 22, 1927.

STATEMENT OF DR. MCDONNELL APARTMENTS JOB AT WOODCLIFF

Contract			$ 98,000.00
Extras			
Jan. 25th—As per requisition	$ 1,212.75		
June 20th—Rock Excavating—Elevator and cellar—66 yds. at $7.50	495.00		
—Filling in between stud for deafening in East and West apartments..	580.00	*b*	
—Filling in between stud partition south wall 30th St.	130.00	*b*	
—Extra work on elevator hoistway for elevator	100.17	*b*	
—Newark Sheet metal work kalamein frames and sash for ventshaft	115.50		
June 29th—7250 Ft. Flax Li Num	398.75	*b*	
—Removing window frame and replacing same in doctor's offices, Park Ave. front	47.00	*b*	
July 1st—4500 Ft. Flax Li Num	247.50	*b*	
29th— 360 Ft. Flax Li Num	36.00	*b*	
—Installing Kitchen maid cabinets (taking down and re-erecting same)	170.00	*b*	

Exhibit D-151.

Aug. 25th	—Cutting Floors and walls in Dr. Fisher's office	72.00	*b*
Sept. 7th	—24 Ft. Flax Li Num.....	1.32	*b*
8th	—Relaying floors and patching same	108.00	*b*
15th	—Laying floor, instaling shelving, patching plaster, building partition around refrigerating machine in cellar	146.00	*b*
22nd	—Putting up shelving, linen closet and bookcase in doctor's waiting room	146.00	*b*
29th	—Shelving, cutting door to fit in Dr. Fisher's office, building up bench for screen and dark room in cellar....	146.00	*b*
Oct. 6th	—Finishing dark room shelves, and tables in Doctor's kitchenette instrument case, putting on patent lock	60.00	*b*
	—Changing location of partition in janitor's apartment and relocating closet in same	350.00	*b*
	—Furnishing and erecting vestibule doors, not in contract	90.00	
	—Changing partition and building added partitions in 3 room apt. front	75.00	*b*
	—Restuccoing front walls above third story	400.00	
Sept. 30th	—1 pc. birch veneer 3-0 x 6-0 for kitchen maid cabinet	3.06	*b*

Exhibit D-151.

Sept. 30th	—Erecting dressing rooms and dressing table	96.00	*b*
	—Furring walls to cover Frigidaire pipes and other necessary cutting for installation of above system....	100.00	
	—Set three pairs of doors supplied by North Hudson Mfg. Co., Labor and hardware	60.00	*b*
	—Fifteen sets and material and labor in setting up	810.00	*b*
	—Extras for millwork as per invoices of North Hudson Mfg. Co.....	769.93	
	—Extras on Heating as per statement of J. C. Keller	140.00	
	—Extras on Electrical Work as per statement of S. & S. Supply Co. ...	3,243.70	
	—Extras on plumbing work as per statement of Cadel Bros. Inc.	832.00	
	—Extras on Tile work as per statement of G. M. Crocetti	195.00	
	—Extras on Elevator shaft as per statement of Foscale Iron Works..	133.55	
	—Laying Flax Li Num, 12,134 Ft. at 2 cents per foot	242.68	*b*
		$11,752.91	
	—10% Overhead on all items begin-		

Exhibit D-151.

Sept. 30th—10% Profit on all extras beginning June 20th $10,540.16 plus $1,054.02 equals $11,594.18. 10% equals....	1,159.42	
—5% Insurance on item of January 25th amounting to $1,212.75.....	60.63	
		$ 14,026.98
Total of contract and extras.....		$112,026.98
Amount already paid us as per statement		82,340.20
Balance due		$ 29,686.78

NOTE—Italicized portions represent pencil notations on original Exhibit.

Exhibit D-151.

VITILLE, KINSELLA & CUNHY

64 Summer Avenue

Newark, N. J.

STATEMENT OF AMOUNTS DUE ON DR. MCDONNELL APARTMENTS JOB

	Due on Contract		*Extras*	*Total*
John G. Keller, Inc.	$1,974.95		$ 140.00	$ 2,114.95
S. & S. Supply Co.	400.00		3,243.70	3,643.70
Cadel Bros., Inc.	1,875.00		832.00	2,707.00
P. Goranson	320.00			320.00
G. M. Crocetti	1,600.00		195.00	1,795.00
Thos. Henry, Inc.	5,732.53	*5,764.13*		5,732.53
Archer Rubber Products Co.	278.10			278.10
Hoegger, Inc.	540.00			540.00
Schulstadt Co.	55.00			55.00
Scagliola Mfg. Co.	275.00			275.00
Cinder Brick & Tile Co.	288.50			288.50
Hudson Fireproof Block Co.	103.80			103.80
C. F. Diffenbach, Jr.	975.00			975.00
Bogorod	1,300.00			1,300.00
G. & F. Parquet Floor Co.	229.03			229.03
Mommolito & Ricardo	2,208.72			2,208.72
Weequahich Building Supply Co.	329.36			329.36
North Hudson Mfg. Co.	1,237.90		769.93	2,007.83
Indiana Flooring Co.	1,663.43			1,663.43
W. N. Cable	462.00			462.00
Newark Sheet Metal Works.	546.00		124.50	670.50
Norwalk Lock Co.	798.00			798.00
Catenacci Stone Co.	190.50			190.50
De Fordge	....		400.00	400.00
Foscale Iron Works	....		133.55	133.55
	$23,382.82		$5,838.68	$29,221.50

Exhibit D-151.

Reduction Cinder Brick Co...	*271.50*
	23,111.32
Thomas Harmony Nov. De Material	*31.60*
	23,142.92
Tony Nigro pointing	*225.00*
Palmerie Lath	*177.00*
Ruther Bros.	*40.00*
	23,584.92
Foscale Iron W.	*58.00*
	23,642.92

NOTE—Italicized portions represent pencil notations on original Exhibit.

Exhibit C-1

VITILLE, KINSELLA & CUNHY
64 Summer Avenue
Newark, N. J.

STATEMENT OF DR. MCDONNELL APARTMENT JOB AT WOODCLIFF.

	Contract	*Extras*	*Paid*	*Due*
John G. Keller, Inc.	$6,500.00	$140.00	$4,525.05	$2,114.95
S. & S. Supply Co.....	2,300.00	2,243.70	1,900.00	3,643.70
Cadel Bros., Inc.	12,400.00	832.00	10,525.00	2,707.00
P. Goranson	320.00		Pipes $20	320.00
G. M. Crocetti	4,000.00	195.00	2,400.00	1,795.00
Thos. Henry, Inc.	11,660.18		5,916.75	5,743.43
Archer Rubber Products Co.	278.10		Door $20	278.10
Hoegger, Inc.	540.00			540.00
Schulstadt Co.	55.00			55.00
Scagliola Mfg. Co.	275.00			275.00
Cinder Brick & Tile Co.	980.00		963.00	17.00
Hudson Fireproof Block Co.	2,125.50		2,021.70	103.80
C. F. Dieffenbach	1,800.00	40.00	950.00	890.00
Louis Bogorad	3,300.00		2,000.00	1,300.00
G. & F. Parquet Floor Co.	810.43		500.00	310.43
Mommolito & Ricardo...	14,826.82		13,238.00	1,588.82
Weequahic Building Supply Co.	4,340.13		4,010.17	329.96
North Hudson Mfg. Co...	7,151.70	775.43	5,466.20	2,460.93
Indiana Flooring Co.....	1,663.43			1,663.43
Walter N. Cable	2,412.00		1,950.00	462.00
Newark Sheet Metal Works	2,215.00	124.50	1,669.00	670.50
Norwalk Lock Co.	780.00	18.00		798.00
Catenacci Stone Co.	1,290.50		1,100.00	190.50
De Fordge		400.00		400.00
Foscale Iron Works	9,500.00	159.27	9,460.72	198.55
Tony Nigro	225.00			225.00
Palmeri	2,000.00		1,823.00	177.00
Reuther Bros	40.00			40.00
	93,788.79	5,927.90	70,418.59	29,298.10

Exhibit C-2.

VITILLE, KINSELLA & CUNHY
64 Summer Avenue
Newark, N. J.

November 22, 1927.

STATEMENT OF DR. MCDONNELL APARTMENTS JOB AT WOODCLIFF

Contract		$ 98,000.00
Extras		
Jan. 25th—As per requisition	$ 1,212.75	
June 20th—Rock Excavating—Elevator and cellar—66 yds. at $7.50	495.00	
—Filling in between stud for deafening in East and West apartments..	580.00	
—Filling in between stud partition south wall 30th St.	130.00	
—Extra work on elevator hoistway for elevator	100.17	
—Newark Sheet metal work kalamein frames and sash for ventshaft	115.50	
June 29th—7250 Ft. Flax Li Num	398.75	
—Removing window frame and replacing same in doctor's offices, Park Ave. front	47.00	
July 1st—4500 Ft. Flax Li Num	247.50	
29th— 360 Ft. Flax Li Num	36.00	
—Installing Kitchen maid cabinets (taking down and re-erecting same)	170.00	

Exhibit C-2.

Aug. 25th	—Cutting Floors and walls in Dr. Fisher's office	72.00
Sept. 7th	—24 Ft. Flax Li Num	1.32
8th	—Relaying floors and patching same	108.00
15th	—Laying floor, instaling shelving, patching plaster, building partition around refrigerating machine in cellar	146.00
22nd	—Putting up shelving, linen closet and bookcase in doctor's waiting room	146.00
29th	—Shelving, cutting door to fit in Dr. Fisher's office, building up bench for screen and dark room in cellar	146.00
Oct. 6th	—Finishing dark room shelves, and tables in Doctor's kitchenette instrument case, putting on patent lock	60.00
	—Changing location of partition in janitor's apartment and relocating closet in same	350.00
	—Furnishing and erecting vestibule doors, not in contract	90.00
	—Changing partition and building added partitions in 3 room apt. front	75.00
	—Restuccoing front walls above third story	400.00
Sept. 30th	—1 pc. birch veneer 3-0 x 6-0 for kitchen maid cabinet	3.06
	—Erecting dressing rooms and dressing table	96.00

Exhibit C-2.

Sept. 30th	—Furring walls to cover Frigidaire pipes and other necessary cutting for installation of above system....	100.00	
	—Set three pairs of doors supplied by North Hudson Mfg. Co., Labor and hardware	60.00	10
	—Fifteen sets and material and labor in setting up	810.00	
	—Extras for millwork as per invoices of North Hudson Mfg. Co.....	769.93	
	—Extras on Heating as per statement of J. G. Keller	140.00	
	—Extras on Electrical Work as per statement of S. & S. Supply Co. ...	3,243.70	20
	—Extras on plumbing work as per statement of Cadel Bros. Inc.	832.00	
	—Extras on Tile work as per statement of G. M. Crocetti	195.00	
	—Extras on Elevator shaft as per statement of Foscale Iron Works..	133.55	
	—Laying Flax Li Num, 12,134 Ft. at 2 cents per foot	242.68	30
		$11,752.91	
	—10% Overhead on all items beginning June 20th as the item on Jan. 25th already includes overhead and profit	1,054.02	
	—10% Profit on all extras beginning June 20th $10,540.16 plus $1,054.02 equals $11,594.18. 10% equals....	1,159.42	40

Exhibit C-2.

Sept. 30th—5% Insurance on item of January 25th amounting to $1,212.75.....	60.63	
		$ 14,026.98
Total of contract and extras.....		$112,026.98
Amount already paid us as per statement		82,340.20
Balance due		$ 29,686.78
Brick work 30 St. & Park Ave. labor and material		398.72
Profits and overhead		59.80
		$ 30,145.30

NOTE—Italicized portions represent pencil notations on original Exhibit.

Exhibit C-2.

VITILLE, KINSELLA & CUNHY
64 Summer Avenue
Newark, N. J.

November 22, 1927.

STATEMENT OF AMOUNTS DUE ON DR. MCDONNELL APARTMENTS JOB

	Due on Contract		*Extras*	*Total*
John G. Keller, Inc.	$1,974.95		$ 140.00	$ 2,114.95
S. & S. Supply Co.	400.00	*5,598.70*	3,243.70	3,643.70
Cadel Bros., Inc.	1,875.00		832.00	2,707.00
P. Goranson	320.00			320.00
G. M. Crocetti	1,600.00		195.00	1,795.00
Thos. Henry, Inc.	5,732.53	*5,923.39*		5,732.53
Archer Rubber Products Co.	278.10			278.10
Hoegger, Inc.	540.00			540.00
Schulstadt Co.	55.00			55.00
Scagliola Mfg. Co.	275.00			275.00
Cinder Brick & Tile Co.	288.50	*17.00*		288.50
Hudson Fireproof Block Co.	103.80	*104.84*		103.80
C. F. Diffenbach, Jr.	975.00	*1,040.00*		975.00
Bogorod	1,300.00			1,300.00
G. & F. Parquet Floor Co.	229.03			229.03
Mommolito & Ricardo	2,208.72	*3,966.38*		2,208.72
Weequahich Building Supply Co.	329.36	*329.96*		329.36
North Hudson Mfg. Co.	1,237.90		769.93	2,007.83
Indiana Flooring Co.	1,663.43	*1,782.43*		1,663.43
W. N. Cable	462.00			462.00
Newark Sheet Metal Works.	546.00	*670.50*	124.50	670.50
Norwalk Lock Co.	798.00	*803.00*		798.00
Catenacci Stone Co.	190.50			190.50
De Fordge	....		400.00	400.00
Foscale Iron Works	....	*248.55*	133.55	133.55
	$23,382.82		$5,838.68	$29,221.50

NOTE—Italicized portions represent pencil notations on original Exhibit.

Exhibit C-2.

VITILLE, KINSELLA & CUNHY

64 SUMMER AVENUE

Newark, N. J.

November 22, 1927.

PAYMENTS MADE TO US ON ACCOUNT OF DR. MCDONNELL JOB

Date	*Paid to*	*Endorsed by*	*Amount*	
1926				
Dec. 1	V.K.C.	MJ Vittile	2,208.35	
15	"		50.00	
24	"	JJ Kinsella	404.20	2,662.55
1927				
Jan. 15	"	"	2,000.00	
18	"	MJ Vitille	1,500.00	
21	"	"	612.35	
28	"	JJ Kinsella	2,000.00	
29	"	"	316.75	6,429.10
Feb. 3	"	"	2,000.00	
11	"	MJ Vitille	1,679.30	
15	"	JJ Kinsella	2,000.00	5,679.30
Mar. 5	"	MJ Vitille	2,000.00	
10	"	JJ Kinsella	4,000.00	
12	"	"	300.00	
15	"	MJ Vitille	2,912.70	9,212.70
Apr. 9	"	JJ Kinsella	300.00	
11	"	JJK—H. Wandleman..	50.00	
22	"	JJ Kinsella	600.00	950.00

Exhibit C-2.

Date		*Paid to*	*Endorsed by*	*Amount*	
1927					
May	2	V.K.C.	Hudson F. Block.....	1,106.70	
	2	"	Cinder B & Tile.....	663.00	
	2	"	Cadel Bros.	5,525.00	
	2	"	Catenucci Stone	850.00	
	2	"	J. L. Breid	311.10	
	2	"	Thos. Henry Co.	3,021.75	
	2	"	M. J. Vitille.....	62.05	
	2	"	North Hudson Mfg....	486.20	
	2	"	J. G. Keller	3,275.05	
	2	"	Foscale Iron	2,380.00	
	2	"	Weequahic Bldg.	1,691.50	
	2	"	M. J. Vitille.....	3,725.00	
	31	"	"	2,960.20	
	31	"	Thos. Henry Co.....	1,870.00	
	31	"	Cadel Bros.	3,000.00	
	31	"	Foscale Iron	600.00	
	31	"	North Hudson	1,000.00	
	31	"	Newark Sheet	850.00	
	31	"	Igoe Bros.	150.00	
	31	"	Catenucci Stone	250.00	
	31	"	D. Evans	900.00	
	31	"	W. N. Cable	1,600.00	
	31	"	M. J. Vitille.....	900.00	
	31	"	Hudson F. Brick.....	110.00	
	31	"	Cinder B & Tile.....	50.00	
	31	"	J. G. Keller	850.00	
	31	"	Diffenbach, Jr.	275.00	
	31	"	M. J. Vitille.....	20.00	
	31	"	"	30.00	
	31	"	"	725.00	39,237.55
June	11	"	Mommolito & Ric.....	2,000.00	
	22	"	M. J. Vitille.....	1,000.00	
	24	"	"	500.00	

Exhibit C-2.

	Date	*Paid to*	*Endorsed by*	*Amount*	
	1927				
	June 30	V.K.C.	Diffenbach, Jr.	250.00	
	30	"	North Hudson	1,400.00	5,150.00
	July 9	"	Angelo Rich	180.00	
	15	"	M. J. Vitille.....	30.00	
	16	"	"	90.00	
	16	"	"	50.00	
	23	"	Angelo Rich	100.00	
	30	"	"	500.00	950.00
	Aug. 8	"	Bogorod	500.00	
	13	"	Angelo Rich	150.00	
	20	"	MJV—Ed Griffith	300.00	
	20	"	Angelo Rich	500.00	
	20	"	Diffenbach, Jr.	300.00	
	27	"	Angelo Rich	100.00	
	27	"	Crocetti Stone	2,400.00	
	29	"	Bogorod	1,000.00	
	31	"	S. & S. Supply	1,000.00	
	31	"	Foscale Iron	1,000.00	7,250.00
	Sept. 1	"	Cadel Bros	1,500.00	
	2	"	Edw. Griffith	200.00	
	8	"	Newark Sheet	819.00	
	9	"	North Hudson	1,800.00	
	20	"	Bogorod	500.00	4,819.00
			TOTAL		$82,340.20

Exhibit C-3.

ITEM #1, MASON WORK:

(a) fireproofing around columns and beams omitted	$1,000.00
(b) face brick for exterior walls were to have matched brick or another building; present brick as inferior	200.00
(c) mortar joints on face brick were to be buff; they were replaced with white	100.00
(d) coping was to be cast stone; was replaced with cement	350.00
(e) chimney fire brick omitted	250.00
(f) lath in shafts and plaster with 3 coats were omitted	250.00
(g) gypsom block in floors and ceiling of doctor's apartment omitted	1,500.00
(h) cellar ceiling was to have three coats of plaster; has only one	300.00
(i) stair soffets were to be plastered; this has been omitted	200.00
(j) plaster cornice in each hall not similar to that on plans	400.00
(k) garbage receptors missing	

ITEM #2, CARPENTER & TRIM:

(a) cabinet trim	1,750.00
(b) instrument cases omitted in doctor's apartment	400.00

Exhibit C-3.

(c)	kitchen dressers and trim omitted	1,000.00
(d)	oak floor not #1 quality white oak	500.00
(e)	milk cabinets in basement omitted	50.00
(f)	platforms for laundry omitted...	50.00
(g)	poor checks	100.00

ITEM #3, TILE AND MARBLE:

(a)	marble stringers of Tennessee Pink from 1st floor to roof omitted	1,500.00
(b)	marble cheeks in vestibule appear in plans, but are omitted in construction	250.00
(c)	marble is not 1¼″ thick	
(d)	plinth blocks omitted	50.00
(e)	trim in vestibule entrance does not run to floor	50.00
(f)	towel bars omitted	25.00

ITEM #4, ORNAMENTAL IRON:

(a)	balusters in specification call for 1″ x 1″ bars; those installed are ⅛″ x ⅝″ stock	100.00
(b)	iron doors in vestibule omitted..	150.00

ITEM #5, KALAMEIN WORK:

(a)	dumbwaiter doors in specification were to be sliding; at present they are of self closing on hinges	150.00
(b)	21 kalamein doors to be reset ..	300.00

Exhibit C-3.

ITEM #6, PLUMBING:

(a) W. C. omitted in doctor's apartment 100.00

(b) sewage pipe in basement exposed on basement floor, whereas plans show them concealed 100.00

(c) refrigeration pans and drain pipes and cellar sink omitted 100.00

ITEM #7, HEATING:

(a) insufficient heating radiation ...

ITEM #8, ELECTRIC:

(a) wires are exposed for bells, should be concealed in conduits 3,000.00

(b) wires in conduits, not b x .....

ITEM #9, ROOFING & SHEET METAL WORK

(a) duct omitted 150.00

(b) the roof is not a bonded Barrett roof as called for in specification 1,500.00

ITEM #10, PAINTING:

(a) there has not been any back painting of trim 300.00

(b) radiators were to have 1 coat prime and 2 coats enamel; they have only 1 coat of aliminum silver 350.00

Exhibit C-101.

(c) no evidence of sand papering and pumicing of woodwork anywhere and 80 rooms, walls, floors and doors not properly painted 800.00

ITEM #11:

Sedgwick dumbwaiter is called for in plan; has been replaced by Goranson 100.00

CARPENTER:

No grounds base picture wall panels window trim 10¢ per lineal ft. 1,200.00

Deafening in bathrooms omitted 100.00

10′ base substituted 6″ base....

ROOFING:

Copper flashings around parapet 160.00

Exhibit C-101.

DAVID M. ACH
ARCHITECT
1 Madison Avenue
New York

Re: Apartment House for
Dr. M. J. MacDonnell
Woodcliff, N. J.

Amount $2,208.35 December 1, 1926.

Certificate No. 1

Owner—Dr. M. J. MacDonnell, Woodcliff, N. J.

Vitille, Kinsella & Cunhy, 64 Summer Avenue, Newark, New Jersey, Contractors for furnishing

Exhibit C-101.

labor and materials for five story apartment house on the North East Corner of 30th Street and Park Avenue, Woodcliff, N. J., under contract amounting to NINETY EIGHT THOUSAND ($98,000.00) DOLLARS, is entitled to first payment of TWENTY TWO HUNDRED AND EIGHT DOLLARS AND THIRTY FIVE CENTS.

This payment is not an acceptance of the work done until final payment has been made and does not form any legal obligation on the part of the Architect.

SUMMARY

Contract	$98,000.00	Credit for Excavation 150 yds. Excavation	$ 216.56
Extra 150 yds. Stone	1,212.75	First Payment	2,208.35
	$99,212.75	Balance	96,787.84
			$99,212.75

DAVID M. ACH,
Architect.

.....1926

Received amount of above Certificate

J. J. KINSELLA.

Exhibit C-101.

DAVID M. ACH
ARCHITECT
1 Madison Avenue
New York

Re: Apartment House for
Dr. M. J. Mac Donnell
Woodcliff, N. J.

Amount $6,112.35 January 10, 1927.

Certificate No. 2

Owner—Dr. M. J. Mac Donnell, Woodcliff, N. J.

Vitille, Kinsella & Cunhy, 64 Summer Avenue, Newark, New Jersey, Contractors for furnishing labor and materials for five story apartment house on the North East Corner of 30th Street and Park Avenue, Woodcliff, N. J., under contract amounting to NINETY EIGHT THOUSAND ($98,000.00) DOLLARS, is entitled to second payment of SIX THOUSAND ONE HUNDRED TWELVE DOLLARS AND THIRTY FIVE CENTS ($6,112.35).

This payment is not an acceptance of the work done until final payment has been made and does not form any legal obligation on the part of the Architect.

SUMMARY

Contract	$98,000.00	Credit 12/1/26	$ 216.56
Extra 12/1/26	1,212.75	First Payment	2,208.35
		Second Payment	6,112.35
	$99,212.75	Balance	90,675.49
			$99,212.75

DAVID M. ACH,
Architect.

..... 1927.

Received amount of above certificate

.....

Exhibit C-101.

DAVID M. ACH
ARCHITECT
1 Madison Avenue
New York

Re: Apartment House for
Dr. M. J. Mac Donnell,
Woodcliff, N. J.

Amount $3,679.30 February 9, 1927.

Certificate No. 3

Owner—Dr. M. J. Mac Donnell, Woodcliff, N. J.

Vitille, Kinsella & Cunhy, 64 Summer Avenue, Newark, New Jersey, Contractors for furnishing labor and materials for five story apartment house on the North East Corner of 30th Street and Park Avenue, Woodcliff, N. J., under contract amounting to NINETY EIGHT THOUSAND ($98,000.00) DOLLARS, is entitled to third payment of THREE THOUSAND SIX HUNDRED SEVENTY NINE DOLLARS AND THIRTY CENTS ($3,679.30).

This payment is not an acceptance of the work done until final payment has been made and does not form any legal obligation on the part of the Architect.

SUMMARY

Contract	$98,000.00	First Payment	$2,208.35
Extra	1,212.75	Second Payment	6,112.35
		Third Payment	3,679.30
	$99,212.75	Balance	87,212.75
			$99,212.75

DAVID M. ACH,
Architect.

..... 1927.

Received amount of above certificate

J. J. KINSELLA.

Exhibit C-101.

DAVID M. ACH
ARCHITECT
1 Madison Avenue
New York

Re: Apartment House for
Dr. M. J. Mac Donnell,
Woodcliff, N. J.

Amount $11,195.52 March 4, 1927.

Certificate No. 4

Owner—Dr. M. J. Mac Donnell, Woodcliff, N. J.

Vitille, Kinsella & Cunhy, 64 Summer Avenue, Newark, New Jersey, Contractors for furnishing labor and materials for five story apartment house on the North East Corner of 30th Street and Park Avenue, Woodcliff, N. J., under contract amounting to NINETY EIGHT THOUSAND ($98,000.00) DOLLARS, is entitled to fourth payment of ELEVEN THOUSAND ONE HUNDRED NINETY FIVE DOLLARS AND FIFTY TWO CENTS ($11,195.52).

This payment is not an acceptance of the work done until final payment has been made and does not form any legal obligation on the part of the Architect.

SUMMARY

Contract	$98,000.00	First Payment	$2,208.35
Extra	1,212.75	Second Payment	6,112.35
	$99,212.75	Third Payment	3,679.30
		Fourth Payment	11,195.52
		Balance	76,017.23
			$99,212.75

DAVID M. ACH,
Architect.

..... 1927.

Received amount of above certificate

VITILLE, KINSELLA & CUNHY.

Exhibit C-101.

DAVID M. ACH

ARCHITECT

1 Madison Avenue

New York

Re: Apartment House for
Dr. M. J. Mac Donnell,
Woodcliff, N. J.

Amount $24,047.35 April 12, 1927.

Certificate No. 5

Owner—Dr. M. J. MacDonnell, Woodcliff, N. J.

Vitille, Kinsella & Cunhy, 64 Summer Avenue, Newark, New Jersey, Contractors for furnishing labor and materials for five story apartment house on the North East Corner of 30th Street and Park Avenue, Woodcliff, N. J., under contract amounting to NINETY EIGHT THOUSAND ($98,000.00) DOLLARS, is entitled to fifth payment of TWENTY FOUR THOUSAND FORTY SEVEN AND THIRTY FIVE CENTS ($24,047.35).

This payment is not an acceptance of the work done until final payment has been made and does not form any legal obligation on the part of the Architect.

Exhibit C-101.

SUMMARY

Contract	$98,000.00	First Payment	$2,208.35
Extra	1,212.75	Second Payment	6,112.35
	$99,212.75	Third Payment	3,679.30
		Fourth Payment	11,195.52
		Fifth Payment	24,047.35
		Balance	51,969.88
			$99,212.75

DAVID M. ACH,
Architect.

..... 1927.

Received amount of above certificate

.....

DAVID M. ACH
ARCHITECT
1 Madison Avenue
New York

Re: Apartment House for
Dr. M. J. Mac Donnell,
Woodcliff, N. J.

Amount $16,140.20 May 19, 1927.

Certificate No. 6

Owner—Dr. M. J. Mac Donnell, Woodcliff, N. J. Vitille, Kinsella & Cunhy, 64 Summer Avenue, Newark, New Jersey, Contractors for furnishing labor and materials for five story apartment house

Exhibit C-101.

on the North East Corner of 30th Street and Park Avenue, Woodcliff, N. J., under contract amounting to NINETY EIGHT THOUSAND ($98,000.00) DOLLARS, is entitled to sixth payment of SIXTEEN THOUSAND ONE HUNDRED FORTY AND TWENTY CENTS ($16,140.20).

This payment is not an acceptance of the work done until final payment has been made and does not form any legal obligations on the part of the Architect.

SUMMARY

Contract to Date....	$100,532.75	First Payment	$2,208.35
		Second Payment	6,112.35
	$100,532.75	Third Payment	3,679.30
		Fourth Payment	11,195.52
		Fifth Payment	24,047.35
		Sixth Payment	16,140.20
		Balance	37,149.68
			$100,532.75

DAVID M. ACH,
Architect.

..... 1927.

Received amount of above certificate

.....

Exhibit C-101.

(Copy)

June 21, 1927.

Vitille, Kinsella & Cunhy,
30th St. & Park Ave.,
Woodcliff, N. J.

Dear Sirs:

The payments on requisition No. 7 are made up as follows:

C. F. Dieffenbach	250.00
North Hudson Mfg. Co.	1,400.00
Thomas Henry Inc.	2,000.00
General Chemical Co.	45.00
Igoe Bros.	90.00
Chris Campane	50.00
	3,835.00
Tony Paid	2,000.00
Kinsella, Vitille & Cunhy.....	1,665.00
	$7,500.00

Very truly yours,

(Signed) DAVID M. ACH.

Exhibit C-101.

DAVID M. ACH

ARCHITECT

1 Madison Avenue

New York

Re: Apartment House for
Dr. M. J. Mac Donnell,
Woodcliff, N. J.

Amount $17,765.00 August 20, 1927.

Certificate No. 8

Owner—Dr. M. J. Mac Donnell, Woodcliff, N. J.

Vitille, Kinsella & Cunhy, 64 Summer Avenue, Newark, New Jersey, Contractors for furnishing labor and materials for Five Story Apartment House on the North East Corner of 30th Street and Park Avenue, Woodcliff, N. J., under contract amounting to NINETY EIGHT THOUSAND ($98,000.00) DOLLARS, is entitled to eighth payment of SEVENTEEN THOUSAND SEVEN HUNDRED AND SIXTY FIVE ($17,765.00) DOLLARS.

This payment is not an acceptance of the work done until final payment has been made and does not form any legal obligations on the part of the Architect.

Exhibit C-101.

SUMMARY

Contract to Date....	$100,532.75	First Payment	$2,208.35
		Second Payment	6,112.35
	$100,532.75	Third Payment	3,679.30
		Fourth Payment	11,195.52
		Fifth Payment	24,047.35
		Sixth Payment	16,140.20
		Seventh Payment.....	7,500.00
		Eighth Payment.....	17,765.00
		Balance	11,884.68
			$100,532.75

DAVID M. ACH,
Architect.

..... 1927.

Received amount of above certificate

.....

New Jersey Court of Errors and Appeals

Between: MARTIN J. MACDONNELL, Complainant-Appellant, *and* MICHAEL J. VITILLE, *et al.*, Defendants-Appellees.	On Bill, &c., On Appeal from the Court of Chancery.
Between: MARTIN J. MACDONNELL, Complainant-Appellee, *and* MICHAEL J. VITILLE, JAMES J. KINSELLA & JOSEPH CUNHY, Defendants-Appellants, ANTONIO MAMOLITE, *et al.*, Defendants-Appellees.	On Bill, &c., On Appeal from the Court of Chancery.

BRIEF OF COMPLAINANT-APPELLANT AND OF COMPLAINANT-APPELLEE.

Statement.

This matter is now before the court on three appeals, one by defendants, Vitille, Kinsella and Cunhy, General Contractors, one by O. V. Bianchi, Esq., their solicitor, and the third by complain-

New Jersey State Library

ant, Martin J. MacDonnell, from a decree advised by Vice Chancellor Bigelow, in a suit in the nature of interpleader.

Complainant is the owner of a building recently erected pursuant to a contract filed in the County Clerk's Office made with defendants, Vitille, Kinsella and Cunhy, as General Contractors. The other defendants to the suit are stop notice claimants.

Complainant filed his bill of complaint on December 7, 1928, alleging the aforesaid contract for the erection of an apartment house for the price of Ninety-eight Thousand ($98,000.00) Dollars; that complainant had paid out to the defendant general contractors on account of work done, Eighty-five Thousand Two and 07/100 ($85,002.07) Dollars; that of the balance of contract price remaining, Three thousand six hundred forty-six ($3,646.00) Dollars had been certified for payment by the architect on his eighth certificate, but no architect's certificate had been given for the balance of the contract price; that prior to payment of said Three Thousand Six Hundred Forty-six ($3,646.00) Dollars so certified, stop notices were served on complainant exceeding said sum; that a number of stop notices were served on complainant by various defendants between September 10, 1927 and September 13, 1928, and that in October, 1928, several actions had been instituted against complainant on such stop notices in the Hudson County Circuit Court; that complainant was willing to pay said sum of Three Thousand Six Hundred Forty-six ($3,646.00) Dollars pursuant to architect's certificate therefor, but could not safely do so because of the conflicting stop notice claimants and tendered it into Court.

Complainant charged that he could not pay to the general contractors the sum of Three Thousand Six Hundred Forty-six ($3,646.00) Dollars of the balance of contract price certified but unpaid, for the reasons aforesaid; that he could not safely pay the balance of contract price thereafter remaining, even if he was indebted therefor, because of the said conflicting stop notice claims involving questions of priorities, etc.; that complainant was not indebted for any balance on contract price uncertified, because certificate of architect therefor, made a condition precedent to payment by the contract and specifications, had not been issued by the architect; complainant further charged that in any event the contract had not been performed, but that defective and inferior work installed and work required by the contract but omitted, exceeded Twelve Thousand ($12,000.00) Dollars in value; that as to extras claimed, complainant ordered or authorized certain extra work but that complainant was not chargeable with the sum of $14,655.67 claimed by defendant contractors for extra work, because the claim made included work either required to be performed by the specifications, or work for which no written order had been given by the owner and architect and not authorized by the owner contrary to the contract and specifications; that if non-production of architect's certificate should be disregarded, and recovery held proper, nevertheless, complainant was entitled to a credit for the omitted and defective work against the said Three Thousand Six Hundred Forty-six ($3,646.00) Dollars balance on contract price and balance of extras. Complainant tendered into court the sum of Three Thousand Six Hundred Forty-six ($3,646.00) Dollars, certified to be due and any other balance due from him.

The defendant contractor appellants filed an answer and counterclaim alleging a balance due them of Twenty-eight Thousand Seven Hundred Forty-two and 65/100 ($28,742.65) Dollars for contract balance and extras and alleging insufficient knowledge as to the allegations of the bill respecting stop notice claimants. Defendant-appellant's brief, however, reads (p. 2): "The admitted claim of the stop notice claimants exceed the amount due from complainant to the general contractor." After the filing of the bill, an order was made, restraining the general contractors and stop notice claimants from proceeding on their claims, upon the express condition that the complainant deposit with the Clerk in Chancery the sum of $30,185.35 or give bond in that amount to secure the payment of such decree as the court might make in the cause. Such bond was filed and thereafter, the matter was referred to Harry Lane, Esquire, as Special Master, to hear and determine what amounts, if any, were due to the general contractors from the owner and what sums were due from the general contractor to the owner, and to determine the priority of the stop notice claimants.

The Master, at the hearings, took testimony on omissions and defects in the work done, and additions thereto, subject to later ruling on the effect of non-issuance by and refusal of architect to issue final certificate. Defendant contractors were unable to produce said final certificate for any additional payment from the architect. Testimony was presented showing approximately forty items of defective and inferior and omitted work and materials (See Exhibit C-3). Defendant contractors claimed a total of forty extras, aggregating $14,655.67 (See Ex. D-56), as to only a few

of which they were able to show written orders or authorization and agreement therefor from the owner. The Master held the absence of architect's certificate no bar to recovery of uncertified amounts, because "its withholding would amount to legal fraud" or was waived, and computed additions to contract price for extras on thirty-three items at $9,733.27 (p. 78); credits due the owner for omissions and defects on seventeen items at $3,022.00 (p. 70), and a balance due, after giving such credits, of $20,521.07, with interest thereon from October 1, 1927, of $3,385.05, making a total award of $23,907.02 (p. 95).

The Master also passed on the separate claims of stop notice claimants and determined the order of priority thereof (pp. 79, 94, p. 96). No exceptions were taken by anyone to the Master's findings on said stop notice claims and said findings are not in question on these appeals.

Complainant owner filed exceptions to the Master's Report, excepting to his award of contract balance despite non-issuance of architect's certificate; to his award on extras despite absence of written order and authorization from owner; to his allowances for omitted and defective work as inadequate; to his allowances for extra work as excessive and improper; to his allowances of interest as improper (p. 97).

Vice-Chancellor Bigelow overruled the general exceptions directed to non-issuance of architect's certificate and to allowances for extras despite absence of written order. He reduced the Master's allowances for additions to contract price by way of extras from $9,733.27 to $9,370.27, sustaining exceptions to Master's allowances for extras on item No. 6 (Ex. D-56) in the sum of $363.00; he sustained certain exceptions to Master's allow-

ances for omitted and defective work and awarded an additional credit to complainant-owner on twelve such items of $6,295.20 (p. 104). Deducting the credits given, the Vice-Chancellor found a balance due from complainant in the sum of $13,862.87, with interest thereon from October 1, 1927, of $2,698.62, making a total award of $16,541.49.

O. C. Bianchi, solicitor for defendant general contractors, on the day fixed for settling final decree, alleged that he was entitled to be paid out of the fund awarded prior to any payment to stop notice claimants, because he was entitled thereto by virtue of solicitor's lien, because his clients had executed assignments to him of their rights in the fund and because his retainer agreement provided for payment to him of one-third (⅓) of moneys recovered as compensation. The Vice-Chancellor disallowed the claim.

For the purpose of expediting settlement of final decree, Vice-Chancellor Bigelow stated his determination in the form of a letter (p. 103) without setting forth reasons therein. The Vice-Chancellor wrote a formal memorandum on his disallowance of a fee out of the fund to Mr. Bianchi (State of Case, Bianchi, "B", p. 74, etc.).

The pending appeals are from said decree of the Vice-Chancellor. The appeal by O. C. Bianchi, *pro se* is directed against the disallowance of a fee to him; the appeal of Bianchi, as solicitor for defendant general contractors Vitille, Kinsella & Cunhy, is directed against the allowances made by the Vice-Chancellor in the sum of Six thousand two hundred ninety-five ($6,295.00) Dollars on twelve items of omitted or defective and inferior work, no appeal having been taken from the Vice-Chancellor's disallowance of extra No.

6 claimed in the sum of Three hundred sixty-three ($363.00) Dollars.

The appeal by complainant owner Martin J. MacDonnell is directed to the Vice-Chancellor's failure to sustain complainant's exceptions to Master's rulings that the owner is chargeable with balance of contract price despite non-production of architect's certificate therefor required by the contract as a condition precedent to payment and to the Master's allowances on various items of alleged extra work claimed, as entirely or partially improper or excessive and to the Master's failure to give proper credits to the owner on a number of items of omitted and/or defective and inferior work and materials installed.

As to the appeal of Mr. Bianchi personally, complainant is not interested. Said appeal is directed solely to a claim of a fractional interest in the fund decreed to be due in this case from complainant owner, in priority to payment from said fund to stop-notice claimants. But after the size of the fund, if any due from him is determined, complainant has no interest in its disposition, whether it be in part to Mr. Bianchi in priority to stop notice claimants or entirely to the stop notice claimants alone. As to the appeal of Mr. Bianchi for defendants Vitille, Kinsella, & Cunhy from the Vice-Chancellor's allowance of Six thousand two hundred ninety-five and 20/100 ($6,295.20) Dollars on twelve items of omitted work, complainant is of course interested.

At the February term of this Court, it was ordered that the several appeals herein be consolidated and argued together. The appeal of Bianchi *pro se* and for Vitille, Kinsella & Cunhy, was prior in time; a state of case was printed by him and a brief served by him covering both of said

appeals. We have pursuant to said order of consolidation presented the argument of complainant on his appeal under Part I of this brief, and complainant's answer to the Bianchi appeals, as argued in his said brief, under Part II of this brief. The State of Case prepared and served on complainant's appeal contains the testimony, exhibits and all of the pleadings excepting only Bianchi's notices and petitions of appeal and the Vice-Chancellor's memorandum on disallowance of Bianchi's claim for fee. The Bianchi state of case contains only portion of the testimony and omits all of the exhibits. Pursuant to stipulation with Mr. Bianchi (p. 513) complainant's state of case is referred to herein on the argument of Mr. Bianchi's appeal. All page references are to State of Case prepared by complainant-appellant excepting only those noted "B", which refer to State of Case of Mr. Bianchi.

The ruling made by the Master that the non-production of Architect's certificate was excused, because "its withholding would amount to legal fraud under the cases" or was waived, permeates and affects the entire determination and computations made. The said ruling, it is submitted, was plainly erroneous. There was no slightest proof of waiver of the certificate introduced; indeed the testimony even of defendants showed affirmative insistence thereon. And, it is submitted, not only was there no "preponderance of evidence" of fraud on the part of the architect in refusing to issue final certificate but the express findings of omissions and deviations in this case themselves affirmatively show that the issuance of such certificate by the architect would have been a fraud on complainant owner.

This contention is advanced under Point I of Part I of this brief. If complainant's position in

that point is sustained, there is an end of both appeals—the propositions advanced in Points II, III and IV of Part I of this brief dealing with complainant's appeal, and those considered in Part II of this brief dealing with the appeal of defendant-appellants then become immaterial. If, however, said Point I is held unsound, then and only then do the allowances for extras by way of addition to contract price and the credits given for omitted and defective work and materials and inferior substitutions become subjects of examination.

But even if Point I should not be sustained and computations of allowances for additions and credits should therefore be held proper, the actual allowances and credits, it is submitted, were made in violation of the contract provisions and applicable rules of law. The errors made in the allowances awarded for additions by way of extras are submitted under Point II; the erroneous rulings on credits for omissions and deviations, under Point III of Part I. A summary of the items is presented at the end of Points II and III respectively, and at the end of Point III a summary statement is also presented showing the balance due from complainant in the event that Point I be not sustained.

Under Point IV, complainant has herein contended that the court erred in its award of interest; and under Point V, that error was made in the rulings on costs. Under Part II of this brief the exceptions of defendants-appellants to the credits for omissions given by the Vice-Chancellor, and the exceptions of Mr. Bianchi to a refusal of counsel fee out of the fund to him, as argued in brief of defendants-appellants, are considered.

The pertinent facts are set out under the respective points.

PART I—APPEAL OF COMPLAINANT-APPELLANT.

ARGUMENT.

POINT I.

The Vice-Chancellor erred in not sustaining complainant's exceptions to the Master's findings that complainant is chargeable with the amount of unpaid balance of contract price, without the issuance of and despite the refusal of the architect to issue final certificate therefor.

The complaining property owner throughout the hearing in this case objected that there could be no recovery under the building contract over and above the balance admittedly due under the progress certificate, and which he had tendered himself ready to pay, because the architect refused to issue a final certificate certifying that the work provided for in the contract had been completed and was accepted by him under the terms and conditions thereof.

The Master who heard the case, however, held that the withholding of the architect's final certificate "would amount to legal fraud under the cases" (p. 62), and decided this case on the theory that the general contractors had fully performed the contract less minor particulars, that is, that they had substantially performed, and therefore were entitled to payment of the contract price, plus additions for extras, less the value of the minor particulars which had been omitted by them. In this finding, upon exceptions taken to the Master's Report, the Master was sustained

by the Vice-Chancellor before whom these exceptions were argued.

The question to be argued under this point, is whether the withholding of the final certificate by the architect was fraudulent against and did constitute a legal fraud upon the general contractors under the cases.

The total contract price was $98,000.00, plus proper additions and less proper deductions. The architect, among other things, testified that he refused to issue the final certificate because the building was only 80 to 85% complete. Omissions, deviations from and substitutions for provisions in the contract were enumerated, which amounted to upwards of $13,000. Express findings were made by the Master and Vice-Chancellor that the owner was entitled to credit on 27 separate and distinct items of omissions and deviations and credit was given to the owner for more than Nine thousand Dollars on account thereof. As to other such items, credit was disallowed on the theory that, while they were admitted deviations from and inferior substitutions for the requirements of the contract, such deviations and substitutions were to be excused, because the items installed *approximated* what was *usual* in apartment houses of the character of the building in question. The omissions, deviations and substitutions referred to will hereafter be dealt with at length as showing substantial departures which not only required the action of the architect in refusing to issue a final certificate in this case, but which would have rendered issuance of such final certificate by him a fraud on complainant owner.

A proper understanding of the arguments to be presented requires an examination of the pro-

visions of the contract relating to payments, extras, acceptance of the work, and architect's certification thereof and therefor.

The pertinent provisions of the Contract are these:

> "Article 6. The Contract Documents—The General Conditions of the Contract, the Specifications and the Drawings, together with this Agreement, form the Contract. * * *"
>
> Article 6 (Ex. D-51, p. 521).

> "Article 3. The Contract Sum. The Owner shall pay the Contractor for the performance of the Contract, subject to additions and deductions provided therein, in current funds as follows: Ninety-eight thousand $98,000 00/100 dollars."
>
> Article 3 (Ex. D-51, p. 519).

> "Article 15: Changes in the work.—The Owner, without invalidating the Contract, may order extra work or make changes by altering, adding to or deducting from the work, the Contract Sum being adjusted accordingly. *All such work shall be executed under the conditions of the original contract* except that any claim for extension of time caused thereby shall be adjusted at the time of ordering such change.
>
> In giving instructions, the Architect shall have authority to make *minor* changes in the work, *not involving extra cost,* and not inconsistent with the purposes of the building, but otherwise, except in an emergency endangering life or property, no extra work or change shall be made unless in pursuance of a written order from the Owner signed or

countersigned by the Architect, or a written order from the Architect stating that the Owner has authorized the extra work or change, and no claim for an addition to the contract sum shall be valid unless so ordered.

The value of any such extra work or change shall be determined in one or more of the following ways:

(a) By estimate and acceptance in a lump sum.

(b) By unit prices named in the contract or subsequently agreed upon.

(c) By cost and percentage or by cost and a fixed fee.

If none of the above methods is agreed upon, the Contractor, provided he receives an order as above, shall proceed with the work. In such case, and also under case (c), he shall keep and present in such form as the Architect may direct, a correct account of the net cost of labor and materials, together with vouchers. *In any case, the Architect shall certify to the amount, including reasonable allowance for overhead and profit, due to the Contractor.* Pending final determination of value, *payments on account of changes* shall be made *on the Architect's certificate.*"

Article 15, General Conditions of Contract, (Ex. D-51, p. 529).

"Art. 24. Applications for Payments.—The Contractor shall submit to the Architect an application for *each* payment, * * *"

Article 24, General Conditions of Contract, (Ex. D-51, p. 535).

"Art. 25. Certificates of Payments.—If the Contractor has made application as above, the Architect shall, no later than the date when each payment falls due, issue to the Contractor a certificate for such amount *as he decides* to be *properly* due."

Article 25, General Conditions of Contract (Ex. D-51, p. 536).

"Article 5. Acceptance and Final Payment.—Final payment shall be due 30 days after substantial completion of the work provided the work be then fully completed and the Contract fully performed.

Upon receipt of written notice that the work is ready for final inspection and acceptance, the Architect shall promptly make such inspection, and when he finds the work acceptable under the Contract and the Contract fully performed he shall promptly issue a final certificate, over his own signature, stating that the work provided for in this Contract has been completed and is accepted by him under the terms and conditions thereof, and that the entire balance found to be due the Contractor, and noted in said final certificate, is due and payable."

Article 5 of Contract (Ex. D-51, p. 520).

"*Payments:*

Payments shall be made by the Owner only when the Contractor accompanies its bill for work performed under the contract by a certificate signed by the Architect and made out upon their regular printed form.

> Partial payments shall never exceed 85% of the value of the work completed at the building.
>
> In determining the value of the work executed, the judgment of the architect shall be final."
>
> Specifications (Ex. D-52, p. 550).

The contract provisions are plain. They provide that the architect shall provide certificates for moneys falling due for (1) changes in the work, for (2) regular progress payments and for (3) final payment.

As to changes, the contract provides that:

Pending *final* determination of value, payments *on account of changes* shall be made on the architect's certificates.

> Article 15, General Conditions of Contract (Ex. D-51, p. 529).

The *method* of determining the value of such changes by the architect is also fixed. When the change is determined by estimate and *acceptance* in a lump sum, that is, by *express agreement as to the total cost of the change,* or when the change is produced by the application of unit prices *subsequently agreed upon,* the architect's *final* determination of the value of such changes will necessarily be controlled by the agreement, but where the changes are brought about upon the basis of *cost* plus *percentage,* or upon the basis of *cost* plus a *fixed fee,* the final determination of the value of changes thus brought about becomes a *very important factor* in *finally* determining the *whole* cost of the building.

> Article 15, General Conditions of Contract, Ex. D-51, p. 529.

As to progress payments the contract provides that the contractor *shall submit* to the architect *an application* for each payment, and *if* the contractor has made application as above the architect *shall* not later than the date when each payment falls due, issue to the contractor a certificate for such sum as *he* decides to be *properly* due.

Articles 24-25, General Conditions of Contract, Ex. D-51, p. 536.

As to final payment the contract provides that the contractor shall submit to the architect an application for payment (Article 24, General Conditions of Contract, Ex. D-51, p. 526), and final payment shall be *due* 30 days after *substantial completion* of the work, *provided* the work be then *fully completed* and the contract *fully* performed, and *only* when after inspection the architect finds the *work* acceptable under the contract, and the contract fully *performed,* shall he issue a final certificate stating that the work provided for in the contract *has been fully performed and is accepted by him,* under the terms and conditions thereof, and that the entire balance *found to be due* the contractor and *noted* in said final certificate *is* due and payable.

Article 5 of Contract, Ex. D-51, p. 520.

The contract further provides that in *determining* the value of the *work executed* the *judgment* of the architect *shall be final.*

Specifications, Ex. D-52, p. 550.

Under this contract, therefore, the builder was required to erect the building *including therein*

all changes properly ordered under the conditions of the original contract, so as to produce *substantial completion* of the *work,* and *only* when the work has been *thus* fully completed and the contract had been *thus* fully performed did the contractor become entitled to a final certificate showing that the balance *thus found due* by the architect and *noted* in the final certificate was due and payable.

The architect under this contract was appointed by the contracting parties an *arbiter* whose powers were limited *only* by the requirement that he *act in good faith.* He was expressly made the judge of the *value of the extra work or changes,* and the value of work executed; he was expressly authorized to determine whether the *work* had been *substantially completed* under the contract, and whether the contract had thus been *fully performed,* and *only if and when* he should determine that the *work* had been *substantially* completed and the contract had been *fully* performed was he directed to *determine* the *entire balance due* the contractor, which *balance* was to be noted in the *final certificate.*

When these contracting parties empowered the architect to determine whether the work *had been* substantially completed, and if so completed, empowered him to determine *the balance due* to the contractor for thus completing the contract, they necessarily *not only* submitted to his judgment the question of the substantial completion of the work but *also empowered him* to make the *evaluation* of the additions to and deductions from the contract price otherwise due for *strict* performance in order to arrive at the *entire balance* due to the contractor on substantial completion, which balance was to be stated in the final certificate.

Substantial completion, under the law, is strict completion less "failures of compliance in some *minor* particulars." (*Reese* v. *The Kline Building and Construction Co.,* 8 N. J. Mis. 296, at 297; *Feeney* v. *Bardsley,* 66 N. J. L. 239; *Dyer* v. *Lintz,* 76 N. J. L. 204, at 206); substantial completion, under the law, is strict completion less "mere technical, inadvertent and unimportant deviations" (*Bozatth* v. *Dudley,* 44 N. J. L. 304, at 309).

Full completion of this contract and full performance of this contract was, therefore, strict completion less *minor* details.

The architect was required to give his certificate if he found the work had been thus substantially completed—that is, if the contract had thus been fully performed, which required a finding of strict completion less failure in "minor" details; "mere technical, inadvertent and unimportant deviations."

The architect chosen by both parties issued progress certificates for payments approximating $90,000; the owner made payments. The contractors sought the balance, which was the balance of $98,000 "subject to additions and deductions" and final certificate therefor. The architect refused to issue such final certificate.

To issue such final certificate, the architect was required to find that the work had been substantially completed and the contract fully performed as required by law, that is, strict performance less minor details. What constituted substantial performance of this contract and *just what* omissions and deviations from strict performance of the contract should result in a finding that the contract had *not* been substantially performed or substantially completed were questions of fact

which by this contract were submitted to the *final judgment* of the architect, and as to which his judgment and finding were to be *binding* upon the parties to the contract, unless that judgment and finding was vitiated by the fraud of the architect in arriving at the same or unless that judgment and finding was waived by the parties.

It is the contention of this appellant that the very findings of the court in this case showing that *substantial* omissions and deviations occurred in the performance of this contract, justified the architect in his judgment that these omissions and deviations resulted in *a failure* to *substantially complete the work* and to thus *fully perform the contract*—and in turn justified him in refusing to issue a final certificate.

The determination made by the architect was his determination as arbiter and judge created and appointed by both parties under the contract. The question presented herein is *not* the propriety or impropriety of such a contract or the wisdom or foolishness of an owner and of general contractors in agreeing to be bound by its terms, *or the degree of skill possessed by this particular architect* chosen, or the wisdom or lack of wisdom of both parties in choosing the particular architect they selected. The question presented is simply one of application of the contract made by these parties to the facts.

The Court itself expressly found deviations and omissions from the work required to be performed under this contract in twenty-seven different respects, aggregating credits of more than Nine Thousand Dollars. The court found *deviations* and *omissions* which were *wilful* and *deliberate;* deviations and omissions which represented *substantial departures;* deviations, omissions and *sub-*

stitutions unauthorized by and without the *consent* or *knowledge* of the owner.

The following are some of these deviations and omissions expressly found on which credits of more than $9,000 were given:

Bonded Barrett Roof, with Barrett, U. S. Fidelity and Guaranty Company Bond for 20 years—specified; roof of a man named Dieffenbach installed instead, with no such bond procurable—allowance	$500.00
Sandpapering and pumicing of woodwork throughout building omitted —allowance	500.00
Back painting of trim omitted—allowance	231.00
Cellar ceiling—one coat of plaster applied instead of three as specified	120.00
Copper flashings around parapet wall omitted—allowance	160.00
Water closet in doctor's apartment omitted—allowance	100.00
Radiators; were to have one coat of prime and two coats of American Radiator enamel — instead aluminum silver was used—allowance..	240.00
Cabinet trim specified throughout the building, mill trim installed—allowance	750.00
Fireproofing around columns and beams omitted—allowance	1,000.00
Deafening in bathrooms omitted—allowance	100.00
Marble stringers of Tennessee pink marble specified from first floor to roof omitted, and plaster substituted—allowance	700.00

Roofing and sheet metal work duct omitted—allowance	150.00
Plinth blocks omitted	40.00
Electrical wirings to be installed in conduits bx wires installed, not in conduits, and inferior electrical system substituted—allowance ...	1,500.00
Refrigeration pans, drain pipe omitted	100.00
Milk cabinets omitted	75.00
1/8" x 5/8" iron bars substituted for 1" x 1" iron bars specified.....	100.00
Grounds omitted throughout building, on which a proper allowance for the omission alone was $1,200 as herein contended, and as a result of which omission, the trim work and panel walls throughout the building *were not in true line and plaster walls not straight* (p. 479)—allowance	114.00

The above are some of the items expressly allowed; many more items of omissions and deviations actually occurred on which credits should have been allowed as set forth under Point III.

The omission of copper flashings around parapet walls was not inadvertent but deliberate, so was the omission of sand papering and pumicing; so was the application of only one coat of plaster instead of three; so was the omission of fireproofing around beams and the *substitution* of 1/8" x 5/8" iron bars for 1" by 1" iron bars—items calculated to escape notice. The substitution of a roof by a man named Dieffenbach for a Bonded Barret Roof with a surety bond guaranty for twenty years was a flagrant violation of the contract requirements and of deliberate instructions

of the architect. The omission of grounds throughout the building was no mere technical omission, but a serious violation fraught with serious consequences. So the substitution of plaster for Tennessee pink marble stringers. So with the substitution of ordinary wiring throughout the building for wiring to be installed in protective conduits, etc., etc. done without any consultation with or knowledge of the owner. So with other items. Even if a roof by Dieffenbach was *just as good* as a Bonded Barrett Roof, a roof by a man named Dieffenbach is not what the owner *bargained for* and what the *contract called for*—it was unquestionably a substantial departure.

The cost of these deviations and omissions were found by the Master and Vice-Chancellor to amount to $9,317.20, almost 10 per cent of the original fixed contract price. Many more deviations and omissions occurred as herein set forth for which they did not give credit (Point III). The deviations and omissions were found by the Architect to have left the building only 80 to 85 per cent completed (p. 285).

These were not the "minor particulars" to which the law closes its eyes in determining performance of a building contract; these were *substantial deviations* and *departures* from compliance.

The architect was not only justified, but in duty bound to refuse a certificate; any other course would have been a fraud upon the owner (*Bradner* v. *Raffsell,* 57 N. J. L. 412, at 419).

Defendants in this case cannot recover unless they excuse non-production of the architect's certificate. The non-production of the certificate can only be excused on the ground of fraudulent withholding or waiver (*Sheyer* v. *Pinkerton,* 57 Atl.

462, at 463; *Byrne* v. *Sisters of Elizabeth,* 45 N. J. L. 213; *Bradner* v. *Raffsell,* 57 N. J. L. 412). The burden of proving such fraud or waiver was on the defendants (*Callaham, Inc.* v. *Comm'rs,* 102 N. J. L. 705, at 707; *Turner* v. *Wells,* 64 N. J. L. 269). Failing to produce the stipulated certificate or to show such excuse for non-production, denial of liability for an uncertified balance to defendants was required.

The law is settled beyond any question in this state that where a building contract provides, as does that *sub judice,* that payments shall accrue only upon the production of a certificate by the architect, the production of the stipulated certificate is a condition precedent to the accrual of payments and to liability of the owner to make payments.

Byrne v. *Sisters of Elizabeth,* 45 N. J. L. 215;
Kirtland v. *Moore,* 40 N. J. Eq. 106, at 111;
Chism v. *Schipper,* 51 N. J. L. 1;
Bradner v. *Roffsell,* 57 N. J. L. 412;
Sheyer v. *Pinkerton Construction Co.,* 59 Atl. 462;
Welch v. *Hulschmitt,* 61 N. J. L. 57;
Hasson v. *Bruzel,* 104 N. J. Eq. 319.

The law is likewise settled that where as here a building contract expressly contemplates alterations and additions during the progress of the work, labor and materials necessary to meet such changes are furnished in pursuance of the contract and its provisions are applicable.

Willets & Co. v. *Earl,* 53 N. J. L. 270, 274; rev'd on other grounds, 56 N. J. L. 334;

Hasson v. *Bruzel,* 104 N. J. Eq. 319;
Builder's Material Supply Co. v. *Shoen,* 86 N. J. L. 290.

No recovery can be had against the owner for unpaid amounts not so certified to.

Byrne v. *Sisters of Elizabeth, supra;*
Bradner v. *Roffsell, supra.*

And, indeed, payments made by the owner despite the non-issuance of such architect's certificate, are prematurely made, and under Section 5 of the Mechanic's Lien Act, subject the owner to additional liability to stop notice claimants to the extent of such payments made.

Somers Lumber Co. v. *Kaufman,* 102 N. J. L. 601;
Stone Post Co. v. *Corcoran,* 80 N. J. L. 549;
Hasson v. *Bruzel,* 104 N. J. Eq. 95.

The Master recognized the contract requirement and the rule of law making denial of liability mandatory, but held the inability of the contractors to produce architect's certificate not fatal to their recovery on two grounds: (a) the withholding of the certificate would amount to legal fraud under the cases, citing *Rizzolo* v. *Poysher,* 99 Atl. 290; and (b) the production of the certificate was waived. But the burden of proof to support those findings was not sustained.

The Master's ruling that the non-production of the architect's certificate was of no force for the reasons stated was plainly error.

1. *The Master plainly erred in his ruling that the "withholding (of the architect's certificate) would amount to legal fraud under the cases."*

It is settled that the word "fraud" in the rule that the certificate of the architect may be dispensed with by proof that the certificate was withheld by *fraud* on the part of the architect, means "fraud"; nothing short of that will suffice.

> *Sheyer* v. *Pinkerton Construction Co.,* 59 Atl. 462;
> *Bradner* v. *Roffsell,* 57 N. J. L. 412;
> *Landstra* v. *Bunn,* 81 N. J. L. 680;
> *Callahan, Inc.* v. *Commissioners,* 102 N. J. L. 705, at 707.

It is likewise settled that the burden of proving fraud is of course on defendant-contractors.

> *Callahan, Inc.* v. *Commissioners, supra,* at 707.

In the cited case, this Court said at pages 707, 708:

> "The burden of showing fraud is on the party complaining. Mundy v. Louisville and N. R. Co., 14 C. C. A. 583; 31 U. S. App. 606; 67 Fed. Rep. 633.
>
> 'Fraud is never presumed, and where a party to the transaction alleges its existence, the burden rests upon him of proving the truth of his allegation.' Guerber Engineering Co. v. Stafford, 96 N. J. L. 280."

There is not one scintilla of evidence in the record to sustain a ruling of fraudulent intent on the part of the architect against the contractors.

