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New Jersey
Court of Errors and Appeals

Bill of Complaint.

(*Filed, Feby. 26, 1923*)

IN CHANCERY OF NEW JERSEY

To His Honor, Edwin Robert Walker, Chancellor of the State of New Jersey.

The complainant, Greenwood A. Robinson of West Hoboken, New Jersey, respectfully shows that:

1. On June 14, 1916, he entered into a contract with the American Master Organ Company, Inc., a copy of which is hereto annexed and marked Exhibit 1.

2. This contract was never performed by the American Master Organ Company, or any one on its behalf. Complainant frequently in letters and by telephone called the attention of the American Master Organ Company and its representatives to its failure to perform its contract, and under date of January 14, 1919, notified George J. Kilgen, who is now President of the defendant company, as to the condition of said organ, a copy of said notification being hereto annexed and marked Exhibit 5.

The American Master Organ Company proceeded to carry out said contract, but it never performed the same in its entirety. During the pro-

gress of the installation of said organ, the American Master Organ Company and its representatives continually represented to this complainant that they were in need of funds, and that if he would advance funds to them, they could proceed more rapidly with the completion of the installation of said organ, and by various promises and persuasion prevailed upon this complainant to advance to them sums of money which were not then due under the terms of the contract, in the aggregate amounting to the sum of $1600.00.

3. By an instrument dated September 30, 1916, the said American Master Organ Company assigned its right to the contract so made with complainant as aforesaid, a copy of which instrument is hereto annexed and marked Exhibit 2.

4. In or about the month of June 1917, a bill of complaint was filed in this court against the American Master Organ Company alleging that it was an insolvent corporation and subsequently this court so adjudicated and appointed a receiver accordingly.

5. On May 27, 1918, an order was made in said cause directing said receiver to sell and transfer among other things all the right, title and interest of the American Master Organ Company in and to its contract with this complainant, such sale to be made to the Pipe Organ Maintenance Company, a copy of which order is hereto annexed and marked Exhibit 3.

6. By an instrument dated June 30, 1918, Wood McKee, Receiver for the American Master Organ

Company, did attempt to make sale in accordance with said order, by virtue of which instrument the defendant herein claims to have obtained title to the organ which complainant contracted to purchase from the American Master Organ Company as aforesaid, a copy of which said instrument is hereto annexed and marked Exhibit 4.

7. On June 30, 1918, there was in existence no such corporation as the Pipe Organ Maintenance Company, a corporation of the State of New Jersey. The Pipe Organ Maintenance Company, a corporation of the State of New Jersey, the defendant herein, did not become incorporated until January 30, 1919.

8. Complainant avers that the said Pipe Organ Maintenance Company so incorporated as aforesaid, was incorporated by George J. Kilgen, who is a practicing attorney of the State of New York, Franklin O. Case and Lehman Strauss; that the said Pipe Organ Maintenance Company has carried on no business except to attempt to collect the moneys due under the various contracts assigned to the Pipe Organ Maintenance Company by the Receiver of the American Master Organ Company as aforesaid; and in so doing defendant has made minor repairs to overcome complaints made by those who had contracted to purchase organs from the American Master Organ Company; it has no factory; it has no office force; it has no steady employees; it carries on no general business; it has no assets in the State of New Jersey excepting whatever contracts it may have purchased from the Receiver of the American

Master Organ Company and still possesses and these are of doubtful value; it has no pecuniary responsibility and is not financially able to respond in damages to this complainant, if this complainant is successful in this litigation.

Under the terms of the order made by this court on May 27, 1918, said receiver was directed to sell to the Pipe Organ Maintenance Company certain contracts of the American Master Organ Company, including the contract of this complainant, upon the said purchaser assuming any obligations of the American Master Organ Company to the contractors upon said contracts, said receiver did not sell said contracts pursuant to said order and did not provide in the bill of sale executed and delivered by him that the purchaser of this complainant's contract should assume the obligation of the American Master Organ Company to this complainant.

The above named defendant was not organized when this complainant's contract was sold by said receiver, but the individuals who were interested in the purchase from said receiver of this complainant's said contract, one of whom was George J. Kilgen, who afterwards became one of the incorporators of the above named defendant, fearing that, irrespective of the actual terms of the bill of sale executed by said receiver, they would be called upon to assume the obligation of the said American Master Organ Company by virtue of the terms of sale directed by this court, proceeded to obtain a certificate of incorporation for a corporation known as the Pipe Organ Maintenance Company, which is the defendant herein.

9. On January 31, 1919, complainant received a notice from the above named defendant, a copy of which is hereto annexed and marked Exhibit 6.

10. In February 1919, complainant was served with a summons and complaint in a suit in replevin instituted by the above named defendant in the Hudson County Circuit Court against this complainant, a copy of which said summons and complaint is hereto annexed and marked Exhibit 7.

11. Annexed to said complaint were four exhibits marked A. B, C, and D. Exhibit A in said complaint being Exhibit 1 annexed hereto; Exhibit B in said complaint being Exhibit 2 annexed hereto; Exhibit C in said complaint being Exhibit 4 annexed hereto; Exhibit D in said complaint being Exhibit 6 annexed hereto.

12. Answer and counterclaim to said summons and complaint were duly filed by this complainant and the defendant herein duly filed its reply and answer to counterclaim, and when said action in said Circuit Court came on for trial, said Circuit Court being of the opinion that said action should be transferred to the Court of Chancery of New Jersey, ordered the same transferred accordingly; and upon said cause coming on for hearing in said Court of Chancery said court directed that the issues should be reframed in accordance with the practice of this court, and that this complainant should file his bill of complaint accordingly, and that in the meantime proceedings on the action transferred from the Circuit Court to the Court of Chancery should remain in abeyance.

13. Neither the American Master Organ Company, nor any one else has ever completed said organ in accordance with the terms of said contract at any time, nor has this complainant ever accepted said organ.

14. Under the terms of said contract made between complainant and the American Master Organ Company complainant delivered to the American Master Organ Company a Wurlitzer organ which he had in his premises known as the Colonial Theatre, at the time of the making of said contract, and shortly thereafter entered into a contract with said American Master Organ Company under and by virtue of which, said Company agreed to place said Wurlitzer organ in a first class condition for a sum not to exceed $50.00 and to sell it for a price not less than $2,500.00, upon the understanding that complainant would consent to apply the moneys realized upon the sale of said Wurlitzer organ and due to the complainant, to the balance of the purchase price due on the organ so purchased from the American Master Organ Company, said American Master Organ Company agreeing that if the complainant desired, it would allow him to retain one-half of said proceeds of sale so due to him, the remaining one-half to be applied to the purchase price of the organ so purchased from said American Master Organ Company by the complainant aforesaid.

15. Said Wurlitzer organ was duly delivered by complainant to said American Master Organ Company but said American Master Organ Com-

pany has never accounted to the complainant for the amount of money for which it agreed to sell said organ for complainant, nor has it ever made any allowance to complainant for the same or any part thereof, and the whole amount due to the complainant out of the price for which said American Master Organ Company agreed to sell said Wurlitzer organ, to wit, a sum not less than $2450.00, is now due complainant.

16. The American Master Organ Company, by reason of its insolvency, is wholly unable to carry out or perform its contract, either in the completion of the organ or in fulfillment of its guarantees for a term of years.

17. Complainant avers that at the request of the American Master Organ Company and its representatives, he has at various times expended divers sums of money in attempting to overcome certain failures on the part of said organ, and that he is entitled to be reimbursed for all moneys expended by him in so doing.

18. At the time when he entered into the contract with the American Master Organ Company as aforesaid, the American Master Organ Company was operating a factory at Lakeview, New Jersey; it had a considerable number of employees and was reputed to be a sound and solvent concern, financially responsible and able to carry out the terms of its contract.

19. Complainant avers that the contract entered into between him and the said American Master Organ Company was an executory contract and

of such a nature as to be incapable of assignment by the American Master Organ Company without the consent of this complainant; that this complainant never consented thereto and that therefore the assignment of said contract by the said American Master Organ Company to said John B. Mason was void and unenforcible on the part of said Mason against this complainant; and that likewise and for the same reason the attempted assignment of said contract and sale thereof by the receiver of this court to the said defendant, purporting to sell all of the right, title and interest of the American Master Organ Company in and to said contract, is likewise unenforcible and void as against this complainant.

20. Complainant avers that the said defendant took nothing and acquired no interest in or to the organ which the American Master Organ Company had agreed to build and install for this complainant, because at the time of the alleged sale by said receiver to this defendant the American Master Organ Company had no rights in or to said organ, or the contract of sale thereof, inasmuch as it had previously disposed of all of its right, title and interest thereto by virtue of the assignment so made by the American Master Organ Company to the said John B. Mason as aforesaid.

21. Complainant avers that the said American Master Organ Company became insolvent in the year 1917, and it has been dissolved in accordance with the statutes of the State of New Jersey providing for the dissolution of insolvent corpora-

tions, and that said American Master Organ Company is now no longer in existence, and by reason thereof it has become incapable of performing its contract with this complainant, and that this complainant is not obliged to accept either the defendant or anyone else as a substitute for or assignee of the American Master Organ Company.

22. Complainant avers that even if said contract made by him with the American Master Organ Company was assignable and even if the defendant could have acquired any right, title or interest in or to said organ, or the contract so made by this complainant with the American Master Organ Company as aforesaid, after the receiver of the Court of Chancery had made sale thereof in accordance with the order of this court, yet inasmuch as the said receiver did not make sale thereof in accordance with the order of this court, and inasmuch as the defendant has at no time assumed the obligations of the American Master Organ Company, under said contract with this complainant as provided in said order, it is not entitled to maintain any action against this complainant to recover said organ or any balance of purchase price that would have been due if said contract had been fulfilled.

23. Complainant avers that he is now and always has been ready and willing, and hereby offers to return the said organ to whomever may be entitled to receive the same, upon this complainant being reimbursed to the amount of moneys that he has paid on account of the purchase price of said organ and expended in attempting to build

and install said organ in accordance with the terms of said contract, and the value of the Wurlitzer organ so delivered by him to the American Master Organ Company as aforesaid.

Complainant is without adequate remedy in the court of law and therefore prays:

1. That said contract may be declared to be rescinded on the part of the complainant and this complainant relieved from any further performance thereof on his part.

2. That an accounting may be had and that a decree of this court may be made adjudging and declaring that this complainant is entitled to be repaid all of the moneys paid by him to the American Master Organ Company on account of purchase price and moneys expended by him in endeavoring to build and install said organ in accordance with the terms thereof, and be paid the value of the Wurlitzer organ delivered by him to said American Master Organ Company to be herein ascertained, and that upon receiving such payment he is to deliver said organ now in his possession to such person, firm or corporation as this court may find is entitled to receive the same.

3. That a decree may be made adjudging and decreeing that this complainant is entitled to hold said organ and retain the same in his possession until such time as the moneys found to be due to him shall be repaid.

4. That a decree may be made by this court perpetually enjoining and restraining the defendant from taking any further proceedings in the action so instituted in the Hudson County Circuit Court as aforesaid to recover possession of said organ, unless and until the complainant is first repaid the amount of moneys so found to be due to him by the decree of this court.

5. That a decree may be made by this honorable court adjudging and declaring that the alleged sale of said contract made by the said receiver of this court to the defendant is null and void as against this complainant, and that the defendant is entitled to no relief against this complainant by virtue thereof.

6. That a writ of subpoena may issue commanding said defendant to answer this bill of complaint and to abide by such decree as this court may make in the premises.

Solicitor and Counsel for Complainant.

Exhibit 1.

AGREEMENT made this 14th day of June, 1916, by and between the

AMERICAN MASTER ORGAN COMPANY, INC.

a corporation organized under the laws of the State of New York and having its factory and office of management at Lake View, Paterson, N. J., party of the first part, and

GREENWOOD A. ROBINSON

residing in West Hoboken, N. J., party of the second part,

WITNESSETH:

1. That the party of the first part, in consideration of the agreement herein of the party of the second part, agrees to construct, erect and sell to the party of the second part, and American Master Organ, according to the annexed specification. Said organ to be erected complete and ready for use in the premises.

COLONIAL THEATRE

in the City of West Hoboken, on or before the 4th day of September, subject, however, to delays from fire, strikes, or causes beyond the control of the party of the first part.

2. The party of the first part further warrants that said organ when completed shall be free from any defects in material or workmanship and agrees that if any such defect or defects shall

develop within five years after completion of said organ, the said party of the first part will, upon written notice, within such period of defect or defects, forthwith remedy same at its own expense, provided, however, that the party of the second part shall permit or allow no other workmen or builders to be admitted into the interior of the organ for the purpose of investigation, tuning, repairs or otherwise, without the authorization in writing of the party of the first part. The expense of the tuning is assumed by the party of the first part for a period of one year from date, of installment. If at the expiration of this time the party of the second part cares to place the tuning and care of the organ in the hands of the party of the first part, the party of the first part agrees to attend to this work on a yearly basis according to contract form attached, at an annual cost of one hundred dollars.

3. The party of the first part further agrees that it will not, during the period of three years from date hereof, without consent of the party of the second part, install or cause to be installed an American Master Organ within the following described territory.

> West Hoboken and any Building Abutting on or Having an Entrance from Central Avenue—Jersey City North of Manhattan Ave.

But this agreement shall not prohibit the party of the first part from installing any organ in any church or school within said territory.

4. The party of the first part further agrees to remove, at its own expense, the organ now in the above premises to the factory of the first part at Lake View, Paterson, N. J., and to store same free of charge and to permit the examination of said organ by prospective purchasers sent for that purpose by the party of the second part.

5. The party of the second part, in consideration of the agreement herein of the party of the first part, hereby requests party of the first part to construct and erect said American Master Organ and agrees to pay therefor the sum of Fifty six hundred and fifty ($5650.) as follows:

$250.00 thereof in cash upon signing of this contract.

400.00 thereof in cash upon the erection in the above named building of said organ complete in accordance with this contract and the balance as follows:

$150.00 per month.

6. The party of the second part further agrees to prepare at his own expense the necessary space required for the installation of the organ and its motor and blowing gear, and to have same complete at least two weeks before the date specified above for completion of the organ.

7. The party of the second part further agrees to do all wiring necessary; to connect the electric supply wires to the motor supplied by the party of the first part for blowing the organ, and to such other points as may be designated by the party of the first part for the interior lighting

of the organ, and to furnish light and heat for the workmen during the period of installation, regulation and tuning of said organ.

8. The party of the second part further agrees that the party of the first part may procure insurance in a sum not less than eighty per cent of the contract price of said organ, such insurance to be in the name of and for the benefit of the parties hereto as their respective interests may appear insuring the said organ in a good reliable company or companies against loss or damage by fire, water, lighting or tornado; and the party of the second part agrees to pay the reasonable cost of such insurance providing that the same shall not exceed the sum of One Hundred dollars per annum, which insurance shall be continued until the purchase price has been fully paid.

9. It is mutually agreed that the title to and ownership of said organ and all its parts, motor and blowing gear, shall be and remain in the party of the first part, until the contract price, as heretofore stated, has been fully paid, with interest upon deferred payments at the rate of 6% per annum, interest to be computed from date of complete installation, and that upon such payment in full the said organ shall become the property of the party of the second part.

10. The party of the first part further agrees to at all times indemnify and save harmless the party of the second part, his heirs, administrators, and assigns, from and against any and all actions, suits, damages, costs and expenses which

shall at any time hereafter be brought against him, his executors, administrators or assigns, by reason of the fact that he, the said party of the second part, is purchasing or has purchased, and is using or has used the said organ in violation of any of the rights of any other person, firm or corporation, accruing either directly or indirectly from the alleged infringement of any patent or patent rights or otherwise. And that should any suit be brought against the party of the second part, his executors, administrators or assigns, to recover damages in the premises during the time that there shall remain unpaid any balance of the purchase price of said organ, that the party of the second part shall not be obliged to make further payments until he has received proper and sufficient surety indemnifying him against any loss arising from the purchase and use of said organ.

11. The party of the second part agrees to permit the party of the first part to demonstrate the organ to prospective purchasers or other interested persons at reasonable and convenient hours.

12. It is mutually agreed that in case there shall arise any difference between the parties hereto, regarding the completion of said organ, such differences shall, at the request of either part, be submitted to arbitration, which arbitration board shall consist of three disinterested persons to be forthwith chosen, one by each of the parties hereto and a third party by the two so chosen, and the finding of the majority of said

committee as to whether said organ has been fully completed in accordance with this contract, shall be final and binding upon the parties hereto.

It is mutually agreed that no changes, alterations or conditions to this contract shall be valid unless made in writing by both parties hereto.

In Witness Whereof the parties hereto have executed these presents the day and year first above written.

AMERICAN MASTER ORGAN COMPANY,
Inc.

By Jas. T. Jordan
Greenwood A. Robinson,
(L. S.)

Witness
Frank R. White.

SPECIFICATION

American Master Organ.

A	Grand Piano		Full Scale
B	Diaphone	18 ft.	30 pipes
C	Bourdon	16 ft.	
	Concert Flute	8 ft.)	
	Orchestra Flute	4 ft.)	97 pipes
	Piccolo	2 ft.)	
D	Open Diapason	8 ft.)	
E	String	8 ft.	
F	Celeste	8 ft.	
G	Diapason	8 ft.	61 pipes

	H	Clarinet	8 ft.	73 pipes
	I	French Trumpet	8 ft.	73 pipes
	J	Orchestral Oboe	8 ft.	73 pipes
	K	Fox Humana	8 ft.	73 pipes
	L	Chimes		20 notes
10	M	Clockenspiel		2½ octaves
	N	Two Birds		
	O	Snare Drum		
	P	Bass Drum		
	Q	Crash Symbal		
	R	Triangle		
	S	Chinese Block		
	T	Tambourine		

20 PEDAL

Compass 30 notes.

	1	Diaphone	B	16 ft.
	2	Bourdon	C	16 ft.
	3	Diapason	G	8 ft.
	4	Clarinet	H	8 ft.
	5	Snare Drum	O	2nd touch
	6	Kettle Drum	P	
30	7	Kettle Drum	P	2nd touch
		Bass Drum	P	2nd touch
	9	Cymbal Reiterator	Q	
	11	Cymbal Reiterator	Q	2nd touch
	12	Triangle	R	2nd touch

40

Bill of Complaint—Exhibit 1

ACCOMPANIMENT

Compass 61 Notes.

13	Grand Piano	A	Full scale	
14	Bourdon	C	16 ft.	10
15	Open Diapason	D	8 ft.	
16	Concert Flute	C	8 ft.	
17	String	E	8 ft.	
18	Celeste	F	8 ft.	
19	Orchestra Flute	C	4 ft.	
20	Snare Drum (reversible piston	O		
21	Chinese Block	S		
22	Tambourine	T		20

SOLO

Compass 61 Notes.

22	Boudon	C	16 ft.	
23	Open Diapason	D	8 ft.	
24	Concert Flute	C	8 ft.	
25	String	E	8 ft.	
26	Celeste	F	8 ft.	30
27	Diapason	C	8 ft.	
28	Orchestra Flute	C	4 ft.	
29	Piccolo	C	2 ft.	
30	Clarinet	H	8 ft.	
31	French Trumpet	I	8 ft.	
32	Orchestral Oboe	J	8 ft.	
33	Vox Humana	K	8 ft.	
34	Chimes	L	2nd touch	
35	Clockenspiel	M		40

36	Clockenspiel	M	2nd touch
37	Triangle	R	2nd touch

COUPLERS

38	Solo to Accompaniment	8 ft.
39	Solo to Accompaniment	4 ft.
40	Solo to Solo	4 ft.
41	Accompaniment to Solo	2nd touch
42	Solo to Pedal	8 ft.

GENERAL

43 Tremulant No. 1
44 Tremulant No. 2
45 Thum Piston for Crash Cymbal
46 Pedal Piston for No. 1 for bird
47 Pedal Piston No. 2 for bird
One Expression Pedal
One Crescendo Pedal
48 Thum Piston crash cymbal-loud

Exhibit 2.

KNOW ALL MEN BY THESE PRESENTS, That the American Master Organ Company, Incorporated, a corporation of the State of New York, with its principal offices in the City of Paterson in the County of Passaic and State of New Jersey, for and in consideration of the sum of Ten Thousand Dollars, four thousand of which is paid and acknowledged upon the date of the signing hereof,

the balance of six thousand dollars to be paid at the convenience of the party of the second part, but not later than six weeks from the date hereof, has assigned and by these presents does assign to John B. Mason of the said City of Paterson, N. J. all its interest in and to three certain contracts for the purchase of organs of said Company as follows:

Contract dated June 14, 1916, entered into by said company with Greenwood A. Robinson, for the installation of an organ in the Colonial Theatre, West Hoboken, N. J., upon which contract there is due the sum of Five Thousand and sixty-five dollars.

Contract dated June 5, 1916, entered into by said company with the Ridgewood Play House Co. of Ridgewood, N. J. for the installation of an organ, upon which contract there is due the sum of four thousand two hundred and seventy-five dollars.

Contract dated July 6, 1916, entered into by said company with the Silver Bow Amusement Co. of Montana, a corporation, with its principal office at Butte, Mont., for the installation of an organ, upon which contract there is due the sum of Eighteen Thousand dollars.

To Have And To Hold The Same unto the said John B. Mason, his heirs, executors, administrators or assigns, for his or their use and benefit forever, subject however and nevertheless, that upon the receipt of the said sum of Ten Thousand Dollars with interest thereon at the rate of

six per cent per annum, that the said interest of the said John B. Mason in and to said contracts shall cease and determine, and the interest hereby conveyed to the said John B. Mason shall be re-conveyed to the said organ company. And the said John B. Mason is hereby authorized and empowered upon the payment of the said sum of ten thousand dollars, to demand and receive of and from the said parties heretofore mentioned, the said sums due under said contracts, and to institute any proceedings in his own name or otherwise to enforce payment thereof, in the same manner and with all intent and purposes as the said party of the first part might or could do were these presents not executed.

And it is hereby agreed and understood that the payment of the said contracts shall be made to the American Master Organ Co. party of the first part, as the agent of the said John B. Mason, and the money so collected by it to be turned over to the said John B. Mason, party of the second part.

In Witness Whereof, the said party of the first part has caused its corporate seal to be hereto affixed and attested by its secretary, and these presents to be signed by its President, this thirtieth day of September, Nineteen hundred and sixteen.

AMERICAN MASTER ORGAN CO., Inc.
James T. Jordan, Pres.

Signed, sealed and delivered
in the presence of
Augustus E. Ely,
Secretary.

Bill of Complaint—Exhibit 2

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

Be it remembered on this 30th day of September, 1916, personally appeared Augustus C. Ely, who, being by me duly sworn upon his oath doth depose and say that he well knows the corporate seal of the American Master Organ Co., a corporation of the State of New York, the assignor named in the foregoing assignment; that the seal thereto affixed is the proper corporate seal of the said company and that the same was so affixed thereto and the said assignment signed and delivered by James T. Jordan, who was at the date and execution thereof, President of said Company, in the presence of said deponent and that said deponent signed the same as subscribing witness thereto.

AUGUSTUS C. ELY

Sworn and subscribed before me
at Paterson this 30th day of
September, 1916.
Wood McKee,
Master of Chancery of N. J.

Exhibit 3.

IN CHANCERY OF NEW JERSEY

Between JAMES T. JORDAN, Petitioner, and AMERICAN MASTER ORGAN COMPANY, Defendant.	On Petition for Appointment of Receiver. Order

The receiver herein having duly filed a petition for the sale of the right, title and interest of said American Master Organ Company in and to the contracts of Herbert J. Coles, Greenwood A. Robinson, Silver Bow Amusement Co., and Ridgewood Playhouse, subject to the lien of an assignment thereof to John B. Mason, to Pipe Organ Maintenance Company, of New York City, and also for the sale to James T. Jordan, of the right, title and interest of said American Master Organ Company in and to an alleged claim against All Souls' Church of Summit, N. J.

And an Order to Show Cause having been made herein directing all the creditors and stockholders of the Company to show cause before the Chancellor, at the Chancery Chambers, at Jersey City, on Monday, May 27th, 1918, at ten A. M. why the prayer of said petition should not be granted, and the receiver to sell said claims; and it appearing that all the creditors and stockholders of said company have had due notice thereof, in accordance with the terms of said Order, and no one appearing in opposition thereto—

Bill of Complaint—Exhibit 3

It is on this 27th day of May, 1918, on motion of Clifford L. Newman, solicitor of said receiver, Ordered, that said receiver be and he is hereby authorized to sell and transfer to Pipe Organ Maintenance Company, all the right, title and interest of said company in and to the contracts of said Herbert J. Coles, Greenwood A. Robinson, Silver Bow Amusement Co., and Ridgewood Playhouse, upon said Pipe Organ Maintenance Company paying to said receiver the sum of Five Hundred Dollars within five days from the date of this Order, and the further sum of One thousand Dollars within thirty days thereafter, said contracts not to be assigned until the entire sum of Fifteen Hundred Dollars is paid, and upon said Pipe Organ Maintenance Company assuming any obligations of said American Master Organ Company to said contractors upon said contracts.

It is further Ordered that said Receiver be authorized to transfer the right, title and interest of said Company in and to said claim against All Souls' Church, of Summit, N. J., to James T. Jordan, for the sum of One Hundred Dollars, said James T. Jordan to assume all obligations of said Company to said church by reason of said claim.

E. R. WALKER, C.

Respectfully advised,

VIVIAN M. LEWIS, V. C.

Exhibit 4.

WHEREAS, the American Master Organ Company, a corporation of the State of New York, with its principal office in the City of Paterson, in the County of Passaic and State of New Jersey, did, in the year 1917, become insolvent and a Receiver was duly appointed by the Court of Chancery of the State of New Jersey for said company, and

WHEREAS, the undersigned, as said Receiver, did, in the month of November, 1917, sell and dispose of all the assets of the said company with the exception of the unpaid contracts held by it, and

WHEREAS, on the 20th day of May, 1918, an order was made by the Chancellor of the State of New Jersey, directing the creditors to show cause why the bid for the equities held by said Receiver of the contracts for organs should not be accepted, which order was made returnable at the Chancery Chambers, in Jersey City, N. J., on the 27th day of May, 1918, and

WHEREAS, on said 27th day of May, 1918, said order was signed by the Chancellor of the State of New Jersey, directing the undersigned, Receiver of the American Master Organ Company, to sell, dispose and transfer to the Pipe Organ Maintenance Company all the right, title and interest of the said American Master Organ Company, in and to the contracts unliquidated and still held by him as Receiver; and in accordance with said order, I, the undersigned, Wood McKee of the City of Paterson, N. J., Receiver of said American Master Organ Company, party of

the first part, for and in consideration of the payments provided for as set forth in said order, under date of May 27th, 1918, to me in hand paid on or before the ensealing and delivery of these presents, do grant and convey unto the said Pipe Organ Maintenance Company, its successors or assigns, a certain contract, made and entered into by Greenwood A. Robinson, of the Colonial Theatre, of West Hoboken, N. J., which contract was for $5,500, upon which there had been paid the sum of $1550.

In Witness Whereof and by virtue of the authority of said order above set forth, I have hereunto set my hand and seal this 30th day of June, 1918.

WOOD McKEE,
Receiver–American Master Organ Co.

In the presence of
Edward F. Merrey

State of New Jersey, }
County of Passaic. }

Be It Remembered on this 30th day of June, 1918, before me the subscriber, a Master in Chancery of New Jersey, personally appeared Wood McKee, Receiver of the American Master Organ Company, a corporation, who, I am satisfied is the person named in and who executed the foregoing Bill of sale and assignment; and I having first made known to him the contents thereof, he did thereupon acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

EDWARD F. MERREY,
Master in Chancery of New Jersey.

Exhibit 5.

527 Charles St.
West Hoboken, N. J.
January 14, 1919.

George J. Kilgen,
Counsellor at Law,
165 Broadway,
New York, N. Y.

Dear Sir:

I have your letter of December 4th, 1918, and replying thereto I should advise that the organ is not and never has been in the condition provided for in my contract, as will be hereafter referred to.

Regarding the action of the party to whom I have leased the theatre, in refusing to permit your man to use any more power until that already used, amounting to $25.00, has been paid for, would say that it would seem to me that when your representative secures permission of an occupant of a theatre to use the electric current for power in order to place an organ in proper condition, and promises to pay for the same, the refusal to allow your man to use more power until he had paid for that which he had already used, was perfectly justified.

Your statement that it cost $350.00 to put the organ back in the condition it was before I had it removed, is ridiculous. I have never had the organ removed and I cannot understand what you mean by any such statement. The organ has not been moved one inch from where it was placed

at the time of the original installation. The only thing that I know of that was removed was the wire connection and the organ pedal, which were removed so that the organ might be properly protected and to prevent anyone from tampering with it. This removal cost $6.30 and if that is what you refer to, the charge of $350.00 to restore the same is absolutely beyond all question.

However, I am in no way responsible for any part of this charge and as a matter of fact you should pay the charge of the original removal because it was due to the fact that the organ was not properly installed and in working order that the removal had to be made in the first place.

Regarding the interest on the unpaid balance, I would say that I decline to pay any interest whatever because I am not liable therefor, inasmuch as the organ was never installed as per contract, and I do not propose to pay the balance due on the contract until the organ is installed in accordance therewith.

In your letter you state that under my contract I was to furnish light, heat and power for the workmen for regulating and tuning the Organ.

While this is true it was only to be furnished during the period of installation, regulation and tuning and was not supposed to cover all the necessary time involved in making repairs, corrections and experiments, due to faulty construction, and I do not consider that I am now liable at all to furnish any power for anything except-

ing possibly such as would be incidental to the ordinary tuning of the instrument were it in proper condition.

Without attempting to make a complete and detailed criticism of the organ, and only for the purpose of referring to some of the defects and results caused thereby, I would say that I am informed that the MAIN and AUXILIARY WIND CHEST which contains practically all the pipes or sound producing members and houses the mechanism which controls said pipes is of a very poor design, causing the organ to respond slowly when the operator plays upon the controlling keys at the piano.

I am further informed that the ELECTRICAL SYSTEM is burning itself out due to excessive voltage, and will mean the constant renewing of all contacts and electro-magnets. The electrical contacts placed beneath the keys and those placed in the controlling mechanism called the Relay, show the results of continued arcing or burning due to this high voltage. After a certain amount of use these contact wires burn to such an extent that they fall off and result in the mechanism becoming unoperative or silent. As the organ is at present arranged it is necessary to use a high voltage in order to make all parts of the organ play together. The Traps and Percussion instruments operate on vacuum and are so designed that they will not be reliable if operated on a lower voltage than used at present. All the electro magnets on all parts of the organ were originally designed for pressures not over 20

inches (water gauge). The percussion and trap chests have as high as 32 inches pressure (vacuum) and consequently the strength of the electric current (voltage) available for their control was increased in order to *force* the magnets to do their work. This causes the same high current to flow thru all parts of the organ and force *all* contacts and magnets. A special magnet should have been designed to control the high pressure part of the organ or the percussion division constructed to work on a lower pressure.

The Centre Piano Pedal which is supposed to lock the piano keys making the piano silent, allows the keys to drop and all the organ speaks simultaneously. The left or soft pedal has the same effect.

The Crescendo Pedal should bring on the different sets of pipes gradually starting from the soft finishing with the loud or full organ. This pedal now brings the full organ on in about three steps.

The Tremulant is very ineffective having no effect on the Vox Humana.

The organ is not installed in a workmanlike and neat manner.

Pedal

16′ Diaphone uneven slow 9 silent notes.
16′ Bourdon " " 5 silent " barely audible most important in pedal.
8′ Open (cello) slow 4 silent notes) Lower
8′ Diap " 3 " ") octave
8′ Clar " 1 " ") bad.

MANUALS

16′ Open lower part very uneven 2 octaves barely audible 6 silent notes.
8′ Open (cello) 3 silent notes uneven
8′ Diap 3 silent notes
8′ Flute 2 silent notes lower octave barely audible, unevenly voiced, overtone very annoying, not true flute.
8′ Voil d'orch 3 silent notes, weak from Ten. C down, particularly
8′ Viol celeste slow on runs and arpeggios
4′ Flute fair
2′ Pico Flutes are of course quicker in higher register
8′ Flugel H. Slow, uneven especially in lower register.
8′ Clarinet Upper 1 & 1/2 Oct too shrill
8′ Oboe Bad especially last 2 octaves
8′ Vox Hum. Badly voiced, slow. No separate Tremolo.

PERCUSSION

8 stops on pedal are either on all the time or off all the time, certain pressures on the swell pedal or the Crescendo pedal seeming to affect them. Most of the percussion works on the 1st instead of the 2nd touch. To specify would not only be laborious detail but confusing. Traps are all wrong. Evidently there are numerous short circuits.

Glockenspeil 1 silent note, 2nd touch out of Order. No triangle on manual at all. No Tam-

bourine, Chinese Block ½ second slow. When traps on manuals speak they speak together. Snare piston broken.

COUPLERS

3 silent notes on Solo to Solo 4′.

The 2nd couplers work on first touch.

There is a very bad "chase" on the tremolo. The piano lock is unusable as it ciphers the entire organ. This is very important.

The unenclosed string ruins the organ of itself, cannot use the crescendo pedal either because of it, and in short the organ is unusable.

Also, the organ is supplied with only one Tremulant where the specifications provide that there should be two Tremulants. (If my recollection serves me right, one Tremulant was intended for the Vox Humana and the other for the balance of the Organ.)

Also, the specifications provide for an eight foot open Diapason and no such Diapason has been installed. I am informed that at the original installation such a Diapason was furnished but because it did not work satisfactory it was taken away and something else has been furnished which is responsible for a great deal of the trouble above referred to.

It cannot be said that this is the organ that I have contracted to buy unless the eight foot Diapason is furnished.

My contract called for a complete organ, free from defects in material or workmanship, and such an organ has never been furnished me, and unless such an organ is furnished I do not propose to make any further payment, and as a matter of strict equity I do not think that the warranty clause should go into effect until after such an instrument has been furnished.

I have already paid over $1,600.00 upon the representation that such an instrument would be furnished, and the most that I will owe after such an instrument is furnished will be the balance of my contract price, without interest or any other charge whatsoever.

As against this I am also to receive credit for the value of my Wurlitzer organ which the American Master Organ Co. took upon condition with which you are already familiar, and under which I am entitled to a credit of at least $2,450.00, as will be disclosed from my letter of October 6th, 1917, to the American Master Organ Co., and to Mr. Mason who is now your client.

You did not mention this organ in your letter at all, and I now give you notice that it must be taken care of in the final settlement when and if you are able to place my organ in the condition required by my contract.

Yours respectfully,

(sgd) G. A. ROBINSON.

P. S. I might also add that the organ has since been connected by your workmen with the

electric power. If you wish this disconnected again for safety sake the same can be done either by your workmen or by someone that I may employ for that purpose, but as to this, I await your instructions.

Exhibit 6.

PIPE ORGAN MAINTENANCE CO.

165 Broadway,
New York Jan. 31st. 1919

Mr. G. A. Robinson,
527 Charles St.,
West Hoboken, N. J.

Sir:—

THE PIPE ORGAN MAINTENANCE COMPANY, INC. hereby demands of you the following goods and chattels, which are its property, to wit: One American Master Organ Company pipe organ, with Grand Piano Console and all its equipments and now in use at the Colonial Theatre West Hoboken, New Jersey; and unless you deliver the same forthwith legal proceedings will be commenced against you to recover possession of the same and damages.

THE PIPE ORGAN MAINTENANCE CO. INC.
By: George J. Kilgen
President.

Exhibit 7.

THE STATE OF NEW JERSEY to the Sheriff of Hudson County, GREETING:

(Seal) We command you that if the Pipe Organ Maintenance Co., Inc., a corporation of the State of New Jersey, shall make you secure, you cause to be taken and delivered to it, one American Master Organ Company pipe organ, with grand piano console, and all wireing, motor, generator, and all its equipment and now in use in what is known as the Colonial Theatre, at 734 Demott Street, West Hoboken, Hudson County, New Jersey, which said Greenwood A. Robinson took and unjustly detains as his; and that you summon the said Greenwood A. Robinson to answer the annexed complaint of the Pipe Organ Maintenance Company, Inc., a corporation, in an action at law, in the Hudson County Circuit Court; and that you notify him that unless he files his answer to said complaint with the Clerk of Hudson County Circuit Court, at Jersey City, within twenty days after service upon him of this writ, and the annexed complaint, the Plaintiffs may proceed in the suit and judgment may be entered against him.

WITNESS, LUTHER A. CAMPNELL, Judge of the Hudson County Circuit Court, at Jersey City, this 24th day of February, A. D. 1919.

JOHN J. McGOVERN,
Clerk.

Ziegener & Lane,
Attorneys.

Bill of Complaint—Exhibit 7

COMPLAINT

HUDSON COUNTY CIRCUIT COURT

PIPE ORGAN MAINTENANCE CO., INC., a corporation, Plaintiff, vs. GREENWOOD A. ROBINSON, Defendant.	Action at Law In Replevin.

The plaintiff, Pipe Organ Maintenance Co., Inc., a corporation of the State of New Jersey, having its principal office in the City of Passaic, New Jersey, says that:

1. On or about the 14th day of June, 1916, the defendant, Greenwood A. Robinson entered into a written agreement and contract with the American Master Organ Company, Inc., a corporation, for the purchase and delivery of an American Master Organ, at the Colonial Theatre, in West Hoboken, New Jersey, a copy of which agreement and contract is hereto annexed, marked Exhibit "A" and made a part hereof.

2. That under the terms of said agreement and contract, the contract price to be paid by the said defendant for the said organ was the sum of Five thousand six hundred and fifty ($5650) dollars, in the manner set forth therein. That on or about the 28th day of October, 1916, the

said American Master Organ Company, Inc., did deliver the said organ and equipment—at the Colonial Theatre in West Hoboken, New Jersey, to the said Greenwood A. Robinson, and kept and performed, all the terms and conditions on its part to be kept, under the terms of said agreement and contract. That the said defendant at or about the time of the execution of the said contract, paid the sum of Two hundred and fifty ($250) dollars provided by the terms of the said contract to be paid upon the signing of the contract; that on October 28th, 1916, and upon the delivery of the said organ, the said defendant paid the sum of Four hundred ($400) dollars as provided in said contract. That the defendant further paid to the said American Master Organ Company, Inc., on account of the purchase price mentioned in said contract.

$150. on December 12th, 1916.
150. on January 23rd, 1917.
150. on February 14th, 1917.
150. on March 11th, 1917.
150. on September 6th, 1917.
150. on September 18th, 1917.

That the aforesaid sums paid by the said defendant, made a total of One thousand five hundred fifty ($1550) dollars.

3. The said defendant has neglected, failed and refused and still refuses to pay the balance of the contract price remaining unpaid, amounting to the sum of Four thousand one hundred ten ($4110) dollars with interest on the various in-

stallments from the time they became due, or any part thereof, although the amounts due under said contract have been duly demanded and payment refused.

4. That on or about the 30th day of September, 1916, the said American Master Organ Co., Inc., mortgaged to John B. Mason of the City of Paterson, the aforesaid agreement and contract, a copy of which mortgage is hereto annexed and marked Exhibit "B" and made a part hereof.

5. That thereafter and on or about the fifth day of October, 1917, by decree of the Court of Chancery of New Jersey, the said American Master Organ Company, Inc., was decreed to be insolvent and Wood McKee, Esquire, of Paterson, New Jersey, was duly appointed Receiver of the assets of said corporation; that he thereafter duly qualified and took upon himself the duties of such office.

6. That by order of the Court of Chancery, dated May 27th, 1918, the said Receiver was authorized to sell and transfer to the plaintiff, Pipe Organ Maintenance Co., Inc., all the right, title and interest of the American Master Organ Company, Inc., in and under the aforesaid agreement and contract.

7. That under said order, the said Wood McKee as such Receiver, duly executed and delivered an assignment to the said plaintiff, Pipe Organ Maintenance Co., Inc., a copy of which is hereto annexed, marked Exhibit "C" and made a part hereof.

8. That under and by the terms of the aforesaid agreement and contract the title to and ownership of the said organ and its equipment was to be and remain in the said American Master Organ Company, Inc., until the contract price, with any interest due, had been fully paid; that plaintiff as assignee of said American Master Pipe Organ Company, Inc., or its Receiver, has succeeded to all the rights, title and interest of said American Master Pipe Organ Company, Inc., under said contract and to the title and right to possession of said organ with grand piano console and all its equipment.

9. That the plaintiff, Pipe Organ Maintenance Co., Inc., on or about the 31st day of January, 1919, duly demanded from the said defendant, possession of the said American Master Organ Company pipe organ with grand piano console and all its equipment. That a copy of said written demand is hereto annexed, marked Exhibit "D" and made a part hereof. That the said defendant has and still does refuse to deliver up possession of said organ, as described in said written demand, and wrongfully detained and still wrongfully detains the same.

10. Plaintiff demands possession of said organ, with grand piano console, and all its wiring, motor, generator, and all its equipment, and $1,000.00 damages, for its detention.

ZIEGENER & LANE,
Attorneys for Plaintiff.

~~*Bill of Complaint—Exhibit 7*~~

ANSWER AND COUNTERCLAIM

Filed February 26, 1923

The answer of the defendant, Pipe Organ Maintenance Company, a corporation of the State of New Jersey, to the bill of complaint of the complainant, Greenwood A. Robinson.

This defendant answering the bill of complaint says:

1. That he admits the allegations of paragraph one with the exception that he begs leave to refer to the original contract for further proof as to its certainty.

2. This defendant denies that the contract was never performed by the American Master Organ Company or any one on its behalf. This defendant denies the other allegations of paragraph 2 with the exception that it admits that the said complainant has frequently written letters but says that same was not because of the failure of the American Master Organ Company or any one on its behalf, to perform its contract, but merely as a subterfuge. This defendant begs leave to refer to the original letters and notifications for proof as to their contents.

This defendant admits that the American Master Organ Company proceeded to carry out said contract but it denies that it never performed the same in its entirety. This defendant denies that during the progress of the installation of the said organ, the American Master Organ Company and

Answer & Counterclaim

~~Bill of Complaint Exhibit 7~~

its representatives continually represented to this complainant that they were in need of funds, and that if he would advance funds to them, they could proceed MORE rapidly with the completion of the installation of said organ, and by various promises and persuasion prevailed upon this complainant to advance to them sums of money which were not then due under the terms of the contract, in the aggregate amounting to the sum of $1600.00. This defendant says that the American Master Organ Company delivered and installed said organ and that the said complainant accepted said organ and used same continuously and thereafter made payments on account of the purchase price of said organ on the following dates and in the following amounts:

June 14-1916 deposit on executed contract	$250.00
Oct. 28-1916	400.00
Dec. 12-1916	150.00
Jany. 23-1917	150.00
Feby. 14-1917	150.00
March 11-1917	150.00
Sept. 6-1917	150.00
" 18-1917	150.00

making a total of $1550.00 paid by the said complainant, and leaving a balance due on the contract price of $4100.

This defendant further says that upon the completion of said installation of the organ, the said complainant paid the above mentioned sum of $400 in pursuance with his contract and thereafter made the various payments as above set forth.

Answer & Counterclaim

~~Bill of Complaint—Exhibit 7~~

3. This defendant denies the allegations of paragraph three, except that it admits that annexed to the bill of complaint and marked exhibit two is a copy of the assignment by the American Master Organ Company to the said John B. Mason. This defendant says that the said paper is only in the nature of an equitable mortgage and that the said Mason never demanded or became entitled to the possession of the said organ. This defendant further says that upon the institution of its suit at law, the said complainant set up the fact of the alleged assignment to Mason as a bar to the action and that this defendant in order to avoid any question whatever, obtained an assignment from the executor of the estate of the said John B. Mason to it, of any right whatever that said Mason may have had or has under any alleged assignment. That annexed hereto is a copy of the aforementioned assignment and marked exhibit 1.

4. This defendant admits the filing of a bill of complaint as set forth in the paragraph numbered four of the bill of complaint, but says that it does not believe that this bill of complaint was filed in or about the month of June, 1917. It says that the American Organ Company was not adjudged an insolvent corporation until October 5th, 1917, when the receiver was appointed.

5. This defendant in answer to paragraph five, admits the entry of the order referred to in said paragraph of the bill of complaint and that exhibit 3 is a copy of said order.

Answer & Counterclaim

~~Bill of Complaint—Exhibit 7~~

6. This defendant in answer to the sixth paragraph of the bill of complaint admits that the fourth exhibit is a copy of the instrument executed by Wood McKee, Receiver for the American Master Organ Company, and the instrument under which this defendant claims title to the organ.

7. This defendant admits that its certificate of incorporation was filed on January 29th, 1919, but says that the Pipe Organ Maintenance Company was in existence June 30th, 1918. That there is no question but that the actual incorporation was contemplated at that time and that the title was taken from the Receiver for the said Pipe Organ Maintenance Co. which was subsequently incorporated as aforesaid.

8. This defendant says that the allegations of paragraph eight of the bill of complaint are entirely immaterial to the issue involved, and that this defendant will, on the stand, move to strike same out. This defendant however denies each and every allegation contained in paragraph eight.

9. This defendant admits the allegations of paragraph nine of the bill of complaint.

10. This defendant admits the allegations of paragraph ten of the bill of complaint.

11. This defendant admits the allegations of paragraph eleven of the bill of complaint.

12. This defendant admits the allegations of paragraph twelve of the bill of complaint.

Answer & Counterclaim

~~Bill of Complaint—Exhibit 7~~

13. This defendant denies that the American Master Organ Company, nor any one else has ever completed said organ in accordance with the terms of said contract at any time and denies that the complainant has never accepted said organ, but says that to the contrary, the complainant did accept said organ and did use said organ thereafter, and has retained possession and dominion thereof, and has continuously had and now has retained dominion and possession thereof.

14. This defendant denies that under the terms of the contract made between complainant and the American Master Organ Company, complainant delivered to the American Master Organ Company a Wurlitzer organ which he had in his premises known as the Colonial Theatre, at the time of the making of said contract, and shortly thereafter entered into a contract with said American Master Organ Company, under and by virtue of which said Company agreed to place said Wurlitzer organ in a first class condition for a sum not to exceed $50.00 and to sell it for a price not less than $2500.00 upon the understanding that complainant would consent to apply the moneys realized upon the sale of said Wurlitzer organ and due to the complainant, to the balance of the purchase price due on the organ so purchased from the American Master Organ Company, said American Master Organ Company agreeing that if the complainant desired, it would allow him to retain one-half of said proceeds of sale so due to him, the remaining one-half to be applied to

Answer & Counterclaim

~~Bill of Complaint—Exhibit 7~~

the purchase price of the organ so purchased from said American Master Organ Company by the complainant aforesaid. This defendant says that the written contract entered into between the complainant and the American Master Organ Company was a complete contract in itself, and that there were no other agreements in relation thereto, except as contained in the wording of said contract and that the said American Master Organ Company, the Receiver of this Court, and this defendant has in no wise, at any time, modified or changed the written provisions of the said contract. This defendant says that the only agreement in respect to the aforesaid Wurlitzer organ is contained in paragraph four of the contract entered into between complainant and the said American Master Organ Co. copy of which is annexed to the bill of complaint as exhibit 1.

15. This defendant denies the allegations of paragraph fifteen of the bill of complaint, except that he admits that upon the acceptance of the organ provided in the contract between the complainant and the said American Master Organ Company, said Wurlitzer organ was duly delivered by complainant to the American Master Organ Company and removed to its factory at Lakeview, Paterson, N. J., in compliance with the aforesaid paragraph four of the contract. This defendant says the said American Master Organ Co., the receiver, and this defendant have in no wise, at any time, not complied with paragraph four of the aforesaid contract.

Answer & Counterclaim

~~Bill of Complaint—Exhibit 7~~

16. This defendant denies the allegations of paragraph sixteen.

17. This defendant denies the allegations of paragraph seventeen.

18. This defendant admits the allegations of paragraph eighteen.

19. This defendant denies each and every allegation of paragraph nineteen.

20. This defendant denies each and every allegation of paragraph twenty.

21. This defendant denies each and every allegation of paragraph twenty-one.

22. This defendant denies the allegations of paragraph twenty-two. This defendant says that it has at all times been willing, able and anxious to comply in every detail with the contract entered into between the American Master Organ Company and this defendant.

23. This defendant denies that the said complainant is now in a position to return the said organ to whomever is entitled to receive the same and to replace this defendant as the assignee of said contract in *status quo*. This defendant says that the complainant has held and used said organ for a long period of time; that he has permitted the said organ to deteriorate to an amount largely in excess of the amount which he has paid on account of the purchase price. This defendant says that upon the refusal of the complainant to pay the installments on the purchase price becoming due, that it was entitled to the

Answer & Counterclaim

~~Bill of Complaint Exhibit 7~~

possession of said organ which possession was denied by the complainant, although due notice was given therefor and suit instituted to replevin said organ. This defendant says that the complainant at no time had the right to demand the return of the money which he has paid on account of the purchase price, under said contract, and at no time has the right to demand the value of the aforesaid Wurlitzer organ.

This defendant further answering says that upon the refusal of the said complainant to make payments of the purchase price coming due and the balance remaining due thereunder, it was entitled to have immediate possession of the said organ. That the complainant has persisted in holding said organ and converting same to its own use and without the payment of the balance of the purchase price of $4100. That this defendant is therefore entitled to recover from the said complainant the balance of the said purchase price of $4100 together with interest from the date upon which each installment became due.

This defendant therefore says that it is entitled to recover the balance of the aforesaid purchase price remaining due with interest as aforesaid.

By way of counterclaim against Greenwood A. Robinson, complainant, the defendant Pipe Organ Maintenance Company says that:

1. It repeats paragraphs one, two, three, four, five, six, seven, nine, ten, eleven, twelve, thirteen, and twenty-three of its foregoing answer.

Answer & Counterclaim

~~Bill of Complaint—Exhibit 7~~

This defendant therefore prays,

1. That said complainant, Greenwood A. Robinson may answer this counterclaim without oath and each statement herein made.

2. That a decree may be entered against the said complainant in favor of this defendant, for the balance of the purchase price under the contract set forth in the bill of complaint and answer, of Forty-one hundred dollars, together with interest from the date upon which each unpaid installment thereof became due, and that the complainant may have such lien upon the said organ for the payment thereof as may be proper and equitable; or in the alternative if it be determined that the said organ should be delivered to this defendant, that it may be decreed that the value thereof has depreciated and the amount of such depreciation and the value of the said organ less the cost of removing same from the premises, may be fixed and it may be decreed that this defendant in addition to the return of said organ and equipment is entitled to recover from the complainant the said balance of the purchase price with interest as aforesaid, after deducting the present value of said organ and equipment, less the cost of removal.

3. That defendant may have such other and further relief in the premises as may be proper.

ZIEGENER & LANE,
Solicitors for Pipe Organ
Maintenance Co., Defendant.

~~*Bill of Complaint—Exhibit 7*~~
Final Decree

ANSWER TO COUNTERCLAIM

The complainant, answering the counterclaim interposed by the defendant herein says that:

1. It repeats paragraphs 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, and 23 of the bill of complaint herein.

2. It denies that the defendant is entitled to any relief as prayed for in its counterclaim and complainant prays that said counterclaim may be dismissed with costs.

MELOSH, MORTEN & MELOSH,
Solicitors for Complainant.

Final Decree.

Filed Nov. 5, 1926

This cause coming on regularly to be heard on the bill, answer, counterclaim, answer thereto and replication and proofs in the presence of Louis C. Morten of counsel with the complainant and Harry Lane, of counsel with the defendant, and the pleadings and proofs having been heard and considered; and the court having duly considered such pleadings and proofs and the arguments of counsel; and it appearing that there is due to the Pipe Organ Maintenance Company, the defendant and from the complainant, Green-

wood A. Robinson, the sum of Forty-one hundred dollars, together with interest from the 28th day of September, 1919, amounting to the sum of Seventeen hundred twenty-two dollars ($1722), amounting in all to the sum of five thousand eight hundred twenty-two ($5822) dollars, being the balance of the purchase price due on the American Master Organ, Piano and equipment referred to in the pleadings and the contract annexed thereto; and it further appearing that during the course of the trial it was agreed by the parties hereto that the organ, piano and equipment now remaining in the hands of the complainant be sold and the money paid into the Court to be applied on account of any sum found due from the complainant to the defendant;

It is thereupon, on this 25th day of October, 1926, by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, Ordered, Adjudged and Decreed that there is due to the Pipe Organ Maintenance Company, a corporation, the defendant herein, from Greenwood A. Robinson, the complainant herein, the sum of Forty-one hundred dollars, together with interest from the 28th day of September, 1919, amounting to the sum of seventeen hundred and twenty-two dollars ($1722) making in all the sum of five thousand eight hundred twenty-two ($5822) dollars, and that the complainant, Greenwood A. Robinson, do pay to the said defendant, Pipe Organ Maintenance Company, a corporation, the said sum of five thousand eight hundred twenty-two dollars ($5822) and the taxed costs of this suit,

including a counsel fee of three hundred & fifty ($350.00) Dollars which is hereby allowed and that the defendant have execution therefor.

And it is further Ordered, Adjudged and Decreed that a sale of the organ, piano and equipment now remaining in the hands of the complainant be had under the directions of James *T.* Murphy, a Special Master of this Court, within thirty (30) days from the date thereof and that the moneys realized from the sale thereof, less the expenses of said sale, be paid up to the amount due on this decree to the said defendant, or its solicitors, and credited on account of the moneys found due by this decree, and that said Special Master do take immediate possession of said organ, piano and equipment and that said Special Master, or either of the parties, may at any time apply to this court for further directions respecting said sale.

E. R. WALKER, C.

Respectfully advised:

JOHN GRIFFIN, V. C.

A true copy.

Thomas Barber, Clerk.

Notice of Appeal.

Filed Nov. 5, 1926

IN CHANCERY OF NEW JERSEY

Between

GREENWOOD A. ROBINSON,
Complainant,

and

PIPE ORGAN MAINTENANCE COMPANY,
Defendant.

On Bill &c.

The complainant, Greenwood A. Robinson, hereby appeals from the final decree made in the above entitled cause on October 25th, 1926, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in All Causes.

Dated November 3, 1926.

MELOSH, MORTEN & MELOSH,
Solicitors and of Counsel with Complainant, Greenwood A. Robinson.

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

LOUIS G. MORTEN,
Of Counsel with Complainant,
Greenwood A. Robinson.

Service acknowledged,
Ziegener & Lane,
Sol'rs Deft.
Nov. 3/26

Petition of Appeal.

Filed Dec. 2, 1926

To the Honorable the Court of Errors and Appeals in the Last Resort in All Causes:

The petition of Greenwood A. Robinson, 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, bearing date October 25th, 1926, in a certain cause in said Court of Chancery, wherein the petitioner was complainant and the said Pipe Organ Maintenance Company was defendant, in this respect, to wit:

(1) That the said decree orders, adjudges and decrees that there is due to the Pipe Organ Maintenance Company from your petitioner, the sum of $4100.00 with interest from September 28th, 1919, amounting to $1722.00, making in all the sum of $5822.00, and that the petitioner pay to the said Pipe Organ Maintenance Company the said sum of $5822.00 and the taxed costs of said suit, including a counsel fee of $350.00 and that the defendant have execution therefor.

(2) That the said decree orders, adjudges and decrees that a sale of the organ, piano and equipment now remaining in the hands of petitioner be had under the directions of James J. Murphy, a special master of said court within thirty days from the date of said decree, and that the moneys

realized from the sale thereof, less the expense of said sale, be paid up to the amount due on said decree to the said defendant the Pipe Organ Maintenance Company and credited on account of the moneys found due by said decree and that said special master take immediate possession of said organ, piano and equipment.

2. And petitioner appeals from the decree of the Chancellor which decrees as aforesaid upon the ground that the same is erroneous in that said court should have decreed that your petitioner was not indebted to the defendant in any sum of money whatsoever, and should not have decreed a sale of the said organ, piano and equipment as therein set forth.

Petitioner therefore prays that the said decree of the Chancellor may be wholly reversed, set aside and for nothing holden and that petitioner may have such other relief in the premises as to this court shall seem proper.

MELOSH, MORTEN & MELOSH,
Solicitor for and of
Counsel with Appellant.

Answer to Petition of Appeal.

The answer of Pipe Organ Maintenance Company, the above named defendant-respondent, to the petition of appeal of Greenwood A. Robinson, the above named appellant.

Respondent not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that a decree was on the 25th day of October, 1926, made and entered in the Court of Chancery of New Jersey in the above entitled cause, for the purpose in said petition mentioned and as therein set forth; that as to the substance and form of said decree, respondent begs leave to refer thereof when the same shall be produced.

Respondent is advised and believes that the said decree is agreeable to equity and he prays that the same may be affirmed with costs to be taxed in favor of respondent.