The architect was their friend (p. 318); he had been architect on and had procured for them a number of jobs before; complainant never knew them before; the architect introduced these defendant contractors, Vitille, Kinsella and Cunhy, to complainant and got them this job (pp. 318, 416); he said he got them the job because he thought they were good contractors and he was satisfied with their work in the past (p. 416); he tried to give them every possible help on this job, even going to the length of making many of his complaints against them orally, to prevent a written record against them if they should perform what was required of them (pp. 310, 318). There was no contradiction of this testimony.

But despite his friendship for the contractors, the architect felt he could not conscientiously, in fairness to the owner, issue a final certificate for additional payment. He had gone great lengths in co-operation; he had even certified for payment practically dollar for dollar of work done, without deducting 15% percentage (p. 305); he acted from friendship, he acted because of expediency—full money had to be advanced to enable Vitille to continue (pp. 305, 306). If Vitille had fully completed his job, he would have been entitled to credit for additions to the contract sum for some of the extras he claimed; on the Master's inquiry on the basis of substantial performance despite non-production of architect's certificate, Ach indicated items in his opinion allowable as extras and the amounts *he* would have allowed (pp. 287, 301). But the contractors did not complete their job; they did not fully perform. There were limits beyond which the architect could not go. He was made by the contract the judge of performance of the contract and its completion; he

was by the contract appointed arbiter of the value of work done; he was by the contract appointed judge to determine if any final balance was due; he was required by the contract to determine that the contract was fully and completely performed, as required, and if any final balance was due, and then to issue a final certificate, under his hand, therefor.

The architect admitted his refusal to issue final certificate (p. 268); *he stated as his reason that the building was never completed as required;* that it was only 80% to 85% completed (pp. 268, 285).

Even if the Contractors, or the Master, or anyone else disagreed with the architect's estimate of the value of the work done, or with his judgment as to complete performance by the contractors, it is elementary that fraud could not be predicated on such disagreement and that such difference in opinion is immaterial. It is fundamental that the decisions of the architect under the contract are final and conclusive on the parties thereto (*Welsh* v. *Hulschmitt,* 61 N. J. L. 57; *Chism* v. *Schipper,* 51 N. J. L. 1), and that the conduct of the architect cannot be impeached for want of skill or knowledge or because his judgment does not agree with that of others.

> *Chism* v. *Schipper,* 51 N. J. L. 1;
> *Bradner* v. *Roffsell,* 57 N. J. L. 412, at 417;
> *T. E. Callahan, Inc.* v. *Commissioners, etc., of Union T. P.,* 102 N. J. L. 705.

But the facts are that the judgment of the others was *in agreement* with that of the architect as to the defective and incomplete performance

by the contractors in this case. There were express findings in this case that the general contractors were guilty of omissions and defective performance, requiring credits to the owner on twenty-seven different items aggregating Nine thousand three hundred seventeen and 20/100 ($9,317.20) Dollars, that there were *deliberate* omissions and violations by the contractors. In addition to the items for which credit was actually given, the testimony is replete with evidence that the building was never *properly* nor *fully* completed. For example, Vitille himself testified (while opposing a stop notice claim and while apparently unaware of the effect of his testimony on his dispute with the owners) that soon after the roof had been placed on the building, there were leaks around the bulkhead (p. 125), and attempts were made to repair the same in December, 1927, and for a long time subsequently (pp. 126, 127, 128).

As before stated it does not rest upon complainant to prove that the architect was justified in refusing to issue final certificate. The burden was upon *defendants* to establish that his refusal to issue a certificate which he was to issue only if and when the work was substantially completed and fully performed, i. e., only when and if he found strict completion less failures of compliance in *minor* particulars, amounted to a fraud upon them, and it is submitted that in the face of the admitted proofs and express findings showing the flagrant omissions, deviations and substitutions in the performance of this contract, it was encumbent upon the defendants, in order to sustain that burden and to establish that the withholding amounted to fraud, to establish that the whole work undertaken by the defendants

was in fact substantially completed, and that the contract *had in fact been fully performed,* except in *minor* details. It was not sufficient under the circumstances of this case merely to establish that there were omissions, deviations and substitutions which some people might consider "minor particulars"; with the architect the sole judge of what constituted such minor particulars, the evidence to sustain that burden should have been such as to justify a holding that the omissions, deviations and substitutions amounted only to minor particulars, and should have risen to such heights as to necessarily convince the average man that they must necessarily be only such *minor* particulars. The Master predicated his conclusions upon no such powerful evidence. Instead, he supported his findings only upon certain alleged facts culled and isolated from the record. Thus the Master found that:

The building was ready for occupancy on October 1st, 1927 (p. 61). This finding certainly has no probative value on the question of fraud. It is well recognized that buildings which are never completed in accordance with the terms of the contract under which they are erected are occupied, and occupancy is no evidence of acceptane under our cases, "either presumptive or conclusive" (*Bozarth* v. *Dudley,* 44 N. J. L. 304, at 312; *Vacuum Ash, etc. Co.* v. *Huylers,* 101 N. J. L. 147, at 149). The owner having this building upon his premises and being unable to return the same, was, under the law, justified in using it, without thereby admitting that it had been completed in accordance with the requirements of the contract (*Bozarth* v. *Dudley, supra,* at 312), nor can the fact that the building was thus occupied by the owner be charged to the

architect as one of the indicia of fraud in his refusal to issue a certificate.

The architect promised to check up the building and issue his final certificate, and never specifically refused to issue the certificates for any reason except that he had not time to check up (p. 61). Admitting this arguendo to be true, it again does not point to fraud in the refusal of the architect to issue the certificate, especially in view of the omissions, deviations and substitutions hereinbefore referred to. It may indicate that the architect was neglecting his duty in delaying to make the inspection required of him. It may also indicate that at the time when he made the statement he was not aware of the full import of the omissions, deviations and substitutions established in this case. Again, it may indicate that he did not know of these omissions, deviations and substitutions when he promised to check up the building and issue his final certificate, and it may also indicate that because of his negligence in properly supervising the work he did not expect to find the omissions, deviations and substitutions subsequently established. But this also is certainly true, that if, pursuant to the promise to check up and issue the final certificate, the architect had immediately made the examination required of him under the contract, and had then found the omissions, deviations and substitutions herein before mentioned, and had then issued a certificate, the issuance of such certificate would in itself have been fraud, not upon the contractors, but upon the innocent owner.

The architect never served upon the contractors a demand to perform any uncompleted work (p. 61). This finding by the learned Master is not

supported by the testimony (see pp. 268, 304, 305, 308, 309, 310, Exhibits D-73, D-74). Nor is there any requirement in the contract for the service of any such formal notice by the architect upon the contractor. Nor can it be contended that the contractors, who were guilty of deliberate omissions, deviations and substitutions did not know of them.

The finding that the architect said that the building was substantially completed and the finding that a great many of the alleged defects and omissions had occurred prior to the issuance of the 8th certificate (Master's Report, pp. 60, 61, 62) will hereafter be dealt with.

Assuming, however, that all of these alleged facts are true, they do not constitute legal fraud in the refusal of the issuance of the certificate in this case, and any force which they might otherwise have is destroyed when considered with the requirements of the contract and specifications, the actual volume and value of the omissions, deviations and substitutions, as well as the other facts appearing from the evidence in this case.

Assuming that after the building was ready for occupancy the architect did promise, as the finding is, to issue a certificate when he had checked up the building such an attitude was strictly in conformity with the duties imposed upon him by the contract and was inconsistent with an intent to fraudulently withhold the certificate. He was made by the contract, the judge of the value of the work done; he was required by the contract before issuance of final certificate to make an inspection and, only if and when he found the contract was fully performed, to issue a final certificate over his signature, certifying that the work provided for had been fully completed and was accepted by him as such (Ex. D-51, Art. 5).

A promise to issue the certificate when his check-up was complete was in exact accordance with the duties of the architect under the contract. The architect himself, testified, however, that no matter how much he tried to help his friends, the contractors, and no matter how much he wanted for personal reasons to issue a certificate to them, he could not conscientiously issue the final certificate; he was forced to refuse the final certificate because the building was never completed as required (p. 268). He wrote to Vitille in December, 1927, setting forth a list of trifling objections which had not even been attended to, despite his then long continued protests (Ex. D-73); he kept sending over specific memoranda from time to time (pp. 309, 310) (see Ex. D-74); he gave the contractors oral lists of more (p. 317). The contractors did not correct or attempt to correct the material omissions and defects objected to; by September, 1928, they had only corrected a portion of the less serious objections set forth in the letter of December, 1927 (p. 309); they never corrected all the omissions or completed performance. The Contractors were in need of funds; and kept beseeching the architect to issue a final certificate nevertheless. In October, 1928, he wrote to Vitille: "I expect to be finished with your certificate surely by Friday of next week" (Ex. D-57). He testified that at the time he wrote that letter he intended to give Vitille a certificate (p. 305). But despite his desire to help out the contractors, Ach realized that to issue the final certificate would be an act of self-stultification. As the Court said in *Bradner* v. *Roffsell,* 57 N. J. L. 412, even if the omissions and defects were due to the express direction of the architect, his certificate that the work was

completely performed according to the contract would have been fraudulent "but it would not have been a fraud upon the contractor, who would have been in *pari delicto, but upon the owner.*" Ach accordingly refused to perform the act of self-stultification and refused to issue final certificate because he could not certify that the contract was completely performed (p. 268). In this judgment, the Master's own findings as to omitted and defective work show him completely justified in his judgment. There is nothing in the testimony to upset that honest judgment.

The fact that the Architect issued eight partial certificates and that a large portion of the defects and omissions occurred before the issuance of the eighth certificate, is not even relevant onthe question of refusal to issue final certificate ~~on the question of refusal to issue final certificate~~ on the propriety thereof. The contract specifically provides as to partial certificates that "no certificate issued nor payment made to the Contractor, nor partial or entire use or occupancy of the work by the owner shall be an *acceptance* of *any* work or *materials* not in accordance with this contract" (Ex. D-51, Art. 25). And as Ach himself pointed out (p. 311) each partial certificate contained a similar reservation (Ex. C-101). On the other hand, not only did Article 5 require the Architect to find full and complete performance as a condition precedent to his final certificate, but Article 25 above quoted further provided as to final certificates and final payments:

> "The making and acceptance of the final payment shall constitute a waiver of all claims by the Owner, other than those arising from unsettled liens, from faulty work appearing after the final payment or from requirement of the specifications, and of all

claims by the Contractors, except those previously made and still unsettled."

To have issued the final certificate would not only have been an act of self-stultification on the part of Ach, but an act of fraud upon the owner and a deprivation of the owner's rights.

Finally, the Master's reference to "substantial completion" does not justify his conclusion of "legal fraud". When questioned as to substantial completion of the building, the architect testified: "I would say it was. *Tenants occupied it.* That's substantial completion" (p. 275). Evidence of occupancy is of course,, no evidence of acceptance, and the fact that the building was substantially completed as a building so that tenants occupied it is not the same as saying the building was substantially completed under the terms of this contract. The Master calls attention to that testimony as proof that the contractors were entitled to their final certificate and that Ach thus admitted his withholding thereof was fraudulent. But substantial completion of a building is not synonymous with full completion of contract less minor details; the fact that the building was substantially completed *as a building* so that tenants occupied it is of course not the same as saying that the building was substantially completed under the terms of this contract. The architect may have used loose language; but his determination was clear and unambiguous. The Master unfortunately failed to note the specific testimony of the architect when questioned as to the percentage of the building completed that it was not substantially completed *as required by the contract;* that it was only 80 to 85 per cent. completed (p. 285). While the work may have been completed so as to make the building habit-

able, no further proof need be offered that the architect's judgment was correct in finding the two specific things he was required to find, viz., that the *work* was not *substantially* completed under the contract and that the *contract* was not *fully* performed, nor need further justification for his withholding of final certificate, because of the failure of such full performance be produced, than the *very findings made in this case* of omissions and defects on twenty-seven items, requiring credits to the owner aggregating more than Nine Thousand ($9,000.00) Dollars. The deliberate non-inadvertent omissions and substitutions already referred to are expressly held by the authorities to be not "inadvertent" but substantial departures. Even if some of the substitutions, while clearly deviations, approximated what was usual in apartment houses of the size and character of the building in question, as the Master insists, they were nevertheless substantial departures. The "approximation" excuse has been before our courts before and rejected. So in *Bond* v. *Mayor,* etc., of Newark, 19 N. J. Eq., 376, where the claim was not "that work or materials were according to contract", but that "the materials and work are about as good as are usually furnished and done in this kind of work, and better than in some cases, and are good enough for the purpose" (p. 379). *Bond* v. *Mayor* was a case where the defective work had been actually accepted by the Mayor and Council and the city was thereby bound to *quantum meruit* payment for the defective work but no such claim of acceptance was or could be advanced here, nor was any such finding made in this case. Chancellor Zabriskie in *Bond* v. *Mayor,* etc., *supra,* speedily disposed of the "approximation" excuse

as destroying the substantial nature of the deviation. He said at page 381:

> "By a substantial departure, I do not mean that the work may not be as good or durable as that called for, but that it is not the same, either in substance or in cost. A brick house may be as substantial and as durable as a marble or brown stone house, yet it is not a substantial compliance with a contract to build a marble house, if the contractor put up one of brick, although proved to be more comfortable, substantial, and durable. Nor would it make it a compliance, if it were shown that it was as good a house, or a little better, than was usually built in the city where it was."

And again, as to the architect's functions, the Chancellor said at page 382:

> "An architect to whom, by the contract, everything was to be referred, could not hold that a brick house was a compliance with a contract to build one of marble; or that steps of blue flag were brown stone steps; or that a wall twelve inches thick complied with a contract to make one of sixteen inches. He could determine whether the marble front, the brown stone steps, or the sixteen inch wall were put up in a workmanlike manner, but could dispense with no substantial matter expressly required by the contract."

There can be no question that the Chancellor's finding was correct. A roof is no mere minor detail of the building. Even if a roof by a man named Dieffenbach was just as good as a Bonded

Barrett roof, a roof by a man named Dieffenbach is not the Bonded Barrett roof with twenty year Surety Company bond which the owner bargained for and for which the contract called. And as to any alleged departures and substitutions for which the excuse of consent of the architect is asserted, although without the consent or knowledge of the owner, such as substitution of grossly inferior electrical wiring and electrical system, as the Court said in *Bradner* v. *Roffsell, supra,* if the architect had nevertheless certified to full performance despite such substantial departures, his certification "would not have been a fraud upon the contractor, who would have been in *pari delicto,* but upon the owner." The architect here could not have found otherwise than he did without committing a fraud on complainant; and the findings of the Master and Vice-Chancellor involuntarily but directly support his judgment on the facts in the case.

The proofs affirmatively show therefore, that the architect's withholding of final certificate was not fraudulent or a matter of whim, but was required and that the Master's finding that the withholding "would amount to legal fraud under the cases" is without any merit. That the architect's judgment was his honest judgment appears beyond peradventure and that is controlling. The fact that the Master thought the effect of the architect's judgment operated "unjustly" is immaterial (*Sheyer* v. *Pinkerton Construction Co.,* 59 Atl. 462, Er. & Ap.). That the Master disagreed with his conclusion afforded no basis for denying its efficacy (*Chism* v. *Schipper, supra; Bradner* v. *Roffsell, supra; Callahan Inc.* v. *Comm'rs., supra*). Indeed this Court has held it error to instruct the jury that they may find fraud from the withholding of a certificate without a substantial rea-

son, since this would permit the jury to determine what are substantial reasons (*Bradner* v. *Roffsell,* 57 N. J. L. 412). The Master cites only *Rizzolo* v. *Poysher,* 89 N. J. L. 618; but that was a case where the architect's refusal was clearly fraudulent; he refused a certificate only because "he did not want it to appear that he was issuing a certificate for a case" (89 N. J. L. at 625). There are no analogous facts in the instant case.

2. *The Master erred in holding that the production of the Architect's Certificate was waived or was otherwise to be dispensed with under the circumstances of the case.*

"Waiver" is defined as the *intentional* relinquishment of a known right.

> *Crawford* v. *Winterbottom,* 88 N. J. L. 588, 589;
> *Freeman* v. *Conover,* 95 N. J. L. 89 at 93.

While the production of stipulated architect's certificate may be waived by the owner in whose interest the provision therefor is engrafted, waiver must be express or reasonably clear from acts, conduct and declarations of the owner which are inconsistent with the purpose of exacting performance.

> *Byrne* v. *Sisters of Elizabeth,* 45 N. J. L. 213.

The burden of establishing waiver is upon the party alleging it.

> *Turner* v. *Wells,* 64 N. J. L. 269.

No contention could be advanced that anyone other than the owner waived the requirement for

it is settled that he alone can waive it (*Byrne* v. *Elizabeth, supra*). Indeed, in the cited case, it was held that even "the verbal approval of the architect either absolutely or conditionally, was not a compliance with the clause" (45 N. J. L. at 219).

There is no proof in the record that the owner *himself* did waive it. He did not waive the requirement expressly; indeed the proofs are that the owner expressly insisted on compliance; defendant Vitille himself testified that when he asked the owner for final payments, the owner insisted on his procuring the architect's certificate therefor (p. 152). For implied waiver of final certificate, the proofs must be clear; even the fact that no certificates at all have been required for previous partial payments is not proof of waiver of certificate for final payment (*Byrne* v. *Sisters, supra*). However, not only is the record devoid of any acts, conduct or declarations of the owner inconsistent with the purpose of exacting performance, but any such possible implication is expressly negated by the affirmative demand of the owner for such certificate which defendant Vitille himself admits the owner made (p. 152).

The holding of the Master that the owner must be held to have waived the non-production of the certificate by filing his bill of complaint in this cause and tendering to pay what is justly due is without merit and is based on an apparent lack of understanding of the bill filed.

The Master says: "The question of the architect's certificate is not made an issue in the bill" (p. 62). But Paragraph 23 of the bill of complaint contains an express allegation that neither the balance of contract price, except $3,646 nor the amount of extras ever became due and pay-

able from complainant to the contractors "by reason of the fact that the said architect has refused and still refuses to issue certificates authorizing the payment of the same," etc. (p. 26). No clearer issue could have been raised.

And the procedure followed by complainant in the particular bill that he filed was expressly calculated to clearly present that issue. Complainant owner was in this situation: the architect had issued eight certificates on which there was a balance unpaid of $3,646. Conflicting stop notice claims were filed prior to the payment of said balance, although after certification thereof. No final certificate for any additional sum had been issued by the architect. *Complainant disclaimed any liability for amounts uncertified.* Complainant's liability to conflicting stop-notice claimants arose under the Mechanic's Lien Law and was limited in aggregate amount to *what was due from him to the general contractors,* with this exception: as to these conflicting stop notice claimants, complainant had no defense to payment of unpaid balance *already certified,* even though on partial certificate for partial payment—for the rule is settled that amounts certified and unpaid even on partial certificate are absolutely due and owing for the purpose of distribution to stop-notice claimants, irrespective of the owner's defenses against general contractor on account thereof (*Stone Post Co.* v. *Corcoran,* 80 N. J. L. 549). With the conflicting stop-notice claims presented, and numerous law suits pending and threatened by stop-notice claimants, complainant, while undoubtedly liable to stop notice claimants for the *certified balance unpaid,* could not safely pay the amount to any of them until the question of priorities was determined. As to the stop-notice

claimants complainant was a stakeholder, and as to them, a bill like the one in the case *sub judice* is a strict bill of interpleader. *Aleck* v. *Jackson,* 49 N. J. Eq. 507, at 510. Under these circumstances, it has been held proper to file a bill which is in part a strict bill of interpleader and in part, in the nature of a bill of interpleader, tendering into court the sum unquestionably due "and such additional sum, if any, as may be determined to be due from them to the contractor." *Vine* v. *Robert W. Kennedy Co.,* 2 N. J. Misc. 774.

Complainant followed the procedure approved by the Court, tendering $3,646 due, *and such additional sum or sums as may be found due from him to the* Contractor, *although asserting that no such additional sum became due* "by reason of the fact that the said architect *has refused and still refuses to issue certificates authorizing the payment of the same*" etc. (Bill, Par. 23, p. 26).

It thus appears definitely that not only did complainant in his bill *not* fail to raise "the question of the architect's certificate" and not thereby proceed on a course of conduct inconsistent with the said requirement but that he expressly asserted it in his bill and expressly tendered the issue, in a bill of complaint in form expressly approved by the Court of Chancery.

Just why, however, because he thus came into the Court of Chancery, "the maxim 'he who seeks equity must do equity' would estop complainant from raising this point," as the Master "feels" (Master's Report, p. 62) is difficult to understand. The fact that complainant seeks equitable relief *does not require him to waive the provisions of the contract, or his rights thereunder.* While "he who seeks equity must do equity," the maxim does not impose upon a litigant the necessity of sacrificing his legal, contractual rights. The con-

tract made is as binding upon the parties in the Court of Equity as it is in a Court of Law; it is settled that Chancery will not make an agreement for the parties different from the one they made for themselves. *Under* v. *Newlin Haines Co.,* 94 N. J. Eq., 459, at 469, 470; *Roche* v. *Osborne,* 69 Atl. 176; *Moffatt* v. *Niemitz,* 102 N. J. Eq. 112.

In concluding the point, it may be noted that Mr. Bianchi, as solicitor *pro se,* on his application for a fee to himself out of the fund in priority to stop-notice claimants, advances the contention that the items of extras claimed by the general contractors was not part of the "contract sum" and that therefore his solicitor's lien is, as to the amount awarded on those items, prior to the claims of stop-notice claimants (See Bianchi's Brief on Cross-Appeal, Point III, pp. 24-28). The question was not raised by any of the defendants either before the Master or the Vice Chancellor. All defendants treated the extras as controlled by the contract and the provisions concerning the final architect's certificate. On the theory that this court may find that an architect's certificate was necessary before final payment fell due defendant may by way of answer, now in this court claim that even if this be true, the extras, as ordered constitute independent contracts upon which recovery may be had, but this is unsound.

The items for which additional compensation was claimed themselves demonstrate the lack of merit of the contention (See Ex. D-56, p. 558). The contract provides that the contract sum shall be an amount there fixed subject to additions; that extra work or changes may be ordered and performed, the contract sum to be adjusted accordingly; that all work of change shall be done under

the provisions of the contract. The items claimed represent, not work beyond the contemplation of the venture, but variations and substitutions, contemplated in the original venture—changing a partition around; substituting different doors, and the like. If these items are not controlled by the written contract they constitute no part of the fund out of which stop-notice claimants are to be paid. But all said alleged changes and alterations for which additional compensation was sought were rendered and performed under and pursuant to the terms of the contract (Ex. D-51).

There was no contradiction at the hearings; the case was tried by complainant, defendant general contractors and defendant stop-notice claimants on that theory. Complainant set up as a defense to payment of any alleged balance of contract sum uncertified, non-issuance of final certificate of architect therefor. Complainant set up in addition that if, for the purposes of argument only it be conceded arguendo that recovery could be granted despite the absence of such certificate, nevertheless, as to the extras claimed, there were not, as to most of the items, written orders therefor as required by Article 15 of the General Conditions. Defendant contractors at the trial urged a waiver of the contract provision for written order. But they made no claim that the alleged extra items were performed pursuant to agreements entirely independent of the contract; they made no claim that the alleged items were not done and were not to be done pursuant to the contract and under the supervision of the architect thereunder, but on the contrary, urged that the architect supervised all of said work and passed on it under the contract. Although if the contention were sound, the stop-notices would not

operate on the amount awarded for extras, neither in the answer of general contractors nor at the hearings was any such claim of non-applicability asserted, but the contrary was admitted. Bianchi's reference to separation of items in Master's Report is a confusion of convenience of treatment for a ruling. The claim now made is an afterthought, advanced for the first time on second application to the Vice-Chancellor for a fee. Even if the facts were in Mr. Bianchi's support, which they are not, as the Vice Chancellor pointed out in denying Bianchi's application: "The case has been conducted throughout on the theory that the extra work was done pursuant to filed contract. It is too late to advance a different theory. Mr. Bianchi's prayer is denied" (State of Case, Bianchi, p. 84).

If the Court should sustain the proposition herein advanced by complainant under this Point, no further inquiry is necessary; such holding would render complainant liable only for unpaid balance of account certified, which he has heretofore tendered into court and has been at all times ready to pay to the stop-notice claimants in the order of priority, as ~~to~~ in this case determined.

The Master conceived that non-production of an architect's certificate was excused and that the case therefore required a computation of fixed contract sum plus additions for extras, less credits to the owner for omitted and defective work. If the position advanced herein is held sound, no such inquiry is necessary or proper; in the event however, that complainant's said contention is held not conclusive, the computation undertaken by the Master must be made. The pertinent rules

of law and the application thereof by the court below in said computation to the extras claimed and to the credits due will now be set forth under Points II and III.

POINT II.

The Vice Chancellor erred in failing to sustain complainant's exceptions to the Master's allowances to the general contractors for extras as in violation of the contractual provisions and applicable rules of law.

A. Preliminary Statement; the contract, the law.

The contract fixed "the contract sum" as Ninety-eight thousand Dollars, "subject to additions and deductions" (Ex. D-51, Art. 3). The general contractors claimed "additions" in the sum of $14,882.62; contractor Vitille submitted a list of forty items purporting to aggregate that total as his "extras" claim (Ex. D-56). As heretofore noted, the Master proceeded to consider and make allowances on the "extras" claim thus presented. The Master disallowed items Nos. 1, 4, 7, 10, 13, 23, 24, 30, 37 either in whole or in part, in the total sum of $4,490.17; he allowed the remaining items in the total sum of $9,733.27. In making said allowances, the Master ignored the contract and applicable rules of law and committed error.

The applicable Contract Provisions:

> "Article 3. The Contract Sum—The Owner shall pay the Contractor for the performance of the Contract, subject to additions and deductions provided therein, in current funds as follows: Ninety-eight thousand ($98,000 00/100) dollars."
>
> Article 3 of Contract (Ex. D-51).

"In giving instructions, the Architect shall have authority to make minor changes in the work, *not involving extra cost,* and not inconsistent with the purpose of the building, but otherwise, except in an emergency endangering life or property, *no extra work or change shall be made unless in pursuance of a written order from the Owner signed or countersigned by the Architect,* or a *written* order from the Architect *stating* that the Owner has authorized the extra work or change, and no claim for an addition to the contract sum shall be valid unless so ordered.

The value of any such extra work or change shall be determined in one or more of the following ways:

(a) By estimate and acceptance in a lump sum.

(b) By unit prices named in the contract or subsequently agreed upon.

(c) By cost and percentage or by cost and a fixed fee.

If none of the above methods is agreed upon, the Contractor, provided he receives an order as above, shall proceed with the work. In such case and also under case (c), he shall keep and present in such form as the Architect may direct a correct account of the net cost of labor and materials, together with vouchers. In any case, the Architect shall certify to the amount, including reasonable allowance for overhead and profit, due to the Contractor. Pending final determination of value, payments on account of changes shall be made on the Architect's certificate."

Article 15 of General Conditions of Contract (Ex. D-51).

"Payments:

Payments shall be made by the Owner only when the Contractor accompanies its bill for work performed under contract by a certificate signed by the Architect and made out upon their regular printed form.

Partial payments shall never exceed 85% of the value of the work completed at the building.

In determining the value of the work executed the judgment of the architect shall be final."

Specifications (Ex. D-52, p. 550).

The applicable Rules of Law:

It is elementary that the claimant for compensation in addition to agreed contract price has the burden of showing that the work for which extra compensation is demanded was not embraced in the original contract or in the duties thereby imposed.

9 Corpus Juris at Building and Construction Contracts, page 849 and cases cited.

Since an undertaking to do what one is already under contract to the promisee to do, is not good consideration to support a promise, if work for which extra compensation is claimed was already included in contract between owner and builder, even an express promise by the owner to pay an additional sum therefor is without consideration and will not warrant recovery.

Hasbrouck v. *Winkler,* 48 N. J. L. 431;
Natalizzio v. *Valentino,* 71 N. J. L. 500, at 502;
Watts v. *Frenche,* 19 N. J. Eq. 401.

And even if the work on which the extra claim is predicated is work in addition to and not called for by the contract, where the contract provides that no extra work or change shall be made except in pursuance of a written order, the production of the written order specified is a condition precedent to recovery of extra compensation.

> *Sheyer* v. *Pinkerton Construction Co.*, 59 Atl. 460;
> *Condon* v. *Jersey City*, 43 N. J. L. 452;
> *Van Buskirk* v. *Passaic Board*, 78 N. J. L. 650;
> *Landstra* v. *Bunn*, 81 N. J. L. 680;
> *Headley* v. *Cavileer*, 82 N. J. L. 635.

The contract in this case admittedly contained such "no extra without written order" provision.

> "The court early recognizing the beneficial character of such stipulation as tending to prevent trumped up claims for extras and acrimonious disputes between owner and contractor resulting in litigation and loose testimony often running into perjury, endeavored as far as they could to give effect to such provisions * * *."
>
> *Headley* v. *Cavileer*, 82 N. J. L. 635 at 637.

Under such a contract the fact that extra work was done pursuant to a verbal order, even though it be the verbal order of the owner is insufficient.

> *Landstra* v. *Bunn*, *supra*.

And recovery in *quasi* contract or *quantum meruit* cannot be predicated on the doing of additional work and conferring of benefits thereby.

Landstra v. *Bunn, supra,* at 682;
Abbot v. *Gotch,* 13 Md. 314.

It is, of course, settled that the parties to such contract can by subsequent agreement waive the force of such a restrictive clause as to particular items of work.

Headley v. *Cavileer,* 82 N. J. L. 635.

To establish such waiver as to *any* item claimed, the party seeking to avoid the force of such restrictive provision has the burden of showing a *distinct* agreement by the owner that *any such particular item* of extras for which additional compensation is sought, shall be deemed to be an extra, and that the owner definitely agreed to pay extra for it.

Headley v. *Cavileer,* 82 N. J. L. 635.

A verbal order by the owner is not sufficient of itself to constitute a waiver of such restrictive provision so as to subject the owner to liability for work ordered.

Landstra v. *Bunn, supra;*
Headley v. *Cavileer, supra.*

This Court said in *Landstra* v. *Bunn, supra,* at page 682:

> "The ordering of the extra work by the defendant without a written order must not be construed as evincing an intention to alter

> or vary the contract, but rather that such action was to be taken in conformity with its terms."

So, in *Headley* v. *Cavileer,* this Court said, at page 643:

> "* * * Some of the extra work claimed was done by the mere request of the owner and without any specific agreement that it was to be paid for extra. Such items the trial court should have excluded and no doubt would have excluded if the opinion in Landstra v. Bunn had then been published."

A fortiori, a verbal order by the architect, even if he were the agent of the owner, will not have such effect.

> *Van Buskirk* v. *Board of Education,* 78 N. J. L. 650; at 655.

And by the express terms of the contract the architect was not the agent of the owner herein to order changes involving *extra cost* so as to subject the owner to liability to make additional payments therefor. Section 38 of the General Conditions (Ex. D-51, p. 545), provides as to the architect that: "He is the agent of the owner *only* to the extent provided in the contract documents and when in special instances, he is authorized by the owner so to act and in such instances he shall upon request show the contract or written authority," and Article 15, above quoted, specifically limits his authority "to minor changes in the work, not involving extra cost."

And, since the powers of an architect under whose direction a building is erected, are deter-

mined strictly by the contract (*Ferber Construction Co.* v. *Hasbrouck Heights,* 90 N. J. L. 193, at 197), he cannot waive any rights of the owner thereunder nor bind him by acts done in a way other than that prescribed in the contract.

Van Buskirk v. *Board, supra;*
Bradner v. *Roffsell,* 57 N. J. L. 412;
Bond v. *Mayor,* 19 N. J. Eq. 376, at 382.

The rule is thus stated in *Van Buskirk* v. *Board, supra,* at pages 655, 656:

> "All this, it is perceived, related to the conduct of the architect, and the insurmountable obstacle to the admissibility of this evidence as proof of a waiver is that the architect alone could not waive those clauses in the contract which required that any order he might make was to be in writing, and have the written approval of the owner. * * * Even if the restriction had been that no alteration or addition should be done without the written order of the architect, and the requisition of the approval in writing by the owner had been absent from the contract, nevertheless, the architect alone could not have orally altered the terms of the contract, nor have created any obligations binding upon the owner, save in the manner provided by the contract itself."

It is further clear, that on items of work definitely chargeable against the owner as extra work under this contract, the decision of the architect on the value thereof is final and conclusive.

It is settled, that the architect's decisions are final and conclusive and binding on the parties

as to those matters over which the contract gives him jurisdiction.

> *Chism* v. *Schipper,* 51 N. J. L. 1;
> *Welch* v. *Hubschmitt Co.,* 61 N. J. L. 57;
> *Newark* v. *N. J. Asphalt Co.,* 68 N. J. L. 463.

The contract in this case made the architect's decisions as to value of work done final.

Article 15 expressly provided that whether any method therein suggested for determining value or no method suggested was agreed to, the Architect should finally determine the allowance due. There was no testimony that any of the methods of consensual fixation of prices suggested in Article 15 was agreed to; and the Specifications, made part of the Contract, provided that:

> "In determining the value of work executed, the judgment of the architect shall be final." (Ex. D-52, p. 550).

The said provision was, of course, applicable to the extra work alleged to have been performed. As heretofore stated in this brief, Article 3 of the Contract provides that the contract sum shall be subject to "additions"; Article 15 of the general conditions expressly provides that all extra work shall be executed under the conditions of the general contract. And it is settled that where a building contract expressly contemplates alterations and additions during the progress of the work, labor and materials necessary to meet such changes are furnished pursuant to the contract and its provisions are applicable. (See Cases, Point I, *supra.*)

B. Application of the pertinent principles of law to the facts shows the Master's allowances clearly excessive and improper.

1. *The Master's allowances on all items allowed except nine were improperly made by him because of his erroneous conception of the force of the restrictive provision in the contract and his misapplication of the doctrine of waiver.*

The provision in the contract that "no claim for an addition to the contract sum shall be valid" unless a written order was given as therein prescribed is plain and unambiguous. It is settled that there is nothing unjust about such a clause and that it is perfectly proper for an owner to insist on the protection it affords against unworthy claims and non-contemplated additional expense. And where such a clause is engrafted for the owner's protection, it is settled that he shall not be exposed to an additional liability above that undertaken by him when he executed the contract unless he *directly* assumes such liability *with his eyes open,* either by his own written order pursuant to the contract carrying visitation ~~for~~ of additional liability, or by his express oral order of additional work as extra work and his express assumption of liability in an additional amount by his specific agreement to pay an additional sum therefor. He is not however, to be subjected to liability to make additional payments because of the mere performance of additional work; or from a verbal order given by him; and of course, no mere verbal order from the architect will have that effect especially where, as here, the contract expressly limits the authority of the architect to "minor changes *not* involving extra cost."

The Master misconceiving these settled principles, and feeling that the restrictive provision which our courts have pronounced "beneficial" was unjust—"he (complainant) should not be permitted to escape payment for such extra work as was performed" (Master's Report, p. 65)—adopted the rule that, *an oral order by the owner or the architect was sufficient* to constitute a waiver of the restrictive provision and to subject the owner to liability for additional compensation despite non-compliance with such restrictive provision.

Complainant, the interested owner in this case does not seek to make any unjust use of the written order requirement. No written order was produced on most of the forty items. But complainant does not set up non-compliance with the restrictive provision in bar of the forty items set out on Exhibit D-56. He relies on the restrictive provision to prevent being mulcted on claims which he did not order *as extras* and for which he did not agree to pay *additional compensation;* as to those items, however, which he did order to be done as extra work and for which he did assume the obligation of paying additional compensation, he agrees that additional compensation is proper.

Those items complainant testified were:

2—Rock excavation.
5—Deafening apartments and south dividing wall.
13—Rock excavation.
14—Removing partition in Janitor's apartment.
18—Erecting dressing room in electric room.
19—Erecting linen closet in hall.

20—Cutting floors and walls, etc., in Dr. Fischer's office.
33—Furnishing and hanging hardware.
38—Additional plumbing items ordered from Cadel Bros. Inc.

Complainant did not withhold that testimony; he gave it after defendant Vitille had been on the stand, and after he had failed to testify to any specific agreement by complainant to pay additional compensation for any items other than three on the above list to wit, Nos. 2, 5 and 13. Complainant himself supplied the deficiency of proof necessary to sustain the Master's allowances on the above nine items, totaling $4,785.98. Complainant specifically testified, however, that he did not order any other work as extra work; that he did not agree to pay additional compensation for any other work; and that he never authorized Ach, the architect to order any extras, besides those above referred to (p. 425). And no "written order from the owner signed or countersigned by the architect, or written order from the architect stating that the owner has authorized the extra work or change" was produced as to any of the other items. The Master nevertheless made allowances totalling $4,947.28 on the other items.

The Master's failure to distinguish between the two groups of items was error. His ruling that the written order provision was inapplicable was based on unsound premises. We will take them up *seriatim.*

(a) Mr. Vitille testified that all of the extra work was done upon the orders of the owner and the architect "and I believe this to be true" (Master's Report, p. 64).

Even if the statement were true, it would be legally immaterial for it is settled that oral orders

by either the owner or the architect or both are not sufficient to abrogate the force of the written order provision and to impose liability, as heretofore shown. But the statement is not in accord with the facts: Mr. Vitille did not so testify. The facts are that Mr. Bianchi, Vitille's solicitor, attempted to give blanket testimony which was not, however, that the owner *and* architect did the ordering of all the items. After questioning Vitille on a few items, Mr. Bianchi offered the list, Ex. D-56, and, without any stipulation with opposing counsel, stated: "The witness will testify that each of these items of extra work was performed by him and that the prices charged are reasonable prices and that they were ordered by the owner *or* architect" (p. 151). Even if that statement of counsel is a substitute for testimony, without stipulation and although he was not sworn, that catch all statement that all the extras were ordered by one *or* the other, "you guess which", is certainly not testimony that all were ordered by *both.* Bianchi follows his indefinite statement, with the same indefinite questions to his witness Vitille: "Q. And, all is ordered by the architect *or* owner? A. Right. Q. Were there any promises made that *they* would pay for this work? A. Yes" (p. 151). Again it is *either—or;* not *both* or *which one* or which one as to which items. Moreover, Vitille, when given an opportunity on cross examination to testify specifically as to the items, referred only to some of them, (the Master's statement "Mr. Vitille testified as to each item of extra work" [p. 70] is in error), and as to those he did testify to, he expressly negated any conclusion that both ordered all. Thus, as to item of Kalamein sash: "Q. Who ordered that work? A. Mr. Ach, the architect"

(p. 163). Thus, as to item of Furring walls for frigidaires: "Q. Who ordered that? A. The architect. Q. The owner present? A. I don't remember" (p. 157). Finally, the Master himself did not "believe to be true" that all extras were ordered by both and that such order was sufficient to impose liability for he himself disallowed items Nos. 1, 4, 7, 10, 13, 23, 24, 30, 37.

(b) Numerous changes were made at complainant's direction and request; he was, with the exception of two or three weeks when away on vacation, daily in and out of the building, and from said actions, "he *impliedly* gave authority to architect to *order extra work orally* and that he was in and about the building and ratified such orders for extra work, and that the contractors had the right to rely upon the orders given for extra work."

The proposition here stated is completely without merit. Even if the statement of "implied authority" was justified by the facts, the proposition stated is palpably unsound. It is clear that an express oral order by the owner without more will not bind him to liability for extra payment (*Landstra* v. *Bunn, supra*); an oral order by an admittedly expressly appointed agent to order orally, which the architect here was not, could have no greater force than the oral order of the principal. Yet, according to the Master, an oral order by the architect pursuant, not to express, but to *implied* authority, will bind the owner. To state the proposition is to demonstrate its lack of merit. Moreover, the statement of "implied authority to order orally" is without foundation in fact. The contract does not permit such implication but expressly negates it. The record is in

accord. No testimony can be found from defendant Vitille that either the owner or the architect told him that the owner had given the architect authority to order extras orally. The architect gave no such testimony. He stated that a material change, like that in the Dentist's apartment he would not order without the owner's authorization; that was one of the nine items the owner expressly promised to pay extra for. As to the other 31 items, the architect expressly stated, when asked his opinion on them that he disallowed 25 of them; the six he did allow, items 9, 15, 16, 29, 34 and 36, aggregating $507.11, he allowed "because the work was done", without, however, daring to state that the owner authorized him with respect thereto (pp. 288-301). And the owner specifically denied any appointment of the architect to order extras orally in disregard of his contractual rights. Even if the existence of implied authority to *order orally* be conceded arguendo, the oral order thus made would not impose an obligation to pay, as above shown; nor would "ratification", if such existed, of the "order" be an assumption of obligation to pay additional compensation. That the owner was in and out of the building, even if that owner was a builder and recognized extras when he saw them, would not constitute assumption of obligation to pay additional compensation; a fortiori, when the owner was a doctor with conceded lack of builder's or architect's knowledge. And as for the statement that liability should be predicated on the contractor's *reliance* on oral orders given by the architect pursuant to the supposed implied authority, on which they had the "right to rely", in the first place, the contract destroys such supposition of justifiable reliance, for Article 38 of

the contract, specifically provides that the architect's agency for the owner is limited to the extent specified in the contract, and that if he claims authority to act outside those limits, the contractors may demand written authority (Ex. D-51, Art. 38, p. 545) and in the second place, the cases in this state expressly hold that liability will not be predicated even on reliance on express orders of the owner, where no question of implied authorization to the architect to give oral orders is involved (*Landstra* v. *Bunn, supra*).

(c) The equitable principle that "the complainant having received the benefit of this extra work * * *, he should not be permitted to escape payment" therefor (p. 65).

This statement represents clearly the thought underlying the Master's ruling throughout this matter, to wit, that a written order provision in a contract is unjust and oppressive and that it is unfair not to give recovery for work done. But the law is clearly settled, contrary to the Master, that *quantum meruit,* "prevention of unjust enrichment" *quasi* contractual recovery, predicated on the mere doing of work and receipt of benefits, is improper; that justice requires that an owner be not held to obligations beyond what he contemplated and agreed to assume (see cases, *supra,* this point).

(d) The owner is estopped by reason of his actions from raising this question, and by filing his bill in a court of equity and obtaining equitable relief (pp. 63, 64).

But even oral orders admittedly given by an owner do not constitute an estoppel (*Landstra* v. *Bunn, supra*); a *fortiori,* oral orders by the "architect or owner." And as for the filing of his

bill of complaint herein, complainant expressly set up the contractual provision referred to in his bill of complaint (Par. 23, p. 26), and expressly excepted to the introduction of evidence in violation of its terms (p. 145). The inequity of relying on one's contract to prevent imposition is not easily apparent.

The Master's ruling was therefore, plainly erroneous. The contractors could not sustain their burden of avoiding the force of the restrictive provision. The Master did not even apply the legal requirement for avoidance but held oral orders of either the owner or the architect and mere doing of work sufficient. The Master's allowances on the items, excepting only items 2, 5, 13, 14, 18, 19, 20, 33 and 38, aggregating $4,785.98, were improper. Even if it be conceded arguendo that any allowance for extras was proper, despite Point I, *supra,* the Master's allowance of $9,733.27 should be reduced by the sum of $4,947.29 to $4,785.98.

2. *The Master's allowances on a number of items were infected with additional errors, were plainly contrary to the evidence, and were clearly improper.*

For the convenience of the court, these particular items will be set forth and discussed individually. The numbering of items used in the Master's report will be employed herein. Specific testimony was available on each of these items; Architect Ach, using Exhibit D-56 gave testimony as to each item in the claim. The Master in reporting on the claims, employs the numbers used by Ach, and makes reference only to his testimony. The Master disallowed items 1, 4, 7, 10, 13, 23, 24, 30 and 37, relying on Ach's testimony.

His allowances on others, despite uncontradicted proofs, were plainly improper. So far as possible, those affected by common error are grouped.

(a) The following items, while properly allowed as extras, were allowed in excessive amounts, in violation of the contractual provision making the architect's judgment of value of the work done final and binding on the parties:

Item No.	*Item*	*Master's allowance*	*Architect's allowance*	*Amount of excess*
18	Erecting Dressing Room in Electric Room (Ach, p. 292)	$166.98	110.88	56.10
19	Erecting Linen closet in Hall (Ach, p. 293) ..	50.80	27.72	23.08
20	Cutting floors, &c., in Dr. Fischer's apartment (Ach, p. 292)	390.83	172.23	118.50

The Master recognized the conclusiveness of the architect's judgment as to value of work done in reducing the contractor's claim on item No. 13 from $598.95 to $377.00. His failure to apply the rule in the above items was plainly erroneous.

(b) Closely allied with the preceding group, are the following items, of substitutionary work involving no extra cost, where no extra allowance was proper without a compensating offset. Where a door is required by the plans to be placed in room "A", and a change is made, omitting that door from room "A", but placing it in room "B", technically, a credit should be given the owner

for the omission in "A" and an offsetting extra to the contractor for the extra in "B", and then only if an express agreement to treat the change as an extra and to pay extra therefor is shown. While the form may be followed, the substance of the transaction is that they are offsetting changes. Thus, on item No. 24 claimed as extra, where a door was installed in a different location, no credit was claimed by the owner for the omission; extra No. 24 in the sum of $33.18 was claimed by the general contractors as an addition; the Master, following the architect's testimony, disallowed the claim (p. 75). The following items represented the same situation, but allowances as extras were made therefor, despite the omission of offsetting credits:

Item No.	*Item*	*Allowance*
12	*Installing Kitchen Maid Cabinet*	$180.97

This was substitutionary work of installing kitchen cabinets furnished and paid for by the owner, done in place of the work of installing kitchen cabinets required by the contract and specifications to be furnished and installed by defendant contractors. Credit was given the owner for the cost of the cabinets not furnished by the contractors, as specified, but furnished by him; no credit was given for the cost of installation of the omitted cabinets. Clearly, as the architect testified, in the absence of an offsetting credit an extra allowance was plainly improper (p. 291).

Item No.	*Item*	*Allowance*
22	*Erecting book case in Doctor's Waiting Room*	$58.08

This was simply the work of erecting a book case in a place not called for in the specifications, in substitution for erecting one in a place as called for thereby. The technical extra claimed was offset by the omission. Architect Ach accordingly disallowed this item (pp. 293, 294). The Master's additional allowance, despite no offsetting credit to the owner, was improper.

28	*Installing Instrument Cases*....	$29.04

This is again the work of installing two instrument cases furnished by the owner, in substitution for the work of installing two instrument cases specified to be furnished and installed by the contractor. The cost of installation was the same, but no offsetting credit given the owner. Ach accordingly disallowed the claim (pp. 297, 298) ; the allowance, in the absence of an offsetting credit to the owner was clearly improper.

31	*Moldings around Kitchen-Maid Cabinets*	$58.08

This item, while not technically in this group, is closely related. The contractors not only did not attempt to sustain the burden of showing this item to be an extra in addition to the

contract but the proof was that it was expressly required by the specification (Ach, p. 299). While kitchen cabinets were furnished by the owner in substitution for those specified to be furnished by the contractors, the moldings required by the specifications to be placed about the cabinets did not change (p. 299). This was, therefore, not even a "substitutionary" extra to be cancelled against an offsetting credit; this was not extra work.

Moreover, not only did none of the items in this group involve extra expense, but there was no evidence that this work was done under "any specific agreement that it was to be paid for extra" (*Headley* v. *Cavileer,* 82 N. J. L. 635, 643).

(c) The following were items of plain imposition by the contractors, not noticed by the Master:

Item No.	*Item*	*Allowance*
39	*Extras on Tile work as per statement of G. M. Crocetti....*	$195.00

This was one of the items the general contractors claimed extra against the owner because of an extra charge against them by a sub-contractor. But sub-contractor Crocetti's own statement showed his charge for this extra work to be $155.00, and not $195 (Ex. D-10, p. 514; Claim of Crocetti, p. 115).

The Master's allowance should be reduced from $195.00 to $155.00.

Item No.	*Item*	*Allowance*
25	*Erecting dressing room in Electric Room*	$50.08

This item is a duplication, included under item #18, discussed above under group (a). For this reason it was disallowed by Architect Ach (p. 294). The Master's allowance therefore is clearly erroneous.

(d) Allowances for the following items were erroneous for a number of reasons: *e.g.* no proof that the work was in addition to that called for in contract and/or no written order produced and/or no proof that an oral order was given by the architect or the owner and/or no proof of any agreement by the owner to pay for the work as an extra and to pay additional compensation therefor. The Master merely took the items, without any proof at all in support and allowed them, or held, as he did in the case of item No. 21: "I have allowed this item for the reason that the architect admits that the work was done" (p. 74), in direct violation of *Headley* v. *Cavileer, supra.*

Item No.	*Item*	*Allowance*
11	*Removing Window Frames in Toilet*	$49.67

No written order for this item was produced; there was no testimony showing that it represented work not called for by contract; there was no testimony that it was ordered by the owner and/or under an express agreement by the owner to treat it as an extra and to pay additional com-

pensation therefor; Architect Ach disallowed it (p. 291). The Master offered no justification for the allowance.

Item No.	*Item*	*Allowance*
17	*Additional Cost of Coal Bin....*	$63.67

This item was for the following work; the coal bin was improperly constructed by the contractors so that it covered the Public Service and Water Company Meters; on complaint of said companies, the contractors made a passageway to said meters. The architect disallowed the item (p. 292). No testimony was offered to charge the complainant owner therefor; no written order was produced; no oral order from him which in itself would be insufficient to charge him (Landstra v. Bunn, *supra*), was shown nor was any agreement shown by him to pay any additional compensation. The Master's allowance was without any justification and without any comment.

21	*Erecting Partition around Frigidaire*	$14.52

The Master allowed this item on this reasoning: "I have allowed this item for the reason that the architect admits that the work was done" (p. 74). The allowance was clearly improper. No written order was produced therefor; there was no proof

that it was ordered by the owner under a specific agreement to pay additional compensation therefor; it was apparently ordered by the Janitor (p. 293). It is settled that the mere doing of the work does not justify compensation—the allowance of this item violates the rule of Headley v. Cavileer, 82 N. J. L. 635 and Landstra v. Bunn, 81 N. J. L. 680.

Item No.	*Item*	*Allowance*
26	*Building bench for Screens*.....	$21.78

Any allowance for this item was improper, for there was no written order; no proof that it was ordered by the owner and/or under an agreement to pay for it as an extra. The architect disallowed it (p. 295); the Master advanced no comment on this allowance.

Even if it be conceded arguendo that any allowance was proper on this item, the amount allowed was excessive in view of the architect's judgment that the value of this work was *$10.89* (p. 295).

27	*Erecting dark room in cellar*...	$101.64

Any allowance for this item was likewise improper, for there was here also no written order; nor testimony that it was ordered by the owner and/or under an agreement to pay an additional sum for it as an extra. The contractor told the architect it was ordered by the man who was

selling the x-ray apparatus; it was all done while complainant was away on vacation (p. 295). Any allowance here was in direct violation of Headley v. Cavileer, *supra.*

Even if it be conceded arguendo that any allowance was proper on this item, the amount allowed was excessive, in view of the architect's judgment that the value of the work was $50.82 (p. 295).

Item No.	*Item*	*Allowance*
34	*Extras on outside stucco per contract of Edward De Forge, Inc.*	$400.00

This was clearly not an extra but was condemned work. Article 19 of the Contract provides:

> "The contractor shall promptly remove from the premises all materials condemned by the Architect as failing to conform to the contract whether incorporated in the work or not, and the Contractor shall promptly replace and re-execute his own work in accordance with the contract and without expense to the owner * * *" (Ex. D-51, p. 532).

Architect Ach condemned the stucco work already done as imperfect and ordered it done over because of such condemnation; Contractor Vitille had it done over by De Forge who charged Vitille $400.00. Ach disallowed this extra claim because condemned work was required by the

contract to be replaced at contractor's expense (p. 299). The Master says "The architect allowed it (this claim) for one-half * * *" (p. 76). The Master, however, is in error. The Architect testified that defendant Vitille told him that complainant had agreed with him to pay one-half of De Forge's $400.00 charge, to wit, $200.00, and that *if* such agreement was made, defendant should be allowed $200.00; but that he (Ach) personally knew nothing about such an agreement, and so far as he was concerned, there should be *no* allowance (p. 299). Ach therefore did not allow the claim for one-half; his testimony as to the agreement was hearsay; even if complainant had made such a promise, it was without consideration, for defendant Vitille was legally obligated to replace condemned work at his own expense. There was no contradiction of Ach's testimony. The Master's allowance of this item was plainly improper.

Item No.	*Item*	*Allowance*
35	*Extras for Mill work — North Hudson Mfg. Co.*	$775.43

The allowance of this item was in violation of every applicable rule. Nothing was shown in support of this item beyond the bare statement in Exhibit D-56: "Extras for millwork as per North Hudson Invoices —$775.43." No attempt was made to

show that any items embraced in this claim were in addition to and outside of the contract; no proof was offered as to what "extras for millwork as per North Hudson Invoices —$775.43" included. The architect did not order the item and did not know what it was for (pp. 299, 300). No written order of the owner was shown; no testimony was offered of any order by complainant to treat this item as extra work or to pay for it as extra.

A search of the record discloses that North Hudson Mfg. Co., introduced in evidence its invoices to the general contractors, in support of its stop notice claim as subcontractor on the *job* (Ex. D-23, p. 516). The invoice addressed to Vitille, *et al.* reads:

"As per mill contract
#1438 .....$6,300.00
Extras for Contractors 889.25
Extras not in Contract 592.38

$7,781.63"

Attached to the invoice is a list of a number of items under different dates totalling $592.38.

There is no extra item anywhere on the bill of North Hudson to defendant contractors in the sum of $775.43. And even if there had been the mere fact that as between subcontractor and general contractors, items were furnished in addition to

their subcontract affords no proof that such items were or were not included in the contract and specifications in suit.

There was no proof of any kind to support this allowance by the Master, which was in violation not merely of Headley v. Cavileer, but of elementary principles of proof.

Item No.	*Item*	*Allowance*
40	*Extras on Iron Work—Foscale Iron Works*	$159.27

This item was plainly not an extra. The architect testified that this item was for elevator guides that were called for in the specifications (p. 301). But even if it be conceded arguendo that it was an extra, no order from the owner for any such work as extra work was shown, nor any agreement by the owner to pay any sum in addition, therefor.

(e) The following items are cross charges in connection with items of omitted work. The Master erroneously allowed these items, while disallowing offsetting omitted item credits. The Vice Chancellor's allowance of the offsetting credits are considered under Part II of this brief.

Item No.	*Item*	*Allowance*
3	*White Cement*	$191.25

This item was allowed without any comment by the Master in disregard of the testimony of Architect Ach that there was no difference in cost between white cement furnished and

buff mortar specified, for which it was substituted (p. 288) and in violation of the rule that the Architect's judgment on value of work done is final and binding on the parties. A partially offsetting credit charge in the sum of $100.00 was allowed by the Vice Chancellor (See Part II this Brief, Item 1-C). The architect's judgment that the value of the one completely offsets the other requires an additional deduction from this allowance in the sum of $91.25.

Item No.	*Item*	*Allowance*
10	*Furnished Flax Linum*	$730.48

This item is discussed under Part II, Point I, Item 1-G. The material furnished here was in substitution for part of the gypsum block specified and omitted. No extra for this item was of course proper without allowance of credit for the gypsum block omitted.

Summary of Allowances for Extras under Point II, B, 1.

Master's allowances	$9,733.27	
Disallowed by Vice-Chancellor (#6)	363.00	
Present Allowance		$9,370.27
Amount erroneously allowed under General Objection (II, B, 1)		4,947.29
Amount allowable for extras subject to deductions under Point III, if Point I held unsound		$4,785.98

Under Point II, B, 1.

Present Allowance		$9,370.27
Amount erroneously allowed under Specific objections (II, B, 2)		
#18	$ 56.10	
#19	23.08	
#20	118.50	
#12	180.97	
#22	58.08	
#28	29.04	
#31	58.08	
#39	40.00	
#25	50.08	
#11	49.67	
#17	63.67	
#21	14.52	
#26	21.78	
#27	101.64	
#34	400.00	
#35	775.43	
#40	159.27	
# 3	191.25	
#10	730.48	3,121.64
Amount allowable for extras subject to deductions under Point III, if Point I held unsound and Point II, B, 1, held unsound		$6,248.63

POINT III.

The Vice Chancellor erred in failing to sustain complainant's exceptions to credits given by the Master for omitted, defective, inferior and/or cheaper work and materials and in failing to sustain the exceptions to the Master's failure to give proper credits and in failing to give proper credits for a number of such items of omitted, defective, inferior and/or cheaper work and materials.

If it be held that Point I is unsound, and that recovery is to be allowed as if the architect's certificate had been issued, deductions for omissions, etc., are of course required.

Citations are not needed for the proposition that the owner is entitled to credit for and to set off against any unexpended balance due on contract or for extra work the amount of any incomplete, omitted, or inferior substituted work and materials. The Master made that general finding (p. 65), and no exceptions thereto were taken by any party.

In the application of this settled principle to the facts, the Master fell into error. Testimony was given by experts Shilowitz and Scheidecker for the owner as to a number of items of defective, omitted, and/or inferior work and materials, most of which are set out and numbered, with the values assigned by Shilowitz to each, on Exhibit C-3 (p. 597). Architect Ach testified that all the items set out on Exhibit C-3 represented deviations from plans and specifications constituting omitted, defective and inferior work and materials (p. 273). Defendant Vitille and his expert Keeler gave testimony contra as to some of the

items of credit so claimed. The Master in considering the testimony of the witnesses, marked that of Scheidecker for special commendation, saying as to him: "Mr. Scheidecker was, to my mind, a most fair witness and I have placed great reliance on his testimony. I feel that his testimony was not biased as is usually the case in the testimony of experts" (p. 67).

The Master made allowances by way of credit for seventeen different items of omitted, defective or inferior substitutionary work and materials, to wit, items No. 1-h, 2-a, 2-c, 2-e, 2-h, 3-a, 3-c, 3-f, 4-b, 5-b, 9-b, 10-a, 10-b, 10-c, 11, 11-x, x (Ex. C-3, p. 597; Master's Report, pp. 69, 70). The Vice-Chancellor sustained exceptions to the Master's failure to give any credit for ten other items, to wit: Items No. 1-a, 1-c, 1-g, 1-i, 2(b), 3-a, 4-a, 6-c, 8-a and b, 9-a, and to his failure to give credit in proper amounts on two of the items allowed by the Master, to wit: items No. 2-a and 9-b (p. 104).

The Vice Chancellor erred in not sustaining exceptions; to the Master's failure to make any allowance on certain other items not allowed by either; to the Master's failure to give credit in sufficient amount on certain items allowed by the Master; and in his giving insufficiently additional credits on certain other items allowed by the Master in insufficient amounts.

While there was some testimony to support the Master's disallowance of certain items of credit claimed, the proofs on the items herein complained of show the disposition made thereof plainly erroneous. Each of these items was definitely shown to cover work and materials entirely omitted, or work and materials substituted for but inferior to and cheaper than that specified. As to some, a claim of consensual change was as-

serted by defendants; as to others, there was no pretense of knowledge or consent to such defects, omissions, or inferior substitutions.

The Master did not specifically report on the individual items disallowed, but made these general statements to justify his disallowance:

(a) As to many items of discrepancy between materials installed and those specified, the materials installed, while *cheaper* and *inferior,* approximated what was usual in apartment houses of the size and character of the building in question. Thus, the Master says, Scheidecker testified that "the use of cabinet trim in a building of this nature was unusual" (Master's Report, p. 67). Cabinet trim, thus referred to by the Master by way of example, was specified for this building; ordinary mill trim was installed.

It seems obvious that the fact that it is usual to install an inferior product, constitutes neither justification for its use in place of a superior product specified, nor for disallowance of a credit for the deviation. The contract price fixed is based on the actual products specified; where no option is given to contractor to substitute materials "just as good", even the use of a substitute of *equal* value is an unauthorized deviation; certainly use of a substitute *not* "just as good", but "which will in general serve the purpose" is not merely unauthorized but warrants a credit for the deficiency. Where a mahogany table is specified, a stained redwood table would probably "serve the purpose"; it might even be usual to use the cheaper redwood table which serves the same general purpose; but certainly the owner should not be forced to pay the higher price of a mahogany table to the contractor for furnishing the

cheaper and inferior redwood table. Indeed, on the very item of cabinet trim used by the Master by way of example, there was unanimity of testimony that cabinet trim specified is much superior to and is much more expensive than the ordinary mill trim substituted. The fact that it is not usual to install the superior and expensive cabinet trim in North Jersey apartment houses is no reason for mulcting the owner for a payment therefor, while allowing the contractor to give him the cheaper and inferior mill trim. And the Master himself, despite his alleged statement of justification, gave a credit to the owner for this inferior substitution (Item 2(a), Ex. C-3; Master's Report, p. 69), although the credit was insufficient in amount.

(b) As to many other items, "I do not believe that the complainant is entitled to credit for a large number of items of alleged omitted materials which in most instances *were substituted* by other materials, in pursuance with the orders and directions of both the owner and the architect" (Master's Report, p. 68). But the refusal of a credit for substitution of cheaper materials for the reason given is in direct disregard of the contract provisions. Even if cheapening changes were made by the express direction of the owner, the contract requires deductions therefor. Article 3 of the Contract fixes the contract price at $98,000 but specifically provides, that the price fixed is "subject to additions and deductions", and Article 15 of the General Conditions of the Contract expressly provides that the owner may make changes altering, adding to or deducting from the work, the contract price to be adjusted accordingly (Ex. D-51, p. 529). The Master him-

self recognized and applied said contract requirement. So, as to item No. 11, where the cheaper Gorenson dumbwaiters were substituted by consent for the Sedgwick dumbwaiters specified, the Master gave a credit for the difference in the sum of $100.00 (M. R. P. 69). So in item 4(b), where Kalamein doors were substituted for the iron doors specified, the Master similarly gave credit for the difference. His refusal of credit on other items for the reason stated was clearly improper.