ZIEGENER & LANE,
Solicitors for Respondent.

Harry Lane,
Of Counsel.

Testimony.

IN CHANCERY OF NEW JERSEY

Between GREENWOOD A. ROBINSON, Complainant, and PIPE ORGAN MAINTENANCE COMPANY, Defendant.	On Bill, etc. Minutes of Final Hearing

Appearances:

Messrs. Melosh, Morten & Melosh for Complainant.

Messrs. Ziegener & Lane for Defendant.

Before: HON. JOHN GRIFFIN, Vice Chancellor.
Chancery Chambers, Jersey City, N. J.

February 26th, 1923.

Mr. Morten: I say that the Pipe Organ Maintenance Company cannot maintain this action, for this reason: In the first place, the contract we made with the American Master Organ Company is not assignable, either at their own option, or by operation of law. It is one of those cases where the *lex personi* is the controlling factor.

The Vice Chancellor: They can assign the amount due on it.

Mr. Morten: Perhaps, if the money was due, they can assign it; but performance of the contract cannot be assigned.

The Vice Chancellor: But they say it is due.

Mr. Morten: They are suing on the contract; and, in the second place, the contract was not assignable because the purchaser of the contract was bound to assume the obligation; you cannot have the cake and the penny, too. Now, the Receiver in the Court of Chancery in this case did not comply with the order for sale; he merely assigned whatever right The American Master Organ Company had in that contract; and the way in which he was directed to make sale did not so provide; it said that in making that sale, the purchaser must assume that obligation. Now, that has not been done, and it is not done today. And I say, further than that and on the *lex personi* proposition, that if they come in, we have the right to say whether that contract is assignable or not, because, as we charge in the bill of complaint, the Pipe Organ Maintenance Company in this case is a corporation without financial responsibility of any kind whatever; they have no factory, no office, no employees, no nothing, except these contracts; therefore, if we win, we lose, because the company is not responsible.

The Vice Chancellor: Let us trace the thing from the start. The contract was made between the American Master Organ Company and Robinson; the organ company agreed to guarantee the organ for a certain number of years—

Mr. Morten: Yes, and before that was done, they went into the hands of a receiver.

The Vice Chancellor: Do not travel so fast. If the contract was completed—that is, if they had the organ actually installed—the Pipe Organ Company then would be entitled to the whole fund mentioned in the contract?

Mr. Morten: I do not concede that—not until the end of five years; we had the right to have the American Master Organ Company do that, under the cases controlling the *lex personi* theory.

The Vice Chancellor: Weren't they to pay the full contract price when the organ was installed?

Mr. Morten: Well, I have forgotten how the payments were to be made. The payments were to be made, yes.

The Vice Chancellor: Now, suppose the American Master Organ Company had put in and installed this organ, so that it was operating and functioning properly, then they were entitled to have the whole purchase price paid—or was there anything reserved?

Mr. Morten: Oh, no; the promise was to pay $150 a month. The party of the second part agreed to pay $5,650 as follows: Two hundred and fifty dollars on the signing of the contract; $400 in cash upon the erection in the above-mentioned building of said organ complete in accordance with this contract, and the balance as follows—$150 per month thereafter.

The Vice Chancellor: Now, the payment of $150 a month would take about two or two and a half years to pay.

Mr. Morten: It would take them until 1919.

The Vice Chancellor: And they guaranteed then that it would run until 1922 or '23?

Mr. Morten: The guarantee would have run to 1921—five years from 1916.

The Vice Chancellor: Then you had a right to rely on your personal guarantee for two years?

Mr. Morten: For the final amount of money.

The Vice Chancellor: Well, must not the defenses be considered separately? If they had completed their contract—1921 has passed—the time of their guarantee has gone by.

Mr. Morten: Surely; I do not see that that has any bearing on it. Their contract was to have that organ in in October, 1916, and that was not done, because the organ was never done until the end of October, and was never played; so that was not performed; and within twelve months afterwards they went into the hands of a receiver in bankruptcy, or insolvency, rather—I think it was 1917—yes, 1917—within a year after the contract was to be performed a receiver in insolvency was appointed.

The Vice Chancellor: How does that affect the case, if they did become insolvent, if, prior to that time they had performed?

Mr. Morten: If, prior to that time, they had performed the contract, it would have had no effect; but they could not have performed this contract, because it was five years afterwards that they were to do certain things.

The Vice Chancellor: During the period of five years they were to keep this organ in repair, or condition?

Mr. Morten: Yes.

The Vice Chancellor: Now, at the time they went into bankruptcy, if there were moneys due as installments on the contract, why would not the trustee in bankruptcy be entitled to receive the money down to the time that default was made?

Mr. Morten: If the contract had been performed, it may be that the trustee in insolvency

would have been entitled to the money, providing we were guaranteed the performance of our contract for those five years, but we were entitled to that.

The Vice Chancellor: What guarantee were they to give you?

Mr. Morten: To keep that organ in repairs for five years—for a five-year term.

The Vice Chancellor: They were not to give a bond, were they?

Mr. Morten: No, no; they were not to give a bond. They were to keep it free from any defects for five years (reading the terms of the contract in this particular).

The Vice Chancellor: Now, there is nothing there that provides that in case they become insolvent, the trustee in bankruptcy could not collect the installments until they committed a breach?

Mr. Morten: Oh, no; if he does collect up to the time they commit a breach, that may be true, but he cannot assign the contract; it did not make the contract assignable.

The Vice Chancellor: He is not assigning the contract; he is assigning the proceeds to be due under it.

Mr. Morten: No, he did not; he assigned all the rights.

The Vice Chancellor: Could not the Court take the assignment as good up to that time?

Mr. Morten: Possibly; if the contract had been performed they could take that; but when they took that, they likewise, when they took it, assumed the obligation which the Pipe Organ Company has not done in this case, under the order

of the Court of Chancery; and they are under no obligation to carry out the terms of the contract, although the Court of Chancery has specifically provided that they must do it. I do not know whether your Honor remembers the terms of the order of the Court of Chancery?

The Vice Chancellor: I do, generally, recall it.

Mr. Morten: It was that the receiver could execute a bill of sale (reading the order of the Court of Chancery referred to); it says that "he is hereby authorized to sell and transfer to Pipe Organ Maintenance Company, all the right, title and interest of said company in and to the" contracts of Robinson and several others, "upon said Pipe Organ Maintenance Company paying to said receiver the sum of Five hundred dollars within five days from the date of this Order, and the further sum of One thousand dollars within thirty days thereafter, said contracts not to be assigned until the entire sum of Fifteen hundred dollars is paid, and upon said Pipe Organ Maintenance Company assuming any obligations of said American Master Organ Company to said contractors upon said contracts." Now, that they have not done. Now, how could an assignment be said to be valid, or how could they have any assignment, unless they performed the order of the Court of Chancery?

The Vice Chancellor: Well, wasn't that made for the benefit of the insolvent corporation?

Mr. Morten: Why, of course not; that was made for the benefit of the contractor. That was the only one that benefited—the Pipe Organ Maintenance Company assuming the obligation--nobody else.

The Vice Chancellor: What concern had they in it, any more than having their claim presented?

Mr. Morten: Who?

The Vice Chancellor: Why, the receiver.

Mr. Morten: We do not claim to be a creditor; we are a debtor; we have no interest in the proceeds of the American Master Organ Company. We say to the Pipe Organ Maintenance Company, "You cannot take our money unless you assume that contract, and that is what the Court of Chancery provided, and you have not done it."

The Vice Chancellor: Have you much testimony to offer?

Mr. Morten: Yes, I presume we will have. I have four or five witnesses.

The Vice Chancellor: How many have you got, Mr. Lane?

Mr. Lane: I think I have three or four. If your Honor please, I don't know whether your Honor has read the opinion in the case of Ridgewood Play House vs. Pipe Organ Maintenance Company, but if your Honor has not, what your Honor has been stating in reply to the argument of Mr. Morten is practically along the lines of the decision in that case.

Mr. Morten: I do not think that point was raised in that case, Mr. Lane, was it?

Mr. Lane: I am sure I don't know whether it was or not, but that is exactly what the Court of Chancery did. The facts are identical.

Mr. Morten: No, the facts are different, Mr. Lane, in very material respects—in fact, the whole decision in the Play House case is based upon a clause in the contract that is not in our

contract at all; that is why we cannot rely on it, because they did not decide the other questions; they decided it upon a clause in the contract.

The Vice Chancellor: What I want to do is to eliminate all the chaff in the case and get right down to the meat.

Mr. Morten: It seems to me, the first thing your Honor will have to decide will be whether or not this contract is assignable, and if assignable, was it assignable in accordance with the orders of the court, and if it was not, and they are in a position to take all the fruits without any responsibility. If your Honor says that can be done, all right.

The Vice Chancellor: What about the assignment to Mason?

Mr. Morten: Well, in regard to that, Mr. Lane told me that the assignment was executed back to them. It is not set out in the pleadings—is not that so, Mr. Lane?

Mr. Lane: Yes.

The Vice Chancellor: The pleadings set out that it was first assigned to Mason. In going through the pleadings, I was searching to see whether Mason was gotten rid of, and I saw that it was assigned to this Pipe Organ Company, so they have just two assignments now. Why was not the Mason assignment good?

Mr. Morten: Well, the assignment was good, possibly—

The Vice Chancellor: All he assigned was the moneys due upon that contract, and the Pipe Organ Company was to go on with the work of collecting the moneys. I presume—anticipating the remarks you have made now as to its not being

assignable now—it seems to me clear that the Maintenance Company have right to assign the money—not to assign the contract, but to assign the moneys to grow due on the contract, and to that end, to collect the moneys and turn them over to Mason.

Mr. Morten: You mean the American Master Organ Company?

The Vice Chancellor: Yes.

Mr. Morten: Oh, I don't suppose there is any doubt about that.

The Vice Chancellor: Then haven't they got the right to assign the moneys to be derived from it, and act as agent, so that when the money came into their hands—

Mr. Morten: I presume they would have the right to assign the moneys as they came due, yes; but my point as to the Mason contract was this, that at the time I did not know there was any assignment from Mason, and it was not set out in the Circuit Court action, and we did not know about that—therefore, my point on that is this, that if the contract was assignable at all, and it had been assigned to Mason, there could be no assignment good against us until Mason had been gotten rid of.

The Vice Chancellor: Now, Mason's administrator has assigned to the Pipe Organ Company.

Mr. Morten: Now, as far as the other point goes, that point is now eliminated, but it was not eliminated at the time we drew our bill. I did not know that until they told me about it afterwards, so I am not relying on that now. I presume, on that point, they can dismiss it entirely, as to what effect the assignment of Mason to the American Master Organ has.

The Vice Chancellor: I will hold, on the assignability of the contract itself, that in equity, Mr. Mason would take an assignment of the moneys due and to grow due under that contract, and appoint the American Master Organ Company to collect the moneys and turn it over to the claimant, and in that respect, he would act as trustee of the agent for the purpose of collecting and turning over the moneys, and while the legal title and right to sue might be in the American Master Organ Company, yet, when the moneys were collected, that they belonged in equity to Mason; so, if that view is correct, I do not see really what difference it makes as to whether the receiver assigned in this fashion or not. The receiver then had nothing to assign, unless there was something behind this assignment that does not appear.

Mr. Morten: We would have to go further than that. I don't know just how far we would have to go in that respect. If, as they contend, Mr. Mason's interest was merely that of a mortgagee. then they would have to show that he had not been paid, I presume; I don't know what the situation is about that.

The Vice Chancellor: I think your answer does say that it was assigned as collateral, Mr. Lane?

Mr. Lane: As collateral; yes, sir.

Mr. Morten: Now he has assigned it back to the Pipe Organ Maintenance Company, the presumption would be that he had been paid, I suppose, because the title to this organ was always (if what they contend is true) in the American Master Organ Company.

The Vice Chancellor: You had possession of the organ?

Mr. Morten: We had only title.

The Vice Chancellor: And equitable title.

Mr. Morten: No, the title remains in the American Master Organ Company, and was to remain there until it was paid.

The Vice Chancellor: It was a conditional sale?

Mr. Morten: Yes, a conditional sale; therefore, the title was in them. It is very complicated. I don't know what to say. My idea was this, that whatever title the Pipe Organ Maintenance Company has got, if any, it derived through the sale in the Court of Chancery, and that is the only title they have got.

The Vice Chancellor: Of course your answer does not show on what consideration this transfer to Mason was made, and whether he has been paid, or whether any title can be made under his legal bill of sale, Mr. Lane?

Mr. Lane: No, sir.

The Vice Chancellor: Is it not rather material to determine whether Mason got such title that he could insist on the payment of all these moneys?

Mr. Morten: Mr. Lane, have you an extra copy of that assignment? I have never seen it, so I am not prepared to meet it. I have never seen it.

The Vice Chancellor: Well, these papers have just been presented today, both the bill and the answer.

Mr. Morten: That was your Honor's direction. You told us to do that, you know. It was presented to us on the day of hearing.

The Vice Chancellor: Well, you saw this answer of Mr. Lane's before today?

Mr. Morten: Oh, yes, sir. Mr. Lane told me about that assignment. There was no copy annexed to his answer, and I presume he got it after that. It is not set up in the answer, and it would be better for you if it was set up, because there is nothing in the pleadings that will raise that issue now.

Mr. Lane: May, 1921, that is dated.

Mr. Morten: Well, it is not annexed to your answer.

Mr. Lane: I had this, I think—yes, I had that in May, 1921, which was just before June, 1921, when the case was coming on for trial. You raised that in the amended answer, I think, that you filed; and that is the reason why I got that so as to endeavor to cut out the question in the lawsuit.

Mr. Morten: It was not annexed to my copy. I know that. I had not seen it.

Mr. Lane: Have you any objection to having it annexed now?

Mr. Morten: No.

Mr. Lane: It was intended to be annexed, if the Court please. I notice that I have not got a copy of it here.

The Vice Chancellor: Well, you may furnish a copy to Mr. Morten and file a copy.

Mr. Lane: Now, if your Honor please, my idea of this situation is this, in reply to what Mr. Morten has said—that if Mr. Morten's position be correct, the situation is that Mr. Robinson has this organ, and he has had the right to keep the organ without making any payment whatever on account

of the purchase price of the organ except the payments that he had made; and that he is entitled, as I read the bill of complaint, to a judgment and get back those installments because the contract was not fulfilled. There is no doubt, on the admitted facts, that the contract was made, that the organ was delivered, and the organ was installed. The organ was ordered in June. It may be that it was supposed to be delivered on some date before it was delivered, but, in any event, that question, it seems to me, is entirely outside of the case, for the reason that if the proof is that the organ was actually delivered on October 26th or 28th, Mr. Robinson made the payment of the installments, that under the contract, were due and to be paid upon the installation of the organ. And he then proceeded to make several other payments. The company went along and went into insolvency, in this Court, and there was a sale by the receiver, Mr. McKee, to the Pipe Organ Maintenance Company. The creditors, under the order of this Court, I think, received a certain sum of money in pursuance of that sale, and to my mind, it makes absolutely no difference whether or not the receiver actually went through the form of executing an assignment, or what he did, or whether he went through the form of executing an assignment that, in its terms was diametrically opposed to what the order of this Court provided. We do not, of course, admit that he did any such thing. That when this case comes into equity—into the same court—between the parties, that this Court will determine that the assignee, the purchaser, obtained what? Just what that order provided and just what he could

obtain under the sale, and under the order of this Court, and what he bid for—and that, to my mind, is what he obtained. Now, before I go any further, I am waiting to hear what Mr. Morten's position is—whether or not his position is that anybody has the right to collect this money or not, if there is any money due from Mr. Robinson on this organ; or whether, because the company went into bankruptcy, Mr. Robinson has the right to keep the organ and to be absolutely released from any obligations for making and payments for it whatever, although, if the company had not gone into insolvency the American Master Organ Company would have been in a position to collect the money, but, because they went into insolvency, he has a right to keep his organ and also not to pay a cent of money?

The Vice Chancellor: Doesn't that swing back to one simple proposition—did you perform your contract?

Mr. Lane: And, if we did not, how much should be charged against us for such portions as we did not perform—that is what it swings back to entirely; or if we did not keep up the guaranty how much should be charged against us for the guaranty? That is exactly what it swings back to, if your Honor please, and exactly the position this Court took in this Ridgewood case. There was a provision about guaranty in the Ridgewood Playhouse case for the reason that the Court allowed, as my recollection is, a certain amount of money for the upkeep of the organ during a certain period. So there certainly is that. The sole effect, if your Honor please, it seems, comes down to this—first, was the organ installed in ac-

cordance with the contract; secondly, was the organ excepted by the defendant; thirdly, if that be so, then the Master Organ Company were in the position of being entitled to their money; fourthly, was there any violation of the guaranty that provided in the contract? If there was a violation of that guaranty, does that, of itself, go to say that they are not entitled to collect a nickle; or are they, as in the Ridgewood Playhouse Company case, chargeable with what was the cost and damage that Mr. Robinson was compelled to go to in order to do work which they did not perform; and, of course, I want to get out of your Honor's mind any false impression. The proof will be that after this Pipe Organ Maintenance Company got the contract, the Pipe Organ Maintenance Company went, and at the request and solicitation of Mr. Robinson, the contractee, went and sent men over there for the purpose of readjustment of this organ in compliance with the contract, and after that was done, Mr. Morten's clients went on and started to pay new installments, but they stopped their installments—

The Vice Chancellor: I am only trying to get at what is legally to be tried here.

Mr. Lane: My position is that we are going to try here the issue as to how much is due on this contract, and that is all that there is really any dispute about. Of course, Mr. Morten brings in a collateral question about some other contract about some other organ, but all that is to be determined is how much money is due on this contract; and it seems to me that all these other questions that are raised are really outside of the real issue. Your Honor calls it a "legal issue";

I call it a real issue of fact, after your Honor has determined the legal issue.

The Vice Chancellor: You have asked for a rescission of the contract, Mr. Morten?

Mr. Morten: Yes, we say when that organ was not installed as it should have been (and it has not been installed by the Master Organ Company) we are not obliged to accept installation by anybody else with their guaranty that it might be done properly; and we are in this position—we say, "Here is your organ; you have not performed your contract; give us back the money you have belonging to us and you take your organ." That is our position and that is what we say today. We cannot keep the organ.

The Vice Chancellor: And you seek a rescission on what ground?

Mr. Morten: On the ground that they never performed and have never performed their contract. That is one ground, and the second ground (which is the very thing which they dodge right along), is that if your Honor could find that it were possible to assign this contract by the receiver, as he has done, that we would not be obliged to accept; equity would say that we would get the same protection that we bargained for in our original contract—in other words, protection that would guarantee to us what we bargained to get; and the Pipe Organ Maintenance Company would have to show that they were in a position to carry out that contract before equity would make us carry out our part of the contract with them.

The Vice Chancellor: Suppose this organ company was an individual and died? Do you mean

to say that no one else could perform the contract?

Mr. Morten: You mean died when—before the organ was installed?

The Vice Chancellor: Yes, or before the guarantee was concluded?

Mr. Morten: I may say this: That we would not be obliged to pay for it. Suppose I engaged your Honor to make a painting for me and you died before it was done?

The Vice Chancellor: That is another proposition. Here is something marketable.

Mr. Morten: Here is a peculiar instrument, and it is of the same nature as the painting proposition.

The Vice Chancellor: My estate may continue the work and finish it up.

Mr. Morten: They may not be able too.

The Vice Chancellor: If they could not, that is another proposition.

Mr. Morten: I say I am willing, if they are willing, to come in and complete the contract, or give us a guarantee that they can do so, we are willing to let them do that. We won't stand on a mere technicality. But we do say we are entitled to some protection, some guarantee on it.

The Vice Chancellor: Here is where we are drifting away from what I want to find out. Here is a contract made for the installation of an organ. The organ is installed; one side says it was properly installed and you, for six or seven months afterwards, paid the installments falling due on that contract.

Mr. Morten: No, we never did, I don't believe.

Mr. Lane: Oh, yes, you did.

The Vice Chancellor: It says so.

Mr. Morten: The organ was installed on October 26th, and there was not a payment until December.

Mr. Lane: Why, you made a payment on October 28th of $400.

The Vice Chancellor: Beginning with December 12th, 1916, you paid monthly thereafter $150, under the terms of the contract, down to and including September 18, 1917.

Mr. Morten: Yes, sir.

The Vice Chancellor: Now they say they performed the work and have agreed to a guarantee. Now, when they failed to live up to their contract, if the organ was installed, it may be possible that you would have a right to refuse to make your installment payments, and you might not; because rooms get out of repair you cannot stop paying rent.

Mr. Morten: The proposition as to the paying of rent is quite different from a contract, if your Honor please.

The Vice Chancellor: I know that is true; the point here is what right did you get under that guaranty? You got no right until a condition arose which required the guaranteeing party to do something. Now, it might never arise, and until the condition did arise you were bound to pay. I do not understand that the party here is not entitled to the money unless a condition arises which requires that something shall be done.

Mr. Morten: See if I understand your Honor correctly: If that organ had been properly installed and we had accepted it at that time, on October 26th, thereafter I admit we would have

been obliged to make payments in accordance with the contract, until something arose—is that your Honor's position?

The Vice Chancellor: Yes; that is your best position, as I see it.

Mr. Morten: Oh, yes; we do not deny that at all, if they had performed their contract.

The Vice Chancellor: Then, as I say, doesn't it come right down to the question whether they have performed their contract?

Mr. Morten: Well, it would be that, too. Then we had this other proposition, which is a legal proposition—

The Vice Chancellor: Well, I don't pay much attention to that; we are in a court of equity now.

Mr. Morten: Well, I say, even in a court of equity, we would be entitled to that protection, also.

The Vice Chancellor: I don't know that you can take advantage of that.

Mr. Morten: Well, I am perfectly willing to abide by your Honor's decision, as I must, for the time being.

The Vice Chancellor: I am not deciding anything; I am only trying to get the drift of this case from a legal standpoint and the issue to be tried.

Mr. Morten: Yes, sir. Well, I am ready to proceed.

THE CASE FOR THE COMPLAINANT.

Mr. Morten: I offer the pleadings in evidence, with the exhibits annexed to the pleadings, to have the same effect as if they were formally offered in evidence and proved.

Mr. Lane: That, of course, includes this assignment which is supposed to be attached to the answer?

Mr. Morten: Yes.

LEE P. WOODBERRY, sworn.

Direct-examination by Mr. Morten:

Q. Mr. Woodberry, where do you live? A. No. 3591 Boulevard, Jersey City.

Q. What is your profession? A. Organist.

Q. How long have you been an organist? A. A little over nine years.

Q. In 1916, where were you employed? A. At the Summit Theater in West Hoboken.

Q. As an organist? A. As an organist.

Q. At that time did you have knowledge as to where the Colonial Theatre was, in West Hoboken? A. I did.

Q. Did you know Mr. Frank R. White, who was the vice president of the American Master Organ Company? A. I had met him at the time that they installed the organ.

Q. At the time they installed what organ? A. At the time they were building this organ down there—this American Master Organ, the new organ.

Q. Where? A. In the Colonial Theatre, West Hoboken.

Q. That is Mr. Robinson's—is he here? A. Yes.

Q. Did you have any conversation with him at that time about Mr. Robinson's organ—the installation and building of it? A. Why, Mr. White, if I remember correctly, came up—

Mr. Lane: Wait a minute—did you have any?

The Witness: Yes, I had a conversation with Mr. White.

Q. What conversation did you have with him?

Mr. Lane: I object to that, on the ground that the conversation is not binding on us.

The Vice Chancellor: You succeeded him.

Mr. Lane: Well, I want to get in a timely objection.

The Vice Chancellor: Oh, well, I will not regard it for a moment if it seeks to vary the terms of the written contract. I will let him answer the question.

Mr. Lane: May I ask what the purpose of the question is?

The Vice Chancellor: Oh, you are not before a jury.

Mr. Lane: Well, as long as your Honor gets the objection all right; I don't know just what is coming.

Mr. Morten: I do not seek to vary the contract or alter its terms. Does that satisfy you?

The Vice Chancellor: Go ahead.

A. My conversation with Mr. White was in regards to about taking a position on his organ in his building at Butte, Montana.

By the Vice Chancellor:

Q. As what? A. As an organist. They were building a large organ at Butte, Montana, and at the time, I was supposed to start in at the Colonial Theatre and play that organ there until this Butte, Montana proposition was ready.

Q. What time in 1916 was this, do you recall? A. Well, I am not positive; I don't want to state unless I am really sure; it was somewhere around about December, or some place around there; I cannot really give you the exact date, I haven't committed it to memory.

Q. Was it after the organ was installed in the Colonial Theatre? A. No, the organ was building in the theatre.

Q. While they were building it? A. Yes.

Q. You said as I understood you, that Mr. White told you to go down and play at this organ at the Colonial Theatre so you could be prepared to play on the organ out at Butte, Montana? A. That was the idea.

Q. Did you go down to this organ at the Colonial Theatre and play on the organ? A. I did.

Q. How many times did you visit the theatre for the purpose of playing on the organ, and how many times did you play on that organ there? A. Well, about twenty-five times, easy.

By the Vice Chancellor:

Q. In what period of time? A. Well, in a period of about six months—four months—along there.

By Mr. Morten:

Q. What kind of an organ is this—can you give us a general description of it? What is it composed of? A. Well, it is a piano console with two manuals; one is an organ manual, and the other is a piano manual, which can be played on the organ and on the piano, too.

Q. What else has it? A. Well, it has trap-drums and percussion instruments, and different sets of pipes.

Q. Do you know what a diapason is? A. I do.

Q. What is it? A. It is a metal pipe.

Q. At the time you played on this organ was there a dispason on this organ? A. There was.

Q. Now, when you played on the organ, was it ever in condition where you could play it and play all the parts? A. Not to my knowledge, not at any time I ever tried it; it was not in any condition.

Q. Did you have any conversation with Mr. White, after you had played this organ in which you told him about the condition of the organ as played? A. I did.

Q. What did you tell Mr. White was the trouble? A. Well, I did not go into any very great detail with Mr. White, because I was looking to better myself, in which he wanted to help me; and the only thing I really criticised and told him he had to look out for was his drums, which would not work; and I told him how good the drums at my theatre worked, and he came up and heard them, and so I made an arrangement with Mr White and Mr. Ely that they were to come up to the theatre some night after the show and I would show them how those drums worked.

Q. That was at the Summit Theatre? A. Yes, where I was playing at the time.

Q. And did they come up? A. They did—both Mr. White and Mr. Ely; I took them underneath the organ and showed them this trap arrangement, how it worked, and how it worked on suction, and the results I got, which Mr. White looked over it, and he said he would try to do the same thing down at the Colonial, that they had to do something on their traps, they wouldn't work.

Q. When you say "drums" what do you mean? A. Snare drums and pipe drums, cymbals, crash cymbals and chinese block.

Q. Those are all parts of this organ? A. Well, those are what we call "traps."

Q. And you say none of those would work? A. No, they wouldn't work at the time I played on them. That was the particular one thing that I criticised in the organ, and I wanted, in that way, to help Mr. White on this one special part of the organ.

By the Vice Chancellor:

Q. The drums you refer to? A. Yes, I didn't criticise much of it because I was not in a position to criticise to him so much the other part of the organ as I was that, the traps would not work at all, and I wanted to help him in that respect.

By Mr. Morten:

Q. You know very well what the "traps" are—let us understand what those traps are composed of? A. Brass drums, kettle drums, snare drums, crash cymbals, Chinese blocks, triangle, tamborine.

Q Cymbal re-iterator? A. Yes, I think they

have one on there, if I remember correctly; I am not positive about that; I think they did.

Q. With a bird part to it—was that part of your traps, the bird? A. I don't recall exactly, but I think there was birds on it.

Q. If there was birds, would it be part of the traps? A. Well, it might be with the traps at that time—a special.

Q. I call your attention to this contract, which provided in Item 46, "Pedal Piston, No. 1 for bird?" A. And No. 47 "Pedal Piston No. 2 for bird."

Q. Now would that instrument, if I may use that word, be included in what you call the traps? A. Why, yes, you could call it the traps—just the different effects that would naturally be covered in that word—it would have birds and a siren whistle, and those are all, in one way, termed by musicians, as "traps."

By the Vice Chancellor:

Q. This was a combination of various instruments, in a combination called an "organ," that were operated by the piano keys, or organ keys? A. Organ keys, yes; or else by foot pedals or little pistons, or buttons you might have to touch, that would work them.

By Mr. Morten:

Q. What controls these drums and traps? A. Well, it can be controlled by stops.

Q. What kind of stops? A. Well, a stop.

By the Vice Chancellor:

Q. A pedal? A. Not a pedal, a stop.

By Mr. Morten:

Q. Percussion stops? A. Yes, but you asked me how they could be controlled; they are stopped either on the pedal tread or toe piston, or a push botton, or stop on the organ console.

By the Vice Chancellor:

Q. Could you control these drums and traps on this organ by any of those? A. It wouldn't work. That is the reason I took a chance and told Mr. White and Mr. Ely to come up to the Summit Theatre to the other organ; I wanted to help them, and they came up there, and I showed it to them, and I did it all on account of my friendship with Mr. White.

Q. You know Mr. Sprackling? A. I do.

Q. He was the organist at the Colonial Theatre? A. Well, not at the time I was there; but I knew him when he came on the position, yes; I met him there.

Q. Now, after Mr. Sprackling came there did you try to play the organ while he was there? A. I surely did.

Q. Did you know Mr. Ely, the Secretary of the American Master Organ Company? A. I do.

Q. Did you ever have any conversation with Mr. Ely regarding this contract with Mr. Robinson? A. Why, yes; but not really in a business-like manner; they just told me about it, that is all.

Q. Did you ever have any talk with him regarding a Wurlitzer Organ—Mr. Robinson? A. Why, I was out in the factory—

Q. One moment—did you have any? A. Yes.

Q. What conversation did you have with Mr.

Ely in regard to a Wurlitzer Organ, with Mr. Robinson?

Mr. Lane: I object to that on two grounds—first on the ground that I assume, from the pleadings, that the purpose is to prove some collateral agreement or some different agreement in respect to the Wurlitzer Organ than that contained in the written contract; it has a special paragraph or provision as to what the agreement was with reference to this Wurlitzer Organ, and of course, that being complete in itself, it cannot be varied by parol in any way, shape or form; and upon the second ground, that any talk with the Secretary of the Company is not and cannot be held to be of binding force and effect upon the Company; and particularly that when the Pipe Organ Company purchased under the order of this Court (while, of course, they are not in a position, and I am not asking the Court to put them in the position of *bona fide* holders for value, or anything like that) but the rule as to written contracts should be lived up to just as strictly as it is possible. The very reason, if your Honor please, of that rule—

The Vice Chancellor: I know, but suppose I agree with you that a contract shall not be changed unless in writing, that provides for the payment of $100, and you came to me and say, "Here I have got a Wurlitzer Organ that I will turn in to you for $2,500, and you credit it on account of

the contract," and the Wurlitzer Organ is turned in—cannot be proved that that was credited on the contract?

Mr. Lane: Yes, but in the pleadings they say it happened at the time the contract was entered into.

Mr. Morten: No, we do not—we say afterwards.

Mr. Lane: I don't think so.

The Vice Chancellor: I think I will let it go in. A more serious objection, I think, would be that the Secretary does not seem to have authority to bind the corporation as such.

Mr. Lane: And your Honor will consider I have made that objection, without my objecting all along the line—that I have objected to that line of questions?

The Vice Chancellor: Yes.

A. I observed that old style K Wurlitzer Organ on one side of the shop.

Q. What shop? A. In the American Master Organ Company.

Q. Where was it? A. One in Lakeview.

Q. Lakeview, N. J.? A. Yes, near Paterson.

Q. When was that? A. Well, that I cannot tell you; it was about the time they were building that organ for Butte, Montana. It was after they had made the organ at the Colonial.

Q. It was after you had started to play on the Colonial Organ, or were practicing on it, was it? A. Well, about around that time.

Q. All right—go ahead—you say you saw this style of organ? A. I did, yes; and I asked either

Mr. White or Mr. Ely (they were both there—I don't remember which one I spoke to) "whose was that old organ over there," (I saw the condition it was in); he said, "Why, that is Mr. Robinson's."

By the Vice Chancellor:

Q. Who was Mr. Ely and Mr. Robinson? A. Mr. Ely was the gentleman I met with Mr. White; I think he was the President or something.

By Mr. Lane:

Q. You don't know, do you? A. Secretary.

By Mr. Morten:

Q. Mr. Ely was Secretary and Mr. White was Vice President? A. Yes.

Q. Was Mr. White with you? A. Yes, we were both there together. Mr. White was taking me there, and he was showing me this big organ they were building for Butte, Montana. That was the reason of my visit there.

Q. Tell us what was said about the organ? A. Why, they said they were going to fix it up and sell it to Mr. Robinson, that is all I know.

Q. Do you know whether or not that diapason is still on Mr. Robinson's organ? A. It was on Mr. Robinson's organ, yes.

Q. Do you know whether it was there when you left? A. No, I think that was taken off, and if I remember correctly, Mr. White said they shipped it to Butte.

Q. To Butte, Montana? A. Yes, and that they substituted some other stop for the Colonial.

Q. Now, in playing Robinson's organ—the organ that was in Mr. Robinson's theatre, what ef-

fect did this outside diapason have on the organ, if it was used? A. Well, it was absolutely out of place there; it was of no use at all; I did not see any reason for it being out there—out in the open; it was absolutely useless.

Q. But when you did use it, what effect did it have on the music of the instrument? A. Well, it drowned the effect of anything else you tried to play, because there was nothing enclosed; it was all out in the open; there was no chance to soften or lighten.

Q. Have you ever seen any organ where the diapason was so strong that you could not soften or lighten it? A. Well, I never saw one in a theatre, and of course that is the only ones I am acquainted with.

Q. And how many theatre organs have you seen? A. Well, a good many.

By the Vice Chancellor:

Q. Of different designs? A. Yes, sir; I have played all kinds of organs.

By Mr. Morten:

Q. Do you know what is in the organ now—do you know what they have got there in place of this outside diapason? A. Well, if I remember, that is a string, a large string, I think they put there a sort of gambier; I am not sure, it is in the string family; I don't remember.

Q. What effect does it have, if you attempt to play that string, or use the string with that substituted for the diapason? A. Well, a poor effect; I wouldn't use it; it is absolutely useless, I wouldn't use it.

Q. Is it controllable, as it is there now? A. There ain't anything controllable that I know of.

Q. Can the tone be shaded? A. With that stop, it cannot, whether it is a camera or an open diapason, or what it is. In the position it is placed in, it is absolutely impossible to control it, or have any soft or light effect with it.

Q. Now, do you know whether or not it had what we call a "piano lock pedal?" A. Yes, it had.

Q. What effect on the piano does that pedal have when properly installed? A. If properly installed, the piano lock pedal will disconnect the piano from the organ.

Q. That is, it won't play the organ? A. Play it, but still play it on the piano keys. This lock is supposed to lock the piano hammers—the action of the piano—it is supposed to lock it.

By the Vice Chancellor:

Q. So then you do not play the piano? A. You don't play the piano when you have the lock on, but you play on the piano keys—the hammer does not strike the string.

Q. When you use this paino lock pedal on this organ, what effect does it have? A. Well, it ciphers very many stops—the notes and different keys.

Q. Just explain to the Court what you mean by "ciphering stops?" A. "Ciphering" is where a certain number of notes or stops will stick without being touched, without you controlling them—there is something that is not under your control; it opens when it should not open.

Q. What effect does it have on the music? A. That is not music, that is agony.

Q. Now, could this piano lock pedal be used at all without having this "agony" that you speak of in the music? A. Well, it could be used if it was fixed or properly fastened.

Q. No, I mean in this organ, could you use it? A. No, it was impossible to use it; if you used it you had trouble and the only way to do was to leave it alone.

By the Vice Chancellor:

Q. That could readily be repaired, couldn't it? A. Well, I am not acquainted enough on the details of that, your Honor.

By Mr. Morten:

Q. You are not an organ builder—you are an organ player? A. Yes.

Q. And you only know what the results are? A. By using something that is supposed to be used to get the desired effect, I know when I use it.

Q. I understood the Court to ask you if you had played organs in this country—did I understand the question to be that?

The Vice Chancellor: No, if he had played on different types of organs.

Q. You have answered that you have played on different types of organs? A. Yes, I have.

Q. Just state some of the organs you have played on? A. Well, I played on the Moeller and Behman and Wurlitzer, or Hope-Jones, they call it, and the Kimball organ.

Q. And for what purpose have these organs you have been playing been used? A. For picture work.

Q. Theatrical work? A. Yes, that is my main work.

Q. And the organ in the Colonial Theatre—what kind of an organ was that? A. That is an American Master Company organ.

Q. I mean, was that one that was used for church, or what? A. It was designed for theatrical purposes.

Q. And when you say an "organ for theatrical purposes," what does that include—what instruments? A. Well, theatrical organs are generally built as nearly like church organs as possible with whatever instruments we use in the organ augmented with larger pipes to make it bigger and louder toned.

Q. But these organs you speak of are built with drums and clarionettes and all those things? A. Yes.

Q. And all the combinations are played by one person? A. Yes; it used to be termed a "one-man band."

Q. A "one-man band"? A. Well, some used to term it that.

Q. Well, that is the term that is known among organists, you mean? A. Well, some of them, yes—most of them.

Q. Now what can you say about the touch on an organ of this kind, or how should it be? A. Well, these organs, theatrical organs are all electrical action.

Q. They are all controlled by electrical action? A. Yes.

Q. And how should they respond? A. Almost instantly.

Q. Did this organ in the Colonial Theatre respond in that way? A. I should say it did not.

Q. At any time that you played on it, could you get immediate response of the various keys or various tones that you wanted to produce? A. The organ was absolutely impossible—to come right down to facts, it was absolutely impossible to sit down and do a day's work on it, because when I wanted it to work, it wasn't there; it wasn't in condition.

Q. At any time? A. At any time, to play.

Q. Covering this period of some four or six months that you tried it at different times? A. Yes.

Mr. Lane: I would like Mr. Kilgem, of the New York Bar, and ask your Honor's permission to have Mr. Kilgem cross-examine this witness. I think he would be much shorter than I would be, and he has technical knowledge of organs.

The Vice Chancellor: Yes.

CROSS-EXAMINED by Mr. Kilgem:

Q. Mr. Woodberry, where did you learn your profession? A. My profession?

Q. Yes. A. Well, I started with Professor Goldworth at 127th Street and Fifth Avenue, New York City.

Q. How long ago? A. Well, that was a little over nine years ago.

Q. So, with the playing at this particular theatre you had about four years experience, is that right? A. No, I don't know where the four years comes in.

The Vice Chancellor: Two.

Q. You had an experience, did you, then, at that time that we are discussing, October 1916, when this organ was put in the Colonial Theatre, how much experience had you at that time as an organist? A. Well, around about four years, I think.

Q. About four years? A. Something like that.

The Vice Chancellor: One moment now—you have eleven years experience now—this is 1923. In 1916, if you went nine years up to the present time, your experience covered from two to three years?

The Witness: Well, something like that; I don't know definitely the answer.

Q. You were never employed in any organ factory, were you? A. Yes, I was not employed, but I went up to Behman in Binghamton, New York, with the organ I was playing at the Summit Theatre, getting an idea of how the organ worked.

Q. How long had you been there? A. Well, I was up there about ten weeks; I went up there on my own hook.

Q. You only went there to get an idea of how the organ worked? A. To get an idea which would help me in my playing.

Q. You never assisted in constructing an organ? A. Well, I helped up there, yes, too; it was in the factory—like winding armatures, magnets, and helping on tuning tops in the tuning room, and wiring in relays.

Q. Do you know the difference between the different organs you have mentioned? A. I do.

Q. Their method of producing sound? A. I do.

Q. Are they all on the same principle as that that this organ contained? A. Well, not exactly on the same principle, but on the same idea.

Q. This was known as an "electric action," wasn't it? A. No, electrical control action—there is no action electrical—electrical contact.

Q. I mean, it was known as an "electric action," to distinguish it from "pneumatic"? A. Yes.

Q. Do you know what "pneumatic action" is? A. Yes, I do.

Q. That is different from the action mentioned in this case? A. Well, they had to have "pneumatic" in the chest. There is no organ that I know that has a magnet that plays the pipes alone; you must have a little pneumatic in the chest in order to open the valve and let the wind into the pipe.

Q. But you don't have to have electric action to play a pneumatic organ, do you? A. It is not a pneumatic action, it is an electric organ, with pneumatics in the chest.

Q. This was an organ for electrical action? A. It works by electricity.

Q. Do you know how a pneumatic organ works that has no electrical action? A. Yes, tubular, and, I forget the other name—"tracker action"—there is tubular and tracker action.

Q. There are three kinds of action—tracker, pneumatic, and electrical—you know the difference between them, do you? A. I do.

Q. In this particular organ, which we are discussing, had you ever gone inside of it? A. Not much—a couple of times I went in to pull out some ciphers, I remember, and that is about all I remember doing.

Q. Do you know how many stops it had? A. I couldn't recall now without looking over the specifications, because I played so many different organs that it has passed my mind just exactly what stops it has. I remember some of them but not all.

Q. But you know it had traps? A. I do.

Q. And you know it had pipes? A. I know it had pipes.

Q. And you know it had a key-board? A. It had a key-board which was no use.

Q. Was that separate and apart from the piano? A. One key-board above the piano—it was coupled on to the piano.

Q. In other words, the action was operated from a piano, and an organ key-board? A. Yes, two.

Q. Two key-boards? A. Yes, that is it.

Q. What makes the cipher, do you know? A. There is several reasons that cause a cipher—dirt under the armature in the magnet, would cause it; another way would be by contact, wires touching in the relay would cause ciphering.

Q. Would a little dust in the palate—you know what the "palate" is, don't you, of an organ? A. Yes.

Q. It lets the wind into the pipe, doesn't it? A. Yes.

Q. And ciphering is caused by some little particle getting in the palate, which holds the palate open, and lets the wind in and causes your cipher? A. No.

Q. That is not it? A. No, it is not it; ciphering is caused by magnet trouble, most generally, or relay trouble.

Q. Well, now, the trouble in the magnet is where some dust gets in and prevents the little armature from operating—is not that it? A. That would be one cause; another cause would be trouble in relay.

Q. You don't know then that that would be a cause? A. I have found it out since.

Q. At that time you did not know it? A. You are asking me now about how much I know—if you ask me what I knew then, that is a different thing.

Q. At that time you did not know it? A. I did not know what the causes were.

Q. Do you know where the organ was placed? A. I do.

Q. Where?—at what part of the theatre? A. In the right-hand side of the theatre—on top of the stage.

Q. On the stage? A. Stationed off from the stage, on the side.

Q. Do you know where the boiler room was? A. Yes, that was downstairs—down in the cellar.

Q. Is it not a fact that the organ was directly next to the boiler room? A. Well, it was over further from the boiler room—the boiler room set back, and the organ set this way (indicating).

Q. But it was within four feet of the boiler, wasn't it? A. That I couldn't tell you.

Q. You don't remember that? A. I remember the boiler being down in the cellar, back underneath the stage—backwards.

Q. What time of the year was it that you were there and played it? A. Well, along about the winter time—in the early winter.

Q. The boiler was in operation—was that

right—the boiler was used then? A. I don't know whether the boiler was used; I didn't pay much attention to it, it might be so, or might not.

Q. Was the climate cold enough to require heat at that time? A. Well, I was in there in the morning; I was in another theatre. My time was spent in the morning, or else at nights after everybody went home, because I was employed in another theatre within five blocks of it.

Q. How soon after the organ was put in there, did you begin to play there? A. Well, I started in even before the men left the job as being completed.

Q. The organ was put in there on the 28th of October, 1916? A. Yes.

Q. How long did you remain there? A. I left there in March to go out to the Coast—March 28th, I think, though Mr. White, who sent me out to Idaho. And from that time up to the time, I went to the Coast was the time I had been playing that organ.

Q. In other words, the winter months? A. Yes.

Q. Do you know that in the shaking of the furnace, the ashes would go up into this organ and cause what you have described as "ciphering"? Do you know that? A. Why, if the organ would have been properly placed, no matter how many ashes there were, it wouldn't do it, because you have a separate room for your blower, to keep the dust out.

Q. Don't you know, as a matter of fact, that these complaints you speak of were caused by the ashes getting up into these little armatures and causing them either to cipher or stop operat-

ing? A. Well, would that do it every day in the week, or at different times you tried it?

The Vice Chancellor: Answer the question.

A. Well, if that was the condition it would, but not the way it was there; it would do it at certain times only.

Q. How was that remedied when it did cipher, do you know that? A. I don't know, because I didn't know then as much about an organ as I do now, so far as construction was concerned.

Q. The organ people, the Master Organ Company, sent a man there whenever there was any complaint about operating the organ, didn't they? A. I don't know.

Q. You don't know that? A. I don't know; I was not employed at the theater and was not there enough to find out all of these details.

Q. You were not employed there? A. I was not. I agreed with Mr. White and Mr. Robinson that I would take that position until the position at Butte, Montana was ready, but I didn't do it, and I was down there playing on it.

Q. When there was something that didn't operate the Organ Company went there and remedied it? —didn't they? A. I don't know.

Q. Well, it was remedied—don't you know that it was remedied when he went there a second time? A. No, it was not.

Q. It was not? A. It was not remedied. Every time I played that organ there was not any time I found it any better one day than it was the other.

Q. You found that there was some other stops that did not operate, is that right? A. It was, in general, a botched-up affair, that is all.

Q. Where are you playing now? A. I am playing at the Roosevelt Theatre in West Hoboken.

Q. That is the defendant's theatre—is that right? A. Yes, sir.

Q. That is the reason you are here today, is that right, because you want to testify in a manner that would be favorable to him, is that right? A. My testimony would have gone in if I worked for him, or not; it went in a long time before—before I even stopped working out there; I have been friendly with Mr. Robinson a long time, I think.

Q. Do you have any trouble with the organ that you are now playing? A. Very little.

Q. Very little? A. Very little.

Q. But you do have some trouble? A. Well, you have trouble with a good automobile, or a good organ; you have a little trouble with them.

Q. That is exactly what I am trying to get at—an organ is apt to get out of operation by reason of a slight dust or drop of water getting on the wires, is not that a fact—moisture? A. Well, no organ should be installed where there was water to get into it.

Q. But if there is a little bit of moisture gets in on the action, it ceases to operate, is not that right? A. Some parts of it would; where that one part was affected it probably would affect it on one part of it, but not in general.

Q. Now, is it not a fact that that happens with

nearly all organs they, being mechanical, require constant attention—is not that right? A. That might be with one or two notes, but not in general—I mean there was not one single stop in that organ that you could get 61 notes out of it. If you ran the chromatic scale from the bottom end of the keyboard up to the top, which would constitute 61 notes, you would not have one quarter of them working.

Q. You wouldn't know whether that was caused by the— A. (Interrupting) I didn't know what it was caused by at that time.

Q. You know now, don't you, that they might be caused by the shaking of ashes in the boiler room? A. No, not to affect all those notes, it wouldn't; it was mostly electrical trouble—burning off the contact, the relays, causes that mostly.

Q. It would affect some of them, is that right? A. It may, a few very few, because it wouldn't put everything out of business in that way; and it would affect one part, but not the one next to it; if you got ashes in it, it might affect one stop alone; take the flute, for instance—you get some ashes in it—there is probably some notes of that flute that won't work, but you wouldn't have the majority of them cut out.

Q. But if you had dust in all of them they would all stop, wouldn't they? A. Well, you would have to have a lot of dust in the room to do that.

Q. Now, don't the traps get out of order more often than the pipes? A. I do not find it so. The one I am playing now has been in use a year, and I haven't had to touch my traps once, and they always work. The trouble that I found—

The Vice Chancellor: There is no question.

Q. Now, this particular organ, at the time that it was put in there four or five years ago, do you know whether that was a new kind of organ? A. A new kind of an organ? I did not go into details about it; it was a new make.

By the Vice Chancellor:

Q. Why don't you answer the question—did you know it was a new design, a new style of organ? A. Oh, yes; I misunderstood it.

By Mr. Kilgem:

Q. Electric action organs were not in common or ordinary use at that time, is that right? A. Well, they were, in theatres, but not anywhere else.

Q. How long before 1916, were they used in theatres, that you know of? A. Oh, three years, four years, maybe more than that, but I couldn't swear exactly how long it was; it was quite awhile.

Q. They were not a standard staple proposition—is that right? A. That I don't know.

Q. Well, you know that the tracker action organ was a standard staple organ? A. Well, in churches—I know that.

Q. In churches, yes; the difference between a church organ and a theatre organ is not anything, is it? A. Very much—a great deal different.

Q. Well, you mean in its having a lot of traps, and a church organ has not? A. No, they have different action altogether; you are talking about tracker action and the organs they play in churches.

Q. Did you ever play in churches? A. I have not to any great extent; I never made a practice of it.

Q. You don't know about the difference between a theatre organ and a church organ, do you? A. Oh, yes; I know there is a great deal of difference. I studied and practiced on church organs; that is where I first started to take it up—organ work—it was in a church, on an electrical organ.

Q. And what is the difference between them? A. What do you mean—regarding the action, or pipes, or what?

Q. You say they are an entirely different thing—now what do you mean by that? The pipes are the same, aren't they? A. The pipes are the same?

Q. Yes. A. No, some pipes are, but we have different stops and pipes in a theatrical organ that they wouldn't dare put in a church organ. We have a limit to a church organ. The idea of a theatre organ is to get orchestral effects.

Q. But the pipes of both organs are the same, aren't they—I mean by that the pipe, the stop is the same in both? A. You mean the open diapason?

Q. You know the difference, do you? A. Oh, yes I know the difference.

Q. Is there a difference between the open diapason and the upper? A. Yes, the upper is in the upper register of the open diapason.

Q. Now, you are getting at something—you know the difference, then, between a division of various stops? A. I do.

Q. In other words, a theatre organ is different

from a pipe or church organ by reason of the fact that the stop of eighty-five notes is divided into four names, but being the same all the time, is not that right? A. Well, it would be the same identical stop.

Q. The same pipes, but it would be called by a different name, up to the first series, and another down to the fourth series? A. Yes.

Q. That does not appear in the church organ, ordinarily, does it? A. No, that would be called a "unit system bearing stops," but a church organ has straight stops—legitimate straight stops. That is where we have relays on the organs today.

Q. Did you ever play a standard organ made by the Austin Company of Boston? A. I have played on an Austin organ, yes, but that name you just spoke of, I don't remember.

Q. I am asking about the Austin Organ—that is a standard organ, is it not? A. Yes.

Q. They are recognized high grade organ manufacturers, aren't they? A. Yes.

Q. They build theatre organs, too, don't they? A. Oh, yes, they build organs that are put into theatres, but they don't term them as "theatre organs" for they are not. They are a legitimate straight organ, with maybe a harp or bells or chimes added; but it is not termed as a 'theatrical organ."

Q. What is the difference between a "theatrical organ" and an organ of the kind that the Austin Company would build? A. We have more orchestral effect in a theatrical organ; and the other organ has more of a church effect—a church design.

Q. You mean you have more stops? A. More stops and different traps, etc.

Q. Do you know what the "chest" is in an organ? A. Yes.

Q. The chest of an organ for a theatre or a church would be exactly the same, wouldn't it? A. Well, the chest would be about the same, yes; maybe with a little different ideas, but it would be about the same principle.

Q. And the pipes would also be the same, except that in a theatre organ they would be called by some different names to be more theatrical, is that right? A. Not exactly; in one way you are right; in another way, I cannot agree with you because we have stops on a theatrical organ that they do not have on church organs.

Q. You have traps that you don't have in church organs, don't you? A. Yes.

Q. You don't have drums in a church organ? A. No.

Q. But they have a harp? A. Yes.

Q. And they have chimes? A.Yes.

Q. In both the theatre and the church organ? A. Yes.

Q. Before your time, or rather while you were learning as an organist, did you ever know them to have a harp in a church organ? A. Well, I cannot swear to that; they may have; I didn't pay much attention to it.

Q. Now, is it not a fact that you don't know anything about any organs except this particular kind of an organ, that is a percussion organ? A. I know about all kinds of organs; I have had enough experience in them to know about them; I do, to day.

Q. But you never worked on any, or know anything, except as an organist—is not that right? A. I have; in the last two years, I have spent a great deal of time inside of an organ; in fact, I helped to wire up the relay of my own organ I am playing today.

Q. But at that time you did not know anything about it? A. Not at the time.

Q. Not in 1916? A. Not at that time, I didn't know about the inside of an organ; the inside of an organ I didn't know about.

Q. Is it not a fact that, so far as you can recall, that organ was as good as any organ built at that time, or better? A. No; it was the worst thing I ever played on at that time.

Q. That is your opinion? A. That is my opinion.

Q. But you were willing to take the job and play on it? A. I did not take the job—that is just the reason I did not accept the job down at the Colonial.

Q. Why was it the worst organ you ever played? A. Well, it never responded when I wanted it to. There was absolutely no traps in it at all—there were traps in there but they would not work.

Q. But you don't know why they wouldn't work, do you? A. I didn't look to find out; I tried to help them out of their troubles at that time by giving an idea why the drums at my theatre were working, and they came up and I tried to help them all I could, and they met me afterwards, and told me that they did not work.

Q. Did you ever play an organ like this that

required attention from time to time? A. Any organ requires a little attention at times; none will stand up without a little attention; they must have some attention paid to them.

Q. And this particular kind of organ requires a whole lot more of attention than a church organ, the standard organ? A. Yes, because they are used more; they are used every day in the week, and a church organ probably once or twice a week.

Q. Now, to make this kind of organ entirely satisfactory, it would be better to have an organ builder on hand all the time, wouldn't it? A. Why, not necessarily all the time, no.

Q. A good part of the time? A. Generally theatres have organ builders on contract that visit the theatres possibly once in two weeks.

Q. But it would be better if they were there all the time, wouldn't it? A. Why some theatres do have a man all the time. It depends on the size of the organ. The big theatres have their own; and in New York in a large house, they probably retain one man as a house electrician, and also a man to look after the minor details of the organ.

Q. These complaints you are mentioning as objectionable are mostly remedied in a few seconds, are they not? A. No, not in these organs, it was not.

Q. But I am speaking now generally? A. No, all depends on what the nature of the trouble is.

By the Vice Chancellor:

Q. You are both working at cross-purposes—he is asking you generally if it is not the fact that

these organs get out of repair and it is a matter of a few minutes work for an electrican or artisan to put it in shape? A. Well, in some instances, yes; but some take longer.

Q. Well, is not that so in the general run of the cases—is not that generally the case—that is what he wants to know? A. Why, yes; I will say, "Yes" to that. Of course it varies.

The Vice Chancellor: Of course that varies.

By Mr. Kilgem:

Q. Do you know anything about an organ in Ocean Grove made by Hope-Jones? A. I do not; I never heard of it. I haven't played on it, and never saw the inside of it.

Q. And you don't know that they keep a man on the organ all the time, do you? A. I don't know whether they do, or not.

Q. Had you ever been in any other organ besides this one, up to the time under discussion 1916? A. Inside of an organ?

Q. Yes. A. No—yes, I beg your pardon—I was, in the Summit Theatre, the organ I was playing at the time.

Q. That is a Behman Organ? A. Yes, a Behman organ.

Q. And that is from the City of Binghamton, New York? A. Yes.

Q. You were never inside of a Wurlitzer organ?—were you? A. Not at that time.

Q. You were never inside of any organ made by this concern, the American Master Organ Company? A. No, not inside.

Q. Did you play any other organ of theirs, anywhere? A. I did not.

Q. You were friendly, of course, with Mr. White at that time? A. Very much so.

Q. And you are not friendly now—is that right? A. I did not say that.

Q. But there is a coolness between you—you do not feel obligated to testify in any manner that would be in his favor? A. Why not? I have nothing against him, not a thing.

Q. You said something about the notes not responding—do you know why? A. I do not.

Q. Don't know what caused it? A. Not then, I didn't; I probably do today, but not that time.

Q. Do you know why now? A. Well, I couldn't testify in regards to that organ at the time, now, why it was, but I know if that same trouble would start on my organ, I would know where it would be.

Q. Where would it be? A. Faulty installation. It would be in contacts too close to the keyboard, or else burning off the contacts in a relay; that would cause this trouble; and burning off wires, catching in the clips and holding it and keeping it up against the key, would cause it.

Q. Arcing? A. Arcing.

Q. Is that Behman organ the same kind of organ that this one in question here is? A. At the Colonial Theatre?

Q. Yes. A. About the same idea, yes—an electrical organ.

Q. As a matter of fact, most theatrical organs are the same general idea, aren't they? A. Well, some little difference, but I generally find that an

electrical organ is an electrical organ; some may have a little different idea than the others. I can explain it—it is like an automobile, they all run by gasoline but have a little different way of working.

Q. They are all liable to get out of order very easily, is not that right?—they are very sensitive? A. Yes.

RE-DIRECT-EXAMINATION by Mr. Morten:

Q. Are they liable to get out of order the same as this organ was?

The Vice Chancellor: An automobile?

Mr. Morten: No, he asked whether all are liable to get out of order.

Q. Are they liable to get out of order to the same extent that this organ was in the Colonial—all organs? A. Well, if they do, I have never run across them.

Mr. Lane: Mr. McKee is here from Paterson. I would like to, I would like to have him sworn for one question if Mr. Morten has no objection.

Mr. Morten: No.

The witness stood aside

WOOD McKEE, Esq., sworn:

Direct-examination by Mr. Lane:

Q. Mr. McKee, you were the receiver of this American Master Organ Company, were you not? A. I was.

Q. And these papers that are attached to the pleadings that have been offered in evidence, such as this assignment and bill of sale—you are the Wood McKee mentioned in those papers? A. I am.

Q. As Receiver, and also an Administrator of the Mason Estate? A. Yes, sir.

Q. Now, the question arose this morning as to whether or not Mr. Mason, or the Mason Estate, had been paid the ten thousand dollars referred to in the assignment of the American Master Organ Company, to be paid by the Company, or anyone; and I will ask you the question just what the situation is in relation to this assignment to the Pipe Organ Company? A. My recollection of it is that at the time of the sale of the accounts the Mason Estate had an assignment of several contracts (just what ones they were I do not recollect now) as security for a loan of ten thousand dollars. As Administrator of the Mason Estate, after I was discharged as Receiver, I was very desirous of closing that Estate, and, realizing, as we did that, with every contract we held, the parties signing the contracts all made objections to the condition of the organs, and we realized that there would be a lot of trouble in collecting these contracts, and when they were sold to the parties that bought them I made the proposition

that they make an offer to us for what interest we had in them, which they did.

Q. That is, to Mason? A. Yes, to the Mason Estate; and we accepted their proposition; and in order to close that Mason Estate, we made an assignment of all our interest in the contract to them.

Q. Now, just one other question—while you were receiver do you recollect making any demand for moneys from Mr. Robinson, or not; or don't you recollect that? A. Yes, I am quite sure we did. In fact, I do recollect of writing Mr. Robinson and demanding payments due under that contract.

Q. Now, there is one other question—did you know anything about this Wurlitzer Organ that was out in Lakeview, I think it was? A. I recollect something coming up about a Wurlitzer Organ; I think Mr. Robinson wrote me about it; but just what the detail was I do not recollect now; and I am quite sure that that was sold among the other articles, or disposed of.

By the Vice Chancellor:

Q. Sold by you, as Receiver? A. Well, I am not sure about that, whether it was. There was something about a Wurlitzer.

Mr. Lane: It was not, as matter of fact, your Honor.

The Witness: My account would show that; this is from pure recollection, and it is very hazy as to just what disposition was made of that.

CROSS-EXAMINATION by Mr. Lane:

Q. How much did the Mason Estate get for those contracts? A. I think it was fifteen hundred dollars.

Q. Is that the same fifteen hundred dollars that was paid to you, as receiver? A. No.

Q. In other words, three thousand dollars was realized for those contracts? A. Fifteen hundred of that went to the Company, that was realized at the sale by me, as receiver; the other fifteen hundred went to the Mason Estate for their interest in those contracts.

Q. Now, Mr. McKee, have you any recollection as to any date of any letter that you may have sent to Mr. Robinson? A. No, I haven't the slightest recollection of it.

Q. Did you ever get any reply from Mr. Robinson, do you think, for any letter you may have sent him? A. I think so; I think there were one or two; that is my best recollection.

Q. You had nothing to do with the American Photo-Player, did you? A. I could not say, Mr. Morten.

Q. No, I mean in this particular matter that you were receiver in, you did not write on behalf of them, or did not cause any letters to be written, did you? A. Do you mean as regards the master organ?

Q. Yes. A. I think so.

Q. Well, any letter that you might have sent out, whether it was actually signed by you, or not, would bear your name, wouldn't it? —that is, you never sent any letter out under the name of the Vice President of the American Photo Player

Company, did you? A. Oh, no; no, I had no connection with any concern of that kind.

By Mr. Lane:

Q. I don't know whether I did ask you this, or not—did you ever receive any moneys from Mr. Robinson on account of this contract while you were receiver? A. Well, I have no personal recollection of that, but if I did it would be in my report.

The Vice Chancellor: Is it claimed that any money have been paid excepting those shown in the answer?

Mr. Lane: No, sir; I don't think so.

The Witness: I am positive I made a demand on all the parties with whom these parties had contracts, that was part of my duty as receiver.

By Mr. Lane:

Q. But you don't remember particularly Robinson from the others—is that what you mean? A. Well, I am quite sure I did to Robinson because I am quite positive I received an answer back from Robinson, and I know, at the time I sold the Mason's interest in all of these contracts, I had a general talk with them about the different positions; I did particularly with the Ridgewood and the Butte, Montana, and this one, and I think there was another one; I think there were four or five. I am not sure which, and, well, in fact, all contract holders immediately turned in and said that "this was wrong," and "that was wrong," and we immediately saw a multiplicity of law suits and chancery fights, and of course that I

didn't want to go into, and that was really one of the reasons I wanted to get rid of the contracts, or get rid of Mason's interest in the contracts.

By Mr. Morten:

Q. You say you made demand—you don't mean you made personal demand, do you—you mean you wrote a letter demanding it—that is what you mean? A. Yes, I never saw Mr. Robinson personally.

Mr. Lane: The only difference, if your Honor please, about how much money was to be paid, was about the fifty dollars; I cannot understand where it comes in—they say $1600 and we say $1,550. The only purpose of saying this is that your Honor may find it somewhere in the testimony. We are not going to kick about the fifty dollars, one way or the other.

NELSON SPRACKLING, sworn:

Direct-examination by Mr. Morten:

Q. Mr. Sprackling, where do you live? A. I live in New York City—31 Morton Street, New York City.

Q. What is your profession? A. I am an organist.

Q. How long have you been an organist? A. Well, I have been an organist for over twenty years.

Q. Do you remember when you were engaged in

playing an organ at the Colonial Theatre, West Hoboken, owned by Mr. Robinson? A. I do.

Q. Do you know about when that was? A. I have not refreshed my memory; it is, I think, in April of 1917, until a year and a month or two later.

Q. Now, how often did you try to play on that organ during those thirteen or fourteen months? A. I played that organ afternoons and evenings at the regular show hours.

Q. That is every week day? A. Every week day, and sometimes, Sunday, I did, too.

Q. Now, at any time during this whole thirteen or fourteen months were you able to play that organ completely as it should have been played? A. In its entirety, no.

Q. What have you to say regarding the drums and traps—you know what they are, do you? A. I do.

Q. What have you to say regarding the playing of the drums and traps? A. Speaking generally, that they were not usable.

Q. Did they ever work? A. Not to my recollection.

Q. Outside of the drums and traps, were there any other defects in the organ, that you noticed? A. There were.

Q. Now, you remember, in December, 1918, making an examination of the organ and making a report as to its condition? A. I do.

Q. And was the condition in December, 1918, any worse than what it was during the fourteen months while you were there—I mean generally speaking? A. Generally speaking, it was about the same.

Q. I show you a letter dated December 19, 1918, signed "Nelson Sprackling" and ask you, if that is your signature? A. That is my signature.

Q. And what is that? A. This is a letter that I wrote Mr. Robinson on December 19th, after he had asked me to submit a report to him on the condition of the organ at that time, and that is all it is.

Q. And was that report made by you after you had examined the organ? A. This report was written by me three days, I see here, after I had examined this organ.

Q. Did it truly represent the condition of the organ as you found it at that time? A. As far as my knowledge goes.

Q. And your knowledge is limited to a knowledge of what, in this respect? A. Well, my expert knowledge is as an organist.

Q. You are not a mechanical organ builder? A. I am not.

Q. And you know nothing about an organ excepting as to the results it gives? A. No, that is not true—I do know, but my opinions in regard to it are not expert.

Q. Now, then, what condition did you find the organ in at that time?

Mr. Lane: I object to his reading that letter, or referring to the letter, excepting after having his recollection searched first to find out if it is necessary.

Q. Can you now, without regard to that memorandum, tell what the various defects were you found in the organ, at that time—all of them? A. No, sir.

By Mr. Lane:

Q. Can you tell any of them? A. Yes, sir.

Mr. Morten: I submit, now he has a right to use the memorandum, under those circumstances.

Mr. Lane: I don't think he has until he has testified to all of his recollection; then if there is anything he has left out, he can tell.

The Vice Chancellor: I suppose that is right, but it is going to come down to the same thing; he will want to read over this memorandum anyway. The witness appears to be an honest witness and I do not believe it is going to affect him any. I will sustain your objection, though, because your point is well taken. He may state, in the first instance all the errors and omissions he found there from memory.

Mr. Lane: I don't want to take up time, if your Honor please. If he reads it under those conditions, why let him do so.

Q. Now, then tell us what conditions you found in that organ at that time using the memorandum?

The Vice Chancellor: Now, you are coming to the point where the only thing he can do is to read the memorandum.

The Witness: Shall I read it?

Mr. Morten: Tell us, as you read it, what it is for we are not organ players.

The Witness: Shall I read this?

Mr. Morten: Yes.

A. "December 19th, 1918. Mr. G. A. Robinson, West Hoboken, N. J. My dear Mr. Robinson: I am herewith submitting a report on the condition of the organ in the Colonial Theatre, West Hoboken, as it was last Monday, the 16th of December. Of course what I express is my opinion as an organist and is based on my observations of last Monday and my familiarity with the organ from about a year's acquaintance when I was organist at your theatre, from April 1917 to May, 1918, barring the summer of 1917. Generally considered the organ is in wretched shape. The great fault seems to be in the unresponsiveness of the tone. If chords are struck on the flute for instance, there is no incisiveness of attack. That is more noticeable in arpeggios, for here half of the tones will not be heard at all as the pressure will have been released before the pipes have a chance to respond. This unresponsiveness of the organ is the fault with the traps as well as it is with the pipes. Of course this general fault is enough to make the instrument almost unusable. Another general fault is the uneveness of voicing. This will be shown in specific detail. The best thing about the organ is the pleasing quality of the full organ minus the big unenclosed string which draws on the open Diapason tablet and for which stop it was substituted."

I shall attempt a few details in the following list:

(The witness here refers to an appended list of defects.)

Q. Just read them. A. Under the heading of "Pedal." "The 16′ diaphone—uneven, slow; 9

notes silent. The 16′ Bourdon, uneven, slow, 5 notes silent—barely audible; most important in the pedal. 8′ open (cello) slow; 4 silent—

Q. Do you mean 4 notes silent? A. Yes, 4 notes silent. "8′ diapason, slow, 3 silent; lower octave bad. 8′ clarionette, slow, "and it has 4 or 3 silent, I cannot tell, I have it marked "one"; that doesn't make any different. Under the heading "Manual"; "16′ open in lower part; very uneven, 2 octaves barely audible; 6 silent."

Q. Tell us what you mean by that as you go along? A. "The lower part very uneven, 2 octaves barely audible, 6 (notes) silent. 8′ open cello, 3 silent, uneven. 8′ diapason, 3 silent; 8′ flute, 2 silent, lower octave barely audible, unevenly voiced, overtone very annoying; not a true flute. 8′ viol d'orch, 3 silent notes, weak from Tenor C down, 8′ viol celesti, slow on runs and arpeggios. 4′ flute, fair; 2′ Picolo flutes are of course quicker in higher register. 8′ Flugel horn, slow, uneven, especially in lower register; 8′ Clarinet, upper 1 and ½ octave too shrill. 8′ oboe, bad, especially last 2 octaves. 8′ Vox Humana, badly voiced, slow. No separate Tremolo."

"Percussion:" I find that 8 stops on pedal are either on all the time or off all the time, certain pressures on the swell pedal or the crescendo pedal seeming to affect them. Most of the percussion works on the 1st instead of the 2d touch. To specify would not only be laborious detail, but confusing. Traps are all wrong. Evidently there are numerous short circuits. Glockenspiel —1 silent note, 2d touch out of order; no triangle or manual at all. No tamborine. Chinese Block

½ second slow. When traps on manuals speak they speak together. Snare piston broken." Under the heading "Couplers"—the last paragraph: "3 silent notes on solo to Solo 4." I don't know what I mean here, but I said, "There is a very bad 'chase' on the tremolo"—I suppose I meant that there is fluctuation of tone, or something. I can't remember. "The piano lock is unusable, as it ciphers the entire organ. This is very important. The unenclosed string ruins the organ of itself; cannot use the crescendo pedal either because of it, and in short the organ is unusable, etc. I hope I have made my opinion sufficiently clear." That is the letter.

Q. Now then was there any open diapason on this organ at the time that you were there—outside diapason? A. I don't think so.

Q. You speak there of a "cello," I think you called it? A. Well, I had placed "cello stop" in parenthesis. It drew on the diapason stop.

Q. That is, it operated on the diapason stop—is that it? A. Yes.

Q. And this "stop" that you speak of, is that the stop that called for the open diapason, that operated on this cello? A. Well, it was substituted, as far as I understood at the time.

Q. Well, what effect did it have if you tried to use it? A. I did not use it.

Q. Well, what effect did it have? A. Well, the effect would be that being a string tone, it covered up the rest of the organ—what they call "eating it"—I would call it "eating up the tone."

Q. What effect did it have on the music? A. Well, you couldn't hear the full organ, as a full organ—I mean it was not a desirable sound.

Q. Was it controllable? A. Was what controllable?

Q. This sound, on this substitute stop? A. What do you mean?

Q. Could you make it loud or soft, as you desired? A. Do you mean this string stop?

Q. Yes. A. No; that is, you could not control it; it was not expressive.

Q. Well, was it the intention of the plan to have that controlled? A. Evidently not.

Q. Well, should it have been controlled? A. Well, if I were drawing the specifications for the organ, I should have it controlled, but evidently it was not, in the specification.

Q. Well, could it be used properly in the organ without being under control? A. It could not.

Mr. Lane: Well, I object to anything that is not in the specification, if the Court please.

The Witness: I don't know what the specification said; I never saw the specification for the organ.

The Vice Chancellor: One moment—do you mean to contend, Mr. Lane, that these people were buying an organ that created bedlam instead of music?

Mr. Lane: No, sir.

The Vice Chancellor: If it was in the specification this way and was not operative to produce music, then I should say, off-hand, it was not fit to be installed.

Q. What do you mean by "crescendo"? A. "Crescendo" means "increasing." It is an Italian term.

Q. If you brought on the full crescendo on this organ, it included this outside stop, didn't it? A. Yes, it would.

Q. Now, then, if you attempted to bring on that full crescendo in the organ, what effect would it have on the music? A. Well, it wouldn't be pleasing—that is, to me it would not be musical.

Q. Well, what would it be? A. Well, unmusical.

Q. Now, where do you play now, by the way? A. At the State Theatre in Jersey City.

Q. Is there any stop on that organ that is uncontrollable? A. No.

Q. Now, where have you played organs? A. Do you mean church or theatre organs, or everything, or what?

Q. Everything—just tell us everything. A. Well, I played at numerous churches and I have played at quite a number of theatres. Do you want me to specify?

Q. Well, whereabouts in the country—just give us the different cities? A. I played in Cleveland in my early youth; later I played in Denver; I had two or three organs there—the First Methodist organ and Saint Barnaby's; and I played the Hope-Jones organ at the Paris Theatre there.

By the Vice Chancellor:

Q. Is that like the one at Ocean Grove? A. Yes, I should say so. It was installed by Mr. Hope-Jones. And since that time I have played in the East two or three places, but I am not now a church organist; I confine myself to the theatres.

By Mr. Morten:

Q. What kind of an organ was that you played

on in Denver—how many manuals? A. Which one?

Q. This church organ. A. Well, the First Methodist organ—there was an old standard pneumatic—well, it was part tracker, too—a pneumatic tracker action of the Roosevelt type.

Q. Was it a large or small organ? A. It was a four manual organ.

Q. What is a four manual organ—a large or small organ? A. It is a large organ; it is the largest organ there is, as far as manuals are concerned.

Q. And while you were playing this organ in Denver, did you know Mr. White, Mr. Frank White, the vice president of the company? A. Yes.

Q. And let me ask you—did you have any interest in the American Master Organ Company? A. I had a friendly interest—it didn't amount to a great deal—with Mr. White.

Q. Well, were you interested financially in any way in it—the American Master Organ Company? A. Well, to the modest sum of one share of stock.

Q. And that was $100, was it? A. Yes.

Q. How did you come to get this position at the Colonial, do you recall? A. I desired to come East and Mr. White was in Denver, and when he came East, after this trip to Denver, why, he provided me with this position with Mr. Robinson.

Q. How are these tones, if I may use that word, controlled in an organ, whether they are made loud or soft—how are they controlled? A. The organ is controlled expressively by the foot pedals.

Q. And what do you mean by that—what do

these foot swells do? A. They open shutters and shut shutters.

Q. And when they open shutters, what effect does it have on the tone? A. It increases the tone, naturally.

Q. And, naturally, when they are closed, they decrease the tone? A. Decrease the tone.

Q. Well, were there any shutters to control the tone on this cello that you speak about? A. No, there were not.

Q. Where was this cello placed that you were talking of, in regard to the organ chamber—inside or outside? A. Outside.

Q. What you say, "outside," will you just tell us what you mean by that? A. I mean the pipes of this stop were placed in a row in front of the organ chamber, unenclosed.

Q. When you speak of "unresponsiveness" of tone, what do you mean by that? A. I mean, in this particular case, or in any case that might occur, that—just let me think a second and I will give it to you briefly—music must be played fast or slowly, or in any desired tempo, and if you play chords, the response of chords does not necessarily demand an immediate contact, because it will come in time, and it will not be noticed because the hands will not have left the keyboard before the tone responds; but in fast passages of the arpeggios or scale where the finger touches the keyboard and immediately leaves it, there is not enough of the wind made to produce a tone; or if the tone is produced, it is liable to be a small and not incisive tone; and if you cannot receive the desired musical results the organ would be

termed "unresponsive." That is what I meant in this letter.

Q. And in other organs that you have played on did you find that same condition? A. At times, yes.

Q. Is it generally the condition of an organ? A. Not of good organs.

Q. If an organ was in condition, would it be true that you would get that unresponsiveness? A. Not with a modern electric action.

Q. Is it intended that an organ should be responsive in order to be in true musical condition? A. It is.

Mr. Lane: We will admit that.

Q. Now, on this organ, I direct your attention to the fact that I am referring now to the *vox humana*—was there any tremolo on the *vox humana?* A. I say there is not, in this letter. I do not recall that now, but I say in the letter that there was not, and evidently there was not.

Q. If an organ is properly constructed should it or should it not have a separate tremolo on the *vox humana?* A. Well, that is a matter of opinion and I would say, in my opinion, yes.

Q. Can you get a proper *vox humana* effect unless you have a separate tremolo on it? A. Oh, no; not at all.

Q. And the specification in this case called for a separate tremolo on the *vox humana?* A. I don't know; evidently it did or else I would not have spoken of it here.

Q. But you know there was none there? A. It says here (referring to the letter) that there was not.

Q. Now, do you recall the piano stop pedal? A. I do.

Q. What is that used for? A. The middle pedal of the piano action is used in this organ as a lock stop on the piano.

Q. And what would that do? A. When it is down it locks the piano off.

Q. And what can you do then, when you lock the piano off? A. You play the organ without the piano.

Q. Would you play it on the manual? A. Play it on the piano manual.

Q. On the piano manual? A. Yes.

Q. Now, how many manuals did this organ have? A. Two.

Q. And one manual, you say, was the piano manual—what was the other manual? A. Well, that is not the way they are termed; one is called "solo" and the other is called "accompaniment."

Q. What was the accompaniment manual used for—I mean, if you had the piano pedal on, what would be the result of playing the accompaniment manual? A. The result would be that I should have the piano sounding as I played.

Q. And if you locked the piano pedal and you played the accompaniment manual, what would be the result? A. The result is supposed to be that we should have no piano.

Q. And if you locked the piano, in this organ, what result would you get? A. The result was that there were ciphers on this organ.

Q. Just tell us what you mean by "ciphers." A. A "cipher" is the sounding of pipes or different traps making a tone not under the control of the organist.

Q. How many notes would cipher? A. I have no idea.

Q. More than one? A. Oh, yes.

Q. How many notes were there on the organ? A. 61, multiplied by the number of stops.

Q. And would they all cipher? A. Oh, no.

Q. What percentage, about? A. I have no idea; I should say quite a number.

Q. And you could not stop the cipher by leaving the piano pedal locked? A. No.

Q. Were you ever able to use the piano lock pedal at all during the time you were there and get the results that you should have gotten? A. Not to my recollection.

Q. While you were there, do you know whether any attempts were made to overcome the difficulties that were encountered in the preparation of the organ? A. Yes.

Q. Were they ever overcome while you were there during those sixteen months—that is, was the organ ever in proper condition, complete? A. Not fully, no.

Q. Did you ever have occasion to limit yourself to the playing of the piano alone while you were working there? A. Oh, yes.

Q. And why were you limited to the piano alone? A. Because I could not use the organ.

By the Vice Chancellor:

Q. By "the organ" you mean that which brings in the drums and all the other accoutrements? A. Well, he is speaking about the piano now; he asked me why I was limited to the piano. I told him I could not use the organ. I would mean by that that I could not use the organ pipes, I was

not able but very seldom, as far as I can recollect, to use the traps.

(By consent of counsel Mr. Sprackling was excused, at the recess, with direction to return at 3:30 P. M.)

Recess until 2 o'clock P. M.

Afternoon session.

Hearing of the cause resumed at two o'clock P. M.

EARLE J. BEACH, sworn.

Direct-examination by Mr. Morten:

Q. Where do you live, Mr. Beach? A. 62 Elliot Place, East Orange.

Q. What is your business? A. Organ builder.

Q. How long have you been in the organ building business? A. Approximately seventeen years.

Q. And what is your particular line at the present time in organ building? A. Manufacturing of pipe organs.

Q. And, in manufacturing, what part do you have charge of? A. I have charge of the design, construction and manufacture throughout.

Q. Did you ever have occasion to examine the organ in the Colonial Theatre at West Hoboken? A. I did.

Q. Before you had examined this organ at all, had you ever heard it played? A. I have.

Q How did you come to know that this organ was being installed there? A. Mr. White told me of his having the contract to install an organ for Mr. Robinson.

Q. That is Mr. Frank White, who is Vice President of the American Master Organ Company? A. Yes.

Q. Now, do you recall going into the theatre to listen to the organ after Mr. White told you that he had installed it there? A. I do.

Q. Was that before or after you had made an examination of it? A. Before.

Q. Do you remember when you made your first examination? A. Not that date.

Q. Well, do you remember what month it was? A. No, I could not tell you the month. I remember it was at an afternoon matinee.

Q. Now, before you had made the examination, at this afternoon matinee, you say, you went in to listen to the organ play? A. Yes, sir.

Q. At that time? A. Yes.

Q. I show you a letter bearing the signature, "E. J. Beach," and ask you whose writing that is? A. That is mine.

Q. Can you, by reference to that letter, fix the time or month, about, when you were there and made your first examination? A. (Examining the letter) Well, my first examination was not on my own volition. I dropped in one afternoon to listen to the organ.

Q. I am talking about your examination when you looked at the organ, that is—not listened to it. A. Yes, because I carried out the terms of my letter on February 6th.

Q. February 6th, of what year? A. 1918.

Q. Now, before that date, you say you went in and listened to the organ playing? A. Yes.

Mr. Lane: How long before?

Q. Can you tell how long that was before January, 1918? A. No, I cannot recollect the date.

Q. Well, do you know whether it was any length of time that elapsed between the time when the organ was installed and when you were there—any appreciable length of time? A. Well, the organ had been used publicly for some time, as I recollect.

Q. Now, at that time when you first heard it played, did you notice anything about that organ? A. Well, it appeared to me that the organist might be having some difficulties of some kind, beyond his control.

Q. Well, from your experience as an organ builder, after listening to the organ, did you come to any conclusion as to its usefulness? A. Well, I thought it was like most any organ, that it required some mechanical adjustment of different kinds.

Q. Now, you say, in February, 1918, you made an examination of it—at that time what condition did you find the organ in? A. I found the organ to be in very bad condition.

Q. Did you make any detailed report at that time? A. Not at that time.

Q. Now, do you remember examining the organ on any other occasion? A. Yes.

Q. Do you recall when that was? A. About a year after that.

Q. Did you make any report of your examination at that time? A. I did.

Mr. Lane: I must object, if the Court please, to the witness being shown the report until he tells us what he found in general words.

The Vice Chancellor: Let him tell what he found.

Q. Can you tell generally what condition you found the organ in in January, 1919? A. I found the organ required a lot of work to be done on it to put it in real playing condition.

Q. Well, on either occasion, either in February, 1918, or in January, 1919—were the drums and traps working? A. I never heard the drums in the organ.

Q. Can you tell, without referring to your report, the different things that you found were faulty in this organ? A. I found, principally, a lot of mechanical defects due largely to design, rather than actually becoming out of order.

Q. Well, can you tell what they were, without referring to your report? A. It appeared, from the experience I had had in the particular magnet that was being used in that organ.

Q. By the way, what kind of a magnet was that? A. It was what is known as a "horse show type electro magnet."

Q. Had you ever had experience with them? A. Considerable.

Q. Where? A. In Hope-Jones Factory in Elmira, New York.

Q. Had you any experience with the design for

that magnet? A. I aided materially in the design.

Q. What did you find about it? A. The magnet was specifically designed to be operated on a certain voltage, or pressure, and wind pressure, and in executing the design of the magnet it is necessary to take both wind pressure, voltage and contacts into consideration. If the voltage is exceeded we suffer from what is called "arcing at the contacts"—that means burning; it is a little spark of electricity follows the conductor back as it tends to separate.

Q. What effect did that have? A. That, in time, burns that particular piece of metal until it drops off.

Q. And when that drops off, what happens? A. We have a silent note.

Q. What did you find about this particular organ, about voltage? A. This particular magnet was intended to be used on ten volts pressure; it was being operated on fifteen, and there was a noticeable burning of all contacts throughout the organ, especially in one of the control departments that is known on the organ trade as a "relay."

Q. Will you just explain what that is—the court don't know and we don't know—explain what that is. A. It is necessary in pipe organ construction to "relay" all electric circuits, when the number required exceeds six. We are limited in the keyboard, or control board, to a certain direction of an inch in width for each key; and, as has been found, it is only practicable to utilize, at the most, eight individual circuits or wires in connection with any one key. In this organ, I believe there

were some twenty or thirty circuits per note—that is, it was possible, by the specification, to draw twenty or thirty different numbers or tone-producers, or whatever they might be, on any individual key. Well, from the fact that there was that number, it necessitated the construction of an additional machine or contact—making device which would take care of the extra number of circuits employed, so, if we had twenty circuits, for argument's sake, on any one keyboard and we were limited to eight circuits for the key, we would have to construct a machine which would give us twelve circuits additional for that particular key. When one note is depressed, the eight circuits of its own are closed and an auxiliary of twelve circuits is closed by what is known as a "relay." This "arcing" was particularly noticeable within the relay mechanism; the greatest trouble being on certain stops becoming silent; and, tracing it up, these particular circuits were principally "relay circuits." In order to make repairs, it would have been necessary to have changed the electrical design of that relay to cause it to be permanent. Temporary repairs could have been made by replacing these contacting wires as fast as they burned off, but that means that a man could stay there the rest of his life and keep replacing them as fast as they burned off, without accomplishing anything, and at the end of the time, he would still have the same work in front of him.

By the Vice Chancellor:

Q. You are speaking about replacing it so that thing could not happen? A Well, it was impos-

sible to replace the contacts so that that would not happen; it was necessary to redesign that relay and provide it with electrical equipment in such a way that that could have been entirely eliminated.

By Mr. Morten:

Q. What would have been the expense of that? A. Well, the expense of relays runs into an awful lot of money; that is one of the most expensive pieces of apparatus in an organ.

Q. Well, what would you say approximately, it would cost to put in this new piece in this machine? A. Well, making a rough guess, it would cost, approximately, a thousand dollars to replace a relay—not the actual cost of the instrument, it is the cost of the labor, and the necessary change that has to be made in the organ and in connection with the organ, to accomplish the change.

Q. After that was done, would this machine operate successfully? A. No, it would not have caused the proper operation of the percussion instruments of the organ.

Q. Why? A. The magnets that were used to operate the organ, in the main part of the organ, were of those types that I have described before, but the same type of magnet had been used for the operation of percussion instruments within the organ. The percussion instruments are on what are termed "high pressure"; in order to have these magnets operate on this heavy pressure, it would become necessary to increase the voltage; in doing that, all the magnets throughout the whole organ suffered—they were being overlaid constantly.

By the Vice Chancellor:

Q. Which means what? A. Which means the constant deterioration of all electrical equipment within the organ. These magnets burn out, one by one. As to how fast they burn out, nobody can predetermine. Some, perhaps, may never burn out, and then again, they may all go inside of a few months. Judging from what I saw, it appeared that these percussion instruments had been originally made to be operated on pressure.

By Mr. Morten:

Q. What kind of pressure? A. Wind pressure —but had been changed to "vacuum" or "suction," as it is termed, for which an auxilliary blower had been supplied.

Q. Do you know what kind of generator they were using there at that time on this organ? A. I couldn't tell you its name or make.

Q. No, I mean as to power? A. It has a ten-volt generator.

Q. How many horse power? A. Well, I am not prepared to state, because we are generated to the wattage, and I could not give you that accurately.

Q. Now, then, do you recall, or can you tell us what defect you found with the main and auxilliary wind chest, without referring to the memorandum? A. The main wind chest, especially in regard to any stop in particular that I remember (and that was none), is the *vox humana,* which, as I recall, set in an independent chest which had been tubed from the main action. This had evidence of all kinds of misuse.

Q. In what way? A. Well, it was what we commonly call "full of bleed holes."

Q. And what are "bleed holes" put in a tube for? A. That is the easiest way for a mechanic to get contact in the high—that is "faking," in other words, as we call it.

Q. I don't quite understand you yet. A. In designing the action it is practically customary to design all actions so their connection is of one-type connection, so we have no leakage. Well, if, through any defect in design, such as tubing which is too small—diaphragms or pneumatics being too small—or the tubes being too long, it is necessary in order to have them operate satisfactorily, to drill little holes called "bleed holes."

Q. Where? A. Any place that is most convenient.

Q. In what? A. In the chest or tube—any place within the channel where this tube leads, or in the tube itself. This temporarily relieves the condition until it becomes dirty.

Q. In other words, it reduces the pressure? A. It reduces the pressure within the tube.

Q. And then, when it is filled? A. When it is filled, it goes back again and somebody else comes along and drills a hole in another place, and that was evidently what had been done here, because there was holes all along the line.

Q. And is that the proper job—to have the tube filled with "bleed holes" in order to have a proper organ? A. No, absolutely not.

By the Vice Chancellor:

Q. Right there—take the various pressures throughout the organ, as applied, I presume to the various instruments—must there not be some uniformity in the pressure of each—that is, you

may have greater pressure, for instance, for a drum than you have for a horn, or something of the kind? A. An organ is generally divided into two or three or half a dozen pressures; and a large number of one particular class or group would be on a constant wind pressure. Our aim is to have a constant wind pressure; if the organ is designed and built for pressure on a certain wind pressure, it has to be kept at that pressure.

Q. Suppose the wind pressure on one part of the organ is either too high or too low, does that affect any of the component parts of the instrument outside of the area where the pressure is too high or low? A. Well, it has an effect upon the tone-producing member, such as the pipes; it would have no material effect on the mechanical end of the organ, because the organ design is not figured so close that a slight variation in pressure would have any material effect on the mechanism.

Q. But, I say, taking the instrument as a whole, if the pressure on one area is higher than it should be, how does that affect the other parts? A. Well, that is practically impossible to happen, because we have pressure regulators which take care of the pressure and distribute it throughout the wind chest, throughout the different channels; so there can be no variation in pressure.

Q. Then, whatever bleed holes are in it, the pressure was regulated, and notwithstanding the bleed holes filling up, the pressure is not greater than it should be in the area? A. Well, what generally happens in tubing, especially in a system similar to this, is that there is no wind in the tube excepting while it is being operated, and the

effect of the hole being there would have no effect upon any other part of the organ except for the actual time it was in use.

By Mr. Morten:

Q. Now, this organ was divided into different "areas" as you say, and the pressure is distributed through these different "areas" and controlled by what? A. By pressure regulators.

Q. Now, what is the effect on a tube that had been bled if that hole becomes filled up again—this bleed hole? A. Why, the condition is back to where it started from.

Q. And what does it do with it—what does it do with the tone of the tube? A. Why, if a particular section in the control opens up in order that a bleed hole will cause it to speak more promptly, you go back to the slow stage; and if it closes up it keeps still altogether—what I mean is what is commonly termed a "cipher"—and if that hole is gradually closed, that ciphering condition reappears.

Q. What can you say, if you can recall, regarding this organ and its responsiveness to the touch? A. The organ, as I remember it, was slow or sluggish.

By the Vice Chancellor:

Q. And what would that indicate? A. Improper design. The organ had the appearance of being a large experiment.

By Mr. Morten:

Q. You spoke of one key on the piano having six circuits and those six circuits at times were used, by relay, to control forty or twenty circuits—is that so? A. Yes.

Q. Now, then, if one key should be pressed, what will these other twenty circuits, in turn, control? A. Pipes—percussions.

Q. And so you may press one key and if the organ is properly adjusted you may get how many notes or tones played? A. Twenty, or whatever number it is designed to draw on any one keyboard or key.

Q. Do you recall the greatest number of drums that were designed on any one key of this organ? A. No, I could not; I can tell from the specification.

Q. Will you look at that specification and tell us how many notes were designed to be controlled by a single key—the greatest number, if you can? A. Sixteen.

Q. Sixteen? A. Wait—there is more than that —well, approximately eighteen.

Q. Now, then if the contacting for this key was burned off by this higher voltage, as you say, than that for which the magnet or contact was constructed, what would happen if you touch the key? A. You would have no response.

Q. Eighteen notes would be silent? A. Eighteen notes would be silent.

Q. Now, every time you touch that key, do you get eighteen notes? A. No.

Q. How is that regulated? A. That is within the control of the organist.

Q. And how does he do it? A. He has what is called "stops," or little knobs, pistons, doubles. There is several different kinds of matters that control which are named "doubles," that he either depresses or draws, or some other mechanical contrivance which is under his control, that when he

puts that down, that closes the electrical switch which controls this particular key or relay and causes it to operate.

By the Vice Chancellor:

Q. It is like selecting the proper key on a piano? A. That is it exactly. When the action of the spring becomes disarranged for any reason, there is no response.

By Mr. Morten:

Q. But this controls sixteen or eighteen notes instead of one? A. By pulling out sixteen or eighteen stops—that is by their handling of the full eighteen; that the organist has under control.

Q. Now, do you recall the vacuum pressure on this percussion and trap chest—how high it was? A. I do.

Q. How high was it? A. Approximately 30-inch water gauge. I am quite sure of that pressure.

Q. And what was necessary to be done, in view of that pressure, with the electric current, to control the magnets? A. Specially designed magnets and contacts should have been provided.

Q. Were these designed magnets and contacts that were in this organ fit or proper to take care of the excess voltage? A. They were not. It appeared that this voltage had been raised for the purpose of causing these high pressure actions to work.

Q. Without a corresponding raising of the magnets? A. Without a corresponding winding of the magnets.

By the Vice Chancellor:

Q. That is, the voltage of these horse-shoe magnets had to be increased in order to take care of this high pressure? A. That is right.

Q. And in order to take care of the high pressure the power of the magnets had to be increased or should have been increased with magnets of greater power? A. Yes.

By Mr. Morten:

Q. And if the magnets of greater power had been put in, what effect would it have had on this contact burning out, or "arcing," as you call it? A. The contacts would have had to have been provided for the handling of that excess of current.

Q. Would the present contacts that are in the organ now have been sufficient to take care of that? A. No.

Q. And even if the magnets had been re-wound, you could not have used the contact points that are in there now—is that it? A. No.

By the Vice Chancellor:

Q. Given this figure of a thousand dollars—would that include the doing of all these things you have spoken of? A. Well, that thousand-dollar figure was a conservative figure on replacing the relay itself.

Q. Have you figured on what it would cost to build up this machine in a harmonious manner, so that it would accomplish the purpose for which it was intended? A. Well, your Honor, if I was to do that, I would have retained nothing but the pipes that were within the organ.

Q. What was that worth? A. Approximately six or seven hundred dollars.

Q. Otherwise you would say the organ was practically useless to accomplish the purpose for which it was installed? A. It has proven to be far more expensive, in the general run of cases, to start and rebuild or redesign that work—that is, work that has been set up and in place, than it is to take it out and scrap it and provide it anew.

Q. Has that been your experince as an organ builder? A. It has been in practically the majority of cases.

Q. If you were given the contract to place this organ in the condition for which the specification called for it to be, as far as it could be done, would you be willing to make allowance for anything, or could you use anything other than the tone pipes that are there? A. The grand piano was of standard manufacture.

The Vice Chancellor: I do not understand that there is any evidence in this case yet to show that this instrument was manufactured according to the specifications, or in conformity with them; or whether it was so manufactured and the specifications were followed and it could not be made into a success.

Mr. Morten: There are both conditions.

Q. Was the instrument constructed as the specifications called for, Mr. Beach? A. Well, apparently, from the console it was; and as far as the external parts were concerned; as far as I could see, the actual members were there.

Q. Was the diapason there? A. Well, I couldn't say that was or not; the specification does not

specify, and very few organ specifications do specify—I mean, they are not specified in detail; it is only in general, what this specification called for could be formed in any one of a dozen different ways, and still perform what this black and white copy specifies; that does not specify that it should be done in any particular method; it is simply what was done to accomplish the result as given here in this sheet.

Q. Well, do you recall when you were there, whether the outside diapason was there?

Mr. Lane: He says he doesn't know.

A. I don't think I do. I don't remember any diapason being there.

Q. Outside, I mean? A. No, there was no diapason that I remember of. The stop I remember particularly was the string stop; that was on the outside, on my second visit.

Q. I am talking about on your second visit—was there any outside diapason? A. No.

Q. You say it was a string stop? A. A string stop.

Q. And that was on the diapason stop, was it? A. I believe it was.

Q. And do you know what effect that had on the organ, that string stop? A. It was so overwhelming in power that it was of no musical value whatsoever.

Q. Could it be controlled by the organist? A. Yes, off and on.

Q. If the contact points were there, you mean, and everything was in working order? A. Electromechanically, it was there.

Q. Do you know whether or not it was controlled while you were there? A. Yes, it was.

Q. Now, the center piano pedal, did you notice that? A. Yes.

Q. What was the condition of that? A. That was supposed to be a locking device to enable the organist to use the piano keyboard to control the organ; and when that pedal was in normal position, the piano and organ could be operated; and when the pedal was depressed the piano was eliminated and it allowed the organist to play the piano alone.

By the Vice Chancellor:

Q. Using the piano keyboard? A. Using the piano keyboard.

Q. Now, when they were locked, did you use the piano keyboard and then did it play the organ only? A. It played the organ only.

Q. And you used the piano keyboard? A. Used the piano keyboard. That is what it was supposed to do.

By Mr. Morten:

Q. What did it do is what we want to know? A. Well, it played the organ without the organist.

Q. You mean, without touching the keys, the whole organ played? A. Surely.

Q. Was it musical or a general outburst of sound? A. No, it was not music at all. It would simply cause all the keys to lower and played all the keys simultaneously.

Q. All the keys of the organ played simultaneously without the organist touching any of them? A. Yes.

Q. And would you say that was or was not under the control of the organist? A. It was not under the control of the organist.

Q. The cresendo pedal—do you recall that—what you had to say about that, without looking at your report? A. No, I don't know as I can tell you.

Q. Can you recall the tremulant on the vox humana—whether it had any effect on it, without looking at your report? A. I believe there was a separate tremulant provided for the vox humana.

Q. In the specifications? A. No, not in the specifications; I believe the specification calls for two tremulants—yes, it does—tremulant No. 1 and No. 2.

Q. And how many tremulants were there there, can you tell, without looking at your report? A. I believe there were two, as specified.

Q. Can you tell what effect it had on that vox humana—are you sure about the two? A. It has been such a long time that I cannot swear absolutely as to whether there were two or not. There were two at one time I made the examination, because I remember its being not the ordinary method of installment—of having two tremulants operating on one reservoir; it is customary for one to operate only on one control.

Q. Well, is it possible to operate two tremulants on only one control, and get the result? A. Provided they are used separately?

Q. No, I mean at once? A. No, not if they are used together; no.

By the Vice Chancellor:

Q. One, of course can, though? A. Yes, if they were to be regulated absolutely alike, then it would be possible, but it is very impracticable.

By Mr. Morten:

Q. Do you know anything about fuse protection? A. There was none of that.

Q. You said, when you looked at this organ originally, you thought there was two tremulants and when you looked the second time you thought there was only one? A. I believe, on the second occasion, there was only one; I am not certain.

Q. If you had two tremulants, and each on a separate wind control, or wind pressure, then could you operate them? A. Yes, surely.

Q. But if you had them on the same wind control then what would be the result? A. It would be specifically held to their own individual purpose—that is, it would not be practicable to use both on what is called a "full organ."

Q. Would you say that this organ, when you examined it, either in 1918, or 1919, was a mechanically, substantially perfect piece of mechanism? A. No, I would not.

By the Vice Chancellor:

Q. Well, was it substantially useful for the purpose for which it was intended? A. Well, in building an organ, the organ has to be built with the idea that practically 99% is going to operate at all times. Of course it is a piece of machinery and it is bound to have different defects that would have to be regulated.

By Mr. Morten:

Q. Was this organ so that 99% operated any one time? A. No, and it never will; not to my knowledge. I don't see how it ever could have.

Q. You do not see how it could have been fully operated? A. No, I don't see.

By the Vice Chancellor:

Q. Could you form an estimate as to what per cent of it could be operated? A. Well, that would vary, your Honor, because there are certain elements in an organ which are vital to the organist, and that might be a small thing in the handling of it, and the handling by the organist is what interprets the organ to the listener, and what might be a small item to me might be a big item to you, or to the listening public.

By Mr. Morten:

Q. Is there such a thing known in an organ as "vibration"—that is, such a thing as you have that result at times? A. Well, I don't know what you would term as "vibration"; the organ tone itself is vibration. There is what we call an unpleasant result from the effect following the use of two tremulants, for instance, with a different beat of wind in.

Q. If the two tremulants were on the same wind pressure and a different beat of wind in, what would it cause the organ to do? A. The wind pressure would have no effect on it; that is a question of pulsation, or how many beats the tremulant happens to give. If we have one beating very rapidly say, with one that beats slowly, it is considered bad music.

Q. What is that "music" known as? A. Some organists call it "a chase," some "a vibration," and they have their own individual names for it.

By the Vice Chancellor:

Q. But they are none of them complimentary? A. No; it is entirely free from that.

By Mr. Morten:

Q. If they were going to use two tremulants, as this organ was designed for apparently, what should they have had? A. Provided a separate wind supply for the vox humana; it is an absolute necessity.

Q. I believe you said you do not recall what effect the tremulant had on the vox humana—that you could not recall it without looking at your report—I now show you your report—that section pertaining to the tremulant on the vox humana—and ask you, after reading that, whether or not you can refresh your recollection and tell us what effect the tremulant had on the vox humana? A. Well, I would take it, that on my second trip there was only one tremulant within the organ, because, as I say here, "the tremulant is very ineffective, having no effect on the vox humana."

Q. And you say that is one of the necessary things for the vox humana? A. The vox humana is useless without the tremulant.

By the Vice Chancellor:

Q. What is the effect of the tremulant? A. To produce the sound of the human voice—it lends effect to that particular set of pipes, as when a concert violinist is playing his violin and presses his finger on a string to produce the vibratory effect.

By Mr. Morten:

Q. I call your attention to the specification for this organ—that part of it which refers to the 8 foot open diapason? A. There are two of them.

Q. Yes—the 8 foot open diapason—is it the usual thing to put an 8 foot open diapason on an organ of this kind? A. Yes, it is.

Q. I am talking about one that is outside of the chest? A. It is not customary to place any individual stop without a swell box on any organ.

Q. If you put it without a swell box, can it be put there so it can be controlled? A. Well, "controlled" as regards expression, do you mean?

Q. Yes. A. No, it cannot.

Q. And how is it controlled when it is put in the swell box? A. Similar to the other members. The tone is confined within the chamber when the shutters or blinds are closed; and that effect is what we call "soft," and as soon as they are opened by the organist, it allows the tone to emerge from the chamber and we term it "loud."

Q. Anyone can regulate the volume by opening and closing the shutters? A. Yes.

Q. Now; when it is without the wind chest, what do you do with it? A. Nothing, only use it as it is.

Q. And when you do use it as it is, what effect would it have? A. That would depend upon the power of the stop.

Q. Well, suppose you had an 8 foot open diapason outside of the wind chest in this organ, what use would it have? A. It would have only one use, as far as I could see, and that would be to use it in conjunction with the full organ, to build up the volume of the organ.

Q. Could it then be used properly to create harmony, without control? A. In a very limited way.

Q. Would it be considered a musical instrument, to have it that way? A. It is very unmusical.

By the Vice Chancellor:

Q. Without this box and these shutters, do I understand you to say that this open diapason could only be used at the time when the volume of sound coming from the other part of the instrument harmonizes with the one single degree of volume that came from the diapason? A. That is correct.

Q. Then, when you put on the soft pedal, or shut it off, it is then out of harmony with the rest of the music of the player because the volume would be too great? A. Well, that would depend—as I stated, if that stop had been placed outside, and regulated soft, they could have used it as a soft, slow stop; but I would imagine, from its position, that it had been placed outside the organ chamber in the first place, because there was no room within the organ chamber, and, secondly, with the idea of building up more volume to the full organ, in which case it would have been voiced very loud.

Q. Without any soft pedal? A. It would have no control over it whatsoever.

Q. Neither the soft pedal, nor any of them, would control it? A. No—no control.

By Mr. Morten:

Q. And when you put the crescendo pedal on—does that throw on this outside diapason? A. It should.

Q. And if that does, what happens to the rest

of the organ? A. Well, if it was voiced loud, it would drown the rest of the organ entirely.

Q. Of course that would be considered anything but what would be desired? A. Yes.

Q. What should be done with a tube that is placed outside of the wind chest—how could it be controlled? A. If it is controlled it is customary to use associated members of the same family as the individual stop, one or more.

Q. What effect does the tremolo have, if you have a tremolo on an organ controlling the diapason, and the diapason is inside the wind chest—what effect does it have? A. It has a tremulant effect upon that, also.

Q. Now, if it is outside the wind chest, does the tremulant control it? A. It depends on where the wind supply was originated from; if we have the wind supply from the same chest in which the same pipes are located, it would affect that; and if from some other chest, it would not.

Q. And if from another source, what kind of note would be produced? A. Constant—no tremulant effect upon it.

Q. Would it produce a proper tone? A. That is a question of operation.

By the Vice Chancellor:

Q. You do not always play with the tremolo? A. No; some organists leave it on all the time, and some use discretion; and throw it off once in a while.

By Mr. Morten:

Q. In an organ of this kind, Mr. Beach, what horse power motor should be used? A. 2 or 3

horse power, at the most, would have adequate supply for that organ.

Q. What was used on this? A. There were two blowers—one of 5, and I don't know what the other one was—1 or 2 horse power, I believe.

Q. One of 2 and one of 5? A. Yes.

Q. Is it necessary and proper to have a second motor in an organ of this kind? A. No, it is not.

Q. When they had this extra motor, do you know what it was used for? A. Used to create vacuum for this percussion stop.

Q. And do you know what voltage that created —what pressure? A. Possibly, 30 inch water gauge.

Q. You spoke about the magnets being burned out by this increased pressure—now aside from the relay system, how many magnets are there in this organ? A. As many magnets as there are pipes.

Q. Can you tell how many there are? A. I can look it up here.

Q. Will you look at it (referring the witness to the specifications)? A. At rough figures, three thousand.

Q. Three thousand? A. Yes, it might be two thousand.

Q. And is the cost of replacing those magnets included in your $1,000 estimate? A. No, it had nothing to do with anything but the relay.

Q. Could this instrument, in your opinion, as at present designed, be put in perfect condition? A. Not as it is at present designed, no.

By the Vice Chancellor:

Q. Well, could it be put in usable condition to accomplish the result for which it was intended? A. No, it could not.

Q. By "usuable" I mean reasonably usable? A. The organ could not be placed in condition so that everything in this contract would operate as above stated, provided as soon as that had been accomplished, you could go away and forget it, because it would not be permanent; there would be absolutely no guarantee as far as reliability is concerned.

By Mr. Morten:

Q. What would be likely to follow, suppose you did build it up, and put it in A No. 1 condition and every note operating today, with the organ designed as it is today, and operating as it is apparently being operated—what would happen? A. It would not be in A No. 1 condition, and I wouldn't call it that. It is a question of utilizing the members as they were supplied by the original manufacturer and having them operate.

Q. Yes. A. It would be only a temporary affair, because the minute you walked out of the building, perhaps, some of these would begin to become silent, or continue to operate when they should not; and the control would be very unreliable.

Q. Do these specifications that you have there specify how it shall be built, or does it specify only what is to be in it? A. It specified only what is to be in it.

Q. And is it just as important that these vari

ous parts be assembled properly as that they be constructed properly—that is, in order to have the organ work properly? A. Well, that is assumed—that if the organ is properly designed, the members will operate properly.

Q. In your opinion, as the organ now stands, would it be possible to rebuild that organ and have it an organ that would do the work for which it was intended, satisfactorily, for any length of time, under the present design? A. No.

By the Vice Chancellor:

Q. Do you know of any of these organs being in operation before this was installed, or since? A. That is the first organ of this type that I had ever seen. I have seen several since.

Q. Operating successfully? A. Well, I did not make a minute examination of them. I was called in a lawsuit in regards to one of the others, for testimony.

By Mr. Morten:

Q. Have you examined other organs made by this Company? A. Not in detail—in a general way.

Q. Where was the other organ, by the way? A. I examined one that was in the Ridgewood Opera House; it is called the "Play-House."

Q. And what do you say regarding the general construction of that one in Ridgewood? A. It differed, from the fact that there was no vacuum employed in that organ, at all, as I remember.

Q. Had the American Master Organ Company

built any other organ beside this, as far as you know? A. They had built other organs, as far as I knew, but how long I couldn't say.

Q. How long have they been in business, do you know? A. I cannot give you dates on that.

Q. Did you ever know of any organ, outside of the one designed by the American Master Organ Company, that was of this design? A. Well, this organ follows the general specifications of most theatrical organs.

Q. I am talking about this design? A. Mechanically?

Q. Yes. A. I never did.

Q. If the mechanical design is not proper, or not what it should be, what effect does it have on the organ, no matter how good its individual parts are? A. It is absolutely of no use.

Q. You don't know who furnished the additional motor of 5 horse power, do you? A. I do not; I know who manufactured it, but I don't know who supplied it.

CROSS-EXAMINATION by Mr. Kilgen:

Q. When did you see the organ the first time? A. Sometime previous to February, 1918.

Q. 1919? A. 1918.

Mr. Morten: May I ask you to cross-examine Mr. Sprackling before continuing with this witness? He has to be back and play at the State Theatre. Does it make any difference to you?

Mr. Kilgen: We are not going to keep Mr. Beach very long.

Q. You did not see that organ when it was put in there, did you? A. I did not.

Q. And when you saw it in 1918, that was after the American Master Organ Company failed—is that right? A. I don't know.

Q. What time in 1918 was it, what month? A. February, I believe—February 6th.

Q. The Organ Company failed in October, 1917. A. It must have been afterwards then.

Q. So you saw it two years after the organ Company had failed—you don't know whether the organ, when it was put in there in October, 1916, conformed with the specification, do you? A. I do not.

Q. You don't know how good it was, if any? A. No.

Q. You do know that what you saw in 1918 was an organ substantially as indicated in the specifications—is that right? A. Right.

Q. And it had a piano, you say—there was a standard piano? A. Yes.

Q. Whose make was it, do you know? A. Kranich & Bach.

Q. Was it a grand? A. A grand.

Q. In good order, was it, when you saw it in 1918? A. Apparently.

Q. Have you any idea what that piano was worth at the time it was put in there? A. In the neighborhood of a thousand dollars.

Q. You saw how many pipes, did you say? A. I couldn't say; I don't know as I specified the number.

Q. You testified a few minutes ago? A. Oh, approximately three thousand I said; that is roughly.

Q. About three thousand pipes? A. Yes.

Q. Have you any idea what they were worth when they were put in there in 1916? A. No, not in that day, and I have no idea what they were worth.

Q. What are they worth today? A. Approximately, seven hundred dollars.

Q. For three thousand pipes? A. Yes.

Q. And the blowers—what would they be worth when they were put in there—the blower and the generator? A. Well, I wasn't as familiar with blower prices at that date as I am now; but, today, the two together would be worth approximately five hundred dollars.

Q. And the generators? A. Possibly thirty or thirty-five dollars—one generator.

Q. So that the parts that this Company had to buy from the outside amounted to about what you state, added together—is that right? A. Well, that is hard to state, because in the piano business there is an awful fluctation in prices from the purchasers, down and up.

Q. Well, pianos are not any cheaper today than they were then? A. My price on the piano was relative to retail value, the wholesale value was possibly around $400.

Q. The price of pianos has not gone down, has it, since? A. No.

Q. If they hadn't used the piano, and it was where this company could get it, they could get more for it today than they paid for it, couldn't they? A. Yes.

Q. Now, the first time you saw it was in 1918, which was about two years after it was put in there—is that right?

Mr. Morten: I object; he did not say, "first time he saw it"—he says, "the first time he examined it." He said he heard it played shortly after it was installed; now if that is what you are referring to, all right.

Q. Don't you know that the piano and the organ was used from October, 1916, until September, 1917, about a year? A. I do not.

Q. Right along? A. I do not.

Q. You don't know that? A. I do not.

Q. When you saw the piano, or organ, separate or together, had you been told that this defendant had had the wires all cut—the cable—separating the piano from the organ itself? A. I never knew that condition to exist.

Q. You never knew that? A. No.

Q. You never knew that, at a certain period of time, this defendant leased that theatre to a man named Pezazos, sitting back here? A. I don't know anything about that, at all.

Q. Who was in possession of that theatre when you were there? A. Why, I assumed that Mr. Robinson was.

Q. But you don't know? A. How should I know.

Q. Nobody told you then, that the piano had been separated and the organ had been piled up and fenced up? A. The organ was not in that condition. How could I have ever examined it?

Q. The organ was not in that condition, at that time? A. Absolutely not.

Q. But it had been before that, hadn't it? A. On the two times, I examined it, the organ was in the identical position, in each case.

Q. It was not used, was it? A. It was used when I was visiting it the first time; and on the second occasion, I don't know, because it was before theatrical hours.

Q. Did you try to use it? A. I did.

Q. Could you use it? A. To such an extent that I arrived at the conclusions that I have in my report.

Q. It was connected up then, was it? A. It was.

Q. You did not know, as matter of fact, then, that about the time that they ceased paying the cables had been cut?

Mr. Morten: I object; there is no such testimony.

The Vice Chancellor: He is not saying that there is; he is just asking him for the purpose of offering evidence later, perhaps.

A. I knew of it at no time—of the cables being cut.

Q. Now, if the cables were cut that would disconnect the piano from the entire organ, wouldn't it—the main cable? A. It would.

Q. You could not use it after that, could you—the organ? A. No.

Q. You could use the piano, couldn't you? A. Yes.

Q. And when you were there were they using the piano? A. No.

Q. Were they using the organ? A. Yes; that is, I used the organ; I don't know what the use was for public performances.

Q. You used the organ, and you found this

switch there so you could connect it up? A. On my first visit, they were using the organ, because I witnessed a performance during the afternoon, without making any examination whatsoever.

Q. That was in 1918? A. That was previous to my visit there in February, 1918.

Q. How about the second time that you went there—did you see the organ? Where was it then? A. I made three visits to the theatre, to my knowledge, one entirely at my own desire, and two at the request of Mr. Robinson. The first time I dropped in as a matter of interest, by having been informed that the organ had been installed by Mr. White; I voluntarily dropped in because I was in that vicinity, and heard the organ, at an afternoon matinee—that is, for a period of time. On my subsequent two visits it was in the morning, and I turned the wind on myself and turned it off myself.