Not only are the two general reasons urged insufficient to justify denial of credits on the items hereinafter stated but neither reason is pertinent at all to a number of said items. The items objected to will be taken up *seriatim*. Where items are numbered on Ex. C-3, those numbers are used herein; otherwise, arbitrary numbers are assigned.

A. Items for which no allowance was given by Master.

1(b) *Inferior face brick on Exterior walls—$210.00.*

The specifications provided in part that: "Front brickwork shall be Claytex, Factory 5, Colonial laid in Flemish bond * * *" (Ex. D-52, p. 551). Scheidecker testified that the brick furnished and installed was not Claytex Colonial (pp. 478, 485, 486), but a rough cut brick substituted instead (pp. 485, 486). He set forth his calculations snowing the value of the difference to be $210 (p. 486).

The Master refused to give credit for the substitution of the cheaper material merely because, as he found, after execution of the contract, the

contractors were shown another building and requested to use the same kind of face brick there used, and they did substitute that cheaper brick. He said: "Mr. Scheidecker testified to a difference between the face brick used in the building and that specified, whereas, I am convinced that the contractors were directed to use a face brick similar to that used in Tudor Hall, an apartment house erected in the City of Englewood, and that in fact Mr. Vitille was taken up to see the kind of face brick there used. Under these circumstances I do not believe that the complainant is entitled to credit for a large number of the items of alleged omitted materials which in most instances were substituted by other materials, in pursuance with the orders and directions of both the owner and architect" (p. 68). But even if the finding of substitution by consent was justified, the owner is nevertheless entitled to credit for the difference resulting from the substitution as above noted. Article 15 of the Contract expressly provides that the owner may make changes altering, adding to or deducting from the work, the contract sum to be adjusted accordingly (Ex. D-51, p. 529). The Master's disallowance was therefore plainly improper, for whether the brick used was "similar to that used in Tudor Hall", or not, since it is cheaper than the brick specified, deduction from the contract price was required, and disallowance to the owner of such deduction or credit in the sum of $210 was error.

1(f) *Lath in Shafts and plaster omitted $250.00.*

The specifications required wood lathe in dumbwaiter shaft and elevator shaft and plaster in both (Ex. D-52, pp. 553, 554). Lathe and plaster

were omitted in the dumbwaiter shaft; wood lathe was omitted from the elevator shaft, the plaster being applied directly to the block wall. The omission was testified to by Shilowitz (p. 197) and by Architect Ach (p. 273); it was admitted by Vitille and his expert, Keeler (pp. 336, 337). Testimony was given by Shilowitz and Keeler that it was not usual to use wooden lath in the shafts. Disallowance of a credit for this reason overlooks the fact that the omission resulted in a saving to the contractor, and that credit should be given to the owner to that extent.

2-f *Platforms for Laundry omitted* $50.00

The specifications provide that contractors shall "furnish at laundry tubs 2 x 4″ studs and 2 x 7/8″ flooring spaced 1″ apart" (Ex. D-52, p. 557). These platforms required were admittedly not furnished. No excuse for this omission was advanced. Complainant's witness Shilowitz valued the omission at $50 (p. 198); Scheidecker, at $25 (p. 497). Defendant's witness Keeler valued the omission at $15 (p. 347). The Master's failure to make any allowance on this item was clearly erroneous.

(2d) *Oak floor, not as specified* $500.00

The specifications provided for flooring of "first quality selected white oak" (Ex. D-52, p. 556). Shilowitz testified that the flooring furnished was only about one-third clear oak (p. 197). Scheidecker testified that the flooring was a mixture of white and red oak, mostly red (p. 481). The difference in value was computed by Shilowitz as $500 (p. 197) and by Scheidecker as between $400 and $500 (p. 497). On cross ex-

amination, Scheidecker testified that the flooring installed was good flooring, but that the flooring specified was more expensive, simply because of the color—white oak being more expensive (p. 510). The testimony of witness Keeler, for the defendants, while apparently intended to be, was actually *not* contradictory but was in accord. Keeler testified that "the specifications call for No. 1 quality white oak" (p. 345). He testified he didn't know of any such grade, that the best grade of white oak today is first grade, selected for color, and that the next grade, is known as first grade; that the cheaper first grade is installed in the building and the more expensive selected white oak is not so installed (pp. 345, 346). Keeler, failing to observe that the specifications called for *selected* white oak, testified that the flooring installed was according to specifications which he stated "called for No. 1 quality white oak" (p. 345). The specifications, however, plainly require "selected" white oak. Defendant's expert Keeler himself admitted, therefore, that selected white oak flooring which was specified, was not installed and that selected white oak is more expensive than that installed.

There was no contradiction of the testimony that the difference in value was $500.00. The Master's failure to make the allowance herein, was plainly erroneous.

2-x *Mortar joints rough cut, instead of struck as specified* $350.00

The specifications under "Brick work" expressly require that all mortar joints must be struck (Ex. D-52, p. 551). Expert Scheidecker testified that the joints as installed were "rough cut", instead of "struck" (pp. 478, 486), that this was a seri-

ous deviation and omission from the specification (p. 478), that it costs $5.00 a thousand more to strike, and that the value of the deviation and omission by calculation was $350.00 (p. 486).

There was no contradiction by any one of this deviation and omission; there was not even, as to this item, testimony of consensual substitution. The Master's failure to allow credit for this item was plainly improper.

3-b *Marble Cheeks in Vestibule omitted*.. $250.00

The marble cheek pieces required by plans and specifications to be installed in vestibule were omitted; the omission was admitted by Vitille (p. 181) and by his expert Keeler (p. 389). The witness Shilowitz testified the value of the omission was $250 (p. 198). There was no contradiction of his testimony. The Master's failure to give the required credit on this item was plainly erroneous.

5(a) *Dumbwaiter doors to be sliding; instead of self-closing on hinges* $150.00

The specifications required installation of double-sliding dumbwaiter doors (Ex. D-52, p. 555). Vitille substituted hinged doors (pp. 182, 199, 200, 499). Shilowitz testified that the difference in value was $150 (pp. 199, 200). Scheidecker testified that the difference in value between the two, was $15 or $20 a door, or $250 (p. 499). No contradictory value was fixed.

The only defense to this item was the claim of Vitille that the substitution of hinged doors for sliding doors was made with the architect's consent (p. 182). But even if that claim were true, it would not make disallowance of credit in the

amount of the substitution difference proper. Omissions *not* consented to require credits to the owner therefor—the Master so ruled; the contract expressly contemplates changes *by* consent and deductions from the contract price therefor. The Master's disallowance of this item was clearly improper.

11-y *Six inch baseboard installed instead of ten inch base specified* $460.00

The specifications provide for 10″ base throughout (Ex. D-52, p. 556); a six inch base was substituted (pp. 292, 498). There was no denial of the substitution. Scheidecker testified that the value of the difference was $460 (p. 498). Keeler testified that the difference between 6″ base and 10″ base was 2¢ a foot for the cost of material, or a total for 5,000 feet, of $100.00 (p. 402). The Master erred in failing to make any allowance on this item.

B. Items on which Master gave insufficient credit.

Item 5(b) *21 Kalamein Doors to be reset* $300.00

The Master allowed $150 credit on this item. His allowance was plainly inadequate.

All the experts agreed that the kalamein doors were defective and improperly installed and would have to be returned to the factory for correction. Shilowitz and Scheidecker both testified that the cost of correction was $300 (pp. 200, 252, 253; pp. 481, 500). Shilowitz and Scheidecker disagreed as to values on some items; but on this item, there was complete unanimity of judgment. No attempt was made to fix a contradictory value,

or to contradict the judgment given. The Master seems to have arbitrarily cut the figure in half. An additional credit of $150 on this claim is plainly required.

11-x *No grounds-base picture wall panels, window trim—10¢ per lineal foot*...$1,200.00

The Master allowed $114. The allowance was painly inadequate and erroneous.

The specifications expressly required ½" spruce grounds for all walls for base, picture panels, wall panels, etc. (Ex. D-52, p. 556, p. 202, p. 479). There was no denial that the specified grounds were omitted *throughout the building.*

Shilowitz testified that grounds cost 10¢ a lineal foot, that there was an average of 200 feet a room, and that the total value of the omission was about $1,200 (p. 202).

Scheidecker testified that the omission was total throughout the building, and was a very costly omission. When questioned on value, he likewise testified that the grounds were worth 10¢ per lineal foot (p. 497). This colloquy then occured:

> "Q. Now *assuming* there are 1400 lineal feet what would you say the total difference would be?
>
> A. $114.00" (p. 497).

The Master allowed $114.00, relying on the amount thus stated by Scheidecker in answer to the *hypothetical* question put to him. Acceptance of that answer to *hypothetical* question as the actual value of the *total* omission was plainly erroneous.

Shilowitz testified that the grounds were omitted from each room in the five story building; that there were an average of 200 feet in each room or a total of 12,000 omitted feet at 10¢ a lineal foot, making a total sum of $1,200. There was no contradiction of his figures by Scheidecker. Scheidecker agreed that the grounds were omitted from each room in the building and that they were worth 10¢ a lineal foot. He was not asked and accordingly did *not* state the *total number* of lineal feet omitted. He was asked and did state the value of 1,140 lineal feet of grounds. Scheidecker's answer of $114.00 to a hypothetical question assuming only 1,140 lineal feet was of course proper. That the examiner's assumption of the 1,140 lineal feet for the sixty room five story apartment building in question was unwarranted, though perhaps an inadvertent dropping of a zero from an intended assumption of 11,400 lineal feet, is obvious. Scheidecker's testimony shows plainly that the value of the total omission was in his opinion no mere $114 for he testified at page 479:

> "A. (Fifth Omission) Another item in the carpentry work, grounds are specified and apply to all walls for picture molding, panel molding and everywhere where trim is to be applied to the walls. In my investigation I found *there were no grounds ever put anywhere in the building.* That is the cause of the trim work and panel walls not being in true line and the plaster walls not being straight. If grounds were installed the plasterer has a method of scrowling the walls, and if they are not installed, he's just guessing at it. *It would cost considerable more money to put in grounds on this job.*"

And in any event the assumption was only an assumption, without any probative force. Shilowitz's testimony of an omission of 12,000 lineal feet was in accordance with the size of the building; his testimony is supported by Scheidecker; there is no contradiction of either their testimony as to the omission or the value thereof. The Master's allowance of $114.00 was plainly inadequate, an allowance of $1,200.00 should have been made, and correction of the Master's error by an additional credit in the sum of $1,086.00 is required by the proofs.

C. Items on which Master agreed credit was proper but gave insufficient credit and the Vice-Chancellor gave insufficient additional credit.

2(a) *Cabinet Trim Omitted* $1,750.00

The specifications required cabinet trim to be installed throughout the building (Keeler, p. 342; Shilowitz, p. 197; Scheidecker, pp. 478, 479; Ach, p. 273). All the witnesses agreed that cabinet trim was not installed, but ordinary mill trim was substituted. So Keeler, defendant's expert, admitted that "The trim installed in the building does not comply with the plans or specifications." "The specifications called for cabinet trim and the trim finished was a mill trim" (p. 370). So Scheidecker testified at pages 478, 479:

> "Third Omission is a big item and is the mill work in the job. Specification calls for cabinet trim throughout the entire building. There is mill work in there, bought from an ordinary mill, cut on the job, while cabinet work is made in a cabinet shop and not in a

> mill, and comes to the job all assembled, glued, mitred. There should be absolutely no handling on the job. That is specified."

The Master allowed the sum of Two Hundred Sixty-seven ($267.00) Dollars for this omission. His allowance was clearly inadequate.

The only testimony which could possibly support that figure was that of the contractor's witness Keeler, who testified as follows:

> "Q. What difference is there between the cost of putting in trim that is in this building and the cabinet trim that is specified in the specifications?
>
> A. Without the addition of any allowances for overhead or profit, $260. That's the unit" (p. 343).

This was the extent of the testimony adduced by the contractors as to value. What the witness meant by "That's the unit" is conjectural. No attempt was made to explain the statement or to justify the figure.

As opposed to the guess that Keeler's figure of Two hundred sixty ($260.00) Dollars for "the unit" was intended to cover the entire omission, there was the testimony of Shilowitz and Ach who agreed that the reasonable value of the omission was at least One thousand seven hundred fifty ($1,750.00) Dollars, and the testimony of Sheidecker, whom the Master said "was to my mind, a most fair witness and I have placed great reliance upon his testimony. I feel that his testimony was not biased as is usually the case in the testimony of experts" (p. 67) who testified that the difference in value was between Fifteen

hundred ($1,500.00) Dollars and Two thousand ($2,000) Dollars, which he described as a "very reasonable allowance" (p. 492).

Scheidecker and Shilowitz gave detailed testimony as to the difference between cabinet trim and the mill trim cut on the job which was substituted therefor, and both testified that cabinet trim was much more expensive and that the difference in value was considerable. And defendant's expert, Keeler, in a portion of the testimony omitted from defendant-appellant's state of the case likewise testified that cabinet trim is superior to the ordinary mill trim which was used on the job and that cabinet trim is much more expensive than mill trim; that in the DeWitt Clinton Hotel which he constructed, he only used cabinet trim in the foyers (pp. 369, 370).

The rejection of the clear detailed testimony of Scheidecker, supported by the testimony of two other experts, and by Keeler's own testimony, for the ambiguous statement that the saving to the contractors for "the unit" was Two hundred sixty ($260.00) Dollars, was improper, and the Master's allowance of Two hundred sixty-seven ($267.00) Dollars, a figure given by no one, was plainly inadequate. The Vice-Chancellor allowed $750. Certainly the testimony supported said allowance as not excessive; but the proofs were clear that the actual value of the difference was $1,750. No reason suggests itself for denying to the proofs their merited force. The allowance of $750 made was inadequate; additional credit should be given complainant on this item in the sum of $1,000.

9(b) *Roofing and Sheet Metal Work. The roof is not a bonded Barrett roof as called for in specifications* $1,500.00

This was a case of deliberate violation of the contract requirements. The Master admitted the unauthorized deviation; the credit given by him was grossly inadequate and was based on an erroneous theory of damages. The Vice-Chancellor's additional allowance was insufficient in amount.

The specifications provide that:

> "The roof shall be applied by a roofing contractor approved by The Barrett Company. He shall furnish The Barrett Company's Surety Bond Guaranty issued by the U. S. Fidelity & Guaranty Co. of Baltimore, covering a period of twenty years from date of completion" (Ex. D-52, p. 555).

The roofer, Dieffenbach, who was given the subcontract by the defendant general contractor, admitted that he was not a licensed Bonded Barrett roofer, and that he did not furnish a Bonded Barrett roof (p. 117). Defendant general contractor, in response to the question: "Q. Did you construct a Barrett roof and furnish the bond?", quaintly answered "No, that's up to the roofing contractor" (p. 186).

No claim was made that the owner waived the requirement of a Bonded Barrett roof; the substituted work, it was admitted, was done in direct violation of the express terms of the contract.

The testimony clearly shows that the roof installed was defective. Architect Ach testified that the roof has been leaking for a couple of years (p. 316), that he was in the apartment a number of times and saw the damage done (p. 316), but

that the bond has never been produced (p. 283). The owner testified that there was hardly a time when the roof did not leak after a heavy rain, that there was continual leakage, that he lost tenants, had to renovate apartments and to make concessions in the rent aggregating more than $1,000; that he paid for repairs to the roof and the apartments damaged by leakage; that he had to refinish furniture damaged by leakage (p. 427).

Contractor Vitille himself testified that the roof was defective. Vitille admitted that leaks appeared around the bulkhead and that when he made tests by throwing water against the bulkhead, the water went through and damaged the ceilings and the rooms below (p. 125). He further testified that the roof leaked "every time it was raining" and that both he and the architect gave "plenty notice" to Dieffenbach, the roofer, to make repairs (p. 127). Indeed, the roofer, a stop notice claimant, conceded to defendant general contractor at the trial, a credit of One hundred twenty-five ($125.00) Dollars for defects in the roof which the defendant contractor had repaired at his own expense (p. 127). Scheidecker testified that if a Barrett Bonded Roof had been installed and bond issued, and the roof nevertheless leaked, the bond would have been made good (p. 503).

The failure to install a Bonded Barrett Roof and to furnish a Barrett Bond guaranteed by the U. S. Fidelity & Guaranty Co. was, of course, a breach of contract. The testimony clearly shows the impossibility of procuring a bond after the construction of a roof by an unlicensed roofer.

Testimony was offered that the cost of the bond issued is included in the price of a Bonded Barrett Roof, and that the additional cost so included

would be about Ninety ($90.00) Dollars on this roof job. The Master allowed Ninety ($90.00) Dollars to compensate the owner for what would have been the cost to a Bonded Barrett roofer of a bond from the Barrett people guaranteeing the roof for twenty years if the now non-procurable bond had been procured.

Obviously, the allowance made by the Master was inadequate. The testimony was clear that the roof installed was defective, and had been a constantly consistent source of trouble and expense since its installation, already causing a very considerable monetary loss to complainant. The Ninety ($90.00) Dollars credit was certainly not compensation for the defects or for the damage done.

And in any case, the allowance made ignores the settled applicable rule of damages. Complainant contends that no balance at all is due to the defendant contractors under the contract because they did not fully complete their contract and were unable to obtain and produce an architect's certificate, and has heretofore argued this point. The Master and Vice-Chancellor have both proceeded on the assumption that the contract, while not fully performed, was substantially performed, and that the withholding by the architect of final certificate was fraudulent. But the law is clear that where recovery is sought by a contractor on the allegation of substantial performance, deductions to the owner are required from the agreed contract price sufficient in amount to make good the defects and deficiencies.

Dyer v. *Lentz,* 76 N. J. L. 204, 206;
Porter Screen Mfg. Co. v. *United Contractors,* 80 N. J. L. 115;

Anderson v. *Odd Fellows Hall Association,* 84 N. J. L. 176; rev'd on another point; 86 N. J. L. 71.

"While the substantial completion of the work gave the right to recover, it did not give the right to recover the full amount of the contract price, but only to recover that amount *subject to a deduction of an amount sufficient to make the completion not merely substantial, but entire.*"

Porter Screen Mfg. Co. v. *United Contractors, supra,* at page 116.

An allowance of Ninety ($90.00) Dollars is not sufficient to make the completion "entire"; it is clearly not sufficient to make good the deficiency herein. The owner bargained for a Bonded Barrett Roof with a Barrett, U. S. Fidelity & Guaranty Co. surety company bond for twenty years. He got a Dieffenbach roof and no bond. The fact that it would only have cost a Bonded Barrett roofer Ninety ($90.00) Dollars to get a bond is immaterial; the owner cannot for Ninety ($90.00) Dollars get a Bonded Barrett Roof, nor can he get the Barrett, U. S. Fidelity & Guaranty Co. bond for twenty years. The only way the omission of a Bonded Barrett Roof and a Barrett Surety Company guaranty for twenty years can be corrected is by installing and paying for the same. Ninety ($90.00) Dollars won't do it. It was admitted by all the experts that the value thereof is at least the sum of Fifteen hundred ($1500.00) Dollars. The Master's allowance of Ninety ($90.00) Dollars was not only insufficient to cover the actual defects in the roof as installed, which for eighteen months after its erection, constantly leaked and caused damage and expense to

the owner exceeding One thousand ($1,000) Dollars, but was predicated on an erroneous theory of damages. The Vice-Chancellor's allowance of Five hundred ($500.00) Dollars is at least not excessive, but is likewise inadequate.

The uncontradicted proofs required an allowance of $1,500 to make good the deficiency—"to make the completion not merely substantial, but entire." That allowance should have been made. An allowance of $1,000 in addition to that heretofore given on this item is required.

Summary of Credits for Omissions and Defects.

Allowed by Master	$3,022.00
Allowed by Vice Chancellor	6,295.20
Additional credits required under Point III:	
Item 1(b)	$210.00
Item 1(f)	250.00
Item 2(f)	50.00
Item 2(d)	500.00
Item 2(x)	350.00
Item 3(b)	250.00
Item 5(a)	150.00
Item 11(y)	460.00
Item 5(b)	150.00
Item 11(x)	1,086.00
Item 2(a)	1,000.00
Item 9(b)	1,000.00
	$ 5,456.00

Total credits required to the owner if Point I is to be disregarded, and recovery to be given nevertheless for contract price including extras less credits for omissions and deviations $14,773.20

COMPLETE SUMMARY OF BALANCE DUE IF POINT I IS TO BE DISREGARDED.

(A) Under Point II, B, 1.

Contract Price Fixed		$98,000.00
Amount of Extras		
Allowed		
By Master	$9,733.27	
Disallowed		
By Vice Chancellor..	$ 363.00	
Total Allowed	$9,370.27	
Excessive as herein (II, B, 1)	4,947.29	
Amount Allowable	$4,785.98	
		4,785.98
		$102,785.98
Credits:		
Amount Paid under Contract	$84,190.20	
Credits allowed by Master	3,022.00	
Credits allowed by Vice Chancellor	6,295.20	
Credits herein claimed under III	5,456.00	
Total Credits	$98,963.40	
		98,963.40
Balance due from Complainant...		$3,822.58

(B) Under Point II, B, 2.

Contract Price Fixed		$ 98,000.00
Amount of Extras		
Allowed:		
By Master .....$	9,733.27	
Disallowed by Vice Chancellor	363.00	
Total allowed .....$	9,370.27	
Excessive as herein claimed (II, B, 2) ..	3,121.64	
Amount allowable .....$	6,248.63	6,248.63
		$104,248.63
Credits:		
Amount Paid under Contract .....$	84,190.20	
Credits allowed by Master	3,022.00	
Credits allowed by Vice Chancellor	6,295.20	
Credits herein claimed under III	5,456.00	
Total Credits .....$	98,963.40	$ 98,963.40
Balance due from Complainant		$ 5,285.23

POINT IV.

The Vice-Chancellor erred in holding complainant chargeable with interest on the full principal balance adjudged due from him.

After all the computations were made, allowances given and credits computed, the Vice-Chancellor found a principal balance due from complainant of $13,862.87. Even if the contention advanced in this brief under Point I is not sustained, the balance so found due is erroneous (see Points II and III). But the Vice-Chancellor awarded interest on said principal balance, from October 1st, 1927, to the date of decree in the sum of $2,698.62, and ruled that interest was properly allowable from October 1, 1927, on any principal balance which should be found due. The Master had similarly awarded interest on the principal balance of $20,521.07 found due by the Master (p. 95); and exceptions to his ruling were duly taken (p. 101, exception 17). The Vice-Chancellor erred in failing to sustain said exception; and he erred in himself making such allowance by way of interest.

In making said ruling the Court said:

> "The owner has had the income of this building; interest should therefore be allowed from October 1, 1927, to the date of the decree, and thereafter on the total therein stated until paid either into court or to the persons entitled" (p. 104).

The Court, in so ruling, felt himself bound by *Agnew* v. *Board of Education of Paterson,* 83 N. J. Eq. 49. In this, however, it is submitted

the learned Vice-Chancellor was in error. That was a case brought under the Municipal Lien Act. Defendant Board of Education admitted that it owed the sum of $29,696.31, the sum involved in said suit, all of the required work having been done. The conflict was solely among subcontractor claimants *inter sese,* and between the contractor and the subcontractors as to who was entitled to the fund, a liquidated sum. The Board was ready to pay this money but was stopped by injunction. The Court held that since the Board had the use of the building, and also the use of the money, liquidated in amount and due and owing by it, interest could properly be allowed on said debt.

That ruling was clearly in accord with the settled rule that interest is allowable on due and liquidated debts or demands from the time they become due and payable.

Warren Bros. Co. v. *Hartford, etc., Co.,* 102 N. J. L. 616.

But where the demand or claim is unliquidated and the damages uncertain—as in the case at bar —it is settled by all the authorities that no interest is allowed or can be allowed until the amount due has been ascertained by judgment or decree and merged in the judgment or decree.

Horst Co. v. *Breidt City Brewing Co.,* 94 N. J. L. 230 (E. & A.);
Philbuck v. *Mundy,* 93 N. J. L. 43;
Spear v. *Van Orden,* 3 N. J. L. 232;
Gray v. *C. R. R. of N. J.,* 157 N. Y. 483;
Goelet v. *Matt J. Ward Co.,* 242 Fed. 65;
Erickson v. *Stockton, etc., R. R.,* 148 Cal. 206, 82 P. 61;

Tryon v. *Clinch,* 44 Cal. App. 629, 186 P. 1042;
Hayden v. *Astoria,* 84 Oreg. 205, 164 P. 729;
Evans v. *Mosely,* 84 Kan. 322, 50 L. R. A. (U. S.) 889.

The rule and its reasons were thus stated by Mr. Justice BLACK, speaking for this Court in *Horst Co.* v. *Breidt City Brewery, supra,* at page 235:

> "* * * interest is not allowed on an unliquidated damage that is not capable of ascertainment by mere computation, for the reason that the person liable does not know what sum he owes; he cannot compute the interest, and therefore he is not in default for not paying (22 Cyc. 1512; 8 R. C. L., p. 533, paragraph 85), not on uncertain and unascertained damages. *Speer* v. *Van Order,* 3 N. J. L. 652; *Philbrick* v. *Mundy,* 93 Id. 43."

The rule is especially applicable to a case where recovery is sought as on *quantum meruit* for building work done and undone.

Zimmerman v. *Loft,* 110 N. Y. Supp. 499;
Fox v. *Davidson,* 87 N. Y. Supp. 603;
Tryon v. *Clinch,* 44 Cal. A. 629, 186 Pac. 1042;
Hayden v. *Astoria,* 84 Oreg. 205, 164 Pac. 729.

The precise question was presented in *Zimmerman* v. *Loft, supra,* where extras were claimed by

the contractor and credits for omissions by the owner. An allowance of interest on the amount found due was held reversible error. Mr. Justice McLaughlin, speaking for a unanimous court, said at p. 502:

> "Nor do I think, under the facts, that Blom was entitled to interest. The amount claimed for extra work was unliquidated, and concededly certain amounts had to be deducted from the contract prices by reason of Blom's failure to complete the contract. Both of these amounts could only be ascertained by proof at the trial. *Excelsior Terra Cotta Co.* v. *Harde,* 90 App. Div. 4, 85 N. Y. S. 732, aff'd, 181 N. Y. 11, 73 N. G. 494, 106 Am. St. Rep. 493; *Fox* v. *Davedson,* 111 App. Div. 174, 97 N. Y. S. 603."

That was the situation *sub judice.* The owner here did not wrongfully or otherwise withhold a balance of $20,521.07 or a balance of $13,862.87 due from him on October 1, 1927; there was no such definite balance due from him, leaving as the only problem merely a dispute as to ownership between the contractor and some one else. What balance was due from him, if any, was completely unascertained and unascertainable. Not merely was any amount due for extras determinable only by proof, as witness the prunings and cuttings herein, but the damage of deviations and omissions required to be deducted, was uncertain—the contractor conceded $400; more than $9,000 was actually allowed. Interest on such uncertain and unascertained damages is not recoverable; no reason suggests itself for departing from the rule.

In this very case, it was directly contemplated that no interest should be allowed. On April 29, 1929, Vice-Chancellor Bentley made an order in this cause fixing the maximum liability of complainant at $30,186.35, and imposing a restraint on stop notice suits on filing bond in that sum (pp. 46, 47, 48). That sum was the total of the principal amounts claimed due from complainant, to wit: balance on eight certificates $3,646.00, plus balance of contract without additions, of $11,884.68, plus additions claimed by way of extras of $14,655.67. "Said sum of $30,186.35, which shall limit the maximum liability of complainant" (p. 48) expressly excluded an allowance for interest; even if the greatest possible amount had been charged by the Master against complainant, it could not have included interest. The bond was filed by complainant in that amount (p. 49); the case was tried under that order and on that basis.

Certainly, in no event should the owner be charged with interest after June 5, 1929, the date of the filing of the bond in the instant action. The rule is settled that "when a bill of interpleader is properly filed, the payment of the money into court, or a proper offer to do so, the stakeholder being at all times ready to do so, stops the running of interest." 33 C. J. 467. And the order of Vice-Chancellor Bentley of October 15, 1929, expressly recites that complainant's bill of complaint was properly brought (p. 52).

The hands of the contractors were not so "lily white" in this case that a penalty should be imposed on the owner on principles of "justice" for wrongful detention of a debt which was not a debt and which he could not have wrongfully detained until after determination was made of what balance was due. The allowance of interest made

was not required by any authority, but was in violation not merely of the "rule of this case" but of the rules settled by the authorities, and was, it is submitted erroneous.

POINT V.

The Court erred in denying costs to complainant and in requiring complainant to pay one-half of fee of Two thousand ($2,000.00) Dollars, allowed to Harry Lane, Special Master.

The Vice-Chancellor denied costs to complainant and required complainant to bear one-half of Master's allowance, saying:

> "In this controversy both the owner and the contractor made excessive claims. They should each bear their own costs; the Master's fee should be divided equally between complainant on the one hand and the defendants who show the fund on the other" (p. 105).

It is submitted however, that both the Master's fees and the complainant's costs should be paid out of the funds required to be paid into Court by complainant; and that the Vice-Chancellor, in his said ruling, overlooked the essential nature of this proceeding.

Complainant was not at fault in filing his bill herein; he was then and still is willing to do equity. He was not engaged in any controversy with the contractors in which he made excessive claims; the architect refused to issue a final certificate for payments. Even if the architect's determination is set aside herein, complainant did

not cause that determination; there is not even a suggestion in the record that complainant contributed to the determination by collusion or otherwise. The determination of the architect whether rightly or wrongly made, was obviously and unquestionably caused solely by the wilful and negligent actions of the contractors on this job. And complainant was likewise not engaged in any controversy with stop-notice claimants. He was willing to pay what was due from him; he could not pay any of them what he owed all because of their own conflicts. And to them, he was a pure stakeholder (*Aleck* v. *Jackson,* 49 N. J. Eq. 507, at 510). That the general contractor who engaged them was guilty of derelictions was no fault of complainant.

Complainant filed his bill herein as a stakeholder for the stop-notice claimants. The course he pursued was approved by the Court of Chancery. There was an express recital in this cause that "complainant's bill of complaint is properly brought" (p. 52). As to stop-notice claimants, complainant's "bill as filed presented a clear case of interpleader" (*Aleck* v. *Jackson,* 49 N. J. Eq. 507, at 510).

Where a bill of interpleader is properly filed, it has been uniformly held in this state that the complainant is entitled to have his costs out of the fund. *Rahway Savings Institution* v. *Drake,* 25 N. J. Eq. 220; *Wakeman* v. *Kingsland,* 46 N. J. Eq. 113; 33 C. J. 469. In Dickinson's Chancery Precedents, page 486, it is indicated that not only costs, but a counsel fee to complainant is the normal and proper practice (see form and note).

In *Blair* v. *Porter,* 13 N. J. Eq. 267, the court refused to allow costs to complainants because

the bill was inequitably brought. The Chancellor said at page 270:

> "The bill will be retained but without the usual allowance to complainant of costs out of the funds—that under the circumstances would be inequitable."

But in this case, there can be no question that the bill was properly brought. And as to the stop-notice claimants who will receive any fund, the suit was brought for and because of them. The multitudinous stop-notices, the dispute as to their order of priority, the multitudinous actions at law by them all justified the filing of the bill. This case clearly falls within the purview of the authorities cited.

PART II—APPEAL OF DEFENDANT CONTRACTORS VITILLE, KINSELLA AND CUNHY AND OF O. C. BIANCHI, PRO SE.

POINT I.

The Vice Chancellor did not err in sustaining the exceptions to the Master's refusal to give proper credit for certain items of omitted or defective work referred to as items 1 (a), (c), (g), (i), 2 (a), 2 (b), 3 (a), 4 (a), 6 (c), 8 (a), (b), 9 (a) and 9 (b), and in making the respective allowances awarded to the owner on account thereof.

If the Court should hold well-taken complainant's contention heretofore set forth under Part I, Point I, of this brief, that non-production of architect's certificate prevented recovery of any alleged balance uncertified, it will, of course, be unnecessary to deal with defendant-appellant's exceptions to Vice Chancellor's allowances for omitted and defective work considered under this point. The said exceptions are taken up herein in the interest of completeness.

The argument of defendants-appellants on this point, set forth in pages 5 to 11 of their brief, consists merely of a statement of the allowances and of a statement of the law that a Master's findings on questions of fact are entitled to great weight and should not be interfered with unless it clearly appears from the weight and nature of the evidence that the Master has erred. The individual items are not considered; no reference is made to the testimony thereon; no attempt is

made to summarize the evidence and/or the applicable principles of law relating to each item to sustain the Master or to show the Vice Chancellor in error. Appellants content themselves with the general statement of the law referred to.

With the general statement of law presented by appellants in their brief that the Master's findings on questions of fact are entitled to great weight, complainant has no quarrel. But the Master's findings are not conclusive on the Vice Chancellor or on this Court; it is settled that his findings will be set aside when not sustained by the proofs. As Chancellor Zabriskie said, in *Holmes* v. *Holmes,* 18 N. J. Eq. 141, at pages 142, 143:

> "Did the master arrive at a correct conclusion from the evidence? To determine this, it is necessary to review and weigh the evidence. For this reason the master's report is entitled to no special consideration beyond the soundness of his reasoning, and the advantage of seeing the demeanor of the witnesses while examined, which is of importance in judging of their credibility, when they contradict each other. But the report has not the position of a verdict, on a motion for a new trial in courts of law. That will not be set aside merely because the court would have come to a different conclusion from the evidence.
>
> The testimony on this point is painfully conflicting, and the master reports that, upon the conflicting testimony, and the restraining character of the order, he had difficulty in determining it to his satisfaction. I have felt the same difficulty, but upon mature consideration, have arrived at a result entirely sat-

isfactory to me, but different from that reached by the master."

While conflicting testimony was given on a number of items in suit, the proofs on the twelve items of omitted and/or defective work in question plainly show the Master in error thereon and definitely support the Vice Chancellor's allowances. The general principes applicable to the owner's claim for credits for omitted, defective and inferior work and materials have heretofore been presented under Point I, Point III, of this Brief, and will not be here repeated. The pertinent proofs on the respective items questioned by defendants-appellants will be presented *seriatim.*

ITEM NO. 1—MASON WORK.

(a) *Fireproofing around columns and beams omitted* *$1,000.00*

This was a plain case of omission without the pretence of excuse. The specifications expressly required fireproofing around all columns and beams (Ex. D-52, pp. 550, 551). All the witnesses agreed that the required fireproofing was omitted. The architect Ach so testified (pp. 270, 273). Shilowitz confirmed the omission (p. 196); Scheidecker likewise testified that "a very big omission was the omission of the fireproofing of beams and columns throughout the building," that none of the work had been done (p. 478), and that nothing had been substituted for this fireproofing (p. 485). Complainant's witness, Keeler, likewise admitted the omission (p. 332). The value of the omission was calculated by Shilowitz to be $1,000 (p. 196). The witness Scheidecker set forth actual calculations showing the

value of the omission to be Two thousand two hundred fifty-five and 60/100 ($2,255.60) Dollars (p. 485).

The Master made no allowance at all for this omission without making any reference to the item anywhere in his report. Nothing in the testimony warranted its disallowance; the Master was in error, and the testimony required an allowance by the Vice-Chancellor in at least the sum of One thousand ($1,000) as made by him.

1 (c). *Mortar joints on face brick were to be buff; they were replaced with white.....$100.00*

The specifications provided that all brick be laid in Portland cement, that side and court walls should be laid with white joints and that front brick work should be laid with buff mortar joints struck (Ex. D. 52, p. 551).

It was admitted that the mortar joints on front brick were not buff as required by the specifications, but that white joints were used, just as on the other brick and walls (Shilowitz, pp. 196, 197; Keeler, p. 333). Keeler, the contractor's witness, when asked "Would it or would it not, cost more to make it of buff than white?" answered "More" (p. 333). He did not, however, testify how much more. Shilowitz testified that the value of the omission, consisting of the cost of the pigment, the labor involved in putting up the colored jointing, and the laying up the face brick separate from the common, was One Hundred ($100) Dollars (pp. 196, 197, 216). There was no contradictory testimony.

Contractor Vitille claimed to have used instead of the Portland Cement required by the specifications, the more costly white cement, and as item No. 3 of his claim for extras (Exhibit D-56), the

allowance on which is not attacked or questioned by him on his appeal, but is heretofore considered by complainant under Part I, Point II, this brief, the contractor asks for an extra allowance of One Hundred Ninety-one and 25/100 ($191.25) Dollars to cover the difference between the cost of 153 bags of white cement furnished, and 153 bags of Portland Cement required by the specifications. He, however, makes no allowance for the value of the pigment and labor involved in the omission of buff mortar joints required.

The Master, failing to distinguish these items, made an allowance to the contractor in the amount claimed of One Hundred Ninety-one and 25/100 ($191.25) Dollars for white cement instead of Portland Cement, but failed to give the credit due to the owner on the uncontroverted testimony of One Hundred ($100.00) Dollars for the omission of the buff mortar joints on face brick. The extra allowance made by the Master has been considered supra, on the cross-appeal of complainant; his failure to allow the claim here made is without justification in the testimony, which clearly supports the Vice-Chancellor's allowance.

1 (g). *Gypsum block in floors and ceiling of Doctor's apartment omitted.....$865.20*

The specifications plainly provide for gypsum block in the floors and ceilings of the doctor's office, for deafening purposes (Ex. D-52, pp. 552, 553). It was admitted by Vitille, defendant contractor (pp. 175, 176), corroborated by his expert Keeler (p. 338) and by the other witnesses that no gypsum block was installed at all in either said floors of ceiling contrary to the specification requirements.

Vitille claimed the architect had agreed to take another deafening material, flax linum, in place

of gypsum, as required (p. 175). He claimed he installed said substitute, flax linum, in the floors in place of the required gypsum block, but admitted he had not installed either gypsum block or any other deafening material in the ceiling (pp. 175, 176). An extra allowance to the contractor for the flax linum furnished in the total sum of Seven Hundred Thirty and 48/100 ($730.48) Dollars was claimed by him and allowed by the Master (Master's Report, Item 10, p. 72). *Yet no off-set was allowed complainant for the gypsum block omitted.*

The expert witnesses all agreed that an offsetting credit to the owner for the omitted gypsum block should be given. Shilowitz testified that the value of the omitted gypsum block was Fifteen hundred ($1500.00) Dollars (p. 197); Scheidecker testified that the value of the omission was Fourteen hundred ($1400.00) Dollars, setting forth precise calculations and using the contractor's own figures of forty (40¢) cents a square foot (pp. 488, 489). Keeler, the contractor's own expert, testified that the gypsum block specified was omitted, and asserted that the flax linum was an offsetting extra charge and that the one item should offset the other (pp. 339, 340). He testified that the omitted gypsum block would have cost Eight hundred sixty-five and 20/100 ($865.20) Dollars (p. 339), the amount the Vice-Chancellor allowed.

The Master himself recognized that an allowance should be made for the omitted gypsum block at least offsetting the flax linum extra, saying at page 340:

> "By the Master: So that counsel may know, what I take from this testimony is that something was substituted for the gypsum

block, that the contractor has charged the entire cost of the substitution as an extra without in any wise allowing any credit for the omitted material, or the saving to him and my understanding from this testimony is that if he is allowed the extra cost the owner is entitled to the credit for the omitted material."

The Master's failure to make the allowance he himself admitted to be proper, was clearly erroneous, although probably an oversight. The very testimony of defendants directly supports the Vice-Chancellor's allowance in the sum of Eight hundred sixty-five and 20/100 ($865.20) Dollars.

1 (i). *Stair soffets were to be plastered; this has been omitted* *$130.00*

The specifications expressly require the stair soffets to be plastered (Ex. D-52, p. 553). The expert witnesses all agreed that the specifications required the stair soffets to be plastered, and that the work had not been done as required by specifications (Shilowitz, p. 197; Scheidecker, p. 490; Keeler, p. 341; Ach, p. 273).

Vitille, defendant contractor, admitted the omission but claimed that the specifications did not require it (pp. 177, 178). But his testimony was contrary to the specifications and to the testimony of all the witnesses. Then Keeler, his expert witness, testified that while the work had been omitted and was required by specifications, it was not shown on the architect's plans (p. 341). Every other witness shows Keeler to be wrong in his contentions. And even if Keeler was correct in contending that the plans did not show such plastering, the contract provides that "The

general conditions of the contract, the specifications and the drawings, together with this agreement, form the contract" (Article 6, Ex. D-51, p. 521), and the specifications provide that "Anything which is not shown on the drawings, but which is mentioned in the specifications, or vice versa, * * * shall be furnished and performed as though specially shown and mentioned on both" (Ex. D-52, p. 550).

The expert witnesses all agreed that the value of the omission was at least the sum of One hundred thirty ($130.00) Dollars, the amount allowed. Shilowitz testified that the value of the omission was Two hundred ($200.00) Dollars (p. 197); Keeler, defendant's expert, that "$200 was a fair price * * * I say it would cost all of $200" (p. 384). Scheidecker testified that the value of the omission was One hundred thirty ($130.00) Dollars (p. 490).

The testimony clearly showed the omission and the proper deduction therefor. The Master made no allowance for this item, nor did he refer to it at all. The Master was clearly in error, and the evidence plainly supported and required the credit in the sum of One hundred thirty ($130.00) Dollars given by the Vice-Chancellor.

2 (a). *Cabinet Trim omitted.....$750.00*

This item has been fully considered on complainant's appeal under Part I, Point III this brief, and reference to said discussion is herein made. The Master allowed $267.00 for the substitution of the inferior ordinary mill trim for the expensive and superior cabinet trim specified. The Vice-Chancellor allowed $750.00. The testimony required an allowance for this omission of at least the sum of One Thousand Seven Hundred

Fifty ($1,750.00) Dollars, and complainant does so contend on his cross-appeal under Part I, Point III, *supra,* this brief; clearly, the testimony supported the Vice-Chancellor's allowance of $750.00 as not excessive.

2 (b). *Instrument cases omitted in Doctor's apartment* *$400.00*

The specifications required the general contractor to furnish and install wooden instrument cases in the doctor's apartment (Shilowitz, p. 197; Scheidecker, p. 617; Ach, pp. 297, 298). After the contract, those wooden cases specified were omitted and complainant owner furnished and himself paid for steel instrument cases he substituted therefor (Ach, pp. 297, 298). The defendant contractor saved the cost of furnishing and installing the wooden cases specified and merely installed the steel cases furnished and paid for by complainant.

Article 15 of the general conditions made part of the contract expressly provide that the owner may make changes deducting from the work and that the contract sum shall be adjusted accordingly (Ex. D-51, p. 529). All witnesses agreed that the cost and value of the wooden instrument cases omitted was Four Hundred ($400) Dollars (Shilowitz, p. 197; Scheidecker, p. 617).

Defendant contractor testified merely that he installed "the" instrument cases (p. 179), and not only gave no credit for the wooden cases omitted, but asked for and was given by the Master an extra allowance of Twenty-nine and 04/100 ($29.04) Dollars for installing the steel cases furnished and paid for by the owner (Master's Report, p. 75, Item 28).

Complainant has contended on his cross-appeal that the Master erred in making the extra allowance of Twenty-nine and 04/100 ($29.04) Dollars for installation of steel cases, as the cost was the same as that of installing the wooden cases specified (pp. 297, 298). (See Part I, Point II this brief.) Clearly, however, on the uncontradicted testimony, the Master erred in not giving any credit for the wooden cases omitted. The Vice-Chancellor's allowance of Four Hundred ($400.00) Dollars for this omission was required by the testimony.

3 (a). *Marble stringers of Tennessee pink from first floor to roof omitted..... .....$700.00*

The specifications expressly required installation of stringers of Tennessee pink marble (Ex. D-52, p. 555).

All witnesses agreed that the required marble stringers were omitted on one side of the stairs (Scheidecker, p. 498; Shilowitz, p. 198). Defendant, Vitille, admitted the omission, and said he put plaster in place of the required marble stringers, admitting that marble cost more than plaster (p. 180, ll. 37-40).

Shilowitz figured the value of the omission at Fifteen Hundred ($1,500.00) Dollars (p. 198). Scheidecker valued the omission after calculations, at Seven Hundred ($700.00) Dollars (p. 498).

There was no contradiction, either of the omission or of the testimony as to its value, but no allowance therefore was given.

The Master obviously erred in not making any allowance for this omission, and the Vice-Chancellor's allowance of Seven Hundred ($700.00) Dollars was clearly warranted by the testimony and evidence.

4 (a). *Ornamental Iron Balusters in specifications call for 1″ x 1″ bars; those installed are ⅛″ x ⅝″ stock.....$100.00*

The specifications expressly required 1″ x 1″ baluster bars (Scheidecker, p. 499; Shilowitz, p. 199; Ex. D-52, p. 555). These were not installed by Vitille, but ⅛″ x ⅝″ bars were substituted (p. 499, p. 199). Vitille himself admitted that he omitted the required baluster bars (p. 181). Shilowitz testified the difference in value was One Hundred ($100) Dollars, and Scheidecker valued the omission at Two Hundred Sixty-two and 50/100 ($262.50) Dollars (p. 499).

There was no contradictory testimony on this item. The Master plainly erred in not allowing therefor, and the Vice-Chancellor's allowance of One Hundred ($100.00) Dollars was clearly warranted by the uncontradicted proofs.

6 (c). *Plumbing — Refrigerator pans, drain pipes and cellar sink omitted.....$100.00*

The plans and specifications required refrigerator pans, drain pipe and cellar sink, which were omitted. (Scheidecker, pp. 145, 146, Shilowitz, p. 200).

Shilowitz valued the omitted work at One Hundred ($100.00) Dollars (p. 145); Scheidecker testified the value of the omission was Four Hundred ($400) Dollars (p. 500). Defendant's expert did not contradict their testimony.

No allowance whatever for the omission was made by the Master. The Vice-Chancellor's allowance in the sum of One Hundred ($100.00) Dollars was clearly warranted by the proofs.

8. *Electrical Work.*

(a). *Wires are exposed for bells, should be concealed in conduits; (b) wires in conduits, not b x $1,500.00*

The Master, on this item, made a plain mistake of law.

The electrical specifications as contained in the original specifications made part of the contract expressly provided that all wiring should be concealed in and run in conduits (Scheidecker, pp. 479, 500, 501; Shilowitz, p. 200; Bonatz, "B", p. 157; Bianchi's admissions, p. 396). It was admitted by Vitille and by all of the witnesses that this was not done, that no wires were run through conduits but that ordinary B. X. wiring, exposed, not concealed in or covered by conduits was installed. (Vitille, pp. 182, 183, 184, 185; Scheidecker, pp. 479, 500, 501; Bonatz, "B", p. 156).

Seib, an officer of the S. & S. Supply Co., subcontractor of Vitille, which installed the electrical work, but not an electrician, testified that wiring in conduits is much more expensive than ordinary wiring, and that he had told the architect that to wire the house in such a manner "would be expensive" ("B", p. 169). Bonatz, himself an expert electrician, testified that the difference in value between the work as originally specified and the job as installed was Fifteen Hundred ($1500.00) Dollars ("B", p. 156). He testified from personal knowledge of the job and the installation. Vitille gave him the original specifications to bid on ("B", p. 152) and he had checked the work required and submitted his bid; he was called on to make repairs to the electrical system ("B", pp. 152, 153); and he personally examined and tested the system installed ("B", p. 161).

Not only were the expensive conduits not installed, but Bonatz further testified that the telephone system installed was an Auth system, whereas a Loeffler system had been specified in the specifications made part of the contract, worth about Three Hundred ($300) Dollars to Four Hundred ($400.00) Dollars more, "B", p. 157). Seib, officer of the installing company, admitted that the Loeffler system is more expensive than the Auth ("B", p. 169). Shilowitz testified that the difference in value of the omitted work herein was Three Thousand ($3,000.00) Dollars (p. 200).

The omission of the work as required in the specifications made part of the contract in suit was admitted by everyone; the difference in value between the job as installed and the job so specified was fixed by the expert Bonatz at Fifteen Hundred ($1500.00) Dollars and the expert Shilowitz at Three Thousand ($3000.00) Dollars. No contradictory testimony as to the value of the omission was offered.

Vitille's sole defense to a credit for the inferior and cheaper substitution was that while conduits, etc., were required in the original specifications on which he bid and which were made part of the contract awarded to him by complainant on October 13, 1926, for the sum of Ninety-eight Thousand ($98,000.00) Dollars, he received from the architect on March 30, 1927 revised electrical specifications which did not require installation of wire in conduits, etc., and the cheaper installation was accordingly made pursuant to the said revised specifications (p. 184).

It seems clear from the testimony that on March 30, 1927, five months after the contract was made, different electrical specifications were submitted by the Architect to Vitille. (Ach, p. 276, Vitille, p. 184.) Architect Ach testified that the electrical

specifications were changed after the contract was signed, but that the changed specification was not submitted to complainant (p. 276). Complainant testified that he never authorized any change in the specifications as to electrical work (p. 425) and that he never had any knowledge of any change in any specification for electrical work (p. 417). Architect Ach, against his own interest it would seem, admitted that he never submitted the revised specification to complainant (p. 276).

But whether the change made by the architect was with the consent, knowledge and authorization of the owner or not, a deduction from the contract price and credit to the owner in the amount of the difference because of the omissions and cheaper substitution was plainly required.

Article 15 of the General Conditions made part of the Contract, provides:

> "In giving instructions, the *architect shall have authority to make minor changes* in the work not involving extra cost and not inconsistent with the purposes of the building, but otherwise, except in an emergency endangering life or property, no extra work or change shall be made unless in pursuance of a written order from the owner, signed or countersigned by the architect, or a written order from the architect stating that the owner has authorized the extra work or change and no claim for an addition to the contract sum, shall be valid unless so ordered."

Article 38 of said general conditions provides as to the architect:

> "He is the agent of the owner only to the extent provided in the contract documents

> and when in special instances he is authorized by the owner so to act, and in such instances he shall, upon request, show the contractor written authority."

If the change here made was a *major* change the architect had no authority from the owner to order it made, for an architect's powers are determined strictly by the contract (*Ferber Construction Co.* v. *Hasbrouck Heights,* 90 N. J. L. 193), and an architect has no power to bind the owner in a way other than that provided by contract nor to waive the owner's rights thereunder (*Van Buskirk* v. *Board,* 78 N. J. L. 650; *Newark* v. *N. J. Asphalt Co.,* 68 N. J. L. 458; *Bradner* v. *Roffsell,* 57 N. J. L. 412; *Bond* v. *Mayor,* 19 N. J. Eq. 376). The inferior substitution, if a major change, would therefore be an unauthorized deviation, not binding on the owner, requiring deduction from contract price for the cheapening in the amount of the difference.

But even if the change made was binding on the owner, either because a *minor* change and therefore within the authority of the architect to act on behalf of the owner pursuant to Article 15, or because expressly authorized by the owner, the owner is nevertheless entitled to credit for the difference between the value of the work installed and the value of the work originally specified, since the contract price was arrived at with reference to the original specifications, and Article 15 of the Contract (Ex. D-51, p. 529) expressly provides that the owner may make changes therein deducting from the work, the contract sum to be adjudged accordingly.

The testimony was uncontradicted that the value of the omitted items was at least the sum of Fifteen hundred ($1500.00) Dollars and required the Vice-Chancellor's allowance in that amount.

9 (a). *Roofing and Sheet Metal Work*
Duct omitted $150.00

Defendant, Vitille himself admitted that he had failed to install the duct required (pp. 185, 186) and the other witnesses, including defendant's own expert, Keeler, corroborated his statement, and the Master stated on the record that it was stipulated that the required duct was omitted (p. 350). Shilowitz valued the omission at One hundred fifty ($150.00) Dollars (p. 200), and Keeler, defendant's own expert testified:

> "Q. There has been testimony taken to the effect that this duct might have been worth about $150. Is that right?
> A. That's about right" (p. 350).

Nevertheless, the Master failed to give any credit for this item. The Master was clearly in error, and the Vice-Chancellor's allowance of One hundred fifty ($150.00) Dollars was required by the testimony.

9 (b). *Roofing and Sheet Metal Work.*
(b) *The roof is not a bonded Barrett roof as called for in specifications* $500.00

This item represented a deliberate violation of the contract and has been fully discussed under Part I, Point III, this brief. The Master allowed Ninety ($90.00) Dollars on this item, applying an erroneous rule of damages. The Vice-Chancellor allowed Five hundred ($500.00) Dollars. The proofs clearly show the Vice-Chancellor's allowance of Five hundred ($500.00) Dollars warranted as not excessive; but, as contended under

Part I, Point III, this brief, the proofs show an allowance in at least the sum of Fifteen hundred ($1500.00) Dollars on this item required.

POINT II.

Complainant is not interested in the question of allowance to Mr. Bianchi of counsel fee out of the fund, if any, determined to be due from owner to defendant contractors under the contract in suit.

In Points II and III of their brief, appellant, Bianchi, claims to be entitled to a portion of the fund decreed to be due from owner to defendant contractors by virtue of general and specific solicitor's liens and assignments, and that such payment is due him out of the fund in priority to any payments therefrom to stop notice claimants. In so far as such points raised concern merely the payment of a fee out of whatever size fund is decreed to be due from complainant in priority to payments out of said fund to stop notice claimants, the points raised do not affect the rights of complainant. But in so far as the claim made is predicated on the theory that allowances by way of additions for extras are no part of the fund because the items of work covered thereby was not done pursuant to and under the contract in suit, but were the subject of independent contracts, the theory advanced does affect complainant's rights, but is unsound and was properly rejected by the Vice Chancellor, as heretofore shown (see Part I, Point I).

Point IV of said brief (p. 28) reads "That in any event the Court erred in not *allowing* costs to the successful litigants." The only claim made

under this heading is that Mr. Bianchi, solicitor of defendant general contractors, is entitled to a counsel fee. The argument advanced is not that complainant should pay this counsel fee, but that the stop notice claimants should pay the same, because the amount of money decreed to be due from complainant to the general contractors, constituting the "fund" was established largely through the efforts of Mr. Bianchi, solicitor for said general contractors, and that therefore he should have been allowed a counsel fee *out of that fund,* prior to any payment therefrom to stop notice claimants, who were aided by his creation of that fund, and because, since there is a fund in which they may share, the stop notice claimants are "successful litigants," and successful parties may, since 1915, be charged with payment of reasonable counsel fee.

In support of this contention, Mr. Bianchi cites and quotes *Smith* v. *McDonald,* 69 N. J. E. 765, and *Riverside Apartment Corporation* v. *Capital Construction Company,* 107 N. J. E. 405, in both of which cases counsel fees were allowed *out of the fund established or protected.*

In view of the confinement of the claim made to payment out of the amount awarded to the general contractors, whatever the same should be, and of the fact that complainant is not affected by payments out of such fund, no argument will be presented on this question.

As to the other grounds of appeal contained in the two petitions of appeal of defendants Vitille, Kinsella and Cunhy, and of Mr. Bianchi, their solicitor, they were not argued in the brief of defendants-appellants and under the settled principles are to be deemed abandoned.

Cropsey v. *Cropsey,* 104 I. J. Eq. 187 (E. & A.).

Conclusion.

It is respectfully submitted that the Court erred in holding complainant chargeable with any unpaid contract balance uncertified despite non-production of architect's certificate, that the final decree appealed from should be reversed to the end that a new decree may be formulated charging complainant only with balance certified but unpaid, and that appeals of defendants-appellants should accordingly be dismissed.

It is further respectfully submitted that in any event the objections herein raised by complainant to the allowances made and credits given, and to the award of interest and the rulings on costs should be sustained and the final decree herein reversed to the end that a new decree may be formulated embodying the corrections thus required.

It is further respectfully submitted that the appeals of defendants-appellants should be dismissed insofar as they attack the credits given by the Chancellor on account of items of omitted and defective work hereinbefore referred to under Part II, Point I. As to the claim of Mr. Bianchi that he is entitled to payment out of the fund decreed due from complainant to defendant-contractors prior to any payments therefrom to stop notice claimants, complainant is not affected thereby and is consequently not interested in the determination thereof, after the size of the fund out of which the amount due to Mr. Bianchi, if any, shall be paid is fixed by this Court.

Respectfully submitted,

J. EMIL WALSCHEID,
Of Counsel with Complainant-
Appellant and Appellee.

MILTON ROSENKRANZ,
on the Brief.

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Bill of Complaint.

Filed Dec. 7, 1928.

In Chancery of New Jersey.

To The Honorable Edwin Robert Walker,
Chancellor of the State of New Jersey:

The complainant, Martin J. MacDonnell, of the Township of North Bergen, in the County of Hudson and State of New Jersey, respectfully shows that:

1. On October 13, 1926, complainant entered into a certain agreement in writing with Michael J. Vitille, James J. Kinsella and Joseph Cunhy, trading as Vitille, Kinsella & Cunhy, hereinafter referred to as contractors, whereby the said contractors agreed to erect a five story apartment building on a certain tract of land owned by complainant, located on the northeast corner of Thirtieth Street and Park Avenue, in said Township of North Bergen, at a price of Ninety-eight Thousand ($98,000.00) Dollars, to be paid in the manner and at the times in said contract set forth.

2. Said lands and premises are more particularly described as follows:

> "ALL that plot, tract or parcel of land and premises, situate, lying and being in the Township of North Bergen, in the County of Hudson and State of New Jersey, more particularly described as follows:
>
> BEGINNING at the point of intersection of the northerly line of Thirtieth Street, produced easterly and the easterly line of Bulls Ferry Road, as said street and road are laid down on a certain map entitled "Map 'A' of

a portion of the property belonging to the Woodcliff Land Improvement Company, Township of North Bergen, Hudson Co. N. J., Sept. 1892" duly filed in the Register's Office of the said County of Hudson, on the fifteenth day of September, eighteen hundred and ninety-two; thence (1) easterly and along the northerly line of Thirtieth Street, produced easterly, eighty-seven and eighty one-hundredths (87.80) feet to a point; thence (2) northerly, and at right angles to the first course, fifty (50) feet to a point; thence (3) westerly and parallel with the first course ninety-one and nine one-hundredths (91.09) feet to a point in the easterly line of Bulls Ferry Road; thence (4) southerly and along the easterly line of Bulls Ferry Road fifty and eleven one-hundredths (50.11) feet to the point or place of beginning.

3. On October 14, 1926, and before any work was performed, or materials were furnished in pursuance of the said contract, the said agreement, together with the specifications accompanying the same and referred to therein, was duly filed in the Office of the Clerk of the County of Hudson, in which County said lands and premises are situate.

4. The said contractors proceeded with the construction of the said building and complainant from time to time made to them payments provided for by said contract in strict conformity with the terms thereof, and a total of Eighty-five Thousand Two Dollars and Seven ($85,002.07) Cents was paid by complainant to said contractors, as provided for in and by said contract.

5. The said total of Eighty-five Thousand Two Dollars and Seven ($85,002.07) Cents comprises

the entire contract price with the exception of the sum of Thirty-six Hundred Forty-six ($3646.00) Dollars, withheld on the eighth installment payment, and the sum of Eleven Thousand Eight Hundred and Sixty-five ($17,765.00) Dollars was due ($11,884.68) Cents, withheld on the ninth and final installment payment, which sums are withheld for the reasons more particularly hereinafter set forth.

6. On August 20, 1927, one David Ach, the architect under whose supervision the building was being erected and who was required by the terms of said contract to issue his certificate before any sums should become due and payable thereunder, duly issued his certificate, certifying that the sum of Seventeen Thousand Seven Hundred and Sixty-five ($177,765.00) Dollars was due to the said contractors as the eighth payment on account of said contract, and between said August 20, 1927 and September 10, 1927, the entire amount of said eighth payment was duly paid to said contractors, except the sum of Thirty-six Hundred Forty-six ($3646.00) Dollars.

7. Prior to the payment of said balance of Thirty-six Hundred Forty-six ($3646.00) Dollars, complainant received from Antonio Mammolite and Pasquale Ricciardi, a notice in writing, dated September 10, 1927, that they had performed for said Vitille, Kinsella & Cunhy, contractors, certain work and labor in the erection of said building to the amount of Four Thousand One Hundred Sixty-six Dollars and Thirty-eight ($4.166.38) Cents, and that said contractors had, upon demand, refused to pay said amount of Four Thousand One Hundred Sixty-six Dollars and Thirty-eight

($4166.38) Cents to said Antonio Mammolite and Pasquale Ricciardi.

8. Prior to the payment of said balance of Thirty-six Hundred Forty-six ($3646.00) Dollars, complainant received from Hoegger, Inc., a corporation of the State of New Jersey, a notice in writing dated September 12, 1927, that it had furnished to said Vitille, Kinsella & Cunhy, contractors, certain bathroom accessories used in the erection of said building to the amount of Five Hundred Forty ($540.00) Dollars, and that said contractors had, upon demand, refused to pay said amount of Five Hundred Forty ($540.00) Dollars to said Hoegger, Inc.