Q. That was in 1919? A. In 1918 and '19.

Q. What was the condition both times—were they different, or about the same? A. Approximately the same.

Q. Was there anything indicating that there were men working there? A. On my second and last visit it appeared that there hadn't been anything done to it.

Q. But at the first visit? A. That was my second visit.

Q. Well, at any visit, was there anything to indicate that men had been there working on the organ? A. Yes, there was.

Q. Was that in 1919? A. Yes.

Q. Where is the organ now? A. I couldn't tell you.

Q. You don't know. A. I have no idea.

Q. When did you last see it? A. I haven't seen it since that day.

Q. Have you been in the theatre since that day? A. I have not.

Q. You were never told by anybody where the organ is? A. No, I never was.

Q. It is no part of the organ now being used in the Roosevelt Theatre next door, is it? A. Absolutely none.

Q. How do you know that? A. Because I supplied the organ that is in the Roosevelt Theatre, from beginning to end, brand new.

Q. When did you complete that? A. A year ago.

Q. 1920? A. No, March 1921—this is '23—March, 1922.

Q. When you were making these investigations you spoke of—you were negotiating, weren't you, with Mr. Robinson for the building of a new organ? A. I was not.

Q. When was the contract made for the building of the organ in the Roosevelt Theatre? A. In June, 1921.

Q. That is when the contract was made? A. Yes.

Q. When did you put the new organ in there? A. Started in, in December, 1921.

Q. Do you mean to say you hadn't any negotiations with him? A. I had absolutely no idea that Mr. Robinson anticipated building a theatre.

By Mr. Morten:

Q. That is, in 1919? A. 1919—in regards to the organ in the Colonial Theatre.

By Mr. Kilgen:

Q. The organ was what is known as the "Hope-Jones" design, wasn't it?—or pattern, or style?

Mr. Morten: Which organ are you talking of?

Mr. Kilgen: This organ in controversy.

A. Why, I had strong reasons of my own to believe that it was of Hope-Jones design, to a certain extent.

Q. You worked with the Hope-Jones and the Wurlitzer people? A. I worked with Hope-Jones, yes, sir.

Q. And this organ is after the pattern that Hope-Jones introduced in this country, is it not? A. As far as specifications goes.

Q. Well, as far as the magnets and general action and construction are concerned? A. No, the magnets are absolutely the same, but the general construction, no.

Q. I mean the action—the construction of the action? A. Well, the magnet and a part of the action of the magnet is of the Hope-Jones design, partially; and the action, partially, also.

Q. Didn't you use the same design in this Roosevelt theatre? A. Absolutely no.

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

Q. You did not use the same kind of magnet at all? A. Didn't use anything that resembled the Hope-Jones organ, in any shape or form.

Q. When were you with Hope-Jones—when did you leave that concern? A. About four or five years ago.

Q. That was about the time that this organ was

being installed—is that right—1916? A. Comparing the two together, I cannot see what relation they had.

Q. Well, it was around that time? A. Around that time.

Q. Were the organs played with electric action at that time a success? A. Commonly.

Q. They are better today, though, aren't they? A. Certainly.

Q. They have improved on them very much—is that right? A. In general ways, yes.

Q. In other words they have become more standard and more reliable? A. As far as the actual basis principle and the ideas are concerned, I do not consider they are any different today than they were fifteen years ago. There are refinements and changes and alterations, as there would be in the development of any piece of machinery, but the basic principle remains as it started.

Q. But the result is that today they have got an electrical action that is somewhat practical—is that right? A. They had in those days.

Q. Is it not a fact that in those days, Hope-Jones or the Wurlitzer factory would never permit an organ to be used without having an organ-builder at hand? A. No, it is not.

Q. That is not the fact? A. No, that is not the fact.

Q. Mr. White, the President of this American Master Organ Company was also connected with the Hope-Jones Company, wasn't he? A. In the capacity of an organist and demonstrator, yes.

Q. Organist and demonstrator? A. Yes.

Q. Was he a good organist, or a bad one? A. Very good.

Q. Now, is it not a fact that it requires somewhat of a different organist to play this particular kind of organ in place of a church organ? A. It is.

Q. This is a staccato percussion action, is it not—responds promptly, compared with the ordinary church organ? A. The action that is used, the mechanical part of the organ, is no different from what is used in a church organ or house.

Q. Excepting these particular kinds of organs you can thumb as you would a piano—as a percussion instrument—as distinguished from an organ that made a sound by opening a valve and letting the sound go through a pipe—in other words, one is a depression and the other is a percussion? A. No, the results obtained by an organist from any organ depends upon the organist himself and not upon the organ.

Q. Can an ordinary organist play this kind of an organ, as well as a person that has been drilled in the playing of this kind of an organ? A. No, the requirements of a proper musical education to be able to play on an organ is no different in regard to a theatre or a church; it originally used to be, but within the last ten or fifteen years practically all players who played slow actions were eliminated and they have the electro magnet action. Hope-Jones never built a mechanical action.

Q. Hope-Jones was not an organ builder, was he, until he came over here? A. I believe he was an organ builder in Europe.

Q. Don't you know he was a telephone builder? A. I don't know anything about his European experience, only what I have been told and read.

Q. Is it not a fact that an organist playing in a church cannot play this kind of an organ without some special training—is not that a fact? A. That is a fact.

Q. Why? A. That is due to the individual, to his education and anything but the organ.

Q. Is it not a fact that the best organists, men that have made the greatest reputations playing church organs, have gone into theatres to play this kind of organs and made a bad failure of it—is not that a fact? A. Only in some instances. That is largely due to temperament and not the organ. I claim that an organ of a theatre and a church are absolutely no different one from another, and if there is any difference, it is in the organist himself.

Q. But you will admit that a public church organ player cannot play this kind of an organ without some special training? A. I do.

Q. You never played an organ yourself, have you? A. I have.

Q. In a church? A. Yes.

Q. And in a theatre? A. No.

Q. Never in a theatre? A. Not for compensation, no.

Q. You have been asked a great deal about "tremolo"—will you tell us what that is? A. It is a mechanical device for filling wind pressure in the organ in the way of causing it to have a vibrating effect on the wind pressure, and that causes any particular pipe which happens to be

sounding from that wind supply to vibrate at the same rate of speed at which this particular device operates.

Q. What would be the cost of putting a thing like that in an organ? A. The average tremolo is worth, approximately fifty dollars.

Q. It is simply a little box attached to the main wind trunk with a weight on the end of a tongue that wiggle up and down when the wind goes in there, is not that right? A. No, that has been abandoned a good many years ago.

Q. Then give us an explanation of what it is, or what it ought to have been in 1916, when this organ was built? A. It consisted of what would be called a bellows with a slot hole cut in the cover, with an adjustable slide over the slot to allow as much wind to exhaust or escape in proportion to the speed in which you wish it to travel, and this bellows has direct connection with the wind supply of the pipes and is controlled by the action which starts and stops it.

Q. Do they always work, or are they liable to get out of order very easily? A. They are very reliable.

Q. Very reliable? A. Yes.

Q. You mean the present kind of a tremolo, or the kind they used before? A. The tremolos, as far as I can remember, in ten or fifteen years, have not varied in design at all.

Q. They have not varied in all the time you have described? A. No, sir.

Q. Do you know what kind was in this organ? A. I could not definitely picture it now.

Q. But you know there was one there? A. I know there was one there.

Q. You don't know whether there were two? A. Not definitely, I don't.

Q. Two could be there, if they were put on different wind trunks, couldn't they? A. Yes.

Q. There would not be any inconsistency about it? A. No.

Q. Did the wind tremolo work when you tried out the organ? A. As I remember, on one occasion there appeared to be two tremulants in the organ, and on my last visit, I could almost positively state there was only one; but, on both occasions, I know there was only one source of wind control, or reservoir.

Q. So, if on the first occasion, there had been two tremulants, (which there was evidence of), it would be mechanical bad taste, but you don't know whether it would operate at all then? A. No, I did not, except that I had the impression that there was two there from the fact that when the organ was used there was an unequal beating of two members of the organ, and I could not understand how that could happen except that there was two tremulants within the organ.

Q. You don't know that there was a time when the American Master Organ Company refused to do anything further on the organ, until they paid—do you know anything about that? A. I do not.

Q. What is the most expensive thing or part of an organ? A. The console, that is, that would depend on the organ. On a small organ the console would be; and on a large organ, possibly the pipes may be, and the action. It depends on where you want the organ set up.

Q. And on this particular organ what would

you think to be the most expensive thing in it—would it be the chest, or the action, or the console, or the pipes, or the lumber that went into all of these things? A. The actual value of the lumber is hardly to be considered, it is the labor and making up into actual working parts which creates the cost.

Q. Then, in addition to those figures that you have stated before, as to the value of the piano and the pipes and blower and generator, must be added the very important element of the labor to unite these—is that right? A. That is correct.

Q. So if they cost joined, as you have stated, about $300, was it— A. I believe I stated somewhere around a thousand or fifteen hundred dollars.

Q. Oh, yes, you stated that the piano would cost what? A. At the retail value of a thousand dollars, and I am sure they did not buy it at retail.

Q. And the pipes, you say, were worth about how much? A. Approximately, $700.

Q. And the blower? A. About $500.

Q. That would be about $2,500—have you any idea what the reasonable value of the organ was at the time it was put in there—a reasonable value—you have the specification there before you—look at it. A. The selling price?

Q. The selling price—the price that this theatre or company would have to pay for that kind of an organ, made by a standard manufacturer? A. That would vary very much.

Q. What is your idea of what would be a reason-

able price, if you were going to build it? A. Today and at that time are entirely different things.

Q. I am asking you at that time. A. At that time, I couldn't tell you.

Q. Well, then tell us today.

Mr. Morten: I object; I cannot see what relevancy the cost of building that organ today can have upon this issue.

Mr. Kilgen: Well, you have taken our organ and have not paid for it.

Mr. Morten: You give us a bond to put it in order and we will pay you for it. Now, I object to this line of testimony as to the value of the various parts that may be there as highly irrelevant to this issue. If the contract has been performed, we pay; if the contract has not been performed, it is immaterial what the value of the stuff is there. That is their's when they return the money to us. Now, I object to this.

The Vice Chancellor: I do not see how it bears on the issue in the case, but I will allow it.

Mr. Kilgen: It is put in to enlighten the Court. They have evoked the common law right (or the assignees of this Company do) of refusing that organ by coming into a court of equity and asking the Court equitably to adjust the reasonable difference.

Mr. Morten: I object to his making that statement. We are not here for that.

The Vice Chancellor: What they want is this—they want to rescind this contract,

or have you perform. Now, if you can perform they will pay you.

Mr. Morten: Yes, I make that offer today.

Mr. Kilgen: Now, the question is determined entirely by the question of acceptance. They bought the goods, they kept them a year, and in this case of Wurlitzer vs. Montclair Theatre the Court held there was an acceptance after two or three months.

(Question admitted.)

A. Between six and seven thousand dollars.

Q. You don't know what the contract was on this instrument, do you? A. I do not.

Q. And your report that you speak of was made two years after the organ had been installed, is that right? A. I don't know the date the organ was installed.

Q. Do you know the date when you first—

The Vice Chancellor: You have all that, haven't you, in the testimony?

Mr. Kilgen: I want to get this particular feature in—that after the organ had been accepted and they had used it two years, in comes an expert to tell us what it was worth.

The Vice Chancellor: But you have it all in the case, and this witness knows nothing about it; he saw the thing three times.

Mr. Kilgen: Well, we will waive that question.

Q. When you saw the organ did it look like a mechanical success—did it look as though it was built by an organ builder or a butcher? A. Well, half and half.

Q. What half was the bad part? A. Why, the installation was very poor.

Q. The installation? You did not find any fault with the piano? A. No; there was no fault with the piano, no.

Q. No fault with the pipes? A. No.

Q. Nor with the blower? A. No.

Q. But there was with the installation—the putting it in—is that right? A. As far as the workmanship was concerned, it was very bad.

Q. In what particular—was the chest bad? A. The workmanship that generally accompanies installation. If the installation appears to be very good, you can generally depend on the instrument throughout; but the wiring on the organ was done in such a way that I believe it was done very speedily, because it was done in the most convenient way, regardless of any future repairs.

Q. Had you ever been in the plant of the American Master Organ Company? A. Yes.

Q. Did they have the proper kind of plant? A. I never was through it.

Q. How far were you in it? A. As far as the office.

Q. You never went into the factory? A. I never did.

Q. You don't know how many men they employed? A. I do not.

Q. Did you ever see any other organ built by the American Master Organ Company besides this one? A. Yes.

Q. Where? A. In the Play House, in Ridgewood.

Q. Any other—did you ever see the one in the High School in Paterson? A. No.

Q. Ever see the one in the United States Theatre in Paterson? A. I believe I saw the one that was in the Goodwin Theatre in Newark.

Q. Did you ever see the one up in the Broadway Theatre in Yonkers? A. No.

Q. Are they using the one at Ridgewood now, do you know? A. I am not prepared to say.

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

Q. When did you last see that? A. Oh, a question of two or three years ago.

Q. You don't know that they are not using it, do you? A. I don't know anything about it.

Q. Do you know about the Goodwin Theatre one—are they using that in Newark? A. I have reason to assume that they are, but I could not swear to it.

Q. Is there any reason why this organ could not be used just as it was when you heard it in 1919? A. I did not hear it at all in 1919.

Q. How? A. The organ was in such bad mechanical condition when I saw it in both 1918 and 1919, that it was not useful—that is, persons sitting in the audience would know it was a public organ playing.

Q. And yet they advertised it, and used it as a means of getting business through it—is not that right? A. If they did that.

Q. The organ could have been put in a workable condition, according to your idea—is that right? A. Temporarily.

Q. Is it not a fact, Mr. Beach, that that organ required attention just the same as an automobile, or any other mechanical device? A. It is.

Q. And if they are not attended to they fall into disuse and perhaps become entirely useless? A. That is correct.

Q. That applies more to an electrical than it does to any other kind of an organ, is not that true? A. An electrical organ requires a lot of attention, but I wouldn't say any more.

Q. It takes the slightest thing to put an electrical organ out of commission, is not that true? A. No, I wouldn't say that. It takes slight things to affect individual parts.

Q. Moisture? A. It have very little effect.

Q. It would have a little effect? A. Very little effect.

Q. You have heard of the Steers Manufacturing Company, haven't you? A. Yes.

Q. The Steers organ? A. Yes.

Q. They were a standard organ? A. They were.

Q. Did you know that in Montclair, they put an electric organ in, and a cable around a baptismal font, that, after it was there three months they had to take it out—that the moisture from that baptismal font caused the cable to short circuit and put the entire organ out of commission—did you know that? A. I did not.

Q. You have heard of organs being put out of commission by a little bit of moisture or water, haven't you? A. I have.

Q. Have you ever heard of an organ being put out of commission by reason of dust or ashes go-

ing up in the air and landing on the palates of an electric action organ? A. I remember distinctly of two occasions, but they were extremes; they were not ordinary.

Q. Well, was one of them this organ? A. No.

Q. You don't know anything about the ashes that clogged up this entire organ, do you? A. I don't see where it was possible for ashes to affect this particular organ in any way at all; in the way and method in which this blower was installed, in a separate room, independent of the boiler room, with a galvanized pipe leading to the exterior of the building, I have absolutely no conception of how it could have anything to do with the ash-pit at all.

Q. You don't know that the door was covered with a trap, to keep the ashes out, do you? A. No; the machine is a drum itself; it is a steel drum; I could see no reason for covering it with a second.

Q. You don't know that they had a cover on the intake to prevent the ashes from going in there? A. I don't know that there was a cover put there to keep the ashes out. I do know there was a galvanized iron pipe leading from that intake to the exterior of the building, and that is customary in installations, regardless of ashes or anything else.

Q. If there was such a thing it would affect the promptness with which the organ worked, wouldn't it? A. Ashes would be detrimental to any organ action.

Q. And, if the intake, on the generator and motor were covered, it would prevent a supply of sufficient air to give the organ the promptness

that it ought to have—in other words, it would be slow, wouldn't it? A. No, that would not have any effect upon it, because ashes or dirt affecting the generator would have nothing to do with the speed with which the organ operated.

Q. If you did not get air sufficient to open the palates it would be slower—if there was not sufficient air there, the palates would not open promptly enough, would they? A. It would have a more serious effect on other members of the organ, outside of the palates.

Q. Well, would it speak as fast with a large supply of air as with a lesser or smaller supply? A. That would depend entirely upon the pressure with which it was supplied. If the pressure remains constant, it has no regard to the quantity.

Q. You stated that the organ required mechanical adjustments—when? A. On both occasions.

Q. Both occasions when you were there? Now, do not all organs require that, when they are in constant use? A. All organs require it, if they are in constant use or if they are idle; they require attention at all times.

Q. And failure to get that attention might ultimately put them entirely out of commission? A. It would.

Q. You never made an offer to reconstruct this organ, did you? A. I never did.

Q. Have you ever been asked to? A. I never was.

Q. You do not claim to have as extensive a plant as the American Master Organ Company, do you? A. My plant is the equal of their plant.

Q. You do not employ anywhere near the num-

ber of men that they do? A. I do not know how many men they employ.

The Vice Chancellor: What difference does it make?

Mr. Kilgen: I withdraw the question. I think it is relevant and material.

RE-DIRECT EXAMINATION by Mr. Morten:

Q. You said you had never been asked to reconstruct this organ—if you were asked to reconstruct it, would you undertake to reconstruct it? A. My honest opinion in regard to reconstructing it is, that I would give Mr. Robinson $700 for the pipes and he could have the rest.

Q. That is all it is worth at the present time? A. That is—and the salvage value of the piano and possibly of the blower.

Q. And what is that worth today? A. Well, I have stated the value of those before.

By Mr. Lane:

Q. How much did you say the piano was? A. I believe my rough estimate on those members was somewhere around two thousand or twenty-five hundred dollars.

By Mr. Kilgen:

Q. That is, today? A. Yes.

Q. You don't know what it was worth, in 1918, or 1916? A. I know it was worth lots less.

Q. If it was new it would not be worth as much today as it was worth at that time? A. It was worth half as much, new, at that time, as it is worth today.

Q. And if left in a store opposite where they

are at the new theatre, with all kinds of refuse piled on top of it, it would be worth a whole lot less, wouldn't it? A. Certainly.

Q. And the piano—if it had been thumped on for four years would not be worth quite as much as when first put in there? A. A used piano has not the value of a new one.

Q. And if you were asked to buy that piano today you wouldn't give anywhere near as much as you would when it was put in there?

The Vice Chancellor: You have claimed the right to take this out, under the conditions of the sale, you say; now, you either have the right, or have not got the right; I do not see that it makes much difference what the value of these things is. You either have the right, or you have not. If you haven't the right, then you have got to put it in repair, before you can fulfill your contract. I do not know where all this is leading to.

Mr. Kilgen: Excepting that it was let in in an action brought by this same Company against a concern up in Ridgewood, N. J., where all of these equities were let in, and all these questions were gone over. I claim that they are immaterial and irrelevant. If we delivered the organ and they accepted it and used it for an entire year, why, they must either pay for it, or surrender it; that is all there is to it. That is all.

NELSON SPRACKLING, re-called.

Cross-examination by Mr. Kilgen:

Q. Mr. Sprackling, you live at 31 Morton Street, New York City? A. Yes.

Q. How long have you been an organist? A. For about twenty-three or four years.

Q. Have you ever been an organ builder? A. No, sir.

Q. Were you ever in an organ factory? A. Yes.

Q. A pipe organ factory? A. Yes.

Q. Whose factory were you in? A. Hutchings & Volte is one of them; that is many years ago. I just happen to think of them, and I have been in others.

Q. Where—any other factory? A. Yes, the American Master Organ Company.

Q. You were a stockholder in the American Master Organ Company, weren't you? A. Yes, I was.

Q. You lost the money you put in, didn't you—is that right? A. Yes.

The Vice Chancellor: What difference does it make?

Mr. Lane: It shows bias, perhaps.

The Vice Chancellor: All right.

Q. You were in the organ factory of the American Master Organ Company? A. Yes.

Q. Did you go through the works? A. I did.

Q. Where were they located? A. At Lakeview.

Q. Lakeview, N. J.? A. Yes.

Q. You saw the men at work there? A. Yes.

Q. Did it look like an organ factory to you? A. Yes.

Q. Did you notice how many men there were employed there? A. I have no idea how many men were there.

Q. A number of men? A. A number of men, yes.

Q. Did you ever play any organ, beside the Colonial Theatre organ made by the American Master Organ Company? A. I did, yes; I played the Play House organ, but not as a regular organist.

Q. Which play house? A. The Play House that has been mentioned in this testimony.

Q. Do you mean at the Colonial Theatre? A. No, the Play House Theatre at Ridgewood.

Q. How long did you play that there—very often? A. No, I haven't played it more than three or four times, probably.

Q. When you first played on this kind of an organ, you thought they were pretty good, didn't you? A. I certainly did.

Q. And you thought this was a pretty good organ, didn't you, when it first went in there? A. Well, I was disappointed with the organ.

Q. A little disappointed? A. Yes, sir; I was.

Q. And you invested your money in the American Master Organ Company because you thought they were— A. (Interrupting) I did it because I would like to see the men who were in control of this business go on and make a success of their business.

Q. And it was not because you thought that they were making a remarkably attractive instrument? A. Well, yes; I think it was partly that.

Q. Exactly. A. I thought they were on the right track.

Q. They were making an organ, a thing that was required? A. I thought they had a successful idea.

Q. That it was going to be better than the organ that the Wurlitzer people put out, known as the "Hope-Jones organ"—was that right? A. Yes, sir.

Q. In fact, better than any other? A. Well, I had confidence in Mr. White.

Q. And you had confidence in the proposition as a whole—it appealed to you, didn't it? A. I thought it was a pretty good proposition, yes.

Q. And whenever you played the organ anywhere, it made a good impression on you, didn't it? A. No, sir.

Q. Well, where did it make a bad impression—at the Play House? A. At the Play House.

Q. Anywhere else? A. At the Colonial Theatre.

Q. And at the Colonial Theatre? A. Yes, sir.

Q. That made a bad impression on you, eh—and how long did you stay there? A. I stayed there about a year.

Q. About a year? A. Yes.

Q. And in all that time you played this organ, is that right? A. No, I was not there during the summer of 1917.

Q. But you were there during 1916? A. No, sir; I was there from April, 1917, to about the 1st of May, 1918, or sometime in May, I forget when it was.

Q. And all that time you were there, you were

playing the organ, was that right? A. I played what there was of the organ.

Q. Did you ever see any of the American Master Organ people there working on it? A. Yes.

Q. They were supposed to look after it and take care of it, weren't they? A. I don't know anything about that.

Q. You saw the men there at work? A. Yes, I did.

Q. You play an organ now, I believe, in the theatre, don't you? A. Yes, sir.

Q. Is that a new organ? A. Yes.

Q. Put in there within a month, was it not? A. No, within six months.

Q. And that was built by Moeller—is that right? A. Yes, sir.

Q. It is on a different principle from this, is it not? A. I think it is, but how different I could not say.

Q. You don't know the difference? A. I don't know that, expertly.

Q. But you do know there is a difference? A. Oh, I do.

Q. Is it a pneumatic, electric or tracker action organ? A. It is electrical.

Q. Electrical action? A. Yes, I should say so.

Q. Do they have much trouble with it? A. Very little.

Q. But yet they have some? A. Yes.

Q. Is it not a fact that an organ has got to be tuned just so often? A. Surely.

Q. And an electrical action organ has to be looked after to see that none of the parts become defective in any way? A. Yes.

Q. The wires are very narrow, aren't they, or rather, very thin? A. Yes.

Q. Like threads? A. Yes.

Q. And the least little contact of some kind will destroy them, is not that right? A. Yes.

The Vice Chancellor: Is there any question about that. The witness has said so a number of times, and all the other witnesses have said the same thing; they have even gone so far as to say that in some cases there is an electrician kept there for the purpose of constant repair.

Mr. Kilgen: We will leave that out.

Q. You do know that an organ sometimes might require an organ builder there all the time that they are playing the organ, is not that right?

The Vice Chancellor: It has been testified to, and I will accept it as true, unless he says to the contrary.

A. No, I never saw an organ builder at an organ all the time, no; but I have seen an organ taken care of; sometimes they are taken care of very well, and sometimes fairly, and sometimes badly.

Q. The first time you examined this organ was in April, 1917—was that right? A. Yes.

Q. You did not see it when it was being installed? A. No.

Q. Did you compare it with the specifications? A. I probably did.

Q. When you went through it, was anybody with you there from the Organ Company? A. I have no idea that anybody was.

Q. You know whether you were alone, or whether somebody was with you, when you examined it, do you not? A. When was this?

Q. In the examination which you made before this so-called report. A. Oh, at that time, I made that statement in Mr. Robinson's presence.

Q. But nobody from the American Master Organ Company was there? A. No.

Q. No other organ builder? A. No.

Q. You never did examine it with any of the American Master Organ Company, did you? A. No, I don't think I did; I have gone over the organ with the organ builder who happened to be sent there with the organ men; that was part of my job.

Q. Who was that? A. Oh, I don't know—one of the men of that factory.

Q. Is it this man who stands here (indicating a gentleman present in the hearing room)? A. Oh, I don't know; it may have been; I think I met him down there, I am not sure.

Q. You don't know anything about the question whether the organ was a proper mechanical job? A. Will you kindly state that again, please?

Q. A mechanical job—was it a job that would commend itself to a mechanic? A. I am not a mechanic.

Q. You don't know, then? A. No, but I have an opinion about it.

Q. And all of your report is based upon your being an organist? A. Absolutely.

Q. So that you do not really know whether the failure to get the amount of tone and kind of thing you wanted was the result of some mech-

anical defect, or the result of bad judgment on the part of the person that produced it? A. I have only an opinion on that, and I have not given it.

Q. You were paid, of course, for making the report, weren't you? A. Absolutely not.

Q. Oh, you did it voluntarily? A. Absolutely, for Mr. Robinson.

Q. The fact that you were a stockholder in the Company did not prejudice you, at all? A. I had no idea why he wanted it.

Q. But you did make a report, very prolific and voluminous? A. I went through the organ; he asked me to go and make a complete examination of the organ; he came to the theatre where I was playing and asked me to go down and make a report, and I said, "Yes, sir," and I made a two-leaf letter.

Q. And that was based on your knowledge as an organist, rather than as an organ builder? A. It is based upon the plain results—upon my knowledge as an organist.

Q. As an organist? A. As an organist.

Q. Organists do not always agree on what should be the result of certain combinations of stops, do they? A. I don't think that has anything to do with the combinations of stops.

Q. Well, with the tone, or sound of the organ? A. Well, I should say, generally speaking, that organists will agree as to the beauty of an instrument.

Q. They are not like painters, then? A. Oh, there is disagreement, of course.

Q. There is a disagreement? A. There is a disagreement, yes; I don't think that it is great.

Q. There is not any standard rule that you could apply to an organ and say, "Now, that is a good organ," and "that is a bad organ"? A. That is a matter of art, and there can be no standardization in art.

Q. No, so, if we put an organist on the stand and he testifies as to what his impressions are, they are just as apt to be correct as yours, aren't they?

The Vice Chancellor: As to the music produced?

Q. As to the music, and as to how it should be produced? A. Well, may I suggest this—I do not want to make a statement that you do not ask for, but I think this will save time: I should say that any organist of whom I have knowledge, going to that instrument, would have submitted the same report that I did; he could not help it, because it was based upon the condition of the individual stops.

Q. Is not Mr. White a pretty good organist? A. He is.

Q. He was in 1916, wasn't he? A. Yes, sir; Mr. White taught me the theatre organ.

Q. He was the Vice President of that company, wasn't he? A. I don't know what office he held, but I know he was a leading man.

Q. So his idea of what an organ should be, from an organist's point of view, would be pretty good, wouldn't it? A. Yes, I think he would agree with me.

Q. You don't know, then, whether Mr. White supervised the construction of this organ, or not, do you? A. I don't know about that; I suppose

he had a great deal to do with this organ, because the specifications of the American Master Organ Company, I think, were the result of his ideas.

Q. You thought they were pretty good, didn't you? A. I certainly did; I liked them.

Q. They were so good that when this contract was drawn they expected, and stated in the contract, that they would have the exclusive right to use that particular organ; is not that the fact? A. I don't know anything about the contract.

Q. You did not see the contract? A. No.

Recess until Tuesday, February 27, 1923, at 10 A. M.

Chancery Chambers, Thursday, Feb. 27, 1923.

Hearing of the cause resumed at ten o'clock A. M.

Mr. Morten: I have not offered this report of Mr. Sprackling; if they want to cross-examine upon it, I will offer it now in evidence.

Mr. Lane: We object to it.

The Vice Chancellor: Of course the report is admissible, is it not? He has testified to it.

Mr. Morten: I will not press it, so long as they object; then they cannot cross-examine on it.

NELSON SPRACKLING, re-called.

Cross-examination resumed by Mr. Kilgen:

Q. I may ask you a question that has been asked before; there has been such a shifting of the witnesses in the intervals, and I do not probably remember each particular question I asked. If I remember well, you stated that you went there when the organ was first put there? A. No.

Q. How soon after that? A. That was, I believe in October, and I went there in April.

Q. In other words, it was used from October to April before you came there? A. Yes, sir.

By the Vice Chancellor:

Q. October to April, nineteen hundred and what? A. I don't know the date; but I think it was October '16, wasn't it?

By Mr. Kilgen:

Q. In other words, the organ was completed on the 26th of October, when the second payment was made as per contract?

Mr. Morten: I object; this witness was not familiar with the matter until April; he never came there; he didn't know anything about it.

Q. In other words, you did not know anything about it, and never saw the organ until you went there in April? A. April; that was the first time I saw it.

Q. Nineteen hundred and what? A. Seventeen.

By the Vice Chancellor:

Q. As I understand it, you went there in October and heard the organ?

Mr. Morten: No, that was Mr. Beach.

The Vice Chancellor: Oh, yes, yes.

By Mr. Kilgen:

Q. In April, 1917, you went there as an organist, is that right? A. Yes, sir.

Q. And the condition that you testified to, or the report, rather, that you were alleged to have made, was made when? A. December, 1918.

Q. In December, 1918? A. Yes, sir.

Q. You were not playing there then, were you? A. No.

Q. You went there for the purpose of making this examination? A. Yes, sir.

Q. Did you go in the organ? A. No, I did not go in the organ.

Q. You did not know what the organ looked like inside, at all? A. No, I didn't know anything about it.

Q. You did not know that the organ had been disconnected from the console, and practically stored or packed up in a rear room, between the time that you left there and the time that you went there and re-examined it? A. I did not.

Q. You did not know that? A. No.

Q. You don't know that when you went there in 1918 the men were, at that time, or just preceding that time, working on the replacing of the organ and restoring it to its proper condition, do you? A. I do not know anything about it, sir.

Q. You did find that the organ was in a fit

condition to use except as you have stated—that is to say, you could make a sound, it was connected up, in other words? A. It was connected up, yes.

Q. And that was what time? A. December, 1918.

Q. But you don't know when the men ceased working there? A. I don't know anything about it, about the men.

Q. You simply went there and found the organ, you turned on the motor, and you tried it, and made this report, so-called? A. I did.

Q. And you did not examine the organ, at all, as to whether it was the same organ, another organ, or a part of two organs, or what particular kind of an organ it was, did you? A. I did not—can answer that, but that is not quite the answer I would like to give.

The Vice Chancellor: Well, it is a compound question and the witness cannot possibly answer it.

Q. If you have any other form of explanation, we will hear it. A. Well, I will say that the question, as you place it to me, was such that I could not answer by "Yes" or "No," or directly. I would like to state that I should think, decidedly, at the time I examined that organ—

Q. Pardon me, I did not ask you to think anything.

The Vice Chancellor: You are asking a question that calls for nothing else. If you will ask a question the witness can answer properly, you may do so.

The Witness: I should like to state that I should think that the organ was the same organ that I had heard before; I should swear to it, as far as from all human standpoints of judgment are concerned, that it was the same organ.

Q. You did not know then whether any new parts had been added? A. I did not know, but I should say no, in my opinion.

Q. You don't know whether the organ had been changed in any way? A. I don't know, but I should judge no.

Q. You didn't know that a tremulant was put on that was not there before? A. Oh, no; I had no idea about that at all.

Q. Don't know anything about that? A. Don't know anything about that, at all.

Q. You didn't know that bird whistles were put in there, too? A. I probably did not look at the bird whistles.

Q. What you did look at you thought was the same organ or parts of the organ that had been there when you were there the year before? A. I didn't think anything about it; I just simply took it for granted.

Q. Took it for granted? A. Yes.

Q. But you really didn't know that that was the same organ, or not? A. I don't think I will answer that question.

The Vice Chancellor: He has answered it half a dozen times.

Q. You don't know that men were at work on that organ between September 25th and Novem-

ber 29th, 1918, do you? A. I have answered that "no" before.

Q. Answer it again. This is cross-examination.

The Vice Chancellor: You need not answer that. He has said half a dozen times that all he knows about it was what he found by being there in December, 1918, and what he had seen in April, 1917.

Mr. Kilgen: That is all.

By Mr. Morten:

Q. Mr. Sprackling, when you made your examination of the organ, in December, 1918, do you remember whether or not there was a flugelhorn there at that time? A. I don't remember now; but if it is in the report, that is all I know.

Q. If it is on the report, was it there? A. I should say, yes.

Q. I call your attention to your report in which you speak of an 8-foot flugelhorn that is "slow, uneven, especially in lower register"—now, is there any such instrument provided for in the specifications (showing the witness the specifications)? A. (After examining the specifications) I do not see it.

Q. You do not find it? A. No.

Q. There are some more (referring witness to another part of the specifications)? A. No, it is not in there.

Q. I call your attention to the fact that the specifications, under the words "solo compass, 61 notes" mention a French trumpet, under Item No. 31—is there any French trumpet in that organ? A. (After examining the specifications) I

don't know; I did not make the specifications of the organ.

Q. When you played on it, did you find any French trumpet there? A. I cannot remember.

By Mr. Lane:

Q. Then, as I understand it, if there was a flugelhorn on this organ it was something that was put on in addition to what the specifications provide—something additional—is that right? A. Well, I shouldn't say it was "additional," but I should say, from my judgment, it might be a substitution.

Q. Well, now, will you kindly tell us what it was a substitution of? You looked over this specification—tell us what it was a substitution of. A. It might have been a substitution for a French trumpet.

Q. Never mind what it "might have been," can you tell us what it was? A. I don't know, I cannot remember.

Q. Did you see the French horn? A. The flugelhorn.

Q. What did you say it was a substitution of? A. I say, from looking at this specification, at this moment, it might have been a substitution.

Q. Of what? A. Of a French trumpet.

Q. Well, a French trumpet—then there is a French trumpet provided for in the specification, is there not? A. It says so in the specification.

Q. Can you tell us whether a French trumpet was in that organ at the time you played it, or not? A. I cannot remember.

Q. Therefore, if there was a French trumpet there it was not in substitution of that—now,

could it have been in substitution of anything else except a French trumpet—anything else provided in the specification? A. Well, that is the nearest in the family—that is the nearest stop in these specifications that the flugelhorn would be—I mean it is nearer in sound than any other, it is a reed stop, or, at least. I think it is a reed stop.

Q. Well, how is it that, with this organ, you could not find much music in; you could detect the difference between a French trumpet and this flugelhorn, or whatever you call it—what is the difference in the sound—do they sound anything alike, a French trumpet and a flugelhorn? A. To tell you the truth, I don't know what a French trumpet sounds like.

Q. Why did you say, a moment ago, that it might have been a substitution for a French trumpet? A. Because a trumpet is a trumpet, but a French trumpet is something I don't know much about; it may be a particular kind of trumpet; but I know what a trumpet sound is.

Q. Did you play all over that organ to see if there was a trumpet sound in there? A. I probably did not have it in my mind at all at the time, or merely pulled out the "stop flugelhorn" and did not have any idea of the French trumpet because "French trumpet" was not marked on the stop key.

Q. A moment ago you said you didn't know whether it was in there or whether it was not? A. Well, it might have been this way—that if a French trumpet, for instance, were in the organ, and it was all right, I wouldn't have put anything in the report.

Q. Did you put anything in the report about a French trumpet? A. No, I have nothing in the report about a French trumpet.

Q. The only reason that you can give now that you put in the flugelhorn was because there was not any flugelhorn provided for in the specification, is that right? A. No, sir.

Q. What was the reason? A. I did not see the specifications; I pulled the stop key, evidently, this must have happened—I pulled the stop key called "flugelhorn" and that opened the stop. I played upon the keyboard, heard the flugelhorn, on each of its tones, or each of its keys, rather, and made my judgment of the stop; but I had no idea of the French trumpet in my mind, because it was not in my mind.

At this point the Court excused the parties until two o'clock, in view of the trial of another case which was set for today, of which the Court took up the hearing at that time.

At two o'clock the hearing of the case was further adjourned until Wednesday, February 28, 1923, at ten o'clock A. M.

GREENWOOD A. ROBINSON, sworn.

Direct-examination by Mr. Morten:

Q. Mr. Robinson, you entered into a contract with the American Master Organ Company, a copy of which is supposed to be annexed to the bill of complaint in this case? A. I did.

Q. I show you a contract and ask you if that is your copy of the contract, that was executed in duplicate at the time it was entered into? A. It is.

Mr. Lane: We will admit it.

Mr. Morten: I offer it in evidence.

Mr. Lane: I understand it is already in evidence.

Mr. Morten: Well, I offer it for the purpose of being able to correct it if there are any errors in the copy annexed to the bill of complaint, that is all, because I did not compare it.

(The paper is admitted and marked Exhibit D-1.)

Q. At the time you entered into the contract, who was instrumental in securing this contract? A. Mr. Frank R. White, and Mr. Ely.

Q. Who was Mr. White? A. Mr. Frank R. White was Vice President and Mr. Ely was the Secretary of the American Master Organ Company.

Q. And their plant was at Lakeview, New Jersey? A. Yes, the first time that I met them they had an office in Broadway, New York City; and Mr. White wrote me a letter, if I recall it, about May, 1916, which letter I answered, asking for an appointment at the factory.

Q. The contract called for certain payments—was a schedule of those payments made by the American Master Organ Company, and submitted to you? A. It was, at a later date.

Q. I show you a statement of payments that is headed "American Master Organ Company, Incorporated," and ask you if that is the schedule of payments that was submitted to you after you had entered into the contract? A. It is.

Mr. Morten: I offer it.

Mr. Lane: I object to it, on the ground that it is immaterial and irrelevant. The contract covers that entire situation.

The Vice Chancellor: I will overrule the objection for the present; I don't know what it is going to lead to.

Admitted and marked Exhibit D-2.

Q. I call your attention to certain notations opposite the dates of payment—they were not on this schedule when you received it? A. No.

Q. Who put those on? A. I placed them there.

Q. And what are these notations on the side?

Mr. Lane: May I ask if the purpose is to show how much he paid? Does this agree with our figures?

Mr. Morten: Excepting to that fifty dollars you are talking about.

The Vice Chancellor: Well, he disagreed more than that—as I take it from your claim, $1,600 was paid as a lump sum?

Mr. Lane: Oh, no, if your Honor please, $250 was paid at the time the contract was entered into, $400 at the time it was in-

stalled, and then there were various installments of $150 each, making up the $1550.

The Vice Chancellor: Oh, I took it that you paid up $1600 in advance. Is there any dispute then, that the moneys were paid at the time specified in your answer?

Mr. Morten: Oh, yes, there is every dispute. We did not pay at the time of the installation, or anywhere near it; nor were the installments paid at the time they were due, and I am going to show when the payments were made and why they were made.

The Vice Chancellor: All right.

Q. (Question repeated). A. These are notations that I made at the time I made a payment.

Q. According to the schedule which had been furnished to you by the American Master Organ Company, the date the first payment was due was what? A. December 11, 1916.

Q. And how much was the payment? A. That was not the first payment; that was the first monthly payment; that is, there was a payment of $400 made prior to that, but this was the first on the schedule.

Q. The first on the schedule of monthly payments? A. Yes.

Q. And when was that paid by you? A. On the 11th of December, 1916.

Q. When was the next payment due? A. On January 11, 1917.

Q. And when was it paid? A. On the 31st of January, 1917.

Q. When was the next payment due? A. On the 11th of February, 1917.

Q. And when was it paid? A. On the 10th of February, 1917.

Q. When was the next payment due? A. On March 11th, 1917.

Q. And when was it paid? A. On the 12th of March, 1917.

Q. And when was the next payment due? A. April 11, 1917.

Q. And when was it paid? A. Not until the 18th of, I believe it was September.

Q. It is August—it is "8th month." A. August 18th. I sent that payment.

Mr. Lane: We have a payment of September 18th of $150; otherwise, we pretty near agree with you.

The Witness: Well, this check was mailed to them on the 18th of August, and they returned it to me.

Q. They returned it to you? A. Absolutely.

Q. What is this other date here? A. I left this mark on there, because of the fact that I had originally made it on that day; I made the remittance on that date. These were the days here, that I had really paid the money; and they came back and didn't seem to want to accept the money on the 18th of August, and I think I have communications there that call attention to this very payment.

Q. What is this memorandum here (indicating)—anything to do with the payment—that memorandum? A. No, that is a separate memorandum. There was another payment, Mr. Morten, here, I think there were two payments here, if I am not mistaken—there was a payment made

on the 18th of August and another on the 18th of September.

Mr. Morten: Do those agree with yours, Mr. Lane?

Mr. Lane: Well, the 18th of September does.

(To the Witness) Did you say they returned the 18th of August payment?

The Witness: They returned the August 18th payment, and I sent it back to them again, and finally they agreed to accept it.

Mr. Lane: Then the amounts agree with mine, and the dates are approximately the same, and that amounts to $1550.

Q. Now the contract provided for a first payment of $250 upon the signing of the contract, was that paid? A. It was.

Q. Now, it provides for the payment of $400 upon the installation of the organ complete in accordance with the contract—was the payment of $400 made? A. Yes, it was made, but with objections.

Q. Do you know what date it was made—have you got the date of that? A. I don't happen to have that date.

Mr. Lane: October 28th is our date, that we received it.

The Witness: I believe it was around that date.

Q. How did you come to make that payment of October 28th? A. Why, prior to the 26th, the date that the organ was opened, Mr. White and

Mr. Ely had constantly made demands upon me for money, and I had told them that I was ready to pay them whatever may be due them at the time it was due.

Q. Did they tell you why they wanted it—you say they made demands—how did they make them? A. Requests—not demands, but they requested them.

Q. Do not use the word "demand" if they did not demand it. A. They requested me, from time to time, to help them out with money.

Q. Did they say why they wanted you to help them out? A. Well, I don't know whether I can say it the way I would like to say it.

Q. Well, what did they say as to why they wanted you to help them out? A. That they were short of money.

Q. Now, this organ was to have been installed on September when? A. Supposed to be completed on September 4th, which was Labor Day.

Q. And at that time, was the organ complete? A. Not by any means.

Q. You said that your were asked to consider this organ, and that you received a letter from Mr. White about it—I show you a letter dated May 2nd, 1916, and ask you if that is the letter that you received? A. It is.

Q. Did you reply to that letter? A. I did.

Q. Under what date? A. May 26th, 1916.

Q. And is the paper annexed to it your reply? A. It is.

Mr. Morten: I offer these in evidence (showing the same to Mr. Lane).

The Witness: I might say, at this time,

that prior to the receiving of this letter (I believe it must have been in the month of March or April of the same year) I had visited a show room on Broadway in which they had one of their instruments for demonstration purposes, and I went to see that instrument as a prospective buyer; and the letter from Mr. White is the result of my call there. That was the first time I really met them.

Mr. Lane: I simply desire to make the formal objection to the offer, that it is immaterial and irrelevant.

Mr. Morten: I offer it principally for the purpose of showing that Mr. White was Vice President of this company.

Mr. Lane: We admit that he was Vice President.

The Vice Chancellor: Well, if that is the only purpose of submitting it, why offer it?

Mr. Morten: Also to corroborate what Mr. Robinson said in regard to whom his negotiations were with.

Mr. Lane: We admit his negotiations were with Mr. White.

Mr. Morten: Well, perhaps you will, but why should we take your admission if we can prove that otherwise?

The Vice Chancellor: I will overrule the objection. I do not know what it will lead to.

(The letter and answer were marked as one Exhibit, D-3).

Q. Now, then, between September 4th and October 26th, did you have any conversations with Mr. White or Mr. Ely, or both of them, regarding the delays relative to the installation of the organ? A. Quite a number.

Q. And what were those conversations with them, or to what effect? A. Why, they had promised to have that organ playing for September 4th, and I had occasion to advertise the official opening of the organ on two separate occasions.

Q. And when you say "advertise it," what did you do? A. Put it in my program—made mention of the fact in my program, the programs are issued once a week; and several weeks prior to the opening I had made a special mention of it in the programs as an advance news article.

Q. Now, did they know you had done this, or was this done without their knowledge? A. Certainly, they knew it.

Q. Who fixed the date at which you were to advertise the opening? A. Mr. White.

Q. When you fixed the first date, you advertised for your organ opening was the organ opened at that time? A. No, it was not.

Q. Now, was there any other date fixed? A. Yes, there was a date fixed.

Q. And who fixed that date? A. Mr. White.

Q. And when he fixed the second date at which the organ was to be opened, was the organ opened? A. It was not.

Q. Did you have any correspondence with Mr. White regarding this opening of the organ? A. I received a very lengthy letter from Mr. White.

Q. I show you a letter dated October 18, 1918,

on the letterhead of the American Master Organ Company, signed "Frank R. White" and ask you what that is? A. That is an apologetic letter from him acknowledging that they had fallen down on the completion of the organ in time for the official opening. It is a letter in which he asks me—

Mr. Lane: I object to that.

The Vice Chancellor: Do not state the contents of the letter.

Mr. Morten: I offer it.

Mr. Lane: I make the same objection as in the other case.

The Vice Chancellor: I will overrule the objection.

(The letter is marked Exhibit D-4, and was read to the Court by Mr. Morten).

Q. Now, then, in this letter he speaks about the grand formal opening—had that been talked about relative to this organ before this? A. Quite extensively.

Q. What conversation had you had with him, if any, regarding the advantages of having an American Master Organ over any other organ that was then on the market?

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

The Vice Chancellor: I will overrule the objection.

A. Why, when I first saw the instrument at their office on Broadway, one thing that appealed to me at that time was the fact that they had a grand piano in conjunction with the organ; and

a strong feature, as it was explained to me, at that time, was that this grand piano could be placed either in conjunction with or without the organ; that was one notable feature. At that time there were very few instruments on the market that could give you that effect. Another feature that he recommended was the pleasing quality of the tone of his pipes; and I must say that the demonstration that was given to me there impressed me some, and I thought really that I was getting something that was entirely different. I was willing to be shown, in other words; and, as I said before, it impressed me with the pleasing quality of the tone, and the additional fact that there was a grand piano there, which I had not known of being used in a theatre on an organ before. And there was another thought—I will get it in later.

Q. All right—now then, what was the first date on which this organ was played at a public performance? A. October 26th.

Q. 1916? A. 1916.

Q. Which is the date mentioned in this letter—and who played the organ that night? A. Frank R. White.

Q. You mean the same Frank R. White who is the Vice President of this company, and that you refer to in the letter? A. Yes, the same.

Q. Just what took place as Mr. White played that organ that night? First, tell us only what you saw or what you heard. A. Why, I sat with him, so that I not only saw but heard.

Q. All right—tell us what took place. A. Why, he would start off pulling on the various stops,

and, on a few stops he seemed to get some fair good result—that is, maybe one or two stops would give a fair good tonal quality; but, from time to time, while he sat there, I noticed he would pull on additional stops—for instance, the drums—he would have occasion to call on the drums, or some of the traps, and he couldn't get any response, and several times he used the word "Damn."

Q. Just tell us what he said—don't tell us what he "used," but what he said. A. "Damn it " in a very heavy tone, in a kind of disappointed expressive way.

Q. Was he pleased with the way the organ acted that night?

Mr. Lane: I object to this. It is what he stated, not the witness's conclusions.

The Vice Chancellor: I think I will sustain the objection for the present.

Q. Well, what did he do, and how did he act? A. In his mannerisms, they were just that of a man that was keenly disappointed in calling for something he could not get; and he displayed very great anger, inasmuch as he had expected the organ to be in perfect shape. That I know, because he has spoken to me about it. He had not seen the instrument to play on for several days before that, and when he came on to the instrument to start off playing it, and found these parts that would not respond, why, it seemed to annoy him very, very much.

Q. Well, did he make any comment as to whether or not the things were responsive—did he say anything about it, whether it was work-

ing or not? A. Why, referring to any one particular stop, he used the words, "What the hell's the matter with that?" several times.

Q. Was there any improvement in the playing of the organ, that night, at all? A. It got worse.

Q. Did Mr. White play on the organ after the opening night, at all? A. Quite a number of times.

Q. At any time that he played on it, did the organ respond as he wanted it to? A. No.

Q. Did he talk to you about it, as to what was necessary to be done, or what they would do with it? A. Nothing, except that he said they would have to take care of these defects. The drums and traps were left alone, entirely, because of the fact that they would not respond.

Q. They would not respond to what? A. To the touch of the key that would call for them in accompaniement with the balance of the stops that were being used.

Mr. Morten: Mr. Lane, have you letters of November 13th and 24th, 1916, Robinson to the American Master Organ Company?

Mr. Lane: I do not believe so. Have you got what you call copies?

Mr. Morten: I have copies, yes.

Mr. Lane: I may have them here, but I will say that I have not got them here.

Mr. Morten: (To the Court) We have agreed that notice which we gave to each other in the Circuit Court to produce documentary evidence will apply to the Chancery action, and both sides gave no-

tice, so we can use copies if we cannot get the originals.

Q. Mr. Robinson, I show you a paper and ask you what that paper is? A. This is a copy of a letter I wrote to the American Master Organ Company on November 13th, 1916.

Mr. Morten: I will offer it in evidence (showing same to Mr. Lane).

(The letter is admitted without objection and marked Exhibit D-5).

Q. Mr. Robinson, did you receive answers to the various letters you wrote the American Master Organ Company, as a rule? A. Well, they seemed to be afraid of writing. I received very few communications from them, and I did not receive an answer to these letters until some time later—in fact, my letter of the 24th, if I recall, requested an answer to my letter of the 13th, and I did receive an answer some time later, just what date, I do not recall at this time.

Q. I show you a letter on the letterhead of the American Master Organ Company, dated November 24th, 1916—what is that? A. This is a letter received by me from the American Master Organ Company.

Q. In reply to what? A. In reply to my letter of November 13th.

(The letter is offered in evidence by Mr. Morten, admitted without objection, and marked Exhibit D-7).

Mr. Morten: I presume that I had better read those letters to your Honor, because

they won't mean anything to your Honor unless I do.

The Vice Chancellor: Yes.

(Mr. Morten thereupon read the letters referred to to the Court, beginning with the letter of November 13th, 1916, Robinson to American Master Organ Company, Exhibit D-5).

Q. I notice that the words "traps and drums" are noted at the foot of this letter (referring to an inset)—were those inserted in the original letter, those words? A. They were, yes.

Mr. Morten: Then I should probably change my reading to have that include "drums and traps not working." (Referring to Exhibit D-5).

Q. Now, then, after the receipt of those letters did they get the organ in perfect playing condition? A. They did not.

Q. Has it ever been in perfect playing condition? A. Never.

Q. I show you a paper and ask you what that is? A. This is a copy of a letter written by me to the American Master Organ Company on December 8th, 1916.

Q. I show you another letter, on the letterhead of the American Master Organ Company, and ask you what that is? A. That is a letter from the American Master Organ Company, of December 9th, 1916, signed by A. C. Ely.

Q. In reply to the letter of the 8th? A. In reply to my letter of the 8th.

Mr. Morten: I offer these letters in evidence.

(The letters are admitted without objection, and are marked, respectively, Exhibits D-8 and D-9, and were read by Mr. Morten).

Q. Now, then, from that time, when you wrote that letter, was the organ working? A. Some parts of it were working.

Q. I call your attention to a letter on the letterhead of the American Master Organ Company, dated March 13th, 1917, and ask you if you received that letter? A. I did.

(The letter was thereupon offered in evidence by Mr. Morten, admitted without objection, and marked Exhibit D-10).

Q. Read that letter—do not read it out loud—I want you to read it so you will know its contents. A. (Witness examined the letter) All right.

(The letter, Exhibit D-10, was thereupon read by Mr. Morten).

Q. What was it brought about the writing of this letter, Mr. Robinson? A. The drums and traps would not work, and they found it necessary to change the equipment. They had an idea of putting in a similar action to what Mr. Woodberry testified to at the time he was on the stand.

Q. Similar action to what? A. On the drums and traps.

Q. Similar to what? A. To the action that he had in his instrument, and they had one small motor there which they figured would have to be

changed, and they asked my permission to use a two-horse power motor that was attached to the Wurlitzer machine, pending the arrival of their motor, which permission was granted them.

Q. Did their motor come? A. Their motor came on April 24th; this was about seven or eight weeks after the letter was received by me. On April 24th it came to the theatre C. O. D. and I refused to receive it.

Q. You mean you refused to pay the money? A. I refused to pay the charges. I got in touch with the factory by 'phone and stated the case, and the motor was delivered on the 26th—taken care of, I presume, by them.

Q. Was that the first time they had ever had a motor there for the blower? A. To my recollection, yes. I think the action was different to what the blower required.

Q. Do you know what kind of motor they did have there previous to that time? A. I don't believe that he had a blower attachment there previous to that. They had a generator—I don't know much about the electrical end of it—but they had a generator attached to the wall there, I know.

Q. I show you a paper and ask you what that is? A. This is a copy of a letter that I wrote the American Master Organ Company on the 2nd of May, 1917.

(The letter is offered in evidence by Mr. Morten, admitted without objection, marked Exhibit D-11, and read to the Court by examining counsel).

Q. And did you receive a reply to that letter, that you recall (showing the witness a paper)? A. I think I did; yes—under date of May 4th—I received it probably on May 5th. That is the reply.

(The letter was thereupon offered in evidence by Mr. Morten, admitted without objection, marked Exhibit D-12, and read by examining counsel).

Q. There is a note, in lead pencil, at the foot of this letter, that is in your handwriting—that is not part of the letter, is it? A. That is mine; I made a notation on the upkeep clause of the contract.

Q. After the receipt of that letter did they send over anyone to work on that organ? A. Why, yes; they sent workmen from time to time; they had workmen almost constantly there.

Q. I show you a number of papers that are held together in a clip, and I ask you to tell me what they are, beginning with the top one first? A. The top one is the receipt of the registration of the letter mailed to the American Master Organ Company; the date of the receipt is June 8, 1917.

Q. And is that the letter that is attached to the receipt? A. It is.

Q. What is the other paper that is attached? A. There is a notation here, which is a copy of the original detailed account sent to the American Master Organ Company of several defects that existed on the 8th of June, 1917, in the organ.

Q. Was there a copy of that enclosed in the letter of June, 8th? A. There was.

Q. Now, what is that paper (referring to another paper in the package shown the witness)? A. This is a copy of several notes that were made on the 22nd of June, 1917, of the defects as found at that time.

Q. Who made them? A. I did.

Q. Who was present when you made them? A. At this particular time, I do not recall that anybody was present.

Q. Well, what is the last one (referring to the final paper in the package shown the witness)? A. That is notations made on July 5th, 1917, of defects as I found them in the organ at that time.

Q. Can you, without referring to these various writings, tell us what those defects were? A. They consisted of—

Q. No, I mean, can you give them, all of them—I do not mean a general specification—can you tell us what is in these papers here, everything, without referring to them? A. Silent notes.

Q. Can you give us what is on these papers here without referring to them? A. Well, I could not, in detail.

Q. Well, that is what I want to know. A. No.

Mr. Morten: I offer in evidence the letter of June 8th, the copy of list of imperfections that accompanies that letter, and the registry receipt, showing that it was sent by registered mail.

(The papers are admitted without objection, marked as one Exhibit, D-13, and the letter of June 8th was read by Mr. Morten).

Q. Now, Mr. Robinson, I am going to ask you to read this, because I don't know as I can read that list of defects that you enclosed; it is all your handwriting. Read the list of defects referred to in that letter—which you enclosed to the American Master Organ Company with that letter. A. "Silent notes on Solo organ, there were 3 on the vox humana; 3 on the oboe; 5 on the clarionet; 19 on the flugelhorn; 2 on the piccolo; 4 on the 4 ft. flute; 12 on the celesti; 9 on the string; 1 on the 8 ft. flute; 9 on the diapason; 7 on the diapason; 7 on the cello; 3 on the Bourdon; on the pedals there were 7 diaphones; 2 bourdon; 2 cello; 8 diapason; 4 clarionet."

Q. When you say that, what do you mean by "they were silent"? A. Silent notes; they would not respond to the touch. There were also two on the chimes silent; two on the Glockenspiel notes were also silent. On the solo there is one note that plays without any stops on, and also plays with any stop.

Q. Just tell us what you mean that it "plays without any stops on." A. Without any of the stops thrown in, this note would sound through.

Q. And is an organ supposed to play without any stops on? A. No.

Q. Now, you say, in addition to that, what? A. It also played when any other stop was pulled on; that is, it stayed on when any other stop was pulled down; in other words, it would pull through with the other stop. On the accompaniment, the flute stop stays on all the time, we could not throw that stop off. I then called attention—I will read it in full "Temperature now being high-

er than the organ was installed, requires the piano down to the present pitch of the organ. At this time, there are no results from the drums and traps." This is the thing in detail.

Q. I ask you to refer to your memorandum, dated 6/22/17, and ask you what defects you noted at that time? A. There was a cipher—in other words, a constant playing of the chimes when starting the motor—that is, when the motor was started up the chimes would give a tingle. The kettle drum was off on first touch (there are two touches, first and second touch). The cymbal reiterator, soft, was off, entirely; we could not get any response. The triangle was attached to the cymbal stop—that is to say, on the cymbal stop you would get the triangle. The Chinese Block was off entirely, you could not get a response. The tambourine was off. The triangle reiterator was off—you could get no response; on the pedals there were soft, silent notes; 1 silent diaphone; 3 silent bourdons; 1 silent open diapason; 4 silent diaphones; I evidently have diaphones there twice—2 silent clarionet. These defects I telephoned over to the factory on that day.

Q. Were they remedied? A. They were not. They had men working on it since I sent the first list in the early part of June. They sent somebody over, and they would fix them, and then it would immediately go into disrepair again. Every day there was something like that happened.

Q. I show you a memorandum dated July 5, 1917, and ask you what that is? A. That is notations that I made, of that date, of silent notes on the solo. There were 5 bourdons silent—

Q. What was done with that memorandum—did you communicate that condition to the company? A. Telephoned to the company, yes, whenever I found any defects. I was almost in constant telephonic communication with them; every day I had to phone them, pretty near. There was 1 open silent; 4 diaphones silent; one 8 ft. flute silent; 9 celesti silent; 17 flugelhorn silent; 5 clarionets silent; 7 oboe silent; 4 vox humana silent; on the Glockenspiel one of the hammers became broken; the 4 ft. coupler on and off—we couldn't control it; it would go on and then it would come off of its own accord. The swell shades were not all working. The tremolo—one of the tremolos (I think at that time there were two) ciphered the oboe and vox humana—in other words, when the tremolo was thrown on it would play those two stops without any keys down. The 8 ft., down to the bottom of the bourdon, was almost inaudible—about half that stop was inaudible, you could not hear it at all.

Q. I show you a letter dated August 17, 1917, on the letterhead of the American Master Organ Company, to which is attached a memorandum in lead pencil, and ask you what that is? A. This is a letter that I received from the American Master Organ Company, signed by Mr. Ely, making an appointment at the theatre.

Mr. Lane: Never mind what the letter says—you received it.

The Witness: And in answer to a telephone that I had with him—

Mr. Lane: I object; the letter will speak for itself.

The Vice Chancellor: Does not the letter indicate what it is a reply to?

The Witness: Yes, it does, Judge.

Q. Well, what is that attached to it? A. This is a yellow slip of paper which contains a lot of notes and figures, which were made by Mr. Ely, of defects at that time in the organ.

Mr. Morten: I will offer the letter and the memorandum attached to it, in evidence.

Mr. Lane: I object to the memorandum, if your Honor please, unless it is shown that it went with the letter—in other words, I am only trying to find out if the letter simply makes an appointment, how the memorandum got into his hands, or what it is, or how he got it.

The Witness: There are some notes here I made myself, later.

Mr. Morten: I will straighten that out.

The Vice Chancellor: (To Mr. Lane) How about the notes made by Mr. Ely?

Mr. Lane: In his own handwriting?

The Vice Chancellor: Yes.

Mr. Lane: They may be all right, but just a memorandum of notes made in the handwriting of Mr. Ely would not be relevant unless we had everything that went with it.

Mr. Morten: The letter made an appointment, and Mr. Ely came over, and these things he noted.

Mr. Lane: He has not said so. If that is the situation, it is all right.

Mr. Morten: That is what he said, as I understood him—I will ask him.

Q. You tell us about it. A. I telephoned Mr. Ely that the organ was in very bad shape, and Mr. Ely wrote me that he would come over on Saturday morning following the writing of the letter, which I believe was the 23rd of August, and he came over, with a workman, and took a note of the defects at that time. That note is this.

Q. The paper which you now have? A. The paper which I have before me. The figures that are on there are in Mr. Ely's handwriting. I saw them made.

Mr. Lane: I have no objection to the part that was put on by Mr. Ely, if your Honor please.

The Vice Chancellor: All right; it may be offered.

(The letter and the upper part of the memorandum are admitted, marked Exhibit D-14, as one exhibit, and the letter was read by Mr. Morten).

Q. You say that Mr. Ely came, and that this upper part has certain figures on it that are made in Mr. Ely's handwriting? A. Yes, sir.

Q. Read only from that paper such memorandums as were noted thereon by Mr. Ely, and in his handwriting. A. Well, it is pretty hard to make out some of these figures here, but you can get the number of notes referred to. He has, for instance, "Vox" (which is the vox humana); he has "No. 1," then he has "25 C sharp." Now

that referred to the particular notes that were wrong. He then goes into the oboe, and has marked "1-11C," and something (whatever it is, I don't know, it is almost eradicated); also, on the oboe "6-25 C sharp," then he goes into the Clarionet and he marks the figure "16," struck out; then he has the letter "P" over and above "30." Then he has—

Mr. Lane: This is perfectly plain; anybody can read it. I prefer to have somebody else read it, because I insist he is not reading it correctly.

The Vice Chancellor: Well, if you cannot agree upon the writing, some one else can translate it.

The Witness: I am perfectly satisfied, your Honor. It is very hard to make out.

(It was then consented that Mr. White should read it in conjunction with the witness.)

The Witness: (Resuming the reading.) There is a dash, "28," with the word "Pipe" written over the top. "T. C." still on the clarionet. We have the letter "P" over and above the figure "6."

Mr. White: I don't know what any of that is. I know it is Ely's writing. It is, no doubt, some shorthand he understood himself.

The Witness: (Resuming.) Then the letter "P" over "30.". On the trumpet he has "4, 6, 9, 10, 14, 16, 19, 20, 23—

The Vice Chancellor: Well, offer it in evidence, it can be read later.

The Witness: Well, your Honor, those were all silent notes. I saw him try the notes, myself, and write down these numbers. This is evidently the number of silent notes—as many number as there are on a particular stop.

Q. And that is what that writing represents? A. Absolutely.

Q. You saw him try the notes? A. I saw him try the notes, and I saw him write them down.

Q. If they did not respond? A. If they did not respond.

Mr. White: It will take all the morning to read that to you.

Mr. Lane: Why Mr. Black (the stenographer) can copy that in three minutes, if your Honor will look at it.

The Vice Chancellor: Go on with your examination.

Q. Now, then, Mr. Robinson, the lower part, or writing on this memorandum, is what? A. Writing of my own.

Q. And writing concerning what? A. Different things that were wrong with the organ—silent notes, etc.

Q. At what time? A. I made it two days after Mr. Ely had been there with the man which was made on Monday following. He was there on Saturday.

Q. And can you tell us, without referring to the memorandum everything you found wrong, or the various things you found wrong at that time? A. I couldn't.

Q. Refer to the memorandum, and tell us what you found on that day, namely, two days after Mr. Ely had been there with his man to have repairs made? A. There was no tremolo working. The flute stop pulled on to the accompaniment without putting the stop on. There was a lot of silent notes—two on the piccolo, two on the oboe, three on the trumpet, six on the four feet flute, two on the celesti, two on the eight foot flute, two on the bourdon, one on the pedal bourdon, one on the clarionet pedal. The celesti had a run through on all stops.

Q. What do you mean by that? A. That is a sound produced without the keys being put down—in other words, the celesti stop was ciphered. That is all on the memorandum.

Q. Now, I show you two letters from the American Master Organ Company, one dated September 14, 1917, and one dated September 26, 1917, and ask you what they are? A. They are letters received by me from the American Master Organ Company.

Mr. Morten: I offer them in evidence.

(The letters are admitted without objection, marked Exhibits D-15 and D-16, respectively, and are read by Mr. Morten.)

Q. How did you come to have Mr. Guttschmidt working on that organ? A. There was certain tinsmith work that had to be done—piping—and Mr. Ely requested me to get a local tinsmith to do the work, and I got this party by the name of Guttschmidt, and he would not take the work unless I guaranteed the payment of it, which I

did. When the work had been done, he submitted his bill to the American Master Organ Company and could not collect it, with the result that he fell back on me and brought me to court, and I had to pay the bill with costs of the Court.

Q. He got a judgment against you? A. He got a judgment against me, which I paid. I then called the attention of the American Master Organ Company to the fact that I paid this bill, and asked them to reimburse me, which they failed to do; they did not even acknowledge my letter; didn't even authorize the payment of the bill until away after the time that it had been paid. But, having assumed the liability to the party, Guttschmidt, I paid it. That was for work in conjunction with the working of the drums and traps.

Q. I show you a letter dated October 4th, 1917, and ask you what that is? A. That is a letter received by me from the American Master Organ Company.

Mr. Morten: I offer it in evidence.

(The letter is admitted without objection, and marked Exhibit D-17, and read by Mr. Morten.)

Q. Now, before that time, had you received any word from the American Master Organ Company that they had gone into insolvency? A. No.

Q. Did you know they were in insolvency, from other sources? A. Around that time I received a notice of the hearing; I think it was just a little later than that.

By Mr. Lane:

Q. A little after when, was it, as matter of fact? A. I received the notice of the stockholders meeting at the hearing.

By Mr. Morten:

Q. Well, did you receive it, or was it given to you by someone else who had received it? A. I received it from Mr. Sprackling.

Q. Was it directed to you? A. No.

Q. I show you a copy of letter, or paper, dated October 6, 1917, and ask you what that is? A. That is a copy of a letter which I registered to the American Master Organ Company, and, I believe, sent one also to John Mason, in answer to the letter of the American Master Organ Company of the 4th of October.

Mr. Morten: I offer it in evidence.

(The letter is admitted, without objection, marked Exhibit D-18, and is read by Mr. Morten.)

Q. Can you point out the clause in your contract which provides that you shall not allow any one to go into the interior of the organ without the consent of the American Master Organ Company (showing the witness the contract, Exhibit D-1)? A. It is in there somewhere, but I don't know just where it is.

Q. Here it is (indicating)? A. Yes.

Q. What clause is it? A. Clause 2.

Q. Clause 2 provides as follows: "Party of the first part further warrants that said organ when completed shall be free from any defects in material and workmanship, and if any such defects

shall develop within five years after completion of said organ, the party of the first part, shall, upon written notice'' etc. ''forthwith remedy the same at its own expense, provided, however, that the party of the second part shall permit or allow no other workmen or builders to be admitted in to the interior of the organ for the purpose of investigation, tuning, repairs or otherwise, without the authorization in writing of the party of the first part''—now, in your letter you refer to the fact, and ask for authorization to have someone investigate the organ—was that permission given? A. It was.

Q. And did you endeavor to have someone make an investigation of the organ and give you a price as to what it would cost to put the organ in repair? A. I did.

Q. Do you remember whom you tried to get? A. I tried to get the Rudolph Wurlitzer Company, the American Photo-Player Company—

Q. Mr. T. H. Wood? A. T. H. Wood; John Perrigallo. I think that is all I tried to get at that time.

Q. I show you a letter, dated October 12th, 1917, and ask you what that is? A. That is a copy of a letter that I wrote to Mr. T. H. Wood in New York City.

Q. And who is T. H. Wood? A. He is workman whose branch of organ work was the tuning of pipes, as I understand it.

Mr. Morten: I offer that copy in evidence.

Mr. Lane: I object to it.

The Vice Chancellor: On what ground?

Mr. Lane: On the ground that it was not sent to us; we have no knowledge of it. It is a letter he wrote to somebody else. It is clearly immaterial and incompetent.

Mr. Morten: It is offered for the purpose of showing that there was authority given to us to go into the organ, and did make an honest endeavor to get someone to examine it.

Mr. Lane: Well, subsequently, on November 12th, you wrote us a letter telling us the result of your investigation; now, if you come to that letter, I will probably withdraw all objection. Now, I never saw that one before.

Mr. Morten: I think I have a perfect right to show what these men said, and not our conclusion as to what they said.

Mr. Lane: I object to it, on the ground that it is immaterial and irrelevant as against us.

The Vice Chancellor: I will sustain the objection. The witness can tell what efforts he made to get people to examine the organ; and that is all that letter can be used for.

Q. You have mentioned several people to whom you made application to examine this organ for the purpose of determining what repairs were necessary, and what they would cost; what was the result of your efforts in that respect—did you get any figures? A. I did.

Q. For the complete eradication of the trouble? A. No.

Q. I show you a paper and ask you what that is? A. It is a copy of a letter written on November 12, 1917 to the American Master Organ Company.

Q. And how was it sent to the American Master Organ Company, by what kind of mail?

Mr. Lane: We admit we received it, if your Honor please.

A. That was by registered mail.

Mr. Morten: I offer it in evidence.

(The letter is admitted, without objection, with the two registry receipts, marked Exhibit D-19, and the letter is read by Mr. Morten.)

Q. Now, some mention has been made, previously, to the effect that this organ was disconnected from the piano—do you recall whether or not that was so? A. It was so.

Q. And do you know who did it? A. Yes.

Q. Who? A. John Perrigallo.

Q. And who was John Perrigallo? A. He was a man employed by the American Master Organ Company while they were in existence.

Q. I show you a paper and ask you what that is? A. That is a bill from John Perrigallo.

Mr. Lane: Does he know that he was employed at that particular time?

Mr. Morten: No, this was when they were in insolvency.

Q. And does that refresh your mind as to the date when it was done? A. It does.

Q. When was it done? A. May 21, 1918.
Q. How much did you pay for it? A. $6.30.

By the Vice Chancellor:
Q. Was this man in the employ of the Company at that time? A. Not at that particular time; no, sir; he was prior to this time.

Mr. Lane: We are going to show all of that, your Honor.

By Mr. Morten:
Q. Now, I show you letter under date of May 30, 1918, and ask you what that is? A. That is a letter from Mr. George J. Kilgen.
Q. Did you reply to that letter? A. I did.
Q. Under what date? A. Under date of June 1st, 1918.
Q. (Showing the witness a paper.) Is this a copy of that reply? A. It is.
Q. (Showing another paper.) And what is this? A. This is a letter from George J. Kilgen, dated August 17, 1918.
Q. (Showing another paper.) Did you reply to it? A. I did.
Q. Under what date? A. The 22d of August, 1918.

Mr. Morten: I offer these in evidence.

(The four papers are offered in evidence, admitted without objection, marked respectively, Exhibits D-20, D-21, D-22 and D-23, and are read by Mr. Morten.)

By the Vice Chancellor:
Q. Who is Mr. Kilgen? A. That is the attorney, sitting right here at the table.

By Mr. Morten:

Q. Do you remember what man they had with them when they came (referring to a passage in the Exhibit D-22)? A. Yes, I think I do.

Q. I show you a letter on the letter-head of Mr. Kilgen, dated September 10, 1918—you received that letter? A. I did.

Q. It refers to a copy of a letter addressed to attorneys who are intended to be named as "Melosh & Morten"—was there a copy contained with that letter of Mr. Kilgen? A. There was.

Q. And was there attached to the letter the copy? A. Exactly.

Q. And also it refers to the removal of the Wurlitzer Organ at Lakeview, and an authority for that—was this authority that is here enclosed with that letter as well? A. It was.

Mr. Morten: I offer those three documents in evidence to be marked as one exhibit (and the same were admitted without objection and were so marked, and all three were read by Mr. Morten).

Q. After that Wurlitzer Organ had been taken to the factory at Lakeview, in or about October 1916, when they were attempting that organ in your theatre in West Hoboken, did you visit the factory at Lakeview and see your organ—the Wurlitzer—there? A. I did.

Q. Did you ever visit the factory after that? A. I did.

Q. And did you see your organ, or any part of it? A. I did.

Q. What did you see? A. At what particular time—the second time?

Q. Yes? A. Why, I saw the framework of the organ, with all the insides, or a majority of the insides, missing, the drums and traps and a lot of the pipes were missing.

Q. Can you fix the time as to about when that was? A. That was shortly after I received notice from Mr. Kilgen.

Q. Or from Mr. McKee? A. Or from Mr. McKee.

Q. I show you a letter on the letter-head of Mr. Wood McKee, and ask you what that is—is that the letter that you refer to? A. Yes, this is the one.

(The letter is offered in evidence, admitted without objection, and marked Exhibit D-25, and is read by Mr. Morten.)

The Vice Chancellor: Wasn't that offered when Senator McKee was on the stand?

Mr. Morten: No, it was not offered. They did not ask for the letter, at all.

Q. Now, you say right after that you went over, and that was the time you saw your organ all apart? A. In the month of December, 1917. I also saw the watchman of the factory there—of the American Master Organ Company's factory—and I inquired from him as to whether there was anybody around of the American Master Organ Company, and he said, "No."

Q. Well, that was after Mr. McKee had been appointed Receiver? A. After Mr. McKee's letter.

Q. Do you know whether this watchman is the

watchman that Mr. McKee had there—that you saw? A. He was the watchman in charge of the factory—he told me he was the watchman in charge of the factory. At the time I was there there was an awful lot of heavy iron drums inside of the factory, too, about 36 inches in depth and about five feet long; there must have been a couple of hundred of them there.

Q. Not part of your organ, were they? A. Oh, no; not by any means; but my organ was still there—that is the framework.

Q. Now, I show you a letter, or a copy of a letter rather, dated November 23, 1918, and ask you what that is? A. This is a copy of a letter I wrote to Mr. George Kilgen.

Q. How did you send it to him? A. By registered mail.

Mr. Morten: I offer it in evidence.

(The letter is admitted without objection, marked Exhibit D-26, and read by Mr. Morten.)

Q. Do you recall having any conversation with Mr. Kilgen, at or about the time of the writing of this letter, concerning his desire to remove the organ to some factory for having it repaired, and what was said about it, and whether you consented to it? A. I do not just recall, I think he wrote me a letter stating that he would have to remove it to the factory in order to place it in perfect condition.

Q. And did you have any conversation with him about that, as to whether you would consent, and, if so, on what conditions? A. I don't just recall, at this time.

Q. Did you get a reply to your letter of November 23d, from Mr. Kilgen? A. I did, under date of December 4th.

Q. Is this the reply (showing the witness a letter)? A. This is the reply.

Mr. Morten: I offer it in evidence.

(The letter is admitted without objection, marked Exhibit D-27, and is read by Mr. Morten.)

Q. Did you reply to that letter? A. I did.

Q. I show you copy of letter dated January 14, 1919, and ask you what that is? A. That is the reply to the letter received from Mr. Kilgen.

Q. And between the time that you received this letter from Mr. Kilgen and the time you wrote this letter, did you have anybody examine the organ? A. I did.

Q. Who did you have examine it? A. I had Mr. Earle Beach and Mr. Nelson Sprackling.

Q. And where did you get the information from, contained in this letter of January 14th? A. I received that information from them in the form submitted.

Mr. Morten: I offer it in evidence.

(The letter is admitted in evidence together with the registry receipt, without objection, marked Exhibit D-28, and is read by Mr. Morten.)

Q. By the way—at the time when this organ was being gone over by Mr. Kilgen, were you in possession of the theatre? A. I was the owner, but it was leased out.

Q. To whom? A. Mr. Spascino.

Q. Did you have anything to do with the management or operation of the theatre other than as the owner of the building? A. None whatever.

Q. Now, referring to the Wurlitzer Organ—the original contract provided that they should take and store that organ at Lakeview, as you have said; subsequent to the time when the organ was taken to Lakeview, did you have any arrangement or conversation with the American Master Organ People regarding what was to be done by them on your organ, or how it was to be disposed of? A. Prior to the contract, did you say?

Q. No, after the contract—after the organ got there, did you have any arrangement? A. After the organ got there?

Q. Yes? A. Yes, I did.

Q. Now, what was that arrangement and with whom was it made? A. I judge it was around the end of October, 1916; around the end of October, they acknowledged receipt of the organ out there, and from then until I think about the end of the year they were continually asking me for money. At that time nothing had really been done on the Wurlitzer, but a proposition was made to me by both Mr. Ely and Mr. White that if I would permit them to put the organ (that is, the Wurlitzer organ) into good condition they would dispose of it for me; and upon asking Mr. Ely what the cost of that would be, he said he would not ask more than fifty dollars, and included in that would be—

Mr. Lane: I desire, at this time, to object to what I conceive may come out from

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this statement about this matter, if it is anything that may relate to affecting the terms of this written contract, which is the contract under which suit is being brought, and on which we are suing.

The Vice Chancellor: If it is for that purpose, I will not consider it, but I do not know where it is going to lead to.

Mr. Lane: I do not, either, if your Honor please; I just want to get my objection in.

The Vice Chancellor: I will overrule the objection now, and you may move to strike it out at the termination of the case, if it tends to vary the contract.

Mr. Morten: It is another contract, entirely.

Mr. Lane: Well, if it is another contract entirely, I make the same objection, because we have nothing to do with any other contract.

Mr. Morten: Yes, you do; I submit—

Mr. Lane: Well, I make the objection.

Mr. Morten: I submit to the Court, that, under the very terms under which they got this contract, they had to assume the obligations of the American Master Organ Company. They took the assignment and all the equities, therefore they were bound to do this.

The Vice Chancellor: I will overrule the objection for the present. I will see where it is going to lead.

A. (Resuming.) Well, Mr. Ely told me, that among other things, it would be made to have a

new appearance on the outside—that several pedals, for instance, the several metal parts would be nickel-plated; and he told me at that time, he did not think it would cost more than fifty dollars; so I told him to go ahead; after he had told me, on the question of amount, about what he thought he could get for it. He said, "Well, you ought to get about one-half of what it cost you. What did it cost you?" I said, "About $4,500." So I said, "Do you think you can get half of that?" "Oh," he says, "I think we ought to get about $2,500.00"; so I told him to go ahead and make these improvements, or rather, fix it up; and from that time until March, 1917, I thought they were disposing of it because I had made mention of it several times; and the men that came to work, from the American Master Organ Company, on an organ of theirs which was then in the Colonial Theatre, told me they were working on it—they had a man by the name of George (and I think Brown was his second name—George was his first name), and then they had a boy by the name of Bennie—the two of them, I understood, worked on the Wurlitzer; and George told me himself he worked on it.

Q. Well, at the time when they suggested that you put this organ in condition, was anything said by them, as to whether or not they had a purchaser? A. Not at that time. That came in the month of March—

Mr. Lane: I assume, your Honor, that I can have the same objection to this whole line?

The Vice Chancellor: Yes, I will con-

sider your objection to this whole line of testimony.

A. (Resuming.) In the month of March—

Mr. Lane: What year?

A. 1917, after I had made three monthly payments on the organ (after repeated requests on the part of both White and Ely, I had made three monthly payments) then, on the 12th of March, I stopped making the payments, and towards the end of the month, Mr. White visited me at the Colonial Theatre, and we had quite a lengthy conversation. Among other things he requested money, as he had done before, and I asked him what progress they were making with the Style K Wurlitzer Organ; he said at that time that he had a party in mind who he thought he could sell the Style K to, and I then told him that if it could be sold without any further delay, I would give them about one-half of what I received, to be applied on the contract. At the same time, we were drawn into a long argument about the American Master Organ, and Mr. White said that they had fallen down miserably on their end of the contract, and that if I felt that way disposed, I could get out of it.

Q. What contract? A. The American Master Organ contract.

Q. The contract in this suit? A. Yes; and I told him I had no intention or no desire to want to get out of the contract; that I thought that he had sold something that he could not deliver; and as I said before, he said at that time, or he acknowledged rather, that they were in error, and

they had not been able to carry it through; but I still felt, with the quality of the pipes (which, I must say, was beautiful) and with my confidence in them, that they might be able to deliver, and that is the reason why I made the proposition of paying them half of what he might get on the sale of the Wurlitzer.

Q. I show you a letter, on the letterhead of Pipe Organ Maintenance Company, dated January 31, 1919—did you receive that letter? A. I did.

Q. I show you letter dated February 6, 1919, and ask you what that is? A. That's a reply to the letter received from the Pipe Organ Maintenance Company.

Mr. Morten: I offer them in evidence.

(The two letters are admitted in evidence, without objection, marked Exhibits D-29 and D-30, and both are read by Mr. Morten.)

Q. And shortly after that this suit was started? A. Yes, sir.

CROSS-EXAMINATION by Mr. Lane:

Q. Mr. Robinson, you have been in several litigations over different organs that you have had, have you not?

Mr. Morten: I object.

The Vice Chancellor: I will sustain the objection.

Q. Mr. Robinson, you had a Wurlitzer organ there prior to this, did you not? A. I did.

Q. And why did you get rid of it—why did you get this new organ? A. Why did I get rid of it?

Q. Yes? A. Why, simply because I felt that there were more pipes and more variety in the one that I was purchasing.

Q. Was your Wurlitzer working all right? A. It certainly was.

Q. And you say that you paid $5,000 for it? A. $4,500; I did not say "$5,000."

Q. $4,500—and how long prior to this had you paid $4,500 for the Wurlitzer?

Mr. Morten: I object; how is that material?

Mr. Lane: It is very material, to affect his credibility on the last testimony that he has given here in this case—very material—as to whether or not there was anything reasonable that these people agreed to sell the organ for $2,500 and not less than $2,500. It is very material.

The Vice Chancellor: Second-hand.

Mr. Lane: Second-hand. It is very material to find out just what the condition of the organ was.

Mr. Morten: I say it makes no difference.

Mr. Lane: It makes all the difference in the world.

The Vice Chancellor: I will let you go on for a while. I do not see how it is material as yet, but go ahead. I have yet to see how this Court has any jurisdiction at all over a case of this character. It looks to me, at present, like a simple, common-law case.

Mr. Morten: We thought so and we were ready to go ahead there, but we are forced here. My objection is that the time he paid for it is immaterial. How long he had it is one thing, but when he paid for it is immaterial; I do not know that it makes much difference, but that is my point.

The Vice Chancellor: All right; I will overrule your objection for the present.

Q. (Question repeated.) A. I don't know just what date I paid for it.

Q. When did you purchase it? A. I wouldn't be able to state the date even.

Q. How long had you been using it? A. Probably a couple of years.

Q. And did you go to purchase a new organ because your old organ was not working all right, or did you go to purchase it because you wanted to get a better organ? A. I was looking to improve conditions. I had, a short time previous to that, enlarged the theatre, and the Wurlitzer was, I might say, a little too small for the enlarged condition and the improved conditions; I added about four hundred seats to my theatre, and I figured that I needed a larger instrument to better take care of things.

Q. By the way, Mr. Robinson, did the organ that was installed there look anything like any of these organs I show you—did it look anything like that one (indicating the picture of an organ in a paper now exhibited to the witness)? A. Which organ do you mean?

Q. The American Pipe Organ that was installed —the American Master Organ? A. No.

Q. Did it look anything like that (showing the witness another paper)? A. Well, this is the console, and this is the outside (indicating on the paper)—you ask me if the organ looked something like this?

Q. Yes, did it? A. The console looked something like this, but on a much smaller scale.

(Mr. Lane asked that the papers be marked for identification and the same were marked H L-1 and H L-2, respectively.)

Q. You made your agreement, didn't you, in reference to this Wurlitzer organ, in your written contract with the Company? A. I made the agreement?

Q. Yes. A. No, there was a condition in the original contract that they should store it free of charge.

Q. And you talked over with them—with the Company—what should be done with the Wurlitzer at that time, didn't you, before you entered into the contract? A. I did not.

Q. Well, how did you come to put that in the contract—how did that come to be put in the contract? A. What do you mean "put in"? It was not put in the contract.

Q. How did the Wurlitzer come to be mentioned in the contract? A. Simply because I had to have some place to store it.

Q. Well, who brought that question up? A. I brought it up.

Q. Certainly, and all that you asked the American Master Organ Company people to do was

to have some place to store it—was that right? A. Exactly.

Q. At the time that you entered into this written contract? A. Exactly.

Q. And that is what you provided for in these written paragraphs that you have mentioned in the contract? A. They were to take it to their factory, in accordance with the terms of the contract, and place it on exhibition there.

Q. And they were to permit an examination of the organ by prospective purchasers sent for that purpose by you? A. Absolutely.

Q. And subsequent to entering into this agreement you proceeded to advertise the sale of this Wurlitzer piano, did you not? A. I did not.

Q. Never made any advertisement in your name in any paper whatsoever for the sale of this Wurlitzer? A. No, sir.

Q. No question about that? A. Positive.

Q. Or in any publication? A. I do not recall a single one.

Q. You say you do not recall a single one—might there have been possibly one in your name? A. There possibly might have been one; I do not remember any.

Q. Well, how could there have been, if you did not put it in? A. By somebody else advertising it for me; I suppose.

Q. By somebody else advertising it for you—starting when? A. I didn't know of a single instance, I don't know of it being advertised.

Q. When could the first advertisement be put in by anybody advertising for you, if it were put in? A. Why, it would not be in until it was out of the factory, would it?

Q. Well, when did it go out to the factory? A. During the month of October, 1916.

Q. The Wurlitzer was taken out to the factory in October, 1916—is that right? A. That is correct.

Q. Taken away from your plant before this new organ was put in there, is that right? A. It was practically simultaneously, you see, I could not shut off one instrument until I was almost prepared with some other instrument to take its place; in other words, we could not be without music.

Q. And at that time, you sent it out there in pursuance of this written agreement—is that right—permitted it to go out there? A. Yes, that is correct.

Q. And did you send any prospective purchasers out there to look at that organ, under the provisions of this written agreement? A. I do not recall sending anybody.

Q. Well, now, did you send anybody, or will you say you did not? A. I say I don't recall.

Q. Is your recollection faulty of that or are you pretty certain of it? A. I do not recall ever sending anybody out, at all.

Q. And you did not say anything about this Wurlitzer, or say a word about it, until when? A. Towards the end of the year, 1916.

Q. Toward the end of the year 1916? A. There had been some mention, shortly after it went out there; you see, Mr. White had made a demand on me for money, and figured that the second payment of $400 should be coming to them at the time they shipped this organ of theirs to the theatre, and I would not pay that.

Q. Why, don't you know, some of these letters you wrote before the suit was started mention the fact that they were to credit you with a certain amount of money on your Wurlitzer organ—did you mention that in any of your letters?

Mr. Morten: I object, because it distinctly shows it was mentioned in letters here long before the suit was started.

The Vice Chancellor: Is not that so?

Mr. Lane: I withdraw the question.

Q. Why don't you mention it, or did you mention it in any letters to the American Master Organ Company before the failure? A. Did I mention what?

Q. Anything about this Wurlitzer organ—as to what they should do with it? A. Before the suit was started?

Q. No, before the failure of the American Master Organ Company, or before you knew of the failure of the American Master Organ Company, and that a receiver was in charge? A. I do not recall ever having made any mention of it at all. The only thing I could have drawn their attention to would have been the crediting of the cost of shipping it out there, which they agreed to pay.

Q. Well, do you recollect calling that to their attention? A. I think that is in one of my communications.

Q. Before the failure? A. I am almost sure of it.

Q. Now you said that they kept demanding money from you, didn't you, before the failure? A. They did.

Q. Why didn't you, or did you, in any of your letters, say to them that there could not be possibly any money due to them because you were entitled to a credit on the Wurlitzer?

The Vice Chancellor: Why, he was not entitled to that until it was sold.

A. I was not entitled to it until it was sold. They had arranged to sell it for me, and when they did sell it, why, I was willing, as I told White in March, 1917, at the time he was pleading for money, that if he sold it, I would give him half of it to be applied as a credit on the American Master Organ.

Q. I show you an advertisement on the "Moving Picture World" of August 12th, 1916, and ask you if you ever saw that before, or ask you to read it. A. (Examining the advertisement) Yes, I do recall that.

Q. And what is your recollection in reference to it? A. Why, it runs through my mind that I placed it in there; I had almost lost sight of it.

Q. You placed it in there in August, 1916, before the installation of the organ, is that right? A. Absolutely.

Q. And you personally were endeavoring to sell it? A. Absolutely.

Q. Now, do I understand you to say now that there was not to be any credit unless and until the Wurlitzer was actually sold? A. From the Wurlitzer machine?

Q. From the Wurlitzer machine? A. Why, there was nothing spoken about credit until it was sold—that was the term of the condition,

that if it was sold, I was willing to pay them some of the money received from the sale of it.

Q. And, if it was not sold, he was not to receive any credit, is that right? A. It was agreed to be sold.

Q. Yes, but if it was not sold? A. It was agreed to be sold—

The Vice Chancellor: Counsel and the witness may talk just a trifle easier (To the witness). The question asked you is this—whether there was any credit to be given on account of the Wurlitzer machine until the machine was sold?

A. Not until it was sold.

The Vice Chancellor: That is perfectly plain. The witness said it in direct-examination, and it has been said several times.

Q. And if it were not sold, there was not to be any credit; is that right? A. No, absolutely none.

Q. It never was sold, was it? A. That I don't know.

Q. When did you last see it? A. The last time I saw it was right or shortly after I received the letter from the Receiver, Mr. McKee.

Q. You received a notice that it had not been sold up to that time, didn't you? A. I do not recall whether it said it was sold, or not; I don't think there was anything in the letter to the effect of its being sold. He called my attention to the instrument being out in the factory there.

Q. You received a notice from Mr. McKee, did you not, to take that piano out of that factory?

Mr. Morten: Do you mean, other than what is in the evidence here?

Mr. Lane: No, I do not mean other than anything.

A. That was the letter of December 1st, I think it was, 1917.

Q. And did you take it out of the factory? A. I did not; I went out to the factory to look at the instrument, and it was all apart.

Q. And when was that, that you went out there? A. Shortly after I received that letter.

Q. And how soon after—the next day? A. Well, within a few days; I do not just recall.

Q. Did you tell anybody you were going out there? A. It was not necessary to.

Q. Well, did you? A. I did not.

Q. Did you tell Senator McKee that you were going out there? A. I did not; I went out by machine; I went out alone.

Q. Did you have an agreement wherein anything was mentioned about $2450? A. A verbal agreement; that is, I did not have any written agreement, no.

Q. You had no written agreement in relation to that? A. None, whatever.

Q. By the way, why didn't you put this contract in writing that you were going into; you were very careful to have your other contract in writing—why didn't you put this in writing? A. Why, at the time that I bought this other instrument I did not know just what he would be able to get for the K, and I was perfectly willing to let it lie in the factory there. And I had absolutely no need, at that time, for the money from

the sale of it; I could get along fairly well, and I just simply let it lie idle there, and I did not even think about the old instrument any more until they made the proposition to me to sell it.

Q. Oh, this proposition came from them? A. Absolutely.

Q. Not from you? A. Not from me, at all.

Q. Now, if that is so, why was it you were trying to sell this before this time—if you were perfectly willing to let it lie in the factory? A. This was away before the time, September 4th, which was set for the opening of the new instrument, and there had been absolutely no talk at all about this old K. But I suppose this advertisement here was that I thought, "Well, I might just as well get rid of it," and that is why this advertisement appeared. I don't even recall whether I got any answers to the advertisement; and, of course, I am just as well satisfied to have my tangible assets in cash as in property, if I could have done so; but it did not make any difference to me to let the machine lie at the factory.

Q. So, as I understand it, at the time that you entered into this written contract you had no desire to dispose of this Wurlitzer, at all? A. It was never discussed.

Q. Never discussed? A. No.

Q. Now, you afterwards became in need of money, is that the idea; and is that what made you want to sell it? A. I have no idea of being in need of money; I had plenty of money at that time.

The Vice Chancellor: I cannot see the drift of this testimony.

Mr. Lane: If the Court thinks there is no credit to be given for $2500, or anything like it, I am perfectly willing to withdraw the cross-examination; but Mr. Morten put it in.

The Vice Chancellor: Do you claim that there is a $2500 credit, Mr. Morten?

Mr. Morten: I claim this—that, as against us, he has either got to return the organ, or give us the $2,500 credit; that is the condition under which they took it and made the repairs.

The Vice Chancellor: I do not know of any evidence in the case, so far—I watched for it—that justifies anything against the defendant on the Wurlitzer machine.

Mr. Morten: If the Court please, this is the evidence, as I recall it—I may not have the same recollection as your Honor has, but, as I recall it, the evidence was that the organ was taken originally for storage; after that the American Master Organ Company wanted some money, and they were pressing Robinson for money; Robinson says, "All right; why don't you see what you can do with the Wurlitzer?" and they said, "Yes, but you have got to have it put in first-class condition, you will have to make it look nice on the outside, before you can do anything with it;" Robinson says, "How much will it cost?" "Fifty dollars." "Well, what can you do about the sale of it?" "Well, we have a purchaser ready to buy it." "At how much?"

"At twenty-five or twenty-four hundred dollars." Then Robinson says, "Go ahead and fix it."

The Vice Chancellor: I do not recall that; I was watching to see if there was anything of that kind said, and my recollection is that Robinson said he thought it was worth two thousand to twenty-five hundred dollars—

Mr. Morten: No; they thought that.

The Vice Chancellor: Well, someone said that; and they said they were positive they could sell it for $2500; but I do not find anything that would amount to a contract or agreement with them to sell.

Mr. Morten: They had a purchaser for it, and that was the time the repairs were being made.

The Vice Chancellor: They said they thought they had a purchaser for it; but there was nothing in the conversation, so far,—with just one man testifying to it—that, as I saw it, bound the Pipe Organ Company to sell that thing and give credit. All I understood was that it was a sort of an arrangement between the two, separate and apart from this contract for the pipe organ, that if they were to sell that organ, a $1250 credit would be given to the Company—

Mr. Morten: Well, one-half of whatever they sold it for.

The Vice Chancellor: Well, one half—and credited on account of the contract,

which would be an advance payment, according to the terms of the contract. I do not see anything that amounted to a contract.

Mr. Morten: Well, that was my understanding of the evidence; I may be wrong.

The Vice Chancellor: I do not see anything that amounted to an agreement to sell that and apply it on account of the contract. I could not, for the life of me, see where there was anything there to bind the Pipe Organ Company.

Mr. Morten: Well, if I was to say to your Honor, "If you will pay for the putting of this organ in condition, I have a purchaser who will pay $2000 or $2500 for it, and then we will credit half of it," it strikes me that if you do make that agreement, and do carry out that contract, and make those repairs and put the organ in condition, you cannot charge us for anything of that kind unless you sell the organ; and that is part of the contract that they undertook to do.

The Vice Chancellor: Well, that only amounts to fifty dollars, about; and, to my mind, it is clearly an independent contract, for which a suit at law should be brought. I was watching to see where this question arose, and I must say I looked carefully at it when the testimony came out, to see if any such thing as a contract was shown binding them to sell absolutely for the sum of $2500 and divide, and I could not find

it; and that would only leave the question of whether they should collect this fifty dollar for the repairs to the organ prior to the sale of the organ.

Mr. Morten: Well, perhaps my recollection is wrong; I would not want to say that my recollection is better than your Honor's in that respect.

The Vice Chancellor: Well, I won't say that, because you are in the case and probably know better about it.

Mr. Morten: Well, we are counsel, and, of course, imbued with our own ideas.

The Vice Chancellor: Well, that is my recollection. We will adjourn until two o'clock.

Recess until two o'clock p. m.

Afternoon session.

Hearing of the cause resumed at two o'clock p. m.

GREENWOOD A. ROBINSON, re-called.

The Vice Chancellor: Now, let me understand: This case has drifted away from my actual sight of it. Is it not the only point that this machine was not so constructed as to operate?

Mr. Morten: There are several things that we will urge in equity: First, that the organ was never built as it should have

been built; second, that when the assignment was made, there was no corporation to whom the assignment was made at that time, and, therefore, the assignment, if made at all, was nil—

The Vice Chancellor: I know, but we are not wasting any time on that part of it now.

Mr. Morten: No, that is a legal point.

The Vice Chancellor: But on the fact point—is not the only question involved whether this organ was usable?

Mr. Morten: That is, whether it was even usable in the way it was intended.

Mr. Lane: If your Honor please, if that is the only question I will hold my cross-examination down to that.

The Vice Chancellor: Is not that all there is to it, on that point?

Mr. Morten: Yes, I think that is all there is on the facts.

The Vice Chancellor: If it was a commercially proper machine, constructed all right, and it was a mere question of repairs to make it usable, naturally you could spend money on the repairs to make it usable and then charge the vendor with it. But all this talk here about this other matter, I do not see that there is anything in—all this side talk that is being offered. I think the case has got to be confined to the question whether or not this thing, as designed, was a merchantable article.

Mr. Morten: Was a mechanical article.

The Vice Chancellor: A mechanical article.

CROSS-EXAMINATION resumed by Mr. Lane:

Q. Mr. Robinson, at the time you ordered this organ you were running the theatre yourself, were you not? A. Yes.

Q. And you continued to run that theatre yourself up to what time? A. 1918.

Q. What month? A. The latter part of April or the beginning of May.

Q. 1918? A. Yes.

Q. Now, from October, 1916, was that organ, at any time, used by you in your performances? A. Used by me, myself, do you mean?

Q. Oh, no—used under your directions, or used in your performances—was it used there? A. Yes, it was used.

Q. And during what periods of that time was it used? A. Why, the entire period, with the exception, of course, of when it was so badly out of repair that we had to use the piano.

Q. Well, what period did that cover; when was that; just state, as near as you can recollect when that was, that you could only use the piano? A. I could not say the dates, there were so many times.

Q. You mean that there were various times that you could not use the organ—for how long a space of time, at a time? A. Possibly a day at a time—until relief was given.

Q. Possibly for a day or two at a time it would get out of kelter, and then what would have to be done? A. Well, all during that period there was some part of the organ that might be playable.

Q. I am not disputing that at this moment, Mr. Robinson; but you did use some parts of the organ during that entire time, excepting for a day or two at a time when you only used the piano? A. Yes.

Q. When something put it out of kelter—when the whole works were out of order—is that what you mean? A. Correct.

Q. Then what would happen on those occasions? A. I would get in touch with the factory and have them send somebody over to try and fix it.

Q. And after they had fixed it, it would start and work all right again for a while, is that right? A. For a short while, yes.

Q. And you covered this situation pretty well —these faults and defects—in your letters, didn't you? A. Well, I covered some part of it; but I had so many telephones regarding it of which there is no record here in writing.

Q. Now, do you know how long they were installing that organ—working on it? A. I do not just recall; several weeks.

Q. Yes, several weeks; and it came along, as I understand it, up until a week before October 26th, and then this letter by Mr. White was written, and, on his representations, the thing was held over until October 26th for the grand opening—is that right? A. Yes.

Q. And at the time of the grand opening this organ was built up there and in shape, and looked like the American Master Organ that you had seen somewhere, I think you said—did it? A. Why, it did not look like it, excepting for the console. There was a big change from what I had seen in the demonstration instrument.

Q. Well, do you mean change in design? A. Change in the general appearance; that is, on the demonstration instrument they had a cabinet, which showed the instrument with the pipes in front, whereas, in our proposition we had a console situated down in the orchestra pit, and the organ chamber proper was placed in a building that I had constructed specially for it outside of the main building, but with an opening into the main building. Therefore, the organ proper could not be seen. In front of the organ chamber I had, at my own expense, erected what we call "dummy pipes," making the appearance of a church organ. I had done that on both sides of the stage. But, as I say, directly you could not see the organ. And, further, it was vastly different to what I had seen on Broadway.

Q. Well, getting down to real facts, the organ, however, so far as looks went, was satisfactory to you, wasn't it—so far as looks and position went? A. The console, yes.

Q. I do not know what you mean by "console," —I am talking about the whole organ—everything? A. Well—

The Vice Chancellor: The organ could not be seen.

Q. Well, couldn't you see the rest of the organ in the room? A. Inside of the organ, yes.

Q. Weren't you ever in there? A. I was in several times.

Q. And as far as the appearance, and everything you saw of it, inside and outside, in looks, it was satisfactory to you, on October 26th? Now,

I am not talking about the playing end of it? A. To all appearances, it looked all right.

Q. Now, on October 26th, you say that Mr. White came there—had you heard it played before October 26th? A. Yes, on the instrument on Broadway.

Q. No, no, your instrument—had you heard your instrument played at all before October 26th?

Mr. Morten: Do you mean at a performance, or privately?

Mr. Lane: For anything.

A. Yes, I had.

Q. And how long before that had you heard it play? A. Well, just prior to the official opening, as we call it, several of the mechanics may probably have tried a chord out, or something like that.

Q. Well, did you hear anybody that knew how to play an organ play on it? A. Yes.

Q. Who? A. A party by the name of Kenyon, who was my organist on the old K.

Q. And how long before October 26th was that? A. Just prior; I wouldn't say just when.

Q. Would you say the morning, or several mornings before? A. Well, no; I suppose it was several days before, while they were working on it.

Q. Then, on October 26th, you heard White play? A. Yes.

Q. For the grand opening? A. Yes.

Q. And you say that, according to his general actions, there were different things about the playing that he was not particularly pleased with, is that right? A. Right.

Q. But, nevertheless, he did play through a selection, or whatever they played, didn't he—he went through the performance, didn't he? A. Absolutely.

Q. And who then took up the playing on the organ—did he play all that week? A. I think he played for two or three days; I am not absolutely sure.

Q. He played there at different performances for two or three days? A. Yes.

Q. By the way, what performances did you have —day and night? A. Afternoon and evening.

Q. And then who came on? A. He secured me a party by the name of Hall, from Atlantic City, who had been a church organist.

Q. And did you know, at that time that Hall was one of the best known organists in the country? A. I did not.

Q. And you have not found that out since? A. According to his salary, he was not.

Q. How long did Hall stay with you? A. Four or five months, I judge.

Q. And during those four or five months that Mr. Hall was there you gave your performances fairly regularly, didn't you, using this organ? A. I did.

Q. Now, on October 28th, as I understand it you paid—was it October 28th, do you recollect? A. October 28th—I think that was the date.

Q. On October 28th you paid the $400 that, according to the contract, was supposed to be paid upon the installation of the organ, didn't you? A. I did.

Q. And did you send that, or how did you pay

it? A. I do not recall whether I handed it to White, or mailed it.

Q. Did I understand you to say that you paid that because White said he needed money badly? A. I did not. If I am permitted at this time, I will explain why it was paid at that time.

Q. Well, explain? A. Mr. White made a demand for money, and even asked me to try and let them have more than four hundred dollars, and that is the time that this Wurlitzer proposition was brought up; he wanted far more than four hundred dollars, if I could afford to pay it to him, and said at that time that if I would let him take the Wurlitzer back to the factory and fix it up he would sell it for me; that he had a party he would guarantee would buy it; and I told him that I would pay him the four hundred dollars, but I did not feel like paying him any more at that time, but, if what he said about the Wurlitzer was correct, why, then, if he sold it according to the way he said, I would see to it that they got at least half of what it was sold for.

Q. Now you say that this was on October 28th, is that right? A. I believe that is the day.

Q. Have you talked to your counsel about this matter since you testified this morning? A. No, I was out to lunch.

Q. About the Wurlitzer piano? A. I was out to lunch.

The Vice Chancellor: That is precisely what he testified to, as I understand it, before.

Mr. Morten: It is, exactly.

Mr. Lane: I may be at fault; I thought

he testified, as far as the Wurlitzer was concerned, that it was not until March that he had the conversation about it.

The Vice Chancellor: No, I don't know about the time; but that is what he testified to before; I do not know what time he fixed.

Q. Well, there was something similar to that, but I mean didn't you testify this morning that it was some time in March you had this conversation with White and Ely? A. I testified that there was two occasions on which I had spoken to White about this proposition—the Wurlitzer.

Q. And was Ely present at both of them? A. No.

Q. Was Ely present at the first one, or the second one? A. I believe Ely was present at the first one; that was the time he wanted the payment of four hundred dollars.

Q. And wasn't any of those conversations had in Lakeview? A. No; all that they were interested in was the opening of the organ, and that is the time the thing happened.

Q. You were not in arrears, at that time, so far as you understood it, for any installments, were you—at the time you had this conversation? A. None whatever. I did not feel, myself, as though this four hundred dollars was due at that time.

Q. I see; but, as I understand you to say now, they demanded payment of the four hundred dollars, and requested payment of something in addition, if you could see your way clear to pay it—is that right? A. I don't believe they did demand it; they requested it. Prior to this date they had several times asked me to let them have

some money, and I did not feel as though I should let them have it until the conditions had been lived up to.

Q. On October 28th, when you made this payment, did you make any claim against them for their delay in installation? A. No but I told them what I thought of it.

Q. But, nevertheless, on October 26th, you were perfectly satisfied to take this organ, provided it was installed properly, etc., and continue with your payments in accordance with the contract —is that right? A. No, it is not right.

Q. Then did you make any protest about it? A. I did.

Q. When? A. Around that time.

Q. Well, around what time—before or after you paid the check? A. Both before and after I paid the check. I paid the check to them feeling that a little encouragement on my part would help them to complete the instrument; that is the only reason I paid it.

Q. At the time you paid this check the instrument was completed, as I recollect your testimony, wasn't it? A. It was not completed.

Q. In what way was it not completed? A. There were several parts that did not work; even when White was playing it on the opening night he was so thoroughly disgusted with it he cursed and swore at it at the time.

Q. Well, these things you spoke of are things that you, in a later letter, mentioned as "minor defects," didn't you? A. They were not.

Q. They were not? A. The drums and traps were not any better than what they were on the

opening night for a matter of eight months after.

Q. Well, outside of the drums and traps, they were minor details, weren't they? A. Well, I don't believe they were, because they were constantly recurring.

Q. And they should, in your opinion, have been taken care of by attention from time to time? A. If they were proper, they would not need attention from time to time.

Q. Don't you know that on any organ, if you go and examine any organ, you will find some silent notes on it? A. Very seldom, if the organ is properly installed.

Q. You have had experience with the Wurlitzer before? A. I had.

Q. Did you ever have to have that attended to? A. Once in a while, yes.

Q. How often? A. Probably once a month, or once every six or seven weeks.

Q. Not once every two weeks? A. I did not.

Q. The American Master Organ Company had a man there at least every two weeks, hadn't they? A. The American Master Organ Company had men there pretty nearly all the time.

Q. Before I forget it: as I understand it, the amounts that you claim to have been paid were the amounts that you mentioned this morning, which amount to $1550, is that right? A. That is correct.

Q. And not $1600? A. Why, if the Court please, I can explain the other fifty dollars, I believe.

Q. Go ahead. A. After I had been authorized to permit, or give permission to have somebody

to examine the organ I engaged the services of Mr. Beach, whose charge for the examination was fifty dollars; and that is the other fifty dollars that is in question.

Q. Now, when did you find that out? A. Find it out, applying to what?

Q. That this was the other fifty dollars in question—when did you first become acquainted with that fact? A. At the time I made up the sixteen hundred dollar item.

Q. Well, didn't you make up these items as amounts you had actually paid to the organ people? A. I do not quife get the question.

Q. Didn't you say, at that time, to your counsel, who filed these pleadings, that they were the amounts you had actually paid to the Organ people? A. $1550?

Q. No, didn't you say, $1600"? A. No; applying to the $1500, I do not recall having stated to the counsel that I had paid $1600 to the Organ Company.

Q. Now, did you have good attendances while this organ was played, or not? A. I do not believe that they were any different to what they were prior to that date; of course I have no record of it at this time.

Q. Did you ever give any testimonials that this organ was a good organ, and backing up the American Master Organ people, after this organ was installed, or not? A. I do not recall.

Q. You do not recall whether you did, or whether you did not? A. I do not recall whether I did, or not.

Q. And you would not at this time, say that you did not? A. I cannot say.

Q. Well, that organ was not so bad, then, that you might not have given testimonials? A. I wouldn't exactly say that; I would say this, as I have said previously, that the general tonal quality of the pipes was all that I could desire, and, when working properly, a very pleasing effect could be had. I was perfectly satisfied with the general tonal quality of the pipes; but, so far as the organ as an instrument was concerned, I was never satisfied.

Q. Now, you kept up your payments, as I understand it, until March, 1917? A. Yes.

Q. And then you stopped making the payments —why? A. Because of the bad disorder of the organ.

Q. Well, was not Hall still playing on the organ at performances? A. I do not believe he was at that time.

Q. And weren't you using the organ at that time? A. We were using it at performances, yes.

Q. And what organist did you have then? A. I think I had a party by the name of Glover.

Q. How long did he stay there, playing that organ? A. No, I believe Glover followed Sprackling, at the time Sprackling was sick. I think Sprackling came along after Hall.

Q. How long did you have him there? A. Sprackling?

Q. Yes? A. Sprackling was there for a matter of, I think, thirteen months, with the exception of the summer of 1917, at which time he met with an accident.

Q. And Sprackling took Hall's place, and Sprackling testified that in April, 1917, he went there? A. Yes.

Q. And who did you have in the summer-time, when Sprackling was away sick? A. Mr. White came for a period of, I think, one week.

Q. White played there continuously for a week, didn't he? A. Or the better part of a week. After that we got in touch with a player who was, at that time, up in Canada, by the name of Glover, who came down to play the instrument.

Q. Now, during this time, or, let us say, the time while Hall was playing the piano, did you tell the Master Organ people to take their organ out of there, that you did not want it? A. No, I did not; I did want it.

Q. Did you, at any time, tell them to take it out? A. I never did; I always wanted it.

Q. You always wanted it, and you would not give it up? A. Absolutely not.

Q. Well, you have still got it there? A. I still have it.

Q. Where is it? A. Do I have to answer that question, Counsellor? It is in safe keeping.

Mr. Lane: I think it is very material, to find out what he has done with the organ; he may have sold it to somebody.

The Vice Chancellor: I think the question should be answered.

A. I still have it, stored away.

Q. Where? A. On the second floor of a garage, a private garage.

Q. In other words, it has been taken out of this building? A. It has.

Q. Is the piano in the building? A. The piano is still in the building.

Q. Still in the building, and still being used, is it? A. To my knowledge, yes.

Q. Now when did you take the organ out of your theatre? A. I believe it was the latter part of 1919.

Q. 1919, the latter part? A. Or the beginning of—no, it was later than that, it was later than that. I took the organ out of the building at the time I had to tear down the housing for it; that was on other property; and that was for the purpose of making or erecting a new theatre. Now, I could only determine the exact date of that if I had a chance to look at my records of when the starting of the new theatre took place; but it was later than 1919.

Q. Was it the first part of 1920, or the latter part of 1919? A. No, it was later than that. The theatre was started, I believe, in March; it was the latter part of 1920 or the beginning of 1921, because the theatre proper was started in March, 1921.

Q. So, as I understand it, in any event, it would have been necessary for you to have torn down this organ because you had to tear down some part of your building in 1920, or whenever you did it, is that right? A. It would not have been absolutely necessary, but, under the existing conditions, I made it necessary.

Q. And you said you stored it in a private garage? A. I did.

Q. All parts of it? A. Not in the private garage—on the second floor, which was clear.

Q. Are all the parts there? A. They are.

Q. That were there? A. With the exception of one or two.

Q. Where are they? A. They are in the present Roosevelt Theatre.

Q. In the Roosevelt Theatre—and what parts are they? A. They are in the corridor alongside of the Colonial Theatre.

Q. I do not care just where, but I say what parts of the organ are in the Roosevelt Theatre? A. One of the chests and the motor.

Q. When you say "one of the chests," what do you mean by that? A. Why, one of the chests, that the pipes rest on.

Q. Well, it is a very considerable part of the organ, is it not—the chest? A. Not necessarily.

By the Vice Chancellor:

Q. What are its dimensions? A. The dimensions of it are about 10 inches deep by about 4 feet wide, and about 9 feet long.

By Mr. Lane:

Q. And is that the only one that is in there? A. That is the only one.

Q. Just one, 10 inches wide and 9 or 10 feet long? A. Yes; all the rest of it is in this place that I have.

Q. And where is that?

The Witness: Do I have to answer that, your Honor?

The Vice Chancellor: Yes.

A. It is at a residence on the Boulevard.

The Vice Chancellor: What he wants to know is, who is the owner of the garage, and the street number.

The Witness: It is a private garage, your Honor.