9. Prior to the payment of said balance of Thirty-six Hundred Forty-six ($3646.00) Dollars, complainant received from Cadel Brothers, Inc., a corporation of the State of New Jersey, a notice in writing dated September 13, 1927, that it had performed certain work for, and furnished certain materials to, said Vitille, Kinsella & Cunhy, contractors, to the amount of Eighteen Hundred Seventy-five ($1875.00) Dollars, pursuant to contract, and to the amount of Eight Hundred Thirty-two ($832.00) Dollars, for extra work, and that said contractors had, upon demand, refused to pay said amounts, or either of them, to said Cadel Brothers, Inc.; and on October 1, 1928, said Cadel Brothers, Inc., instituted an action in the Hudson County Circiut Court against this complainant, to recover the sum of Two Thousand Seven Hundred and Seven ($2,707.00) Dollars, which action is still pending and undisposed of.

10. Prior to the payment of said balance of Thirty-six Hundred Forty-six ($3646.00) Dollars,

complainant received from North Hudson Manufacturing Company, a corporation of the State of New Jersey, a notice in writing dated September 13, 1927, that it had furnished certain materials used in the erection of said building to the amount of Two Thousand Forty-seven Dollars and Eighteen ($2,047.18) Cents to said Vitille, Kinsella & Cunhy, contractors, and that said contractors had, upon demand, refused to pay said amount of Two Thousand Forty-seven Dollars and Eighteen Cents ($2,047.18) to said North Hudson Manufacturing Company; and on October 1, 1928, the said North Hudson Manufacturing Company instituted a suit in the Hudson County Circuit Court against this complainant, to recover the said sum of Two Thousand Forty-seven Dollars and Eighteen ($2,047.18) Cents, which suit is still pending and undisposed of.

11. Prior to the payment of said balance of Thirty-six Hundred Forty-six ($3646.00) Dollars, complainant received from Thomas Henry, Inc., a corporation of the State of New Jersey, a notice in writing dated September 13, 1927 that it had furnished to said Vitille, Kinsella & Cunhy, contractors, certain masons' materials used in the erection of said building to the amount of Five Thousand Six Hundred Ninety-one Dollars and Twenty-seven ($5,691.27) Cents, and that said contractors had, upon demand, refused to pay said amount of Five Thousand Six Hundred Ninety-one Dollars and Twenty-seven ($5,691.27) Cents to said Thomas Henry, Inc.; and on October 3, 1928, said Thomas Henry, Inc., instituted a suit in the Hudson County Circuit Court against this complainant, to recover the sum of Five Thousand

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Three Hundred Twenty-nine Dollars and Thirty-nine ($5,329.39) Cents, which suit is still pending and undisposed of.

This complainant is unable to explain the discrepancy between the amount of said Stop Notice and the amount claimed in said suit.

12. Prior to the payment of said balance of Thirty-six Hundred Forty-six ($3646.00) Dollars, complainant received from Edward De Forge, Inc., a corporation of the State of New Jersey, a notice in writing dated September 21, 1927, that it had performed for said Vitille, Kinsella & Cunhy, contractors, certain work in the erection of said building, to the amount of Four Hundred ($400.00) Dollars, and that said contractors had, upon demand, refused to pay said Four Hundred ($400.00) Dollars to said Edward De Forge, Inc.; and on October 5, 1928, said Edward De Forge, Inc., instituted a suit in the Hudson County Circuit Court to recover said sum of Four Hundred ($400.00) Dollars, which suit is still pending and undisposed of.

13. Prior to the payment of said balance of Thirty-six Hundred Forty-six ($3646.00) Dollars, complainant received from one Louis Bogorad, a notice in writing dated October 1, 1927, that he had furnished to said Vitille, Kinsella & Cunhy, contractors, certain materials in the erection of said building to the amount of Thirteen Hundred ($1300.00) Dollars, and that said contractors had, upon demand, refused to pay said amount of Thirteen Hundred ($1300.00) Dollars to said Louis Bogorad; and on October 31, 1928, said Louis Bogorad instituted a suit in the Hudson County Circuit Court against this complainant to recover

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said sum of Thirteen Hundred ($1300.00) Dollars, which suit is still pending and undisposed of.

14. Prior to the payment of said balance of Thirty-six Hundred Forty-six ($3646.00) Dollars, complainant received from Indiana Flooring Company, a corporation of the State of New York, a notice in writing dated October 5, 1927, that it had furnished to said Vitille, Kinsella & Cunhy, contractors, certain materials to the amount of Seventeen Hundred Eighty-two Dollars and Forty-three ($1782.43) Cents "less freight charges," the amount of said freight charges being unknown to complainant, and that said contractors had, upon demand, refused to pay said amount of Seventeen Hundred Eighty-two Dollars and Forty-three ($1782.43) Cents "less freight charges" to said Indiana Flooring Company.

15. Prior to the payment of said balance of Thirty-six Hundred Forty-six ($3646.00) Dollars, complainant received from Hudson Fireproof Block Co., a corporation of the State of New Jersey, a notice in writing dated October 14, 1927, that it had furnished to said Vitille, Kinsella & Cunhy, contractors, certain materials in connection with the erection of said building, to the amount of One Hundred Twenty-one Dollars and Thirty-two ($121.32) Cents, and that said contractors had, upon demand, refused to pay said amount of One Hundred Twenty-one Dollars and Thirty-two ($121.32) Cents to said Hudson Fireproof Block Co.

16. Prior to the payment of said balance of Thirty-six Hundred Forty-six ($3646.00) Dollars, complainant received from one Guido M. Crocetti,

a notice in writing dated October 18, 1927, that he furnished to said Vitille, Kinsella & Cunhy, contractors, certain work in the erection of said building to the amount of Sixteen Hundred ($1600.00) Dollars, pursuant to contract, and to the amount of One Hundred Fifty-five ($155.00) Dollars, for extra work, and that said contractors had, upon demand, refused to pay said amount of Seventeen Hundred Fifty-five ($1755.00) Dollars to said Guido M. Crocetti; and on September 19, 1928, said Guido M. Crocetti instituted a suit in the Hudson County Circuit Court against this complainant to recover the said amount of Seventeen Hundred Fifty-five ($1755.00) Dollars, which suit is still pending and undisposed of.

17. Prior to the payment of said balance of Thirty-six Hundred Forty-six ($3646.00) Dollars, complainant received from Scagliola Manufacturing Co. Inc., a corporation of the State of New Jersey, a notice in writing dated March 28, 1928, that it had furnished materials to and performed labor for, said Vitille, Kinsella & Cunhy, contractors, used in the erection of said building, to the amount of Two Hundred Seventy-five ($275.00) Dollars, and that said contractors had, upon demand, refused to pay said amount of Two Hundred Seventy-five ($275.00) Dollars to said Scagliola Manufacturing Co. Inc.

18. Prior to the payment of the said balance of Thirty-six Hundred Forty-six ($3646.00) Dollars, complainant received from one Carl F. Diffenbach, a notice in writing dated September 13, 1928, that he had furnished to said Vitille, Kinsella & Cunhy, contractors, work, labor and materials in connection with the covering of roof, together with the

furnishings of side-lights, gutters and leader flashings used in the erection of said building, to the amount of Ten Hundred Forty ($1040.00) Dollars, and that said contractors had, upon demand, refused to pay said amount of Ten Hundred Forty ($1040.00) Dollars to said Carl F. Diffenbach, Jr.

19. Ever since the issuance of said eighth certificate by said architect the said Vitille, Kinsella & Cunhy, contractors, have demanded of this complainant payment of the balance of Thirty-six Hundred Forty-six ($3646.00) Dollars due under said certificate, but complainant has refused to make said payment to said contractors by reason of the service upon him of the aforesaid notices in writing.

20. The said Stop-Notice claimants who have instituted suits as hereinbefore set forth threaten to prosecute said suits to judgment and the said Stop-Notice claimants who have not yet instituted suits against complainant threaten to institute the same and prosecute the same to judgment, and complainant has been and will continue to be harassed by multitudious suits at law to his irreparable injury, unless relief is granted to him in this Court.

21. Complainant has been unable to, and is still unable to determine to whom of the aforesaid claimants the said sum of Thirty-six Hundred Forty-six ($3646.00) Dollars, and such other or further sums as complainant shall be decreed to pay, rightfully belong, by reason of the fact that complainant is informed and believes that the order of priority among said Stop-Notice claimants may be affected by the fact that said Stop Notices

were not received by complainant in the order in which they are dated; and further by the fact that the claims for labor may be preferred to the claims for materials under the Mechanics' Lien Law; and further by defects in the form of several of said Stop Notices, to wit, the Stop Notice filed by Hoegger, Inc., which fails to allege the location of said building; the Stop Notice filed by Thomas Henry, Inc., the amount of which fails to coincide with the amount set forth in the complaint filed by said Thomas Henry, Inc., in the Hudson County Circuit Court; the Stop Notice filed by Edward De Forge, Inc., which is not properly signed by the claimant; and the Stop Notice filed by Indiana Flooring Company, in which the amount demanded is not specified as nearly as possible.

22. Subsequent to the issuance of said eighth certificate by said architect, said Vitille, Kinsella & Cunhy, contractors, demanded payment from complainant of the balance of said contract price, and also demanded and still demand the sum of Fourteen Thousand Six Hundred Fifty-five Dollars and Sixty-seven ($14,655.67) Cents, which said contractors claim for extra materials alleged to have been furnished and extra labor alleged to have been performed in the erection and construction of said building; but said contractors had not, prior to the filing of the bill of complaint herein, instituted any proceedings at law for the recovery of the amounts so claimed.

23. Complainant alleges that neither the balance of said contract price, except the said sum of Thirty-six Hundred Forty-six ($3646.00) Dollars, nor the amount of said extras, ever became due and payable from complainant to said con-

tractors, by reason of the fact that the said architect has refused, and still refuses to issue certificates authorizing the payment of the same; by reason further of the fact that no authorization in writing was ever procured for many of the items included in said claim for extras as provided in said contract; by reason further of the fact that many of the items claimed to be extras by said contractors are included in the original specifications; and by reason further of the fact that the said claim for extras is grossly excessive, and that the fair value of any and all the extras alleged to have been furnished is not more than Six Thousand One Hundred Fifty-seven Dollars and Fifty-five ($6,157.55) Cents.

24. Complainant further alleges that he is entitled to credit against any sum or sums found to be owing from him to said contractors for work defectively performed or omitted under said contract, materials deviating from the specifications annexed to said contract, and work unfinished and materials unfurnished, and complainant is informed and believes that the reasonable value of said credits is in excess of the sum of Twelve Thousand ($12,000.00) Dollars.

25. The said Vitille, Kinsella & Cunhy, contractors, have never paid or settled the demands of said Stop Notice claimants, or any of them, and the said Stop-Notice claimants still demand the payment of their claims from complainant.

26. Complainant has always been willing, and still is willing to pay said sum of Thirty-six Hundred Forty-six ($3646.00) Dollars, and such further sum or sums as may be found to be owing

from complainant to said contractors, after due credit has been given to complainant for such set-offs as he may have, to such person or persons as is or are lawfully entitled to receive the same, and to whom he can pay such sum or sums with safety, and he hereby tenders said sum of Thirty-six Hundred Forty-six ($3646.00) Dollars, into this Court.

Complainant is without adequate remedy in the Courts of Law, and therefore prays:

1. That said Michael J. Vitille, James J. Kinsella and Joseph Cunhy, Antonio Mammolite and Pasquale Ricciardi, Hoegger, Inc., a corporation, Cadel Brothers, Inc., a corporation, North Hudson Manufacturing Company, a corporation, Thomas Henry, Inc., a corporation, Edward De Forge, Inc., a corporation, Louis Bogorad, Indiana Flooring Company, a corporation, Hudson Fireproof Block Co., a corporation, Guido M. Crocetti, Scagliola Manufacturing Co. Inc., a corporation, and Carl F. Diffenbach, Jr., who are the defendants to this suit, may answer this bill of complaint and each statement therein made, and may interplead and determine their rights to said sum of Thirty-six Hundred Forty-six Dollars ($3646.00) and such further sum or sums as may be found owing from complainant to said contractors, after due credit has been given to complainant for such set-offs as he may have;

2. That complainant may be ordered to pay into this court the said sum of Thirty-six Hundred Forty-six ($3646.00) Dollars, and such further sum or sums as may be found owing from complainant to said contractors, after due credit has

been given to complainant for such set-offs as he may have;

3. That an account may be taken and a settlement of the amount due from complainant to said defendants, Vitille, Kinsella & Cunhy, may be had;

4. That complainant, upon payment into this Court of said Thirty-six Hundred Forty-six ($3,646.00) Dollars, and such further sum or sums so found owing from complainant to said contractors, and procuring the said defendants to inter-plead and settle their rights to said sum of money, may be Ordered, Adjudged and Decreed to be discharged from all liability to said defendants, or any of them, in the premises;

5. That pending the determination of this suit, the defendants, Cadel Brothers, Inc., a corporation, North Hudson Manufacturing Company, a corporation, Thomas Henry, Inc., a corporation, Edward De Forge, Inc., a corporation, Louis Bogorad and Guido M. Crocetti, may be restrained and enjoined from taking any further proceedings in the actions at law heretofore instituted by them against this complainant; and that the defendants, Michael J. Vitille, James J. Kinsella, Joseph Cunhy, Antonio Mammolite and Pasquale Ricciardi, Hoegger, Inc., a corporation, Indiana Flooring Company, a corporation, Hudson Fireproof Block Co., a corporation, Scagliola Manufacturing Co. Inc., a corporation, and Carl F. Diffenbach, Jr., may be restrained and enjoined from instituting any action or actions at law against complainant for the recovery of any sum or sums alleged to be due to them or any of them, by virtue of labor performed or materials furnished in the erection and

construction of the building of complainant, described in the bill of complaint;

6. That complainant may be paid out of said fund paid into Court by him, his costs of these proceedings;

7. That a writ of subpoena may issue, commanding said defendants to answer this bill of complaint, and to abide by such decree as this Court may make in the premises.

PLATOFF, SAPERSTEIN & PLATOFF,
Solicitors of Complainant.

DAVID SAPERSTEIN,
Of Counsel.

Answer and Counterclaim of Michael J. Vitille, James J. Kinsella & Joseph Cunhy, trading as Vitille, Kinsella & Cunhy.

Filed April 9, 1929.

71/182.

IN CHANCERY OF NEW JERSEY.

Between MARTIN J. MACDONNELL, Complainant, and MICHAEL J. VITILLE, *et als*, Defendants.	On Bill, etc. Answer and Counterclaim.

The defendants, Michael J. Vitille, James J. Kinsella and Joseph Cunhy, trading as Vitille, Kinsella & Cunhy, by way of answer say that:

1. They admit the allegations contained in paragraph 1.

2. They admit the allegations contained in paragraph 2.

3. They admit the allegations contained in paragraph 3.

4. They deny the allegations contained in paragraph 4, and allege that the amount paid on the contract amounts to $83,740.20, and that the complainant is entitled to a credit of $400.00 for the cost of twenty dressers, leaving a balance due to the defendant contractors of $13,859.80.

5. Defendants deny the allegations contained in paragraph 5.

6. Defendants deny the allegations contained in paragraph 6.

7. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 7, and leave the complainant to his proof thereof.

8. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 8, and leave the complainant to his proof thereof.

9. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 9, and leave the complainant to his proof thereof.

10. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 10, and leave the complainant to his proof thereof.

11. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 11, and leave the complainant to his proof thereof.

12. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 12, and leave the complainant to his proof thereof.

13. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 13, and leave the complainant to his proof thereof.

14. Defendants have not sufficient knowledge or information whereof to form a belief as to the

allegations contained in paragraph 14, and leave the complainant to his proof thereof.

15. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 15, and leave the complainant to his proof thereof.

16. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 16, and leave the complainant to his proof thereof.

17. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 17, and leave the complainant to his proof thereof.

18. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 18, and leave the complainant to his proof thereof.

19. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 19, and leave the complainant to his proof thereof.

20. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 20, and leave the complainant to his proof thereof.

21. Defendants have not sufficient knowledge or information whereof to form a belief as to the allegations contained in paragraph 21, and leave the complainant to his proof thereof.

22. The defendants admit the allegations contained in paragraph 22, but allege that the sum

they have alleged for extra work is $14,882.86 and they have refrained from instituting suit on the said claim by reason of the fact that the complainant has promised from time to time to make payment in full of the amount due to the defendants. Defendants further allege that the complainant has promised to pay to them the balance due on the contract, together with the said extra work, making a total due to the defendants of $28,742.66

23. Defendants deny the allegations contained in paragraph 23, and allege there is due to them the sum of $14,882.86, for extra work ordered by the complainant, and for which he promised to pay to the defendants, and the further sum of $13,-359.80 being the balance due on the original contract.

24. The defendants deny the allegations contained in paragraph 24, and allege their work was done in a good workmanlike manner, and that all the material furnished on the said job was of the best quality and that the plans and specifications were carefully followed by the defendants in doing all of the work called for by the complainant's plans and specifications and agreement therewith.

25. Defendants admit that they have not paid all of the Stop Notices filed with the complainant, by reason of the fact the complainant has failed to live up to his agreement to pay the balance due on the contract, and that he has failed to pay all of the extra work ordered by him and which he promised to make payment of, and that the defendants are ready and willing to pay the said Stop Notices as soon as the complainant fulfills his part of the agreement to his original contract and extra work.

26. Defendants deny that the complainant has ever offered to them the sum of $3646.00 but allege instead that the complainant has promised to pay the balance due on the contract and for the extra work ordered by him and that he has failed to do so.

FIRST DEFENSE.

Defendants by way of defense and relief ask that the court order the complainant to pay unto the court the sum of $13,859.80 due and owing to them on the original contract and the further sum of $14,882.86 due to them for extra work, and that the defendants may be permitted to substitute and proceed with their claim against the said complainant in an action at law.

COUNTERCLAIM.

The defendants by way of Counterclaim say that:

1. They repeat the allegations contained in paragraphs 1 and 2 of the complainant's Bill, and allege there is due and owing to them on the contract mentioned in paragraph 1, a balance of $13,-859.80 for which payment has been demanded and the same has not been paid.

2. Defendants allege that there is due and owing to them the sum of $14,882.86 for work, labor and material ordered by the complainant, and which work, labor and material the said complainant, after ordering the same promised to pay. The said work, labor and material ordered by the complainant was all extra work, separate and apart from the contract, plans and specifications, and was done for and at his request and under the

supervision of his architect, and the payment of the same has been demanded by the defendants and the same has not been paid, and there is now due and owing to them the full sum of $14,882.86 for extra work.

3. The defendants demand a judgment against the complainant for the full sum of $13,859.80 due on the original contract and the further sum of $14,882.86 due for extra work, labor and material, making a total sum of $28,742.66 due and owing to them from the complainant, and for which sum the defendants demand a judgment against the complainant for together with interest.

O. C. BIANCHI,
Solicitor of defendants, Michael J. Vitille, James J. Kinsella & Joseph Cunhy, trading as Vitille, Kinsella & Cunhy.

Order of Reference.

71/182.

IN CHANCERY OF NEW JERSEY

Between
MARTIN J. MACDONNELL,
Complainant,

and

MICHAEL J. VITILLE, *et als*,
Defendants.

On Bill, etc.

Order of Reference.

It appearing to the Court that the complainant has filed with the Clerk of the Court his bond in the sum of $30,186.35 in form and with surety approved by the Court conditioned to pay such decree as may be made in this cause, in compliance with the order of the Court made herein on the 29th day of April, 1929; and it further appearing that the complainant's bill of complaint is properly brought, and application having been made to speed the cause, and due notice of this motion having been given, it is on this 15th day of October, 1929,

Ordered that this matter be referred to Harry Lane one of the Masters of this Court, to hear the same for the Chancellor and to report to him; that the said Master take and state the account between the complainant and all the defendants on the biulding contract referred to in the bill of complaint and for extra work, and to report what amounts are due from the complainant to the defendants respectively after crediting all proper

payments made by the complainant thereon and making all proper allowances and set offs to which the parties maybe justly entitled to upon said building contract and extra work, and that said Master also ascertain and report the amounts due, if anything, on the several claims and demands of the parties to this suit as against the funds to be paid to the Court, and the order of priority of such claims, and it is

Further Ordered that the parties to this suit do, within twenty days from the date of service of a copy of this order, file with the Clerk of this Court statements in writing of their several claims to said fund and that the complainant and all defendants interplead, settle and adjust their several claims and matters in controversy in this suit as between and among themselves before said Master, and it is

Further Ordered that the said Master complete said testimony and file his report with all convenient speed, and it is

Further Ordered that all further equities are reserved until the coming in of the Master's report.

E. R. WALKER,
C.

Respectfully advised,
JOHN BENTLEY,
V. C.

Order of Re-Reference.

Filed Dec. 11, 1930.

71/182.

IN CHANCERY OF NEW JERSEY.

Between MARTIN J. MACDONNELL, Complainant, and MICHAEL J. VITILLE, *et als*, Defendants.	On Bill, etc. Order of Re-Reference.

The above cause remaining unheard, it is, on this 17th day of November, 1930, Ordered, that said cause now be heard before the Honorable John O. Bigelow one of the Vice-Chancellors of this Court to hear the same for the Chancellor, and to report the same to him and to advise what order should be made thereon, and that said hearing be heard at the time and place to be fixed.

EDWIN ROBERT WALKER,
Chancellor.

Master's Report of Accounting.

Filed June 18, 1930.

IN CHANCERY OF NEW JERSEY

Between MARTIN J. MACDONNELL, Complainant, and MICHAEL J. VITILLE, *et als*, Defendants.	71/182 On Bill, etc. Master's Report on Accounting.

In pursuance of the Order of Reference entered in the above entitled cause on the 15th day of October, A. D., 1929, whereby it was, among other things, referred to the undersigned, one of the Master's of this Court, to hear the same for the Chancellor, and to report to him and to take and state the account between the complainant and all the defendants on the building contract referred to in the Bill of Complaint and for extra work, and to report what amounts are due from the complainant to the defendants respectively after crediting all proper payments made by the complainant thereon and making all proper allowances and set-offs to which the parties may be justly entitled to upon said building contract and extra work, and that the undersigned also ascertain and report what the amounts due, if anything, on the several claims and demands of the parties to this suit as against the funds to be paid to the Court are, and the order of priority of such claims, I do respectfully report to his Honor, The Chancellor, that I have been attended by the solicitors for

the parties as hereinafter set forth; and I do report that I have taken the testimony of the witnesses produced before me and have received and inspected the exhibits produced in such manner, which testimony and exhibits are submitted herewith and made a part of this, my report.

I do report that all the following appeared before me during the course of the taking of the depositions.

APPEARANCES.

Mr. John H. Platoff for Platoff, Saperstein & Platoff, Solicitors for Martin J. MacDonnell, complainant.

Mr. O. C. Bianchi, solicitor for defendants, Michael J. Vitille, James J. Kinsella and Joseph Cunhy.

Mr. Israel Greene, Solicitor for defendant, Guido M. Crocetti.

Mr. Gilmour for McDermott, Enright & Carpenter, Solicitors for defendant, Irving Trust Company, as Trustee in Bankruptcy of Indiana Flooring Company.

Mr. Frank Cozzolini, Solicitor for defendants, Antonio Mamolite and Pasquale Ricciardi.

Mr. Thomas McNulty, Solicitor for defendants, Cadel Bros. Inc., North Hudson Mfg. Co., and Thomas Henry, Inc.

Mr. George Marcus for Wright, Vanderburgh & McCarthy, solicitors for defendants, Carl F. Diffenbach, Jr., and Edward Griffith.

Mr. Morris Gotlieb, as agent for Hoegger, Inc., pro se.

Mr. Louis De Forge, solicitor for defendant, Edward De Forge, Inc.

Mr. Sinisi, as agent for Hudson Fireproof Block Co., pro se.

Mr. Dante Rivetti, solicitor for Scagliola Manufacturing Co. Inc.

Mr. Herrigel for Herrigel, Lindabury & Herrigel, solicitors for defendant, Newark Sheet Metal & Kalamien Co.

Mr. Louis R. Kagan, Solicitor for defendant, Peter Goranson.

Mr. Oscar Stempler, Solicitor for defendant, John G. Keller.

Mr. Molloy for Heine & Laird, Solicitors for defendant, Walton N. Cable.

Mr. A. Theodore DeMuro, Esq., Solicitor of Angelo Rich (not a party defendant).

Mr. Emanuel P. Scheck, of Osborne, Cornish & Scheck, solicitors of S & S Supply Company, appearing Specially.

STATEMENT.

The Bill of Complaint was filed in this cause, setting up the contract entered into between the complainant, as owner, and the defendants, Michael J. Vitille, James J. Kinsella and Joseph Cunhy, trading as Vitille, Kinsella & Cunhy, as contractors, for the erection of a five story apartment building in the Township of North Bergen, at a price of $98,000.00. The Bill further set forth that the building contract and specifications had been filed in the County Clerk's Office and that numerous stop notices had been filed with the owner under the provisions of the Mechanics Lien Act, and that in some instances suits had been instituted. The contractors and the Stop Notice claimants were made parties defendants. Subse-

quently, additions to Bill by way of supplement were filed bringing in additional stop notice claimants. The Bill set forth that all of the contract price had been paid with the exception of $3,646.00 withheld on the Eighth installment payment, and the sum of $11,884.68 withheld on the Ninth and final installment payment. The Bill further set forth that the contractors claimed that there was due to them for Extras the sum of $14,655.67, but complainant alleges that the fair value of any and all of the extras alleged to have been furnished is not more than $6,157.55. Complainant, in his Bill, also contends that he is entitled to credit for work defectively performed or omitted under the contract, materials deviating from the specifications annexed to the contract, and work unfinished and materials unfurnished, the reasonable value of said credits he alleges to be in excess of $12,000.00.

In the twenty-sixth paragraph of his Bill, complainant sets forth that he has always been willing and still is willing to pay the said sum of $3,646.00 and such further sum or sums as may be found to be owing from complainant to the contractors after due credit has been given to complainant for such set-offs as he may have, to such person or persons as is or are lawfully entitled to receive the same, and to whom he can pay such sums with safety, and complainant tendered said sum of $3,646.00 into court.

Complainant, in his prayer in the Bill of Complaint, prayed that the contractors and stop notice claimants, who were made defendants to the suit, should interplead and determine their rights to said sum of $3,464.00 and such further sum or sums as may be found owing from the complainant to the contractors after due credit has been

given to complainant for such set-offs as he might have, and that complainant be ordered to pay such sum into Court. That an account might be taken and a settlement of the amount due from complainant to the contractors had, and that complainant be decreed to be discharged from all liability to said defendants or any of them in the premises. The Bill also prayed for a restraint against the contractors and stop notice claimants from proceeding at law against complainant.

The original papers on file disclose that upon the argument of the Order to Show Cause why restraint should not issue, an Order was entered on the 29th day of April, A. D., 1929, containing the restraint prayed for; "provided, however, and this order is made upon the express condition, that the complainant do deposit with the Clerk of this Court the sum of Thirty Thousand, One Hundred Eighty-six Dollars, Thirty-five Cents, ($30,186.35), on or before May 14th, 1929, to secure the payment of such decree as may be made by this Court in this cause, which said sum of $30,186.35 shall limit the maximum liability of complainant; or in lieu of cash, the complainant may file in this cause, his bond in said sum on or before May 14th, 1929, in form and surety to be approved by the Court, which bond shall contain a provision that it may be enforced in this Court in a summary manner after due notice to the principal and surety and after hearing thereon, conditioned to pay such decree as may be made in this cause, limited as aforesaid."

I have been advised that the bond provided for in said order was duly filed.

Under these circumstances, I apprehend that under the order of reference there are two separate

and distinct matters to be determined, viz: first, the amount due from the owner to the contractors; second, the amount due to each stop notice claimant respectively and their order of priority. At the inception of the taking of the depositions and endeavoring to keep the testimony on these two questions as separate and distinct as possible, I first took the testimony of each stop notice claimant on his particular claim, endeavoring as much as possible to keep the testimony respecting the claim of each stop notice claimant separate. I then took up the question of the testimony respecting the contractors' claim.

In this report I feel that the two matters should be treated in just the reverse order and that first I should deal with the contractors' claim and ascertain the amount of the fund in which the stop notice claimants are to participate.

CONTRACTORS' CLAIM.

As between counsel for the owner and counsel for the contractors and the stop notice claimants, there was developed before me a sharp clash respecting the legal rules to be applied in determining the amount due the contractors, and numerous memorandums of law were filed with me by respective counsel.

Counsel for the owner in his memorandum raised five points of law, which I shall briefly discuss for the benefit of the Court and to appraise the Court of the reasons for my findings herein set forth.

POINT ONE.

Where a building contract provides that payments shall accrue only upon the production of a certificate by the architect, such provision is a condition precedent to the liability of the owner to make payments in the absence of fraud or collusion.

With this general statement of the law I have no quarrel, but if by this contention of counsel he means that because there has been no final certificate issued by the architect, that therefore there can be no recovery from the owner (although in his memorandum he does not appear to go as far), I cannot agree with him in view of all of the facts and circumstances of this case.

The testimony shows that the building was completed for occupancy on October 1st, 1927. The testimony further shows that on numerous occasions the architect promised to check up the building and issue his final certificate. That, at no time did the architect specifically refuse to issue the certificate for any particular reason except that he had not had time to check up, nor did he at any time serve upon the contractors any demand to perform any incomplete work. The architect, Mr. Ach, testified on Page 279 of the testimony, that the building was substantially completed. The architect further testified that he had granted certificates up to the final certificate. In this connection, it is well to remember that a great deal of the alleged omitted or substituted work, if not all, had been omitted or substituted prior to the issuance of the Eighth certificate by the architect. It is also well to remember that the amount retained from the contract price ap-

proximates the fifteen percent retained percentage. I feel that in view of all of the testimony, that with the exception of a few items for which I hereafter give credit to the owner, that the contractors were entitled to their final certificate, and particularly in view of the testimony of the architect himself and Mr. Scheidecker, the building expert produced on behalf of the owner, that its withholding would amount to legal fraud under the cases.

See Rizzolo vs. Poysher, et al, (Court of Errors and Appeals), 99 Atl. Rep. 390.

Furthermore, complainant has applied in this Court for equitable relief and in his Bill of Complaint tenders to pay what is justly due to the contractors and prays that an account may be taken and a settlement of the amount due from him to contractors may be had after due credit has been given for such set-offs as complainant may have. The question of the architect's certificate is not made an issue in the Bill. And, upon this bill the complainant has obtained the equitable remedy of injunction. If on no other doctrine, I feel that the maxim "he who seeks equity must do equity" would estop complainant from raising this point.

POINT TWO.

The production of the certificate may be waived but the waiver must be express or reasonably clear from the acts and conducts of the parties.

In my opinion, the complainant could not, even at law, resist payment of the amount that may be meritoriously due because no final certificate has been issued, but I am confident that in this suit

he must be held to have waived the nonproduction of the final certificate when he came into this Court, asked for and obtained an injunction, prayed for an accounting to determine the amount due and tendered himself ready to pay such amount as may be found to be due.

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POINT THREE.

Where a contract provides that no extra work or exchange shall be made except in pursuance of a written order, the production of the writing is a condition precedent to the right to recover unless it was waived.

The testimony shows that the specifications used by the architect was a stereotyped set of specifi-
20 cations and that constantly changes were being made both by the architect and the owner, and that the changes were substantial. The testimony shows that the owner is a doctor and was vitally interested in the erection of this apartment house and particularly in the apartment on the first floor, which was to be used by himself as a combination office and living quarters. The owner, with the exception of two or three weeks when he took a trip, was daily in and out of the
30 building and watching its progress. It is admitted by both the owner and the architect that at the owner's request and direction numerous changes and additions were made. The architect says that in some instances written orders were issued but in most instances no written orders were issued. Mr. Vitille testified that all of the extra work was done upon orders of the owner and the architect. Whether this be so or
40 not, I am convinced from the testimony, from the

actions of the owner that he impliedly gave authority to the architect to order extra work orally and that he was in and about the building and ratified such orders for extra work and that the contractors had the right to reply upon the orders given for extra work. Further, that the owner is estopped by reason of his actions from raising this question, and further by the filing of his Bill in a Court of equity and obtaining equitable relief as hereinbefore reverted to. In a number of instances the extra work was ordered in writing. In a number of others the architect admits that the extra work was ordered by him orally with the owner's consent.

In the leading case of Headly vs. Cavilier, 82 Atl. Rep. 908, the Court of Errors and Appeals considers this question with great thoroughness and holds that no matter how stringent the provisions are placed in a contract prohibiting it from being altered or added to in any wise, that parties who have contracted together have a right to cancel their contract, or alter it in any wise not prohibited by law, or to supplement it by another additional contract and that no matter how stringently such clauses may be worded, it is always open for the parties to agree orally or otherwise, upon proper consideration, that they be partially or entirely disregarded and another arrangement sustituted.

POINT FOUR.

The architect has no authority to waive any of the substantial rights of the owner under the contract.

There is no doubt but that the above is a true statement of the strict legal law. However, under

the circumstances of this case and in view of the testimony of both the contractor, Vitille, that all of the extras were ordered by the owner, and the architect, and I believe this to be true, and furthermore, in view of the testimony of the architect and the owner that numerous items of extra work were verbally ordered at the express directions of the owner and that the owner was constantly in and out of the building while the extra work was being performed, I do not believe that in order for the contractors to recover for the extra work, that it is necessary to hold that the architect alone waived any provision of the contract and specification in the ordering of this extra work. Likewise on the equitable principle heretofore adverted to, the complainant having received the benefit of this extra work and which I find was at either his express knowledge or with his acquiescense, I find that he should not be permitted to escape payment for such extra work as was performed.

POINT FIVE.

The owner may have set-off against any unexpended balance due on the contract or for extra work, for which certificates have not been issued, his claim for incomplete or defective work.

I thoroughly agree with this statement of the law and have in this report allowed to the owner all credits to which I feel he is entitled to by reason of any incompleted or defective work.

The foregoing are all of the points raised by counsel for the owner in his memorandum and argument before me. I am aware that it is somewhat unusual in a reference of this kind for the Master to consider in detail legal questions raised, but in view of the fact that their application to the

case at bar is principally determined upon the evidence submitted, I feel that it was appropriate for me to dispose of them before generally considering the evidence produced pro and con on the contractor's case.

According to the statement of their claim, filed by the contractors, their claim is as follows:

Contract Price		$98,000.00
Credits		
Amount paid on account	$83,740.20	
Credit for 20 dressers	400.00	
Total Credits		84,140.20
Balance due on contract		13,859.80
Amount due for extra work		14,882.62
Total amount of claim		$28,742.88

Credits to Owner for Moneys Paid on Account

There was some question as to the amount of credit which the owner was entitled to receive for moneys paid on account to the contractors. At the suggestion of the Master, the owner and his counsel and the contractors and their counsel got together and checked up all of the payments with the result that at the conclusion of the hearings it was stipulated on page 636 of the testimony that the owner was entitled to credits for payments made on account of the sum of $83,740.20.

Credits Allowed to Owner for Omitted and Defective Work and Materials

In addition to Mr. Vitille, one of the contractors, and the owner and the architect, experts were produced on both sides. The complainant produced

Mr. Shilowitz, an architect, to testify to certain omissions. Mr. Shilowitz testified as to the value he placed upon the omitted work and materials without in anywise giving credit for the alleged substituted work and materials. Furthermore, an examination of his testimony indicates, to my mind, that most of the values placed by him were simply approximate values. The other expert produces on behalf of the owner, Mr. Scheidecker, was, to my mind, a most fair witness and I have placed great reliance upon his testimony. I feel that his testimony was not biased as is usually the case in the testimony of experts. An examination of the testimony of Mr. Scheidecker shows that the building was substantially completed. He further testified that in numerous instances, where there were discrepancies between the materials placed in the building that the materials placed in the building more nearly approximated what, in his judgment, were proper in the erection of an apartment house of the size and character of the building in question. For instance, he testified that the hanging of gypsum block from the ceiling in the doctor's apartment was absolutely impractical, and also that the use of cabinet trim in a building of this nature was unusual. Also, that it was usual for the stair soffets not to be enclosed and plastered. Mr. Shilowitz claimed an allowance of $1500.00 because there was not a bonded Barrett roof placed on the building. Mr. Scheidecker, on the other hand however, testified that the roof that was placed on the building was a good roof and that the only difference between that and a bonded Barret roof was the absence of the bond. He also testified that the cost of the

bond saved to the contractors was approximately $90.00.

From an examination of the entire testimony on both sides, I am convinced that the specifications were a stereotyped form of specification and that in reading them in connection with the plans, it was necessary to make the specification comply with the plans and that numerous changes were necessary as the work progressed. I am further convinced from the testimony that the erection of this apartment house was a personal enterprise of Dr. MacDonnell and that he, as well as the architect, was constantly upon the job, and that he himself, as the work progressed, made numerous changes. For instance, Mr. Scheidecker testified to a difference between the face brick used in the building and that specified, whereas, I am convinced that the contractors were directed to use a face brick similar to that used in Tudor Hall, an apartment house erected in the City of Englewood, and that in fact Mr. Vitille was taken up to Tudor Hall to see the kind of face brick there used. Under this circumstances I do not believe that the complainant is entitled to credit for a large number of the items of alleged omitted materials which in most instances were substituted by other materials, in pursuance with the orders and directions of both the owner and the architect. I find, however, that there are numerous items of omitted work and materials and defective work and materials for which I hereafter give the owner credit.

From an examination of the entire testimony, I find that the owner is entitled to credit in the amounts indicated for the following omitted and defective work and materials.

Kitchen dressers omitted: (Contractors admit credit for $400)	$500.00
Iron doors in vestibule substituted by kalamine doors	150.00
Kalamine doors not set properly	150.00
Back painting of trim omitted	231.00
Radiators: were to have one coat of prime and two coats of American Radiator enamel—instead aluminum silver was used: Allowance	240.00
Vestibule entrance trim: specifications provided for trim to run to floor, whereas trim as set only runs to top of wainscoating; allowance	35.00
Roof: Roof on long enough to have shown defects in material and workmanship. Testimony is to effect that roof is in very good condition: Allowance—saving of cost of bond	90.00
Cellar ceiling: one coat of plaster used instead of three as specified	100.00
Deafening in bathrooms omitted, Allowance	100.00
Grounds omitted—Allowance	114.00
Plinth block omitted. Allowance	40.00
Cabinet trim: saving to contractors	267.00
Amt. carried ford.	$2,137.00

Amt. Brght. For'd		$21,137.00
Milk Cabinets in basement omitted. Allowance	75.00	
Towel bars in bathrooms omitted. Allowance	25.00	
Dumbwaiters: Gorenson dumbwaiters used instead of Sedgwick as specified. Saving to Contractors	100.00	
Roofing: Copper flashings around parapet omitted. Allowance	160.00	
Painting work: Allowance for omission of sandpapering and pumicing of woodwork and improper and defective painting	500.00	
Total amount of Credit to Owner for Omitted and Defective Work and materials		$3,022.00

EXTRA WORK.

Mr. Vitille testified as to each item of extra work.

In considering the items for extras on the contract, I have used Exhibit D-56, which is the exhibit used by Mr. Ach, the arcihtect, in his testimony respecting the extra work. The direct testimony of Mr. Ach respecting the extra work is found on Page 293 to 307 of the testimony. Mr. Ach had a copy of Exhibit D-56 before him and in his testimony referred to each item by number. I have on the right side of the exhibit the items so far as to be in accordance with the testimony of Mr. Ach.

In this Report I will refer to the respective items by the numbers so designated. It will be noted from a reading of Mr. Ach's testimony that on numerous occasions he allows the items but

that there is a slight discrepancy as to the amount he allows the item for. This in numerous instances is caused by the fact that he only allowed five percent on each item instead of ten percent overhead and ten percent profit. I am convinced from the testimony that the charge of ten percent overhead and ten percent profit made by the contractors is proper, and I have on each item allowed, included this percentage.

With respect to the various items:

Item No.		Amount Disallowed	Amount Allowed
1.	Lumnite Cement:	$105.00	$
	I have not allowed this item in view of the architect's testimony on page 293 that the substitution of Lumnite Cement was necessary to prevent freezing and the contractors neglected to provide proper facilities for heating materials.		
2.	Rock excavation per requisition:		1,212.75
	Both the owner and the architect agree that this item should be allowed.		
3.	White Cement:		191.24
4.	Elevator Shafts concreted and waterproofed:	100.17	
	I have not allowed this item in view of the architect's testimony on page 294.		
5.	Deafening apartments:		720.11

Item No.		Amount Disallowed	Amount Allowed
	Deafening south dividing walls:		178.37
	The architect on Page 295 agrees that the work was done and the contractors should have allowance therefor.		
	Amt. Carried For'd	205.17	$2,302.48
	Amt. Brought For'd	$205.17	$2,302.48
6.	Face Brick and Laying:		363.00
7.	Sand, Cement and Labor:	267.65	
	I have not allowed this item in view of the architect's testimony on Page 295.		
8.	Furnishing nnd erecting Kalamine and Iron Buck for Vestibule Doors:		108.90
	I have allowed this item, but in giving credit for omissions I have given credit for the iron doors omitted.		
9.	Kalamine frame and sash in vent shafts:		139.15
	The architect agrees that contractors should have allowance for this item.		
10.	Furnishing Flax Linum:		730.48
	Laying Flax Linum:	264.42	
	I have not allowed for the laying of the Flax Linum in view of the architect's testimony page 296. The architect agrees that the contractors should have allowance for the furnishing of the flax linum.		

Item No.		Amount Disallowed	Amount Allowed
11.	Removing window frame in toilet:		49.67
12.	Installing kitchen-maid cabinets:		180.97
13.	Rock excavation:	221.95	377.00
	In view of the architect's testimony on page 297, I have allowed this item for $377.00 instead of the amount charged, to wit: $598.95.		
14.	Removing partition in Janitor's apartment:		101.72
	The architect on page 297 agrees that the contractors should have allowance for this item.		
	Amt. Brought For'd	$959.19	$4,362.37

Item No.		Amount Disallowed	Amount Allowed
	Amt. Brought For'd	$959.19	$4,362.37
15.	Taking down and reerecting new partition:		155.48
	The architect, on page 297 agrees that contractors should have allowance for this item.		
16.	Furring walls for frigidaire pipes:		100.44
	The architect agrees on Page 298 that the contractors should have allowance for this item.		
17.	Additional cost of coal bin:		63.67
18.	Erecting dressing room in electric room		166.98

The architect, on page 298, agrees that contractors should have allowance for this item.		
19. Erecting linen closet in hall:		50.80
The architect, on page 298, agrees that contractors should have allowance for this item.		
20. Cutting floors and walls, etc. in Dr. Fisher's office:		390.83
The architect, on page 298, agrees that the contractors should have alance for this item.		
21. Erecting partition around frigidaire:		14.52
I have allowed this item for the reason that the architect admits that the work was done.		
22. Erecting book case in Doctor's waiting room:		58.08
Amt. Carried For'd	$959.19	$5,363.17

Item No.	Amount Disallowed	Amount Allowed
Amt. Brought For'd	$959.19	$5,363.17
(22 Cont'd) I have allowed this item because the architect admits on page 300 that it was done in pursuance with his order.		
23. Erecting extra shelving:	181.50	
I have not allowed this item in view of the architect's testimony on page 300.		
24. New Door opening to Ward-Room:	33.18	

Item No.		Amount Disallowed	Amount Allowed
	I have not allowed this item in view of the architect's testimony on page 300.		
25.	Erecting dressing room in electric-room:		50.08
26.	Building bench for screens in cellar:		21.78
27.	Erecting dark room in cellar:		101.64
28.	Installing instrument cases:		29.04
29.	Building up table in Doctor's Kitchenette:		12.00
	Patent Locks and bench for telephone books, etc.:		6.00
	The architect, on page 304, agrees that the contractors should have allowance for these items.		
30.	Installing book cases in Doctor's office:	72.60	
	I have not allowed this item in view of the architect's testimony on page 340, and that this work seems to have been covered in the plans and specifications.		
31.	Putting moldings around kitchen-maid cabinets:		58.08
	Amt. Carried For'd	$1,246.47	$5,649.79

Item No.		Amount Disallowed	Amount Allowed
	Amount Brought Forward	$1,246.47	$5,649.79
32.	One piece of birch veneer for kitchen-maid cabinets:		3.72
	The architect agrees on page 304 that contractors should have allowance for this item.		10
33.	Furnishing and hang hardware on 15 sets French doors:		980.10
	Hanging three pairs of French doors supplied by North Hudson Mfg. Company		72.60
	This was ordered by the Doctor and the architect agrees on page 304 that the contractors should have allowance for this item.		20
		$1,246.47	$6,706.21

SUB-CONTRACTORS.

34.	Extras on outside stucco per contract of Edward De Forge, Inc.		30 400.00
	I have allowed this item. The architect allowed it for only one-half, but I can see no reason why, in view of the testimony, that the contractors should not have allowance for this extra charge on De Forge, Inc., subcontract.		40
35.	Extra for mill work—North Hudson Mfg. Co.		775.43

Item No.		Amount Disallowed	Amount Allowed
	I have allowed this item in view of all of the testimony. The architect, on page 305, testified but does not seem to be very clear with respect to this item.		
36.	Extras on heating work— John G. Keller Co.		140.00
	The architect agrees on page 305 that the contractors should have allowance for this item.		
	Amt. Carried For'd.		$1,315.43
	Amount Brought Forward		$1,315.43
37.	Extras on Electrical Work —S. & S. Supply Company:	$3,243.70	
	The testimony shows that this bill is not against the contractors and that the owner is directly responsible to the S. & S. Supply Company for same. On page 636 it was stipulated that the contractors should not be allowed for this item.		
38.	Extras on plumbing work —Cadel Bros. Inc.		832.00
	The items covered by this bill were selected and ordered by the owner. Also, see architect's testimony on page 306.		193.00
39.	Extras on tile work—G. M. Groccotti.		195.00

Item No.	Amount Disallowed	Amount Allowed
40. Extras on iron work—		
Foscale Iron Works:		159.27
	$3,243.70	$2,501.70
Total amounts of sub-contractors bills allowed amount to	$2501.70	
10% Overhead allowed	250.17	250.17
	$2751.87	
10% Profit allowed	275.19	275.19
Total amount extras—sub-contractors		$3,027.06

RECAPITULATION.

Extras—General Contractors	$6,706.21
Extras—Sub-Contractors	3,027.06
Total Amount	$9,733.27

I do, therefore, respectfully report that there is due from the complainant (the owner), to the defendants, Vitille, Kinsella & Cunhy, the contractors, the sum of Twenty Thousand, Five Hundred Twenty-one Dollars, Seven Cents, ($20,521.07), together with interest thereon from October 1st, 1927 to July 1st, 1930, amounting to Three Thousand Three Hundred Eighty-Five Dollars, Ninety-Five Cents ($3,385.95), making the total amount including interest up to July 1st, 1930, the sum of Twenty-three Thousand, Nine Hundred Seven Dollars, Two Cents, ($23,907.02).

Annexed hereto and marked 'Schedule A' is a

Schedule of the contractors' claim against the complainant.

Annexed hereto and marked 'Schedule B' is a statement of the claims of stop-notice claimants and their order of priority.

Annexed hereto is a schedule of the exhibits submitted in evidence and returned with this report.

All of which is respectfully submitted this Eighteenth day of June, One Thousand, Nine Hundred Thirty.

HARRY LANE,
Special Master in Chancery
of New Jersey.

SCHEDULE A.

Amount of Contractors' Claim against Complainant.

Contract Price		$98,000.00
Amount of Extras allowed		9,733.27
Total		107,733.27
Credits:		
Amount paid on acct.	$84,190.20	
Amount allowed the owner for omitted and defective work and materials	3,022.00	
Total credits		$87,212.20
Total Amount of Claim		$20,521.07
Interest from Oct. 1, 1927 to July 1st, 1930,		3,385.05
Total amount of contractors' claim against owner with interest to July 1st, 1930		$23,907.02

Exceptions to Master's Report.

71/182.

Filed July, 1930.

IN CHANCERY OF NEW JERSEY.

Between MARTIN J. MACDONNELL, Complainant, and MICHAEL J. VITILLE, *et als*, Defendants.	On Bill, &c. Exceptions to Master's Report.

The complainant, Martin J. MacDonnell, hereby excepts to the report filed in this cause by Harry Lane, Esq., one of the Masters of this Court, bearing date June 18, 1930, in the following respects and for the following reasons:

1. The said Master's finding that the owner is chargeable with the amount of the final payment and the amount of the extras as set forth in said report without the issuance of certificates for said final payment and for said extras by the architect, is contrary to the provisions of the building contract and to the specifications marked in evidence as Exhibits D-51 and D-52, and is not supported by the testimony.

2. The said Master's finding that the said contractors were entitled to their final certificate and that the withholding thereof would amount to fraud, is contrary to the evidence, contrary to the contract between the owner and said contractors, and contrary to law.

Exceptions to Master's Report.

3. The testimony showed that said architect never agreed to issue said final certificate, and the said Master's finding that the contractors were entitled to receive the final payment, was erroneous as a result thereof.

4. The said Master's finding that the work and materials alleged by the owner to have been omitted or substituted had been performed or furnished before the issuance of the eighth certificate by the architect, is irrelevant and immaterial, and is not the basis for a finding that the owner is required to pay for all work and materials performed or furnished prior to the issuance of said certificate by reason of the fact that the contract between the parties, and the certificates themselves provided that the issuance of any certificate shall not be deemed a waiver of any of the owner's rights.

5. The said Master erred in his conclusion that complainant, by tendering in his bill of complaint, payment of what is justly due to the contractors, waived any rights he might have to set up the non-production of the architect's certificates against the claims of said contractors; and further erred in stating that the question of the architect's certificate is not made an issue in the bill of complaint, which statement is in direct contradition to Paragraph 23 of the bill of complaint; and further erred in stating that the production of the architect's certificates may be dispensed with under the maxim that "He who seeks equity, must do equity."

6. The said Master's finding that the production of the architect's certificates may be dispensed with under the circumstances of this case, is contrary to the valid and lawful agreement between

the owner and the contractors and results in effect, in the creation of a new contract between said parties.

7. The said Master's finding that the production of the architect's certificates had been waived, is erroneous and contrary to the evidence, and said Master's conclusion that complainant waived the same by tendering himself ready to pay such amount as may be due in the bill of complaint, is not a sufficient basis for a finding that said certificates had been waived.

8. The said Master's finding that in all cases where extra work was performed without written authorization therefor the said written authorization was waived, is contrary to the evidence, and contrary to law, and the said Master's finding that the owner is chargeable with the amount of said extra work where no written orders were procured, is contrary to the contract between the parties, and the specifications.

9. The said Master's finding that the owner impliedly gave authority to the architect to order extra work orally, is irrelevant and immaterial, and cannot be made the basis of a finding that the owner thereby became responsible to pay for said extra work.

10. The said Master's finding that the owner is estopped by reason of his conduct from denying his liability for extra work by reason of the non-producing of a written order therefore, is contrary to law and to equity, and is in violation of the contract between the owner and the contractors.

11. The said Master's finding that the owner and contractors orally agreed to waive that portion

of the contract providing that a written order would be required to charge the owner for extra work, is erroneous, and any such alleged agreement was not supported by adequate consideration.

12. The said Master's finding that the owner could be charged with extra work ordered by the architect is erroneous by reason of the fact that there is no proof that the architect was authorized to waive any of the substantial rights of the owner under the contract.

13. The cerdits allowed to complainant for omitted and defective work and materials, are insufficient and inadequate, and contrary to the evidence of the value of said defective work and materials.

14. The said Master's finding that where work or materials were substituted for those specified in the contract and specifications such substitutions were as suitable are more suitable for the building in question, are irrelevant and immaterial, and contrary to the contract between the owner and contractors, and do not warrant the Master in rejecting the claim of complainant for omitted and defective work for which substitutions were made.

15. The measure of damages adopted by the Master for the loss to complainant by reason of the failure of the contractors to furnish a bonded Barrett roof was erroneous in that complainant was entitled to the difference between the value of the roof installed and the value of a bonded Barrett roof.

16. The amount allowed to the contractors for extra work is excessive and contrary to the evi-

dence, and the said contractors were not entitled to credit for any extra work for the reasons hereinabove set forth.

17. The said Master's finding that the complainant is liable for interest in the sum of Thirty-three Hundred Eighty-five Dollars and Ninety-five Cents ($3385.95) from October 1, 1927, to July 1, 1930, is contrary to law, and complainant is not chargeable with interest in this cause by reason of the fact that complainant could not safely pay the amount chargeable against him to anyone prior to the determination of this Court without being subjected to the liability to make payment twice, in view of he conflicting claims presented to complainant by the various defendants; by reason further of the fact that the amount owing by complaint was unliquidated and could not be paid by him until the determination of this Court; and by reason further of the fact that complainant has heretofore tendered into Court the amount admitted by him to be due, and such further sum as this Court should find to be due from him.

And by reason of the exceptions above stated, complainant alleges that said Master has not reported properly and in accordance with the order of this Court referring the same to him, and with the principles of law and equity.

PLATOFF, LAPERSTAIN & PLATOFF,
Solicitors of Complainant,
Martin J. MacDonnell.

COURT OF CHANCERY OF NEW JERSEY
ONE EXCHANGE PLACE
JERSEY CITY

JOHN O. BIGELOW
VICE CHANCELLOR

November 5, 1930.

Platoff, Saperstein & Platoff, Esq'rs,
400 - 38th Street,
Union City, N. J.

Ovidio Bianchi, Esq.,
319 Main Street,
Orange, N. J.

MacDonnell vs. Vitille 71/182.

Gentlemen:

I have delayed so long deciding this case that I will not take the further time which would be required to put my conclusions into a formal opinion.

The general exceptions argued in Part I of complainant's brief should be overruled.

The exceptions to the Master's refusal to give credit for certain items of omitted or defective work are sustained to the following extent:

Item	1(a)	$1,000.	
	(c)	100.	
	(g)	865.20	
	(i)	130.	
	2(a)	750.	
	(b)	400.	
	3(a)	700.	
	4(a)	100.	
	5(c)	100.	
	8(a and b)	1,500.	
	9(a)	150.	
	(b)	500.	
			$5,295.20

MacDonnell vs. Vitillo #2. Nov. 5, 1930.

The exceptions to the Master's allowance of extras should be sustained as to item 6, $363. All other exceptions relating to the principal sum due are overruled. The principal found due is therefore $13,062.87.

The owner has had the income of this building; interest should therefore be allowed from October 1, 1927 to the date of the decree, and thereafter on the total therein stated until paid either into court or to the persons entitled. But if the owner has already paid the money into court; then interest at six percent should be calculated to the date of payment into court, and thereafter at the rate (if any) allowed by the Clerk.

In this controversy both the owner and the contractor made excessive claims. They should each bear their own costs; the Master's fee should be divided equally between complainant on the one hand and the defendants who share the fund on the other. As the complainant has paid this fee the decree should give him credit for one-half, namely $1,000. on the amount found due by him. The charge of this sum of $1,000. should not be borne by one-stop notice claimant. The claim of each stop notice claimant sharing in the fund should be reduced pro rata, so as to absorb this charge.

Notice of the settlement of the decree should be given to all parties, and those stop-notice claimants who, by the terms of the decree as drafted will receive no part of the fund or less than the amount found due them, should be expressly so advised.

Yours very truly,

[signature]

Assignment.

Filed Nov. 17, 1930.

71/182.

IN CHANCERY OF NEW JERSEY.

Between
MARTIN J. MACDONNELL,
Complainant,
and
MICHAEL J. VITILLE, *et als*,
Defendants.

On Bill, etc.
Assignment.

We, the Undersigned, defendants in the above entitled cause of action and described in said complaint as being the general contractors, do hereby assign, transfer and give over unto to O. C. Bianchi, our attorney and solicitor in the said matter, all our right title and interest to the sum of $5,395.71, found to be due and owing to us, the general contractors, on the contract made between us and the owner, Martin J. MacDonnell and the sum of $11,130.30, found due and owing to us by this court for extra work performed and extra material used. And we do hereby assign to him all our right title and interest in any decree, judgment, finding or award that may be made or entered by this court predicated on the amount found due and owing from the said Martin J. MacDonnell the above complainant to us as general contractors.

This assignment of our right title and interest in the above matter is made to O. C. Bianchi for and as security for the payment to him of the com-

pensation due to him as our attorney and solicitor, under and by virtue of the agreement made between us and the said O. C. Bianchi on October 15, 1928, wherein the said attorney and solicitor was to receive one-third of whatever judgment, decree, award or settlement that might be made on the claim that we, as contractors, had against the said Martin J. MacDonnell as owner of the apartment house building then being erected by him.

It is understood and agreed upon that after the payment to him of his compensation, that the balance of the said judgment, award, decree or finding shall be paid to us or to such of our creditors as may have a right to be paid.

VITILLE, KINSELLA & CUNHY,
By Michael J. Vitille.

Dated, November 25th, 1930.

Petition of Solicitor.

71/182.

Filed Nov. 17, 1930.

IN CHANCERY OF NEW JERSEY.

Between MARTIN J. MACDONNELL, Complainant, and MICHAEL J. VITILLE, *et als*, Defendants.	On Bill, etc. Application for Solicitor's Lien on Judgment. Petition of of Solicitor.

To Edwin Robert Walker,
Chancellor of the State of New Jersey.

The petition of O. C. Bianchi, a solicitor in Chancery of New Jersey, respectfully shows:

That on or about the 13th day of October, 1926, the firm of Vitille, Kinsella & Cunhy, as general contractors did enter into a contract with one Martin J. MacDonnell, as owner, for the erection and construction of an apartment house building situated on the Northeast corner of 30th Street and Park Avenue in the Township of North Bergen, New Jersey.

Your petitioner further shows that after the erection and completion of the said building, the said Martin J. MacDonnell, did refuse and neglect to pay the general contractors the balance alleged by them to be due on he general contract, and also did refuse to pay to the general contractors, compensation for the extra work and material which they allege they had performed on the building, at the request of the said owner.

Petition of Solicitor.

Your petitioner further shows that on or about the 15th day of October, 1928, the above named general contractors did employ, hire and retain your petitioner to represent them in all and any proceedings, either in law or in equity, that he might deem necessary in order to collect by judgment, settlement or in any other manner, the balance that they alleged was due and owing to them on the general contract, and for the extra work and material furnished by them.

Your petitioner further shows that the said general contractors agreed, contracted and promised to pay to your petitioner, and authorized him to retain from any amount that might be agreed upon in settlement of any suit instituted, or from any award make to the general contractors by any court of equity, or by any judgment or other manner, the sum of thirty-three and one-third (33-1/3) per cent of any amount agreed upon in settlement or awarded by any judgment or decree in any court.

Your petitioner further shows that under the said agreement the sum of thirty-three and one-third (33-1/3) per cent was to be paid as compensation to your petitioner, before the payment of any stop notices or the debt of any person or corporation having any lien or claims against the said contractors.

Your petitioner further shows that he agreed and promised that he would take all necessary steps that in his opinion would be deemed necessary by him to collect the amount heretofore mentioned, and that he would represent the said general contractors in any proceedings that might arise as a result of the said claim. That your petitioner would advance all disbursements and pay

out all and any necessary fees that might be necessary for the filing and recording of pleadings in any cause of action at law, or in equity that might be instituted relative to the claim hereinbefore mentioned.

Your petitioner further shows that by and in pursuance of the contract made between him and the general contractors, he did represent the said general contractors in the litigation or hearings held as a result of the facts hereinbefore mentioned, concerning the erection of the apartment house of the said Martin J. MacDonnell, that he personally attended all hearings, drew all necessary pleadings, filed all necessary memorandums and made all necessary disbursements.

Your petitioner further shows that he has never been paid any compensation for any of the services rendered by him, that he has received no advancements for any payments of any disbursements made by him, and that as a result of the litigation and efforts made by your petitioner to secure a verdict or finding in favor of his clients, the general contractors, that he did succeed, after many days of litigation, after many hearings, after a bitter contest both in questions of law and facts, in having a decree in favor of his clients, the general contractors, the sum of $16,466.05 Your petitioner further shows that many stop notices were filed with the said Martin J. MacDonnell, owner, by various material men who had furnished material on the said building, and that the litigation which has terminated in favor of the general contractors, was one growing out of the filing of a Bill in the nature of a Bill of Interpleader, and that the said stop notice claimants did file their respective claims with the Court of Chancery, and

that the said Court has determined the validity of the said stop notices, as to time of service and the amount due on the said stop notices.

Your petitioner further shows that he files this petition under and by virtue of the provisions of an Act known as the "Attorney's Lien Act of 1914," Chapter 201, under and by virtue of which Act your petitioner respectfully submits that he is entitled to a lien of thirty-three and one-third (33-1/3) per cent of the decree or final judgment entered in behalf of the general contractors, in this suit, and to which your petitioner's clients were made party-defendants because of their contention that they had a just and legal claim against the owner for the balance due on their contract, and for the amount due to them for their extra work.

Your petitioner contends that he is entitled to have the compensation due to him under the above agreement first paid to him, before the payment of any of the stop notices, liens or claims that have been filed in the above proceedings, and before the payment of any counsel fees, and respectfully petitions this court to determine and enforce the lien of your petitioner in the payment to him of the sum of thirty-three and one-third 33-1/3) per cent of the final decree in this cause, the same being the sum of $5,488.00.

And your petitioner will ever pray, etc.

O. C. BIANCHI,
Petitioner.

Solicitor's Agreement for Compensation.

Filed November 26, 1930.

Know All Men by These Presents, that whereas on the 13th day of October, 1926, the firm of Vitille, Kinsella & Cunhy, as general contractors did enter into a contract with one Dr. Martin J. McDonnell, for the erection and construction of an apartment house building, situated on the Northeast corner of 30th Street and Park Avenue, in the Township of North Bergen, New Jersey.

And Whereas, after the erection and completion of the said building, the said Dr. Martin J. McDonald as owner, did refuse and has refused and neglected to pay to the said general contractors, the balance due to them on the general contract, and the amount due to them for extra work, which they alleged they performed on the said building at the request of the owner.

Now Therefore, the said Vitille, Kinsella & Cunhy, general contractors, do hereby employ, hire and retain O. C. Bianchi, a Counsellor-at-Law of the State of New Jersey, for and as their attorney, to represent them in all and any proceedings either in law or in equity that he may deem necessary to collect by judgment, settlement or in any other manner, the alleged balance due and owing to them on the said general contract and extra work. And, they do hereby agree, contract and promise to pay to O. C. Bianchi and authorize him to retain from any amount that may be agreed upon in settlement of this suit, or that may be awarded to the said general contractors by any court of law or equity, by any judgment, decree or any other manner, the sum of thirty-three and one-third (33-1/3) per cent of any amount agreed upon in settlement or awarded by any judgment or decree of any court.

Petition of Solicitor.

It Is hereby agreed upon that the said amount of thirty-three and one-third (33-1/3) per cent shall be first paid to the said O. C. Bianchi, before the payment of any "Stop Notice" filed in this matter, or the debt of any person or corporation having any lien or claim against the said general contractors, and the said O. C. Bianchi, does hereby promise and agree that he will take all necessary steps that in his opinion may be deemed necessary by him to collect the amount hereinbefore mentioned, and to represent the said general contractors in any proceedings that may arise as a result of the above claim, and that he will advance, disburse and pay out all and any necessary fees that may be necessary for the filing and recording of pleadings in any action at law or equity that may arise or be instituted relative to the claim hereinbefore mentioned.

In witness whereof we have hereunto set our hands October 15th, 1928.

VITILLE, KINSELLA & CUNHY,
General Contractors,
By Michael J. Vitille.
O. C. Bianchi.

In the presence of
Delia Batista.

Assignment.

Filed Nov. 26, 1930.

71/182.

IN CHANCERY OF NEW JERSEY.

Between MARTIN J. MACDONNELL, Complainant, and MICHAEL J. VITILLE, *et als*, Defendants.	On Bill, etc. Assignment.

Know all men by these presents, that we, the undersigned, Vitille, Kinsella & Cunhy, general contractors in the above entitled cause of action, do hereby assign, transfer and give over unto O. C. Bianchi, our attorney and solicitor in the above matter, all our right title and interest in the decree, judgment and findings of the Master in the above matter, to have and to hold to him and his heirs forever.

This assignment of our right title and interest in the above matter is assigned to the said O. C. Bianchi, for and as security for the payment to him of the compensation due to him under and by virtue of the agreement made between us, wherein the said attorney and solicitor was to receive one-third of whatever judgment, decree or settlement might be made in the said matter as and for the payment of professional services to be rendered by him.

It is understood and agreed upon that after the payment to him of the compensation, that the bal-

ance of the said judgment shall be paid to us and to such creditors of ours as may have a right to be paid.

VITILLE, KINSELLA & CUNHY,
By Michael J. Vitille.

Dated, July, 1930.

Amended Petition of Solicitor.

Filed Nov. 26, 1930.

71/182.

IN CHANCERY OF NEW JERSEY.

Between MARTIN J. MACDONNELL, Complainant, and MICHAEL J. VITILLE, *et als*, Defendants.	On Bill, etc. Application for Solicitor's Lien on Judgment. Amended Petition of Solicitor.

To Edwin Robert Walker,
Chancellor of the State of New Jersey.

The petition of O. C. Bianchi, a solicitor in Chancery of New Jersey, respectfully shows:

That on or about the 13th day of October, 1926, the firm of Vitille, Kinsella & Cunhy, as general contractors did enter into a contract with one Martin J. MacDonnell, as owner, for the erection and construction of an apartment house building, situated on the Northeast corner of 30th Street and

Park Avenue in the Township of North Bergen, New Jersey.

Your petitioner further shows that after the erection and completion of the said building, the said Martin J. MacDonnell, did refuse to pay the general contractors the balance due on the general contract, and also did refuse to pay to the general contractors, compensation for the extra work they had performed on the building at the request of the said owner.

Your petitioner further shows that thereafter the question as to what was due and owing to the general contractors was determined by this court, and your petitioner files this petition for the purpose of having the compensation paid to him, that he alleges is due to him for the services rendered by him as solicitor for the general contractors, and which compensation your petitioner alleges should be paid to him from the amount found due and owing on the general contract and the amount found due and owing for extra work to the general contractors, separate and apart from the amount due to them on the general contract.

Your petitioner alleges that the general contractors are insolvent and cannot pay your petitioner for his services as solicitor, and that your petitioner has a lien for his compensation on the said amount found due and owing on the general contract, and for extra work, and that his compensation be paid to him from the said fund, first and prior to any other liens, claims or stop-notice claimants.

Your petitioner further sets forth the following state of facts under which he alleges he is entitled to the said compensation as solicitor for the said general contractors.

Petition of Solicitor.

That on or about the 15th day of October, 1928, the above named general contractors did hire, employ and retain your petitioner to represent them in all and all proceedings, either in law or in equity that he might deem necessary in order to collect by judgment, settlement or any other manner the balance they alleged was due and owing to them on the general contract, and for the extra work and extra material furnished by them.

Petitioner further shows that the said general contractors agreed, contracted and promised to pay to your petitioner, and authorized him to retain from any amount that might be agreed upon in settlement of any suit instituted or from any award made to the general contractors by any court of law or equity or by any judgment, decree or in any other manner, the sum of thirty-three and one-third (33-1/3) percent of any amount agreed upon in settlement or awarded by any judgment, decree or any other manner.

Your petitioner further shows that under the said agreement the sum of thirty-three and one-third (33-1/3) percent was to be paid as compensation to your petitioner before the payment of any stop-notice or debt of any corporation having a lien and claim on the said general contract.

Your petitioner further shows that by and in pursuance of the contract made between him and the general contractors, he did represent the said general contractors in the litigation or hearings held as a result of the facts hereinbefore mentioned, concerning the erection of the apartment house of the said Martin J. MacDonnell, that he personally attended all hearings, drew all necessary pleadings, filed all necessary memorandum and made all necessary disbursements.

Petition of Solicitor.

Your petitioner further shows that there was filed with the owner of the said building, stop-notices in pursuance with Section 3 of the Mechanic's Lien Act and that after the filing of the said stop-notices a number of the stop-notice claimants instituted suit on their stop-notices against the owner, and that the owner did on the 7th day of December, 1928, file a bill in Chancery which has been generally described as being a Bill in the nature of a Bill of Interpleader, setting forth that various materialmen who had furnished material on the building in question had filed stop-notices with the owner, and that the said stop-notices aggregated more than the amount the said owner admitted was due to the general contractors on their contract. The said owner set forth in paragraphs 21 and 23 of his Bill that he was only indebted to the general contractors for the sum of $3,646.00 which he was ready and willing to pay in court. In the said petition, in paragraph 24 the said owner contended that he was entitled to credits for work defectively performed by the general contractors and for deviating from the specifications, an amount in excess of $12,000.00. The said Bill further set forth that the general contractors had filed a claim for extra work in the sum of $14,655.67. In paragraph 26 of the said Bill and in paragraph 2, the owner prayed that there might be determined by this court the amount due from the complainant to the general contractors.

Your petitioner further shows that after filing the said Bill an Order to Show Cause was made and that on the hearing of the Order to Show Cause, at the request of the late Honorable John Bentley, your petitioner filed a Memorandum setting forth that the said Bill filed by the complain-

ant be dismissed because of the fact the depositing of the sum of $3,646.00 would not protect the general contractors from their claim against the owner, and in his Memorandum set forth the fact that the contractors claimed they were entitled to the sum of $14,655.67 for extra work and that there was a balance due to them on the general contract of $13,859.80, making a total claim of $28,742.66.

Petitioner further shows that after due consideration the court made an order that the owner would be allowed to file his Bill provided he deposited with the clerk of the Court of Chancery the sum of $30,186.36 or a bond in the said sum with approved surety.

That thereafter your petitioner appeared before the said Master for the purpose of proving the claim of the general contractors, for the balance which they alleged was due to them on their contract and for the amount which they claimed was a reasonable and fair payment for the extra work performed by them at the request of the owner, and for all of which extra work, with the exception of a few items there were no written orders but simply a verbal request and promise to be paid by the owner.

Petitioner further shows that the dates of the continuous hearing which covered nine different days are as follows:

Nov. 21/29	10 a. m. to 4 p. m.
Nov. 29/29	10 a. m. to 5:30 p. m.
Jan. 16/30	10 a. m. to 5 p. m.
Jan. 30/30	9:30 a. m. to 5 p. m.
Feb. 13/30	10 a. m. to 4 p. m.
Mar. 19/30	10 a. m. to 4 p. m.
Mar. 28/30	9:30 a. m. to 1:30 p. m.
April 3/30	9:30 a. m. to 3 p. m.
April 10/30	2 p. m. to 4:30 p. m.

Petition of Solicitor.

Petitioner further shows that at the said continuous hearing about seven hundred pages of testimony were taken by the Master and that an examination of the Master's Report, pages 49, 50, 51 and 52 will disclose that there were filed with the Master more than sixty exhibits covering various phases of the case.

Petitioner further shows as will be disclosed by an examination of the testimony taken that he produced and brought forth all the testimony with which to substantiate the general contractors' claim for extra work, and an examination of the items covered by the said extra work will disclose that there were more than 40 items covered by the list of extra work.

Petitioner further shows that an examination of the said testimony will disclose the fact that your petitioner brought forth and produced all the necessary testimony to sustain his claim for the balance alleged to be due on the general contract, and that he produced and brought forth all the testimony that was used to sustain the general contractors' contention that there were no deviations from the specifications of the general contract.

Your petitioner further shows that the chief and main contention for the nonpayment of the claim of the general contractors was the fact that the general contractors had never received from the architect a final certificate for his work, because as is set forth by the owner, the said work had never been completed.

Your petitioner sets forth that an examination of the testimony will disclose the fact together with an examination of the memorandum filed by

your petitioner, that your petitioner had given careful and close study to the legal questions involved, and did by questions and answers produce such testimony as would, and did, excuse the general contractors from producing a final certificate before becoming entitled to the final payment of their general contract. The production of this final certificate was necessary because the general contract specifically stated that payments were only to be made on the production of the final certificate, and your petitioner did, by the testimony produced, bring forth such facts as satisfied the Master and later satisfied this court, that the withholding of the final certificate by the architect was not a justifiable one, that he was not honest and sincere in his withholding of the said final certificate, and that the said acts of the architect amounted to legal fraud on the general contractors, and that both held that the general contractors were entitled to the balance due on the contract, notwithstanding that the said final certificate had not been produced.

Your petitioner further sets forth that your petitioner did make a thorough study of the law in connection with the five points of defense raised by the solicitor for the owner, and that through his efforts he did produce testimony that did overcome the points of law raised as a defense by the owner.

Petitioner further shows that the said Master did find that there was due and owing to the contractors the sum of $9,733.27 for extra work, separate and apart from anything due to the general contractors on the contract and he also found that after making an allowance of $3,022.00 to the owner for omitted and defective work, that there was due to the general contractors on the general con-

tractor the sum of $10,837.20 and he did on page 46 of his Report, find that there was due from the complainant, the owner, to the general contractors the total sum of $20,521.07, covering the value of extra work and balance on the contract, together with interest thereon from October 1st, 1927, making a total claim of $23,907.02, and he did also include in the said Report a statement of the claims of the stop-notice claimants as filed and their order of priority.

Your petitioner further shows that after the filing of the said Report exceptions were filed to the report by the owner and that your petitioner then filed with the Honorable John O. Bigelow, Vice Chancellor, at his request, a Memorandum of Law and Facts in reply to the exceptions filed by the owner, and that after due consideration of the said exceptions, the Honorable John O. Bigelow did reduce the findings of the Master from the sum of $23,907.02 to the sum of $13,862.08 which together with interest brought the same up to $16,466.00 and that the said reduction was made by the court by making no change in the allowance made by the Master for extra work, excepting one item of $363.00 but did allow the owner a further credit for certain items of defective and omitted work amounting to $6,295.20 which credit was deducted from the amount of the general contract.

Your petitioner further shows there has never been paid to him or advanced to him for services or disbursements, any money whatsoever by the general contractors or by any other person, that he has no means of being paid for the services rendered by him as solicitor for the general contract.

Your petitioner further shows there has never been paid to him or advanced to him for services

or disbursements, any money whatsoever by the general contractors or by any other person, that he has no means of being paid for the services rendered by him as solicitor for the general contractors in their suit for the balance due on the general contract, and for the extra work performed by them, separate and apart from the contract, excepting that he be paid from the fund or sum found to be due and owing to the general contractors from the owners, either from the sum found due and owing to the general contractors on their general contract or for the sum found due and owing to them for the extra work performed by them, separate and apart from their contract.

Petitioner further shows that he made a careful examination of all the law and facts in connection with the claim of the general contractors and in connection with the general defense filed by the owner, and that expert testimony of the highest caliber was produced by the general contractors to substantiate their claim, and that Edward A. Keeler, who appeared before the Master to testify as an expert and produced many pages of detailed statement covering every item of the said work, is a man whose reputation as an expert in building matters is held in high esteem, and that he is employed by reason of his expert knowledge in many important litigations covering such work as was covered by this litigation, and that he has rendered a bill to your petitioner for the services rendered to the general contractors for the sum of $

Petitioner further shows that all of the other witnesses called by your petitioner to sustain his claim outside of the general contractors themselves, were witnesses served with subpoenas and that your petitioner went to much expense in call-

ing the said witnesses and in general, in carrying on the said litigation in favor of the general contractors.

Your petitioner further shows that on the 19th day of July, 1930, the general contractors did assign, transfer and set over unto your petitioner, all their right, title and interest in and to the fund, decree or award and whatever was due to them from the owner.

Your petitioner set forth that under the Attorney's Lien Act of 1914, and under the general law of this state, regulating the lien and compensation of an attorney, solicitor, he is entitled to a lien on the balance due under the general contract, and that he is entitled to have the total amount of the allowance made for extra work paid to him, or in the alternative, that he have a lien for his services on the extra work as found by the court and that he is entitled to be first paid his compensation, before and prior to the payment of any other claims, be they stop-notice claimants or otherwise.

Your petitioner respectfully submits that the agreement as made for compensation was fair, that the lien that the solicitor for the general contractors seeks to have enforced is in accordance with the law of this State, and that he is entitled to be first paid prior and ahead of the payment of any stop-notices or other liens, claims or counsel fees.

A copy of the agreement made between the general contractors and their solicitor on October 15, 1928, is hereunto annexed.

Respectfully submitted,

O. C. BIANCHI.

Memorandum.

IN CHANCERY OF NEW JERSEY.

Between MARTIN H. MACDONNELL, Complainant, and MICHAEL J. VITILLE, *et als*, Defendants.	On Bill, &c. Memorandum. 71/182.

Mr. John Platoff, for Martin J. McDonnell,

Mr. Ovidio C. Bianchi, for Michael J. Vitille, James J. Kinsella, John Cunhy.

Mr. Israel Greene, for Guido Crocetti.

Mr. Otto Cooper, for Louis Bogorad.

Messrs. McDermott, Enright & Carpenter, for Indiana Flooring Company.

Mr. Thomas McNulty, for Messrs. Cadel Brothers, Inc., Thomas Henry, Inc.

Mr. Frank Cozzolini, for Antonio Mamolite, Pasquale Ricciardi.

Messrs. Leo Vanderburgh and George Marcus for C. E. Diffenback, Jr., Edward Griffith.

Mr. Louis R. Kagan, for Peter Goranson.

Mr. Winifred Leonard, for Walter N. Cable.

(*This memorandum is not to be published in the official or unofficial reports.*)

MEMORANDUM.

BIGELOW, *V. C.*:

This is a suit in the nature of an interpleader. The complainant is the owner of a building recently erected in accordance with a contract which had been filed in the County Clerk's Office. The defendants are the general contractors and the materialmen and laborers who filed stop-notice with the owner. There was a reference to a master who reported on the amount due by complainant to the general contractors and on the amounts due by the latter to the other defendants. The complainant excepted to the report, briefs were filed and I sustained some of the exceptions, overruled others, and concluded that the amount due by complainant was $16,466 and that this whole sum should be distributed among the labor claimants and among those materialmen whose notices were filed with complainant earliest. The general contractors will receive nothing in this suit; indeed, several of the materialmen whose claims were duly proved will not share in the fund because it is insufficient to meet the just demands of all claimants.

After I had announced my conclusions on the exceptions, Mr. Bianchi, the solicitor and counsel for the general contractors gave notice to the other parties of an application to settle the terms of the final decree.

Upon the return of that notice, he presented to the Court, a petition under Chapter 201 of the Laws of 1914, the Attorney's Lien Act, and moved the Court to provide in the decree that his fee be paid out of the fund of $16,466 found due by complainants.

The bill of complaint was filed December 7, 1928. Therefore, complainant had received stop-

notices from the different defendants on sundry days from September 10, 1927 to September 13, 1928; in October, 1928, several actions had been brought against complainant in the Hudson County Circuit Court on such notices. Upon the filing of the bill, the defendants were restrained from instituting or prosecuting any actions against complainant on account of labor performed or materials furnished in the erection of the building described in the bill. That restraint has since been continued.

The general contractors on April 9, 1929, filed an answer and counterclaim. To each allegation in the bill with respect to stop-notices and suits thereon, they answered that they had not sufficient knowledge or information to form a belief as to the allegation. Further, the general contractors set forth that they had demanded from complainant payment of the balance of the contract price and also, $14,882.80 for extra work, and that they had refrained from instituting suit on the said claim by reason of the fact that the complainant had promised from time to time to make payment to them in full of the balance due, namely, $28,742.66. They admitted that they had not paid all of the stop-notices filed with complainant and alleged that they were ready and willing to pay the same as soon as complainant fulfilled his part of the agreement.

By the counterclaim, the general contractors demanded judgment against complainant for $28,742.66.

Chapter 201 of the Laws of 1914 reads as follows:

"After the service of a summons and complaint in

any action at law, or the filing of a bill of complaint or petition in the Court of Chancery, or the service of an answer containing a counter-claim in any action at law, the attorney, solicitor or counsellor-at-law, who shall appear in said cause for such party instituting the action at law, or suit, or filing the petition, or counter-claim, shall have a lien for compensation, upon his client's cause of action suit, claim or counter-claim, which shall contain and attach to a verdict, report, decision, decree, award, judgment or final order in his client's favor, and the proceeds thereof in whosoever hands they may come; and the lien shall not be affected by any settlement between the parties before or after judgment or final order or decree. The court in which such action, suit or other proceeding is pending, upon the petition of the attorney, solicitor or counsellor-at-law, may determine and enforce the lien."

The general contractors have not instituted any action at law or suit in equity or filed any counterclaim in an action at law. It will be noticed that the act does not mention a counterclaim in equity, but at the time that this statute was passed, the relief which is now obtained by counterclaim was had upon cross bill. Counterclaims in equity were first introduced by the Chancery Act of 1915. The language of the statute of 1914 should be construed to include within its scope not only cross bills, but also counterclaims which now perform the functions of cross bills.

By force of the statute, Mr. Bianchi was given a lien for compensation upon the counterclaim of his clients, the general contractors. The act provides that this lien "shall contain and attach to a verdict, report, decision, decree, award, judg-

ment or final order in his client's favor and the proceeds thereof in whosoever hands they may come." This means a report, decision or decree upon the counterclaim. The solicitor for a defendant is given no lien and the solicitor for a counterclaim is given no lien upon his clients' defense to the original action or suit. There has been no report or decision and there will be no decree in the present suit in favor of the general contractors on their counterclaim. The sum of $16,466. which will be disbursed in this suit, will be distributed on a decree pursuant to the prayer for relief in complainant's bill. The statute gives Mr. Bianchi no lien on that fund.

It may be said, however, that this is too rigid a construction of the act and therefore, I do not stop here. Mr. Bianchi urges that the sum found owing by complainant is due primarily to the general contractors and that the other defendants necessarily trace title through the general contractor, and that their title is only as good as that of the general contractors and is therefore subject to the same lien, namely, Mr. Bianchi's lien.

A materialman or laborer has an inchoate lien on the amount due the contractor from the time he furnishes material or performs work. His claim further ripens with the giving of notice to the owner and when thereafter the time for the owner to make payment to the contractor pursuant to the terms of the contract arrives, the cause of action of the materialman or laborer against the owner is complete. The owner has then no defense against the suit on the stop-notice and when he has paid the stop-notice, he has a perfect defense pro tanto to an action by the contractor.

The petition of Mr. Bianchi sets forth that he

was employed by the general contractors about October 15, 1928. Prior to that date, all the materialmen and laborers who will share in this fund had served their stop-notices and several of them had begun suit against the complainant thereon. Payment by the complainant under their contract had become due October 1, 1928, as found by the Master. Under no construction of the statute did Mr. Bianchi acquire a lien until December 7, 1928, when the bill of complaint was filed. In deed, he first appeared in the suit several days later on the return of an order to show cause. At that time the demands of the stop-notice claimants had fully matured; the fund belonged to them. Their claims are prior and not subordinate to that of Mr. Bianchi.

He further urges that he has been instrumental in creating the fund and should therefore be paid. It is true that throughout the suit, acting for the general contractors, he has borne the burden of establishing the debt of complainant. But all the stop-notice claimants also were represented by their counsel whom, presumably, they will pay. They did not know of the terms of Mr. Bianchi's employment or of his claim to a lien until his petition was filed. If he had notified them of his claim at the outset and that he was willing to assume the task of representing them all in combatting complainant's case, they could have avoided a large part of the expense for their own counsel which they actually incurred. Furthermore, if Mr. Bianchi's motion be granted, his fee would be paid out of the fund and the balance remaining would be distributed first among the labor claimants and second among the materialmen who first notified complainant. Several of the materialmen

who will otherwise be paid, would be cut off entirely by the diversion of part of the fund to pay Mr. Bianchi. It could not then be said that his services were advantageous to them. The prior claimants would be paid in full despite the depletion of the fund; they are the ones who profit by Mr. Bianchi's work but they do not contribute in any event to the payment of his fee. There is no equity in the contention that the motion should prevail because Mr. Bianchi's services were of value to all the defendants.

I inquired of counsel during the argument whether, in case Mr. Bianchi's claim was sustained, his fee could be deducted from the amount payable to all the defendants pro rata so that the entire burden would not fall on the defendants who are last in order of priority. Counsel thought not, and on reflection, I agree with them. If the motion prevails, it is because Mr. Bianchi's claim is prior; the fund is reduced pro tanto and the balance remaining must be divided pursuant to the statute, namely, to laborers first, and then to the materialmen in the statutory order of priority. The court cannot prescribe a different rule of distribution.

Even if Mr. Bianchi's claim was meritorious, I doubt if it could be established on motion in this summary manner. The statute provides that "the court in which such action, suit or other proceeding is pending, upon the petition of the attorney, solicitor or counsellor-at-law, may determine and enforce the lien." I think the Legislature by this procedural provision, intended a dispute between attorney and client. All the reported cases on this statute relating to a controversy between a client and a third party, appear to have

been independent suits to which the attorney was a party and in which his claim to a lien was duly pleaded, put in issue and tried. The claim of Mr. Bianchi is a principal factor in this suit so far as it relates to a number of the defendants. It means to them the difference between having their claims paid in full and receiving nothing at all—complete success or complete loss. They cannot be deprived of their shares in the fund by a final decree based on a mere petition and motion.

Mr. Bianchi rests his case principally on the decision of Vice Chancellor Lane in Brunnetti v. Orandi, 89 N. J. Eq. 116, 104 A. 139. This was an interpleader by an owner against stop-notice claimants and others. But prior to the commencement of the interpleader, the general contractor had instituted an action against the owner and prosecuted it to judgment. His attorney in the suit at law claimed a lien which was evidenced by an immediate assignment to him of a part of the judgment. The attorney was made a party to the interpleader and his claim was litigated and sustained. The Vice Chancellor said: "In the case at bar the noticing claimants brought no suit against the owner. They had knowledge of the suit of the contractor. By silence at least they acquiesced in his prosecuting this suit to judgment. The fund in court represents the proceeds of that suit and its existence is due to the labors of the attorney." The difference between that case and the present one is obvious. Mr. Bianchi also contends that he has a lien independent of the statute. The correct rule is stated in the Brunnetti case that prior to the adoption of the statute, an attorney had a lien only after judgment recovered or after a compromise had been

affected. Mr. Bianchi has no lien unless it is given him by the statute.

Mr. Greene, counsel for one of the defendant materialmen who will not share in the fund, has moved the court to allow him a counsel fee to be paid out of the fund. He urges that he took an active part in the litigation and that his services were effective in increasing the amount found due by complainants although not to a sum sufficiently large to include his client. He does not claim to come within the Act of 1914, or to have a lien independent of the statute. I think I have no authority to require all the defendants to contribute to his fee and that it would be inequitable to make the counterclaimant last in order of priority pay Mr. Greene in addition to his own counsel. Both motions are denied.

Since I wrote the foregoing memorandum, Mr. Bianchi has filed another petition, two assignments executed by the general contractors and a brief in which he advances this theory: Of the principal sum of $13 863 owing by complainant, only $4,493 is due on the filed contract and the balance of $9,370 is for extra work done independent of the filed contract; the stop-notice claimants have no lien on the latter sum, their remedy, if they performed work or furnished materials for such extras, was by mechanics lien and not by stop-notice; the sum of $9,370 being free from the lien of the stop-notice claimants is subject to Mr. Bianchi's lien and except for that lien, should be decreed to be paid directly to the general contractors, his clients.

Mr. Bianchi's position is sound if indeed the extra work was performed pursuant to agree-

ments entirely independent of the filed contract, but it is otherwise if the extra work was such as was contemplated by the filed contract and if the agreements for the extra work were merely supplemental thereto. In such case the filing of the principal contract protects the owner against mechanics' liens, and payments due for extra work are subject to stop-notices under the main contract.

The bill of complaint sets forth that the general contractors had demanded payment "of the balance due of said contract price and also the sum of $14,655.67 which said contractors claim for extra materials alleged to have been furnished and extra labor alleged to have been performed in the erection and construction of the said building * * * that neither the balance of said contract price except the said sum of $3,646. nor the amount of said extras ever became due and payable from complaint to said contractors by reason of the fact that the said architect has refused and still refuses certificates authorizing the payment of the same; by reason further of the fact that no authorization in writing was ever procured for any of the items included in said claim for extras as provided in said contract." It is plain that the draftsman of the bill of complaint when referring to extra materials and labor meant extras furnished pursuant to the filed contract.

The answer of the general contractor admits the allegations that they demanded payment from complainant of the balance of said contract price and also a certain amount for extra materials and labor furnished and performed in the erection of the building and they place this latter sum at $14,882.86. They deny the allegation that only $3,-

646. is due. These defendants also admitted that they had not paid the stop-notices "by reason of the fact the complainant has failed to live up to his agreement to pay the balance due on the contract and that he has failed to pay all the extra work ordered by him for which he promised to make payment of, and that the defendants are ready and willing to pay the said stop-notices as soon as the complainant fulfills his part of his agreement to the original contract and extra work." Nowhere in the answer is the suggestion that the stop-notices took effect only on the contract price and not on the amount due for extras. The very careful report of the special master indicates that no suggestion was made before him by the general contractors that the sum due for extras was not subject to the lien of the other defendants. The contention was not advanced in the briefs filed on the exceptions to the master's report, or in the original petition of Mr. Bianchi for an attorney's lien. The case has been conducted throughout on the theory that the extra work was done pursuant to the filed contract. It is too late to advance a different theory. Mr. Bianchi's prayer is denied.

Final Decree.

IN CHANCERY OF NEW JERSEY.
71/182

Between
MARTIN J. MACDONNELL,
Complainant,
and
MICHAEL J. VITILLE, *et als.*,
Defendants.

On Bill, &c.
Final Decree.

This matter coming on to be heard on application of O. C. Bianchi, Esq., solicitor of Michael J. Vitille, James J. Kinsella and Joseph Cunhy, trading as Vitille, Kinsella & Cunhy, defendant contractors, on application to confirm report of Harry Lane, Esq., one of the masters of this court to whom an order of reference was made herein on October 15th, 1929 and upon motion of Platoff, Saperstein & Platoff, solicitors of the complainant on exception to the said master's report and in the presence of O. C. Bianchi, Esq, solicitor of defendants, Michael J. Vitille, et als., Israel Greene, Esq., solicitor for defendant Guido M. Crocetti, Messrs. McDermott, Enright & Carpenter, solicitors of defendant Irving Trust Company, trustee in bankruptcy of Indiana Flooring Company, Frank Cozzolini, Esq., solicitor for defendants, Antonio Mamolite and Pasquale Ricciardi, Messrs. Leo Vanderburgh and George Marcus, solicitors for defendants, Carl F. Dieffenbach, Jr., and Edward Griffith, Dante Rivetti, Esq., solicitor for Scagliola Manufacturing Co. Inc., Messrs. Herrigel, Lind-

abury & Herrigal, solicitors for defendant Newark Sheet Metal & Kalamien Co., Louis R. Kagan, Esq., Solicitor for defendant, Peter Goranson, Oscar Stempler, Esq., solicitor for defendant John G. Keller, Messrs. Heine & Laird, solicitors for defendant, Walton H. Cable, Otto Cooper, Esq., solicitor for defendant Louis Bogorad, Louis DeForge, Esq., solicitor for defendant Edward DeForge, Inc., and Thomas McNulty, Esq., solicitor for defendants, Cadel Brothers, Inc., North Hudson Manufacturing Company and Thomas Henry, Inc., and upon the bill of complaint, addition by way of supplement to the bill of complaint, and second addition by way of supplement to the bill of complaint heretofore filed herein and upon the answers, counterclaims and claims filed on behalf of the respective defendants herein and upon all the papers and proceedings heretofore had herein, and the court having read and considered the testimony taken before the master and the report of the said master and having heard and considered the arguments of counsel thereon and being of opinion that the exceptions taken by the complainant to the said master's report should be over-ruled except that credit should be given to complainant for certain items of omitted or defective work in the aggregate sum of $6,295.20; not allowed by the master, as follows:

Item 1A	$1,000.00		Exhibit C-3
Item 1C	100.00		Exhibit C-3
Item 1G	865.20	(part allowed) (testimony pp. 356 and 357)	Exhibit C-3
Item 1-1	130.00	(part allowed)	
Item 2A	750.00		Exhibit C-3
Item 2B	400.00		Exhibit C-3

Item 3A	700.00	(test'ny p. 16)	Exhibit C-3
Item 4A	100.00		Exhibit C-3
Item 6C	100.00		Exhibit C-3
Item 8A & B	1,500.00	(part allowed)	Exhibit C-3
Item 9A	150.00		Exhibit C-3
Item 9B	500.00	(part allowed)	Exhibit C-3
	$6,295.20		

and that credit should be given to complainant against allowances made by the master for alleged extra work in the sum of $363.00 (Item 6, page 18 of master's report); and that the principal sum due from the complainant is the sum of $13,862.87 and the court being further of opinion that since the complainant has received the income of the building, the master's allowance of interest on the principal sum from October 1st, 1927 should be sustained and that interest should be allowed on the principal sum to the date of this decree and included herein; and the court being further of opinion that complainant and the defendant contractors, Vitille, Kinsella & Cunhy have each made excessive claims and that therefore no costs should be allowed to either as against the other and the court being further of the opinion that the amount allowed Harry Lane, Esq., for his services as master, to wit, the sum of $2,000.00 and which amount it has been represented to the court has been paid by the complainant, should be apportioned equally between the complainant on the one hand and the defendant stop notice claimants whose claims will be paid hereunder, if and when the amounts decreed to be due to the said defendant stop notice claimants are paid, in the proportion that their several claims bear to the total

amount found to be due from the owner; and it appearing that the complainant has deposited a surety bond made to the Chancellor of the State of New Jersey, pursuant to an order of this court heretofore made herein and that part of the premium representing the excess of the principal sum of the bond over the amount found due from complainant should be deducted and retained by the complainant from and out of the moneys decreed to be due from him to the defendants.

And application having been made by O. C. Bianchi, Esq., solicitor of the defendant contractors Vitille, Kinsella & Cunhy, and upon filing proof of service of notice thereof on all parties in interest to enter a final decree in this cause to settle the manner of distribution of the principal sum found to be due and fixing counsel fees and allowances, if any, to be made to the solicitors of the respective parties to this cause and in the presence of Platoff, Saperstein & Platoff, and upon the return of the said notice, presented to the court a petition (under Chapter No. 201 of the Laws of 1914, the Attorney's Lien Act), setting up an alleged contingent agreement made by him with his clients, the defendant contractors Vitille, Kinsella & Cunhy, whereunder they agreed to pay him for his counsel fees one third of the amount decreed to be due defendant contractors from complainant herein and requested the court to provide in this decree that a lien be impressed upon the moneys so found to be due from the said complainant and that he be paid the amount thereof before any payments to the defendant stop notice claimants, and the court having heard and considered the arguments of counsel thereon; and thereafter a further petition, together with two assignments executed

by the defendant contractors to said O. C. Bianchi, Esq., having been filed wherein the said contractors by one of said assignments purported to assign all their right, title and interest in the amount due to the said contractors on the general contract and extra work, and the other purporting to be an assignment by said contractors, under which said O. C. Bianchi, Esq., claims a lien upon the amount of moneys decreed to be due for extra work alleged to have been done independently of the contract and the court having read and considered the arguments made thereon and being satisfied that the prayers of the petitions of the said O. C. Bianchi, Esq., should be denied; and application having been made by Israel B. Greene, Esq., solicitor of Guido M. Crocetti, defendant, for a counsel fee in the sum of $500.00, and the court being of opinion that the application should be denied;

It is on this 29th day of December, 1930, Ordered, Adjudged and Decreed that the exceptions filed to the master's report herein should be over-ruled, except that the complainant is entitled to credit not allowed by the master for omitted and defective work in the sum of $6,295.20 and is entitled to credit against allowances made by the master for alleged extra work, in the sum of $363.00 as above set forth,

And it is further Ordered, Adjudged and Decreed that the entire principal sum due from the complainant on account of the contract price and for extra work and materials performed and furnished by said defendant contractors, is the sum of $13,862.87;

And it is further Ordered, Adjudged and Decreed that the complainant pay as hereinafter directed, said sum of $13,862.87, together with inter-

est thereon from October 1st, 1927, to the date hereof, being the sum of $2,698.62 making in all the sum of $16,561.49, and that upon making said payment complainant and the lands and premises described in the bill of complaint be released, acquitted and discharged from all claims, liens or liabilities to any of the defendants in this suit for, upon or by reason of said fund and all of the matters involved in said suit and that the bond heretofore filed by the complainant be discharged and that all suits heretofore instituted by any of the defendants against the complainant be terminated, discontinued and permanently enjoined, without costs.

And it is further Ordered, Adjudged and Decreed that the amount heretofore allowed to Harry Lane, Esq., one of the masters of this court, for his serivces herein, to wit, the sum of $2,000.00, when this decree has been performed by complainant, shall be borne equally by the complainant on the one hand and the defendant stop notice claimants whose claims are allowed on the other hand, as hereinafter provided, in the proportion which the amount decreed to be due to said stop notice claimants bears to the total amount found to be due from the said complainant.

And it is further Ordered, Adjudged and Decreed that the complainant be permitted to retain in his hands the sum of $1,000.00, being half of the amount allowed to Harry Lane, Esq., as master for his services herein pursuant to an order of this court heretofore made in this cause, which allowance was paid by complainant, and that the said complainant also retain in his hands the sum of $320.00 being the excess of the amount of the premium on complainant's bond heretofore filed

herein over the amount found to be due from the said complainant, and that said complainant be authorized to set off said amounts from the sum decreed to be paid by him.

And it is further Ordered, Adjudged and Decreed that the claims of the defendant stop notice claimants are hereby allowed in the order and in the amounts as follows:

Defendant Edward Griffith, preferred claim for labor	$ 340.90
And the following materialmen and sub-contractors in the order of priority of service of their stop notices as follows:	
Defendants Antonio Mamolite and Pasquale Ricciardi, September 10th, 1927	1,588.32
Defendant Hoegger Inc., September 12th, 1927	540.00
Defendant Cadel Brothers, Inc., September 16th, 1927	2,707.00
Defendant North Hudson Manufacturing Company, September 16th, 1927	2,047.18
Defendant Thomas Henry Inc., September 16th, 1927	5,475.37
Defendant Edward DeForge, Inc., September 24th, 1927	400.00
Defendant Louis Bogorad, October 1st, 1927	1,280.00
Defendant Walton N. Cable, October 3rd, 1927	462.00
Defendant Irving Trust Company as trustee in bankruptcy of Indiana Flooring Company, October 10th, 1927	1,663.43
Defendant Guido Crocetti	57.29

Final Decree.

And it is further Ordered, Adjudged and Decreed that after deducting the said proportionate share of said master's fees, the said defendant stop notice claimants are entitled to be paid by the complainant the amounts hereinafter stated:

Edward Griffith	$ 320.40
Antonio Mamolite and Pasquale Ricciardi	1,492.32
Hoegger Inc.	508.00
Cadel Brothers Inc.	2,543.00
North Hudson Manufacturing Company	1,923.18
Thomas Henry Inc.	5,142.87
Edward DeForge Inc.	376.00
Louis Bogorad	1,203.00
Walton N. Cable	435.00
Irving Trust Company as trustee in bankruptcy of Indiana Flooring Company	1,563.43
Guido Crocetti	54.29

And it is further Ordered, Adjudged and Decreed that the counterclaim of the defendants Michael J. Vitille et al, be and the same is hereby dismissed.

And it is further Ordered, Adjudged and Decreed, that the complainant pay to the said respective defendants the said sum so found due to them and that failing to do so, said defendants, or any of them, be at liberty to apply to this court upon notice to the principal and surety on the said bond for summary relief under the said bond so furnished by said complainant.

And it is further Ordered, Adjudged and Decreed that the prayers of the petitions of the said O. C. Bianchi, Esq., solicitor of and counsel for said defendant contractors be and the same are hereby denied.

Final Decree.

And it is further Ordered, Adjudged and Decreed that the application of Israel Greene, Esq., for counsel fee be and the same is hereby denied.

And it is further Ordered, Adjudged and Decreed that no costs be allowed to any of the parties as against any of the others.

E. R. WALKER,
C.

Respectfully Advised,
J. O. BIGELOW,
V. C.

Notice of Appeal.

Filed Jan. 15, 1931.

IN CHANCERY OF NEW JERSEY.

Between MARTIN J. MACDONNELL, Complainant, and MICHAEL J. VITILLE, *et als.*, Defendants.	On Bill, &c. Notice of Appeal.

The defendants, Michael J. Vitille, James J. Kinsella and Joseph Cunhy and Ovid C. Bianchi, solicitor for the said defendants, hereby appeal from the final decree made by his honor, Edwin Robert Walker, Chancellor on the advice of Honorable John O. Bigelow, Vice Chancellor in the above entitled cause, on December 29, 1930, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort of all causes.

O. C. BIANCHI,
Solicitor pro se and solicitor for and of counsel with defendants Michael J. Vitille, James J. Kinsella and Joseph Cunhy.

Dated: January 12th, 1931.

I conceive there is a good cause for appeal in the above entitled cause.

O. C. BIANCHI,
Of counsel pro se and with defendants.

Order.

71/182

IN CHANCERY OF NEW JERSEY.

Between MARTIN J. MACDONNELL, Complainant, and MICHAEL J. VITILLE, *et als.*, Defendants.	On Bill, &c. Order.

This matter being opened to the court by O. C. Bianchi, solicitor pro se and solicitor for and of counsel with defendants, Michael J. Vitille, James J. Kinsella and Joseph Cunhy, and it appearing that the said defendants have filed an appeal from the Final Decree made in this cause on the 29th day of December, 1930,

It Is, on this 15th day of January, 1931, Ordered, that all further proceedings in this court in the above cause be stayed pending the said appeal.

E. R. WALKER,
C.

Respectfully Advised.
JOHN O. BIGELOW,
V. C.

Petition of Appeal.

Filed Feb. 3, 1931.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between MARTIN J. MACDONNELL, Complainants-Appellees, and MICHAEL J. VITILLE, *et als.*, DefendantsAppellants.	On Appeal from Court of Chancery. Petition of Appeal.

To the Honorable, the Court of Errors and Appeals in the Last Resort in all causes.

The petition of Michael J. Vitille, James Kinsella and Joseph Cunhy the appellants in the above entitled cause, respectfully show that the petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date December 29, 1930, made on the advice of Vice-Chancellor, John O. Bigelow, in a certain cause in said Court of Chancery, wherein Martin J. MacDonnell was complainant and Michael J. Vitille, James J. Kinsella and Joseph Cunhy were defendants, to which decree petitioners complain in these respects, to wit:

1. That said decree adjudges that the complainant is entitled to a credit not allowed by the master for the alleged omitted and defective work set forth and listed in said decree in the sum of $6,295.20 as follows:

Item 1A	$1,000.00		Exhibit C-3
Item 1C	100.00		Exhibit C-3
Item 1G	865.20	(part allowed) (testimony pp. 356 and 357)	Exhibit C-3
Item 1-1	130.00	(part allowed)	
Item 2A	750.00		Exhibit C-3
Item 2B	400.00		Exhibit C-3
Item 3A	700.00	(test'ny p. 16)	Exhibit C-3
Item 4A	100.00		Exhibit C-3
Item 6C	100.00		Exhibit C-3
Item 8A & B	1,500.00	(part allowed)	Exhibit C-3
Item 9A	150.00		Exhibit C-3
Item 9B	500.00	(part allowed)	Exhibit C-3
	$6,295.20		

2. That said decree adjudges that the entire principal sum due from the complainant on account of the contract price and for extra-work and material performed and furnished by the appellants-contractors is only the sum of $13,862.87.

3. That said decree adjudges that the complainant on the payment of the said sum of $13,862.87 together with interest of $2,698.62 making in all the sum of $16,561.49 and the lands and premises described in the Bill of Complaint be released, acquitted and discharged from all claims, liens or liabilities to any of the defendants, and that the bond filed by the complainant be discharged and that all suits institutel against him be discontinued without costs.

4. That said decree adjudges that the following stop-notice claimants are entitled to be paid out of the moneys adjudged to be due from the complainant, the amounts hereinafter stated:

Defendants, Antonio Mamolite and Pasquale Ricciardi, September 10th, 1927,	1,588.32
Defendant, Hoegger, Inc., September 12th, 1927,	540.00
Defendant, Cadel Brothers, Inc., September 16th, 1927,	2,707.00
Defendant, North Hudson Manufacturing Company, September 16th, 1927,	2,047.18
Defendant, Thomas Henry Inc., September 16th, 1927,	5,475.37
Defendant, Edward DeForge, Inc., September 24th, 1927,	400.00
Defendant, Louis Bogorad, October 1st, 1927,	1,280.00
Defendant, Walton N. Cable, October 3rd, 1927,	462.00
Defendant, Irving Trust Company as trustee in bankruptcy of Indiana Flooring Company, October 10th, 1927,	1,663.43
Defendant, Guido Crocetti,	57.29

5. That said decree adjudges that the Counterclaim of the appellants be dismissed.

6. That said decree adjudges that the whole sum of $16,561.49 be distributed to and among the stop-notice claimants and materialmen.

7. That said decree denies the claim and application of Ovid C. Bianchi, solicitor of the apellants, general contractors, for a lien for his compensation on the total sum of $16,561.49, the amount found due from the complainant on account of the contract price and extra-work performed and materials furnished by the appellants.

8. That said decree denies the application of Ovid C. Bianchi, that there be paid to him the

amount found due for extra-work by the appellants, and assigned to said Ovid C. Bianchi, as security for his compensation as their solicitor.

9. That said decree adjudges that the sum of $16,561.49 be paid to the stop-notice claimants direct.

10. That said decree denied the application of said Ovid C. Bianchi, solicitor of the appellants for a reasonable counsel fee for services rendered in said cause.

11. That said decree denied the application of said Ovid C. Bianchi, solicitor of the appellants for a lien for compensation as their solicitor upon the amount of money found to be due for extra-work and performed independent of said building contract.

12. That said decree adjudges that no costs be allowed to the appellants.

13. That said decree adjudges that the complainant be permitted to retain in his hands the sum of $1000.00 (out of the principal sum of $16,561.49), to reimburse himself for one-half of the amount allowed to Harry Lane, Esquire, as master in this cause.

14. That said decree adjudges that the complainant retain in his hands the sum of $320.00 being the excess of the amount of the premium on complainant's bond filed in this cause and retain and set off the said sum from the sum decreed to be paid by him.

And petitioners appeal from the parts of said decree of the Chancellor which decreed as afore-

said, on the ground that the same are erroneous in that:

1. The Chancellor should have overruled all the exceptions to the master's report herein filed by the complainant, and should have ordered, adjudged and decreed that the complainant was not entitled to credit of $6,295.20 or any part thereof for the alleged omitted and defective work.

2. That the Chancellor should have ordered, adjudged and decreed that the principal sum due from the complainant on account of the contract price and for extra-work performed and materials furnished by the appellants was $23,907.02, as found by the master and not $16,561.49.

3. The Chancellor should have ordered and adjudged that only upon payment of the sum of $23,907.02 by the complainant, he and his lands be released and acquitted from all claims, liens or liabilities to any of the defendants, that his bond be cancelled, and he be discharged of all suits instituted against the said complainant and that the suits be discontinued.

4. That the Chancellor should have ordered, adjudged and decreed that the stop-notice claimants should be paid in the order of their priority, but only out of the surplus remaining after the payment of the lien or liens for compensation of Ovid C. Bianchi, appellants' solicitor.

5. That the Chancellor should have granted the relief prayed for in appellants' counter-claim.

6. That, assuming that only the sum of $16,561.49 was due from the complaint, the Chancellor should have ordered, adjudged and decreed that

the said sum should be paid to the appellants and not to the Stop-notice claimants subject to the lien of its solicitor for compensation.

7. That assuming the amount due from the complainant was but $16,561.49, the Chancellor should have granted the claim and application of Ovid C. Bianchi, solicitor of appellants for his lien for compensation on that sum.

8. That in any event, the Chancellor should have ordered, adjudged and decreed that the said Ovid C. Bianchi was entitled to a lien for his compensation on the amount found to be due for extra-work performed by the appellants.

9. That the Chancellor should have ordered, adjudged and decreed that the said sum of $16,561.49 be paid to the appellants, subject to the lien of Ovid C. Bianchi, its solicitor for his compensation.

10. That in any event the Chancellor should have allowed the said Ovid C. Bianchi, solicitor for appellants, a reasonable counsel fee.

11. That the Chancellor should have ordered, adjudged and decreed that the said Ovid C. Bianchi, solicitor of appellants was entitled to a lien for the amount of his compensation on the sum of $9,733.27 being the amount allowed for extra-work performed independent of the contract.

12. That the Chancellor should have ordered, adjudged and decreed that the appellants were entitled to their costs in said suit.

13. That the Chancellor should have ordered, adjudged and decreed that the complainant was

not entitled to any rebate for the excessive amount of premium of the bond filed by him.

14. That the Chancellor should have ordered, adjudged and decreed that the whole of the Master's fee be paid by the complainant, without any contribution from the appellants, or stop-notice claimants.

Petitioners therefore pray, that the said decree of the Chancellor in the respects above mentioned be reversed, set aside and for nothing holden, and that the petitioners may have such further relief in the premises as to this court shall deem proper.

O. C. BIANCHI,
Solicitor for appellants,
Michael J. Vitille, James J.
Kinsella and Joseph Cunhy.

O. C. BIANCHI,
Of Counsel with appellants,
Michael J. Vitille, James J.
Kinsella and Joseph Cunhy.

Petition of Appeal.

Filed Feb. 3, 1931.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between MARTIN J. MACDONNELL, Complainants-Appellees, and MICHAEL J. VITILLE, *et als.*, DefendantsAppellants.	On Appeal from Court of Chancery. Petition of Appeal.

To the Honorable, the Court of Errors and Appeals in the Last Resort in all causes.

The petition of Ovid C. Bianchi, one of the appellants in the above entitled cause respectfully shows, that the petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date December 29, 1930, made on the advice of Vice-Chancellor, John O. Bigelow, in a certain cause in said Court of Chancery, wherein Martin J. MacDonnell was complainant and Michael J. Vitille, James J. Kinsella and Joseph Cunhy, were defendants, to which decree petitioner complains in these respects, to wit:

1. That said decree denies the claim and application of Ovid C. Bianchi, solicitor of the appellants, general-contractors for a lien for his compensation on the total sum of $16,561.49, the amount found due from the complainant on ac-

count of the contract price and extra-work performed and materials furnished by the appellants.

2. That said decree denies the application of Ovid C. Bianchi, that there be paid to him the amount found due for extra-work by the appellants, and assigned to said Ovid C. Bianchi, as security for his compensation as their solicitor.

3. That said decree adjudges that the sum of $16,561.49 be paid to the stop-notice claimants direct.

4. That said decree denied the application of said Ovid C. Bianchi, solicitor of the appellants for a reasonable counsel fee for services rendered in said cause.

5. That said decree denied the application of said Ovid C. Bianchi, solicitor of the appellants for a lien for compensation as their solicitor upon the amount of money found to be due for extra-work and performed independent of said building contract.

6. That said decree adjudges that no costs be allowed to the appellants.

7. That said decree adjudges that the Counter-claim of the appellants be dismissed.

8. That said decree adjudges that the whole sum of $16,561.49 be distributed to and among the stop-notice claimants and materialmen.

And petitioner appeals from the parts of said decree of the Chancellor, which decreed as aforesaid, on the ground that the same are erroneous in that:

1. That the Chancellor should have ordered, adjudged and decreed that the stop-notice claimants should be paid in the order of their priority, but only out of the surplus remaining after the payment of the lien or liens for compensation of Ovid C. Bianchi, appellants' solicitor.

2. That the Chancellor should have granted the relief prayed for in appellants' Counter-claim.

3. That, assuming that only the sum of $16,561.49 was due from the complainant, the Chancellor should have ordered, adjudged and decreed that the said sum should be paid to the appellants and not to the stop-notice claimants subject to the lien of its solicitor for compensation.

4. That assuming the amount due from the complainant was but $16,561.49, the Chancellor should have granted the claim and application of Ovid C. Bianchi, solicitor of appellants for his lien for compensation on that sum.

5. That in any event, the Chancellor should have ordered, adjudged and decreed that the said Ovid C. Bianchi was entitled to a lien for his compensation on the amount found to be due for extra-work performed by the appellants-contractors.

6. That the Chancellor should have ordered, adjudged and decreed that the said sum of $16,561.49 be paid to the appellants, subject to the lien of Ovid C. Bianchi, its solicitors for his compensation.

7. That in any event the Chancellor should have allowed the said Ovid C. Bianchi, solicitor for appellants, a reasonable counsel fee.

8. That the Chancellor should have ordered, adjudged and decreed that the said Ovid C. Bianchi, solicitor for appellants was entitled to a lien for the amount of his compensation on the sum of $9,733.27 being the amount allowed for extra-work performed independent of the contract.

9. That the Chancellor should have ordered, adjudged and decreed that the appellants were entitled to their costs in said suit.

10. That the Chancellor should have ordered, adjudged and decreed that the principal sum due from the complainant on account of the contract price and for extra-work performed and materials furnished by the appellants was $23,907.02 as found by the master and not $16,561.49.

Petitioner therefore prays, that the said decree of the Chancellor in the respects above mentioned be reversed, set aside and for nothing holden, and that the petitioner may have such further relief in the premises as to this court shall deem proper.

O. C. BIANCHI,
Solicitor and of Counsel pro se.

General Statement of the Testimony Taken.

This cause of action was based on the filing by the complainant of a Bill in the nature of a Bill of Interpleader in a controversy on a building contract. The testimony taken in this cause was voluminous and in my opinion it would serve no useful purpose to recite it in detail.

The matter was referred to a Master, before whom approximately seven hundred pages, of legal cap size, of testimony were taken, covering a period of about fourteen days and on which he filed a lengthy report of fifty pages of legal cap size.

The testimony was centered on a list of forty items submitted by the general contractors, that they alleged covered extra work performed and materials furnished by them separate and apart from the contract, and another list of about forty items submitted by the owner, which he alleged covered omissions and defective work, for which he sought an allowance from the contractors.

Exceptions were filed by the owner, complainant-appellee, to the Report of the Master.

In ruling on the exceptions, the Vice Chancellor did not file a formal opinion, but wrote a letter to the respective solicitors for the complainant-appellee, and the general contractors, defendants-appellants, as follows:

> Gentlemen:
>
> I have delayed so long deciding this case that I will not take the further time which would be required to put my conclusions into a formal opinion.
>
> The general exceptions argued in Part 1 of complainant's brief should be overruled.

The exceptions to the Master's refusal to give credit for certain items of omitted or defective work are sustained to the following extent:

Item 1	(a)	$1,000.	
	(c)	100.	
	(g)	865.20	
	(i)	130.	
2	(a)	750.	
	(b)	400.	
3	(a)	100.	
4	(a)	100.	
6	(c)	100.	
8	(a and b)	1,500.	
9	(a)	150.	
	(b)	500.	$6,295.20

The Vice Chancellor, who did not see or hear the witnesses made the above changes overruling the Master's report without setting forth any of his reasons for so doing.

The items that were allowed by the Vice Chancellor were part of those that were more seriously disputed before the Master, and on these twelve items we will set out the pertinent and material testimony of the witnesses pro and con.

ITEM I, (a)

The Vice Chancellor made an allowance on Item 1, (a) of $1,000. without having heard, seen or examined the witnesses and, without setting forth any reasons therefore, overruled the Master's findings, disallowing the credit asked, although the Master, in forming his conclusions,

had had the aid and benefit of having seen, heard and examined the witnesses.

The first witness called on behalf of the owner, complainant-appellee, was Charles Shilowitz; he testified to being a registered architect for two and one-half years and to his having made a list of about forty items of alleged omissions and defective work; as follows: (T-168)

By Mr. Platoff:

Q. Have you examined this building of Dr. MacDonnell's at 24-30th Street, Woodcliff?

A. Yes, I have.

Q. At our request?

A. Yes.

Q. Have you read the plans and specifications for that job?

A. Yes.

By Mr. Platoff: (on page T-170)

Q. When did you make the inspection?

A. About three months ago; two or three weeks before the first hearing.

This is work that has not been performed in connection with the plans and specifications.

The fireproofing around columns and beams omitted. Specifications call for fireproofing around all beams and columns in building and $1,000 is a reasonable charge for that omission. In fixing these prices I am fixing the price not on what it would cost to rip down and put the material in, but what it would have cost the contractor if he had gone ahead and done the work when he was building the building. In other words by omitting these items there was an actual

saving to the contractor of the amounts in my opinion.

The next witness for the owner on Item 1-(a) (T-605) was Charles P. Scheidecker. He qualified as an architect with fifteen years experience, stated he had examined the building and had gone over the list made by Charles Shilowitz, and testified as follows:

By the Master:

Q. Mr. Scheidecker, one of the items you mentioned was that the fireproofing around columns and beams had been omitted entirely throughout the building, right?

A. Yes.

Q. Have you made any estimate as to the value of that fireproofing work, and what the cost would have been to put it in?

A. Yes.

Q. And, can you stat the value approximately?

A. I can. I figured the lineal feet of columns and beams; figured what form work was worth, which I based at 16c per foot, and I based cinder concrete which is the usual fireproofing, at $8.60 per cubic yard.

Q. What about forms for beams?

A. Forms for beams are worth 16c per square foot area.

Q. Forms for columns?

A. Worth about 23c per square foot of area.

Q. Now, did you measure the beams?

A. Did I measure the beams in the building? No. I took the steel plan and took the beam measurements from that.

Q. Did you measure the lineal feet of beams from the steel plan?

A. I did.

Q. Did you measure the lineal feet of columns from the steel plan?

A. I did.

Q. And, when you measured them, where did you put them down, that is, number of lineal feet you found?

A. On an estimating paper.

Q. Where is that estimating paper?

A. I don't know.

Q. Well, what did you do with it?

A. I gave it to Mr. Schilowitz to copy it down on the yellow paper, which was transferred to typewritten copy.

Q. Have you that yellow paper here?

A. Yes.

Q. Will you refer to the yellow paper and tell me the number of lineal feet?

By Mr. Bianchi: He says it is not his. These yellow sheets are not written up by him.

A. In the columns there are 2,160 lineal feet.

By Mr. Bianchi: I object to his testifying from papers not written up by him.

By Mr. Platoff: It is proper testimony. This man made an inspection of the building and of the plans and prepared the records, which unfortunately are not in his own handwriting.

By the Master: Even if he did, I would not take it in evidence.

By Mr. Platoff: He will take the same plan and calculations and come down here. Certainly, this man is a competent witness.

By the Master: I will let him use that so far as these lineal feet are concerned.

By the Master:

Q. What about the beams?

A. 2,350.

Q. Is that all the beams?

A. No, there's basement which was not included.

Q. How much?

A. 770 square feet.

Q. Using the price that you have mentioned, have you figures the amount that this fireproofing would cost?

A. I have figured it.

By Mr. Bianchi: I objct to that— to his using the memorandum.

By the Master: It is now a mathematical proposition as far as I am going.

By the Master: I will state on the record that multiplying the square feet of these items by the prices given by Mr. Scheideker will give the total figures of $2,255.60.

Q. Do you know whether or not anything was substituted for this fireproofing?

A. Nothing has been substituted.

EDWARD A. KEELER, testifying as an expert was the main witness for the contractors and his testimony on the First Item, in which the Vice Chancellor allowed the sum of $1,000. Item I, A, on page (T-349), is as follows:

By Mr. Bianchi:

Q. Have you gone over this list of omissions or

were you present at the time of the examination on the omissions?

A. I did go over it and was present.

Q. Would you say these omissions were true?

A. I should have to take each one separately.

Q. Item No. 1, Mason Work, Fire proofing around columns and beams omitted. What have you to say about that?

A. Fireproofing around the steel columns of the basement was omitted. The fireproofing of the steel columns above the basement was done in a different manner. Fireproofing of the steel beams in connection with the steel beams in connection with the steel construction of the building was done in accordance with the specifications in some cases and in a different manner in other cases.

Q. How did the cost of the work as done compare with the work as specified?

A. Aside from the value of the omission of the fireproofing of the steel columns in the basement, the value is the same and in the case of the fireproofing of the steel columns in the basement, there was a saving to the contractor.

Q. Of how much, if you know, about?

A. $118.10.

Q. Have you itemized that?

A. I have.

On Item 1, (a), Michael J. Vitelli, who was a member of the general contracting firm of Vitelli, Kinsella & Cunhy, testified on page (T-140), as follows:

By Mr. Platoff:

Q. Mr. Vitelli, I call your attention to mason work as provided for in the plans and specifications and I ask you whether you fireproofed the columns and beams?

A. Yes.

Q. Sure about that?

A. Just as I was directed to.

Q. I am not asking you that. I am asking you, did you do it as provided in the plans and specifications?

A. Yes.

A review of the above testimony pro and con, will conclusively show that a question of fact was presented before the Master, who, after having seen, heard and examined the witnesses, found in favor of the contractors, defendants-appellants, and that the Vice Chancellor, without having seen, heard or examined the witnesses, and without setting forth his reasons for his finding, reversed the Master on his finding of facts.

ITEM I, (c)

The Vice Chancellor made an allowance on Item I, (c) of $100. without having heard, seen or examined the witnesses and, without setting forth any reasons therefor, overruled the Master's findings, disallowing the credit asked, although the Master, in forming his conclusions, had had the aid and benefit of having seen, heard and examined the witnesses.

As to Item I, C, (on page T-170) Shilowitz testified as follows:

Face brick for exterior walls were to have matched the brick of the other building. The present brick is inferior to that brick. That is worth about $200 on the entire job. The mortar joints on face brick were to be buff. They were replaced with white joints. That is worth $100 because of

the work attached laying up the face bricks separate from the common.

Testimony on Item 1, C, page (T-608) Scheideker testified:

By Mr. Platoff:

Q. Now, you testified that the specifications call for struck joints, and that the job is rough cut. Can you give us the difference in reasonable value to the building caused by that substitution?

A. Yes. Costs $5.00 a thousand more to strike.

Q. How much?

A. $5. a thousand— 70,000— would be $350.00.

Q. You said the specifications call for mortar joints of buff pigment, and that in fact, was constructed there in common mortar. What is the difference in reasonable value between the buff pigment and common mortar.

> By Mr. Bianchi: I object to it because it has been admitted here by the architect that five samples were made and that they agreed on the design and the manner in which the work was done.

A. When I first testified, naturally, about the original plans and specifications.

On the same subject Item (1) C Keeler as expert for the contractor testified as follows: T 350 to 351:

By the Master:

Q. Is the face brick on this building of good quality?

A. It is.

Q. Does the face brick, in your opinion compare with the specifications?

A. It compares with the specifications.

Q. It is in accordance with the specifications?

A. The design as stipulated by the specification has been changed, but the character of the brick as installed is in accordance with the specifications.