The Vice Chancellor: Suppose it is; why don't you answer the question?

A. Emil Eendland; I don't just know the number.

Q. What is the address? A. It must be around 3989, I think the address is; it is opposite Malone Street, on the Boulevard.

Q. And that has been there since this time, is that right? A. Yes.

Q. When was the last time you saw it? A. Oh, several months ago now.

Q. Now, in addition to the chest, you said one of the motors was taken down to this Roosevelt Theatre, is that right? A. I did not say "taken down to the Roosevelt Theatre," I said it was there being stored.

Q. Is this Colonial Theatre now the Roosevelt Theatre? A. It is not.

Q. And where is the Roosevelt Theatre with respect to the Colonial Theatre? A. Alongside of it.

Q. Is that the new theatre that has been built? A. It is the new theatre.

Q. And you say that that chest and the motor are simply stored in your theatre, or are they being used in your theatre? A. They are stored in the theatre.

Q. Not being used? A. They are not being used.

Q. Can you tell me why it is that just that small chest was not taken up with the others, and why it was separated and not kept together? A. I can.

Q. Why? A. Simply because it was so cum-

bersome to take up on the second floor—both that and the motor—so hard to lift. I stored all of this stuff there myself, and I did not want anybody monkeying with it that might damage it. That is the reason I left those two parts there, because they were too heavy to lift.

Q. Is this man Spassino, or whatever his name is, the lessee of this theatre now? A. He is the lessee of the Colonial Theatre.

Q. He was the lessee of the same one that you had, when you gave it up? A. The same.

Q. And you made the lease with him, didn't you? A. I did.

Q. At the time you gave it up he took it over? A. He did.

Q. And he wanted to use this organ, did he not? A. No, sir; not to my knowledge.

Q. And didn't you put a provision in the lease that he should not use the organ? A. There is a clause in the lease to that effect.

Q. And that he should only use the piano? A. There was not any clause there that he could use the piano; I had to provide him with a piano.

Q. And you provided this piano that the American Master Organ people had put in there? A. I did.

Q. And that is the only one? A. That is the only one.

Q. And he has been using that ever since? A. That I don't know.

Q. So far as you know, he has not had any other one? A. I seldom go in there; I don't know.

By the Vice Chancellor:

Q. Well, you did not take it back? A. I have not, your Honor; it is still in the theatre.

By Mr. Lane:

Q. Do you recollect this man going about and stating that he was willing to pay thirty dollars a week for the use of that organ, provided you would permit it to be used? A. He never came to me with any such proposition.

Q. Do you know a man named Nicolletti, of the Spring Theatre? A. I do.

Q. Did Mr. White, or anybody representing the American Master Organ people, speak to you about Nicolletti having heard your organ and wanting one like it? A. I do not just recall whether he heard the organ, or not.

Q. Well, you remember White speaking to you about it? A. Not about Nicolletti.

Q. About whom? A. I don't know who he had in mind; he had somebody else in mind that he wanted to sell the organ to.

Q. He wanted to sell another organ to somebody else in that locality—is that right? A. Someone around that locality, yes.

Q. And when was that, that he talked to you about this? A. I do not recall.

Q. Well, about when—was it six months or a year after the organ had been installed in your place? A. I could not tell you even whether it was 1916, '17 or '18.

Q. Well, you know it was after the organ was installed, don't you? A. It was after the organ was installed, yes.

Q. And you know it was after you had been operating the organ, don't you? A. It was after the organ's being installed.

Q. Well, do you know whether it was after you

had had any performances on the organ? A. Yes, it was.

Q. And you cannot say whether it was a week or six months afterwards? A. I could not.

Q. And you cannot say whether, at the time that White spoke to you about this other individual wanting an organ like this, you had made up your mind whether you were satisfied with the tone of this organ, or not, can you, and the general playing of the organ? A. I cannot; all I can recall relative to that proposition is this, that we had a clause in our contract which prohibited him from selling any of these particular instruments within a certain locality; and Mr. White approached me at one time, asking permission to sell another instrument. Now, how the thing arose I really could not say, but I did not grant him the permission.

Q. You did not grant the permission? A. I did not.

Q. And, in addition to asking for permission, he was willing to pay you some money for it, wasn't he? A. I think he did make a proposition of that kind at the time.

Q. And you would not say that it was not quite a length of time after you had been using this organ? A. No; I believe it was right at the time of the installation of our organ—somewhere around that time.

Q. And at the time that White spoke to you about this, were you satisfied with the organ, or not; or did you state to him whether you were, or were not? A. Why I could only answer that the tonal quality of the pipes I was satisfied with;

but I was not satisfied with the general effect, inasmuch as so many parts were unresponsive.

Q. Before I forget it, Mr. Robinson—I just happened to think of it—you mentioned in your testimony, I think, about the flugelhorn—there was not any question in your mind that there was not to be any flugelhorn, was there? A. Why, originally there was a trumpet installed in that organ, and it was taken out and a flugelhorn substituted for the reason that the trumpet was very blatant—I mean by that, just simply too sharp for the proper balancing of the rest of the pipes, the rest of the stops; and that flugelhorn was substituted.

Q. And you made no objection to that? A. I did not raise any particular objection to anything, excepting my complaints of the various defects as they showed up.

Q. But I mean, you made no objection, so far as you can recollect, in any of your letters, that the flugelhorn should not be there at all? A. I did not know the difference at that time between a flugelhorn and any other kind of horn. I do know that the trumpet was a pipe that gradually widened in diameter toward the top—a very heavily constructed pipe—and the flugelhorn was of much smaller scope—that is, narrower in diameter; and I know that the flugelhorn was closed in on top, whereas the trumpet was all open.

Q. By the way, Mr. Robinson, there was some mention here about military service—you did not actually go away, did you; you were around all the time? A. I crossed the ocean; I was in France.

Q. The only reason I am asking you is to find out how long a period of time you were not acquainted with everything that went on? A. Prior to this time I was in Camp Merritt, doing social secretary work for the Y. M. C. A.

Q. Well, were you away at all before the Receiver was appointed—let us get at it that way? A. I was.

Q. You were away from Jersey City before the Receiver was appointed, in October, or about October, 1917, were you—up until, say, October 1917? A. No, it was after that.

Q. Were you away before you rented the theatre to Spassino? A. I was in Camp Merritt prior to leasing it to Spassino.

Q. Well, just prior? A. No, from January of that year; that is, I was not stationed there, I was back and forth.

Q. Now, at the time this contract was entered into you went over it carefully, and had your counsel go over it, didn't you, before you signed it? A. Why, I don't believe I did.

Q. Didn't you have Mr. Morten go over this before you signed it? A. I don't believe I did. That contract was drawn between Mr. White and myself—I mean by that, that it was nothing more or less than a mutual get-together; in fact I think he wrote the contract in the theatre on my typewriter.

Q. And it was signed right then and there, wasn't it? A. No; if I recall, he had to submit it to his people; it was only signed by Mr. White as a witness.

Q. Now, you recollect, of course, Mr. McKee,

as Receiver, making demands upon you for the payment of the moneys he claimed was due, don't you? A. I remember receiving a letter from him under date of December 1st, 1917.

Q. And do you remember writing back a letter in which you said, I think, that the parts that were defective would cost $45 to replace? A. I believe I wrote that, yes, if I saw that.

Q. And if you wrote that letter—I will find it here in a minute—

Mr. Morten: That is not all there is in the letter.

Mr. Lane: I understand.

Q. That was true at the time, wasn't it,—if you wrote that at that time, that was true, at that time? A. Absolutely.

Q. And that was the time, I believe, that you said that you had gone out and got some estimates, or something, is it not? A. I think that is so; I think that was what was embodied in the letter.

Q. Now, if this organ had been put in shape —if these things had been fixed, and the organ put in proper shape at that time, your information was that the parts necessary would cost $45, is that right? A. That refers to one particular thing, I believe.

Q. What? A. That refers to one particular thing.

Q. Didn't you say, in this letter of November 12, 1917, Exhibit D-19, "I now notify you that the organ must receive attention at once, or else it may be ruined. I have had one of the best

mechanics ever employed by The American Master Organ Company give me a figure on what it will cost to put the organ in shape, and he informs me as follows: That the organ is in bad shape and it will need a more reliable magnet action on drums, etc., which will cost $45, installed''? A. That is right.

Q. ''That two pipes are missing on the piccolo stop,''—is that right—did you write that? A. That is right.

Mr. Morten: Now, the rest of it, Mr. Lane?

Mr. Lane: I am going to come to the rest of it.

Q. Now, what are the two pipes on the piccolo stop? A. Why, that is two pipes that were missing entirely.

Q. How long had they been missing? A. From the beginning.

Q. From the very beginning—is that right? A. To the best of my knowledge.

Q. And did you have any idea, or did you get any estimate from him as to what those two pipes on the piccolo stop were worth, or would cost, to put in there? A. I did not.

Q. Do you know how many pipes there were, all together, in the organ—in this five thousand dollar organ—how many pipes, all together, in it? A. No, I do not recall.

Q. Well, there were some thousands of them, weren't there? A. No, there was not. I think a reference to the specification will give it; I think it was something short of seven hundred.

Q. About seven hundred of them? A. Yes.

Q. And just two pipes were missing? A. Yes.

Q. And had been missing all the time? A. To the best of my knowledge.

Q. But the organ had been playing? A. Some parts of it.

Q. And you never made any kick about those two pipes on the piccolo stop? A. For the simple reason that those two pipes might not be called upon to play; in fact, that entire stop could be shut off—I mean the organ could be worked without that particular stop.

Q. In other words, up to that time, then, you had not had any great inconvenience because of those two pipes on this piccolo stop? A. They would be a great inconvenience if the player had to call on the piccolo stop to play those notes that are missing.

Q. Well, why didn't you make a kick about it before? A. Because he had not emphasized this.

Q. He had not emphasized this in a year's time? All right. A. Well, it is just possible that those two particular notes may not have shown out—I mean by that, in playing I would not know whether the organ player was calling on the piccolo stop, or not. The piccolo, by the way, is of very high rank; it continues from the four foot flute up to the two foot flute; and these two notes may not have had occasion to be used maybe once in six months.

Q. Then your letter goes on (as Mr. Morten requests) "and it will require considerable time to put the organ in first-class condition, and that his charges will be $1.10 per hour for himself

and his helper from and to his home"—now, how many days (you say "considerable time") did this man tell you it would take to put this organ in first-class shape? A. I don't believe it was stated; I don't believe it was said.

Q. Well, did he say it would take one day? A. I believe I have a letter from him. I would not be in a position to say just how long he did say, unless it is in the letter.

Q. Well, didn't he give you any idea how soon you could be operating this organ, how soon he could have it in first-class shape? A. I do not recall the time having been stated.

Q. Didn't he give you any idea as to what was necessary for him to do in order to put it in first-class shape? A. No, I do not recall it.

Q. This was Perragallo, was it? A. Yes.

Q. And you considered, as you stated in here, that Perragallo was a good mechanic? A. Yes, I did; that is, I would say this—I would qualify that statement, if I am permitted—

Q. Go ahead. A. Mr. Perragallo had several occasions to come over there, and I found him to be as good, if not better, than the others that were sent over to fix up temporarily defects as they appeared—that is, to give them temporary adjustment. That is why I qualified him as one of the best mechanics they had. He came over and gave me temporary relief.

Q. Now, when you wrote this letter were you getting this estimate from Perragallo for the purpose of getting temporary relief, or to put your organ in first-class shape, as set forth in the letter? A. I wanted to have the organ in

first-class shape; I wanted to have it perfect, in accordance with the contract.

Q. And McKee, the Receiver, as I understand it, what did he do then? A. I don't know as he did anything.

Q. Did he tell you to go ahead and do the work? A. I do not just recall; I think he authorized me in that letter to procure it.

Q. Did you go ahead and have the work done? A. I went ahead and had it done.

Q. By Perragallo? A. Yes.

Q. And how much did you pay him? A. I think, about forty-five dollars.

Q. And what else? A. And some additional amount for his time.

Q. Well, how much? A. About eleven dollars, odd, I think it was.

Q. Eleven dollars? A. I think it was. We have the bills there. I would not want to swear to the correctness of the bills unless I have them here. I think there is one there for about eleven dollars.

Q. Now, while we are waiting for that bill, can you tell me how it is that you could not tell me, a minute ago, as to approximately the time it would take, and you can tell me now that you think his bill was $11.00 at $1.10 an hour? A. I did not just recall; that is why I could not tell you.

Q. So you just happened to remember that now? A. Yes. (At this point the bill referred to was produced and examined by Mr. Lane.)

Q. "10½ hours"—this is the bill, is it not, at $11.55? A. I believe that is the bill.

(The bill was thereupon marked for identification, H L-3.)

Q. Now, where is your bill for the $45? A. I think that is in there (referring to the papers held by Mr. Morten.)

By Mr. Morten:

Q. Is that here? A. I think so.

By Mr. Lane:

Q. Now, after you had Perragallo do this work, did you then take the matter up with McKee, and tell him you would have the work done, and that it would cost $56.55, or whatever it did cost, or not? A. I do not think I did.

Q. Why not? A. Why, I did not think it was necessary; he had ordered me to go ahead and do the work, and I did it, and that is all.

Q. And you did not make any offer to pay him any money, did you?

The Vice Chancellor: Why, of course not.

A. The situation at that time was that the organ was in such bad shape that I had to have something done to it to hold it up—in other words, I would have had to shut down the organ, I would not have been able to work with it.

Q. Certainly; you had to have $56.55 worth of work done to put it in first-class shape, as you state in your letter, didn't you? A. I don't think it was in first-class shape.

Q. Well, in what particular was it not in first-class shape after Perragallo got through with it?

The Vice Chancellor: I do not care whether it was in first-class shape, if it could stand up and be made to conform to the contract; but the charge here is that

the organ is structurally defective—is not that the charge?

Mr. Morten: Mechanically defective; it could not be made right until you change that mechanical situation.

The Vice Chancellor: If a bolt came loose, and could be tightened up, that has nothing to do with it; the question is, was this structurally a proper organ?

Q. If I understand it, you never told the American Master Organ people that the organ was no good, and for them to take it out of there, did you, and to give you your money back? A. I never did.

Q. Instead of that, you have kept the organ, and insisted on keeping the organ, no matter how it was constructed—is that right? A. I insisted on them living up to their end of the contract; and I wanted what they had sold me; that is all I wanted—no more and no less.

By the Vice Chancellor:

Q. How could you get that out of this organ? How could this organ be made to satisfy the terms of the contract, taking your statement to be true, or the statement of your side of the case to be true, that it is structurally defective and mechanically defective? A. Your Honor, that was the chief difficulty, it would constantly need fixing.

Q. I am not dealing with that; why did you want to keep an organ that is mechanically defective? Why do you keep it now? Why don't you turn the organ back, and sue them for damages?

Mr. Morten: He would, if they gave us the money back.

Mr. Lane: You could then.

Mr. Morten: No, we could not; they were in the hands of a receiver.

The Vice Chancellor: Well, all you could do was to establish a lien for your money on it—is not that so?

Mr. Morten: We have a right to hold it until we get the money back.

Mr. Lane: Oh, no; there is nothing like that in the contract.

The Vice Chancellor: You cannot keep this organ, which may be worth three or four thousand dollars; it has got to be sold; and if you are entitled to a rescission, or entitled to get your money back, you will get it back; but you cannot keep the organ and not pay for it.

Mr. Morten: The position we take is this: They have got to live up to their contract; and if they do not live up to their contract, they cannot recover.

The Vice Chancellor: Oh, yes, they can. You have got to look to get your money back, and deliver up the organ. Now, if they do not pay you, this organ can be sold and, out of the proceeds of the sale, you can be indemnified.

Mr. Morten: Well, we offer to do that now, if that is what they want; but they cannot take the organ away from us. I will make the offer now—I will deliver the organ to them upon being secured to the

extent of the amount of money we have in it, $1,550 (if your Honor should find that we are not entitled to the $50); we will offer that now; we will give the organ to them, providing they will give us the proceeds of the sale up to $1,550. That is the only position we take. They say they cannot perform; now, we will do that. I will make that offer now, in open court.

The Vice Chancellor: Has not this organ deteriorated?

Mr. Lane: Of course it has; we are going to prove that.

The Vice Chancellor: Well, why is it not for the benefit of both sides that this organ be sold and the proceeds of the sale be brought into court?

Mr. Morten: I am willing.

The Vice Chancellor: What do you say, Mr. Lane?

Mr. Kilgen: It is a Kranich & Bach piano, put in there over four years ago; and it is a well-known fact (and we have a man from Paterson here that will testify) that at the end of two years a piano becomes worthless when operated in a moving picture place, because they pound on it twice a day, and sometimes more than twice a day, continuously, every day. As to the remainder of the organ, this organ was only valuable by reason of its unique construction; it was played from the piano; the organ had a key adjustment or attachment so you could play the organ and

piano together or separately. It was the first of the kind, as someone here has testified, ever offered on the market. Here is an illustration of it. Now, to put that organ on the market today it would not bring but fifty dollars. It has a Kranich & Bach piano that sells at nine hundred dollars in their wareroom. The organ and all would not produce a thousand dollars to-day, having been thrown around among the rubbish in the new building. I saw it there, covered with dirt. I would not give fifty dollars for the chest, that cost over a thousand dollars to make. As to the pipes, lead pipes are very sensitive to any impression; in half an hour every pipe could be knocked out of use.

The Vice Chancellor: This bill of sale is a conditional bill of sale. Do they bind themselves to pay?

Mr. Kilgen: No, when we made demand on them they were either bound to pay us the remainder, or turn over the instrument, under the contract. If they fail to do that, they are liable for the value of the organ at that time, plus damages for withholding it from us. That is the law. In the replevin action we tried to get this case before Justice Campbell, who did not seem to get to any determination, and said "You have got to go to the Court of Chancery"—now we are in the Court of Chancery; after four years we are here to try the issues; and all this time this organ has

drifted from pillar to post and become more and more worthless although, at the time we made the demand it was worth not only all they were to pay for it, but perhaps fifty per cent more. The cost of this instrument had gone up; it became impossible to make them because we could not get the material.

The Vice Chancellor: Well, it is not going to improve where it is.

Mr. Kilgen: Not a bit.

The Vice Chancellor: Why is it not for the benefit of both parties to have it sold?

Mr. Kilgen: Because we could not realize anything on it. I dare say, we would not get five hundred dollars for the whole lot.

The Vice Chancellor: Well it is five hundred dollars; it goes to reducing the amount of damages.

Mr. Kilgen: We might try.

The Vice Chancellor: Selling this organ does not affect the position of this case in the least.

Mr. Kilgen: I have no objection.

Mr. Morten: I will offer to consent to it. If counsel want to do it, let the money be brought into court, and let the case be proceeded with and decided.

Mr. Lane: However, we have to go on with the trial of the case, because there is no doubt that the organ is not going to bring anything like the amount that we claim we are entitled to. If they keep the

organ (as in the Wurlitzer case, which I have sent out for) we would be entitled to a decree for our money; if not, we are entitled to a decree for the return of the organ and damages for the detention, which, at least, would be in amelioration of the value of it.

The Vice Chancellor: Well, go ahead.

Q. Now, you, as I understand it, used the organ up until Spassano came in, or whatever his name is, and then after that the organ remained where it was? A. For quite some time.

Q. For quite some time? A. Yes.

Q. That was in April, 1918, when he came in there? A. Yes.

Q. Did the organ remain connected up? A. Until May 21, 1918.

Q. Until May 21, 1918—and then what happened? A. I had it temporarily disconnected.

Q. You had it disconnected? A. That is, some of the cables were disconnected and laid with the balance of the organ.

Q. What do you mean by "disconnected"—how were they disconnected? A. From the relay up to the organ chamber was a big cable that connected the relay with the organ chamber; that was disconnected by Mr. Perragalo.

Q. How was it disconnected—unscrewed, or cut, or what? A. The wires were disconnected from the contact.

Q. Well, were there any cables cut? A. No.

Q. You are positive of that? A. Positive.

Q. Positive? A. Absolutely.

Q. How do you know that the main cable from

the piano to this organ was not cut—just snapped off—how do you know that? A. Because I engaged the mechanic there to disconnect it.

Q. Were you there and saw what he did? A. No, I was not.

Q. Then you don't know whether it was cut, or not? A. I wouldn't say that I do know just how he disconnected it; but he had orders to disconnect it.

Q. And you don't know how those wires were disconnected, do you—whether they were cut, or what? A. No, I do not.

Q. Did you see what was done with the wires and this cable after it was disconnected, as you say—where were they put? A. Into the organ chamber, and around the relay.

Q. How long a cable was it—the main cable? A. Well, there was one cable there running from the relay to the organ room, of probably fifteen feet, or so, if I remember rightly; they were laid in the junction box—the cables that were disconnected.

Q. At the time you did this disconnecting did you ask permission of the American Master Organ Company, or the Receiver, or the Pipe Organ Company, to disconnect it? A. I did not.

Q. Did you give them any notice that you were going to disconnect it? A. I did not.

Q. You just simply acted as you would with your own automobile, is that right? A. I felt, at that time, that there had been sufficient experimenting, and I thought it would be better to just simply disconnect it and store it; that is what I thought.

Q. Now, it was not because you had gone out of the business and leased this theatre to Spassano, that you hadn't the use of this organ, was it? A. Not by any means; I did have intention to use the organ.

Q. What intention? A. The building of a new theatre.

Q. And you were going to put this organ in the new theatre—is that right? A. Had it stood up, yes; because of representations being made to me that any and all additions could be made to this organ, and it could be built up; and I had, of course, in mind at that time the building of a modern theatre, and I had hoped that the American Master Organ would have filled the requirements, so far as music was concerned, in the new theatre; but in that I was utterly disappointed.

Q. Now, you had hoped it would fill the requirements in the new theatre? A. Absolutely.

Q. In a bigger theatre than the Colonial? A. Absolutely—through representations made to me by Mr. White at the time of the contract.

Q. And therefore you decided that you would store this, or cut this cable and store it up in the corner where it was, didn't you? A. Not at that time I didn't store it; I just left it in the position it was in.

Q. Well, with what idea in mind as to what you would do with it eventually, if it could be made to hold up? A. To place it in the new Roosevelt Theatre.

Q. And that is the idea you had in mind at that time? A. Absolutely.

Q. And at that time it was over a year or a year and a half after you had started to use the organ—is that right? A. Yes.

Q. Eh? A. Yes.

Q. And you did not have in your mind at that time that that organ could not be, or never could be played, did you? A. Why, we are just a little beyond ourselves on this: I said "at that time," that is, as of May. The original desire on my part when I contracted for the organ was that I was in hope that what he had claimed at that time could be done; but I was almost convinced, by the time it was temporarily disconnected, that it could not be done.

Q. That what could not be done—the organ made bigger? A. Absolutely; in other words, if I had made it bigger the troubles that had developed during that time would be magnified to the extent or amount that it was made larger, and I really was in a quandry as to what I should do.

Q. Did you ask Mr. Morten's advice—did you have a lawyer at that time? A. May 21st? I was in consultation with Mr. Morten from the time the trouble did start.

Q. And if you had in mind, at the time, that these parts should be added on and this organ made larger, at the time you made the contract, why didn't you say something in your contract about it?

The Vice Chancellor: He did not draw the contract.

Mr. Lane: No; but he signed it, if your Honor please.

Q. Why did you sign a contract which did not say something about that? A. Why, that was entirely unnecessary to even mention the fact, for

the simple reason that the only parts, as I understood Mr. White to say to me, that it would be necessary to provide for the conditions later on would be in the size of the motor required and the blowing apparatus; and I believe the specifications had called for sufficient of a size to provide for more than what was in the organ; a five horse-power was specified, where he told me distinctly that it would not be necessary to use more than a three horse-power motor; so he made the provision at that time.

Q. Now, getting back to where I left off a little while ago; at the time that White wanted you to let somebody else in your neighborhood have an organ similar to yours, and to pay you something for it, you say that you refused permission—is that right? A. I did.

Q. Was it because you were satisfied with the organ you had? A. No, it was not.

Q. Why was it? A. I refused permission because of this fact (and by the way, that is why I insisted that it go into the contract) that my feeling was that if it was what they claimed it to be, I felt, by investing the amount of $5,600, I should have something my competitors could not have; and that is why I insisted on it.

Q. Well, at that time you had not invested $5,600? A. I had contracted for it.

Q. You had contracted to pay $5,600 at that time, but have you any idea of how many of these installments you had paid at that time? Of course you had paid the first $650—now, do you recollect how many more of those installments you had paid at this time you were talking to

White? A. I cannot just place the date that this subject of the spring organ came up; I don't know whether it was after I paid the installment, or prior to it.

Q. Now do you recollect whether, at the time that you had this talk, you were satisfied with this organ, the way it played—do you recollect that? A. I don't believe I was satisfied, because I was continually phoning to the factory of troubles, that were developing, but I had hopes that they would be able to remedy them. I was not satisfied with the instrument as it was.

Q. Well, when did Mr. Beach tell you that the design was out of gear and was not correct? A. 1918.

Q. Not until 1918? A. In January.

Q. During this time that you used this organ did you ever spend any money, for repairs or otherwise, except this forty-five or fifty-five dollars which you paid Perragalo? A. At what period of time?

Q. At any time during any of the time that you had this organ, while it was being used, up until the time that Perragallo was paid this fifty-five dollars? A. Yes, I had occasion to call in several people to fix the troubles that I had.

Q. Well, now, will you tell us who they are, and how much, and when? A. I had Tom Wood—

The Vice Chancellor: Does that prove faulty construction? Suppose they were repairs?

Mr. Lane: Well, I won't go into that, if your Honor please.

Q. Now, you have spoken about a "piano lock stop"—I think that is what you called it—that was supposed to do what? A. A "piano lock pedal."

Q. Yes—do you know what that is supposed to do? A. That was supposed to lock down the piano keyboard so that the piano would not play.

Q. So that the piano would not play? A. Right.

Q. Don't you know that all that that lock pedal was supposed to do, and all that it mechanically could do, was to soften the piano and not absolutely stop the playing? A. Not by any means. The representation was made to me that it would lock the piano.

Q. Don't you know that your specifications do not call for anything like a piano lock pedal—or do they, to your recollection? A. It does not call for it in the specification, but it was put in there.

Q. Well, then, when the lock pedal was put in, it was something that was not called for in your specifications—something in addition—wasn't it? A. I suppose it was, if it is not included in the specifications.

Q. Therefore, according to your contract and the specifications, so far as you can see it now, you were not entitled to the piano lock pedal, were you? A. Then why did you put one in? That is the answer.

Q. All right—when did you first call their attention to this piano lock pedal which you are talking about? A. I don't recall the date. If I can refer to my notes, I would be able to, probably.

Q. Have you notes about these things? A. I think I have.

Q. I mean, your letters that you have put in evidence here? A. And letters. I think you will find it in my correspondence. It was not only the lock pedal that was affected through that device that they had put in, but it also affected one of the other pedals; that is, the mechanism that they had put into the piano lock pedal also affected one of the other pedals.

Q. Now, do I understand it is your contention to-day that you were not bound to, or you did not accept this piano, because of the fact that this piano lock pedal did not stop the piano from playing when the lock pedal was on, or off, whichever it may be—is that the reason? A. That, in conjunction with other faults.

Q. One of the reasons? Was the reason, so far as that lock pedal was concerned, because of the fact that the lock pedal was there and that it affected the mechanism of something else? A. That was only part of the trouble. The piano lock pedal, as I stated previously, affected one of the other pedals which was called for.

Q. Now, what I want to know is this—whether you base your rejection of this organ on the fact that the piano and organ would not work separately, or the organ work without the piano? A. No.

Q. Or the fact that because this lock pedal was put in there, it affected some other part or mechanism, or what not—which is it? A. My contention is that the entire thing does not work properly—that is my contention; there is no par

ticular part of it that has stood up; that is the trouble.

Q. Well, now, I think you read a letter here—you may be able to tell me where it was—I think you read a letter in which you speak about or point out some of the "minor defects"—can you pick that letter out for me quicker than I can? A. Maybe I can.

Q. Would you call silent notes, ciphers, "minor defects," or not? A. Why, I may have mistermed the faults. I had great confidence in the American Master Organ Company and the people connected with it; and what I might have considered at that time "minor" may not have been so—in other words, I could not see why they should not get this thing working; and while I may have, early in the stage, said "minor defects," they have later proven very serious defects. In other words, temporary fixing would overcome some of the difficulties, but the faults would recur at very frequent intervals; and I believe that the letter covering "all minor defects" is one of the earlier letters. The fact remains that I have continually complained; and, after fixing, the same troubles would come back again.

Q. Well, now, you say you had confidence in these people—when was it you lost confidence in them? A. Why, after the repeated effort on their part to place this thing into a condition where I could work with it without having to continually phone and write them.

Q. And when was that—bearing in mind, of course, that you were using this thing almost continuously for a year? A. That was around the

period of March or April, 1917. I had a conversation, around that time, in the rear of my theatre, with Mr. White, and the subject of the conversation was to the effect that they had utterly failed to deliver what they had sold; and his reply at that time was that I could get out of the contract if I wished to do so; but my reply was that I did not intend to, or did not desire to.

By the Vice Chancellor:

Q. Well, after you found that the organ was not operating successfully, and defects appeared from time to time, requiring repairs, which caused you to be dissatisfied with it, why didn't you accept the offer to get out of the contract? A. Well, the offer never really was made to me, your Honor. At that time when the conversation took place he said I could get out if I wanted to, but I had so much money in there that I felt I was not justified in losing that money. There was nothing said at that time about returning me the money that I had paid. If he had made the suggestion I would have accepted it.

Q. Well, you did not undertake to get into any treaty or negotiation with him then about making an end to the contract and getting your money back and returning the organ? A. The proposition was not opened up, your Honor; if it had been opened—

Q. Well, no; why didn't you? A. Of course I had the idea in mind of having this instrument completed, and I had no idea that it could not be done—I mean, I had no definite idea in mind that these troubles were going to constantly recur. I found this to be the case—that

if they had their men constantly in attendance they could hold the instrument up in fairly good shape; and it so happened that, from the time of the opening, on October 26th, almost up to the March period—in other words, for several months—they had men constantly working at that theatre, and the only thing they had not really put into the organ, that was called for, was the drums and traps; and that was the reason why they had to be constantly working on the job—because they were working on the drums and traps; and I did not feel, until they had had a chance to complete the drums and traps, in any way discouraged with the attempt they had made before the troubles did develop.

By Mr. Lane:

Q. Now, you know, Mr. Robinson, from this letter I was speaking about, that, in response to your letter (where you mention about the $45) Mr. McKee, as Receiver, wrote you a letter and told you to go ahead and do that work, as he understood that those were the only items you kicked about—you recollect that don't you? A. Yes, I complained of that particular thing, and I ordered the work done, and the work was done. But after it was done the trouble still bothered me, afterwards; it did not hold up, in other words. Therefore, it must have been some other part that was faulty. I never, at any time, from the installation, or rather, from the opening, on October 26th, up to the time of May, 1918, had the full use of drums and traps—never.

Q. During all of that time, however, you did have the use of the piano, anyway, didn't you?

A. The piano was about the only thing I did have the constant use of.

Q. And right up to the present day—is that right? A. I don't know what has been done with it since I was out of there in 1918.

Q. Do you happen to know what the reasonable value of the use of a grand piano of this kind—the rental of it—is, per week for a theatre? A. No, I do not.

Q. Have you any idea? A. Well, I know I have some pianos now that I am purchasing on time, and included in there are two grand pianos and two uprights, and, from the payments there, I should judge about ten dollars a week.

Q. Ten dollars a week? A. Yes.

Q. And there is no doubt that you have had the use of the piano from 1916 on? A. I have had the use of the piano from 1916 to May, 1918.

Q. To May, 1918—then, after that, you entered into a lease, whereby, under your lease, it was necessary for you to furnish a piano to the lessee? A. Correct.

Q. And you furnished this very piano to the lessee? A. Right.

Q. And you still have that lease with the lessee? A. I have.

Q. Do you still own the building and lease it to him? A. I do not.

Q. Well, what does? A. The Roosevelt theatre Corporation.

Q. Well, have you furnished this piano to the Roosevelt Theatre Corporation for them to carry out this lease? A. I have.

Q. You represent the Roosevelt Theatre Cor-

poration? A. There was no mention made of the piano in the transfer to the Roosevelt Theatre Corporation of the Colonial Theatre, and the conditions, as they existed at that time, continued, I presume. The only transfer that was made was the transfer of the Colonial Theatre property and the lease.

Q. As I understand it, the Roosevelt Theatre bought over the Colonial Theatre—is that right? A. The Colonial Theatre was transferred to the Roosevelt Theatre Corporation.

Q. And who owned the Colonial Theatre—you, or the Colonial Theatre Corporation? A. I owned it originally, personally.

Q. Then it was made a corporation? A. No, it was transferred—sold, in other words—to the Roosevelt Theatre Company.

Q. By you? A. Absolutely.

Q. And your right, under this lease, was sold with it? A. Yes.

Q. And everything that was in the place was sold with it? A. Not mentioned.

Q. Not mentioned, but nevertheless, the stuff was just left there, is that right? A. Right.

Q. And was being used by the Roosevelt Theatre? A. Not by the Roosevelt Theatre.

By the Vice Chancellor:

Q. Did you sell the piano to the Roosevelt Corporation? A. No; there is no mention made of it, at all.

Q. Are they paying rent for it? A. Spassano is paying rent to the Roosevelt Corporation—the tenant of the Colonial Theatre.

Q. And he has the piano? A. The piano is in his possession.

Q. Does he pay rent for it? A. No.

Q. Was a piano to be furnished as part of the terms of the lease? A. According to my lease to him, there was.

By Mr. Lane:

Q. Now, do I understand that the Roosevelt Theatre took over everything that was in the building? A. I don't say that. The Roosevelt Theatre took over the Colonial Theatre and the property.

Q. And the contents? A. And the contents; but the piano was not mentioned.

Q. Well, "and all contents," without mentioning anything that was there? A. Yes, it took over everything.

Q. That was in the building? A. That was there.

Q. And this chest and blower were still in the building, weren't they? A. Yes, but they are not in the Roosevelt Theatre—I mean, they do not belong to the Roosevelt Theatre Corporation.

Q. But they are still in the building? A. They are.

By the Vice Chancellor:

Q. Do they serve any purpose there? A. No, your Honor; I explained that I only left them there.

Q. I understand that—were they left there on storage? A. I left them there because they were too heavy and too cumbersome to move; and I have them there in storage, in a room that is not occupied by the Roosevelt Theatre Corporation.

By Mr. Lane:

Q. Was the organ—the parts that you say you afterwards stored in some private garage—were those parts in this theatre at the time that the Roosevelt Corporation took the theatre over? A. In what theatre?

Q. In the Colonial Theatre? A. They were not.

Q. Were they in any theatre? A. They were not.

Q. When was this transfer? A. As I said, just prior to the commencing of building operations on the Roosevelt Theatre, which was March 1st, 1921. We had no occasion to demolish the organ chamber that I had built at the time of the installation—or, rather, the American Master Organ Company—until we had use for the property.

Q. Didn't you first move the organ over to a store across the street from the Colonial Theatre, which was the office of the Roosevelt Theatre, first, before you took it to any garage? A. Some parts of it I did.

Q. Well, what parts—the parts that are in the garage? A. No, the parts that are in the garage were taken directly there.

Q. On the very day the transfer was made to the Roosevelt Corporation? No, no; I did not say such a thing.

Q. Afterwards or before? A. Before the transfer to the Roosevelt Corporation.

Q. Now, did the American Master Organ Company, the Receiver, the Pipe Organ Maintenance Company, or anybody else, give you permission to take this organ— A. (Interrupting) They did not.

Q. (Resuming)—and use parts of it for one thing, and parts for another? A. They did not. I merely did it for the safety of the instrument.

Q. And don't you know that the time that you had the cable disconnected from this organ that you very seriously injured this instrument?

The Vice Chancellor: He has told you before he did not.

A. I did not.

By the Vice Chancellor:

Q. When was it you disconnected the piano from the organ? A. May 21st, 1918. There was a tenant, at that time—the reason why I did it was because I had heard that the tenant of the Colonial Theatre was playing the organ, or trying to play the organ, and I had a clause in the lease which prohibited him playing the organ, and I did not want to get into a jam, and that is the reason I thought it advisable to disconnect it.

Q. That is, you had a lease and agreement with the tenant in the Roosevelt— A. No, not in the Roosevelt, in the Colonial.

Q. Yes, you had an agreement with the tenant in the Colonial that he should not use the organ? A. Yes, I didn't know whether it would get me into trouble by permitting the use of it, or not, and that is why I insisted on the clause going into the lease.

Q. Any trouble with whom? A. With the American Master Organ Company.

Q. Then, at that time you definitely determined to abandon the use of the organ? A. Practically so, sir.

Q. That was in March, 1918? A. May, 1918.

Q. That was after the inspection was made by Mr. Beach? A. After the first inspection, yes.

Q. After the first inspection—and then, when he reported about the condition of the organ, you practically discontinued the use of it? A. Yes, sir.

Q. And leased the premises to a tenant, with an agreement that he should not use the organ? A. That is right.

By Mr. Lane:

Q. And didn't you use this organ right up until the time that you made this lease? A. Yes.

Q. And is it not a fact that you discontinued the use of this organ because you were making a lease of this building to Spassano? A. It is not.

Q. What? A. It is not.

Q. And is it not a fact at that time you had in mind taking this organ and using it in a proposed new building? A. Not at that time.

Q. Can you state what it was that made you, at that moment, discontinue the use of that organ, excepting the making of this lease to Spassano? A. There was nothing, excepting that I deemed it advisable to have it discontinued, so that it would be better taken care of, that is all. Originally, I had, as I stated before, intentions for this organ to be set up—I had intentions that it should be used in the new Roosevelt Theatre, as, at that time, I had plans for the building of a more modern theatre.

Q. "Better taken care of" at that particular time, for what purpose? A. I do not quite get the question.

Q. What was your idea—for what purpose were you going to better take care of it? A. Simply by having it locked in a room, with nobody to have access to it.

Q. Were you going to take better care of it until you built the new theatre? A. That had nothing to do with the new theatre.

Q. Had you in mind, at that time, the building of the new theatre? A. I had.

Q. And for how long a period had you had? A. In 1912, before I bought the organ.

Q. And you knew, at the time you installed the organ, did you not, that when you built this new theatre, you would have to tear down yourself this—I think you called it—"addition," in which the organ was placed, or installed, didn't you know that? A. There was nothing determined on that; I could have either left it up, or torn it down. We took all the space that we had, and that necessitated tearing it down.

Q. I think this lease was made on April 23rd, 1918, that you are speaking of, to Spassano—the lease, by the way, was made by you individually, wasn't it? A. Yes, it was.

Q. The lease to Spassano? A. To Spassano.

Q. And has it ever been changed, or do you know how long a term this lease was for? A. Five years, with an option of three more.

Q. And you personally collect the rent for this, don't you? A. I do not.

Q. Well, did you, up to the time of the transfer to the Roosevelt Corporation? A. Either I or my Secretary did.

Q. Now, was the organ worse on April 22nd, 1918, than it was on April 1st, 1918? A. Well, that I could not say.

Q. Well, the organ did not fall down just about this time, did it? A. No; here is what happened: One day it would be all right, after the man being there, and the next day it would fall into disrepair; now, I could not determine, unless I was permitted to look at my records.

Q. Do you, or do you not know, that to tear this organ down, or lock it up in this room, and disconnect it, as you say, would be greatly detrimental to the instrument? A. I do not know; and I doubt very much whether it is detrimental to the instrument.

Q. Did you ask Mr. Beach, or any of your other experts, as to whether it would be? A. I did not.

Mr. Morten: He employed an expert to do it.

Q. Who was the expert you employed to do it? A. Mr. Perragallo.

Q. Do you recollect Mr. Perragallo, afterwards—or was it afterwards that that piano was connected up again with the organ? A. Why, I never saw who really did connect it up again; but I know it was connected up again.

Q. Now, how did it come to be connected up again after you had taken it down? A. Through the fact that Mr. Kilgen wanted to place it into what he considered complete working order.

Q. Mr. Kilgen, after the Receiver went out, came in, purporting to represent the Pipe Organ Company, or himself, and he got in touch with you to try to get this organ into good working order, is that right? A. It is.

Q. And did you make any arrangement with him, or agreement with him? A. With whom?

Q. Kilgen? A. I did not make any agreement with him, no; I think he asked permission to go in there and I arranged for him to go in, if I remember rightly.

Q. For what purpose, did he state to you, that he wanted permission to go in, and for what purpose did you give him permission to go in? A. To fix up the organ.

Q. Did you tell him at that time that "the organ never can be fixed up; it is no use to give you permission; it cannot be done"? A. I did not.

Q. And you knew, at the time that he went in there, that he was going in there to attempt to put that organ into working shape, didn't you? A. I think that is what the purpose was. I am a little bit rusty on the time, however.

Mr. Morten: Well, it is in the letters here, is it not?

The Witness: That is what I thought; it is all in the letters there. I am a little bit rusty as to the time.

Mr. Lane: Well, letters of this kind I do not think very much of on either side.

The Witness: At that particular time I was away, during the summer, and I did not know just exactly what happened while I was away.

Q. Well, you say you were away when this happened, is that right? A. I did not say I was away when it happened; I say I was away during the summer, and I do not just recall just what did happen during that time.

Q. You came there every day of the week while those repairs were going on, didn't you? A. I did not; I was in Europe in the middle of 1918; now, I don't know just what date you refer to. If you give me the date I can tell you where I was.

Mr. Lane (to Mr. Morten): Can you pick out what letter that is?

Mr. Morten: Here is a letter right on top, where he makes an offer to do everything that the contract calls for—right on top.

Mr. Lane (inspecting the letter designated): That is not the letter I want; I want the letter that points out the various things that were wrong with it.

Q. What time were you in Europe in 1918, what months? A. During the month of June.

Q. June, and what other month? A. That is the only month—during the month of June.

Q. Don't you know these repairs were made in October and November, 1918? A. I don't know; that is the reason I say that if I could refer to the record, why, I would know.

Q. Mr. Robinson, I am not trying to trip you up, or anything, but I am trying to get away from these records—what I am trying to do is to find out what your recollection is, and I am not trying to make it hazy, at all; the thing I am trying to bring out is, if you were there at this time, and whether your recollection tells you, or if you have any recollection of seeing them do it? Your letters would not show that. A. I do not recall being there.

Q. Now, each one of these letters which you wrote, particularly in 1918 or 1919, before you wrote them you went over them with your counsel, didn't you? A. I do not recall, unless you point out any particular letter.

Q. Well, I will point out this one of January 14, 1919, which was sent by registered mail (handing the same to the witness)? A. I think that was gone over with counsel.

Q. Now, Mr. Robinson, if, at that time, you knew that this organ was structurally in such a condition that it could never be put in shape, why was it that you entered into negotiations to get it into such shape, after you had been told that it could never be put in shape?

Mr. Morten: I object. It has never been testified that there was any instrument in the world that could not be put in shape.

The Vice Chancellor: The only testimony I recall is that it would cost about $45 to put it in shape.

Mr. Morten: You would have to take out the whole magnetic action and relay action, because it is too small.

Q. I will withdraw the last question. Do you know that the American Master organ that is in the United States Theatre in Paterson, a duplicate of this organ, is run on the same voltage that this organ had—do you know that, or don't you? A. I don't know that; but I do know that they have had an awful lot of trouble with the organ that is in that theatre.

Q. You know that organ is going now, don't

you—it is still going? A. The organ was an American Master organ, and I know, at the time that we installed, or, rather, contracted for this American Master organ, they had trouble with their action; but I was given to understand that they had overcome all of that difficulty. A party by the name of Adams owns the United States Theatre in Paterson. I have had several conversations with him.

Q. Well, as I understand it, Mr. Robinson, to sum up the situation briefly (and correct me if I am wrong), this organ was installed in October, 1916, and you used this organ continuously, excepting at different intervals when repairs and alterations were being made, through the end of 1916, 1917 and into 1918, when you leased the property to Spassano, and that since that time the piano has been used continuously, so far as you know, and you have had a lease to furnish a piano—am I not right so far?

Mr. Morten: We have had that about seven times, and we do not deny that.

Mr. Lane: I do not care whether you have, or not. I sat here this morning listening to the reading of letters that took two and a half hours.

(Question repeated.) A. You are wrong.

Q. In what particular? A. You say "the organ"—I never have had full use of the organ; I have used parts, certainly; but I have never had full use of the organ.

Q. Well, what do you mean—that every time that organ has been playing there has been something that did not play on it? A. Absolutely.

Q. Well, but you have had the use of 99% of the organ—we will put it that way? A. I have not had the use of 50% of it.

Q. Not the use of 50% of the organ during that time? A. At no time.

Q. Well, how do you figure out fifty per cent—where do you get that from? A. The drums and traps, in my estimation, of a theatrical orchestral organ, are at least 50 per cent of the proposition; I mean now, in the playing of music appropriate for pictures; and the drums and traps have never worked.

Q. Don't you know, in the modern organ, they have taken the traps out? A. If that be a modern organ, it would never go into one of my theatres. What you do refer to—if I may assist in the matter—is this: you refer to theatres where there is a straight pipe organ, which employ, in the majority of instances, symphony orchestras.

By Mr. Morten:

Q. What do you mean by a "symphony orchestra"—explain that? A. "Symphony orchestras are orchestras composed of upwards of 30 men. In such instances, where full drum and trap effects can be attained through the orchestra, it is not necessary to put them in the organ; and that is why you have that condition of its not being a proposition similar to mine. I would not feel to have the right kind of an installation unless my organ had every mechanical device for the proper playing for pictures, similar to what I have at this time.

By Mr. Lane:

Q. Was there any question brought up about dust in your place during any of this time—dust from the fires? A. Not to my recollection.

Q. And nothing said about the dust from the boilers affecting these magnets, as you call them? A. I have no knowledge about it.

Q. And nothing said about dampness in the back of the building, by Perragallo or anybody else? A. Some mention was made about some dampness.

Q. What was that? A. That some dampness was getting into the instrument; but I never could locate where the dampness came from.

Q. You never could locate it? A. I should personally think that the condensation in cold weather, over night—the condensation of the air against the pipes—would cause some dampness; but I could not overcome that. Now, that is the only thing I could have in mind, or the only thing I could think of, that would cause dampness; and that condition could not be overcome.

Q. Do you recollect when a screen was put over the blowers—do you recollect when that was done?

Mr. Morten: I do not think there is any such testimony.

The Vice Chancellor: There is a blower without a screen, is there not—it is not the blower, it is the diaphragm.

Q. Well, do you recollect any screens being put in? A. I do not know of any, at all. I do know that the arrangements for the supply of the wind

to the organ were such that it brought the air from the outside of the building—that I do know because I furnished galvanized iron ducts, at my own expense, to bring the fresh pure air from about fourteen feet above the ground level.

Q. Well, why was that necessary, to bring in the fresh, pure air—didn't you have pure air in the building there, or was there a lot of dust from the boilers? A. There was no dust, at all; it was an open yard on the outside.

Q. No, but you say it was necessary to go out and get pure air, didn't you?

Mr. Morten: I object; he has not said so.

Q. Did you say that? A. I said "fresh, pure air," that is what I said, "from the outside;" and that was done at the very beginning.

Recess until Thursday, March 1, 1923, at 10 o'clock, a. m.

Chancery Chambers, Jersey City, N. J., March 1, 1923.

Hearing of the cause resumed at 10 o'clock, a. m. in the presence of the counsel of the respective parties.

GREENWOOD A. ROBINSON, re-called:

Cross-examination resumed by Mr. Lane:

Q. Why did you stop making the payments in September, 1917? A. Because of the condition of the organ.

Q. Did the question of the company going into insolvency on October 5th, 1917, have anything to do with it? A. Not in the least.

Q. Did you know that the Company was in insolvency or insolvency proceedings were pending in this court, at the time that you stopped making payments? A. I did not.

Q. On September 6th, and I think on August 18th, according to this memorandum, you started making payments, after you had discontinued sometime back in March—why did you make a payment on August 18th? A. Because of the continued requests of Mr. White and Mr. Ely.

Q. And you did that although the organ was not in proper shape? A. I did the same as I had done before.

Q. And you also made the payment of September 6th for the same reason? A. I did.

Q. Now, as I understand it, you say that the check of August 18th was sent back to you? A. It was.

Q. For what reason? A. That I don't know.

Q. Did you get any letter with it? A. I do not recall; it will be in the records, if I did.

Q. Now, the check was not sent back because it was N. G., or anything of that kind, was it? A. Not in the least.

Q. It was sent back for some reason other than that?

The Vice Chancellor: Well, your client knows why it was sent back.

Mr. Lane: Does your Honor overrule the question?

The Vice Chancellor: No; I am pointing out to you that he cannot tell what motive actuated your client in sending back the checks; he says he don't know, at all.

Q. Did you get any letter with it? A. I do not recall; I say if I did it will be in the record.

Q. Therefore, if the letter has not been produced here you say you did not get any? You kept every letter, did you? A. I did.

Q. Now, this check was sent back immediately, or how long after you sent it? A. I do not believe it was immediately; I think it was several days.

Q. Then what did you do when you got the check back? A. I mailed it back to them.

Q. Immediately? A. Within a short time—maybe two or three days.

Q. With a letter? A. That I do not recall; if I did, it will be in the records there.

Q. And if it is not here, you did not send any letter, because you kept a copy of every letter you sent—is that right? A. To the best of my knowledge, I did.

Q. Now, all this time, of course, between August 18th and the time you sent the check back, you were in telephonic communication with their factory, or their office continuously, were you not, about the organ? A. Well, I had occasion to phone them quite a number of times; I would not say "constantly."

Q. And with whom would you talk when you phoned to them—what representative of the company—during this period particularly I am talking about now? A. In the majority of instances, Mr. Ely.

Q. With Mr. Ely—and did you, in any of these telephonic communications, mention the fact that this check had been sent, and they had sent it back? A. That I do not recall.

Q. And yet, all of this time you say—this particular time—that they were most anxious to get money? A. They were.

Q. And the only reason that you sent the check in August—that first check, of August, 1918—was not because you felt it was due to them, but because they said they wanted to get money? A. They were constantly requesting money.

Q. Now, I am not asking you what they were "constantly doing," or anything else, I am asking you about this particular time (and if I am wrong, correct me): Was the reason that they had pleaded with you for this money that you finally sent the check of August, 1918, although you did not think at that time that they were entitled to get the check? A. If I remember rightly, they had made another attempt to fix this instrument just prior to that time.

Q. And was that attempt successful? A. So far as the successful playing of the instrument is concerned, no.

Q. Well, so far as what was concerned, or in what way, was it successful? A. So far as remedying some of the mechanical defects.

Q. Now, you have been very careful, in sending other checks, I think (in referring back to your $400 payment) in saying that that was not considered as an acceptance of the organ—you cannot say whether you, at this time, when you wrote this letter (if you did write a letter, or have any telephonic communication when you sent this check) said to them, "Now, your organ is not O. K.; your organ is not all right; but I will make you this payment because you pleaded with me, and you need the money," did you, or anything of that kind? A. No, I do not recall any such thing.

Q. Now, of course you were playing this organ from August, 1917 to September, 1917, were you not? A. On and off, yes.

Q. What do you mean by "on and off"? A. Well, I testified that there was certain periods where we had to play the piano alone, and could not play the organ.

Q. Well, was this one of the periods, or not? A. What particular period are you relating to?

Q. August 18th to September 18th, 1917? A. There were periods just immediately prior to that, that the piano had to be played alone; the organ would not play.

The Vice Chancellor: I do not see the slightest bearing this testimony has on this case, whatever.

Q. Then, during the period from August 18th to September 18th, 1917, the organ did not play, is that right? A. September, 1918?

Q. August 18th to September 18th, 1917? A. There may have been periods during that time; I would not want to say, at this time, whether there were or not; but immediately prior there were.

Q. Does your record show when you sent this check back to the Company? A. I believe the records show the date when the payment was sent.

Q. Now, does the record show when the check was returned? A. I believe it does.

Q. Why didn't you keep a record of that—you were keeping a record of these other things? A. If I had to keep a record of everything that happened I wouldn't have a place to store them.

Q. Now, you went right along them, and on September 18th you made a second payment—is that right? A. I believe that is the date.

Q. Now, why did you make this second payment for this organ, if the past month had not been satisfactory to you? A. Because of the repeated requests for money.

Q. They were still requesting money? A. Absolutely; particularly around this time.

Q. Particularly around September, 1917—is that right? A. Absolutely.

Mr. Morten: Now, I object; there was no "second payment" made then, as I understand it. May I look at the record?

Mr. Lane: Yes.

Mr. Morten: (After inspecting the pa-

pers): The second payment here is January 31, 1917. Now, I think Mr. Lane you are not making a proper reference. That is the only reason I am objecting.

The Vice Chancellor: I do not see anything in this that has anything to do with the case; but go ahead; I am going to let you go on with it.

Mr. Lane: I am perfectly willing to state to your Honor my purpose.

The Vice Chancellor: Go ahead.

Q. Now, you made one payment—and I will speak of that as "the first payment"—in the summer, in August, 1917, didn't you? A. I can easily tell if I have the records.

Mr. Morten: Look at the dates; you have them there.

(The record is shown the witness by Mr. Lane.)

A. The first payment was made on the 18th of August—that is, it was mailed to them on the 18th of August.

Q. And that was mailed, as you say? A. That was the one that was mailed—

Mr. Morten: I want to object to this.

Mr. Lane: I withdraw the question, and withdraw the reference to "first" and "second."

Q. You made a payment on August 18th, 1917, didn't you? A. Yes.

Q. And that check was returned to you, did you say, and by you, afterwards, returned to the Company? A. It was.

Q. The same check—or did you make out a new one? A. I do not recall; I believe it was the same check.

Q. And you came along in September, 1917, and you made another payment or installment to the Company—did you, or did you not? A. I believe I did.

Q. What is that? A. I believe I did.

Q. Well, will you look at your record, and tell us whether you did, or not? A. The record says yes.

Q. Well, from that, do you say whether you did, or not? A. Yes, I will, from the record.

Q. And at the time you made that payment, September 18, 1917, did you have any kick about the organ? A. The same complaint that I had had right along.

Q. Did you write any letter with it? A. I don't believe I did.

Q. No. Had they just been there before that, fixing the organ? A. They were still there.

Q. They were still there—had they been there the whole month? A. No, they were there one day, and then they would not come the next; and, on and off, they were there almost constantly.

Q. Now, when you say they were still there, who did you see in between this time—did you see Mr. Ely—this one month I am talking about? A. Do you mean, at the theatre?

Q. Anywheres—about the organ? A. I could not say.

Q. Did you see White during that period? A. I could not say with any degree of certainty.

Q. Were you surprised when you got back this

check, although you heard that they needed money so badly? A. I certainly was.

Q. And yet you did not speak of it to any of them? A. I did, but just whom I spoke to I don't remember.

Q. And what excuse did they give you? A. That I do not remember.

Q. Then you say that they pleaded for this other payment in September, 1917—the last payment you made—that they kept pleading for that? A. They had been pleading right along for money, and whether they pleaded at that particular time, or not, I would not want to say.

Q. That is what I want to direct your attention to, and I will limit the question down to one week before September 18, 1917—would you want to say that during that week that they pleaded particularly with you for money? A. I would say that during that month they did, but I would not say within a week.

Q. Well, now, would you say, before or after they returned the first check—the check of August 18th—that they pleaded with you? A. That I could not say.

Q. Now, while the American Master Organ Company were in existence—by that I mean, before October 5th, 1917, or a period of about a year after the organ was installed in your place—did you make any attempt to demand back from the Organ Company the amount of money that you had paid them? A. I did not.

Q. And to give them back the organ? A. I did not. Why should I? I wanted the instrument.

The Vice Chancellor: You need not ask questions; answer them.

Q. Now, your next payment, according to your record there, would become due when—if everything was all right, when would you consider that your next payment became due, after September 18th? A. You mean, after the organ had been completely installed, don't you?

Q. I don't mean anything of the kind. A. Well, there was not a payment due, is my contention.

Q. No, if the organ was O. K. at that time? A. Well, that is what I asked, if it was completed.

Q. Yes; when did you consider the next payment became due, after September 18, 1917?

Mr. Morten: Do you mean if the organ was placed in condition at that date, or if it had been placed in condition when it was installed—which do you mean?

The Vice Chancellor: It is for the Court to tell when that did become due; what difference would it make what his views are?

Mr. Lane: I will withdraw the question.

Q. You made a payment on August 18th, 1917? A. I did.

Q. Why did you make a payment on September 18th, 1917—now, I am not speaking about the reason of their pleading, I mean why did you pick out that date of September 18th—why didn't you send it on September 15th—was there any reason? A. The only reason I know of is because that was the time that they had come to the point where probably they could influence me to let them have money.