Q. Item C. What sort of a joints are on the brick?

A. On the face brick?

Q. Yes.

A. Constructed of white sand, white cement, with mixture of either yellow or ochre coloring or yellow sand.

Q. Would that or would it not, cost more to make it of buff or white?

A. More.

Q. As it is now finished, would it cost more than what called for in the specifications?

A. More.

By the Master:

Q. Might I ask as to whether or not there has been any extra charge included in the extras relating to that item, and which item is that?

A. Item of $191.25. There has been a charge.

Q. Do you say that that is a fair price for the difference in the value or cost of what was put in?

A. It is.

Q. And that what was called for in the specifications?

A. It is.

ITEM, 1, (g)

The Vice Chancellor made an allowance on Item, 1-(g) of $865.20 without having heard, seen or examined the witnesses and, without setting forth

any reasons therefore, overruled the Master's findings, disallowing the credit asked, although the Master, in forming his conclusions, had had the aid and benefit of having seen, heard and examined the witnesses.

The contractor, Michael Vitelli, testified as follows: T-141:

Q. Did you construct gypsum block in the floors?

A. He made a change. He did not want that.

Q. Who?

A. The architect and the owner.

Q. Both spoke to you personally?

A. The architect spoke to me. He told me that's what the owner wants. He picked out the stuff and we had to use it.

Q. Did you make any allowance for the gypsum block?

A. It cost more money than I put in my estimate at first.

Q. Did you make any allowance?

A. Yes.

Q. Did you put anything in the ceiling of the doctor's apartment; anything soundproof?

A. Yes.

Q. What?

A. Celotex and flaxlinum.

Q. Isn't it a fact that flaxlinum was put in the floors only not in the ceiling?

A. Yes, that's what they asked me.

Q. Isn't it a fact that flaxlinum was put in the floors only and not in the ceiling?

A. Yes.

Q. It was not put in the ceiling?

A. No.

Q. Nothing was put in the ceiling?

A. No.

Q. And the specification called for gypsum block in the ceiling, right?

A. They changed it.

Q. Did you make any allowance for the change?

A. Yes.

Q. Where?

A. In the bill that I submitted.

Q. I want you to show me the bill you say you made the allowances on.

A. On the second page is a statement, the item "credit for work included in contract, 1452 square feet flaxlinum at 5½ sq. are feet, $79.86.

Q. Is that correct, that that is the credit for the gypsum block?

A. That's the credit for the flaxlinum and full amount of which we had we measured up what it will take for the doctor's apartment and the ceiling and we gave him the credit for the amount of flaxlinum which we were supposed to put in and the flaxlinum cost more than the gypsum block cost. That's what he ordered. We spoke to him many times before we ordered the stuff.

Q. What has that to do with the gypsum block?

A. That's the order as instructed by the architect.

Q. Isn't it a fact that the specifications required you to put flaxlinum in every floor?

A. Not every floor.

Q. Which floor was excluded?

A. No floor at all.

Q. Wasn't there a contract for extra work which provided for construction of flaxlinum in all the floors?

A. No.

Q. What floors did you put flaxlinum in?

A. All floors.

Q. Why?

A. Because the architect and the owner ordered it.

Q. Isn't it a fact that allowance for flaxlinum applies for extra work on flaxlinum not on gypsum block?

A. Credit for flaxlinum is for what we supposed to put up for gypsum block.

Ed A. Keeler on item (1) G, testified for the contractor on page (T-356) as follows:

By Mr. Bianchi:

Q. Item (1) G. What have you to say about gypsum block that is called for in that item?

A. The gypsum block fireproofing was not installed in accordance with the specifications. Here is a case where you have an offsetting extra charge.

Q. What was done?

A. The floors and ceilings were of the specified area, were sound proofed and sound resisting by the use of flaxlinum and thermofill, and the thermofill in the floors was placed between the wood joist, directly over the plasterboard, which was applied on the basement ceiling and the flaxlinum apparently was installed. I did not take up the floor. I measured the area between the under and upper floors.

Q. What was the extra charge on this work?

A. Deafening three room apartment, first floor aggregating $720.11. Deafening the south dividing walls, aggregating $178.37.

Q. Is gypsum block a sound resistent?
A. To an extent.
Q. Is that what it is used for?
A. No.
Q. What is it used for?
A. Partition work.

By the Master:

Q. What would it have cost to put the gypsum block in the floors and ceiling of the doctor's apartment, if you know?

A. $865.20 including an allowance of 10% for overhead and 10% for profit.

Q. Was that amount saved by the contractor by not putting gypsum block in, in your opinion?

A. Yes.

Q. Therefore, instead of doing that, he put in these extras, thermofill and flaxlinum. Am I correct in that?

A. Yes.

Q. Would you say that the amount should be to offset the credit that was saved against the cost by putting flaxlinum or do you say that the extras that are charged are after giving the credit for the $800 saving?

A. Not considering the fact that the method indicated in the specification could not be done because it was impractical and not considering any other offsetting item or any other item of extra work done for which a charge has not been made, I should say that one item would offset the other, or whatever the difference is.

By the Master: So that counsel may know, what I take from this testimony is that something was substituted for the gyp-

sum block, that the contractor has charged the entire cost of the substitution as an extra without in any wise allowing any credit for the omitted material, or the saving to him and my understanding from this testimony is that if he is allowed the extra cost the owner is entitled to the credit for the omitted material.

Q. Was there any other item to offset?
A. There were. That's something else.

SCHEDEKER as an expert witness for the owner testified as follows: as to Item (1) G. T-609:

By Mr. Platoff:

Q. Now, you testified that the specifications call for member cast stone and limestone finish and that this has been substituted with a cement coping cast directly in one piece. In your opinion, what was the difference in value?

By the Master:

Q. Assuming that gypsum block in the floors and ceilings of Doctor MacDonnell's apartment was omitted, what would be the value of the gypsum block?

A. In Ceiling? A little difference in ceiling and floor.

Q. In both?

A. If I would estimate the job and I saw there was gypsum block to go on the ceiling I would figure in price for it, but I never saw it done.

Q. Never saw what done?

A. Gypsum block suspended from the ceiling.

Q. It is impractical to suspend block from the ceiling in accordance with the specifications. Is that right?

A. Absolutely.

By Mr. Platoff:

Q. Notwithstanding that, Mr. Scheideker, what in your opinion was the reasonable value of the gypsum block?

A. I would price it around 40c a square foot, but there is absolutely no detail of how it should be built and it could make you do almost anything.

By the Master:

Q. So you are really quite critical of the specifications as to the gypsum block in this building, and when you say 40c per square foot, you are giving a figure that would cover you no matter how the architect insisted that you do the job?

A. That's right.

By Mr. Platoff:

Q. With that in mind, how much in money have you estimated the reasonable value for the omission?

A. Forty cents.

Q. Do you know how many square feet there were?

A. Not off-hand.

By the Master:

Q. I will tell you that there are 3456 square feet in the ceiling and the floor, which figure is subject to being corrected or questioned by the contractor, but he will have to draw my attention to it if there is any error in it, so would you say that

you are referring to this at 40c a square foot?

A. Yes, or approximately $1400.

As to Item I, G, Shilowitz testified as follows: (T-170):

Gypsum block was to be used in the doctor's apartment and that was omitted; worth about $1,500 for floors and ceiling.

ITEM I, (i)

The Vice Chancellor made an allowance on Item I, (i) of $130. without having heard, seen or examined the witnesses and, without setting forth any reasons therefore, overruled the Master's findings, disallowing the credit asked, although the Master, in forming his conclusions, had had the aid and benefit of having seen, heard and examined the witnesses.

Vitelli, the contractor testified as follows: as to Item (1)-J, T-144:

By Mr. Platoff:

Q. Did you plaster the stair soffet?

A. A stair soffet is underneath the steps and buckhead up to the roof.

Q. You mean the steps under the stair case?

A. Yes, and the bulkhead goes all the way up to the roof.

Q. You are sure you plastered all these stair soffets?

A. You can't plaster them. That's steel.

Q. You said you did. Did you or did you not?

A. It is not required.

Q. Did you or did you not?

By Mr. Bianchi: I object. He has given you an answer.

By Mr. Platoff: I insist that's not a proper answer to that question.

By the Master: I think Mr. Platoff is right.

A. Plastered on all sides of wall except underneath the part where the stairs were; where the iron stairs were put up, no plaster.

Q. Did you plaster the cornice in the hall?

A. Yes, sir.

By Mr. Greene: May I suggest to the Master unless counsel really intends to the doing of these things it seems to me futile.

By the Master: I understand Mr. Greene, before you came in, Mr. Platoff had an itemized list of what he claims were items that were omitted from the work and materials that were included in the specifications and for which he is going to claim credit and he intends to put in testimony to prove these items.

Q. What did you plaster them with? What kind of materials?

A. White sand and white cement, float finish.

Ed. Keeler for the contractor testified as follows: on Item (1) I, T-358:

By Mr. Bianchi:

Q. Item I, J, Stair Soffets.

General Statement of the Testimony Taken.

A. The specifications call for the stair soffets to be plastered, plastering to be applied to wall board, I believe. The plans do not show stair soffets. The work as installed is a fireproof stair case with open finished underside, or soffet.

Q. Is there any credit due to the owner on this item?

A. There is not. It is not an omission.

Q. Didn't omit anything?

A. No.

By the Master:

Q. Did you say that the stair soffets are constructed in accordance with the specifications?

A. And the plans.

Q. Is there any difference between the specifications and the plans respecting the stair soffets?

A. Not the way I interpret them.

Scheideker testified for the owner as follows: on Item (1) I, T-612:

By Mr. Platoff:

Q. Do you recall whether or not the specification calls for stair soffets or not?

A. It does call for all stair soffets to be plastered.

Q. Have they been plastered?

A. No.

Q. In your opinion what is the reasonable value of this omission?

A. The furring and lathing is worth about $1.50 a yard, including furring and lathing and the plaster, and about $1.10 for work— finished. A total of $2.60 a yard.

By the Master:

Q. You examined these stairs, did you not?

A. I did.

Q. The stairs as they stand, are a good job, are they not?

A. They are.

Q. And, there has been testimony here that— I don't know whether it covers soffets or something else about the stairs— that the stairs are a better job made the way they are, than if they had been closed?

A. That is merely a matter of opinion.

Q. What is your opinion?

A. My opinion is that apartment houses in this City are very rarely plastered.

Q. And the manner in which the stairs are constructed is the manner in which stairs generally in apartments in this City are constructed?

A. Absolutely.

Q. Do you say that it cost less to construct the stairs in the manner they are constructed than the manner which the specification calls for?

A. Yes.

By Mr. Platoff:

Q. Would you say the difference on these stair soffets is $130?

A. Right. This plastering of the soffets has nothing much to do with the stairs and merely that you have no plaster there.

As to Item, (1), I, (T-171) Shilowitz, testified as follows: The stair soffets were to be plastered; that was omitted; worth $200.

ITEM, 2 (a)

The Vice Chancellor made an allowance on Item 2, (a) of $750.00, without having heard, seen or examined the witnesses and, without setting forth

any reasons therefore, overruled the Master's findings, disallowing the credit asked, although the Master, in forming his conclusions, had had the aid and benefit of having seen, heard and examined the witnesses.

In Item, 2-A, Keeler for the contractor, testified as follows: (page T-359):

By Mr. Bianchi:

Q. Go down to carpentry and cabinet trim. I want to ask you at this time if you ever had been engaged in the actual making of millwork?

A. Yes, sir. I was doing it myself with my own hands.

Q. What do you know about this cabinet trim proposition, we were talking about?

A. The trim as installed in the building does not comply with the plans or specifications. It is different in application, difference in size and workmanship. It is called for cabinet trim excepting the places where the joints are made in the castings of the door opening, and the window caseing. The trim as installed is both mitre and coped. While as specified it would have been put together with dowls and glue at the mill.

Q. Do you know the Tudor Hall apartment job?

A. Yes; in Englewood.

Q. Do you know whether this trim in this building compares with that and how?

A. In character it is equivalent.

By Mr. Platoff: I object to any comparison of trim with Tudor Hall. There was no testimony from anybody that the trim here was to be like Tudor Hall trim. The

only testimony was as to brick work in Tudor Hall.

By the Master: I am uncertain as to whether there was any testimony respecting Tudor Hall excepting the face brick. I have a recollection of Mr. Ach being examined, I thought, in reference to cabinet trim in Tudor Hall and here, or it may have been that this witness testified as to brick work. However, I am going to admit the testimony subject of course, to its being or having been already connected up.

A. It is of the same general character, but I did not check the design in detail.

By the Master:

Q. What have you to say when you say 'general character,' what have you to say from inspection as to difference in cost of the Tudor Hall trim and this trim?

A. No difference.

Q. What difference is there between the cost of putting in trim that is in this bulding and the cabinet trim that is specified in the specifications?

A. Without the addition of any allowances for overhead or profit, $260. That's the unit.

On Item 2, A, Vitelli, the contractor, testified as follows: (T-145)

By Mr. Platoff:

Q. What kind of trim did you finish in this building?

A. What they picked out.

Q. Was a sample of the trim submitted?

A. Yes.

Q. Was the trim that was installed in accordance with the specifications?

A. The trim was installed according to what the Doctor and Mr. Ach wanted; like that in the building in Englewood. The trim was put into the building according to what Dr. MacDonnell and Mr. Ach, the architect, picked out in the building in Englewood. That's the kind of style and finish trim they wanted and that's what they got.

Q. Did you make any allowances for the difference in trim?

A. No allowance.

Q. Did you install the instrument cases?

A. Yes.

In Item 2, A, (T-600) Scheideker testified as follows:

Third Omission is a big item and is the mill work in the job. Specification calls for cabinet trim throughout the entire building. There is mill work in there, bought from an ordinary mill, cut on the job, while cabinet work is made in a cabinet shop and not in a mill, and comes to the job all assembled, glued, mitred. There should be absolutely no handling on the job. That is specified.

By Mr. Platoff: (on page T-614)

Q. You testified before as to carpentry and trim — that the specifications called for cabinet trim and the kind installed is so-called 'knock down trim.' In your opinion, is there any difference in value of what is specified and installed?

A. Good deal.

Q. What is the reasonable allowance?

A. Very reasonable allowance $1500 to $2,000,

I would say. I wish to add that I have yet to see an apartment house with cabinet trim.

By the Master:

Q. As a general rule, an apartment house does not have cabinet trim?

A. They don't, no.

Q. So far as the construction of the trim is concerned in this apartment house, have you any criticism to make of it as compared with other apartment houses?

A. No, I have not.

In Item, 2, A, (T-171) Shilowitz testified as follows:

Specifications call for cabinet trim glued and dowelled at the mill and to be set up in the building. That has not been done, worth $1,750.

In Item, 2, A, (T-279) Ach testified as follows:

By Mr. Platoff:

Q. When did you make your examination Mr. Ach with this list?

A. About four weeks ago.

Q. You conferred with Mr. Shilowitz about this building, have you not?

A. Yes, sir.

By the Master:

Q. In your opinion, was this building substantially completed by the contractors?

A. I would say it was. Tenants occupied it. That's substantial completion.

Q. You said that you refused to grant the final certificate?

A. Yes, sir.

Q. Have you granted certificates up to the final certificate?

A. Yes, sir.

Q. In your own judgment, that amounted to about 85% of the work?

A. Probably a little less.

Q. Was there any provision for a retained percentage?

A. Yes, sir, 15%.

Q. When you say 85% you mean not taking off 15%, but 85% of the work you certified, irrespective of the 15%? That just happens to be the difference between 85% and 100%?

A. Yes, sir.

Q. There is no doubt that there were several changes with your order and the order of Dr. MacDonnell in respect to these plans and specifications?

A. Yes, there were changes made.

Q. Did these changes cover certain omissions as well as certain changes in material and so forth?

A. Yes. Among the omissions were the omission of the Kitchen dressers throughout the house and the substitution of another factory dresser, and there were other changes made. Dentist apartment was put in and the apartment in the first floor in the southeast corner was changed— the arrangement of the rooms. The basement, janitor's apartment, was changed, and the laundry was omitted, and a few other changes were made.

Q. How about the plumbing in the bathroom?

A. Yes, the location of the plumbing was changed.

By Mr. Platoff:

Q. Mr. Ach, what changes were made by you in these specifications?

A. A change made in the plumbing specifica-

tion prior to the signing of the contract. Mr. Cadel submitted an alternate specification which was finally embodied into the contract.

By the Master:

Q. Was the plumbing work that was done by Mr. Cadel, was that performed in accordance with those alternate specifications that were submitted or put into the contract?

A. Yes, sir.

By Mr. Platoff:

Q. Did you submit those proposed changes in specification or alternate specification to Dr. MacDonnell?

A. I think that was a portion of the contract.

Q. The alternate specification actually became a part of the contract?

A. Yes, before signing.

Q. What was the next change made in the plans and specifications?

A. The electrical specification was changed after the contract was signed.

Q. Was that changed specification submitted to Dr. MacDonnell?

A. No, it was not.

By the Master:

Q. Why not?

A. The intent of that specification was to simplify the telephone system and to substitute the make of a letter box to another make which in my opinion was as good a letter box.

By Mr. Platoff:

Q. What was the next change Mr. Ach?

A. There were no other changes made then in specifications, and the next change in the plan was as I recall, the changing of the arrangement of the rooms in the basement, that was the janitor's apartment, and the laundry.

Q. Was there a substitution of any kind? Was there any kind of specification prepared?

A. There was a new plan made showing the location of the rooms and a rearrangement of the basement.

Q. Was that submitted to Dr. MacDonnell?

A. Yes.

Q. Before the work was given out or after?

A. Before.

Q. Was a written order given for that work?

A. I don't think so.

By the Master:

Q. Was the work done in that manner?

A. Yes, sir.

By Mr. Platoff:

Q. Is there a charge for extra work for that work in the basement apartment to which you just testified?

A. Yes, there was an extra charge.

By the Master:

Q. Is the extra charge included in the statement of Mr. Vitelle, the contractor?

A. Yes, sir.

By Mr. Platoff:

Q. Was there any written order for this extra work?

A. No.

Q. What is the next change in the specifications?

A. There was a change made in the first floor, southeast apartment, rearrangement.

Q. Was that change submitted to the Doctor before the change was made?

A. Yes.

Q. Is that the subject of a charge for any extra work?

A. Yes.

Q. Was that change authorized or ordered in writing?

A. I am not sure.

By the Master:

Q. Mr. Ach, as I understand it, some changes were ordered by writing and some verbally by you, right?

A. I believe that is correct.

By Mr. Platoff:

Q. What is the next change?

A. Change in the ward of the Doctor's office. Changes in the toilet room between the two examination rooms.

Q. Going back to the change in the ward room. Was that change submitted to the Doctor before it was made?

A. Yes.

Q. Is that the subject of any written order?

A. I don't think so.

Q. Is it the subject of any charge for extra work?

A. I don't think so. I don't think it was the subject of any extra charge.

Q. The next change in the toilet in the Doctor's office.

A. Yes.

Q. Was this change submitted to the Doctor?
A. Yes.
Q. The toilet was omitted?
A. Yes.
Q. Was that work authorized in writing?
A. I think it was.
Q. Was any allowance made for it?
A. I don't think so.
Q. What is your next change?
A. The re-arrangement of the closets in the Doctor's apartment before any partitions were erected.
Q. Was that change submitted to the Doctor before it was ordered?
A. Yes.
Q. Order in writing or any understanding in writing?
A. No.
Q. What was the next change?
A. Windows in the light court were changed from wooden to kalamien.
Q. Was that submitted to the Doctor before the change was ordered?
A. I believe it was.
Q. Was there any written memorandum for that change?
A. I don't think so.
Q. Any charge for extra work for it?
A. Yes.
Q. What was the next change?
A. The vestibule doors were moved back to the line of the north base of the elevator shaft.
Q. Was there a modification submitted?
A. I don't think so.
Q. Was the order in writing?
A. No.
Q. Any charge made for extra work in connection with that?

A. I don't think so.

Q. Next change?

A. On the second floor in the southwest apartment the apartment was changed to a dentist's office.

Q. Was that change submitted to the doctor before it was ordered?

A. I don't think so. I think he was away at the time.

Q. Was the order in writing given?

A. By phone.

Q. Charge for extra work for that?

A. Yes.

By the Master:

Q. Mr. Ach, you would not make a change, a very material change, changing an apartment from an ordinary apartment to a dentist's apartment without the knowledge or order of the owner, would you?

A. No, sir.

Q. Did you have such an order?

A. Yes, I considered I had. Prior to the Doctor's departure he told me to get in touch with Dr. Fisher, the dentist, and arrange the apartment to suit the dentist's convenience.

Q. You mean Dr. MacDonnell expressly authorized you to change the apartment to suit the dentist's convenience?

A. This was an express order.

Q. Then you mean that the change was not submitted; that after seeing the dentist, you did not actually submit the plan to the owner, is that right?

A. No. When the owner returned the work was completed.

Q. So far as these other changes were concerned did you mean they were not submitted to the owner, that the actual plans were not submitted to the owner, or did you mean that the owner had no knowledge that the changes were going on, or going to be made? For instance, did the owner have any knowledge that the windows in the court were going to be changed or did you go ahead and had that done on your own?

A. I am not sure of that.

Q. How about those vestibule doors?

A. He knew about that. He did not know about the electrical work.

Q. Is that about the only work that he did not know about?

A. I should say one or two other items.

By Mr. Platoff:

Q. What is the next change after the dentist apartment?

A. There were doors put in all the openings between the living room and dining room on all floors.

Q. Did the doctor have knowledge of that before it was done?

A. Yes.

Q. Was there a written order given for that work?

A. I think there was.

Q. By whom?

A. I think an order by Doctor MacDonnell to Mr. Vitelle.

Q. In writing?

A. I think it was in writing.

Q. What is the next change?

A. The kitchen dressers were omitted and built-in dressers were substituted.

Q. That was with the doctor's knowledge prior to the order being given?

A. Yes.

Q. Did you give that order or the Doctor give that order?

A. I think the Doctor gave that order.

Q. You don't know whether he gave it in writing or not?

A. No.

Q. What is the next change?

A. There was an order given for deafening the partitions between the front and rear apartments.

Q. You gave that order?

A. No. The doctor.

Q. You don't know whether the Doctor gave it in writing or not?

A. No, I do not.

Q. What was the next change?

A. Flaxlinum was laid on all floors.

Q. That was additional work or a charge?

A. Additional work.

Q. Who ordered that?

A. The Doctor.

In Item 2, A, (T-329) Mr. Ach testified as follows:

By Mr. Bianchi:

Q. Mr. Ach, on this question of trim, you didn't follow the specifications but you did use the same trim that was used in Tudor Hall?

A. I went up with Mr. Vitelle to Tudor Hall to look at the brick on the outside and went into the inside. When we were inside I told him he could work up his trim similar to that in Tudor Hall.

Q. That was a high class apartment house?

A. Yes.

Q. And that was what the Doctor got in his apartment house?

A. They did not get cabinet trim.

Q. Has Tudor Hall got cabinet trim?

A. Sure.

Q. Are you sure?

A. I am certain.

Q. By looking at the trim in that building and the trim in Tudor Hall, do they look alike?

A. Very much, but are not alike.

Q. If I were to tell you as a fact that Tudor Hall did not have cabinet trim, would you say I am wrong?

A. I don't think so. I am not certain, that if you were to tell me I would not be certain enough to say you were wrong.

Q. As a matter of fact, good trim is in Tudor Hall.

A. Yes.

Q. Nice trim?

A. Very nice.

That's all.

ITEM 2, (b)

The Vice Chancellor made an allowance on Item 2, (b) of $400.00 without having heard, seen or examined the witnesses and, without setting forth any reasons therefore, overruled the Master's findings, disallowing the credit asked, although the Master, in forming his conclusions, had had the aid and benefit of having seen, heard and examined the witnesses.

As to Item, 2, B, (T-171) Shilowitz testified as follows:

Instrument cases omitted in Doctor's apartment which are called for in specifications; worth $400.

Item 2, B, where an allowance was made by the V. C. of $400.00 for an alleged omission in the Doctor's apartment, Vitelli general contractor testified as follows: T-145

By Mr. Platoff:

Q. Did you install the instrument cases?

A. Yes.

Architect Ach testified as follows: on Item (2) B, T-303

By Mr. Platoff:

Item #28. Install instrument cases called for in our contract.

The contract was to supply two instrument cases in the hall of the Doctor's apartment and these were omitted; that is the wooden cases and glass cases were omitted and the doctor purchased steel equipment and this is a charge for installing steel ones and they would have to install the two wooden ones.

Does it cost more to install steel cases than wooden cases that were supposed to be put in?

A. No, it is about the same.

Was that a different molding than was supposed to be put around the wooden cases?

A. No, We should have credit for the wooden cases.

Were they to furnish wooden cases?

A. Yes.

Scheideker for the owner testified as follows: on Item (2) B, T-617

By Mr. Platoff:

Q. Now, the specifications call for instrument cases in the doctor's apartment. Do you know whether or not these have been omitted?

A. I know they have been omitted.

Q. You know what the reasonable value of these would be?

A. Judging what an ordinary doctor's instrument case generally costs— when you figure instrument cases there is a detail accompanying the plans and I have none with this. I would say from $100 to $150 a piece.

By The Master:

Q. How much in money for the whole thing?

A. $400.00.

ITEM 3 (a)

The Vice Chancellor made an allowance on Item, 3, (a) of $100.00 without having heard, seen or examined the witnesses and, without setting forth any reasons therefore, overruled the Master's findings, disallowing the credit asked, although the Master, in forming his conclusions, had had the aid and benefit of having seen, heard and examined the witnesses.

General Statement of the Testimony Taken.

Item 3-A, testimony was as follows, by Vitelli the general contractor: T-146

By Mr. Platoff:

Q. Did you construct marble stringers of Tennessee Pink Marble from the first floor to the roof?

A. No.

Q. Did you make any allowance?

A. No because there was no allowance.

By the Master:

Q. Why no allowance?

A. Because the stuff they picked out cost more than what was specified and that's what they wanted done.

Q. Did you make any charge for the new marble?

A. No.

By Mr. Platoff:

Q. What did you put instead of it?

A. Tennessee Marble.

Q. You just said you did not put Tennessee Marble?

A. A different grade.

Q. What did you put in this building?

A. Tennessee Marble, same as sample submitted.

Q. Tennessee Pink Marble?

A. Yes.

Q. From first floor to the roof?

A. On Stairs.

Q. What does the specification call for on stairs or any other place?

A. On the stairs and base.

Q. What did you actually put in there?

A. The base—

Q. Then you did not put in what the specifications called for?

A. He did not want it.

Q. Did you put in Tennessee Pink Marble?

A. No.

Q. Did you put anything else in place of it?

A. The stringers.

Q. Did you put anything else in place of the stringers?

A. Plaster.

Q. Which cost more, plaster or marble?

A. Marble.

Q. Did you make any allowance for the marble?

A. No, sir. That was all fixed in the contract.

Q. Did you construct marble cheeks in the vestibule?

A. No.

By Mr. Bianchi: I would like to ask the defense to produce copies of blue prints that were sent with the letter of May 21, 1927, from the architect to Mr. Vitille.

Mr. Platoff: This has nothing to do with the present question.

Q. What did you substitute for these cheek pieces, if anything?

A. Tennessee marble.

Q. Do you remember whether the marble was to be 1¼ in. thick?

A. I do not remember.

Q. Do you remember how thick the marble was that you put in?

A. No.

Scheideker for the owner testified as follows: Item (3) a T-620

By Mr. Platoff:

Q. Now, the specifications call for marble stringers, right?

A. Yes. Omitted on the stair, one side.

Q. What would you say the value of that would be?

A. Put in an inch and a quarter marble— about two or two and one-half dollars per lineal foot.

Q. Making a total of about $700.

A. Right.

ITEM 4 (a)

The Vice Chancellor, made an allowance on Item 4, (a) of $100.00, without having heard, seen or examined the witnesses and, without setting forth any reasons therefore, overruled the Master's findings, disallowing the credit asked, although the Master, in forming his conclusions, had had the aid and benefit of having seen, heard and examined the witnesses.

Scheideker testified for the owner as follows: on Item 4, a, T-621

By Mr. Platoff:

Q. Now, referring to ornamental iron, the specification call for a baluster 1x1 bars. I understand it was substituted by 5/8x5/8 stock.

A. That's correct.

Testimony on Item 4-A, by the contractor Vitelli: T-148

By Mr. Platoff:

Q. Did you install towel bars?

A. That was required, yes.

Q. Did you install baluster of 1x1 bars?

A. No.

Q. What did you install?

A. Nothing.

Q. Doesn't the plans and specifications call for 1x1 bars?

A. Not in the plans, in the specifications.

Q. You did not install it?

A. No.

Q. Did you make any allowance for it?

A. No. As to Item, 4, A, (T-173) Shelowitz testified: Balusters in specification call for 1″x1″ bars; those installed 1/8″x5/8″ stock.

ITEM 6 (c)

The Vice Chancellor made an allowance of $100. on Item 6, (c) overruling the Master's findings on that Item.

As to Item, 6, C, (T-173) Shilowitz testified as follows:

Plumbing layout calls for refrigerator pans and drain pipe and cellar sink; were omitted; $100.

Item (6) C, Vitelli, the general contractor testified: T-149

By Mr. Platoff:

Q. Did you install refrigerator pans and drain pipe in cellar sink?

A. Yes.

Q. Isn't it a fact that that was omitted when the plumbing was put in?

A. That's part of the plumbing, if there is any change between the plumber and architect, I don't know. The plumber and the architect made changes every day when the plumber was on the job.

Scheideker for the owner testified on Item 6 (c), T-623

By Mr. Platoff:

Q. Have the refrigeration pans and drain pipes and cellar sinks been installed?

A. No.

Q. In your opinion, what would be the reasonable value of this plumbing?

A. Throughout the whole thing, I would say about $400.00.

ITEM 8 (a and b)

On these two items there was a vast difference of opinion and many pages of testimony were taken, and on these items the Vice Chancellor made an allowance of $1500.00 overruling the Master, who had made no allowance.

Testimony of Mr. Ach for the owner, on Item 8, (a and b), page (T-281)

By Mr. Platoff:

Q. What was the next change made in the plans and specifications?

A. The electrical specification was changed after the contract was signed.

Q. Was that changed specification submitted to Dr. MacDonnell?

A. No, it was not.

By the Master:

Q. Why not?

A. The intent of that specification was to simplify the telephone system and to substitute the make of a letter box to another make which in my opinion was as good a letter box.

General Statement of the Testimony Taken.

The contractor, Vitelli, on Item (8) a and b, T-149

By Mr. Platoff:

Q. Are the electric bell wires concealed in conduits?

A. According to specification the architect made.

Q. Are they or are they not?

A. No.

Q. The specification called for them to be concealed, didn't they?

A. He made a revised specification.

Q. Have you got the revised specification?

A. Yes. Wires were put in according to the architect's orders to the electrician. I have the modified specifications.

Q. Is there anything in this modified specification which changes the requirements for the concealment of the wire?

By Mr. Bianchi: I object. The modified specification speaks for itself.

By the Master:

Q. Who drew that specification you have in your hand?

A. The architect.

By Mr. Bianchi: The letter I offer, from Mr. Ach to the contractors, dated March 30, 1927, wherein there is enclosed a copy of the revised electrical specifications, and the specifications as received, and I call the attention of the court to the last page, third paragraph, relating to bell wires, changing the general specifications to an ordinary No. 18 bell wire.

By Mr. Platoff: I object to the admission of these papers on the ground that they are not signed by the owner or by anyone duly authorized or by the contractor.

By Mr. Bianchi: In the general contract, we are duly pointed out to take instructions from the architect as to such changes as he may suggest and as may be necessary for the proper doing of the work.

By the Master: I understand that there is no contention made as to the fact that the three sheets of revised electrical specifications are not the copy received in the letter. I will receive them in evidence for what they are worth, to be passed upon at some future time. Marked Exhibit D-60.

By Mr. Platoff:

Q. Take that paper and look at it and show me what part of it you say excuses you from concealing in conduits the electrical bell wire?

By Mr. Gilmour: I object on the ground that the specifications speak for themselves.

By the Master: I will allow the question.

A. The third paragraph on the last page.

By Mr. Platoff: I will call the Master's attention to the third paragraph which has been referred to, that there is nothing in that paragraph, as I read it, about electrical conduits.

Q. Are the other wires in this building in conduits?

A. No.

Q. What are they?

A. Wire.
Q. What kind of wire?
A. Electrical wire. V.X.
Q. Is that what the specification calls for?
A. According to revised specification.
Q. By the revised specification, do you mean Exhibit 60?
A. Yes.
Q. Is there anything in the revised specification Exhibit P-60 which changes the original specification?
A. Yes.

By Mr. Bianchi: My contention is that this revised specification for electrical work wipes out anything that may be said in the original specification.

By the Master:

Q. When did you receive from the architect Exhibit D-60 before or after the original contract was executed?
A. After.
Q. How long after?
A. About March 30, 1927.
Q. The original contract was executed when?
A. October 13, 1926.

By Mr. Bianchi:

Q. When was the electrical sub-contract made?
A. February 24, 1927.
Q. Then you received this right after that?
A. Yes.
Q. Did the architect and the subcontractor talk things over about this subcontract?
A. Yes, I believe so.
Q. Do you know?

A. Yes.

Q. That's when you received this, shortly thereafter, right?

A. Yes.

By Mr. Platoff:

Q. Mr. Vitelli, you say you made your subcontract on Feb. 24th?

A. Yes.

Q. And you received from Mr. Ach the revised specifications on what date?

A. March 30th.

By Mr. Bianchi:

Q. Who recommended the S & B Electrical people to you?

By Mr. Platoff: I object. I think it is immaterial.

By the Master: I will allow the question.

A. The architect.

By Mr. Platoff:

Q. Are any electrical wires in conduits?

A. Not in conduits, in v.x.

Q. Did you construct the duct from the vent shaft to the court?

By Mr. Bianchi: I object to it except if Mr. Platoff says the plans and specifications call for duct in a specific place.

A. No that was not put in. The architect was to decide what he wanted.

Q. You did not put it in?

A. No.

General Statement of the Testimony Taken.

The owner, Martin J. MacDonnell testified as follows: on Item (8) A and B. T-441

By Mr. Platoff:

Q. Did you have any knowledge of any change in any specification for the electrical work?

A. No.

Q. Did you know from observation that any changes were being made in the plumbing or electrical specifications?

A. No, I did not notice.

John H. Sheridan on behalf of the owner testified: on Item (8) A and B—T-557

By Mr. Platoff:

Q. Was there any discussion at the time of the execution of the contract concerning the revised plumbing specifications?

A. I am quite sure there was not. If there had been, I would have noted it.

Q. Was there any discussion at that time concerning a revised electrical specification?

A. No, I don't think there was. I am pretty sure there was not. In fact, I never heard of it.

William F. Bonatz, testified: on Item (8) A and B T-515 to T-527

By Mr. Platoff:

Q. Where do you reside?

A. 437 Park Avenue, Fairview, N. J.

Q. What is your business?

A. Electrician.

Q. How long have you been an electrician?

A. Twelve or fourteen years.

Q. Are you in the electrical business now?

A. Yes, sir.

Q. How long have you been in business?

A. Four years.

Q. Are you familiar with Dr. MacDonnell's job?

A. I am.

Q. Did you submit an estimate for electrical work on that job before the job was started?

A. I did.

Q. I show you a copy of the specification and ask you are these the specifications you used to make your bid on?

A. Yes.

Q. Did you submit a bid on the original specifications?

A. Yes.

Q. Did you get the job?

A. No, sir.

Q. Were any revised specifications ever submitted to you?

A. No, sir.

Q. Did you ever submit an estimate on the revised specifications?

A. No, sir.

Q. Who gave you the original specifications?

A. I believe they were submitted by Mr. Vitelli.

Q. This gentlemen (indicating Mr. Vitelli)?

A. I don't know the gentleman myself. They were handed down from my brother to me.

Q. After the job was up, did you ever go to examine the building?

A. After the job was completed, yes.

Q. Did you ever do any repairs there?

A. Yes, sir.

Q. When was the first time you went there, about?

A. Approximately, a year ago, first time.

Q. What did you find when you got there?

By Mr. Bianchi: I object to anything he found there March, 1929, which is more than two years after the work was done.

By Mr. Gilmour: I wish to take the same objection.

A. I simply took a guess at that time—a year ago—

Q. This job was finished in October, 1927?

A. Yes.

By the Master: In view of the fact that testimony has been put in here on both sides, which has been the result of inspections made by architects or experts even after this hearing started, I will take the evidence, of course, not determining what evidential value it may have, and I will allow the objection to the whole line of the testimony.

Q. What did you find when you first went there?

A. I found trouble, considerable trouble on the telephone and bell system, which according to my knowledge of the specification I bid on, were not put in in accordance with this specification.

By the Master: As I understand it, it is conceded that the electrical work that was put in this job was put in in accordance with a revised specification and not the original specification. Is that right?

By Mr. Bianchi: That is right. We worked on a revised specification.

Q. Who sent for you to go there?

A. Dr. MacDonnell.

Q. Was anything out of order?

A. The bells and telephones were entirely out of order.

Q. And, you were called in to fix them?

A. Yes.

Q. What did you find in reference to telephone system?

A. First of all, we could not make connections with anybody in any part of the house. Bells were out of connection—most conduits were burnt in the telephone system, that worked in the telephone system, that worked in conjunction with the bells, and it took me about three or four days to put them back in shape.

Q. Do you know what caused the system to be out of order?

A. I would say improper installation.

Q. Did you make the repairs that time?

A. Yes, sir.

Q. Did you ever go back to the building again?

A. Yes, several times.

Q. When was the next time you went back after that?

A. About thirty or forty days.

Q. What did you find then?

A. Several sections were out—section wires between telephone instrument, were broken and I had to put in new lines to put them in working order.

Q. About how long did that job take?

A. Two and one-half days.

Q. Did you go back again after that?

A. To make adjustments on bells, I did.

Q. How many times did you go back to adjust the bells?

A. Two.

By the Master:

Q. When was the last time you were there, about?

A. Personally? About six months ago.

Q. And, what did you do at that time?

A. I made final adjustment on the bells.

Q. What do you mean final adjustment?

A. Went through every apartment and made sure that every bell was put in working order.

Q. Were most of them in working order?

A. When I got there I found, I should judge about ten of them in working order.

Q. What did you have to do to put them in working order?

A. Make adjustments on them.

Q. Making adjustments doesn't mean much. What did you do?

A. Making adjustments on bell, I mean by that, conduits were badly burned. They tend to burn up and die and consequently the bell does not ring. They have to be cleaned and readjusted.

Q. How long were you there at that time?

A. About one day.

Q. When you left were the bells in good working condition?

A. Yes, they were.

Q. Is that all you did at that time?

A. Yes, that's all on bells and telephones.

By Mr. Platoff:

Q. What kind of a telephone system is installed here?

A. In the building— an Auth system.

Q. What kind did you figure on when you figured the specifications?

A. Loffler.

Q. Have you anything else to say in connection with the installation, either the workmanship or materials used?

A. The materials on the phone system are the cheapest grade of material obtainable. It is very frail. Causes shorts and the like of that. Furthermore, coming from the vestibule, the main instrument in the vestibule, the wire goes right through concrete, which tends to make any amount of trouble.

Q. Not enclosed in any conduit?

A. No.

Q. Why are all these conduits burnt out?

A. Too high a power.

Q. Whose fault is that?

A. The man who installed it.

Q. You tell us what the amount of difference in cost would have been if this job was installed in accordance with the specification?

By Mr. Bianchi: I object. It was to be installed according to revised specifications.

By Mr. Gilmore: I wish to take the same objection.

By the Master: I will permit the question in the event that it might be determined that the revised specifications do not govern.

A. Pertaining to telephone work or entire job, I would say approximately $1500.

By the Master:

Q. What was your amount of bid that you gave to Vitelli?

A. About $2600.00.

Q. What's the difference in cost between the

Auth telephone system and the Loeffler system?

A. I should judge about 40% higher than the Auth.

Q. Difference in money?

A. About $300 or $400.

Q. I show you a copy of the alleged revised specification, Mr. Bonatz, and ask you to kindly point out to us the difference between this specification and the specification that was submitted to you?

By Mr. Gilmour: I desire on the record the objection to the question because the two documents speak for themselves.

A. The difference in the telephones. The original provides for Loeffler system and the revised call for Auth system.

Q. How about conduits?

A. Also, the original specifications call for wires to be in conduits with outlet boxes and the revised specification calls for regular bell wire.

Q. Mr. Bonatz, to what do you attribute the failure of this system to work the first time you came there?

A. Improper installation.

Q. Would you say it came as a result of use and operation of the system?

A. If it were installed properly use and operation would not do that.

By Mr. Bianchi:

Q. How are the wires broken?

A. They are not laid in properly.

Q. How do you say they broke?

A. I could not locate them in the walls.

Q. Now, isn't it a fact that after a certain length

of time the shrinkage of the floor broke and the wires were attached to the floors?

A. Not if they were laid in with proper slack.

Q. It is hard to foretell or foresee how much a floor may shrink?

A. Yes.

Q. And, sometimes it will drop one inch and two inches?

A. Yes.

Q. And, then, these wires ran up through the cornices?

A. Yes.

Q. Now, this Auth system that we are speaking about, that's used in hundreds of apartments, isn't it?

A. I wouldn't say hundreds. A good many of them.

Q. It's a good system?

A. Yes.

Q. A standard system?

A. Yes.

Q. Well known?

A. Yes.

Q. Was there a three hundred watt transformer in this building?

A. Yes.

Q. What was wrong with that transformer?

A. Too powerful.

Q. Well, that's what the specification calls for?

A. It was too powerful.

By the Master:

Q. Did you say the reason for the breaking of the wires was due to the too powerful transformer?

A. Breaking of the conduits was because of the force being too powerful.

By Mr. Bianchi:

Q. You say the conduits were burnt.

A. Yes.

Q. Don't conduits burn without that? They burn from regular usage.

A. Not in a year or a half year.

Q. When you saw them, or repaired them, it was over a year?

A. Yes.

Q. And, bells need adjustments from time to time?

A. They do.

Q. That's nothing unusual about adjusting the bells?

A. Nothing about adjusting, but the thing is an adjustment on them of that nature, where they have burnt conduits, is entirely unusual.

By the Master:

Q. Do you say that so far as you could observe, that this system was installed in accordance with the provision of the revised specifications?

A. From what I see from the revised specifications, yes.

Q. Did you find letter boxes in the job when you went to repair it?

A. Yes.

Q. Original specifications do not call for letter boxes?

A. I think they do not in the specifications, the original ones.

Q. Do you know how much they are worth, as installed?

A. $1.75 a piece. Installed, I would say about $2.25.

Q. How many boxes are there?

A. Twenty-four or twenty-eight.

By Mr. Bianchi:

Q. Isn't it a fact that electrical work of this kind is guaranteed for one year?

A. Yes.

Q. When you saw this work it was over a year at the time you said you fixed it?

A. Yes.

By the Master:

Q. Why is the guaranty only for a year?

A. The guaranty for the year? Well, if anything is going to break down it will break down within that time.

Q. Outside of guarantying the quality of material used and the workmanship, you do not guaranty any more than that, do you?

A. Workmanship and material.

By Mr. Bianchi:

Q. How much did you include in your estimate for the telephone system?

A. I included $425.00.

Q. Is there any difference between that and the Loeffler system?

A. Yes. Cost of instruments.

Q. But the installation is the same?

A. Practically, yes.

Q. Different style instruments.

A. Yes.

Q. What is the difference?

A. It is inferior.

Q. In cost?

A. Well, I should judge about $3 an instrument.

Q. Are you sure of that?

A. Positive of that.

Q. Did you get an estimate on the Auth system?

A. I did not.

Q. Have you been putting in Auth system in lately?

A. No, I have not.

Q. Where did you get your price then?

A. A catalog price.

Q. How long ago is it since you put an Auth system in?

A. Three years ago.

Q. You don't know what the cost of an Auth system was when this building was put up?

A. From contracting knowledge; prices usually maintain a standard equally.

Q. How do you know that the wires that lay in the concrete slap were n.g.?

A. I tested them.

Q. How do you know they were not laid in conduits?

A. I could see it.

Q. You could see the ends, you mean?

A. I chipped concrete away to rectify and verify.

Q. What happened to them inside of the concrete?

A. Evidently broken.

Q. How could they break if laid in concrete?

A. Concrete expands and contracts.

Q. But this particular concrete that you say wires were laid in, looking at it, did it expand or contract?

A. Most likely.

Q. In order to expand or contract it would have to show a break—a crack, somewhere?

A. Not necessarily.

Q. Does concrete crack without showing?

A. It does.

Q. Where was this particular concrete?

A. In the vestibule.

Q. On the floor or on the side of the wall?

A. On the floor.

Q. Were there anything to show that there was a crack in the floor?

A. No.

Q. Then, could that concrete break so as to pull the wire and break the wire?

A. (no answer).

Q. Could that concrete expand if it does not show a crack?

A. Yes, it could.

Q. If the contracting and the expansion were so little that it did not leave any crack in the concrete, isn't it a fact that there is that much more electricity in the wire?

A. Yes, but you take any piece of wire, and keep bending it back and forth for any length of time, and it will break.

Q. Well, this was a solid floor in the vestibule, wasn't it?

A. Yes.

Q. And well enforced?

A. Yes.

Q. And in order for the wire to be bent back and forth the floor would have to go back and forth?

A. No, it does not have to. It just keeps moving.

Q. You did not see any evidence in the concrete that would indicate what you just speak of?

A. No.

Q. And you never saw any concrete that has expanded without showing a crack?

A. Yes.

Q. Where?

A. Anywhere.

Q. Who told you that?

A. My own knowledge.

Q. Where did you get that idea from?

A. From schooling.

Q. What school ever told you that?

A. Any trade school would tell you that.

Q. Well, what school told you that?

A. Baron Dehirsch.

Q. You haven't anything in writing in your office any place to show that concrete can expand without leaving a crack?

A. In the office, yes.

Q. How wide is this vestibule that it had this particular effect of contraction or expansion?

A. Approximately eight feet.

Q. And, it has a terrazzo floor?

A. I don't know whether it is terrazzo or tile.

Q. Did you see any other cracks, at all?

A. No.

Q. Pretty good condition?

A. Yes.

Q. In order to lay these wires that you speak of in the concrete with the conduits, it would be necessary to place the wires before the concrete was laid or poured?

A. Sure.

Q. And, would that be practical to do?

A. It would not be practical but it was done.

Q. If it had been done, it would be laying under the boards?

A. Not necessarily. It would be laying under

the brick, which happens to be in this particular case.

Q. How much did you cut it?

A. Four or five inches off the edge.

Q. On the bottom?

A. Yes.

Q. Did you go upstairs to look at it?

A. I did, but I could not do any cutting up there.

Q. They are in the plaster ceiling up there?

A. (no answer).

Q. You could not see them at all, could you?

A. I could see everything that could be seen, everything else outside of what's in the concrete and to be seen, in the basement and in a wall upstairs in the vestibule, from the instrument down.

Mr. Seib testified for the general contractor: (page T-528 to page T-541 inclusive) Item (8) A and B

By Mr. Bianchi:

Q. How long have you been in the electrical business?

A. About twelve years.

Q. You are familiar with installation of wires and installation of systems that are required in apartment houses?

A. I am.

Q. How many buildings have you worked in?

A. Couple of thousand.

Q. How many apartment houses have you worked on?

A. 70 or 80.

Q. You worked on the MacDonnell job?

A. Yes.

Q. Was workmanship relative to the installation

of wiring generally known as good workmanship?

A. It was done by a workman who was a good many years in our employ and we consider him a good workman.

Q. What kind of material did you use?

A. Best of the kind which was generally used in apartments of this nature.

Q. Did you follow revised specifications in installing the wiring and cable in general that was used on this Dr. MacDonnell job?

A. Yes.

Q. Did you have revised specifications approved by Mr. Ach?

A. Yes.

By the Master: It is conceded that the copy referred to by Judge Bianchi as bearing the signature of Mr. Ach is a copy of the revised electrical specifications. Exhibit D-60.

Q. How long a time is electrical work generally guaranteed?

A. One year.

Q. And that is against defective workmanship and material?

A. Yes.

Q. Were you ever called upon after a year to do any work on this particular job?

A. No.

Q. What sort of a transformer was used in this job?

A. 300 Watt transformer.

Q. Is that the one specified in the specifications?

A. Yes.

Q. In your opinion is that a proper transformer to use on this job?

A. I think so.

By the Master: Was it too powerful for this job?

A. No, I don't think so.

Q. Did you use wire in keeping with the transformer and specifications?

A. I did.

By the Master: Did the writing that you put in comply with the provisions of the revised specification and did you install them in the manner set forth in the revised specifications?

A. I did.

Q. Did you install the Auth telephone system?

A. Yes.

Q. Is that a good reliable telephone system?

A. We have placed that in practically every apartment house we have wired. It is made here in New York.

Q. Is that a popular one?

A. Yes.

Q. Did you install letterboxes?

A. We did.

Q. Are you acquainted with the original specifications?

A. I have seen them since, yes.

Q. Did the original specifications call for letterboxes?

A. It did not.

Q. How much more did it cost to put in letterboxes?

A. Approximately $3. apiece.

Q. About $75 in this particular building?

A. Yes.

Q. How much was paid on your bill?

A. $2,300.

Q. That covers letterboxes and everything?

A. Yes.

Q. Do you know anything about the wires that were laid in the vestibule—were they laid properly in concrete?

A. As far as I know they were laid properly.

Q. Would the telephone system or bells have functioned for a year and a half if the wires had not been properly placed in the building?

A. I don't think so.

Q. If the proper circuits had not been made, would they function properly?

A. No.

By Mr. Platoff:

Q. Are you an electrician?

A. No.

Q. Did you ever do any electrical work personally?

A. No.

Q. You are the general manager in the office of the S & S Supply Co.?

A. Yes.

Q. When you say you did this work in this building, you mean the S & S Supply Co.?

A. Yes.

Q. The fact of the matter is you sent a workman, an electrician to this job to do this work and he took entire charge of the work, did he not?

A. Yes.

Q. And he did all the work?

A. Yes.

Q. How many times a week were you there?

A. Twice.

Q. Why were you there?

A. To supervise.

Q. Weren't you there to arrange for extra work?

A. Sometimes.

Q. You don't know what kind of work this workman did in that job?

A. From an examination, yes.

Q. When did you make an examination?

A. Every time I was over.

Q. What did your examination disclose—you are not an electrician?

A. I am sufficiently conversant with wiring installed to know whether a job is being done right or not.

Q. Do you mean to say you know more about electrical work than the electrician you had on this job?

A. I know more about certain phases of electrical work than the electrician on the job, yes.

Q. You have heard this testimony about the telephone being out of order?

A. Yes.

Q. To what do you attibute that condition?

A. To various factors. It must be remembered that in the installation of wires for bell system that these wires are laid before lathing and plaster is installed. In other words, they run along side the beams, the uprights are 2x4. In this particular building there was considerable change in the first floor in the doctor's apartment after the beams were up and bell wiring installed was completely changed. The change naturally affected the bell wiring. One cannot tell what damage was done to wires during the process of the change by other than the electrical people and to that I attribute any, if any, breaks or trouble in the wiring system.

Q. To what do you attribute the fact that contacts were burned out?

A. To various causes—general use, tampering with the system—a bell system is a very delicate proposition and so is a telephone system and will always be subject to trouble.

Q. Which telephone system is more expensive, the Auth or the Loeffler?

A. The Loeffler, I believe.

Q. How much more expensive is it?

A. I don't think the difference in cost would run more than $125 in this building.

Q. When you first bid on this job, there was given to you a set of original specifications, were there not?

A. I don't believe we had a set of original specifications.

Q. The architect tell you what the specifications contained?

A. No.

Q. Did you request the architect to revise specifications?

A. Yes. He said he wanted wiring in conduits and I told him it was very unusual for an apartment house to wire in such a manner and that it would be expensive.

Q. Didn't you prepare revised specifications and submit them to Mr. Ach for his approval?

A. Yes, I did.

Q. You specified Auth instead of Loeffler?

A. I did.

By the Master: Why?

A. Because as I said before, we have installed Auth system in approximately 75 to 80 apartment houses. They have always given satisfaction; in

fact, I have never heard of the Loeffler phone prior to the time I heard of it from Mr. Ach. The phones which are used in apartment houses are Devoe, Western Electric and Auth. Prices of each of the phones are exactly alike and it was for that reason I suggested to Mr. Ach that Auth be used. We have even installed it in schools.

Q. Have you had exeperience in other apartment houses where the Auth system has been installed and seen how it operated?

A. Yes.

Q. What has been your experience as to the system?

A. Always satisfactory. I don't believe that there has been any testimony here that the system was bad because the Auth phone was installed.

Q. Have you had experience in apartment houses where the Auth phones have been installed with wiring in the same manner as installed in Dr. MacDonnell's house?

A. Practically every apartment house where we made installation is different.

Q. What has been your experience as to how they operate?

A. Very satisfactory. All telephone systems must have care.

Q. What kind of care?

A. Must be looked after.

By the Master: How?

A. The batteries must be constantly replenished when they run down.

Q. And transformers are also an integral part of the uses of this telephone?

A. Yes.

Q. Isn't it true that if the transformer was too

high-powered it would have the effect of burning out contacts on the phone?

A. Yes.

Q. How many Watts in your opinion would burn out the telephone on the transformer?

A. I don't think you will find any of the contacts burned out; they are scarred and need cleaning, but I do not think any of the contacts were burned out.

Q. If I should tell you now that the contacts were burned out on this telephone, what would you attribute that to?

A. Too high-power.

Q. What model Auth telephone is that?

A. They only have one model.

Q. What Watt transformer is proper for this system?

A. I would say anywheres between 250 and 300.

Q. Have you any other jobs where you put in this Auth with transformer of 300?

A. That I am not in a position to say.

Q. Who specified the power for the transformer on this job?

A. Mr. Ach.

Q. Wasn't that part of your revised specifications that you prepared?

A. You will find that in the original specification 300 Watt transformer specified.

Q. What is specified in your revised specifications?

A. The same thing.

Q. Isn't a fact that in all other buildings the transformers are specified to be 250 Watt?

A. I am not in a position to say.

Q. What would govern the strength of what the transformer should be?

A. The length of the wires, number of bells to be rung.

Q. You take all that into consideration when you provide in your revised specifications 300 Watt transformer?

A. No, sir.

Q. Why didn't you?

A. I did not go into the details of the requirements; 300 Watt was originally specified and that was what Mr. Ach put in the revised specifications.

Q. Did you say that you prepared revised specifications?

A. To a certain extent.

Q. Don't you know that a too high-powered transformer would interfere with the telephone?

A. Yes.

Q. Is your opinion that a 300 Watt is not too powerful for this job?

A. I would not care to give an opinion until I went over the installation to see the approximate length of the wires.

Q. And you are not in a position to give this kind of expert testimony or would you require someone to answer that?

By Br. Bianchi: In view of the fact that the specifications call for 300 Watt, I don't think we ought to go into the matter.

By the Master: I will let him answer. If the transformer that was installed had been two powerful for the wiring or number of bells in this system how soon in the usual course of operation would the contacts be burned out or scarred?

A. That would depend how often the bells were used.

Q. You say that a number of changes were made in the contacts of the building?

A. Yes.

Q. How did those changes affect your specifications that were made in the doctor's apartment?

A. You see wires were installed originally on the original uprights and a great many were changed.

Q. By whom?

A. By the general contractor.

Q. Who removed the wires?

A. I assume we did.

Q. Isn't that covered by your bill for extra work, etc.?

A. Yes.

Q. And that work was done by your party at the direct order and request of the owner?

A. Yes. The installation of bell wiring is a delicate proposition because you put it in only when the beams are up. After the lath and lathing go on. If a man chopping lath should hit a wire they are liable to cut the wire or break installation may eventually get into trouble. That is what I meant by other trouble in changing of layout of first floor, a great many beams were changed. When wires were laying on the ground for installation we don't know what happens to them. A few may be pulled out from the permanent connection in the wall and may break it which may develop trouble.

Q. You have that situation in every building don't you?

A. We don't have a situation where a whole floor was changed, very seldom.

Q. And you make your tests nevertheless?

A. Yes.

Q. And your test will disclose any trouble?

A. No, it may not reveal a condition which might ultimately result.

Q. You mean the wires might be bruised and not broken?

A. Yes.

Q. Were any complaints made to you about the electrical system?

A. Bell system, yes.

Q. When was first complaint made to you?

A. I can't say.

Q. About?

A. When the tenants began to move in.

Q. Almost immediately after the building was completed?

A. You will find that most apartments have some complaint.

Q. When was the second time you had a complaint about the bell system?

A. If my recollection serves me right, it was when batteries ran down. I can't say, I think we made two or three trips over there, within the first year covering both the bells and telephone and that generally transpired when tenants moved into the building. You see if a clapper touches the bell proper, it cannot vibrate and cannot ring and that will cause trouble.

Q. And it is your opinion at that time that 300 Watt transformer is a proper transformer to have in that building?

A. Before saying that I would like to go over the installation and look at it.

Q. You are not sure?

A. I am not sure.

By the Master: Would you be apt to in-

stall a bell or telephone system with a too high powered transformer without calling it to the attention of the architect?

A. Not if we realized it at the time of the installation.

Q. You had your plans for this building; did you know it showed extent of wiring, number of bells, etc.?

A. Yes.

Q. Didn't that give you the information?

A. Yes, but we apparently did not realize it at the time.

Q. And your expert electrician put the system in. Did he ever call it to your attention that the transformer was too powerful?

A. He did not mention it.

Q. On these occasions when you were called there to make repairs, did it ever occur to you that the trouble was caused by too powerful transformer?

A. We did not experience any trouble so far as the increase in power was concerned. Most of our trouble was adjustments on bells or push buttons and replacing new batteries on telephone system.

By the Master: How about contacts burning out?

A. We had none that I know of.

Q. You apparently saw Dr. MacDonnell quite frequently, particularly in reference to collecting your bill during the period the later part of 1927 or the early part of 1928?

A. Yes.

Q. At any time that you were talking with Dr. MacDonnell, did he ever criticize or find fault

with your work so far as the bell or telephone system was concerned?

A. I can't say that he did. We generally got calls direct from the Superintendent.

Q. By that question I don't mean calls to adjust some bell that did not happen to ring in some certain apartment, but generally on the general working of the entire system.

A. No. The only complaint I got from Dr. MacDonnell was in connection with the brass finished switch plates, receptacles plates and brass finished letterboxes. He thought he should have plates in a letterbox which could be polished of ordinary unfiinished brass. I told him what he had installed was the usual line of material; that I knew of no unfinished plates or letterboxes unless they were specially made, and he and I went in his car and he took me around to high class apartments and medium class for purpose of making a comparison of plates and letterboxes, and I believe the result was that he was convinced that the installation of letterboxes and plates was the usual line of letter boxes and plates. That is the only complaint I recall receiving from him. The system worked satisfactorily. Up to the time I received all the money that I did; subsequent to that time I suppose Dr. MacDonnell felt he could not conscientiously call on me to make other adjustments. He said he had someone there to adjust.

By the Master: The last time you called this system was working properly?

A. Yes. In December 1927, when Dr. MacDonnell gave me his last check.

By Mr. Platoff:

Q. Did the Doctor ever complain that the telephone system was not working properly?

A. I don't believe so because I base that on the fact that if there had been any trouble in December 1927, it was the last time I had any conference with him and he would have told me at that time or he would not have given me the check.

By the Master: The check he gave you was strictly in reference to the lighting fixtures?

A. Yes.

Q. Was your man over there fixing the batteries or something in connection with the telephone system?

A. Yes.

Q. Before December 1927?

A. Absolutely, I said so.

By Mr. Gilmore:

Q. Dr. MacDonnell apparently knew that if your work was done to revised plans and specifications as he talked to you about letterboxes which were not included in your original specifications?

A. I don't think he knew. I think it was an oversight on the part of the architect; I don't think he knew that letterboxes were not originally specified.

Q. Isn't it a fact that in the distribution of current for bell wiring that the longer the wires the higher the Watts needed?

A. Yes.

Q. And in changing over from the Loeffler to the Auth there was no greater length of wire or resistance used?

A. No.

Q. You say Dr. MacDonnell has paid you some payments on account of your work on account of the installation of this bell system?

A. Yes.

Q. After he had seen the work?

A. Yes.

As to Item (8) (A and B), (T-173) Shilowitz testified as follows:

According to the specifications all the wiring except for the bells, feeders and main branches are supposed to be in conduits of black iron enamel. They are BX. That is worth $3,000.

ITEM 9 (a)

On this item the Vice Chancellor made an allowance of $150.00, overruling the Master who had made no allowance.

Testimony as to Item 9-A page T-153, by the general contractor is as follows:

By Mr. Platoff:

Q. Are any electrical wires in conduits?

A. Not in conduits, in b.x.

Q. Did you construct the duct from the vent shaft to the court?

By Mr. Bianchi: I object to it except if Mr. Platoff says the plans and specifications call for a duct in a specific place.

A. No. That was not put in. The architect was to decide what he wanted.

Q. You did not put it in?

A. No.

Keeler testified as to Item 9-A on page T-368, as follows:

By the Master: It is stipulated that the Item No. (9), A, ventilating duct omitted is a duct that is shown on the plans to be built in the basement.