Q. Yes, but was not the reason because the payments were due a month apart, and you made one payment on August 18th, and the next payment would become due September 18th? A. I don't believe so.

Q. Well, could there, under any possible construction that you had at that time, if the organ had been put in shape at that time, be any payment due, after you had made your payment on September 18th, until October 18th? A. I do not quite get that question.

Q. I will withdraw it. If this organ had been complete, to your full satisfaction, after you had made your payment of September 18th, when would you make your next payment? A. October 18th.

Q. 1917, of course? A. 1917.

Q. Now, before that time you knew that this company was insolvent, didn't you? A. Before what time?

Q. October 18th, 1917? A. No, I did not.

Q. When did you first know it was? A. I don't just remember the date, but it was shortly after, I believe, that printed notice—the date on the printed notice there that Mr. Sprackling handed to me; just what date that was I don't know.

Mr. Lane: Was that put in evidence?
Mr. Morten: No.

Q. Can you tell, by looking at that, when that was, or about when it was? A. No, I could not determine; I say it was somewhere around the date there, because I recall Mr. Sprackling saying that he was going to be at the meeting. It was very close around that time, I know.

Q. Well, there is the notice (showing the witness the paper): Now, that notice is dated October 5th. A. You mean "15th"?

Q. No, it is dated October 5th; look at it carefully; and it is returnable before the Court on October 15th; the notice itself is dated October 15th; now, looking at that, would you say that it was some time between October 5th and October 15th? A. I couldn't say.

Q. Did you attend that hearing? A. I did not.

Q. Did you send it to your lawyer to attend to? A. I did not.

Q. Do you recollect getting a letter from Mr. Morten in reference to the notice and returning you the the slip? A. I do.

Q. Well, how did he get the slip, do you know—did he get it from you? A. He did.

Q. When? A. I mailed it to him.

Q. When? A. Shortly after I received it—October 24th, which is the date of the letter to Mr. Morten. I got this from Mr. Sprackling around the time of this meeting, and shortly after that I mailed it to Mr. Morten.

Q. Well, then, did you talk over, with Mr. Morton, the effect of this insolvency on your dealings with the Company? A. I do not recall whether we spoke of that particular thing, or not.

Q. Did you talk over with him as to whether or not you should make this installment payment of October 18th? A. I do not. If I recall, the reason I mailed that to Mr. Morten was because of the fact that I did not know just what would happen when it had gone into the receiver's hands; I did not know my standing; that is the reason I mailed it to him.

Q. Have you any objections to the offer of the letter in evidence? A. None, at all.

Mr. Lane: I offer a letter, dated October 24, 1917, from Mr. Morten to Mr. Robinson, to which is attached a printed copy of an order of the Court, entered on the 5th day of October, 1917, in the suit of James T. Jordan, Petitioner, and American Master Organ Company, defendant.

(Admitted and marked Exhibit C-1.)

Q. Now, Mr. Robinson, will you tell me whether there were any contents of the Colonial Theatre—anything in the theatre—excepting this organ and piano, that were not included in the sale or transfer to the Roosevelt Theatre—were there any other contents that were not included in the sale or transfer? A. Not that I know of.

Q. It included the chairs, scenery, and all that kind of stuff that was there, didn't it? A. Yes.

Q. Took it over as a whole? A. Yes.

Q. I believe I asked you yesterday how much the hire of a piano would cost, can you tell me your estimate of how much the hire of an organ to play music of this kind would have cost per week? A. I have no knowledge; I didn't know they rented them out.

Q. During the time you had this organ, you did not have any other auxiliary music, like an orchestra, or anything of that kind, did you? A. No.

Q. This organ took the place of any orchestra that you would have hired? A. I never had an orchestra there at the Colonial.

Q. And after you had used this organ for some time, say a month or two, and Mr. Hall, the organist, was playing the organ, did you continue making spread ads of your performances, "Come and hear Hall play on the wonderful organ!" or something like that—did you keep those ads up? A. Not more than once or twice, I don't believe. I think I mentioned the fact in the program.

Q. And for how long after—all the while Hall was there? A. No.

Q. When was the last time that you made any such announcement? A. I don't believe I mentioned Hall's name; I don't definitely recall, but I did mention the fact that I had the American Master Organ in the program; I mentioned it in the program the same as I would have done, and had been doing right along.

Q. How long did yon continue doing that? A. I don't just recall.

Q. Well, during the entire time you were using the organ? A. I could not tell.

Q. There is just one other question, Mr. Robinson—have you any objection to permitting our experts to go up to this garage and look at that organ, in order to arrive at the value of it at the present day? A. I have none, whatever.

Q. Then why did you evade telling where the organ was, yesterday? A. Well, I had no reason, at all.

RE-DIRECT-EXAMINATION by Mr. Morten:

Q. Are you the Roosevelt Theatre Corporation? A. I am not.

Q. What office do you hold in it? A. I am President of the Roosevelt Theatre Corporation.

Q. And you are a stockholder? A. I am.

Q. Of about what interest? A. About a seventh interest.

Q. And what position do you hold there in the operation of the theatre? A. I am engaged as Manager, under contract.

Q. This organ in the Roosevelt Theatre—is it larger or smaller than the one you had from the American Master Organ Company? A. It is about five times as large.

Q. And how long have you had it? A. A little over a year.

Q. How often have you had to have a man come over and look at that organ during the past year? A. I have never had occasion to phone the factory once.

Q. You may not have had to phone, but how often has a man been in there to take care of something during the last year? A. I don't believe more than half a dozen times.

Q. Does it play? A. It does.

Q. Fully? A. Absolutely.

Q. Does it get out of order? A. Not in the least.

Q. You have drums and traps in that organ, too? A. There are.

Q. And they respond? A. They do.

Q. Now, you spoke about this intake yesterday—this galvanized iron pipe which conducted

the air from outside of the building to the organ, the suction or blowing part—you said you put that in—at whose direction was that put in? A. At the direction of Mr. Ely.

Q. And who directed where it should be put? A. Mr. Ely.

Q. And was it placed where he directed it should be placed? A. It was.

Q. And who directed the manner in which it should be put in? A. Mr. Ely.

Q. And was it put in in the manner in which he directed? A. It was.

Q. You spoke yesterday and said that you saw your Wurlitzer Organ the last time you were out there and that it was dismantled—

Mr. Morten: If the Court is not going to consider this question, I won't go into it; I am only doing it because of what the Court might think was a misleading answer yesterday.

The Vice Chancellor: I would like to see where there is any question involved in this case that is not a simple common law proposition as to whether this organ fulfilled the terms of the contract; and if it did fulfill the terms of the contract, that is the end of it. If it does not fulfill the terms of the contract, the question is whether or not your client has put himself in the wrong by not attempting to rescind the contract, and, returning the property and looking for his money. I do not know what else there is in this case. I cannot see why it was ever sent to the Court of Chancery. It

seems to me it is purely an action for replevin, or trover and conversion, or for damages.

Mr. Morten: Well, in case your Honor should find that it was necessary, I would not want to be debarred from explaining that situation.

Mr. Lane: I am perfectly willing to consent to that because I cut off my cross-examination on account of what the Court said, and I considered that I was directing my questions this morning directly to what your Honor now says.

The Vice Chancellor: I do not think one-fourth of the testimony in this case has any relevancy whatever.

Mr. Morten: All right, then, I have no further questions.

Complainant rests.

THE CASE FOR THE DEFENDANT

FRANK R. WHITE, sworn:

Direct-examination by Mr. Lane:

Q. Mr. White, were you Vice President of the American Master Organ Company at the time of the entering into of this contract? A. I was, yes.

Q. And were you the active manager of the Company? A. I was Vice President and salesman of the Company, and demonstrator.

Q. Now, was this organ installed in this place? A. Was it installed?

Q. Yes? A. Yes.

Q. And on or about the date that we have mentioned—October 26th? A. I don't remember the date.

Q. Well, after it was installed, did you go there? A. I opened it, I believe, if I am right.

Q. You mean that you played at the opening night—is that what you mean? A. I did, yes.

Q. Are you an organist? A. I am.

Q. For how long? A. I have been an organist all my life.

Q. Well, how long is that? A I am forty-three years old.

Q. Are you playing now? A. I am playing in the Wellmont Theatre, Montclair, N. J. I played the first organ ever put into a theatre, in Chicago. I have been in the theatre end of it ever since.

Q. About when was it—the first time that you played? A. Played a theatre organ?

Q. Yes. A. Oh, sixteen years ago.

Q. Now, did you see whether or not this organ was in accordance with the specifications that are annexed to the contract? A. Yes.

Q. And just explain in your own words, what the condition of this organ was when you went there at the opening night? A. At the time of the opening as I explained to Mr. Robinson's objections on the occasion, we were in the War, many of the men were being taken by the Dupont people for ammunitions; it was very difficult to get workmen, very difficult to get material; and, in his evidence of yesterday, putting in my letter of apology for delay in the opening, he did not state that we had sent him evidence from the people from whom we had ordered the magnets; we had to have the magnets, and they were just two months late in delivering the magnets to us; and it was absolutely impossible, under the conditions that prevailed at that time, for anyone to try and make a contract for a date specifically. Of course, in the organ business this is entirely unusual—for instance, I can state that Mr. Beach, who testified as an expert here, put an organ into the Montclair Theatre, which I played for three years, and Mr. Beach had four openings postponed; and that was within the last three years.

The Vice Chancellor: There is no question here about the delay.

Q. Let us get away from the delay now—what was the condition of the organ when you played it on this opening night? A. The condition was not as it should have been.

Q. What do you mean by that? A. It was not

entirely satisfactory. I have opened over one hundred organs, and I never played one yet that was—not on the opening.

Q. Was this organ as satisfactory as any one of the hundred organs you have played on on opening nights? A. It was.

Q. Well, the Court here don't understand about "satisfactory" from an artistic standpoint—what do you mean by "satisfactory"—just explain it in your own words? A. An organ requires development—you cannot just put it together and have it work perfectly; it requires someone to develop and work upon it to get it perfect. Sometimes they never get perfect.

Q. Could you play the organ? A. I did play it, yes.

Q. Did it give music from an artistic standpoint? A. There was no complaint from the audience; as I remember, the Press wrote it up very favorably.

Q. Was there any complaint from Robinson at that time? A. Yes.

Q. What? A. As to the fact that it was not entirely complete; and I agreed with him—I sided with him; and I had quite a time with Mr. Ely. I gave him fits about it and took Mr. Robinson's part all through this thing very strenuously, and urged our people to do their utmost, which they did.

Q. Well, there have been a lot of things said about this organ—that this would not play, and that would not play, and silent notes—now, as a general rule, are there any silent notes on an organ? A. I have never played an organ in my life where there were none.

Q. And this list of defects that is continued in— A. (Interrupting) Well, I remember the list, Mr. Lane.

Q. Well, that list of defects—were they very material defects, or not? A. They were immaterial.

Q. Why do you say that? A. Well, I can cite instances—for instance, Mr. Beach, a very competent witness on the stand testifying for the other side, who cared for the organ in the Montclair Theatre for two years, at the time he was taken sick and went to the hospital, one year ago, had to put a substitute by the name of Mr. Cross on the job to take care of the organ, and at that time I made a list for Mr. Cross of defects which covered two pages of foolscap, and covered over four hundred silent notes; yet the organ would play; there was no complaint from their manager because he was getting satisfaction, and there was no complaint from the public. I can take any theatre organ, or any electrical organ, and go over it, and it would be a miracle if you found all the notes playing, because the smallest mote of dust would stop a note playing.

Q. Now, talking about the organ as it stood, will you say that it was, both from a musical standpoint and from other standpoints in accordance with the contract? A. No, it was not for a time.

Q. What? A. It was not, for a time—for instance, the point of the drums has been brought up—Mr. Woodberry testified that he took Mr. Ely and I over to his theatre and showed us something he had developed in the way of drums.

I admitted frankly that his scheme was better than ours, although ours had been installed in many organs long before this, and it had been working; but I thought his scheme was better. It necessitated an expense of $350 to duplicate his scheme. I asked Mr. Robinson, who was not satisfied with the drums in our organ, if he would be satisfied if we put that in, and he said he would be; so, as the testimony has shown, we had this thing duplicated and ordered the suction blower already referred to, and had it put in. It has been mentioned as against us, that it came to Mr. Robinson, C. O. D., but that was just an accident, because we expected to pay for it, and there was no argument about it; it just happened they sent them that way there.

Q. And so far as these drums and traps were concerned, did the Company proceed to do what was agreed to, to Robinson's satisfaction? A. Absolutely. It took us about six months to get that blower, if I remember rightly—that suction blower—and naturally, during all that time, the other affair was neglected and we did not bother our heads about it; we knew the other thing was going in, which has met his satisfaction.

Q. Was that organ at the time of the opening, in substantial compliance with the contract? A. I would say it was as good as any opening that I have played—for instance, as Mr. Beach testified, I opened the organ for him in the theatre at Paterson, New Jersey, two years ago; at that time there was no combination machine in it—the contract called for one— there was no combination, no way of altering any stops at all; I

opened the organ and it was perfectly satisfactory, the man who bought it paid for it; and that combination was not in a year ago—a year afterwards it had not been developed or perfected.

Q. Now, did you subsequently play this organ? A. I played it a good deal, from the time it was opened, October 5th, to July, when I went to Butte, Montana; I don't think there was a week I was not down there; and sometimes I played there. I think once I played a whole week down there for Mr. Robinson, pretty near a week, steady.

Q. And how did the organ play when you were playing there? A. I thought it was about as good as any electric organ at the time was; there were none of them perfect. I would like to state this—Mr. Sprackling, who testified, is one of the most competent musicians in this county, absolutely, and he brought forth a list showing four notes silent on one stop—Mr. Sprackling forgot that when he and I were working together on an electric organ in Denver, the only one he ever played, that the Company had Mr. James Nuttall there, all the time that organ was being played. I never played on any electrical organ, when I played one, that I didn't have a man inside keeping it going. For instance, at the Theatre, the witness Mr. Beach was there every night for one year while I played that organ, it was his duty to stay in the organ and keep it going. The organ at Ocean Grove had Mr. Pfeil in it, all the time for four years; it was never played once without his being inside of it. The Pitt Theatre,

Pittsburg—I played there for a year and a half, and it was never played in any performance without Mr. Pfeil inside of it to catch the faults.

Q. How long would it take to remedy a fault of that kind? A. All you have to do is take the magnet off and blow a little piece of dust off, or something of that kind.

Q. In other words, the main cause is dust? A. The main cause.

Q. Was there any trouble about dust in Robinson's organ? A. That is all the trouble there was—it was dust and dampness. It has been testified by Mr. Beach—I heard him testify—that dampness had nothing to do with an organ, yet that is unreasonable, because we all know that dampness will swell wood, and we all know that every note of an organ has a pneumatic which is two pieces of wood covered with leather and glue and the dampness will loosen the glue. You don't have to be an expert to know that.

Q. What about this outside pipe he was talking about? A. I was not there at the time that was done; I was in Butte, Montana.

Q. Now, in July, which was the last time you were playing this organ, was this organ still playing in the manner you have testified to, or was it entirely out of shape? A. Well, you don't have to take my word for it for this reason—that Mr. Robinson had the most important theatre in one of the most thickly populated centres in the county, and it was his only source of music, and I can offer proof that it was satisfactory to the public in this—that Mr. Nicollette, his competitor, thought so well of the business he was doing with

this organ that he wanted to buy one, but Mr. Robinson had a clause in his contract whereby he had the exclusive use of this machine for a period of years, and I spoke to Mr. Robinson, when I found that I could sell Mr. Nicolletti, and get some money out of him; perhaps—I went to Mr. Robinson, and I asked him if he would accept money and waive that clause—I think I offered him (I won't be sure about it) but I think I offered him at that time something like $150, and he refused to waive the clause. Why would he refuse to let a competitor have an instrument if it was as it has been represented?

Q. What reason did he give you, if any? A. He did not igve me any reason; he just refused; he said he would not waive the clause, that we could not sell anybody in his jurisdiction.

Q. When was that—about how long after the organ had been delivered, as you say, and had been playing? A. About four months.

Q. Did he say anything to you, at that time, about repudiating this contract, and you should take back the organ? A. No, he never said anything about taking back the organ; he was always complaining about it, and complaining about these minor things. Any organist can make up a list of those that will cover a page, but that has no material effect on the music. He had 699 speaking notes in that organ, and if twenty of them were silent, nobody would ever notice them.

Q. What does the five year guarantee mean? A. It means that we guarantee the material and workmanship as not being defective.

Q. What does that mean—defective in what

way? A. Well, workmanship or material—if the chest split, for instance, or something like that.

Q. Does that have anything to do with the maintenance of the organ (referring to the guarantee)? A. Nothing at all.

Q. I ask you to look at the long list of troubles that were supposed to be there, and explain the importance of those troubles, or whether they are minor? A. What is this?

Q. Contained in Exhibit D-28 (showing the witness the exhibit designated)? A. Well, take the first—"the center piano pedal which is supposed to lock the piano keys makes the piano silent, allows the keys to drop," etc—the witness took up about, as I remember, quite a little of the court's time complaining—

> Mr. Morten: I object to this witness characterizing other witnesses; it is up to him to answer the question.

Q. (Question repeated.) A. Well, you ask me to explain—shall I read what is here first? I cannot explain it, without reading it, your Honor.

Q. Well, the best thing is to go over the list, and if you see anything that you characterize as something different to a minor trouble, say so; if they are all minor troubles, say so, and let it be cross-examined upon, on what the other side dispute as "minor." A. (After examining the list) They have nothing to do with the guarantee—none of them; they would have to do with the upkeep—simply a repairman's work.

Q. What do you know about organ building—you have played one, what about building one? A. I have never built an organ in my life.

Q. Well, did you have any experience in any factory? A. No, I did not.

Q. Were you with the Hope-Jones people? A. I was with them five years.

Q. In what capacity? A. Well, I was a draftsman.

Q. A draftsman? A. Drawing patterns, and that sort of thing. I understand the principles of it, but I have never worked as a mechanic.

By the Vice Chancellor:

Q. Then I understand all of these troubles that are mentioned in that exhibit that you have just read have nothing to do with the construction? A. Absolutely. That just looks very much like a list that we would leave for an organ man when he comes every two weeks to tune—very much—except that I started to explain, your Honor, on that matter of that lock pedal—that is the very first thing; I don't know what it is, it is not in the contract, I never heard of it.

By Mr. Lane:

Q. Did you ever hear of a lock pedal, which as I understand, would shut off the piano while the organ was playing, or shut off the organ while the piano was playing? A. Yes, I heard a lot about it in court here yesterday.

Q. No, but before that? A. No, as far as I know, there is no mention of anything of that kind in the contract, your Honor. It happened that Kranich and Bach built that piano, and the construction of the piano developed so that when the organ was attached if you pressed the center pedal it pulled a hammer down and released those

keys, so the piano would not play. Now, we did not develop that feature, or anything else. When the springs were light, it would work that way, so that the piano would be silent, and you could play the organ on it. Now, as in the case of Mr. Adams in Paterson, he wanted that developed, and we put in a little heavier spring and he was able to use it; but there was no complaint by these people at any time; I never heard of the thing from Mr. Robinson, until he came into court. None of all the letters here read in testimony, mention it, even.

Q. What other organ did this company build? A. They built several church organs, and also one for the church in Summit, and one in Worcester, Mass. They built an organ that Mr. Robinson saw, from which he bought this, at the United States Theatre in Paterson, which is still playing. It was absolutely a duplicate of the mechanism that he has. It is still playing and giving satisfaction.

By Mr. Morten:

Q. Orchestral organs, do I understand? A. Orchestral, yes.

By Mr. Lane:

Q. Are all these you mentioned orchestral organs? A. With the exception of the church organs.

Q. Which were the orchestral organs? A. The organ in the United States Theatre in Paterson, I will say first.

By the Vice Chancellor:

Q. Is that the only one you mentioned that is

an orchestral organ? A. That is the only one in the lot, so far. Then there is the organ in the Rialto Theatre, Butte, Montana.

By Mr. Lane:

Q. Is that an orchestral organ? A. Yes.

Q. What size—is it bigger or smaller than this? A. It is the largest organ of its type in the world.

Q. And what other organ—orchestral organ? A. Centre Theatre, Ottawa, Canada.

Q. Now, are those organs all playing? A. Yes, they are.

Q. Did you ever see this organ after July, 1917? A. No.

Q. Eh? A. No, I did not; I was in Butte, Montana for a year; I was there when the company went into insolvency.

Q. Is there an organ in Newark like it? A. Yes, at the Goodwin Theatre.

Q. Of the same size? A. Exactly, the same mechanism, exactly, the same kind—not quite as large, but exactly the same thing.

Q. Were those organs built about the same time as this organ? A. They were built before this organ.

Q. And was the construction of this organ similar to the construction of those organs? A. Exactly.

By the Vice Chancellor:

Q. There was some talk here about there being too much power—electric power—used in working this machine—what do you know about that? A. I know this, your Honor, that an organ with a relay has only been perfected, you might say, in the

last two years; it has been made absolutely perfect. Mr. Beach testified that our magnets would not work under the voltage that we were giving it without burning out—nevertheless, it is the fact that in the Regent Theatre, an organ which he built three years later, he used the same magnets on the same voltage, because it was the only thing discovered at the time. Mr. Beach himself, in the last year, has invented a magnet which overcame all those difficulties, patented it, and, I understand, is getting very fine royalty from it. But that has only been in the last year. We admit all the evidence that was put in—any organ builder would have to admit it.

By Mr. Morten:

Q. The evidence we put in, did you say? A. Yes, the Wurlitzer Company admitted it, up to the time they found the remedy for it—they admitted it by having a man in any organ of any size they put up, and I played on all of them.

By the Vice Chancellor:

Q. Your testimony, then, is to the effect that, according to the state of the art at the time that this organ was constructed and put in, it was mechanically correct, according to that art? A. Absolutely, according to the state of the art at that time.

By Mr. Lane:

Q. Have you any financial interest in this suit now? A. I should say not.

Q. Or in the company? A. Absolutely not.

Q. What is the reasonable rental of an organ of this kind per week for using it?

Mr. Morten: I object on the ground that it is immaterial.

The Vice Chancellor: Well, I don't see how it is material.

Mr. Lane: Of course, they have had the use of the organ, on one theory, if the Court please.

The Vice Chancellor: Am I going to give you a money judgment for rent?

Mr. Lane: No, sir; I don't think so, but that is an element, showing the measure of damages, and showing the measure of benefit that he has obtained from this thing. It may, on some kind of theory, become important.

The Vice Chancellor: The only theory that I can see, in this case, upon which it might be offered is to show that notwithstanding the fact that he saw this organ was defective, he still continued to use it, and saved a certain amount of money, which might tend to negative his statement that it was imperfect. I will allow it to go.

A. Well, if any one were to build one, I should think they would charge about as much rental as they would charge in monthly payments. The only difference would be that you would not have to put down the first payment. As far as I know, I cannot conceive of any one doing such a thing—now with such a large organ, because it was a very large organ.

Q. Well, now, what about the rental of a grand

piano like this—a piano like this, without any organ at all, for theatre purposes?

(Same objection, same ruling.)

A. Well, we rent an upright. I think we pay ten dollars a month for the upright. The grand, I should think, would be about twenty dollars a month, if you could rent it; I am not an expert on that; I am not in the piano business; I shouldn't really be giving an opinion on that, your Honor.

CROSS-EXAMINATION by Mr. Morten:

Q. Do you say that in 1917, no organ was constructed that had a magnet that would take care of the voltage for which it was intended? A. No, I do not say anything of the kind.

Q. If the work required on this organ could have been done at six volts, those magnets would have been sufficient, wouldn't they? A. Yes.

Q. And they did not burn out until you commenced to charge them with ten volts, did they—is not that so? A. I forget just what the voltage of the organ was; but I know that was the general condition.

Q. But they did not burn out until you increased the voltage, did they? A. There was very little burning out; but it was very insignificant; it did not amount to a whole lot.

Q. They did not burn out until you increased the voltage, did they? A. Well, naturally, they would not, no.

Q. Now then, the reason you increased the voltage was because the voltage that was used was not sufficient to operate the drums and traps, wasn't it? A. No, it was not the reason.

Q. Was it increased before you started to operate the drums and traps? A. It was never altered from the time it was made until it was scrapped, so far as I know.

Q. How many months did you play this organ? A. One, as far as I know.

Q. How long did you continue running it on the same motor? It had a suction blower, you remember—that is when our organ was put in, it was on pressure, and Mr. Woodberry's scheme for drums required suction, and that increased your voltage, didn't it? A. Not as I know of, because the trouble you are complaining of was six months before that drum thing was put in.

Q. Do you know how many volts that magnet contained? A. No, I am not an expert; I told you I was not.

Q. Then you don't know whether this mechanical action was perfect, or not, do you? A. It was as perfect as anything at the time was—I know that.

Q. How do you know that? A. Because I know from having played all the organs from the time we put on the first to the time they went in business. I should have known it.

Q. Is the organ at Asbury Park an electric organ? A. Yes.

Q. Do you know Mr. Beach was there for a while? A. Yes.

Q. Do you know there were times that there would be a month go by that he would not touch the thing? A. I don't believe that.

Q. If he would say so, would you believe it? A. No, I would not, because—if you will pardon me

for interrupting—they could easily call witnesses to disprove that, because how about Mr. Pfeil—he has made a business of doing nothing else but caring for this organ for years.

Q. Well, I just asked you whether you knew that? A. No, I do not know it and I don't believe it.

Q. Now, then, you say you are sufficiently familiar with the mechanical action to tell what voltage it would require to operate these things without burning out? A. No, I would not like to answer that. It is four years since I have had anything to do with the mechanics of the organ, I have even forgotten what voltage it was on.

Q. This central pedal, after it was put in by you, was intended to work? A. It was not put in by us.

Q. If it was included in the piano you put in, and the stop on it was supposed to control the organ, it was supposed to work, wasn't it? A. No, it was not; it was made by the Kranich & Bach people; it was just an ordinary piano.

Q. You mean to say that you put in a centre piano pedal, or allowed it to be put in, which would cipher the organ without the desire of the organist? A. It would not cipher it unless you put it down.

Q. Mr. Sprackling says it did—what do you say about it? A. I say it did not.

Q. You say it did not? A. Yes.

Q. That you could operate that centre piano pedal and get satisfaction? A. No, pardon me—for that I will say this, that it was not intended to be put down.

Q. Then why was not that removed? A. Because it would have destroyed the appearance of the piano.

Q. Did you ever see a piano with two pedals? A. No, I never did—not a grand.

Q. Was this piano in open sight of the audience? A. Yes.

Q. Do you mean that persons in the front row could see it, and persons in the back row could not see it? A. Yes. Nobody would want to have a perfectly good grand piano and have the centre piano pedal taken off—for no reason.

Q. Even though it would tend to create a discord in the operation of the organ if it happened to be touched—is that right? A. Well, no; it was not a case of touching it; as I understand it; you would have to put it down and lock it before it would do that.

Q. Did you ever try it? A. I have played the organ a great deal and never thought of doing it.

Q. And you never touched the centre piano pedal? A. No, I did not, except to put it down and see what it would do, just out of curiosity more than anything else. When we found it would do that—

Q. (Interrupting) How could you play the organ without playing the piano? A. I would play on the other keyboard—there were two keyboards.

Q. How would you play the lower keyboard? A. I would not play it.

Q. Then you did not have the full use of both keyboards? A. Yes, you could play the full organ with both keyboards—with the piano.

Q. But you could not play the keyboards without the piano, could you? A. No, not on that organ, because there was no complaint made about it. During the time Mr. Adams thought he would like to try it, and they just put a little additional spring on it, and it worked perfectly.

Q. So there was no complaint about it? A. There was no complaint in any of your letters submitted as to any of those points at that time.

Q. How would you work the soft pedal of the piano in conjunction with the organ, without using the centre pedal? A. I would not have to touch the centre pedal, at all.

Q. You still could do it? A. Yes.

Q. Do you say that could be done? A. Yes.

Q. On this organ? A. As far as I can remember, it could.

Q. Did you ever try it? A. No, I never tried it, because it was not necessary to try it.

Q. Don't you know, Mr. White, that it could not be done? A. What?

Q. (Question repeated.) A. Why couldn't it?

Q. Because the organ would not play, that is why? A. Well, it had nothing to do with the organ, as far as I remember.

Q. Well, all right. Now, then, your crescendo pedal—how many stops should be used in bringing that out? A. I don't know.

Q. You mean you don't know about this particular organ? A. No, it is so far back; I don't remember it.

Q. Well, have you any recollection at all? A. No, none whatever.

Q. Ten? A. I haven't any recollection of that, at all.

Q. Well, do you think it was any less than ten? A. I don't know; I should think it would be considerably less than ten.

Q. If it was three, would you say it would be proper? A. Well, you wouldn't need much more than five, in an organ of that size.

Q. If it brought it on in three, would you say it was working properly? A. Well, it might do it; it was not a very big organ.

Q. How many have you in your own now? A. We haven't any crescendo pedal in that. They are out of date.

Q. How many tremulants did this organ have? A. It had two.

Q. When you finished it, or when you tried to finish it, the specifications called for two, didn't they? A. I think they did.

Q. And they were put in, weren't they? A. No, I think at that time—my own organ has only got one tremulant—but this argument about the vox humana—as a matter of fact, they are not using an individual tremulant for the vox humana any more, today.

Q. But at that time they were, weren't they? A. At that time they were, and we tried to do away with it, and we weren't satisfied, and we had to put in another one.

Q. That was the reason you had to bleed them, didn't you? A. I don't know anything about that.

Q. You know they had to take out one tremulant, don't you? A. No, I don't know that. Remember this—I was not the Superintendent of that factory. I had nothing to do with the mechanical end; I was not the Superintendent of

the factory. I don't know all about these details; I can testify in a general way as to what I know of it, but I am not an expert; I had nothing to do with that sort of thing.

Q. You said this organ had 669 speaking parts? A. Well, you told me that. I never figured them out; I took your word for it. You told me so, in the hall. You were surprised to find it out.

Q. Didn't I tell you it had 699 pipes? A. I don't think it had that many—I thought you meant like chimes and everything else included.

Q. No, I told you it had 699 pipes, and if you were relying on what I told you, then that is what I told you. A. Well, I am surprised—I didn't know it was as much as that.

Q. How many pipes are there in the one you have got now, that you are playing on? A. I haven't figured them out; I should imagine about three thousand.

Q. And do you mean to say that organ is fifteen per cent deficient—is that so? A. What organ?

Q. The one you play on now. A. Fifteen per cent?

Q. Yes. A. I didn't say so.

Q. You said it had four hundred pipes alone that would be out of order and silent and you didn't think that was anything. A. Well, it was something that should not have been. I will admit that, but it was still playing.

Q. Oh, you can play it and get some kind of a sound, but would you call it "music" from an instrument of that kind? A. Well, I admit that was a very bad average at that time—I will ad-

mit that; in fact, it was so bad that Mr. Beach was discharged on the strength of it, and the work was given to Mr. Peregallo—that is the reason he lost out there, it was so bad.

Q. You never saw the organ in the Roosevelt Theatre? A. No, but I have seen others like it; I saw one like it yesterday; Mr. Beach showed it to me.

Q. And the one in the Roosevelt Theatre, if it did not require any attention for twelve months excepting on six different occasions, which were minor details—what would you say about that? A. I would say that it was impossible.

Q. You say it was impossible? A. Absolutely, because it would be grossly out of tune with every change of weather, to start with, and you would, at least, have to tune it.

Q. We are not talking about tuning, we are talking about the mechanical end of it—now, if it does not require attention in the mechanical operation for twelve months, what would you say about it? A. I would say it was wonderful.

Q. You would not say that, was impossible would you? A. Well, the times have changed; they have got this thing down fine. I am playing an organ now that will run for two weeks, I will say, without ciphering. We get one, on an average of every two weeks.

Q. You mean, this one in Montclair plays two weeks without a cipher? A. Sometimes it does; sometimes we have a bunch of them all at once.

Q. And that is the one you complained of that had four hundred silent notes? A. Yes, sir; that is it.

Q. What was done to correct that? A. Mr. Perragallo was given the contract to put it in shape.

Q. And after he gets the contract, it still has these four hundred silent notes? A. No, it has none in the first week after he finished it; then some dust gets in, and there were 61 notes, we will say, in a string stop—they are very delicate, and the dust gets in and clogs up an opening, and that one note is obscured, but there are sixty left, and nobody would fuss about that.

Q. Do you know whether your electrical contacts burn out, in the organ you have got now? A. I couldn't say about that; I believe they do once in a while.

Q. But they do not burn out constantly, do they? A. No, of course I should mention that our organ that I am referring to has been remodelled, even the relay is not the same at all, as it was in those days you are speaking about.

Q. It is not like the design of the American Master Organ, at all, is it? A. No.

Q. Now, then, take your stops on your percussion—you think they should be in such condition that they should work on the first touch instead of the second touch, when they were designed to work on the second touch? A. What is that, again?

Q. (Reading from the list) "8 stops on the percussion—8 stops on the pedal are either on all the time, or off all the time"—do you think that should be so? A. No, it should not be so, of course.

Q. Is not that a mechanical defect? A. No, it

might be due to some error or wiring—cross wiring, or something.

Q. That is a mechanical defect, is it not? A. No, because any one could alter it, if he wanted to.

Q. But it is a mechanical defect, is it not? A. No, not necessarily?

Q. What kind of defect is it? If the wiring is crossed, so that it will burn off, is not that a mechanical defect?

The Vice Chancellor: What difference does it make whether it is, or not—the fact remains that correction of the wiring would correct the evil.

Mr. Morten: It would, if it was only a correction of the wiring; but if there is such a burning-off that would be a mechanical defect.

A. They were not constantly burning off, as I remember; a few of them burned off. I remember I played it when it had a few silent notes, and I made an awful row about it. I did that for the effect it would have upon our workmen.

Q. Why should you make an awful row about something that should be expected? A. Because you have to keep forcing and forcing all the time to get the best out of them; you can't let them get away with anything.

Q. Even though it should be expected and happens in every organ—is that right? A. Yes, at the time it did.

Q. Now, if these things operate on the first touch, instead of the second touch, is that right?

A. Well, they are supposed to work on the first touch.

Q. Were they? A. I never knew of an organ where they did not.

Q. The percussion? A. Well, what percussion do you mean—the cymbal works on the second, the drum works on the first.

Q. And if those things that are designed to work on the first work on the second, and those things that are designed to work on the second, work on the first—is that a mechanical defect? A. No, it is simply that they must have been wired up wrong.

Q. That is a mechanical imperfection, is it not? A. No, simply a case of taking the wire off of that contact and putting it on this one.

Q. Certainly—that is a mechanical imperfection, is it not?

The Vice Chancellor: Why waste time in using mere change of words? I know what it means—it means just as the witness says, that it is a fault of the wiring.

Mr. Morten: Certainly, faulty construction.

The Vice Chancellor: I don't care what you call it; I will call it what is necessary.

Q. Should there be a short circuit in organs of this kind? A. There should not be, no; but there often are.

Q. Do you have short circuits frequently? A. Where?

Q. In the organ you are playing now, for instance? A. No, I haven't had a short circuit, for a year, perhaps.

Q. If the mechanism is proper, and properly installed, there should not be, should there? A. Well, we have a short circuit in our lighting system very often, and it is properly installed. You cannot help those things. No mechanism is absolutely perfect.

Q. How often should you have them? A. I should say, perhaps, once a year.

Q. And if it happens frequently, then there is something wrong, is there not? A. I would say there was, yes.

Q. Now, do you know this organ called for a triangle? A. Yes, I did.

Q. Did you know that none was installed? A. No, I did not; there might have been, but I don't remember.

Q. Will you say there was? A. No, I wouldn't say there was or was not; and if there was, I would say it would have been a very simple matter. If you, at the time, had notified us there was no triangle (the triangle cost about thirty cents and the action $2.00) the triangle would have been put in.

Q. But I say it was not put in? A. Well, I don't know that is was; my personal idea is that it was; but I cannot say why it was not in; it is inconceivable; I don't know why it was not done, because the drums all go together—all outfits work together—so why should we omit the triangle? Perhaps we did, for some reason or another. As I say, I was not in the mechanical department, at all, and when you are asking me these questions, I cannot answer them.

Q. Did you know there was a triangle stop? A. Yes, I imagine I did.

Q. And did you know that you would get the triangle on that stop? A. No, I wouldn't know that.

Q. Will you say that you ever did? A. I don't remember.

Q. You played that organ frequently, didn't you? A. Yes, played it a great deal.

Q. And will you say that every stop operated as it should have operated, at any time? A. At any time.

Q. Yes. A. Yes, absolutely.

Q. I mean, that all operated at one time? A. Yes. Mr. Robinson's letter read yesterday testified at one time we performed a miracle, and he was right; and even then he would not pay for it.

Q. Now, tell me how you could get a triangle that was not there, tell me that? A. You couldn't get a triangle that was not there.

Q. Of course you could not get it. Could you get the tambourine? A. Not if it was not there.

Q. Now, do you know whether it was there, or not? A. Yes, I know the tambourine was there. I never used the triangle—I might say I never used the triangle myself, because I don't think it belongs in an organ. The tambourine I have used in the pictures, because sometimes it is well to use it to fit the picture.

Q. Well, can you tell me why you put these in your specifications if they were not going to be so they could be worked, or they were not necessary—can you tell me that? A. Because the buyers wanted them; and they did work; and they were always put in, as far as I know. You say they did not put in the triangle—I have no

way of refuting you, but it does not seem believable to me.

Q. I did not say you did not put any triangle in there—I only asked you whether you knew it. A. Well, I wouldn't know it; I couldn't prove that I did not, but I will say it is quite unbelievable.

Q. When you last saw that organ, or last played on it, was there an 8-foot open diapason there? A. What 8-foot open diapason?

Q. Called for in your specification? A. I don't know; I don't remember that.

Q. Do you remember, whether or not, the night you opened the organ, it was there? A. No, I don't remember that. I know it has been brought out in the testimony, and the only thing I could say that I remember of all that testimony of things that have been complained of here, is that we substituted a cello stop for the diapason.

Q. Why did you do it? A. Because Mr. Kenyon, who was Mr. Robinson's organist at that time, had heard this stop, I believe in one of the theatres in Paterson and liked it very much, and asked if they could have that—he preferred to have the cello, and we put it in. It is also complained that we left it open and did not enclose it—remember this; that in all theatre organs there are a great many stops that are unenclosed because we don't have any dignity of tone, if there was no expression.

Q. We are talking about theatre organs—are these stops that are unenclosed of such power as to drown out the rest of the organ? A. Yes, they would, easily.

Q. How would you use them, then? A. They do not put the rest of the organ on with it. For instance, it would be foolish to put on an unclosed diapason with the vox humana because anybody would know the vox would not be heard at all.

Q. That is just what happened on this 8-foot diapason? A. Exactly, what was supposed to happen; it was for the dignity. When Mr. Hall gave his Wagnerian program there, and the house was packed, and they were advertising all over, he relied a great deal on that big stop for the magnificent effects of the Wagnerian music, and he could not have produced it without it.

Q. Then, if it was not supposed to be used, why did you call for it in your specifications? A. Well, because that specification was made up to suit Mr. Robinson, and then, just the same way—

Q. (Interrupting.) You say it was made up to suit Mr. Robinson? A. Yes, and his organist came in, and we were friends, and they said they wanted it; and it is the same way in this argument about the trumpet—

Q. You do not answer the question. A. I can't say "Yes" or "No" to it.

The Vice Chancellor: He said this specification was changed at Mr. Kenyon's request.

Q. Now, I ask you, Mr. White, if your open diapason was not supposed to be used with the rest of the accompaniment of the organ, why did you include it in the part of your specification which provided for it? A. I don't know what you are asking me; I don't understand it.

Q. If your specification provides that this 8-foot open diapason was to be used with the accompaniment— A. What do you mean, "with the accompaniment"?

Q. In the accompaniment? A. Oh, yes, yes.

Q. Then it was to be used with the rest of the organ, wasn't it? A. Yes, you could play the whole organ together, if you wanted to do it.

Q. Now, if that is the case, and you drown out the rest of the organ, why was it put in there? A. You don't drown out the rest of the organ, that is silly.

Q. You testified a moment ago it would do it? A. Well, I would say it would predominate it, it would not drown it out, it would predominate it.

Q. Our witnesses said it destroyed the sound of the rest of the organ, and if it did destroy it, you would not consider it a proper place to put it, would you? A. Well, but the witnesses were wrong.

Q. Why, you said there was no 8-foot diapason there at all—how do you know they were wrong? A. Well, there was a diapason in the organ, I imagine—a small one, inside.

Q. I am talking about an outside one. A. Well, we put in a gambier in place of it, which cost us more money.

Q. Was there an 8-foot diapason there when you opened that organ? A. I think there was a small diapason in the organ.

Q. I am talking about outside? A. As far as I remember, there was not.

Q. Why did you say you substituted a string

for it, or cello, at Mr. Robinson's request? A. Well, at somebody's request, I remember at the time.

Q. How could you substitute something that you did not know was there? How could that be done? A. I didn't say I did not know it was there; I admit the string was there.

Q. I am talking about the 8-foot open diapason, did you know that was there, or not? A. It was not there.

Q. And never was there? A. And never was there—I never said it was.

Q. It was not there the opening night? A. Not that I remember. I am taking your word for it.

Q. Didn't you say this 8-foot open diapason was put there at the request of Mr. Kenyon? A. No, I didn't say that.

Q. Because he had seen it out in Paterson? A. No, I didn't say that; I said the gambier was put there at the suggestion of Kenyon, or somebody.

Q. What was put there? A. This cello that you had there, or whatever it was called—this stop; you have so many names, you get all mixed up.

Q. Did you see the cello after it was put there? A. Yes.

Q. Where was it put? A. I don't know; it was put in the organ some place.

Q. Well, what part of the organ? A. I don't know; it was unenclosed, as I remember.

Q. It was unenclosed? A. Yes.

Q. That means outside, doesn't it? A. Outside, yes.

Q. When was that put there? A. I don't know, don't ask me. I wasn't in the factory, as I tell you. I imagine it was put there when the rest of the organ was put there.

Q. The chest for the open diapason was there, is not that so? A. I don't know; don't ask me; you can tell me that, and I will believe you.

Q. You said that that was substituted for the diapason, didn't you, and if the diapason was there they had a chest for it, didn't they? A. We didn't have a diapason there, did we?

Q. I am asking you.

The Vice Chancellor: Well, he said, half a dozen times, he doesn't know.

Q. Do you mean to tell me that Mr. Robinson, who knows nothing about music, insisted upon this open diapason?

Mr. Lane: He said the "organist insisted."

Mr. Morten: No, he said Robinson.

A. He didn't insist upon it, or else it would have been put in; he didn't insist upon anything; he was perfectly willing, for instance, in the case of the trumpet, for us to substitute a stop which cost twice as much as a trumpet; then he comes back at us and makes that an excuse for not paying, for the violation of the contract, when it cost us money. Remember this—this organ cost us more money before it left the factory than his contract called for, and it was put in purely for advertising.

Q. Now, just on the subject—don't you know

that your contracts called for "no substitutions, unless they be by consent, in writing"—don't you know that? A. Yes, I know all of that.

Q. And you mean to tell me that you substituted this horn, at his request without having it in writing? A. Yes, we were foolish enough to do it.

Q. Wasn't that put in because your trumpet was out of order and could not be used? A. No, it was not.

Q. What did you put in place of the trumpet? A. I remember we put in an expensive stop—what you call it, in English, I don't know; it is called "Corps Anglais." The flugelhorn is sometimes used in this country, but it is a very expensive stop.

Q. And there was no trumpet there, was there? A. I don't know.

Q. Well, why did you say it was put in for, if you don't know? A. I think there was a trumpet there at the time, and they liked this better and we gave them that. We did everything we possibly could to satisfy them.

Q. Didn't Mr. Robinson, at the time you were talking about this organ, leave everything to you because he knew nothing about an organ at all? A. I should say he knew considerable about it.

Q. At that time? A. Yes, he was very intelligent on organs, knew all about the mechanism and all about the stops; and, as far as I knew, he left nothing to me.

Q. Do you remember the night you opened the organ—do you remember that you played that night? A. I think I do, yes; and I don't remember anything happening.

Q. Didn't you curse and damn the Bourdon stop, that night, because it could not be worked? A. I wouldn't say that I did; it is not my custom to allow myself to act in that fashion; I have opened organs when hardly anything worked; and what is the use of worrying about it?

Q. Well, didn't you? A. I don't remember, but I will say I did not. I will say and admit that it was not at all to my satisfaction, on the opening night—not at all—and I raised a row with the factory, and I took Mr. Robinson's part; and I will admit it was a terrible opening, but it was not worse than one of the openings I had when I opened Mr. Beach's organ here in Paterson two years ago; it was worse; there wasn't any tremulant, there was no swell shutters—it was terrible.

Q. And was that what you anticipated—on opening night like that? A. I did not anticipate it; I was disappointed myself, but our men were going to ammunitions and our material wouldn't come.

Mr. Morten: I object; that is not responsive; I ask that it be stricken out.

The Vice Chancellor: He stated all that before.

Q. Didn't you try this organ the night before you opened it—that is, before the night that you did open it? A. I don't remember that; it is four years ago; I couldn't remember anything about it.

Q. Do you think you came there without any previous knowledge as to its condition and opened up the organ and played on it for an audience? A. No, it is not likely I did; it is likely I practiced on it first; I don't remember.

Q. And you found this condition, didn't you? A. I don't remember anything about it.

Mr. Lane: It is seven years ago.

The Witness: How many years ago is it—seven?

The Vice Chancellor: Between six and seven.

The Witness: I don't remember anything that happened, excepting that I got up and spoke to the audience when one opening was postponed, and took the blame for the affair; that is all I remember.

Q. Didn't you have to postpone that opening, and tell Mr. Robinson that you would not play on the instrument until it was perfect? A. Yes.

Q. And yet you went to work on opening night, knowing that organ was not in perfect condition, and played it? A. Well, I had to; the opening had been advertised, and I was not running that theatre.

Q. You had already caused them to postpone it twice, hadn't you? A. Possibly I did; I don't remember. We were only causing one postponement; it was not *our* fault; we had a contract with a man to supply the magnets and he fell down.

Q. You mentioned about several organs that you built—why didn't you mention the Ridgewood Playhouse organ you built and never got paid for?

Mr. Lane: I object to that, because we did get paid for it under a decree of the Court.

A. Well, would you like me to answer?

Q. I want to know why you didn't mention that organ? A. Well, there was nothing the matter with that organ. Your star witness, Mr. Sprackling, who testified that this was such a violation of this contract—his wife played it for a year and a half.

Q. Why didn't you say you built that organ and couldn't get paid for it until you went to the Court of Chancery and had a litigation? A. When I was mentioning the organs, I would have gone on and told you about the Ridgewood, if you had let me.

Q. Did you say Mr. Sprackling's wife played this organ? A. For a year and a half.

Q. At what time? A. Practically from the time it was installed, for a year and a half.

Q. You are sure about that? A. Positive—positive—absolutely. She was not his wife then.

Q. Now, did you get paid for the organ at Butte, Montana? A. I got an offer of payment but I would not accept it.

Q. You never got paid for it, did you? A. No, do you want me to tell you why?

Q. No, I don't want you to tell me why. And didn't you take this 8-foot diapason from Robinson's organ and take it out to the Butte, Montana, organ? A. We might have done it—I don't know what we did with it.

Q. You don't know where it went? A. No, it might have gone to Butte, or anywhere; but it was not done to defraud you of the use of it, because the 8-foot diapason is not expensive. In all the letters you put in evidence you never even mentioned that point; in all your complaints why

you would not accept that organ, that was never brought up; it was never brought to our attention until I heard it in court.

Q. Didn't you see any of the correspondence that passed? A. I heard all that was read in court; I didn't hear anything about it; and I certain did not see any complaint about it in my records. I never heard of it until you came to court.

Q. Well, will you tell me, Mr. White, the difference between what you consider "upkeep" and "faulty construction"? A. "Upkeep" refers to the corrections due to tuning, and the corrections of faults which may occur, for instance, in the circuits—burning out; anything that might happen to wear and tear.

Q. Now, would you consider the installation of this new system that you had to adopt in order to get the drums and traps working properly, "upkeep"? A. No, we were willing to pay for that. We did not charge you anything for that.

Q. Do you know that Mr. Ely, in his letter, referred to that as "upkeep"? A. I heard something about it.

Q. You would not call it "upkeep," would you? A. No. It was an experiment that we were willing to indulge in, as far as the initial expense was concerned. We might have tried to have you bear the expense of some of the work on it, I don't know.

Q. Now, is it your idea that if these magnets were not sufficient in size to take care of the voltage and kept constantly burning out, that the replacement of those magnets would be "upkeep"? A. Well, what else would it be?

Q. I am only asking you whether that is what you call "upkeep"? A. Yes, I would say so.

Q. Would you call the replacing of a broken part "upkeep," if it was due to the fact that there was defect in the material? A. No, naturally not.

Q. And if there were a short circuit, and that short circuit burned off contact points that was caused by the fact that the voltage was higher than the instrument was intended for—would you call that "upkeep?" A. We never admitted the voltage was high.

Q. I am not asking you that—I am asking you, if that were true, would you call it "upkeep"? A. If it were true? That is a hard question; I don't know what to say—yes, I would call it "upkeep"; yes, just off-hand, I would; because it happens in my own organ, and it has nothing to do with the validity of the contract. It happens in all organs. Why shouldn't it be "upkeep"?

Q. How often does it happen in your organ? A. I don't know how often.

Q. When did it happen last? A. Oh, I suppose it happens every three or four months, perhaps, that there is some trouble.

Q. If it happened every week, what would you say then? A. Every week?

Q. Yes. A. What would I say? What do you want me to reply to that?

Q. I want to know whether you would say that was "upkeep" or due to mechanical imperfections? A. Why, I would say it depended upon where the fault was.

Q. If the contact points were constantly burning off, in this case, that were used the most, and the burning and falling off of those contact points was due to the fact that there was an excess voltage which was greater than the magnets were intended to carry, what would you say then? A. Well, if your Honor please, I don't care to answer that question, because I do not care to testify as an expert; I am not an expert in electricity, or organ building, and I feel that is just a trap being set for me to say something I am not sure of. I will testify to anything in connection with this case in a general way. When it comes to giving expert testimony, there are many men you can call—John Perragallo can answer all those questions on our side, and Beach on yours. Now why should I be asked to fall into some trap; and it is purely technical, and I am not qualified to answer it.

RE-DIRECT-EXAMINATION by Mr. Lane:

Q. During this period from October to July, when you were around here, you had several talks, did you, with Mr. Robinson, about different things that should be taken care of on the organ? A. Yes; we were very friendly and very close.

Q. Did he ever mention to you that there was no triangle on the thing, and he wanted you to get one? A. I don't remember. If he did, it would be a joke, because a triangle is only something like a "bird," and that "bird" you are talking about you buy on a street corner for fifteen cents. A triangle you can buy for forty-five cents. It is nothing to dispute about.

Q. Now, did he, during that time, question the lock pedal? A. I never heard of it until I came into court.

Q. Now did your Company while you were there, do everything humanly possible to take care of any fault found by Mr. Robinson?

Mr. Morten: I object.

The Vice Chancellor: I will sustain the objection.

Q. Did your Company do everything, or did you do everything you could to take care of any fault that was found in the organ by Mr. Robinson?

Mr. Morten: I object, if the Court please.

The Vice Chancellor: I will sustain the objection.

JAMES JORDON sworn:

Direct-examination by Mr. Kilgen:

Q. Where do you live? A. Paterson.

Q. What business are you in? A. I am not in any business, at all, now.

Q. What business were you in in 1916? A. Piano business.

Q. How long had you been in the piano business? A. 27 years.

Q. At the same place, Paterson, N. J.? A. Yes.

Q. What connection, if any, did you have with this American Master Organ Company? A. For a short time I was the President of the Company.

Q. Were you President during the time that this organ was being constructed? A. I was.

Q. You signed the contract, did you, for its construction? A. I believe so.

Q. Before that, how did you become identified with the Company—in what way? A. Mr. White and Mr. Ely came to Paterson and, through another man, brought it to the attention of the Chamber of Commerce.

Q. You were connected with the Chamber of Commerce? A. I was on the Industrial Committee, and the matter was referred to me, and I went out to Wausau and looked over their plant, and I thought it was all right, a good thing, and I suggested, that, if possible, it be brought to Paterson, because of the fact that it was to employ male help.

Q. Did they have a plant in Wausau of any importance or significance? A. It seemed to me that it was.

Q. Were there a number of men employed? A. There were a number of men; I don't know how many.

Q. At any rate, it resulted in the plant being moved to Paterson? A. It did.

Q. And you were then made President of the Company, is that right? A. Shortly after; sometime during that year.

Q. Did you make any investment? A. I did.

Q. Did the merchants of Paterson make any investment? A. Several of them.

Q. Paid whatever debts the Company owed up in Wausau, did you? A. I paid them.

Q. And the plant was moved to Paterson, or Lakeview, wasn't it? A. Yes.

Q. Which is a suburb of Paterson? A. Lakeview is in the city limits of Paterson.

Q. And you rented a factory there? A. We did.

Q. And you moved the plant and machinery in there? A. Yes.

Q. About how many men did you employ in Paterson?

The Vice Chancellor: What difference does it make? I do not see what bearing this has on the case. The whole question is, did you make and deliver a musical instrument in accordance with this contract, and if you did that, that ends this case; and if you did not, has the conduct of the complainant been such since that he is stopped from setting up that it was not correct, by acceptance, and waiver of right to object.

Q. Do you know whether the organ which was put in the Colonial Theatre complied substantially with the contract that you had signed with them for the building and erecting of the organ? A. I don't know.

Q. You knew the organ had been put there? A. I was told it was put there by the Secretary.

By the Vice Chancellor:

Q. Do you know anything about the manufacture of these player-organs? A. No, your Honor.

Mr. Kilgen: He is not an expert on organs.

By Mr. Kilgen:

Q. You know something about pianos—is that right? A. I think I do.

Q. Mr. Robinson never paid the American Master Organ Company, according to the terms of the contract, did he? A. I was so informed by the Secretary of the Company.

Q. Did you ever make a demand on Mr. Robinson? A. Through the Secretary, we did.

Q. Did the Secretary make report to the Directors and officers of having made a demand and not getting payment?

The Vice Chancellor: I do not see anything this far, that this witness has testified to, that is germane to this case. What do you want him to testify to? Why don't you get down to the meat of it?

Q. You know what the Kranich & Bach piano is, do you? A. I do.

Q. Do you know whether there was one connected with this organ? A. There was.

Q. What would be a reasonable rent for the use of a Kranich & Bach piano, by the week or the month? A. A grand, or an upright?

Q. A public grand—the kind you saw? A. Not less than $10 per week for a theatre; but that would largely depend on where it was to be used and how much use would be expected of it. But, in a theatre, the reasonable cost would be $10 a week—not less than that.

Q. Do you know anything about the renting of organs of this kind—did you ever have any experience of that kind? A. I did.

Q. Where? A. One of the contracts was assigned to me, and after the failure I rented this organ. This organ was in Newark, in the Goodwin Theatre.

Q. What was the reasonable rent for the organ?

Mr. Morten: I object, if the Court please; he has not shown any qualifications.

The Vice Chancellor: I will sustain the objection.

Q. What would the reasonable rent of an organ of the kind put in the Colonial Theatre be per week?

Mr. Morten: I object, if the Court please, on the same ground.

The Vice Chancellor: Same ruling. The witness has not shown any qualification; he just speaks of one instance, where he rented an organ after the contract was made.

Q. You do not know of any other instance or case where an organ had been rented for theatres? A. I do not.

Q. Will you be kind enough to tell the Court why and how the Pipe Organ Maintenance Company got into the matter of these contracts—whether they solicited the Receiver, or you; or whether you were the one that got the Pipe Organ Company interested and got it to develop, and why?

The Vice Chancellor: I do not see that that has anything to do with it.

Mr. Kilgen: They set up, in one of their

answers, that the corporation was not in existence at the time, and insinuate that a lawyer had done a wrong, a thing which a lawyer is not supposed to do—

The Vice Chancellor: I do not care about that. You can prove the fact of the incorporation and all of that, if you want to, but I do not see the connection.

Mr. Kilgen: Why, to show that we did not solicit it.

Q. State how it came about? A. The Receiver was very glad to sell the accounts to anyone who would buy them, as he stated on the stand, that he wanted to wind up the affairs, which he did.