By Mr. Bianchi:

Q. There has been testimony taken to the effect that this duct might have been worth about $150. Is that right?

A. That's about right.

Q. Would you be giving credit for any work that was done in lieu of this duct?

A. No.

By the Master:

Q. Was there any work done that you could observe in lieu of this duct?

A. A lot of work done, in addition to the specification and for which no charge has been made.

Q. Anything that you particularly could poir out as something put in instead of the duct?

A. No, sir.

On Item 9, A, on page (T-624), Mr. Scheideker testified as follows:

By the Master:

Q. Metal duct in the basement, is that omitted?

A. Yes.

Q. How much is it worth?

A. $75.00.

ITEM 9 (b)

The Vice Chancellor made an allowance of $500.00 on this item, and the expert witnesses who testified pro and con on the subject were long in their testimony. The roofing contractor was to

furnish a bonded Barrett roof and to furnish a bond for the roof. It was admitted that no bond was furnished and the question then arose as to what the value of the roof was, without such a bond. The owner wanted a credit for the failure to supply the bond and the testimony on the question of the bond and the quality of the roof follows:

By Mr. Marcus: T-37—direct Mr. Diffenbach.

Q. And, did you perform all the work and furnish all materials?

A. With one exception.

Q. What was that exception?

A. The agreement between Mr. Ach, the owner and myself and was to furnish a bonded Barret Roof; to furnish a bond for the roof.

Q. Did you furnish that bond?

A. No, I did not.

Q. Did they ever object to any of the work?

By Mr. Greene: I object—

By Mr. Marcus: I withdraw the question.

Q. Did you perform any extra work, Mr. Diffenbach?

A. I did.

Q. What work did you perform?

A. At the beginning of the job we had no trouble with any leaks. On my inspection of the job, I suggested that we coat the walls with elasticgum because the walls leaked.

By Mr. Platoff: (On page T-41) cross Diffenbach.

Q. In your contract is it stated that you were to cover this building with a 20 year guarantee?

A. Yes.

Q. Did you do that?

A. I did not. I covered the roof but I did not furnish the bond.

By the Master: (on page T-42) Diffenbach.

Q. Why didn't you furnish the bond?

A. When I accepted the contract from the architect, and the builder was present, before I signed the contract, I stated to the architect that I was not able to furnish a bond. He in turn replied to me he did not see just why it was necessary, for myself being reputable enough in roofing in that locality, that I should and that he would pass on it and it would not be necessary for me to produce a bond.

By Mr. Platoff:

Q. No change was made in the contract about that bond?

A. No.

By Mr. Marcus:

Q. Did the architect ever raise any objection in connection with the furnishing of the bond.

A. Not for the entire job.

By Mr. Platoff: cross Diffenbach.

Q. You didn't have to furnish the bond usually until the job is finished?

A. Not until it is completed.

Q. Therefore, there is nothing unusual for you failing to furnish the bond?

A. There was furnished a certificate of inspection from the Barret Company.

Q. When.

A. While the job was going on.

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Q. How long did you take to finish this job?

A. About five working days.

Q. You never talked to Dr. MacDonnell about this contract of yours, did you?

By Mr. Marcus: I object to the form of the question on the ground it is immaterial.

On Item 9, B, Vitelli testified as follows: (T-153)

By Mr. Platoff:

Q. Did you construct a Barrett Roof, and furnish the bond?

A. No. That's up to the roofing contractor.

On Item 9, B, Mr. Ach the architect, testified as follows: (T-287)

By Mr. Platoff:

Q. What was next?

A. There was a change in the roof covering.

Q. What was that change?

A. The Barrett Specification for the roof called for one thing and regular tar felt was laid instead.

Q. Did the doctor know of that change before it was made?

A. He did not.

Q. You ordered that work, did you not?

A. I did not.

By the Master:

Q. As I understand it, Mr. Ach, I understand you are supposed to be testifying to work changed upon your order or the doctor's order.

By Mr. Platoff:

Q. There was no order for this work?

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A. That's the only one that was done without my knowledge.

Q. This change was made without your instructions?

A. And against my instructions.

By the Master:

Q. What do you mean by that, Mr. Ach?

A. When Mr. Diffenbach, the roofer, came to see me about this contract in the office on the job, I asked him whether he was a licensed Barrett Specification Roofer and he said he was not and I said then he better not take the contract because we were going to insist upon the roof being laid on the Barrett Bonded Specification, and he said that would be alright. He would be licensed by that time and would be able to produce the bond.

By Mr. Platoff:

Q. The bond has never been produced?

A. No, and the roof has been leaking for over a year.

By Mr. Bianchi: (on page T-319) Cross-ex. of Mr. Ach.

Q. Did you see the roof going on?

A. Yes.

Q. Did you stop the roof from going on?

A. I complained about it everytime I saw him working and asked him to get his license.

Q. The roof was put on when the walls were on. right?

A. He was rather slow.

Q. When was this roof put up?

A. When the walls were up.

Q. That's put up before the partitions?

A. I believe that they were.

Q. That's the usual course of putting the roof on when the walls go up?

A. Yes.

Q. To cover it, so to speak?

A. Yes.

Q. How many rolls of paper are used on this roof, do you know?

A. No.

Q. The only difference between a Barrett Roof and any other roof is that the name Barrett is used, isn't that so?

A. Yes—if it is a Barrett roof it is constructed according to the Barrett specification.

By Mr. Marcus: Cross-ex. of Mr. Ach.

Q. You remember the time that Mr. Diffenbach met you, that he wasn't a licensed Barrett Roofer?

A. Yes.

Q. The only complaint that you had about Mr. Diffenbach was that he did not have his license?

A. Exactly that, at that time.

Q. At the time that he did this work, laying of the roof?

A. There were complaints.

Q. As to what?

A. As to flashing, copper work and work along the edges.

Q. Did you ever write a letter to Mr. Diffenbach or Mr. Vitille—a letter of complaint?

A. It was unnecessary. They were there.

Q. Did you see him complete his roof?

A. Yes.

Q. Did you ever raise any question as to specifications not coming up to the Barrett standard?

A. Specifically, not. I just told him that he

would have to have his roof approved. I even told him he would have to cut a square out and have the Barrett people approve it.

Q. You were supervising this job?

A. Yes.

Q. How many times a week were you on the job?

A. Once or twice.

Q. How long did it take the roofer to put up his roof?

A. I don't know.

Q. Did you, at any time, take up a part of the roof to determine whether or not the roof was in compliance with the Barrett specifications?

A. No.

Q. You don't know whether it does or does not comply with the Barrett Specifications?

A. He has no certificate.

Q. Well, do you know whether it complies with the Barrett Specification?

A. No, I don't.

Q. In what respect doesn't it comply with your specification?

A. We have no guaranty from the Barrett Company.

Q. As far as the guaranty is concerned, did you ever have any conversation with Mr. Diffenbach about obtaining the guaranty?

A. I did.

Q. Did you ever tell Mr. Diffenbach in the presence of Mr. Vitille and the Sheet Metal Company that as long as the Barrett specifications have been complied with, the bond was not necessary?

A. I did not.

Q. The roof was completed on August 20th, 1927 when you issued your certificate, wasn't it?

A. Yes.

Q. Did you at that time make any complaints to the roofer not having furnished you a Barrett guaranty?

A. Not at that time.

Q. Now, that certificate of August 20th included the full payment as far as the roof was concerned, didn't it?

A. I would not be able to tell off hand, I assume it would cover 85% of it.

Q. As a matter of fact, didn't you testify that the payments made up to date included dollar for dollar for the work done?

A. Practically.

Q. Now, Mr. Ach, did you at any time, make any other complaints about this roof except that he did not have a license?

A. Yes.

Q. When?

A. After a period of about six months after the roof was completed.

Q. How?

A. To Mr. Vitille.

Q. In writing?

A. On the phone and in person.

Q. As a matter of fact, in August, 1927 you wrote a letter in which you said that you did not feel that the water was coming through the roof. You thought it was coming through the parapet work?

A. I did.

Q. I show you this letter of August, 1927, and ask you whether you mailed that?

A. I did.

Q. Is that your signature?

A. Yes.

Q. At that time you had a fixed opinion as to what caused the leaks?

A. I thought I had found it, but I didn't.

Q. Now, Mr. Ach, you are an architect of thirty years experience?

A. Yes.

Q. You have fixed definitely different opinions of buildings?

A. Yes.

Q. Or you should have by reason of your experience. And you wrote a letter of your opinion as an architect. Isn't that so?

A. I did to the best of my ability.

By Mr. Marcus: I offer this letter in evidence.

By the Master: Same is marked Exhibit, D-75.

Q. Now isn't it a fact Mr. Ach that after you wrote your letter of October, 1927, the contractor waterproofed the walls and didn't charge you for it?

A. Yes.

Q. And did about $350.00 worth of work?

A. Yes.

Q. In order to satisfy that the leaks would not come in through the building?

A. Yes.

Q. You haven't made any complaint since that time about that roof, have you?

A. Yes, since the wall was fixed.

Q. Have you any of these complaints in writing after October, 1927?

A. Yes, I have, October 12, 1928.

Q. That was the time when Mr. Vitille did the waterproofing on the walls, isn't that so?

A. About that time.

Q. So that Mr. Vitille waterproofed the walls after your letter of October, 1928?

A. Yes, and waterproofed the copings too.

Q. And have you made any complaints since that time?

A. I don't think so.

By Mr. Platoff: Re-direct of Mr. Ach.

Q. As a result of your further experience with this roof and leaking of the roof, you know now why that roof leaks?

By Mr. Marcus: I object. The testimony is clear, and he showed by his own correspondence that the roof never leaked and that it was the walls that leaked. His experience as an architect was that the leakage was of the walls not the roof.

By the Master: I will allow the question and allow an exception to Mr. Marcus.

A. I subsequently found that the flashings through the wall were omitted.

By Mr. Marcus: The contract speaks for itself.

Q. Now, Mr. Ach, I show you Exhibit D-14, contract of C. F. Diffenbach, general contract, and ask you to show me that portion of it which provides for construction of flashings?

A. Section 2 provides for the contractor to do it.

Q. Isn't it a fact that this roof leaked for a couple of years?

A. I understand it is leaking yet, up to a short time ago.

Q. Weren't you in that apartment a number of times and made inspection after water came in and damaged the apartments?

A. I was.

Q. Isn't it a fact that you many times asked for the guaranty of this roof?

A. I did.

Q. Isn't it a fact that you wrote a letter to Diffenbach—did you do anything with Diffenbach about the guaranty?

A. I did.

Q. Do you know whether Dr. MacDonnell has employed other roofers to make repairs?

By Mr. Marcus: I object to it on the ground that it has no concern with this particular defendant.

By the Master: I will admit it.

A. I don't know of my own knowledge.

On Item 9, B, Scheideker testified as follows: (T-601)

By Mr. Platoff:

Allright. Now continue with the omissions.

(Sixth Omission) In reference to the roof, I inquired if the owner had a guarantee from the Barrett Company, which is specified and which is the protection to the owner for twenty years. The owner said he has no guarantee. Of course, that a guaranteed Barett Specification roof costs a little more is true, naturally, because of the cost of the bond. That's a big item for the owner's protection, and I would say that the roof on there was not a good roof because—

By the Master:

Q. As I understand your testimony, the only fault that you found with the roof was that it was not bonded by the Barrett Company?

A. Not a bonded specification roof.

Q. Do you know what the cost of a bond is, from your own experience?

A. It is taken in in the cost of the roof. You don't pay for a bond but the authorized agent of the Barrett Company has to install the roof under the Barrett Company specification. A Barrett Company roof is a guaranteed roof and it costs a few cents more per square foot, which takes care of the bond and the guaranty.

Q. Mr. Shilowitz testified, I think, that the Barrett roof would cost with the flashing $1500. How much additional would you say on that amount, approximately, that it would cost to have the Barrett Bond Guaranty?

A. About eight per cent.

Q. Eight percent, you think it amounts to?

A. Absolutely.

In Item 9, B, page (T-174) Shilowitz testified as follows:

Roofing and Sheet Metal Work

There is a metal duct omitted from one of the inner courts to the outer court; that is worth $150. Roof is not a bonded Barrett roof as called for in the specifications; worth $1,500.

By Mr. Platoff: (on page T-199) Direct, Shilowitz.

Q. Since your last testimony have you examined the sample of the roof?

A. I have. It was examined by myself and a representative of the Barrett Roofing people and

we took a cut of the roof about 3 ft. long and 8 in. wide. I made an examination with the Barrett man.

Q. You are qualified to testify if you were there?

A. The testimony of the Barrett man would be better than mine.

Q. Is he here?

A. He can be here.

By Mr. Bianchi: (page T-206) Cross, Shilowitz.

Q. You went up to look at this property. You went to inspect the roof with a roofer. Why did you need a roofer? Aren't you competent to inspect that roof without the aid of a roofer?

A. I am not competent to cut a roof and patch it.

Q. Is that the reason?

A. One of the reasons.

Q. I assume that you had a roofer with you because you were not competent yourself to know the value of that roof?

A. Yes.

Q. So that was all hearsay; information you received from the roofers?

A. That's correct.

Q. You called Mr. Scheideker on the job, didn't you?

A. Yes, that's right.

Q. For what purpose did you call him on the job?

A. To go over the entire job and see if there were any further omissions.

Q. Why did you call him on the job? For what purpose?

A. To see if there were any further omissions.

Q. Weren't you competent to pass on these omissions?

A. Yes.

Q. Why did you need him?

A. For obvious reasons.

Q. They may be obvious to you, but are not obvious to me.

A. In seeking any further omissions, I took in someone who is more expert than myself on that.

Q. You didn't consider yourself as good an expert as Mr. Scheideker?

A. No.

On Item 9, B, (T-453) the owner testified as follows:

By Mr. Platoff:

Q. Doctor, have you kept a record of what you had to pay to mechanics to repair various work in the building?

A. I have my check book and vouchers.

Q. Have you got them with you?

A. No.

Q. You gave me a memorandum here of what you paid for roof repairs. Is that what you made yourself from your records?

A. Yes.

By Mr. Bianchi: I object to his testifying as to what he paid out unless there is proof here by the men who made the repairs or changes on that roof. The damage might have been the result of the manner or neglect on somebodys part. The roof. The roof may have been damaged in a thousand and one ways.

By Mr. Platoff: The specifications call for a twenty year guaranty.

By the Master: My recollection of the testimony in relation to the twenty year guaranty is that it is a twenty year guaranty that the roof was properly put on and against any unworkmanlike work.

By Mr. Bianchi: That's the guaranty, yes.

By the Master: It is not a twenty year guaranty that the roof will not leak or that it will last twenty years.

Q. Did you ever receive the bond in connection with a roof guaranty?

By the Master: It is admitted in previous testimony that there was no bond given.

A. I felt this way about it, that according to specifications I am entitled to a bond and I am entitled to a Barrett Specification roof. If the builder had put on a Barrett roof and had furnished me with a bond and these things would happen I would not have to go to the builder.

As to Item, 9, A and B, (T-174) Shilowitz testified as follows:

There is a metal duct omitted from one of the inner courts to the outer court; that is worth $150. Roof is not a bonded Barrett roof as called for in the specification; worth $1,500.

New Jersey Court of Errors and Appeals

Between MARTIN J. MACDONNELL, Complainant-Respondent, and MICHAEL J. VITELLI, *et als.*, Defendants-Appellants.	On Bill, etc. On Appeal from the Court of Chancery. Stipulation of Facts.

It is agreed by and between the counsel for appellants and counsel for the respondents stop notice claimants as follows:

1. That the respective stop notices were served prior to the filing of the Bill of Complaint in this cause.

2. Said stop notice claims were not disputed by the general contractor.

3. That actions at law had been instituted against the owner on their stop notice claims by respondents, Cadel Brothers, North Hudson Manufacturing Company, James Henry, Inc., Louis Bogorad, and others, prior to the filing of the Bill of Complaint herein, which actions were restrained by the Court of Chancery.

4. That the said stop notice claimants were represented by counsel who attended the hearings before the Master and proved their claims.

5. That the said stop notice claimants had no notice or knowledge of the agreement between the general contractors and their counsel as to the latters agreement for compensation with the general contractors, until the return day of a motion to settle the form of the final decree, on which day the application was made.

6. That the application of said O. C. Bianchi to have a lien impressed upon the fund for his counsel fees pursuant to the alleged agreement (page 61 of the State of the Case), was made on the return day of a motion to settle the form of the final decree, without previous notice to the defendant stop-notice claimants.

7. That after said application was made and taken under advisement by the court, said Bianchi filed a supplemental petition (page 64 of the State of Case), and two assignments executed by the general contractors, (page 55 and page 63 of the State of the Case), without notice to the defendant stop notice claimants.

Dated: October 16, 1931.

O. C. BIANCHI,
Counsel for Appellants.

The foregoing stipulation of facts is entered into upon the express condition that it will be printed and filed as part of the record on appeal and that there will also be printed and filed the general contract Ex. D-51.

THOMAS McNULTY,
Counsel for respondents stop notice claimants, Cadel Bros., Thomas Henry, Inc., and North Hudson Mfg. Co.

Exhibit D-51.

This Agreement made the thirteenth (13) day of October in the year Nineteen Hundred and twenty-six by and between Vitelle, Kinsella & Cunhy, 64 Sumner Ave., Newark, N. J., hereinafter called the Contractor, and Martin J. MacDonnell, 100 - 30 St. Woodcliff, N. J., herein after called the Owner,

Witnesseth, that the Contractor and the Owner for the considerations hereinafter named agree as follows:

Article 1. Scope of the Work—The Contractor shall furnish all of the materials and perform all of the work shown on the Drawings and described in the Specifications entitled Apartment for Dr. M. J. MacDonnell, North East Cor. 30th St. & Park Ave., Woodcliff, N. J. prepared by David M. Ach, Architect, 1 Madison Ave., New York, acting as and in these Contract Documents entitled the Architect; and shall do everything required by this Agreement, the General Conditions of the Contract, the Specifications and the Drawings.

Article 2. Time of Completion—The work to be performed under this Contract shall be commenced at once and shall be substantially completed on the fifteenth day of April Nineteen hundred and twenty-seven.

Article 3. The Contract Sum—The Owner shall pay the Contractor for the performance of the Contract, subject to additions and deductions provided therein, in current funds as follows: Ninety-eight thousand $98,000.00 dollars.

Where the quantities originally contemplated are so changed that application of the agreed unit

price to the quantity of work performed is shown to create a hardship to the Owner or the Contractor, there shall be an equitable adjustment of the Contract to prevent such hardship.

Article 4. Progress Payments—The Owner shall make payments on account of the Contract as provided therein, as follows:

On or about the first day of each month 85% per cent of the value, based on the Contract prices, of labor and materials incorporated in the work and of materials suitably stored at the site thereof up to the 20 day of the preceding month, as estimated by the Architect, less the aggregate of previous payments; and upon substantial completion of the entire work, a sum sufficient to increase the total payments to 90% percent of the contract price.

Article 5. Acceptance and Final Payment—Final payment shall be due 30 days after substantial completion of the work provided the work be then fully completed and the Contract fully performed.

Upon receipt of written notice that the work is ready for final inspection and acceptance, the Architect shall promptly make such inspection, and when he finds the work acceptable under the Contract and the Contract fully performed he shall promptly issue a final certificate, over his own signature, stating that the work provided for in this Contract has been completed and is accepted by him under the terms and conditions thereof, and that the entire balance found to be due the Con-

tractor, and noted in said final certificate, is due and payable.

Before issuance of final certificate the Contractor shall submit evidence satisfactory to the Architect that all payrolls, material bills, and other indebtedness connected with the work have been paid.

If after the work has been substantially completed, full completion thereof is materially delayed through no fault of the Contractor, and the Architect so certifies, the Owner shall, upon certificate of the Architect, and without terminating the Contract, make payment of the balance due for that portion of the work fully completed and accepted. Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

Article 6. The Contract Documents—The General Conditions of the Contract, the Specifications and the Drawings, together with this Agreement, form the Contract, and they are as fully a part of the Contract as if hereto attached or herein repeated. The following is an enumeration of the Specifications and Drawings:

Specification pages 1 to 57

3 pages of instructions to contractors not numbered

Survey

Drawings No. 1, 1a, 2, 2a, 2b, 3, 4, 5
—6 revised 6, 7 revised 7, 8

Change

Where tile is specified cinder may be used use cinder block for backing

Exhibit D-51.

Change brick, to brick to cost $30.00 per M. two top shown as stucco, to be over cinder block

Roof exposed to street front to be varigated slate

Hardware on page 18 furnished by contractor

In Witness Whereof the parties hereto have executed this Agreement, the day and year first above written.

VITILLE, KINSELLA & CUNHY,
By J. J. Kinsella.

MARTIN J. MacDONNELL.

DAVID M. ACH.

New Jersey Court of Errors and Appeals

Between MARTIN J. MACDONNELL, Complainant-Respondent, and MICHAEL J. VITELLI, *et als.*, Defendants-Appellants.	On Bill, &c. On Appeal from the Court of Chancery.

BRIEF OF APPELLANTS.

Statement.

These are two appeals from a decree advised by Vice Chancellor Bigelow, in a suit in the nature of interpleader.

The appellants are the general contractors and their solicitor.

The bill sets up in substance, that a contract was entered into between the complainant, as owner, and the defendants-appellants, Michael J. Vitelli, et al, as general contractors, for the erection of a five story apartment house, in the Township of North Bergen, at a price of $98,000.00; that the contract and specifications were duly filed, that numerous stop-notices were filed, and that in some instances, suits had been instituted by the stop-notice claimants, that the general contractors had demanded the sum of $14,655.67 for extra work, that complainant had paid $85,002.07 on the general contract and that the contractors had demanded payment of the unpaid balance thereon.

The bill charged that the complainant was not indebted to the contractors for the sums demanded and that only $3,646.00 was due on the contract, representing the balance on the 8th payment, and the sum of $6,157.55 for extra work; and as against these amounts, the complainant alleged that he was entitled to a credit of $12,000.00 for alleged defective work and omissions under the general contract.

The appellants filed a counter-claim of $28,742.65 against complainant, representing balance due on the contract and for extra work.

The admitted claims of the stop-notice claimants exceed the amount due from complainant to the general contractors.

After the filing of the bill, an order was made, restraining the general contractors and stop-notice claimants from proceeding on their claims, upon the express condition that the complainant deposit with the clerk in Chancery the sum of $30,185.35 or give bond in that amount to secure the payment of such decree as the court might make in the cause. Such bond was filed and thereafter, upon consent of all parties, the matter was referred to Harry Lane, Esquire, as Special Master, to hear and determine the amount due to the general contractors from the owner, and to determine the priority of the stop-notice claimants.

The testimony before the Master, was centered on a list of about 40 items presented by the contractors for extra work outside of the contract, and another list of about 40 items submitted by the complainant, which he alleged covered omissions and defective work for which he sought an allowance.

The Master after taking about 700 pages of testimony (legal cap size), filed a report about 50 pages (legal cap size) in length.

The Master found (pp. 47, 49) that there was due to the general contractors the sum of $10,787.80 on the contract (after making allowance for omitted and defective work) and a further sum of $9,733.27 for extra work outside of the contract, and interest from the date of the completion of the building, October 1st, 1927, making a total award to the contractors of $23,907.02.

The owner filed exceptions to the report.

By letter, Vice Chancellor Bigelow disposed of the exceptions as follows: He allowed the complainant a further sum of $6,295.20 for alleged omitted and defective work, thus reducing the Master's award on the balance due on the contract to $4,492.60. He awarded the general contractors $9,370.27 for the extra work and interest on both amounts from October 1st, 1927, a total sum of $16,466.00 for which amount the final decree and award was entered.

On the day fixed for the settling the final decree an application by petition was made by O. C. Bianchi, solicitor of the general contractors, for a lien for compensation on the amount found to be due from the owner to the contractors, from which amount the solicitor sought to be paid for his services, first and prior to the payment of the stop-notice claimants.

He produced an agreement (p. 61) with the general contractors wherein they agreed to pay him 1/3 of whatever sum was recovered by way of judgment, settlement or in any other manner, as his compensation for services.

The solicitor also produced two assignments one being wherein the general contractors assigned to him the total amount found due to them from the owner on the general contract and for extra work, and the other being an assignment to him of the

money found to be due to the general contractors for extra work.

The court filed a memorandum wherein the application of the solicitor for a lien for compensation was denied.

The final decree was then entered and therein the court directed that the balance found to be due from the owner to the general contractors on the contract and the amount found to be due to the general contractors for extra work and material, should be paid direct to the stop-notice claimants, in the order of their priorities as found by the Master, and denied any allowance to the solicitor for the general contractors by way of counsel fee or for the compensation the contractors had agreed to pay him.

These appeals involve 4 questions of law, the facts upon which the questions arise are not disputed.

The Appellants Contend That:

1. The Vice Chancellor erred in reducing the award made by the Master from $23,907.02 to $16,-466.00.

2. The court erred in denying the application of the solicitor of the general contractors for a lien for compensation on the balance due to the contractors on the contract and extra work.

3. That in any event, the court erred in denying the solicitor of the general contractors a lien for compensation on the amount due to the contractors for extra work performed outside of the contract.

4. That in any event, the court erred in denying reasonable counsel fee and cost to the appellants.

POINT ONE.

The Court of Chancery erred in reducing the award made by the Master to the contractors without having heard or seen the witnesses, and without advancing any reasons for so doing.

The Master after hearing testimony that covered about 700 pages (legal cap size) filed a lengthy report of about 50 pages (legal cap size) in which he found in favor of the general contractors and against the owner for the sum of $23,907.02, which consisted of $10,787.80 being the balance due on the contract and the sum of $9,733.27 for extra work and material and interest from October 1st, 1927 to July 1st, 1930, amounting to $3,385.05.

After the filing of the report, exceptions were filed thereto by the complainant. Vice Chancellor Bigelow, in a letter dated November 5, 1930, (p. 54) addressed to the solicitors reduced the amount found by the Master. In the letter the Vice Chancellor merely said,

> "The exceptions to the Master's refusal to give credit for certain items of omitted or defective work are sustained to the following extent:

Item 1	(a)	$1,000.
	(c)	100.
	(g)	865.20
	(i)	130.
2	(a)	750.
	(b)	400.
3	(a)	700.
4	(a)	100.
6	(c)	100.
8	(a and b)	1,500.
9	(a)	150.
	(b)	500.
		$6,295.20

No reasons were assigned by the Vice Chancellor, why, he did sustain the exceptions on the items mentioned above.

The testimony of the witnesses pro and con on each of the 12 items mentioned in the Vice Chancellor's letter is set out on pages 108 to 193.

In view of the disputed nature of all the testimony that was advanced relative to the items in question, it was clearly within the powers of the master to draw his own conclusions, and the Vice Chancellor could not arbitrarily disregard the master's findings.

The reading of the testimony plainly indicates that there was a dispute of the items and that the testimony of the expert witnesses for the owner and contractors was conflicting. The master had the witnesses before him personally and thus had an opportunity of judging the weight and credit that the testimony was entitled to.

Joseph Izard vs. *Joel Bodine*, 1 Stockton 309.

The above case was referred to a master, to take an account of the yearly rent, value of certain premises and of the waste committed by the defendant.

Exceptions were filed to the master's report; one of which was that the master had estimated; the rent and value of the premises at too low a sum, and the other that the master had not made a sufficient allowance for waste, etc.

The Chancellor in deciding the exceptions refused to change the findings of the master and said:

> "Where a matter of fact has been referred to a master, depending upon the testimony of witnesses, conflicting in their opinion and differing in their recollection of past events,

> the decision of the Master ought not to be interfered with on his mere judgment of the facts, unless it is a very plain case of error or mistake."
>
> *Clark* vs. *Condit,* 21 Eq. 322.

In this case a reference was made to a Master to ascertain and report whether the sales of part of mortgaged premises were below the fair value of the property, and to take an account of rents, etc. The Master reported that the sales were made at the fair market value of the property at the time of the sale.

Exceptions were filed against the findings of the Master; and

It appears that a number of witnesses were produced pro and con as to the question of value and the court refused to set aside the report; and said:

> "There is the testimony of a number of respectable unimpeached witnesses on both sides, it is a simple question of the weight of evidence. If the Master put more confidence in the testimony of the defendant's witnesses, than he did in those of the complainant, his conclusion is right. He could much better judge of the weight to be given to the testimony of each witness than I can. There is clear testimony of respectable witnesses to sustain his conclusion, and had he arrived at a different conclusion, there is as good evidence to have sustained that. In such cases the established rule is, that the court will not set aside the conclusion of the Master upon the evidence, unless clearly wrong."
>
> *Haulenbeck* vs. *Cronkright, et al,* 23 Eq. 408.

Exceptions in the above matters were filed to the report of the Master as to the gross sum to be paid

to a widow in lieu of her dower rights. The Chancellor refused to sustain the exceptions and said:

> "The conclusions of a Master who has examined and seen the witnesses, are always regarded in equity as entitled to great respect and where his conclusions are clearly supported by competent witnesses who are unimpeached, his report will not be set aside because there is conflicting testimony, unless it clearly appears from the weight and nature of it, that the Master has erred."
>
> *National Bank of Metropolis* vs. *Sprague*, 23 Eq. 81.

This was referred to a Master to ascertain what chattels were and were not intended to be covered by a Chattel Mortgage and also to ascertain the value of said chattels and what was due on the mortgage.

Exceptions were filed, on the objection that the Master had not in his report, included the chattels as being in the mortgage; which they (exceptants) alleged were in fact included in it.

The Chancellor in ruling on the exceptions said:

> "The rule of the court is, that the report of a Master on matters referred to him, will be taken as correct, until some error is shown. *The burden of this is upon the exceptant.*"
>
> *Blauvelt* vs. *Ackerman*, 23 Eq. 495.

In the above matter a bill for an accounting was filed and the matter was referred to a Master, and it appears that voluminous testimony was taken. Exceptions were filed, to the report, and the court said:

> "When from the whole case the result at which the Master arrived is as consonant

> with the evidence as a whole and is as properly just, with reference to the fixed and known data of the case as any that could have been reached, *tho the court is unable to see by what precise view of the evidence* the Master reached the result, his report will *not be set aside.*"
>
> *VanNess* vs. *VanNess,* 32 Eq. 669.

Exceptions were filed to a Master's report on an accounting, the court said:

> "A Master's report on exceptions will be taken to be correct until error is shown. His conclusions upon the facts will be considered justified by the evidence until the contrary is made to appear."
>
> *Wilson, et al,* vs. *Sandall,* 92 Eq. 130.

The finding of Vice Chancellor Backes in the above matter was affirmed by the Court of E. & A. 92 Eq. 463, where in ruling on exceptions filed to a Master's findings on the question of percentage that a defendant was entitled to for compensation said, speaking of expert testimony:

> "The Master had first hand opportunity to value and weigh it, and as well that of defendant, which was not at all times attuned to frankness. The Master's resolve in favor of the complainant's contention is not to be disturbed unless he erred in matter of law or plainly as to the facts."
>
> *Bagley & Sewald Co., et al,* vs. *Traders' Paper Board Company,* 86 Atl. 1029.

In the above case exceptions were filed to a Master's report involving the question of an accounting. It was based on the claim of a railroad company against an insolvent corporation. The ques-

tion arose as to who was responsible in the delay of loading and unloading freight.

Vice Chancellor Howell in ruling on the exceptions said:

> "The evidence on this point is voluminous, contradictory, uncertain and very unsatisfactory. I have perused it carefully with the purpose of ascertaining the fact touching this point, and I am obliged to say I have not been able to find clear and plain statements on the part of the railroad company which satisfied me, that the situation is any different from that which the Master has reported. The Master, who is an experienced lawyer, had the advantage of seeing the witnesses, of observing their manner on the witness stand, and of examining in detail with the aid of counsel and witnesses the books, vouchers and other records upon which the rights of the parties depend. He was therefore, in a better position to judge of the character and weight of the evidence than any one else could be. Under the circumstances, therefore, I ought not to disturb the report of the Master."

The Master saw and heard the witnesses testifying, the Vice Chancellor did not, and he evidently discounted some of the testimony of the complainant and his witnesses and he was the best judge of their truthfulness, because they were constantly in his presence and he was able to observe their demeanor.

Why the Vice Chancellor reduced the amount as found by the Master, we cannot tell as he neither sets up his reasons either in his letter, his memorandum or decree.

In view of the sharp conflict of the witnesses on the testimony set out on pages 108 to 193, and in view of what appears to be the practice of the

courts not to in any way change the findings of the Master unless there has been a clear error committed by him, would leave no other conclusion but that the Vice Chancellor erred in the case at bar, when he arbitrarily modified the award of the Master without stating any reasons in his letter or setting forth any error committed by the Master, in arriving at the conclusions forming the basis of his award.

POINT TWO.

The solicitor of the general contractors has a lien for compensation for the services rendered by him upon his clients' cause of action against the owner, which must be first paid to him before the payment of any stop-notice or other claims.

The appellants advance two theories as to why the solicitor should be paid prior to the payment of stop-notice claimants.

1. That he has a lien on the total amount found to be due from the owner, representing "the balance due on the general contract and the sum due for extra work and materials."

2. That even in the absence of any lien on the amount of the contract price, that he nevertheless, has a lien on the amount due to the contractors for extra work and materials, furnished outside of the contract on the theory that a stop-notice *can only reach the amount due* on the main contract as filed, and not the amount due for extra work performed outside of the contract.

LAW.

The appellants base their right to a lien on the general law of this State covering the subject and chapter 201 of the Laws of 1914, page 410.

Wilson vs. *Seeber, et al,* 72 N. J. Eq. 523, 66 Atl. 909.

"Where an attorney contracted with his client that, as compensation for conducting the suit, he should receive one third of the proceeds of the action, the contract gave him an *equitable lien* upon the proceeds when they took form."

Newman vs. *Shipman,* 15 N. J. Law, 83 (1892).

An attorney has a lien for his costs and compensation upon due judgment recovered by him.

James Terney vs. *Jacob Wilson,* 45 Law, page 282.

An agreement between an Attorney and his client that the attorney shall have a lien upon a certain judgment to be recovered, for a specified sum, as compensation, for his services, constitutes a valid equitable assignment of the judgment pro tanto, which attaches to the judgment as soon as entered.

Laws of 1914, *Chapter* 201, *page* 410.

An Act *to give* an attorney, counsellor-at-law or *solicitor* in Chancery, *a lien* upon *any cause of action,* verdict, report, decision, decree, award or final judgment.

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. After the service of a summons and complaint in any action at law, or the filing of a bill of complaint or petition in the Court

> of Chancery, or the service of an answer containing a counterclaim in any action at law, the attorney, solicitor or counsellor-at-law who shall appear in said cause for such party instituting the action at law, or suit, or filing the petition or counterclaim, *shall have a lien for compensation upon his clients cause of action, suit, claim or counterclaim,* which *shall contain* and *attach to a verdict, report, decision, decree, award, judgment or final order in his client's favor,* and the *proceeds thereof in* whomsoever hands they may come; and the lien shall not be affected by any settlement between the parties before or after judgment or final order or decree. The court in which such action, suit or other proceeding is pending, *upon the petition* of the attorney, *solicitor,* or counsellor-at-law may determine and enforce the lien.

The above Act has been construed and upheld by this court in *Ferraro* vs. *City Hall Garage,* 94 N. J. Law, 209, 109 Atl. 358, and in that case the court held that an attorney has "a lien for compensation upon his client's cause of action."

On page 210, the court said:

> *"The plain meaning of the act is that the attorney shall have a lien on his client's cause of action,* and that a settlement of it by the client without his attorney's consent shall not have the legal effect to extinguish the cause of action, but shall leave it open to the extent that the attorney may proceed to collect against the defendant, whatever sum, after a judicial inquiry and hearing, shall be found to be fair and reasonable."

In that case, supra, after suit had been instituted by the attorney, a settlement was made between the parties without the knowledge of the attorney. On a suit by the attorney against the de-

fendant brought under the Act, the defendant contended that the plaintiff was primarily liable to pay his attorney his fee, and that the defendant was only liable in case the plaintiff was not responsible.

This court held that the *attorney could sue the defendant direct* without seeking any payment from his client, the plaintiff.

In answering the defendant's contention that the plaintiff was primarily liable, the court held that: (bottom p. 211)

Paragraph 24: (p. 11)

> "To adopt this view would eliminate from the statute the protection which the Legislature clearly intended to afford an attorney or solicitor against being deprived of his fee, where he has brought an action or suit for a plaintiff, and which action or suit was settled between the parties without such attorney's consent."

The decision and the facts recited therein indicate to what extent the court believes the Legislature intended to protect an attorney or solicitor under the Act of 1914, for his compensation, *"on his client's cause of action."*

What appears to be the only reported decision having a set of facts similar to the case at bar, covering the question of priorities, as between the lien of the solicitor for the general contractors and the lien of the stop-notice claimants, is that of:

> *Brunetti* vs. *Grandi,* 89 N. J. Eq. 116, 104 Atl. 139.

This case thoroughly analyzes all the law and questions raised in the solicitor's claim and is controlling here.

In Brunetti vs. Grandi, supra, an action at law

was instituted by the general contractors against the owner, and judgment recovered in favor of the contractor. The contractors assigned their judgment to their attorney as security for his services.

The owner filed a Bill of Interpleader setting forth the judgment and various stop-notice claims.

Question was then raised as to who had priority by way of lien on the fund deposited in court.

Did the attorney who represented the general contractors in establishing their cause of action against the owner, have a prior lien for compensation to the lien of the stop-notice claimants?

It was apparently admitted that both had a lien and the court was called upon to decide which was entitled to be first paid from the money found to be due from the owner to the contractor.

The court held that the *attorney's lien* for compensation *had priority* on the fund, and ordered his compensation be paid to him, prior to the payment of the stop-notice claimants.

In the case at bar, Vice Chancellor Bigelow in his memorandum, apparently concedes the correctness of the Vice Chancellor's opinion in Brunetti vs. Grandi, supra, but distinguishes that case from the case at bar by emphasizing the fact, that in the Brunetti case the contractor recovered a judgment at law, but in the case at bar, the contractors did not sue at law.

We respectfully contend that this distinction in the facts does not set forth sufficient cause for a departure from the legal principles enunciated in that case.

The facts hereinafter set out plainly indicate why the solicitor did not start a suit at law.

In his memorandum (middle p. 71) Vice Chancellor Bigelow makes this statement:

"The general contractors have not institut-

ed an action at law or suit in equity or filed any counterclaim in an action at law."

And further on, (second paragraph p. 81):

"Mr. Bianchi rests his case principally on the decisions of Vice Chancellor Lane in Brunetti vs. Grandi, 89 N. J. Eq. 116, 104, A.139. This was an interpleader by an owner against stop-notice claimants, et als, *but prior* to the *commencement of the interpleader, the general contractor had instituted an action against the owner and prosecuted it to judgment.*"

In the case at bar the procedure by which the contractors recovered was by setting up their claim against the owner by *counterclaim* (pp. 15 to 20). The counterclaim contained the same demand that they had previously made for payment on the owner, and which demand the owner speaks of in paragraph 22 of the Bill.

In order to sustain the distinction that the Vice Chancellor makes, it would seem that the solicitor for the contractors in the case at bar, would have to be condemned for using poor judgment in not rushing ahead with a suit at law, in place of biding his time, working for a settlement or seeking an opportunity of proving his clients' case, without taking the risk of having the case thrown out in toto, on any one of the several fine alleged defenses that the owner asserted against the contractors' claim.

THE BILL OF COMPLAINT, (paragraph 23, bottom p. 10) SETS UP THE DEFENSE, THAT *NO FINAL CERTIFICATE* HAD EVER BEEN *ISSUED* BY THE ARCHITECT.

Paragraph 23: (P. 10).

"Complainant alleges that neither the bal-

ance of said contract price, except the said sum of Thirty-six Hundred Forty-six ($3646.00) Dollars, nor the amount of said extras, ever became due and payable from complainant to said contractors, *by reason* of the *fact* that the said architect *has refused,* and *still refuses* to *issue certificates authorizing* the payment of the same; by reason of the fact that *no authorization in writing* was ever procured for many of the items included in said claim for *extras* as provided in said contract; by reason further of the fact that many of the items claimed to be extras by said contractors are included in the original specifications; and by reason further of the fact that the said claim for extras is grossly excessive, and that the fair value of any and all the extras alleged to have been furnished is not more than Six Thousand One Hundred Fifty-seven Dollars and Fifty-five ($6,157.55) Cents."

In the next paragraph the owner sets up:

> "Complainant further alleges that he is entitled to credit against any sum or sums found to be owing from him to said contractors for work defectively performed or omitted under said contract, materials deviating from the specifications annexed to said contract, and work unfinished and materials unfurnished and complainant is informed and believes that the reasonable value of said credits is in excess of the sum of Twelve Thousand ($12,000.00) Dollars."

It appears from the Master's report on (p. 30) that every possible effort was made to defeat the contractors' claim, *on the theory that the production of the certificate was a condition precedent to the liability of the owner to make payment in the absence of fraud and collusion.*

To prove fraud and collusion between an owner

and a contractor, is not a very easy matter, and *the solicitor* in the case at bar *succeeded* in convincing the master and the Vice Chancellor that the withholding of the final certificate was not justified, and part of *this proof was by way of admissions* from statements made by expert witnesses for the owner. For any attorney to gamble on proving his case by admissions from the witnesses of his advisary, is certainly taking a great risk, and to say that the solicitor for the contractors in the case at bar should have taken that risk by immediately instituting an action at law, rather than waiting for a settlement is not reasonable.

The contractors as part of their answer set forth that they had refrained from instituting suit on their claim by reason of the fact, that the *owner had promised from time to time to make payment in full.*

If the contractors' answer is true and if they had confidence in what the owner had promised them and in view of the defense of the non-production of a certificate, *was not* the solicitor justified in biding his time as to what steps to take as against the owner?

The allegation of promises made by the owner was not an afterthought, but was immediately set up in the contractors' answer to the bill in the following language:

> (p. 18, paragraph 22) "The defendants admit the allegations contained in paragraph 22, but allege that the sum they have due them for extra work is $14,882.86 and that they have refrained from *instituting suit* on the said *claim* by reason of the fact, that *complainant has promised from time to time to make payment in full* of the amount due to the defendants.
>
> Defendants further allege that the com-

> plainant *has promised* to pay to them the *balance* due *on the contract, together* with the *extra work,* making a total due to the defendants of $28,742.66."

About 500 pages of testimony of legal cap size were taken pro and con on the presentation of the contractors' claim and the defenses of the owner.

What possible difference could it make, whether the contractors succeeded in establishing their claim on their cause of action by a suit at law or by way of a counterclaim in the Court of Chancery?

Under our present practice a counterclaim performs the function of an original bill or suit.

If the theory of the Vice Chancellor in distinguishing the present case from Brunetti vs. Grandi, be correct, it would mean that in every mechanic's lien case this Court would be encouraging contractors and their attorneys to rush headlong into litigation without making any attempt to make an amicable settlement, is it fair or just to ask an attorney or solicitor to create a fund and establish a claim in favor of his client, and then not pay him for his services?

It is the solicitor's duty in a case of this kind to create as large a fund as possible for the benefit of the general contractors and stop-notice claimants, and for so doing he is entitled to be paid from the fund created, *and the statute of 1914 was passed for the purpose of protecting an attorney and solicitor for his services on his clients' cause of action* in creating the fund.

Is he to lose his right to compensation for the services rendered by him to the general contractors, simply *because the owner suddenly filed* a Bill of Interpleader and sought to deposit (p. 13) the small sum of $3,646.00 in court, instead of the

amount of $28,742.66 claimed by contractors by reason of the balance due on the contract and extra work? (p. 18)

The owner filed his bill instead of keeping his promise to the contractors that he would pay them. *Having been restrained* by the Court of Chancery *the general contractors had no other remedy but to set up their claim as a counterclaim to the bill,* which they did and have succeeded thereon.

In *Ferraro* vs. *City Hall Garage* and *Brunetti* vs. *Grandi; supra,* the court held *that it was the intention of the Legislature* under the Act of 1914, *to give* an attorney, solicitor or counsellor-at-law *"a lien for compensation" upon his client's cause of action.*

In the case at bar the Vice Chancellor in holding a different view than was held in the two cases supra, places the lien of a stop-notice claimant to a part of the fund (created as a result of proceedings on a cause of action), superior to the lien acquired by a solicitor or attorney, under the Act of 1914 on his client's cause of action.

On (p. 79) the Vice Chancellor in arriving at this conclusion says, *that upon the service* of a stop-notice, the claim of the stop-notice claimant *has fully matured.*

That is not so. A stop-notice *does not fully mature* until it is *first established* that there is money in the hands of the owner *belonging to the contractor.*

The language of the Vice Chancellor on this question on (p. 79) is as follows:

> "The petition of Mr. Bianchi sets forth that he was employed by the general contractors about October 15, 1928. Prior to that date, all the materialmen and laborers who will share in this fund had served their stop-notices and several of them had begun

> suit against the complainant thereon. Payment by the complainant under their contract had become due October 1, 1928, as found by the Master. Under no consideration of the Statute did Mr. Bianchi acquire a lien until December 7, 1928, when the Bill of Complaint was filed. Indeed, he first appeared in the suit several days later, on the return of an order to show cause. AT THAT TIME THE DEMANDS OF THE STOP-NOTICE CLAIMANTS *HAD FULLY MATURED THE FUND BELONGED TO THEM.* Their claims are prior and not subordinate to that of Mr. Bianchi."

In the case of Brunetti vs. Grandi, supra, Vice Chancellor Lane *held, that the attorney's lien was superior to that of the stop-notice claimants; he gives the filing of a stop-notice a totally different effect from that of* Vice Chancellor Bigelow.

In Brunetti vs. Grandi, supra, the court said that while it is true that the term "assignment pro tanto" has been applied to the effect of stop-notices, the served notices *have not* all the qualities of assignments, and holds that *they are not complete assignments,* and that the *filing of a notice does not take away all the rights* of the contractor as *against an owner, the owner cannot claim any credit* or *credits* on *stop-notices served on him, unless he has paid them,* and in discussing that point the court said (p. 120):

> "Although the term 'assignment pro tanto' has been applied to the effect of these notices, *the served notices have not all the qualities of assignment,* for the owner cannot, in an action brought by the contractor against him, claim credit for the amount claimed by any of the notices unless he shall have in fact paid the amount claimed to be due. Wightman vs. Brenner, *supra.* Notwithstanding therefore, the service of no-

> tices, *the contractor retains either in his own right or in the right of the noticing claimants, a sufficient cause of action to warrant a judgment* in a law court *for the full amount due from the owner under the contract.* It seems to me that the holdings that the effect of the service of notice is to assign pro tanto, and that the owner has no right to credit until payment, and that the contractor may recover after the service of notice from the owner, the full amount due on his claim, *must necessarily result in the holding* that when the contractor brings his suit against the owner *he represents the claims of the noticing claimants* and *their causes of action.*"

And on page 119, the court said:

> "The contention of the noticing claimants is that at the time of the service of summons the contractor had no cause of action upon which an attorney's lien could attach, because the notices served theretofore had operated as assignments pro tanto of the moneys due from the owner to the contractor, to the extent necessary to pay the claims. It has been held that notices served under the third section do operate as assignments protanto, Wightman v. Brenner, 26 N. J. Eq., 489; Kirtland vs. Moore, 40 N. J. Eq. 106, 2 Atl. 269; Kreutz v. Cramer, 64 N. J. Eq. 648, 54 Atl. 535. An action at law will lie by a noticing claimant against the owner.
>
> In such an action *it is, however necessary* for the plaintiff to prove *that there is a sum due from the owner to the contractor. Such an action will not lie until the amount is due under all of the terms of the contract.* Booth v. Kiefer, 60 N. J. Eq., 57, Atl. 12."

And on page 121, Brunetti vs. Grandi, supra, the court in its conclusions said:

> "*I conclude,* therefore, that *the contractor had a cause of action within the meaning of the Statute of* 1914, *either in his own right or in the right of the stop-noticing claimants, and if in their right, then* that *he acted as their agent by force of the statute,* and that *the amount due to the attorney constituted a lien upon the cause of action* and *is entitled to be first satisfied.*"

The conclusions in the case of Brunetti vs. Grandi, supra, as to the effect of the filing of a stop-notice seem logical, for *the mere filing of a stop-notice means nothing, unless you are in a position to prove that there is actually money due from the owner to the contractor, and that it was due at the time the stop-notice was filed. After the notice is filed the owner is and remains indebted to the contractors.*

It is therefore respectfully submitted that the solicitor's lein is superior to the lien of the stop-notice claimants; on the amount due from the owner.

POINT THREE.

The solicitor has a lien on the amount due to the contractors for extra work.

The solicitor filed two separate applications for a lien for compensation.

In the first application he sought a lien on the *total amount* found to be due from the owner to the contractors. His second application was for a lien *on the amount* found to be due to the contractors for *extra work* and *material.*

The theory upon which the second application is based is that a *stop-notice can only reach the amount due on the contract as filed.*

It was recognized in the case at bar, both by the Master and by the Vice Chancellor, that the general contractors *had two separate and distinct claims* against the owner.

In deciding the amount due from the owner to the contractors, both the Master and the Vice Chancellor separated the amounts due on each (p. 49).

The owner in his Bill also recognized there were two separate claims, (paragraphs 22 and 23; pp. 10, 11)

The rights acquired by stop-notice are created by statute, where an owner under Secton 2 of the Mechanics' Lien Act has filed his contract and specifications in the County Clerk's Office before work begun, etc.

The effect of filing the contract per *Section* 2, is to shut off a laborer or materialman from filing a mechanic's lien.

The contract as filed protects the owner and limits his liability. All the world can read its

terms, each materialman and mechanic has full knowledge as to how much money is to be paid, when, and how, so that they look to the owner under his contract for their payment, if it becomes necessary for them to file stop-notices.

A stop-notice is filed in pursuance with *Section* 3 of the Mechanic's Lien Act, *the effect* of which *is to order the owner to retain the amount of* the said stop-notice *out of the amount owing by him on the contract, or that may become due from* him *on the contract;*

> 3 *C. S.* 3294 (3) Whenever any master, workman or contractor shall, upon demand, refuse to pay any person who may have furnished him materials used in the erection of any such house or other building, or any sub-contractor, journeyman, laborer employed by him in erecting and constructing any building, the money or wages due to him, it shall be the duty of such journeyman, laborer, materialman or sub-contractor to give notice in writing to the owner or owners of such building of such refusal, and of the amount due to him or them, and so demanded, specifying said amount as nearly as possible, and the owner or owners of such building shall thereupon *be authorized to retain the amount so due and claimed* by such journeyman, laborer, materialman or sub-contractor out of the amount *owing by him or them on the contract,* or that thereafter may be come due from him or them *on such contract* for labor and materials used in the erection of such building, giving the master workman or contractor written notice of such notice and demand, and if the same be not paid or settled by said master workman or contractor, such owner or owners, on being satisfied of the correctness of said demand, shall pay the same and the receipt of such journeyman,

> laborer, materialman or sub-contractor for the same shall entitle such owner or owners to an allowance therefor in the settlement of accounts, between him and such master workman or contractor, or his representatives and assigns, as so much paid on account (P. L. 1898, p. 538), as amended P. L. 1905, p. 311, and P. L. 1910, p. 500.)

If a contract *has not been filed there is no right of stop-notice,* so that whatever rights are created are strictly by statute.

> *English* vs. *Warren,* 65 Eq. 30, 54 Atl. 860.
>
> The remedy by stop-notice is limited to houses where the contract and specifications have been filed.
>
> The right to resort to the fund in the hands of the owner is confined to cases where, because of the contract being in writing and filed, the claimant is deprived of the right to lien.
>
> *Summerman* vs. *Knowes,* 33 N. J. L. 202.

There were two distinct claims.

In the answer and counter-claim filed by the contractors, (pp. 18 to 20), they set out two separate claims.

One, for the balance due on the contract and the other for the balance due for extra work.

On (pp. 47 and 49), is set forth the different figures due under each claim.

On (pp. 39 and 46) the Master with due care itemized the different items of the two claims.

In Vice Chancellor Bigelow's letter, dated November 5, 1930, (Photostat copy on p. 54) he recognized the two claims, since he made a further allowance to the owner for omitted or defective work,

and sustained the master's allowance as to extra work as to one small item.

Under *points* 3 *and* 4 *of the Master's Report* (pp. 32 to 34), it is clearly shown that there was never any contention that any of the extra-work was performed by reason of the terms of the contract.

The owner put in a defense against any allowance for extra work on the theory that there were no written orders therefor.

The allowance made for extra work was made under the theory advanced in *Headly* vs. *Cavilier*, 82 N. J. Law, 635, 82 Atl. 908, where the court held, that where an owner gave an order for work and promised to pay for the same, that *the order and promise* constituted *a separate contract, apart from the original,* and that *each order constituted separate, individual contracts,* and held further that the owner was liable if the order and promise was made, irrespective of the general clause of the contract, requiring orders for extra work to be in writing.

The total amount allowed by the Vice Chancellor *for extra work was* $9,370.27 with interest from October 1st, 1927, and on this amount the solicitor in his application, contended he had a lien on his clients' cause for compensation for the services rendered by him in establishing the claim of the general contractors; *for extra work, notwithstanding* the fact *that the court may not* have agreed with him that he had a lien *on the amount found to be due* to the contractors *under the contract.*

It is therefore, respectfully submitted that the solicitor's lien for compensation on the amount due from the owner to the contractors for extra work, can in no wise be affected by any rights that

the stop-notice claimants may have acquired by reason of the filing of their notices.

The fund created for extra work has not been attached, and was not reached either in law or in equity by the filing of the stop-notices.

The solicitor is entitled to be paid the compensation agreed on between he and his clients, out of the money awarded to the contractors for extra work, irrespective of any claim that the stop-notice claimants may have on the balance due on the contract.

POINT FOUR.

That in any event the Court erred in not allowing costs to the successful litigants.

In the final decree as entered (p. 93) no costs or counsel fee were allowed to any of the parties.

It has been the general practice in Chancery to allow costs to the successful litigant and a counsel fees to the litigant's solicitor.

In the case at bar the solicitor representing the general contractors filed in court their claim against the owner, and succeeded in establishing that claim and creating a fund; in which the stop-notice claimants will share.

The allowance to counsel is permitted by the Chancery Rules and Section 6 of the Chancery Act of the Laws of 1915,

> "The court upon making any order or decree, may charge the successful party with cost, or a reasonable counsel fee or both, in any case in which the court shall deem it just to do so."

The act of the Vice Chancellor in not making an allowance for counsel fee to the solicitor for the general contractors is inconsistent with what he stated in his memorandum (second paragraph, p. 79):

> "He (Mr. Bianchi), further urges that he has been instrumental in creating the fund and should therefore be paid. *It is true,* that *throughout* the *suit,* acting for the general contractors *he has borne the burden* of establishing *the debt* of complainant."

Under the above quotation *the Vice Chancellor* admits and *recognizes* the fact that the solicitor for the general contractors *was the one who was instrumental in establishing the fund.*

On the question of paying reasonable fees for services rendered for the benefit of those who take the fund, the following case appears to enunciate the law of this state on the subject:

Smith vs. *McDonald,* 69 N. J. Eq. 765.

> "Application has also been made to this court by all the counsel engaged for the allowance of counsel fees to be paid out of the fund. The practice in this court of allowing costs and reasonable fees to be paid out of the estate for services rendered for the benefit of those who take the fund, and who should, in equity, contribute toward the payment of the same, *seems to be established.*"

Vice Chancellor Bigelow's refusal to allow a counsel fee appears contrary to his decision in the case of *Riverside Apartment Corporation* vs. *Capital Construction Company,* 107 N. J. Eq. 405, 152 Atl. 763, filed as of *December* 26, 1930. The decree in the case at bar was entered *December* 29, 1930.

In that case the Vice Chancellor made an allowance of counsel fees to the solicitor of two lien claimants, who as he stated, had been especially vigorous in attacking the claims of mortgagees and had succeeded in carving out a fund in which lien claimants as a class would share.

The following is a copy of the syllabus by the court:

> "When two lien claimants through their counsel, have been especially vigorous in attacking the claims of mortgagees and have succeeded in carving out a fund in which lien claimants as a class will share, they may be allowed counsel fees out of said fund."

It is therefore submitted that irrespective of whatever opinion, the Vice Chancellor did have, as to the legality of the solicitor's claim for compensation, that the results obtained by him in this case, clearly establish that the solicitor has rendered services that were of benefit to all the lien claimants, and that an allowance would have been consistent with the general practice in Chancery.

Conclusion.

It is respectfully submitted that the court erred in reducing the findings and award made by the Master, to the general contractors-appellants, without having heard or seen the witnesses and without advancing any reason for so doing.

And it is further submitted that the final decree entered in this cause be reversed, to the end that a new recree may be formulated to concur with the findings and award of the Master to the general contractors, and that the solicitor for the general

contractors-appellants be decreed to have a lien for his compensation on the findings and award of the Master on the contract and extra work, which solicitor's lien will be prior and paramount to the lien of the stop-notice claimants; or in lieu thereof; on the amount found due for extra work, and that in any event, the solicitor for the appellants should be allowed reasonable fees and cost.

Respectfully submitted,

O. C. BIANCHI,
Solicitor for and of Counsel
with Defendants-Appellants.

ISRAEL B. GREENE,
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New Jersey Court of Errors and Appeals.

BETWEEN MARTIN J. MACDONNELL, *Complainant-Appellee,* and MICHAEL J. VITILLE, *et al.*, *Defendants-Appellants,* ANTONIO MAMOLITE, *et al.*, *Defendants-Appellees.*	On Bill, &c. On Appeal from Court of Chancery.

Brief of McDermott, Enright & Carpenter, Solicitors for the Defendant-Appellee, Irving Trust Company, as Trustee in Bankruptcy for Indiana Flooring Company.

There are two appeals in the above entitled matter, one by the builder, Michael J. Vitille and his partners, and the other by their solicitor, Mr. Ovid C. Bianchi for convenience respectively referred to herein as the appeals of the builder and of Mr. Bianchi. The former is briefed for the appellants under Point I and the latter under Points II and III of Mr. Bianchi's brief.

I.

Appeal of builders.

The builders appealed because the decree, in sustaining certain of the exceptions to the Reference Master's report, reduced by $6,658.20 the amount which the Master had found due upon the contract.

The Court's findings (there was no formal opinion on this phase) are set forth in the Vice Chancellor's letter of November 5, 1930 (S. C. Insert between pp. 54 and 55). This was a question of fact. The Master had the benefit of seeing the witnesses and hearing them testify.

We respectfully submit that this appeal should be sustained and that the decree of the Court of Chancery in so far as it sustains the exceptions to the Master's report should be reversed.

II.

Appeal of Mr. Bianchi.

Mr. Bianchi appealed because the Court denied his applications for a counsel fee as solicitor of the builders.

We respectfully submit that his appeal should be dismissed for the reasons stated in the opinion of Vice Chancellor Bigelow (S. C., pp. 75-84).

McDERMOTT, ENRIGHT & CARPENTER,
Solicitors for the Defendant-Appellee, Irving Trust Company, as Trustee in Bankruptcy for Indiana Flooring Company.

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New Jersey Court of Errors and Appeals

Between

MARTIN J. MACDONNELL,
Complainant-Appellee,

and

MICHAEL J. VITELLI, *et als.*,
Defendants-Appellants.

On Bill, etc.

BRIEF OF MAMMOLITE AND RICCIARDI, DEFENDANTS-APPELLEES.

The defendants here represented are stop-notice claimants whose claim allowed for One Thousand Four Hundred Ninety-two Dollars and Thirty-two Cents ($1,492.32) constitutes the second in order of priority under the Chancery Decree (Case, p. 91).

With the contractors-appellants' effort to increase the fund under Point I of their brief, they have no complaint and therefore on that appeal, limit their argument to the other three points discussed in that brief.

POINT II.

The general contractor's solicitor has no lien for compensation from the fund, superior to stop-notice claims.

Counsel's contention is based entirely upon the authority of *Brunetti* v. *Grandi,* 89 N. J. Eq. 116, 104 Atl. 139, but, as pointed out in Vice-Chancellor Bigelow's memorandum, several vital points of difference exist.

In the first place, the contractor in the Brunetti case had not only started suit, but had recovered judgment, while the lien claimants, in the language of Vice-Chancellor Lane, "brought no suit against the owner. They had knowledge of the suit of the contractor. By silence, at least, they acquiesced in his prosecuting the suit to judgment. * * * I conclude, therefore, that the contractor had a cause of action * * * either in his own right, or in the right of the stop-noticing claimants, and, if in their right, then that he acted as their agent by force of the statute"; in the instant case the contractors did not start suit while (stipulation, Supplemental State of Case, p. 1) stop-notice claimants, Cadel Brothers, North Hudson Manufacturing Company, James Henry, Inc., Louis Bogorad and others had started actions at law prior to the filing of the bill of complaint herein and were restrained from further prosecution by order of the Court of Chancery.

Secondly, in the Brunetti case, after judgment for the contractor had been obtained, the attorney had recorded an assignment of judgment to himself and was a party defendant in the interpleader suit, and although no dispute arose as to the value of his services, ample opportunity was afforded to litigate it if disputed; here the solicitor was not a party to the proceeding, did not raise the point in the pleadings, testimony or original memorandum; in fact, not until the time set for the settlement of the final decree was the argument advanced, and then only on a petition without notice to the other parties. It is worthy of note, too, that not even then were his alleged assignments from his clients, the contractors, produced; these were not forth-

coming until after the Court's first memorandum had been completed (Case, p. 82).

These two very material differences clearly distinguish the two cases. Here suit had not been started by the contractors, and the question of attorney's fees was not properly brought before the court below. Appellant devotes considerable space in his brief to the reasons why suit was not started, but, so far as we can ascertain, proofs supporting these reasons do not appear in the record; lacking such support, the argument is improper and wholly unavailing; furthermore such reason is wholly ineffective as to the lien claimants.

POINT III.

The solicitor has no lien on the amount due to contractors for extra work.

Appellant contends that the amount found due for extras is not subject to the lien claims, by reason whereof that fund belongs to the contractors and therefore is liable for the attorney fee under the statute and assignment. Such claim is clearly untenable.

Amongst the "conditions of the contract" is the following (complainant-appellant's State of Case, p. 529):

> "Art. 15. Changes in the Work—The owner, without invalidating the contract, may order extra work or make changes by altering, adding to or deducting from the work, the contract being adjusted accordingly. All such work shall be executed under the conditions of the original contract except that any claim for extension of time caused thereby shall be adjusted at the time of ordering such change."

Headley v. *Cavileer,* 82 N. J. L. 635, 82 Atl. 908, cited by appellant, was a suit at law by the contractor against the owner for the balance due under the contract and for extras. That case decided that recovery could be had for extra work performed as a result of oral agreements between the parties even tho the contract itself required such orders to be in writing. We have searched in vain to find in the opinion filed in that case any authority whatsoever which justifies the statement on page 27 of appellant's brief, that the order and promise constituted a separate contract, apart from the original, and that each order constituted separate, individual contracts.

This is not, of course, a case where a fictitious contract had been filed as in *Murphey-Hardy Lumber Co.* v. *Nicholas,* 66 N. J. L. 414, 49 Atl. 447, where the filed contract had been superseded by a new and different agreement as suggested in *Buckley* v. *Hann,* 68 N. J. L. 624, 54 Atl. 825; or where a material alteration had been made as in *Coles & Son Co.* v. *Lothridge,* 81 N. J. L. 406; hence the rule there applied that liens attached against the property and fund, is not applicable.

The only cases we have discovered which lend support to appellant's claim are *Willetts* v. *Earl,* 53 N. J. L. 270, in which the Supreme Court said (p. 274) that the owner by abrogating the whole or part of the contract price and making another instead, or entering into a further contract requiring additional work or materials, places himself outside the protection of the statute, and *South End Improvement Co.* v. *Harden,* 52 Atl. 1127, where liens were allowed for work done under unfiled subsequent contracts, supplemental to the original contract which was filed, but *Willetts* v. *Earl* expressly precludes such liens

for work done and materials furnished *in pursuance of such contract* (the situation in the instant case), while the South End Improvement Co. case is clearly distinguished in the later Chancery case of *Hasson* v. *Bruzel,* 144 Atl. 319, at page 320, in these words: "The extra work was done under the original contract and not under a separate, tho supplemental one authorized thereby as was the case in *South End Improvement Co.* v. *Harden.*" In the Hasson case under a supplemental order for building outside stairs the owner had paid the contractor direct the agreed sum of $650. The Court held that this fund was subject to the stop notices served in connection with the original filed contract, and since the amount of these stop-notices exceeded the balance found due under the original contract, the owner was directed to pay that sum in addition to the amount interpleaded. The same principle was followed also in *Dunn* v. *Stockern,* 43 N. J. Eq. 401.

These were extras performed *in pursuance of* the original contract and must be subject to the stop-notices served and proved thereunder. The intent of the law cannot be otherwise. Else the whole subject, admittedly difficult of practical interpretation, would be hoplelessly confused by imposing upon claimants the burden of close observance in the progress of the work as to whether any extras were ordered, and, if so, whether their claims were directed to the contract or the extras, or if to both, in what proportions, with the requirement in each instance of pursuing the proper remedy of stop-notice or lien or else be barred from recovery from the owner.

POINT IV.

The Court did not err in denying costs to appellants.

In the first place, appellants were not successful litigants. Admittedly, through the combined efforts of counsel for all the defendants, in which appellants' solicitor actively participated, the fund was increased from $3,646 to $13,862.87. But appellants have no interest in that fund. It belongs to the lien claimants. Appellant's counter-claim was dismissed, and although this appears as a ground for appeal in the petitions, it was not discussed in the brief and is apparently abandoned.

In the second place, Section 6 of the Chancery Act, recited in appellant's brief, makes the award of costs and counsel fees discretionary with the Court. His denial is not, we submit, a proper ground for appeal.

Appellant's reference to the same Vice-Chancellor's opinion in the case of *Riverside Apartment Corporation* v. *Capital Construction Co.*, 107 N. J. Eq. 405, 152 Atl. 763, without further comment than was made, seems to be somewhat misleading. An examination of the facts and conclusions in that case indicates that costs were there allowed only to *successful* litigants, to be paid from the funds which those claimants themselves were to receive. Claimants not participating in the fund were denied costs. Appellants here do not participate in the fund; hence they are in no position to complain.

The decree of the Court of Chancery should in these respects be affirmed.

FRANK COZZOLINE,
Solicitor for and of Counsel with
Defendants, Mammolite and Ricciardi.

ERNEST L. QUACKENBUSH,
Of Counsel.

162MAY.T.1932

Filed after the Oral Argument by leave of Court.

New Jersey Court of Errors and Appeals

Between

MARTIN J. MACDONNELL,
Complainant-Appellant,

and

MICHAEL J. VITELLE, *et als.*,
Defendants-Respondents.

On Appeal From the Court of Chancery.

BRIEF OF DEFENDANTS-RESPONDENTS CADEL BROS., INC., NORTH HUDSON MFG. CO., AND THOMAS HENRY, INC.

These respondents are stop-notice claimants.

There is an appeal here by complainant owner; one by the general contractors and a third one by the solicitor of the general contractors.

This brief includes the contentions of the respondent stop-notice claimants with respect to each of the appeals.

The appellant general contractors Vitelle, Kinsella and Cunhy submit a State of Case which is supplemented by a State of Case furnished by complainant-appellant.

For convenience the contractors' State of Case will be called the V.K.C. State of Case and the owner's State of Case will be referred to as the MacD. State of Case.

Statement of the Case.

The Bill was filed by the owner in the nature of an interpleader. The contractors and stop-notice claimants either answered or filed statements.

There was a reference to a Master. The Master reported. There was a hearing, upon exceptions to the report, by the Vice-Chancellor.

The Vice-Chancellor reduced the amount of the award; sustained the Master's report otherwise and denied an application by the contractors' solicitor who sought to establish a lien for his services with priority.

Complainant owner appealed because the Court held him liable notwithstanding the architect had not issued a final certificate. The contractors appealed because of the reduction in the amount allowed by the Master.

The solicitor appeals from the denial of his applications for a lien and priority.

Respondents' Contentions.

These respondents contend that the appeals are without merit and present no valid cause for reversal. Respondents' separate contentions as to the several appeals are briefly the following.

As to the Owner's Appeal.

1. Respondents performed the work and furnished materials. Their claims are not disputed. They have not been paid. The owner has long had the use and benefit of such work and materials. There is no question as to the validity of their stop-notices. No one questions either the amount or the priority. They are entitled to be paid.

2. The building was accepted. The architect approved except as to trivial matters (MacD. S. of C., 580). The general contractor was entitled to a formal certificate. Production of a certificate was waived and otherwise excused. The owner

admitted the obligation by filing his bill in the nature of an interpleader. The owner is estopped from asserting, as a defense, the lack of an architect's certificate.

As to the Solicitor's Appeal.

3. The contractors' solicitor is not entitled to a lien because:

(a) The statute does not give him one.

(b) His client's counterclaim was dismissed.

(c) No equitable right exists.

4. He has no right to priority as against the stop-notice claimants because:

(a) His client's claim is subordinate to those of the stop-notice claimants; his can have no greater standing.

(b) The claim was not made or asserted in time.

(c) As against the stop-notice claimants the lien cannot be asserted in a summary proceeding.

(d) He is not a party to the suit.

5. The points raised by appellants are narrow and highly technical. They are contrary to the spirit of the Mechanic's Lien Act and to all principles of justice and equity. The owner seeks to retain the benefit without giving compensation. The solicitor for the contractors seeks a large part of the fund at the expense of the stop-notice claimants who did not employ him either expressly or impliedly.

The Briefs.

The Brief entitled "Brief of Appellants" is submitted for the general contractors and their solicitor.

The Brief entitled "Brief of Complainant-Appellant and of Complainant-Appellee" sets forth the various contentions of the owner.

This Brief includes the stop-notice claimant's argument with respect to the matters in the other Briefs with which these respondents are concerned.

The first four points will deal with the owner's appeal and point five with that of the contractors' solicitor.

ARGUMENT.

THE OWNER'S APPEAL.

POINT I.

A formal architect's certificate was not required.

The production of a final certificate from the architect was excused.

These respondents contend that the absence of a final certificate from the architect presents no valid objection to the allowance of the claim for the balance due on the contract. The case was tried upon the theory of substantial performance. Such substantial performance was shown. The architect admitted that the only defects were trivial (MacD. S. of C., p. 580, Ex. D-74).

The rule is:

> "A condition in a building contract requiring the production of an architect's cer-

> tificate as a condition precedent to payment may be waived by the owner in whose interest it is ingrafted in the contract, either by express words relieving the building therefrom, or the waiver may be inferred from such acts, conduct or declarations of the owners as are inconsistent with the purpose of exacting performance."
>
> *Sargeant Brothers, Inc.* vs. *Brancati,* 107 N.J.L. 84, s.c. 151 Atl. 843.

The quotation above is from the syllabus by this Court in the case cited. It has long been recognized that a contractor may recover if he has substantially performed. He must give credit for defects and omissions, but his claim is not to be defeated if there has been a substantial compliance.

The architect might well decline to issue the final certificate where there was not complete and exact performance. However, if there has been substantial compliance and the contractor is entitled to recover he must also necessarily be excused from producing the architect's certificate.

To hold otherwise would be to defeat the rule which permits recovery and does not require the exact performance which, however, the architect might insist upon as a condition of the issuance of the final certificate. This is one of the instances where waiver may be inferred. The owner elected to file the bill in the nature of an interpleader. By so doing and by the prayers of his Bill he admits and acknowledges that he is indebted. He seeks the aid of the Court in restraining the separate law suits. He must be held to submit to the jurisdiction and unless there is a balance due the contractor, he has no right to proceed with his Bill in the nature of an interpleader. This is such an Act as results in the inference of waiver.

The owner by his Bill of Complaint admitted that the sum of $3,646.00 was due and that other sums were due. He tendered into Court such sum (V.K.C. S. of C., pp. 11 and 13).

If the contract had not been substantially performed there would have been no liability for this amount or any amount. By Bill of Complaint and by the owner's contention in this regard there is an admission, by operation of law, that the building contract was substantially performed. Complainant should be estopped from making a contrary assertion.

In the case of

F. Bowden Co. vs. *Baier,* 99 N.J.L. 361; s.c. 123 Atl. 737,

it was held that the non-production of an architect's certificate was no defense against the stop-notice claimants where the owner had paid the contractor.

The owner who has paid the contractor is estopped from asserting as a defense the lack of an architect's certificate, because such payment is an admission that the money was due. The filing of an interpleader suit by the owner is equivalent to such a payment to a contractor and is an admission that the money is due.

The alleged reservation of rights in the Bill of Complaint does not change the situation. This reservation was not incorporated in the order of interpleader, and it may be assumed that the Court would not have allowed the interpleader had such a reservation been insisted upon.

It is utterly inconsistent for an owner to proceed by bill in the nature of an interpleader and at the same time dispute liability *in toto* because of the alleged non-production of an architect's certificate.

Exact performance is not required. It has long been recognized that it is virtually impossible to exactly perform in its minute details, a building contract of the kind involved in this case. That which is required is substantial performance.

Bozarth vs. *Dudley,* 44 N. J. L. 304;
Feeney vs. *Bardsley,* 66 N. J. L. 239, s.c. 49 Atl. 443;
White Door-Bed Co. vs. *U. S. Mortgage, etc., Co.,* 106 N. J. L. 372, s.c. 146 Atl. 216;
Dyer vs. *Lintz,* 76 N. J. L. 204, s.c. 68 Atl. 908;
Reese vs. *Kline Co.,* 8 Misc. 296, s.c. 149 Atl. 826.

The provision in a building contract requiring the production of an architect's certificate is construed to mean that there has been *in fact* an approval. Formal approval by the actual issuance of a certificate is not necessary.

Devlan vs. *Wells,* 65 N. J. L. 213, s.c. 47 Atl. 467.

It is sufficient that the contractor shows that he was entitled to the required architect's certificate. Actual production of such certificate is not essential.

Kirtland vs. *Moore,* 40 N. J. E. 106, s.c. 2 Atl. 269.

There was substantial performance and approval in fact.

The architect testified (MacD. S. of C., p. 275, l. 12):

> "Q. In your opinion, was this building substantially completed by the contractors? A. I would say it was. Tenants occupied it. That's substantial completion."

The architect wrote to the contractors (Ex. D-73, MacD. S. of C., pp. 579, 580):

> "These trivial matters have been hanging on for months * * *."

This referred to *all* of the omissions and defects.

The cases which hold that a contractor, when required by his contract with the owner, must produce an architect's certificate or show an unreasonable or fraudulent withholding, do not say that these are the only alternatives. There are other alternatives, such as a showing that the contractor was entitled to a certificate or that there was a waiver of the requirement. A contractor or sub-contractor who has substantially performed the work is entitled to recovery from the owner who has received and retained the benefit. Narrow and technical objections on the part of the owner are not looked upon with favor.

The strict requirements of the contract may be changed and modified by parol arrangements.

Headley vs. *Cavileer,* 82 N. J. L. 635, s.c. 82 Atl. 908;
Rizolo vs. *Poysher,* 89 N. J. L. 618, s.c. 99 Atl. 390;
Hasson vs. *Bruzel,* 104 N. J. E. 319, s.c. 144 Atl. 319.

The contractor is excused from producing an architect's certificate if the same has been arbitrarily or fraudulently withheld.

Bradner vs. *Roffsell,* 57 N. J. L. 412, s.c. 31 Atl. 387;
Chism vs. *Schipper,* 51 N. J. L. 1, s.c. 16 Atl. 316.

These decisions do not imply that it is only in such circumstances that the production of the architect's certificate is excused.

The cases of

> *Sheyer* vs. *Pinkerton Co.,* 59 Atl. 462; (not otherwise reported), and
> *Mansfield* vs. *Cape May,* 105 N. J. L. 242, s.c. 143 Atl. 379,

were decided in favor of the respective owners for the reason that the required certificates had not been produced. No question of waiver or excuse for non-production was presented in either case.

POINT II.

The charge for interest was proper.

In this case the owner, not only has had the use of the property, but was also allowed to give a bond in lieu of a cash deposit, for the greater part of the claims. He was, therefore, properly charged with interest.

In

> *Agnew* vs. *Board of Education of Paterson,* 83 N. J. E. 49, s.c. 89 Atl. 1046; aff. 83 N. J. E. 336, s.c. 90 Atl. 1135,

it was held that the modern tendency in determining whether interest should be allowed, or not, is to get away from ancient hard and fast rules and determine the question of the award of interest according to principles of equity and justice.

POINT III.

The credits for defects and allowances for extras were correctly allowed.

An examination of the evidence discloses that many of the omissions were cared for by acceptable substitutions. The owner and the architect were almost constantly in touch with the work as it progressed. Their views and wishes were met by the contractors.

The specifications were stereotyped and many changes were necessary. The ordering of extras from time to time during the course of construction resulted largely from the same causes.

The law contemplates just this situation as a common occurrence. Modifications and changes may be by parol and an owner may not stand on the strict letter of the contract when he himself has been in the main responsible for the changes.

Headley vs. *Cavileer, Rizolo* vs. *Poysher, Hasson* vs. *Bruzel, supra.*

It will serve no useful purpose to repeat the evidence here.

The Master's Report is plain and its fairness is apparent. It is based upon common sense and sound principles.

POINT IV.

The direction as to the Master's fee was proper.

This is plainly a matter for the exercise of sound discretion. No abuse of discretion is urged.

The conclusion of the Vice-Chancellor is that the complainant owner should pay one-half of the Master's fee (V.K.C. S. of C., bet. pp. 54 and 55).

It is apparent that the owner was not entirely successful, else why the appeal here?

Not having entirely prevailed, he is properly chargeable with a part of the Master's fee.

THE SOLICITOR'S APPEAL.

POINT V.

The solicitor was neither entitled to a lien or priority.

Mr. Bianchi, the solicitor for the defendants, Vitelle, Kinsella and Cunhy (general contractors), presents, in his own behalf, a separate appeal.

After the main case was heard by the Master and the hearing had before the Vice-Chancellor, upon the exceptions to the Master's Report and on the day that the Final Decree was to be signed, Mr. Bianchi filed a petition by which he sought to establish an attorney's (solicitor's) lien (V.K.C. S. of C., p. 57).

Thereafter, Mr. Biachi filed an amended petition (V.K.C. S. of C., p. 64).

By this amended petition Mr. Bianchi sought to enforce his alleged lien and claimed priority as against the stop-notice claimants.

Mr. Bianchi's application under his petition and amended petition was denied by the Vice-Chancellor (V.K.C. S. of C., p. 84).

In the brief filed by Mr. Bianchi as solicitor for and of counsel with the defendants-appellants, Vitelle, Kinsella and Cunhy (general contractors), there is included under the headings, Point Two and Point Three, Mr. Bianchi's individual con-

tentions with respect to his separate appeal (V.K.C. Brief, pp. 11 to 28).

In the same brief, on page 4, the contention is made that the Court below erred in denying the solicitor's application for a lien for compensation and in declining to treat the extra work as a separate claim distinct from the general contract for the purpose of establishing the alleged solicitor's lien.

Mr. Bianchi argues that not only is he entitled to a lien but also that his claim is entitled to priority as against the stop-notice claimants.

With respect to this particular appeal and the contentions made by Mr. Bianchi with respect thereto these respondents say:

(a) Mr. Bianchi has not made out a case for himself within the Attorney's Lien Act (P.L. 1914, Chapter 210, p. 410).

(b) He is not entitled to priority as against the stop-notice claimants.

(c) As against the stop-notice claimants, he has no standing upon a mere petition and summary hearing.

(d) His claim cannot be divided as against the general claim and that for extra work.

(e) He is not a party to the suit and had no standing in Court as against the stop-notice claimants.

(f) He is not properly before this Court.

(g) The attorney's lien act should not be invoked to defraud the stop-notice claimants.

A.

The Attorney's Lien Act of 1914 was evidently enacted for the protection of attorneys against

unconscionable settlements between the parties to suits behind the attorney's back. Its primary purpose was to prevent loss of compensation to attorneys whose clients saw fit to collect directly from the other side and thereby seek to defeat the attorney's claim for compensation.

The Statute does not include a lien for a solicitor whose client's claim is exhibited by a counterclaim *in an equity suit.* This may have been a legislative oversight, but the language of the Statute is controlling and it does not give a solicitor's lien where his client's cause of action is presented to the Court by counterclaim *in a Chancery suit.*

The language of the Statute is:

> "After the service of a summons and complaint in any action at law, or the filing of a bill of complaint or petition in the Court of Chancery, or the service of an answer containing a counterclaim in any action at law, the attorney, solicitor or counsellor-at-law who shall appear in said cause for such party instituting the action at law, or suit, or filing the petition, or counterclaim, shall have a lien for compensation, upon his client's cause of action suit, claim or counterclaim, which shall contain and attach to a verdict, report, decision, decree, award, judgment or final order in his client's favor, and the proceeds thereof in whosoever hands they may come; and the lien shall not be affected by any settlement between the parties before or after judgment or final order or decree."

The language of the Statute is plain and unequivocal and does not require construction.

> *McGowan* vs. *Metropolitan Life Insurance Co.,* 60 N.J.L. 198.

The statutory solicitor's lien is dependent upon and cannot exist without a successfully established

cause of action. If the client loses the lien must fall. The counterclaim was dismissed (V.K.C. S. of C., p. 92, ll. 23 to 26). Even if the Statute had any application there could be no valid lien because the client's cause of action failed.

It is true that under the statute, the lien may survive the extinguishment of the client's cause of action where a settlement has been made.

Ferraro vs. *City Hall Garage,* 94 N.J.L. 209, s.c. 109 Atl. 358.

If the client prevails the lien attaches itself to the judgment or decree, but in no case has an attorney's lien been sustained where there was no settlement and the client's cause of action resulted in a dismissal.

B.

Mr. Bianchi represented the general contractors. The stop-notice claimants are entitled to priority as against the general contractors. The solicitor of the general contractors, however, seeks to establish a lien and further contends that his lien is entitled to priority as against the stop-notice claimants. He shows an agreement between himself and his clients whereby he was to receive one-third of any amount agreed upon in settlement or awarded by any judgment or decree (V.K.C. S. of C., pp. 61 and 62).

Mr. Bianchi argues that he has a lien; that it survives his client's defeat and that it has priority. As authority for this claim of priority he relied upon below and relies upon here, the decision of the Court of Chancery in the case of

Brunetti vs. *Grandi,* 89 N. J. E. 116, s.c. 104 Atl. 139.

On page 14 of the brief submitted by Mr. Bianchi, the citation of the Brunetti case is found together with this statement:

> "This case thoroughly analyzes all the law and questions raised in the solicitor's claim and is controlling here."

Of course this is not so. The decision of the Court of Chancery is not controlling upon this Court.

In the Brunetti case the facts were different and the determination of the Court in that case, in allowing the solicitor a lien and in affording priority, apparently rested upon certain conditions not here present. In the Brunetti case the general contractors had brought suit and had obtained judgment before the filing of the Bill in the nature of an interpleader by the owner. The stop-notice claimants had not brought suit and acquiesced in the prosecution of the suit by the general contractors and later benefited by the establishment of the general contractor's claim. The amount due to the attorney was agreed to. The stop-notice claimants had notice of the bringing of the contractor's suit and rested upon that suit, to establish the fund, out of which they were to be paid. After the contractor obtained his judgment he assigned it to his attorney. The stop-notice claimants had obtained a benefit as a result of the successful prosecution of the contractor's suit by the attorney. The attorney claiming the lien was made a party defendant to the interpleader suit. The Court in reaching its conclusion apparently was moved by general equitable principles rather than by any particular reference to the Statute. Although the stop-notices operated as assignments *pro tanto,* the effective cause in giving vitality to the claims was, in the particular case, the general contractor's action. In other words, the attorney

was given a lien and priority because in Equity it appeared that he had in reality been the attorney for the stop-notice claimants as well as for the general contractor in the suit which established the claim and resulted in the payment of the money into the Court of Chancery.

This Court in the recent case of

Grunt vs. *Zapeikov,* 107 N. J. L. 143, s.c. 151 Atl. 730.

held,

> "Upon notice given, the workman or materialman to the extent of his demand, takes the place of the contractor so that if the owner as against the latter can withhold the payment of the monies earned; he can do so in like manner against the demands of the former."

The giving of the notice is not only an assignment *pro tanto* but is also a complete substitution.

In the Brunetti case the stop-notice claimants had done nothing to protect their respective claims and the basis of the decision was to hold that the attorney was entitled to priority because it was he alone who protected the contractor *and* the stop-notice claimants. The Court said the fund in Court represented the proceeds of that suit and its existence was due to the labors of the attorney.

Here there is an entirely different situation. The general contractors did not bring suit. The owner filed the Bill and brought in all of the parties. Prior to the filing of the Bill, neither the owner nor the stop-notice claimants had any knowledge or notice of any claim by Mr. Bianchi. He was not made a party to the suit as he undoubtedly would have been had he previously instituted any proceeding for his clients and given notice of his intention to claim a lien. The attorney did nothing

to assert a claim until after the case had been tried and decided. The agreement with his clients was only produced at the last minute when the decree was about to be entered. No notice was given to the stop-notice claimants. No Order to Show Cause was issued. No opportunity to question the matter was afforded. The stop-notices had been served upon the owner long prior to the filing of the Bill of Complaint. Their claims were not disputed, but were expressly admitted by the general contractors. The general contractors did not sue; the stop-notice claimants did sue and it was because of their suits that the owner filed his Bill of Complaint. Certainly the general contractors should not be permitted to disturb the status of the stop-notice claimants and it is quite inconceivable that their solicitor could have a better right.

It would be most unjust and inequitable to allow the solicitor to defeat the just claims of the stop-notice claimants by a last minute appearance on the scene with a petition asserting a lien for the first time.

The respondent stop-notice claimants performed work and supplied materials incidental to the construction of an apartment house. The general contract is dated October 13, 1926 (Exhibit D-51, MacD. State of Case, p. 519).

The stop-notices of these respondents were served September 16, 1927. Their claims were not disputed. The general contractors did not seek to enforce a mechanics' lien and permitted four months to go by. These stop-notice claimants sued at law. The owner filed his Bill of Complaint in the nature of an interpleader on December 7, 1928, to restrain the actions at law.

Mr. Bianchi in no way alone aided or assisted the stop-notice claimants and did nothing to legally entitle him to any consideration in the

Court of Equity, whereas in the Brunetti case the stop-notice claimants would have been out except for the general contractors' suit which was prosecuted by his attorney.

To allow such a claim as is presented here, by Mr. Bianchi, would undoubtedly open the door to a method which could and would be used by unscrupulous persons to the great prejudice and detriment of sub-contractors and in many cases would completely take away the protection of the Mechanics' Lien Act.

The decision of the Vice-Chancellor upon the exceptions to the Master's Report was given November 5, 1930 (V.K.C. S. of C., between pp. 54 and 55).

On November 17th the solicitor's petition for a lien was filed, and this was supplemented on November 26th. The Vice-Chancellor's determination of the Bianchi petitions is in the State of Case (V.K.C.) on pages 74 to 84. The Bianchi petitions were denied after a very complete consideration of all of the points raised by Mr. Bianchi in his own behalf. The Court found that he did not come within the decision in the Brunetti case and that his claim was neither well founded nor timely.

C.

In

Levy vs. *Public Service Railway Company,* 91 N. J. L. 183, s.c. 103 Atl. 171,

and in

Artale vs. *Columbia Insurance Company,* 9 A. R. 638, s.c. 157 Atl. 157,

this Court and the Supreme Court, respectively, held that it is only between attorney and client that the matter of lien may be determined by peti-

tion and summary hearing. As against the adverse or other party to the proceeding the attorney can only enforce his lien by action. The determination of the lien, its extent and value are matters which the adverse parties are entitled to litigate. The solicitor, in this case, in seeking to take away a large part of the fund, which is legally the property of the stop-notice claimants, is asserting a claim that cannot be disposed of in a summary way.

D.

In the pleadings no suggestion was made that the general contractors' claim for extras was not subject to the lien of the other defendants. At the hearing before the Master the general contractors' claim for extras was presented as a part and parcel of the whole claim, subject to the rights of the stop-notice claimants. In the exceptions to the Master's Report no suggestion of any splitting up of the claim was made.

In the first petition filed by Mr. Bianchi no such suggestion was made, and it was only in the further petition that the point was raised for the first time. The stop-notice claimants included extra work and materials. These claims were expressly admitted to be due by the general contractors. The amounts of the respective claims were fixed by the Master, who also determined their respective priorities. No exceptions were filed by the general contractors to such determinations. The general contractors did not attempt to make any distinction, and certainly their solicitor was not entitled to raise the question after the amounts and priorities had been determined. This particular contention by the general contractors' solicitor is manifestly an afterthought and is an effort to obtain a part of the fund re-

gardless of the equities and the merits of the case. The funds, or in this case, the bond, takes the place of the property, and the stop-notice claimants should not be prejudiced by reason of the injunction against prosecution of their suits at law.

It would be highly inequitable to allow anything to deprive them of their rights where their claims have been fully established and are not in dispute. The possibility and probability of extra work was foreseen and was provided for by the contract itself. The extra work is incidental to and directly connected with the main contract.

The contention made by the solicitor for the contractors with respect to this splitting of the contractors' claim is unsound.

In

Vacuum Ash, etc. Co. vs. *Huyler's,* 101 N. J. L. 147, s.c. 127 Atl. 203,

this Court held that it was proper to treat two separate contracts as one where the separate units were both necessary to a complete system. In that case there were actually two separate contracts. They related, however, to two separate units of a complete system and the Court treated the two separate contracts as a single one.

The extra work was part and parcel of the construction of the building under the contract.

E.

Mr. Bianchi appeared as solicitor of the defendants, Vitelle, Kinsella and Cunhy (V.K.C. S. of C., p. 20). Before the Master he appeared as such solicitor for such parties (V.K.C. S. of C., p. 25).

It should be noted that he did not petition to be made a party to the cause by either his original

petition or amended petition. He gave no notice of his petition. No opportunity was given the stop-notice claimants to answer such petition. Certainly the attorney who prosecutes or defends an action at law is not a party to such action, nor is a solicitor in a Chancery cause a party to the suit. As between himself and his client he undoubtedly had the right to apply to the Court to fix his lien, if any, upon his client's claim. It is a mistaken notion to think that an attorney or solicitor has any status himself even to ask for counsel fees for himself. Any and all applications are made for his client and awards, if any, are to the client and not to the attorney. The attorney's lien if it exists is against that which his client is to receive. The only exception is where the adverse party pays directly without affording the attorney or solicitor an opportunity to protect his lien for compensation.

A contractor's cause of action, against which his attorney might have a lien, does not include a stop-notice claimant's cause of action. The causes of action are separate and distinct. The contractor's cause of action is only for such amount as is left after the stop-notice claimant is satisfied.

F.

The notice of appeal (V.K.C. S. of C., p. 94) recites:

> "The defendants, Michael J. Vitelle, James J. Kinsella and Joseph Cunhy, and Ovid C. Bianchi, Solicitor for the said defendants, hereby appeal from the Final Decree, etc."

The notice is signed O. C. Bianchi, Solicitor *Pro Se* and Solicitor for and of Counsel with Defendants, Michael J. Vitelle, James J. Kinsella and Joseph Cunhy. Ovid C. Bianchi as an individual or as a party did not appeal, and indeed

he was not a party and apparently realized that he was not a party. The notice of appeal is an anomaly and a very queer practice would spring up if an appeal such as we have here could include an appeal of the solicitor for the parties. Mr. Bianchi filed a separate petition of appeal (V.K.C. S. of C., p. 103). In such petition he recites that he is one of the appellants. In his petition he includes such matters as:

> "7. That in any event the Chancellor should have allowed the said Ovid C. Bianchi, Solicitor for Appellant, a reasonable counsel fee" (V.K.C. S. of C., p. 105).

The practice seems to be very irregular. It would seem that if Mr. Bianchi was not satisfied with the ruling of the Vice-Chancellor on his petitions he should have applied to be made a party to the cause or should have instituted a separate suit or proceeding. At no stage in the proceeding did he file an answer or a statement of claim or make any claim to the fund in any proper, regular or legal way.

G.

It has been held that the inchoate lien acquired under a stop-notice cannot be impaired or defeated by any secret arrangement between the contractor and the owner. Any agreement between the owner and the contractor to be binding upon the stop-notice claimants must be authorized and provided in the contract as filed.

> *Smith* vs. *Dodge & Bliss Co.*, 59 N. J. E. 584, s.c. 44 Atl. 639.

Should not the same principle be applied to protect stop-notice claimants against secret arrangements between the contractor and his attorney?

In conclusion on this phase of the case these respondents submit that Mr. Bianchi has failed to show that he is entitled to assert a lien either under the Statute or under any general rule of law or equitable principle and that they should not be called upon to suffer a depletion of the amounts to which they are entitled in order that the general contractors' attorney and solicitor may be compensated

The Mechanics' Lien Act is remedial and should be liberally construed in favor of lien claimants.

MacNab, etc., Co. vs. *Paterson, etc., Co.*,
72 N. J. E. 929, s.c. 67 Atl. 103.

It was never intended that the act to protect attorneys should destroy the protection given to material men and workers by the Mechanics' Lien Statute.

Conclusion.

The final decree is just, equitable and meritorious. It is amply supported by the facts and the law. There should be an affirmance.

Respectfully submitted,

THOMAS MCNULTY,
Solicitor of Defendants-Respondents,
Cadel Bros., North Hudson Mfg. Co., and Thomas Henry, Inc.

JOHN MILTON,
THOMAS MCNULTY,
JOHN W. OCKFORD,
Of Counsel.

162MAY.1.1932

Filed after the Oral Argument
by leave of Court.

New Jersey Court of Errors and Appeals.

BETWEEN
MARTIN J. MACDONNELL,
Complainant-Appellant,
and
MICHAEL J. VITILLE, *et al.*,
Defendants-Appellees.

On Bill, &c.

On Appeal from Court of Chancery.

Brief of McDermott, Enright & Carpenter, Solicitors for the Defendant-Appellee, Irving Trust Company, as Trustee in Bankruptcy for Indiana Flooring Company.

This responding defendant is one of the stop notice claimants. Neither the amount of its claim nor the sufficiency of its stop notice was questioned.

The appeal involves the amount due from Martin J. MacDonnell, complainant-appellant, hereinafter referred to as the owner, upon his building contract with the contractors Michael J. Vitille and others, and against which various stop notices had been filed.

The owner filed his bill in equity in the nature of a bill of interpleader, seeking to be exonerated from further liability upon paying into the Court the sum of Three thousand six hundred and forty six dollars ($3646.00) or such further sum as the Court might find owing on the contract after due credit for setoffs to which he was entitled, and prayed that an account might be taken of the amount due from him on the contract (S. C., p. 28, paragraphs 2-4 inclusive). As the result of

filing the bill, certain stop notice suits at law were restrained.

The matter was referred to a Master who, after taking testimony at great length and hearing the numerous parties and allowing certain setoffs and credits to the owner, determined the amount due upon the contract and upon the various stop notices as well as the order and priority of such notices.

Upon the owner's exceptions to the Master's report, the Court reduced the amount due upon the contract from $23,907.02 as found by the Master (S. C., p. 94, ll. 1-15) to $16,561.49 (S. C., p. 111, ll. 10-15). No opinion was filed giving the reasons for such reduction, but the Court's findings are set forth in the Vice Chancellor's letter of November 5, 1930 (S. C. 103-105 inclusive). The owner, claiming that a considerably smaller amount was due upon the contract, then took this appeal from the Court's decree basing his contentions chiefly on the facts that the building contract required a certificate of the architect prior to the making of any payment thereunder and that no extras would be allowed unless ordered in writing by the owner.

Generally speaking, under contracts of this nature such certificates and orders in writing are pre-requisite to payment, but either may be waived and under the cases are not required if the withholding is fraudulent, such as where a building is substantially completed in accordance with the contract.

The architect testified that the building was substantially completed (S. C., p. 275, ll. 12-15). The owner took possession of the building, rented out the various apartments, and received the rents and benefits therefrom. He is now trying to get out of paying for the same on a technicality.

The Master found after hearing the testimony

that the requirements of the architect's certificates and the written orders for extras and changes had been waived or within the meaning of the cases fraudulently withheld.

One of several instances presumably relied on by the Master as evidence of waiver of the contract requirements was in connection with the changes in the apartment to be occupied by Dr. Fisher, a dentist. The testimony in this regard is to the effect that the owner who was about to go away on a trip told the architect to get in touch with Dr. Fisher the dentist and arrange the apartment to suit the dentist's convenience (S. C., p. 280, ll. 10-25). That was done and the changes made in accordance with the dentist's instructions, but no written order was signed by the owner directing the change. That the owner cannot escape payment for the change needs no argument. He waived the contractual requirement of a written order.

In *Headley* v. *Cavileer,* 82 N. J. L. (E & A) 635, Mr. Justice Parker speaking for this Court at page 638 said:

> "* * * until the Legislature sees fit to enact some statute of frauds covering this point, building contracts solemnly entered into in writing and under seal must be subject to radical change by the mere conversation of the parties, if such conversation answers the test of a contract at common law."

He who seeks equity must do equity. We respectfully submit that the appeal should be dismissed.

McDERMOTT, ENRIGHT & CARPENTER,
Solicitors for the Defendant-Appellee, Irving Trust Company, as Trustee in Bankruptcy for Indiana Flooring Company.

THE COURT PRESS, INC., N. Y. C.

162MAY.1.1932

Filed after the Oral Argumen
by leave of Court.

New Jersey Court of Errors and Appeals

Between MARTIN J. MACDONNELL, Complainant-Appellant, and MICHAEL J. VITILLE, *et al.*, Defendants-Appellees.	On Bill,&c., On Appeal from the Court of Chancery.
Between MARTIN J. MACDONNELL, Complainant-Appellee, and MICHAEL J. VITILLE, JAMES J. KINSELLA & JOSEPH CUNHY, Defendants-Appellants.	On Bill,&c., On Appeal from the Court of Chancery.

Reply Brief of Defendants-Appellees and of Defendants-Appellants.

Statement.

There are before the court three appeals. This reply to the appeal of the complainant (Owner) is filed on behalf of the defendants (General Contractors for the payment to them of the amount as found by the Master (S. C., page 95), and on behalf of the appeal of their solicitor for the payment of the compensation due to the solicitor for his services in proving the claim of the general-contractors, the successful parties.

All page references are to the State of Case prepared in the appeal of the (Owner) Complainant-

Appellant, all of the exhibits and testimony are there printed at length, whereas in the State of Case prepared for the appeal of the General Contractors, Defendants-Appellants; not all of the testimony and exhibits was printed.

The State of Case appears to be complete with the exception of a stipulation dictated by the Master and agreed to by counsel and which should be in the testimony at bottom of page 150, S. C., directly before the introduction of Exhibit D-56. This stipulation was inadvertently left out either by the stenographer or the printer and is important. Counsel now appearing for the Owner Complainant-Appellant have been substituted for the original solicitors and evidently did not know of the stipulation as their argument under Point Two would indicate. It was stipulated by Counsel that Michael Vitille, one of the general contractors would give the same answer to each of the forty items of extra work; that he had previously given on a number of the items when testifying on the list set forth in Exhibit *D-56,* that is to say, that he would testify, that each item of extra work was ordered either by the owner or architect and that at the time the orders were given, a promise to pay a fixed or a reasonable amount was made by the owner or the architect. A reading of the testimony on page 150 will readily show that something was said before the bare statement therein as to what was said by Mr. Bianchi.

Reply to Point I.

The owner has, by way of defense to the claim of the general contractors, stated that the building was not completed in accordance with the contract,

and that the general contractors have failed to produce a final certificate.

This point on the question of the final certificate has been well covered in the master's report (S. C., page 60) and the general contractors respectfully submit that in view of the following letter, questions and answers, coupled with the circumstances hereinafter mentioned, and the law herein cited, that the master was justified sitting as a jury, to find as he did, that the withholding of the certificate under all the circumstances amounted to legal fraud. The architect kept promising to make up a certificate, give no reason for not doing so, and finally none was made (S. C., pages 457-465-466-476). His acts were not honest, not sincere and the certificate was fraudulently withheld.

On this point the courts attention is especially called to a letter sent by the architect, David Ach, dated October 31, 1928, and the testimony given. The letter reads as follows (Ex. D-57, page 569):

October 31, 1928.

Mr. M. J. Vitelle, etc.,
My Dear Mr. Vitille:

I expect to be finished with *your* certificate *surely* by Friday of this week.

Very truly yours,

DAVID ACH.

From the completion of the building in October 1927 to the date of the above letter conferences were held with hopes of settlement and general contractor started no suit, which was justified in view of the above defense. (S. C., 439-415-453-456-457-465-476).

On this point the architect testified as follows (Middle of page 305):

Ques. *So that on October 31, 1928, when you said to Mr. Vitille, I expect to be finished with your certificate surely by Friday of this week, you intended to give him a certificate?*

Ans. *Yes.*

The courts attention is directed to this question and answer made by the architect (Middle 304):

Ques. *Now isn't it a fact that you always told him* (contractor) *you would give him a certificate?*

Ans. *Yes.*

Ques. *And you told Mr. Keeler that too?*

The court's attention is further directed to this important question and answer by the architect (Top page 275):

Ques. (By the Master) *In your opinion, was this building substantially completed by the contractors?*

Ans. *I would say it was. Tenants occupied it. That's substantial completion.*

The certificate on which the defendants are relying upon as a defense to this suit, was the final certificate and the architect testified that he had granted eight certificates, that the final one would be the "ninth" and in connection with this, the testimony will show that all of the alleged omitted or substituted work had been omitted or substituted, prior to the issuance of the eight certificates by the architect, so that the architect and the owner had acquiesced in whatever changes and substitutions had been made by the contractors, and had waived any rights or claims that they might have had against the contractors, by reason of the said changes, because *at the time that the eighth certificate was issued the building had been complet-*

ed, as the following testimony of the architect will disclose,

> By the Master (Top of page 285, S. C.)
>
> Ques. Mr. Ach, can you tell from your records what was the date of the last certificate that you issued?
>
> Ans. The 8th payment was the last certificate and it was issued under date of August 20, 1927.
>
> Ques. Have you that certificate?
>
> Ans. Yes, sir.
>
> Ques. After the issuance of that certificate, was any work at all done by the contractors on this apartment?
>
> Ans. Yes.
>
> Ques. How much about?
>
> Ans. That was practically the end of the job. There was some painting done; flooring work; I think most of it was painting and the finishing up.
>
> Ques. The building was completed when did you say, when it was completed?
>
> Ans. I think they started to occupy it around the first of September and October, 1927.

The court's attention is directed to the fact disclosed by the above testimony; that *the tenants started to move into the building ten days after the issuance of the eighth certificate, which was dated August 20, 1927,* that is to say between the first of September and October, 1927.

Charles Scheidckir, a building expert called by the owner, testified as follows on the question as to whether the building was substantially completed (S. C., page 508, line 15).

> By the Master:
>
> Ques. This building is substantially completed, is it not?

Ans. As a speculative apartment, it is just as good, but it is not according to the specifications.

By the Master:

Ques. You know that there were numerous changes made from what you hear?

Ans. Merely from what I hear. I was here before.

Ques. And you did not go to the architect or to the owner to ascertain what changes they had conceded, and then see whether or not the building had been constructed in such manner?

Ans. I did not.

By Mr. Bianchi:

Ques. But is this building substantially completed with the exception of these particulars that you have mentioned in your direct-examination?

Ans. Yes.

By the Master:

To Edward Keeler, expert for contractor, (bottom 331):

Ques. From your experience and examination of this building and specifications, do you say that these are properly chargeable items, confining yourself, of course, to the items that you personally saw were put into the building, for extra charge under this contract?

Ans. They were.

Ques. Can you tell whether the contract has been substantially complied with from the character of the building as you find it on your inspection?

Ans. Yes.

Ques. Do you think that the work had been done in a good workmanlike manner?

Ans. It has.

The withholding of the final certificate was not justified or honest. My reason for citing the above testimony is that I believe that the general contractors have brought their case, through the weight of the above evidence backed up by the indisputable fact that the building was accepted and occupied by the owner and his tenants, within the law as laid down by the following cases.

> *Welch* v. *Hubschmett Building, etc. Co.*, 61 N. J. (32 Vr.) 57, 38, Atl. 824. A provision in a building contract that the decision of the architect shall be final and conclusive is binding, *subject to the implied condition that the decision be honest.*
>
> *Chism* v. *Schipper,* 51 N. J. L. (22 Vr.), 1, 16 Atl. 316, 2 L. R. A. 544. When a building contract provided that the decision of the architect should be conclusive on the question whether work done in the course of the erection of the building was within the specifications or not, held, that it was an implication, indispensable to the effectuation of the purpose of the parties, that such decision should be an honest one.

At no time throughout the (whole) construction of the building, did the owner or the architect *stop the contractors* from doing their work, either by verbal notice, written notice or in any other manner, but it was amply shown that the owner lived directly across the street from the building, (S. C., page 415) that he saw what was going on from day to day, that the architect made frequent calls at the building, (S. C., page 311), that he saw the work that the contractors were doing, and that whatever the contractors did was in accordance with the wishes, demands and orders of the owner and architect, it is not reasonable to believe that the owner and architect would have allowed the

contractors to complete the building in the manner that they did, unless they were absolutely satisfied with the performance of the work that they were doing, and therefore, there was no reason for withholding the final certificate in view of the fact that at the time of the issuance of the eighth certificate, the building had been completed with the exception of a little painting work and finishing up (S. C., page 285), and in that particular, the court's attention is called to the following case:

> *Feeney* v. *Bardsley,* 66 N. J. L. (37 Vr.) 239, (E. & A.) 49 Atl. 442. If a contractor contracts to erect a building, *if he substantially complies with the contract,* even though he has failed in some minor particulars, he is entitled, to recover the contract price, less what will be a fair allowance to the owner to make good the defects in the performance of the contract.

In keeping with the opinion of the court in the above case the master in his findings made a proper allowance to the owner for whatever omissions or defects that may have existed in the performance of the contract, (S. C., pages 66-70).

Throughout the whole case with almost 700 legal cap pages of testimony taken, there was not a scintilla of evidence produced to show a demand of any substantial nature made by the architect or owner upon the general contractors, to do any work of any nature whatsoever by which it could be indicated that the building had not been substantially completed. *And there was no testimony whatsoever that the architect specifically refused to issue a certificate for any particular cause.* (S. C., top page 308).

I also desire to call the court's attention that the question of the architect's certificate was not

made an issue in the complainant's Bill, but that the owner simply contended in his bill that he was only indebted to the general contractors for the sum of $3,646.00, whereas, the general contractors contended that they were entitled to the sum of $30,186.00, which covered the balance due on the contract and the extra work (S. C. 62, page 16).

The testimony from *the facts and circumstances indicates that the issuing of the final certificate was waived* when neither the owner nor the architect did not demand and insist upon certain work being done before the issuing of a final certificate and as cause for not issuing it. *The general contractors acted in good faith and patiently waited* for their payment, *they did not start suit* nor *file any mechanics' lien,* such as they would have done if they, had not, had faith in the promises made to them by the architect and the owner that they would be paid (S. C., 476, 465, 466).

Reply Point Two.

The general contractors filed an itemized statement, (Ex. D-56) (S. C., pages 558 to 568), alleging that the reasonable value of their extra work was $13,527.97, and on which items the Master allowed the sum of $9,737.27. On this point as to the amount of extra work performed by the contractors and its value, several days were spent in taking testimony, and the many pages prove that from the beginning of the building to its completion, there were numerous changes made by the owner, and the architect and that they also *made many changes because of the errors made* in the plans and specifications as drawn by the architect.

The itemized list gave in minute detail, all the extra work and the contractor testified that for part of the extra work there were written orders and that for other extra work there were oral orders given by the owner and the architect, together with promises made by the owner to pay for each item of extra work before the doing of the work.

The testimony of the owner, page 456, that of his first attorney page 453 and that of the general contractor pages 465-466 and on page 476 relating to conferences held towards settling of claims for extra work and payment of general claims would indicate that there never was any serious dispute, but that there was extra work and that the general contractor and his attorney were justified in their belief that there would be an amicable settlement of the claim for extra work and balance due on the contract without rushing headlong into Court. Everybody expected a friendly settlement till suddenly other attorneys filed the Bill in Chancery.

The testimony of David Ach, the architect starting on bottom of page, S. C., 275, would indicate that it was a fact that there were many changes made in the plans and specifications both by the owner and the architect. It therefore stands to reason that as a result of changes made, extra work and extra material were used, and it all resulted in the extra items of which there were forty, which were practically all admitted with the exception as to their value by the architect, he testified that as to a few there were written orders made when the building was first started, but that thereafter the rest were by oral agreement. See bottom of page 275, and top of page 276.

By the Master:

Ques. There is no doubt that there were

several changes with your order and the order of Dr. MacDonnell in respect to these plans and specifications?

Ans. Yes, there were changes made.

Ques. Did these changes cover certain omissions as well as certain changes in material and so forth?

Ans. Yes. Among the omissions were the omission of the kitchen dressers throughout the house and the substitution of another factory dresser, and there were other changes made. Dentist apartment was put in and the apartment in the first floor in the southeast corner was changed—the arrangement of the rooms. The basement, janitor's apartment, was changed, and the laundry was omitted, and a few other changes were made.

Ques. How about the plumbing in the bathroom?

Ans. Yes, the location of the plumbing was changed.

Middle page 278 question by the Master to Mr. Ach:

Ques. *Mr. Ach, as I understand it, some changes were ordered by writing and some verbally by you, right?*

Ans. *I believe that is correct.*

On page 280 *he (architect) testified that changes were submitted to the owner before any work was done.*

Ques. *Mr. Ach, you would not make a change, a very material change, changing an apartment from an ordinary apartment to a dentist's apartment without the knowledge or order of the owner, would you?*

Ans. *No, sir.*

Ques. *Did you have such an order?*

Ans. *Yes, I considered I did.*

Ques. *You mean Dr. MacDonnell expressly authorized you to change the apartment to suit the dentist's convenience?*

Ans. *That was an expressed order.*

The last questions and answers by the general contractor in his direct testimony were to the effect that *he did no extra work until he had been ordered by the owner and architect, and promises made by the owner to pay for the extra work, and it was stipulated* at the end of the direct examination of the general contractors, that the contractor would so testify to each item, and then the itemized list was offered in evidence, pages 150-151. Thereafter the general contractor was cross-examined on each item of extra work.

Many pages of testimony were taken to sustain the contention of the general contractors, that many of the changes were necessary because of the errors made by the architect in drawing his plans and making his specifications. Pages (S. C.) 153 to 193 were all used in cross examination of general contractor on extra work.

The complainant insists that under article 15 of the contract, the general contractors cannot recover for any extra work unless they have a written order for the same, and the contention of the general contractors is that under the law of this State, where a contractor receives an order to do certain work and a promise from the owner to pay for the same, that the owner cannot set up the provisions of article 15 as a defense.

Our contention is that the giving of an order and the making of a promise to pay is a separate and distinct contract as to each item, and that the testimony in this case clearly brings all of the extra work performed within the decisions of the following cases, and that the Master was justified in finding for the general contractors on the extra work.

Fortunate v. *Cicalese,* 108 Atl. 183, 93 Law 461, Court of Errors and Appeals, November

17, 1919. The complaint that the court allowed testimony as to extra work without a written order, contrary to the contract requirements, is without merit, where the judge properly charged that the question was, Did the contractor and the owners agree that extra work should be done, and did the owners agree to pay for it?

If there was an express contract to pay for the extra work, but amount was not fixed, plaintiff contractor was entitled to a reasonable sum.

Headley v. *Cavileer,* Court of Errors and Appeals. March 4, 1912, 82 Atl. 908, 82 Law. 735. Where a building contract provides, in substance, that no additions or alterations made during the progress of the work shall be regarded as extra work unless agreed to in writing and signed by the parties before such work is begun, the mere performance of extra work without such written agreement will not give use to an implied waiver of the provisions of the contract in that respect.

But, where it is made to appear subsequent to the execution of the original contract, and during the progress of the work, the owner and contractor made further oral agreements that certain changes or alterations should be considered as extra work, and specifically agreed upon the price to be paid for the same or expressly agreed that a reasonable price should be charged therefore in addition to the price, a jury is entitled to infer that the stipulation forbidding a recovery for such extras without written agreement has been waived by the parties.

Reply to Point III.

Part three of the complainant's brief relates to the Master's findings as to omitted and defective work.

There were many and many pages of testimony taken in connection with the owner's claim and *I submit that it is simply impossible for any one to draw any definite conclusion as to this work, except by some one sitting as the Master did, in the status of a jury* and drawing his conclusions not only from the facts and figures submitted, but from the general demeanor of the various witnesses, and in connection with this the general contractors had Mr. Michael J. Vitille testify. He was the person who supervised all of the work and was on the job from the beginning to the end.

He was the person who had had over twenty-five years of practical experience in the building game, and who had kept detailed statements of every cent that had gone into the building and he presented in court an itemized statement for all material used in the building, he presented an unusual set of books, far different from what is generally kept by contractors, and he was able to testify in the most minute manner.

Mr. Edward Keeler testified for the complain- and gave a detailed statement of all the work that had been done on the job and covered many pages of testimony. On page 331 Mr. Keeler testified as follows:

> Ques. (By the Master) *Can you tell whether the contract has been substantially complied with from the character of the*

building as you found it on your inspection?
Ans. *Yes.*
Ques. *Do you think that the work has been done in a good workmanlike manner?*
Ans. *It has.*

He was an expert witness who gave qualifications covering thirty-five years of actual experience, that he was now employed by various Surety Companies in completing work, not only on small buildings but on some of the largest buildings in the State of New York, that his largest in New Jersey was the million dollar job of completing the Asbury Park High School. He, like Mr. Vitille, produced long statements showing each item of work. The defense produced Mr. Scheidcker, who testified to various changes in the building but in conclusion testified like Mr. Keeler did, that the contract had been substantially complied with (page 508).

I therefore feel that as stated before that the Master was in the best position to draw conclusions as to credits and charges and respectfully submit to your Honors on this point pages 66 to 78 of the Master's Report showing the claims and counterclaims of the owner and general contractors on the question as to the reasonable value of the extra work and of the value of omissions, etc.

Many days were spent in reaching the findings and the conclusions that the master did, and in my opinion brings his findings and his conclusions within the following decisions of our courts:

> "The conclusions of a master who has examined and seen the witnesses, are always regarded in equity as entitled to great respect and where they are clearly supported by competent witnesses who are unimpeached, his

report will not be set aside because there is conflicting testimony, unless it clearly appears from the nature and weight of such testimony, that the master has erred. *Izard* v. *Bodine,* 9 N. J. Equity, 309. *Haulenbeck* v. *Cronkright,* 23 N. J. Equity 407, affirmed, 45 N. J. Equity, 513.

The rule of the court is that the report of a master on matters referred to him will be taken as correct, until some error is shown. The burden of showing an error is upon the exceptant. *National Bank* v. *Sprague,* 23 N. J. Equity, 21.

VanNess v. *VanNess,* 32 N. J. Equity, 3729. The conclusions of a master will be considered justified by the evidence until a contrary is made to appear.

Blaubell v. *Ackerman,* 23 N. J. Equity, 495, affirmed 25 N. J. Equity, 570. When from the whole case the result at which the master has arrived is as consonant with the evidence as a whole, and is properly just with reference to the fixed and known date of the case as any that could have been reached, although the court is unable to see by what precise view of the evidence the master reached this result, this report will not be set aside.

Sinnickson v. *Bruere,* 9 N. J. Equity, 650. The court will not interfere with the report of a master on a question submitted to him depending upon the credibility of witnesses, unless the error of the master is satisfactory and clearly made to appear.

Clark v. *Condit,* 21 N. J. Equity, 322. Where the evidence of a master is evenly balanced as conclusions, they will not be set aside until clearly wrong.

Reply to Point Four.

The master and the Vice-Chancellor charged the complainant with interest on the full amount found to be due to the contractors. The interest allowed was from October 1, 1927 to July 1, 1930, when the Master's report was filed and amounts to $3,385.95. (Master's report, S. C., page 95). The complainant alleges that this allowance was erroneous, and the *general contractors submit the allowance of interest as matter of damages* in this case was proper.

The *owner* in this particular case took possession of the building and occupied the same from on or about September 1, 1927, and is still in possession.

From that time on the owner has been drawing an income from the building. The building was completed at the time the tenants moved in and *as a result of the building being completed, the owner was able to collect rent.* The master has found that at the time the building was occupied and taken over by the owner, *there was due* to the general contractors the total sum of $20,521.07, and to this sum he added interest of $3,385.05 (S. C., page 95). The master having found that that sum was due to the general contractors had a right to say as a matter of law, that *that amount should have been paid* to the general contractors *at the time that the owner took over the actual possession of the building* on October 1, 1927. See testimony of architect, S. C., page 285.

Under what theory or principal can it be said that the owner should draw an income; rent from the building, and not pay the general contractors their share of that income on the money that was due to them from the *erection of the building,* and

which *made it possible* for the owner to have a building to which he could bring tenants? The fact that the owner was able to collect rent on and after October 1st, clearly brings this present case within that line of cases, which hold that *interest is charged and allowed in accordance with principles of equity in order to accomplish justice in each particular case.*

Certainly, justice could not prevail in this case if the owner be allowed to receive rent and receive the fruits of the building, without paying interest on the unpaid balance due to the contractors.

In connection with this principal I submit the following cases:

> *Hoover Steel Ball Co.* v. *Schaeffer Ball Bearing Company,* 107 Atl. 428. Interest as matter of damages is charged and allowed in accordance with principles of equity in order to accomplish justice in each particular case.
>
> Interest is allowed as matter of damages for the detention of the debt of the legal rate. *Agnow* v. *Board of Education,* 83 N. J. Equity, 336, 90 Atl. 135, the court said:
>
> It should be born in mind that the whole tendency of courts of law and courts of equity for a considerable period of time has been to break away from hard and fast rules, and charge and allow interest in accordance with principles of equity in order to accomplish justice in each particular case.
>
> *Erie Railway Company,* Ackerson 33 N. J. L., page 33. Interest must be assessed as damages for the detention of the debt.

There are no set rules on the question of interest and each case must stand on its own merits and in the present case, it is submitted that under the

facts herein that the principles of equity require the payment of interest on a debt which was due and payable on the completion of the building, October 1, 1927.

Part Five—As to Cost.

The Bill filed *was one in the nature of a Bill of Interpleader,* but not an out and out Bill of Interpleader. The complainant in drawing his Bill did not set forth a statement of facts that would put him in the category of one who states that he has a certain amount of money in his hands and does not know to whom to pay the same, and seeks the protection of the court, but instead came into court and said, under the 26th paragraph of his Bill, (S. C., page 27) that he was willing to pay into court the sum of $3,646.00. He alleged in his Bill that the general contractors were indebted to him for the sum of $12,000.00 for omissions and defective work (parg. 24, p. 37). He asked that a general account be taken between the complainant and the general contractors, so that when the complainant came into court he did not produce in court all of the money that was due from him to the general contractor or that the contractor alleged was due to him, *nor did he disclaim any interest* in the money that was to be deposited in court.

After the complainant had been ordered to deposit with the Clerk of the Court of Chancery the sum of $30,120.00; the complainant came into court and made his claim to this money, so that it cannot be said that this is a Bill of Interpleader, where under the strict rules of the Court of Equity, it is necessary for a person who files a Bill of Interpleader to disclaim any interest whatsoever

in the fund placed in the Clerk's possession (S. C., page 46).

The litigation in question which resulted in almost seven hundred pages of testimony, legal cap size, being taken before the master, was the result of the owner's refusal to pay the general contractors the balance due on their contract and the value of the extra work.

If the court agrees with the report of the master that there is due to the general contractors the sum of $23,907.02 (S. C., page 95) *being the amount arrived at by him after taking in consideration all of the testimony as to the value of the extra work, value of omissions and credits due to the owner, and allowing interest on the balance due from October 1, 1927, then I respectfully submit that the general contractors have prevailed in their claim, and that the complainant should be made to pay all costs, consisting of the allowance made to the Master as his fee, such allowance as may be made by the court to the prevailing party as counsel fees and costs as are fixed by our Chancery Rules.*

None of the decisions set forth by the complainant in his brief, were cases where costs were allowed or Bills of Interpleader, apply to this action, for in my opinion this suit is far from being in the same category as the ordinary Bill of Interpleader, and *it would be very unfair to say that the complainant can come into court, try his very best to defeat the claim of the general contractors, and then after the general contractors have succeeded in establishing the greater portion of their claim,* to say that out of the judgment or decree the contractors should have to pay counsel fees and costs.

By the decree of this court the contractors have

succeeded and they certainly cannot be penalized the expenses of this litigation.

The owner did nothing that would bring him within the circle where justice and equity should relieve him of this expense of paying the masters' fees, counsel fees and costs.

In conclusion, it is respectfully submitted that the master sitting as a jury hearing, seeing and watching all of the witnesses throughout the many days that it took to take all the testimony, filed with this court conclusions that were absolutely in keeping with the law and facts as he found and determined them (pages 55 to 96). It was a praiseworthy report to say the least.

The question on the issuing of the final certificate was a very delicate one and it was only through a careful study of the case as a whole, coupled with the general propositions of law on the subject, that the master was finally able to determine that the ultimate act of the architect in not writing out the certificate, was simply one of indifference, insincere, not honest and for no substantial reason whatsoever, and amounted to what he defined as "legal fraud".

The testimony of the architect, and of the experts produced by the complainant, the taking over of the possession of the building and occupying the same with tenants about ten days after the delivery of the eighth certificate was proof of the master's justification in finding as he did, that the ninth and final certificate should have been delivered in keeping with the promise made on October 31, 1928, and as testified to on page 305, that he, the architect, intended to give the general contractors a certificate.

As to the question of omissions and the perform-

ance of the contract the master heard many pages of testimony covering every possible detail, and sitting as a jury, he was justified in giving whatever credits he deemed the owner and general contractors were respectively entitled to (S. C. 95).

The masters' report in this case is unusually clear and his facts and figures show a thorough knowledge of the subject, that he carefully weighed the evidence pro and con, and his findings should be affirmed by this court, as the master was in the best position to judge the merits and demerits of the respective claims made by the owner and the general contractors. My reason for stating that this court should affirm the findings of the Master is because the Vice-Chancellor submitted no reasons for the changes he made to the master's report (S. C., 103-104).

Respectfully submitted,

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