Q. You came to me, didn't you? A. I came to you, yes.

Q. And you asked me, if I could not find some way of disposing of the accounts? A. Yes.

The Vice Chancellor: Oh, I see. I thought you were talking about the organization of the Company and soliciting the trade of Robinson.

Mr. Kilgen: Oh, no—it was as to whether there was any impropriety—whether my appearance in the matter was in any manner irregular.

The Vice Chancellor: I see.

Q. I told you I would see what I could do—is that right?

Mr. Morten: I object to that. Is this gentleman testifying?

The Vice Chancellor: Just ask the witness the questions, and do not lead.

Q. What was the result, or what did you do about disposing of these unfinished contracts, or organs, and in the matter of obtaining payments for them?

Mr. Morten: Were you there at that time?

The Witness: I was there at the time.

A. The accounts were sold to you.

Q. Do you remember whether you stated that the Receiver wanted money to pay up the preferred creditors? A. I do.

CROSS-EXAMINATION by Mr. Morten:

Q. Mr. Jordan, you are familiar with the construction of pianos—that is your business, is it not? A. It was. I retired from that business three years ago.

Q. And when this piano, or any of these pianos, was put in with an organ, the construction of those pianos was made with the idea of having them connected up with these organs, wasn't it? A. Some slight change was made in the piano, to admit the organ keyboard, that is all.

Q. Yes, the idea was that these pianos were made a little different from what a piano would be made that was going to be used simply as a piano, and in connection with nothing else—wasn't that it? A. No, sir.

Q. Did you make any difference in the construction of the piano at all—in the pedals or in the control? A. No, sir; not to my knowledge.

Q. Were not parts added to it? A. After it reached our factory.

Q. Yes, that is what I mean? A. Oh, I thought you meant the piano-maker did it.

Q. Well, the Kranich-Bach people made this piano, didn't they? A. Yes.

Q. Then they sent it to your factory so you could make such changes or additions, or take away what was necessary, and do what would be necessary? A. So as to tie it up to the organ?

Q. Yes? A. Right.

Q. And provision was made to lock the centre piano pedal in your factory, wasn't it? A. Not that I know of.

Q. You didn't know that? A. No.

Q. Well, if the piano pedal had a lock, it was done in your factory, was it not? A. If it was made at all, I suppose it was.

Q. And if it was made at all, it was made for the purpose of allowing the organ to be played without the piano, wasn't it—that is the purpose of it, is it not? A. I never understood that to be done. We had an extra keyboard for the organ, so that it never seemed to me that it was necessary to lock the piano when we had the extra keyboard connected with the organ, or for the organ.

Q. Well, could you play the lower manual and play your organ without playing the piano, without the centre piano lock? A. Yes, you could play the lower keyboard.

Q. Without playing the piano? A. Without playing the piano.

Q. I do not want any misunderstanding about it, Mr. Jordon?

The Vice Chancellor: This is not cross-examination. He is your witness.

Mr. Morten: I am; I don't want to mislead him, and I think Mr. Jordan is mistaken, honestly.

Q. The lower manual is the manual that plays the piano, is it not? A. No, that is the manual that plays the organ.

Q. And if you play the lower manual with the centre piano pedal keyboard open, what happens—do you play the piano? A. I don't understand you.

Q. If you don't have that piano lock on, when you play the lower manual, does the piano play? A. No, sir.

Q. It does not? A. No.

Q. The piano lock affects what manual? A. If there was such a thing, it affects the piano, of course.

Q. I said what manual? A. The upper manual.

Q. And if you want to play on the upper manual and not use the piano, to have it go through to the organ, you would have to use the piano lock, wouldn't you, if there was such a thing there? A. If there was such a thing.

Q. And if there was such a thing there, it was intended to be used, wasn't it? A. If it was there.

Q. And you could not play the organ without playing the piano unless you used this piano lock, could you? A. So far as I know. Will you allow me to say I am not an expert organist, nor an organ builder?

Q. And this piano could not be used for any other purpose than a theatre purpose, could it? A. Do you mean, separate from the organ?

Q. No, I mean, well, anywhere? A. If it were separate from the organ?

Q. Yes? A. Why not?

Q. Well, could it be—you would have to take off all your manuals—everything you had added to it? A. You could take that off.

Q. Would the piano be just as valuable after all these things were put on and taken off again? A. The piano itself would.

Q. Would it be just as merchantable? A. Yes; I had one myself.

Q. Well, would the public buy it, after it had been used that way? A. No, not after it had been used that way.

Q. No—it is nothing more than a used piano after that, is it not? A. That is all.

Mr. Lane: There is one question I would like to ask Mr. Robinson, as my own witness, if necessary.

GREENWOOD A. ROBINSON, re-called:

Direct-examination by Mr. Lane:

Q. You recollect this lease between yourself and Spassano, do you not? A. Yes.

Q. (Showing the witness a paper)? A. That is the lease.

Mr. Lane: The reason I am doing this is so as to not put the whole thing in unless they want it.

Q. You recollect putting a provision in that lease as follows: "Said tenant further agrees

that this lease does not carry with it the right to use the organ now in said premises, and that said organ shall remain in said building and is the sole and exclusive property of the landlord''—you remember that being put in? A. Yes.

Q. And you were the landlord? A. Right.

GEORGE J. KILGEN, sworn:

Direct-examination by Mr. Lane:

Q. Mr. Kilgen, you are an attorney-at-law of New York State? A. Yes, sir.

Q. And you are the President of the Pipe Organ Maintenance Company, the complainant? A. I am.

Q. And, in writing these letters to Mr. Robinson and your communications with him, were you acting as such President? A. I was.

Q. And did you serve a demand for possession of this piano on Mr. Robinson, Exhibit D-29? A. Yes, sir; I did.

Q. And did he refuse to deliver the piano? A. He did.

Q. Or the organ, I mean? A. He did.

Q. Did your Company do any work on this organ after that? A. We did.

Q. Did you go there and see the organ? A. I was there almost every day during the time that the men worked there.

Q. And during what period of time was this? A. A month—about a month.

Q. About a month when—what year? A. I

would have to refresh my memory by looking at that memorandum there.

Q. Is there something there that may assist you (showing the witness a paper)? A. There is a bill there from Mr. Paterson—(After inspecting the papers.) Well, from the 25th of October.

Q. What year? A. 1918, to the 25th of November, 1918.

The Vice Chancellor: What work is this he is speaking of?

Mr. Lane: It was some work on the organ when it was put in the shop, that they talked about afterwards. If Mr. Morten has no objection, I will consent to it being stricken out. I will ask him to tell about his communications and dealings with Mr. Robinson about this piano afterwards.

Mr. Morten: Well, I don't know what you mean.

Mr. Lane: All right.

Q. Go ahead. A. After more or less discussion with Mr. Robinson, Mr. Morten wrote a copy—substantially a copy—of a letter which one of these organists had reported to him as the defects. In reply to that, I told them we would do everything that could be done to satisfy them, which we did. We went up to the theater and found that the cable connecting the console—which is the piano—with the organ had been cut, severed.

Q. Did you see that yourself? A. Yes, sir.

Q. Just explain to the Court what that is, what

it means? A. Why, the organ was played from this piano that we have heard mentioned, with an organ keyboard attached to it under the piano keyboard.

Mr. Morten: I understand this is going for astray from what your Honor said would be the question. I have no objection, provided I am permitted to go into it as far as they do. The question is not what happened to this organ in 1919—the question is whether the instrument is perfect.

Mr. Lane: Mr. Robinson was, I think, asked on cross-examination as to whether or not he admitted that he disconnected the piano, and as to whether or not he cut the cable. Now, the cutting of the cable is a very important thing, and is very detrimental to any organ because it cuts all the wires in the organ, as will be testified to, and I think, will be admitted by the experts on both sides.

Mr. Morten: Your men did it.

Mr. Lane: My men did not do it; it was the man that did the $6.30 job.

Mr. Morten: This Perragallo, your expert here, is the very man. Mr. Robinson never testified he did it, or never said he did it.

Mr. Lane: Well, Mr. Perragallo was not our expert then.

Mr. Morten: Yes, but he was the fellow that did it.

The Witness: He was working for Mr. Robinson—he did that for Mr. Robinson.

Q. Go ahead—what condition did you find it in? A. We found the piano—the cable connecting the piano with the organ, severed, cut. We found the organ keyboard disconnected from the piano, and we found the relay, which was in the back of the piano, separated from the piano, and all stored in a room adjoining—a furnished room, I should call it, where the main relay stood, and that fenced up with parts. The parts had to be removed first. And then we discovered that, the wires having been separated, we had to restore the organ keyboard and the relay, and test out each wire; amounting to a great many—I should say seven hundred or more—to locate where it belonged, so as to make the connection again between the keyboard and the organ itself. It took the men that we had there an entire month to do that. The organ was fully re-connected and the—

Mr. Morten: If the Court please, I object to it, because it don't appear that he was there; he don't know how long it took, he was only there every other day; he was not there; so I object to that testimony that it took them a whole month to do it.

The Vice Chancellor: It is not a question of how long it took them to do it, but what they did. I am not expected to allow any compensation for that.

The Witness: I know, when Mr. Paterson presented his bill, that it was all right, so far—

Mr. Morten: Now, if the Court please, I object to that.

Q. Never mind that. What condition was the organ put in?

Mr. Morten: I object unless this witness knows.

Q. Do you know? A. I do know.

Q. Do you know anything about organs? A. I know a whole lot about them.

Q. Tell us what your experience has been with organs? A. My father was an organ builder from 1851 until he died, about twenty years ago—

Mr. Morten: I object to that and ask that it be stricken out.

The Vice Chancellor: I am not going to strike it out, I am going to let it go in.

A. (Resuming)—and, as a boy, I spent most of my time in an organ factory, where a great many men were employed, and organs were being built, and I dare say today (my brother being the head of the concern) they have the largest number of organs in general use in the United States. My time, between my age of understanding until the time I went to college, was largely spent in and around the factory. I was pretty thoroughly familiar with every detail of the making of an organ. Since that, and up to the present time, I have been kept in constant touch with the improvements and development of the organ industry. I am the attorney for a number of the organ manufacturers. I was made attorney of this American Master Organ Company because I did know something about organs. I was solicited by Mr. Jordan to do what could be done in the mat-

ter of perfecting these organs and satisfying the people and complying with the contract as near as possible, under the order of this Court to carry out the contract, if they were to be carried out, if there was anything to be done. I did see that this was done in other organs, and we did get what was due on them, more particularly the one at Yonkers, New York.

Q. And what did you do with this one?

Mr. Morten: Oh, no; I submit, in the first place, that he is not qualified, even.

The Vice Chancellor: Yes, that testimony he has given here is qualifying.

Mr. Morten: I want to cross-examine him.

The Vice Chancellor: You may cross-examine him.

By Mr. Morten:

Q. Did you ever work in a factory where they built orchestral organs the same as this one? A. There were none in existence.

Q. You never worked in them. Did you ever know about winding the magnets in an organ of this kind? A. Yes.

Q. Did you see the magnets in this organ? A. I knew every detail of this organ.

Q. Did you see them? A. Yes.

Q. How were they wound? A. There is a standard method. If I had Mr. Perragallo here, I could show you. To describe it; it is called the "horse shoe magnet," or a thing like a staple.

Q. What are the essential features of the design of the magnet, do you know? A. Yes.

Q. What? A. Why, it consists of an armature and a magnet.

Q. How do you calculate the size of the wire to be used in winding? A. The size of the wire?

Q. Yes? A. Or the thickness—what do you mean?

Q. The size of the wire?

The Vice Chancellor: The thickness of course—how do you calculate it?

A. I don't know as I know that.

Q. Do you know what power magnet is required for a certain specified wind pressure? A. No, I don't think there is any standard for that. It is a magnet of sufficient strength and force to open the palate and let the air into the chest.

Q. Do you mean it is left to guesswork—it cannot be calculated? A. It can be calculated.

Q. Do you know how to calculate it? A. Each particular organ is tested by its own requirements at that time.

Q. Do you mean to say that a man building an organ cannot estimate and know definitely what he is going to require ahead of time—what kind of a magnet—that that cannot be done? A. When he gets to know the requirements of the particular organ, yes.

Q. Don't he know what the requirements are before he completes it? A. He may or may not.

Q. Would not a proper and skilled mechanic or designer know? A. Not until the organ was laid out?

Q. Does it have to be built before he can tell? A. No.

Q. He can tell it when he lays it out on paper? A. When he lays out his organ—it is just like the building of a house, to know how many bricks he would want.

Q. You never laid out an organ of this kind, did you? A. Never in my life.

Q. And you cannot tell whether the magnets in this organ were sufficient for the wind pressure that was used, can you? A. I cannot.

Mr. Morten: I submit that he cannot pass on this organ.

The Vice Chancellor: Well, I will let him go on. That is electricity.

Mr. Morten: Well, that is all there is to this case. If you took away the electricity, you have no organ.

The Vice Chancellor: (To Mr. Lane): Go ahead.

By Mr. Lane:

Q. What I want to know is what you did and what you saw and what was done, while you were there, and what had been done in between, on the days that you were not there. A. When I say I was there "every other day," I was really there more than every other day—I was there sometimes every day for a while, it was only after they had gotten well under way that I would go there every other day, but I was there pretty near every day. At any rate, I have a report from Mr. Peterson every day as to what they did there each day. They took the organ out—the parts that had been separated—and put them together again and spent this time indicated on Peterson's bill here, connecting up those wires.

Mr. Morten: I move to strike that out because it is apparent that he don't know that they did it, because he was not there.

A. I know the result—that when they got through at the end of the month, the organ was all ready for general use, excepting the tuning and voicing—just as is indicated in my letter.

Q. Which letter are you referring to? A. In which the demand was made for the payment, under the contract.

Q. Now, for what reason did the company proceed to fix up this organ in this shape? A. Well, we endeavored, wherever there was any controversy, to do whatever could be done; if the man was half-way willing to meet us, we would do everything that could be done, under the circumstances, to do the right thing to comply with not only the contract, but with the order of the court to fulfill and carry out the contract, if it could be done.

Q. Were you ready at all times, and hold yourselves out to Robinson to do so? A. Yes.

Q. Ready at all times to fulfill his contract? A. We were; and we so stated to Robinson's attorney.

Q. You referred to the letter—will you pick it out from these letters? A. It was read in evidence here yesterday.

By Mr. Morten:

Q. (Tending the witness a letter.) This is the one you want, is it not, of December 4, 1918—is not that the one you refer to? A. I think this is it. When I wrote the letter marked Exhibit D-27,

dated December 4, 1918, the work of the restoring of the organ to its former condition was practically finished, but we could not proceed any further because the tenant of the theatre objected to the use of the electric lights, and did not furnish any heat, claiming that we should pay for that. I told Mr. Robinson the situation, and Mr. Robinson said he would not pay for it; and I directed his attention to the contract, in which it was stated that he had to furnish light and heat and power for the purpose of repairing or regulating or doing anything that the organ might require. He denied that he had to do that, just as he did here on the stand yesterday. The result was that we had to stop with the work. The next thing I learned was that the organ had been taken out of there, and I saw it in a store opposite the new theatre that they were building—the Roosevelt Theatre, in a heap of all kinds of building material, and generally dilapidated, except the piano, which remained in the Colonial Theatre, and which the tenant was using twice a day all the time, and he told me the other day he was using it yet. Of course, he had no other piano, and that is what he had to use.

Q. Could you have made arrangements to lease that organ? A. The tenant wanted to rent it. I submitted a lease to him on behalf of the complainant company in which he was to pay $30 a week—

Mr. Morten: I object, if the Court please.

The Vice Chancellor: One moment—how is that evidence?

Mr. Lane: Well, it is only evidence, if

the Court please, as to the reasonable use, and it might be evidence on the question of damages for detention.

The Vice Chancellor: What has that got to do with it? This is purely an action of replevin, or trover and conversion, and the defense is that you did not perform.

Mr. Lane: Yes, sir.

The Vice Chancellor: I do not see what this evidence has to do with this case, at all. This man has got the machine and has not returned it and refuses to return it.

Mr. Kilgen: The law provides a penalty for failure to return a thing of that kind, and the penalty is the reasonable value of the use of it.

The Vice Chancellor: I will sustain the objection.

Mr. Lane: On that ground, your Honor?

The Vice Chancellor: On the ground that an attempted contract of leasing between the tenant and the witness has no bearing on this case.

Q. Now, Mr. Kilgen, did Mr. Robinson tell you that he was going to move the organ out of there—did he tell you he was going to before he did it? A. He told me he was not going to use it; it didn't make any difference how much we finished it up, or what we did to it; that we could not satisfy him.

Q. When was that? A. That was about the time these men were working there, in November, 1918, he said that he did not intend to use it there.

Q. Did he tell you he intended to use it anywhere else? A. I don't remember that he did.

Q. Now, did he tell you that he was going to tear that organ out, and put it across the street? A. I don't remember that he told me that; I knew it, however.

Q. What? A. I knew it from some other source.

Q. Well, did you know it before he did it?

Mr. Morten: I object. If he knew it from some other source, it is hearsay.

The Vice Chancellor: Yes.

Q. What other source did you hear it from? A. The general rumor—

Q. Well, I don't want "general rumor"—did you see it? A. I saw it across the street, yes.

Q. You knew it from seeing it there, didn't you? A. Yes.

Q. But you only knew that after he did it? A. Oh, yes; that is all.

Q. Now, did you know, before that, that he was going to do it? A. I did not, except, as I say, by general rumor—except so far as Mr. Robinson told me that it didn't make any difference what we did with the organ, he would not use it.

Q. When was it that it was taken out of there—that you saw it out of there? A. Sometime after November, 1918.

Q. Well, I know that, but when? A. I don't know when.

Q. Well, was it two years after, or one year, or three years? A. I should say it was a couple of years.

Q. Could you examine it, or did you go inside and look at it? A. Why, I tried to go in when

they had it lying in the new theatre, which was unfinished, and Mr. Robinson not only ordered me out, but he used force—he used his employees to keep me from seeing it.

Q. Kept you from going and seeing it—that was before this time—before you saw it moved across the street? A. That was afterwards. It had been moved over across the street into the theatre.

Q. So it was moved back again? A. No, in the Roosevelt Theatre.

Q. It was moved out of the store into the Roosevelt Theatre? A. Yes.

Q. The whole organ? A. Well, not the piano of course. And I was not in there long enough to see how much of it there was; Mr. Robinson took good care that I wouldn't. I saw the box there and saw some of the pipes there.

CROSS-EXAMINATION by Mr. Morten:

Q. Now, Mr. Kilgen, you bought these contracts in May 1918, didn't you? A. Whatever the date is stated in the assignments, after the order of the Court had been signed.

Q. You bought them on a speculation, didn't you? A. No, I did not.

Q. And at the time you bought them there was no corporation known as the Pipe Organ Maintenance Company, was there? A. There was a proposed corporation.

Q. Now, you heard my question, and you are a lawyer, and you know how to answer it, don't you? A. There was not the formality of filing a certificate; it had not been completed.

Q. And the Pipe Organ Maintenance Company is practically yourself, is it not? A. It is not.

Q. Who are the two other incorporations? A. Mr. Strauss, who put up most of the money, was the principal incorporator, and Mr. Case put up some money.

Q. Where is Case employed? A. In Paterson, N. J.

Q. And when you bought these contracts, did these gentlemen put up the money? A. Yes, sir.

Q. And you knew, at the time you bought them and took title in the name of the Pipe Organ Maintenance Company, that there was no such corporation, and that there was no such corporation until January 30, 1919? A. If I remember well, the order provided for—

Q. I did not ask you that—you are a lawyer and you know I am entitled to an answer to my question—now, I ask that you answer it? A. You asked if I knew—there was one to be organized and it was for that company that the dealing was carried out; but Mr. Strauss objected to being in any way liable—

Q. (Interrupting.) Can you tell me why the sale to the Pipe Organ Maintenance Company by the Receiver did not carry with it an obligation to assume the contract?

Mr. Lane: I object to that, because it does not appear that that is so. It does not appear that the bill of sale does not, but that the order of sale does.

Mr. Morten: I will read from the order of the Court of Chancery itself, if you deny it.

Mr. Lane: The order of the Court of Chancery does carry the obligation; as I understand it—the order of the Court does but the actual bill of sale does not.

Q. All right—do you now say that the Pipe Organ Maintenance Company assumed the obligation of the American Master Organ Company? A. They did.

Q. Can you tell why it was not included in the bill of sale made by the Receiver? A. Mr. McKee drew up the bill of sale, and I do not remember why, if there was any reason.

Q. It was not left out intentionally, for the purpose of escaping liability, was it? A. Not at all. The Pipe Organ Maintenance Company was acting in good faith, and accordingly had completed almost all of its contracts in good faith, and was paid for them.

Q. Has the Pipe Organ Maintenance Company performed any other contracts than these? A. Yes, sir.

Q. I mean, the American Master Organ contracts? A. Yes.

Q. Have they got any factory? A. No, sir.

Q. You say this organ was substantially completed when you stopped—is that right? A. Yes.

Q. Then you did not get a chance to get a test-out of the organ, to find out whether you had fully completed it, did you? A. No, I didn't have to; I knew it.

Q. Why did you say it was "substantially completed," then? A. Because the tuning had not been done. Mr. Perragollo went there two or three times to do it, and could not do it.

Q. Would you say, if that organ was in substantially perfect condition in September, 1918, any such condition as is disclosed in our letter to you, D-28, dated January 14, 1919, could have appeared? A. Why, certainly.

Q. You know what is in this letter to you? A. I can remember, substantially, what that stated; that could happen over night.

Q. Now, it could happen over-night that these magnets could be so decreased in size as not to be able to take care of the necessary voltage? A. The magnets would not be changed a particle; but the shaking of the furnace one night would raise enough dust to put the entire organ out of commission and stop every magnet from working.

Q. You say that is so? A. Yes.

Q. Did you ever know where it occurred? A. I did.

Q. Where it put every magnet out of business—where? A. I have known—

Q. (Interrupting.) Where? A. Well, the Baptist Church in Montclair had its cable running parallel with its baptistry—

Q. I am not asking about that—you talk about dust and say the shaking of the furnace did it—now, I want to know where? A. Any instance from the same cause can have the same effect.

Q. You are a lawyer—please answer my question: Do you know of a single instance where the shaking of a furnace has put out of action the entire electrical action of an organ such as Robinson's, and where the furnace was located, such as his was, outside of the building? A. I would have to think over the matter quite a while to

specify just what particular organ had that trouble.

Q. Don't you know you don't know of any? A. Well, maybe I exaggerate a little by saying "the entire organ could be put out of action; but a bucket of water could destroy the best and largest organ of this kind.

Q. Don't you know, in this case, the organ proper was entirely outside the theatre—it was not anywhere near the furnace? A. I beg your pardon—the relay where these magnets were was right over a little extension from the furnace room, from the boiler room, to the right of it.

Q. Don't you know the relay was in the cellar? Where did you say this relay was? A. The relay was in a room through which you had to go to get to the furnace—an anteroom, you might call it. But there was no door, or anything else, to keep that dust out of that boiler room from floating into the organ, or relays.

Q. Was not the relay in the room alongside the piano, away from the boiler room, and out in the theatre proper? A. There was a room cut out of the theatre proper—in other words, the main building had been cut off, forming a room in which this relay was, which was connected by a large opening or a door to the boiler room—in other words, you could not get to the boiler without going through that room.

Q. Well, how many magnets did the relay contain? A. I don't remember—one for each pipe I would say, without looking at the specifications I could not tell.

Q. You say the relay contains one for each

pipe? A. A magnet for each pipe, or for each stop.

Q. Now, are you sure about that? A. Pretty sure.

Q. Now, did you count them, or are you guessing? A. Guessing, as to the number; but there were a great many.

Q. Now, Mr. Kilgen, you know you are not on the stand to guess; we only want to know what you know of it? A. Well, I don't know the number.

Q. You don't know? A. The number of them, no.

Q. And do you mean to tell me that, not knowing the number of these magnets, or where they are placed, all of them, that the shaking of the furnace, or the dust would come in and destroy the entire magnetic action? A. I modified that by saying I might have a little exaggerated it. There was one part of the traps that were on the left-hand side, and the relay from that side, of course, would not be affected the same as the right-hand side, because they are forty or fifty feet apart.

Q. Can you say you are sufficiently familiar with the location of these magnets to put them on a diagram? A. Well, you see, this all is four or five years old, and my memory is not positively clear about the matter, because I have been in a great many places where there were organs since then.

Q. Well, are you sure your memory is positive as to all the other facts you have testified to? A. As to the location of the boiler room and the chest and the magnets, yes.

Q. (Showing the witness a paper): I will ask you to look at that diagram, (which I assure you is a diagram of this theatre drawn by the American Master Organ Company for the very purposes of this organ) and point out the places where these magnets were, and the relay, the organ proper and the boiler room? A. As near as I can make it out, this was the partition that was put up (indicating), and this went around in here and around over here.

Q. That does not mean anything on the record; I would like to have you mark the partitions. The partition marked No. 1 was put up, and the partition marked No. 2 was put up, and the one marked No. 3, was put up for what purpose? A. Behind this partition here (No. 1) was the principal relay—right here (the witness marked the place designated with an A). The organ itself was, my impression is, right over this, with a trap-door leading up to it (indicating on the diagram by a B for the trap door). The organ itself would be marked C—that is, the principal organ. There was a chest, if I remember well, alongside of that, outside of the partition. That is D. That was an open chest. Now (indicating) this here was a swell box—C. was the swell box with the doors or shutters facing this opening, which had above it a sham organ front.

Q. Dummy pipes, you mean? A. Dummy pipes—"sham," we call them. The piano, if I remember well, was here, or somewhere in here, somewhere in this point right in here (indicating). Then the organ, if I remember well, was in front, down in here (indicating).

Q. You mean the piano, you are talking about now? A. We call them "organs"—it is the piano console.

Q. The piano console was where—mark it by the letter E? A. (Complying) I should say it was down in here, somewhere.

Q. Just put a little circle, with the letter E in it, which we will recognize as the piano console? A. (Complying) It was somewhere about there; it may have been a little backward or forward, but it was about there, as well as I can remember. Now, there were stairs going down into this opening here (indicating); they may have changed them, but I remember that. They have got a new door marked there. It is not my impression that it was there. F is marked for the door. Now, to get to the boiler room you would have to go back here (indicating).

Q. To get to the boiler room you would have to go back to the point where I have indicated it by what? A. Not here—under here, under the organ (indicating). You would go in there; and to get to the boiler room you would have to go in there, through that door, as well as I remember.

Q. Go outside of the theatre, entirely? A. No, sir; this is the outside of the theatre, all up here (indicating).

Q. Now, put H on the boiler room? A. (Complying) That is the boiler room. Now then, that boiler faced this way, as well as I can remember it, it faced toward the organ; the organ itself was in direct line with those grates; and when this door was not closed down that dust would go up there—

By Mr. Lane:

Q. Through this door, B? A. Up through the trap-door, B. Now, over on this side from the door was the relay of the traps; the traps were above this; and there was another sham front—

Q. At the point marked J? A. J, yes, which would be over No. 3. That contained the traps.

By Mr. Morten:

Q. Over the partition, No. 3, you mean? A. Over the stage platform. That contained, as I say, the relay; and the traps were up above. The "traps" mean the chimes and drums and little things they have mentioned here—the triangle, tambourine and Chinese block; they were all up in this particular section of the theatre. The cable runs from this keyboard, or console, back here and down under here to this relay, and over in here to this relay (indicating). When that cable was cut off, about where it is marked G here, that part, from there over, (indicating) was moved in over here (indicating), and this attachment connected with the piano was moved in here (indicating), and all of that was fenced off, when we went there—entirely enclosed; and then, some of these parts over here (indicating), if I remember well, were put in there (indicating); the chest, if I remember well, from over here (indicating) had been put in there (indicating). The organ, here, to body of the great organ, if I remember well, was also nailed up in the front.

Q. Now then, Mr. Kilgen, do you want this Court to understand that you contend that, by shaking the grates of a boiler, away over here at H, with a door in between, ashes could go into

that theatre and across the entire body of the theatre, and go over to the relay of the traps and drums at the circle J, and put that relay out of order? A. It could put it out of order; yes, sir.

Q. That is what you want this Court to understand? A. Yes, sir, anywhere. The sweeping of the theatre would. For that reason these theatre organs are always out of action.

Q. Then, if the Roosevelt Theatre organ has run for twelve months without a single bit of trouble, due to magnet imperfection, or any major trouble of any kind, can you explain how that has happened? A. The Roosevelt Theatre is a new, clean theatre; and, no doubt, since the organ has been put in there, it has, perhaps, been taken care of with a pneumatic cleaner, and, in place of blowing the dust out, would suck it out—that is possible. But when the Roosevelt Theatre is as old as this one, the organ will be just as much in peril and danger.

Q. Now, this was out of order the first year—how do you account for that, then? A. The same reason.

Q. Do you know that they actually sweep the Roosevelt Theatre with brooms to-day? A. I don't know. As I say, if they did sweep it carefully to-day—being a new building, with new carpets—it would make an awful big difference between that and an old, broken-down, worn-out building, patronized largely by a class of people who do not particularly care about their shoes when they enter a theatre.

Q. Now then, the fact that these contract points were continually burning off in this mechanical

device that was used to electrically control the keys, from the time the organ was installed, and continued to do that even after you had repaired it, would not indicate to you that the mechanical device or operation of this organ was defective originally, would it? A. They were not burned off.

Q. They were not burned off? A. No, sir.

Q. Did you examine the organ after you got this letter? A. Which letter do you mean?

Q. The letter of January 14, 1919? A. I don't think so; I think it was down at that time.

Q. I am going to call your attention to the fact that Mr. Beach has sworn that he examined this organ in January, 1919, which was after you had repaired it—now, do you still want to say that you think that organ was taken down in January, 1919, before this letter was written to you? A. I don't know. I know this—that in the interval between November, 1918, and the time indicated there, that anything might have happened to the organ.

Q. And if all the contact points were burning off, that would be due to the ordinary wear and tear, would it? A. It was not used, and could not be burning off.

Q. But, if they indicated that they had been burned off, didn't your men use it? A. Not then. When they quit, in November, 1918, they never went near it again; nor did I go near it November 25th.

Q. Didn't you receive a letter, in which you were notified that this organ was in your charge when you went to repair it, and if they were

burned off those points would be up to you? A. That was in 1918?

Q. Yes, on November 23d, 1918? A. I don't remember the date.

Q. Well, let me show you the letter, D-26 (exhibiting the same to the witness)? A. Mr. Robinson was prolific in his letter writing, and he no doubt had this particular kind of proceeding in mind, and possibly—

Mr. Morten: I object, and ask that that be stricken out.

The Vice Chancellor: Strike it out.

The Witness: This (referring to the Exhibit D-26) was dated November 23d, 1918.

Q. The very time you were doing this work? A. About the time we quit; about the time we got through.

Recess until two o'clock, p. m.

AFTERNOON SESSION

Hearing of the cause resumed at two o'clock, p. m.

Mr. Lane: If your Honor please, the other witness I had intended to call (who was my last witness—Mr. Perragallo) the expert who was mentioned here, I had on the 'phone at twelve o'clock, at Paterson, and he told me that he would be here at two o'clock; I am expecting him every minute. He has been sitting here for the last two or three days; and that is the situation I find myself in; and I don't know whether Mr. Morten can go on with any proofs, or not.

Mr. Morten: I can go on with this sketch, because I proposed to do it, anyway.

The Vice Chancellor: What sketch?

Mr. Morten: This sketch that Mr. Kilgen has pointed out; Mr. Kilgen is entirely in error in his description, and of course I intend to contradict that.

GREENWOOD A. ROBINSON, re-called:

Further direct-examination by Mr. Morten:

Q. Mr. Robinson, I show you this—

The Vice Chancellor: Why waste time over that? Why not let me appoint some man who can go up there (the place is in

the same shape now as it was then), and he can report, and there would not be any question about the physical location of these various things?

Mr. Morten: No, but I want to show that the fact of this dust putting this organ out of order is a natural, physical impossibility, because it could not be so, from the location of this boiler room.

The Vice Chancellor: All right.

Q. You see this room that Mr. Kilgen has marked with the letter H, which he calls the boiler room? A. Yes, sir.

Q. Passing from this room to the room which contains the letters A, B, C and D, there is an opening—what is that opening? A. That is a fire-door, an improved fire-door, self-closing.

Q. Is it ever open, except when passing through it? A. No, sir.

Q. Where was the organ chamber that Mr. Kilgen has designated as containing the various articles which have been lettered A, B, C, and D—where was that? A. That is not located on this plan, at all; it is outside of the building, entirely.

Q. Is it in this part of the building, at all? A. It is not.

Q. Where is it? A. It is at a point located from here (indicating) 12 feet deep this way (indicating).

Q. It is 12 feet outside of the building? A. No; not in its entirety; it extends just inside the wall here a little, with the swell shades (indicating); the wall had to be taken apart, as the diagram shows.

Q. The wall, at the letter C, was taken apart, and the organ chamber was moved entirely outside of the original building? A. Entirely outside of the original building.

Q. Where was this relay system that was spoken about, which I think Mr. Kilgen placed as at A—where was it? A. Right over here (indicating) alongside of the piano console.

Q. And near where he has placed the letter G? A. Yes, sir. This was enclosed, also, by a cardboard cover—that is, a beaver board cover. It was intricate mechanism and it was enclosed.

Q. For what purpose? A. To prevent anybody from going in and tampering with it, or doing anything with it they should not do.

Q. And these pipes that you say were in the organ chamber, what separated them from the building proper? A. The swell shade frame and swell shade shutters, which was designed by the American Master Organ Company—that is their own sketch here—the matter of about a 3 in. wood partition, a triple boarded partition, with felt paper in between to make them air-proof.

Q. And these pipes that they talk about, which were outside of the organ chamber—could any dust get through to them, at all, from the theater? A. Utterly impossible. The main entrance to the organ chamber was on the outside, entirely.

Q. Put the letter R there. A. (The witness complied).

Q. And could you get into the organ chamber at all from the building itself, and if so, how? A. There was an airproof door on this side which was constantly locked, to which I only had the key.

Q. And what floor was that door on? A. It was on the second floor.

Q. That is, you mean, a story up? A. A story up from the platform of the stage.

Q. And what kind of a door was that? A. That was a triple wood door, with felt and paper in between.

Q. Mr. Kilgen has placed the drums and traps over at the letter J—where were they? A. They were in this room.

Q. In the room which you have said was the organ chamber and entered by the door R? A. This is a longitudinal section. The organ proper was placed down below, and the drums and traps were all placed on top here.

Q. Were they ever over where the letter J is? A. Never; there was only the chimes over where he states the drums and traps were placed. There was, in addition to that, another trap, which was called the "glockenspiel," which was placed alongside here behind this front partition (indicating); a glockenspiel was placed there.

Q. Mark it. A. (The witness marked the spot indicated with a letter S.) And a very thin cable, just sufficient to take care of that was carried from the relay in that point. The chimes, alone, were placed in this point marked T—the chimes alone, of all the traps, were placed in this point here. This (indicating) was a brick wall; it would not hold one tenth of the traps.

By the Vice Chancellor:

Q. I had the impression that the organ and all these parts were concentrated at one point, but the way you are talking now, the chimes and some

instruments were over in one part of the building, and others in other parts of the building? A. Yes, your Honor, it was connected by an electrical cable.

Q. I see; I supposed it was just like the organ? A. The majority of the organ, your Honor, was placed in this room including a majority of the drums and traps; but, for certain effects, the glockenspiel was placed over here, and the chimes were placed high up, behind these dummy pipes Mr. Kilgen testified to. That was for effect. And they were reached by a thin cable no thicker than that pencil (indicating) just sufficient to take care of sixty notes—sixty fine, hair-like wires, bound up in one cable.

CROSS-EXAMINATION by Mr. Lane:

Q. Now these cables that you talk about—how many cables were there? A. For what?

Q. For anything—how many cables ran through the theater? A. Well, I couldn't tell how many cables, all told. I know there was one cable leading over here to the chimes (indicating).

The Vice Chancellor: He was examined now specifically for the purpose of rebutting the statement made by Mr. Kilgen that dust could get into it.

Mr. Lane: Oh, well, I won't go into that.

JOHN PERAGALLO, sworn:

Direct-examination by Mr. Lane:

Q. Mr. Peragallo, where do you live? A. 306 Buffalo Avenue, Paterson.

Q. What is your business? A. Organ builder.

Q. How long have you been engaged in that business? A. Twelve years.

Q. And did you have anything to do with the installation of this American Pipe Organ in Robinson's Place? A. Not the installation; no, sir.

Q. Not with the installation at all? A. No, sir.

Q. Did you see the organ before it was put in? A. Yes, up at the shop.

Q. Did you have anything to do with the construction of the organ there? A. At a time, I did.

Q. And did you see the organ after it was put up in the theatre? A. I did.

Q. How soon after? A. Well, I don't recall exactly—probably three or four weeks, or so.

Q. Was that the first time you saw it up there in the theatre? A. Well, I don't exactly recall just now.

Q. Well, at the time, you did first see it up there in the theatre did you have occasion to examine it, at all? A. Yes, I was called on to look it over.

Q. Called on to go over it—can you state, from your examination, whether it was in compliance or substantial compliance with this contract? A. Well, to a certain extent, it was.

Q. How did you come to go there?

Mr. Morten: Has he fixed the time?

Mr. Lane: He said the nearest he could place it, was about three or four weeks afterwards.

Mr. Morten: After what is he talking about?

The Witness: After it was installed.

Q. How did you come to go there? A. I was sent down by Mr. Ely.

Q. And what did you do when you got there? A. Well, I fixed up repairs.

Q. According to the list, as stated on the list? A. Yes.

Q. Well, what kind of repairs were they? A. Well, minor repairs.

Q. Did you have any major repairs, or major things you changed—important things? A. Not that I recall at that time.

Q. What do you call minor repairs—I show you letter Exhibit D-28, and ask you to look over that letter, and tell me, outside of the piano pedal, what, in that letter, in that list, would not be what you characterize as "minor repairs?" A. "Uneven and slow notes" would be minor repairs.

Q. No, I mean tell us anything that would not be "minor"? When you get through, everything would be "minor," except what you say would not be "minor." A. Of course, the silent notes—you cannot clearly state whether they would be "minor" or not.

Q. Well, all right—go on. A. "Part of regulation" termed here "slow or uneven."

By the Vice Chancellor:

Q. That would be a major repair? A. Well, it should have been done during the installation. They will get soft or loud, from time to time, caused by use. "Clarionet, upper half too shrill"—that is a matter of regulation.

Q. Is that a major repair? A. Well, it should be, if it was that way at the time of installation. "Vox humana, badly voiced," if so, is a major repair. "No separate tremolo" is very important. That is as far as I can see.

By Mr. Lane:

Q. The rest are minor? A. As far as I can recall.

Q. Now, what would be necessary to correct this "lower part, very uneven" that you speak of—the Bourdon—what would be necessary to correct that or get it into shape? A. The lower part of the Bourdon would be a matter of regulation. There is a low slide on each pipe, on the bottom of each Bourdon pipe, that you can regulate according to the power. The Bourdon, to start off, is not a very powerful stop; it is simply a subdued low bass.

Q. Well, could you have gone there at any time during the time this organ was in operation, and corrected that, if that had existed? A. Yes.

Q. How? A. By regulating the slide.

Q. And that is all that would have been necessary? A. That is all.

Q. Now, this "vox humana, badly voiced, slow"—what would be necessary, or could you have corrected that? A. Yes, it could have been corrected.

Q. How? A. By taking the tongues out and giving it a proper shape—that is, a repair set a reed tongue on just a certain distance away from the shallot, in order to get the proper action. There might have been a chance that the tongue might have warped a little, or might have been imperfectly set.

By the Vice Chancellor:

Q. What is the tongue made of? A. It is made of brass.

By Mr. Lane:

Q. How big is it? A. Well, it depends—according to the size of the pipe. The scale runs there about an inch to two and a half to three inches.

Q. It is not hard to get a new one if necessary, is it? A. No, it is not hard to get a new one. It is very seldom necessary, if properly handled.

Q. How long would it take you to fix up a thing of that kind? A. Why, if it was very badly voiced, it would take at least two days.

Q. And "no separate tremolo" you said was somewhat important—what about that, what is that? A. Well, that is an apparatus that has a mechanical device put at the end of the chest, or piped off, I would say, in order to get a beat or shake in the human voice of the vox humana stop.

By the Vice Chancellor:

Q. That is, vibration? A. Vibration. That is regulated according to the will of the organ builder or the repair man.

By Mr. Lane:

Q. This list that I have shown you is a list that was made up in January 1919—when you examined the organ, on or about November or December, 1916—did you notice all of these things out of commission, or not? A. Well, that I could not recall. There was a good deal to do on that organ when I was there.

Q. Well, did you do it? A. Yes, I did.

Q. Did you do everything that was on the list? A. As far as I can recall, yes.

Q. And at the time you left the organ, what shape was it in? A. Well, it was in first class shape, as far as I could see.

Q. And did you see Mr. Robinson there at that time? A. I do not recall whether I seen him at that time, but I seen him a majority of the times.

Q. Did you ever tune this organ—do you tune organs? A. Yes, I do.

Q. Did you ever tune this one? A. Yes, I did.

Q. Well, then, of course you heard it play? A. Yes, I did.

Q. Well, how did it play? A. Why, I cannot say that; I can say it did not play good.

Q. Now, Mr. Peragallo, how often did you go there to do jobs like this on the organ—how often would you say you went there during the first year? A. Well, that I could not say exactly.

Q. Well, did you go more than once? A. Yes.

Q. You can recall particularly, can you, the first occasion that you went there? A. No.

Q. I don't mean the date of it, I mean you recall going there the first time? A. Yes, I do recall.

Q. And did you report to anybody that everything was all right when you made your repairs, as you call them?

Mr. Morten: I object to it, as immaterial.
Mr. Lane: I withdraw it.

Q. You said you cannot just exactly say how many times you were there? A. No, I cannot.
Q. Were you there more than once? A. Yes.
Q. Over how long a period of time was it between the times you were there—were you there more than five times, would you say? A. Yes, a great deal more than that, I believe.
Q. Well, more than ten times? A. Yes, more than that.
Q. Now, over how long a period of time were you there—the first time was sometime in November or December, 1916—now, were you there as late as July?

The Vice Chancellor: What year?
Mr. Lane: 1917.

A. Yes, I was.
Q. You were there as late as July? A. Later.
Q. And later than that—and during that entire time you heard the organ play at different times, did you? A. Well, when I went there it was not playing every time; occasionally when I went in the afternoon in the case of emergency calls, it was.
Q. Now, during all this time you were working for the Organ Company were you—up until the time of the failure? A. Until the time of the failure, I was; yes, sir.

Q. Then, after that time did you go away, or what did you do? A. I started in for myself.

Q. Now, do you recollect doing some work there for Mr. Robinson? A. I do.

Q. And what was that—and when, about? A. I believe it was before the winter.

Q. Before the winter? A. Or around the winter time, in 1918—I fixed up the traps.

By the Vice Chancellor:

Q. The winter of 1918, do you mean—the winter of 1917-1918 or 1918-19? A. No, that would be the winter of 1918, I believe.

Q. I know, but which end of it? A. Oh, the start—January, 1918, I believe; I do not recall exactly.

By Mr. Lane:

Q. Well, was that the work for which you sent the bill for $6.30, do you recollect? A. On what item; I don't recall.

The Vice Chancellor: Show the witness the bill.

Q. I show you a bill, dated May 21, 1918? A. Yes, I remember that.

Q. And was it about that time, that you did this work? A. Yes, I did some work then.

Q. Well, did you do any other work for Mr. Robinson after you left the American Master Organ Company—did you do any other work for Mr. Robinson before this work for which you rendered the bill on May 21, 1918? A. Well, I don't recall whether it was before or after; but I know I was there several times.

Q. And what work did you do for Robinson—you disconnected these chimes and one thing and another—is that what you mean? A. Yes.

Q. What other kind of work did you do for Mr. Robinson? A. Why, I replaced the suction magnets that proved to be defective.

Q. How many? A. Why, I could not say offhand—I judge about twenty-five.

Q. About twenty-five suction magnets? A. About, I do not recall exactly.

Q. What do you mean—magnets that were put in this new suction apparatus, or was it something that was on there originally? A. Well, originally, they were not on suction, they were on pressure; and it was when Sprackling had White go up and see this other organ, I understand, that they got this idea of suction, and placed them—

Mr. Morten: I object to that.

The Vice Chancellor: Strike it out.

Q. Were you there? A. Well, as far as I know—

Q. Never mind—were you there? A. Yes, I was.

By Mr. Morten:

Q. When this conversation took place between Sprackling and White? A. No, not then.

Mr. Lane: I am only asking him what he heard while Mr. Robinson was there with Sprackling.

The Witness: No—neither one.

Q. But you do know that apparatus was changed from what you call "pressure" to "suction," after it was installed? A. I do.

Q. Now, you took these magnets out, as you say—what were they?—did they wear out or what—the twenty-five you replaced? A. No, they were there.

Q. They were there? A. Yes.

Q. Why, did they have to be changed—what was the matter—what happened to them? A. Well, the action did not prove to be as reliable as it should have been.

Q. Well, would that have been so if it were still working under pressure instead of suction or not? A. No, it would have been a different arrangement, entirely.

Q. Therefore to better that condition, you put in about twenty-five magnets—is that what you mean? A. Yes.

Q. How much did the magnets cost approximately? A. They could retail at about twenty-three or twenty-five cents.

Q. Apiece? A. Apiece.

Q. Was that before or after you disconnected these chimes up in the air—was that before or after? A. I couldn't recall that just now.

Q. Well, now, what else did you do? Was this organ, at the time you did this, in playing condition? A. Yes, it was in playing condition.

Q. Now, what else did you do for Mr. Robinson? A. Well, I went over some notes there, just to take it up roughly, and cleaned up the commutator and the generator, which was causing a great deal of trouble.

Q. Now, at the time that you did these different things for Robinson, did that place the organ back in first class shape, or not? A. Well, I don't believe I really finished all my time on it, to put it in first class shape as it should have been.

Q. Why? A. Because I was not called upon to go to that extent.

Q. Do you mean Mr. Robinson did not ask you to go that far—is that what you mean? A. Yes.

Q. Now, did you see the organ when it was moved out of the theatre? A. No, I did not.

Q. Every time that you saw the organ had it remained in the same place? A. No; the organ proper did; yes.

Q. But what had been moved? A. The connections of the console and the pipes, outside of the box.

Q. Simply the connections of the console with these chimes, or the connection of the console with the whole organ—which do you mean? A. With the whole organ.

Q. Now what had been done with them? A. A. They were put in the room and enclosed.

Q. And who did that? A. I did that.

Q. At whose orders? A. At Mr. Robinson's orders.

By the Vice Chancellor:

Q. Did you disconnect the piano from the organ? A. Yes, I did, your Honor.

Q. How did you do it? A. By taking the key contacts off, and then disconnecting the cables off the union board.

Q. Did you cut the cables? A. Well, they had to be, yes.

Q. And you are the man that cut the cables? A. Yes.

By Mr. Lane:

Q. What was the result of cutting those cables? A. Well, the end of the wire was soldered on the terminal or "pin," as we call it, and they had to be cut in order to be disconnected right at the terminals.

By the Vice Chancellor:

Q. After that was done the piano had no connection with the organ? A. No.

Q. The piano was then played independently of the organ? A. Yes, sir.

Q. Then the organ itself was unplayable, was it? A. Yes.

Q. That reduced the music in the house to the piano? A. Yes.

Q. And that was done at the request of Mr. Robinson? A. At Mr. Robinson's request.

By Mr. Lane:

Q. These cables which you say were disconnected—how many were disconnected, or how many were cut? A. Well, I say the entire unit that controls the organ. They were not all cut, but just certain connections, such as stops and swell control.

Q. Well, we don't know much about those things—have these cables got a lot of different wires in them? A. Yes; but they run to a board with a lot of pins on it; they are twisted on and

then are soldered, in order to complete the circuit.

Q. Now, subsequent to that you went there to try to put this organ in shape again, did you? A. Yes, I did.

Q. And when was that, about—you and a man named Peterson, wasn't it? A. Well, Peterson was there before me; I remember that, but I do not recall the days or the dates.

Q. Well, what condition did you find the organ in? A. Well, there was a little work on it that Peterson hadn't quite finished when I gave him a hand.

Q. So how many days would you say you were working there, about—a week, or a month, or two days? A. Well, I tell you, I couldn't really recall that.

Q. All right—were you there more than one? A. I believe I was, yes.

By the Vice Chancellor:

Q. Did you connect up the cable with the piano afterwards? A. After I cut it?

Q. Yes? A. Yes, your Honor.

Q. You were the man who connected it up? A. Yes.

By Mr. Lane:

Q. Well, did you do it or did this Peterson do it, or do most of the work? A. Well, he did most of the work, but there were some parts that he was a little puzzled about and I helped him out on it.

By the Vice Chancellor:

Q. At whose request did you connect it up? A. I believe at Mr. Kilgen's request.

Q. Not Mr. Robinson's? A. No, I don't believe so.

By Mr. Lane:

Q. Well, then, what happened—was it entirely finished? When you get all the work through what condition was the organ in when you finished getting it connected up? A. Well, it was up to the time of tuning and regulation that I last recall it, when I worked on it.

Q. What shape was it in then—good shape or bad shape? A. I couldn't say it was in first class shape because tuning and regulation is an important item in the finishing.

Q. Well, outside of the tuning and regulation, was it in as good shape as you could get it into until you came up to the tuning and regulation? A. As far as mechanical or playable condition was concerned, yes.

Q. That was the check Mr. Kilgen paid you with, wasn't it, at the time (showing the witness a check)? A. Well, just now I don't recall it; that is endorsed by me, I believe, yes.

Mr. Lane: I offer that check more for showing the date, more than anything else.

Mr. Morten: No objection.

(Admitted and marked Exhibit C-2.)

CROSS-EXAMINATION by Mr. Morten:

Q. Now, Mr. Peragallo, where did you ever serve your time to learn organ tuning? A. With the Ernest M. Skinner Company of Boston.

Q. How long did you put in? A. Five years.

Q. How old were you when you started? A. I was not quite fifteen.

Q. And you served there until twenty? A. Yes.

Q. When did you learn your trade as to learning the electrical of an organ? A. Ever since I started in.

Q. But you knew nothing about it when you started in, is that so? A. When I started in with the Ernest W. Skinner Company, I didn't know anything until I took up a course in it.

Q. Where did you ever study? A. With an organ builder where I was employed.

Q. Who was that? A. Fred L. Wilcke.

Q. Where? A. In New York City.

Q. When did you start? A. About nineteen—

Q. (Interrupting.) How old were you when you started? A. I was about 14.

Q. When you started in to study the electrical work? A. No, when I started in as a helper to assist Mr. Wilcke.

Q. When you were 14? A. Yes, I was going—going on 15.

Q. How old are you now? A. I am 27.

Q. Up to 1916, had you any experience of electrical organs? A. I had.

Q. Where? A. In New York.

Q. What were you doing? A. I was assisting Mr. Wilcke.

Q. As what? A. As an organ builder.

Q. In what particular branch? A. In tuning, repairing, etc.—all that pertains to organs.

Q. Did you ever have any instruction in designing? A. With Mr. Wilcke I did.

Q. What instruction did he give you in designing? A. All that pertained to an organ.

Q. You know all that—about the electrical end of it? A. Yes, I do.

Q. What is wattage? A. Wattage is the voltage time of the amperage.

Q. What is voltage? A. Voltage is the pressure of the electrical source.

Q. And amperage? A. The amperage is the quantity of the electrical source.

Q. What is ohms? A. Ohms is the resistance.

Q. How is it produced? A. By winding to a certain amount.

Q. Has any of that got anything to do with magnets? A. It has.

Q. What is necessary for the construction of a magnet and its electrical circuit? A. To construct a magnet?

Q. Yes. A. A winding around a soft iron pole—that is, a winding according to whatever ohms is required, or resistance.

Q. How do you determine how much the strength of a magnet is? A. How do you determine it?

Q. How do you determine what the strength of a magnet should be? A. Well, by an ammeter.

Q. That is the way you measure it—how do you determine what it should be before it is constructed? A. Well, that is according to your winding.

Q. Well, how do you determine what it should be?

The Vice Chancellor: The trouble is that it is a little confusing—when you have got a job to do requiring the use of a magnet, how do you determine what power that

magnet should have to satisfy the condition?

A. Why, we figure about 100 ohms resistance.

Q. About 100? A. On a magnet—each individual magnet.

Q. Why 100—why not 150? A. Because they are too heavy.

By the Vice Chancellor:

Q. Then, in order to get that power, you use magnets—more or less—each one having 100 ohms? A. More or less.

Q. More or less—a fewer or greater number of magnets? A. No, winding will cause that ohm resistance—winding on the magnet itself.

By Mr. Morten:

Q. Well, what is it that determines the number of ohms that you should put there—do you simply guess abstractly at 100? A. No.

Q. What is it? A. The length of wire and the amount of wire.

Q. That is what determines it? A. It does.

Q. No matter whether the job was big or small, you would still do the same thing? A. Each magnet is the same; yes, sir.

Q. Whether you have 10 volts, or 100 volts, just the same? A. No, it is not.

Q. Well, what is the difference? A. Well, the difference is that we figure on a 10 volt operation.

Q. Yes; ordinarily, you figure in all organs of this kind, on a 10 volt operation, don't you? A. Yes.

Q. And do you know of any organ where you figure on any different voltage? A. Yes, I do.

Q. Where? A. We allow as high as 20.

Q. You mean you should allow as high as 20? A. Yes.

Q. And if the magnets do not carry 20 volts, they are not proper for that kind of work, are they? A. Well, no, they would not be.

Q. And if you do have a greater voltage on the magnet than the magnet can carry, what happens? A. Well, you will weaken the magnets and probably burn them out.

Q. Yes, burn them out? A. Yes, that is possible.

Q. You went to Butte, Montana, didn't you? A. I did.

Q. When did you go to Butte, Montana? A. That was sometime in March or April, I believe.

Q. What year? A. 1918, if I recall it, or 1919.

Q. Whom did you go for? A. I went for the American Master.

Q. The American Master Organ Company? A. Yes.

Q. Who sent you—that is, what officer, Mr. White or Mr. Ely? A. Well, the whole committee of the Organ Company—Mr. Sheridan and all included.

Q. Where did you get your instructions from—the factory at Passaic, or Lakeview? A. At Lakeview.

Q. And they had built part of the organ there? A. They had built all of the organ, that I know of, there.

Q. And you had worked on it there? A. I had.

Q. And you are sure that it was in the early part of that year, around March, that you went? A. I am.

Q. How long were you out at Butte? A. I was out there three and a half months.

Q. You returned some time around July? A. Yes—I believe the year was earlier than that—now that I recall it; I believe it was before 1918.

Q. When what? A. When I went out there.

Q. When do you think it was? A. It was just before the Company failed.

Q. That was March 1917 that you went there then, wasn't it? A. Well, I couldn't say surely.

Q. Then if you went to Butte, Montana, in March 1917, how were you working on Mr. Robinson's organ from November, 1916, to July, 1917?—as you testified? A. There were parts to that we had made up in stock there.

Q. But how could you do work on Mr. Robinson's organ if you were out in Butte, Montana? A. I was not working on the installation.

Q. Well, how could you do work on it in any way? A. I don't see why I could not be working on it.

Q. Do you think you can work in Butte, Montana, to day and work in Jersey City tomorrow? A. No, it is not possible.

Q. No; and if you were out in Butte, Montana from March until July how could you be working on Mr. Robinson's organ at that time—that is March, 1917?

The Vice Chancellor: He changed his statement. I think he said he went in the fall of 1916.

Mr. Morten: He said he worked from November 1916 until July 1917—I have it here—that is what he said in his direct testimony.

The Vice Chancellor: You mean, in Butte, Montana?

Mr. Morten: No, on Mr. Robinson's organ. Now, I am willing to have him correct it, of course. I knew he was in Butte, Montana, during the spring.

The Witness: I was there prior to the failure of the American Master Organ Company—I would say about three or four months prior to the failure.

Mr. Lane: That would bring it to about July.

Mr. Morten: Yes; he was out there three or four months.

The Witness: I was there about three and a half months.

Q. Now, was that organ in Butte, Montana, finished completely and installed? A. It was.

Mr. Lane: I object; if we are going into the qualifications of other organs, all right.

The Vice Chancellor: He has answered the question.

Q. And the drums and traps in the Montana Organ worked on pressure, didn't they? A. No, they did not.

Q. What did they work on? A. On suction.

Q. Are you sure about that? A. I am quite sure.

Q. Did any other organ that the American Master Organ Company built, outside of Robinson's, work on suction? A. As far as I knew, the Butte, Montana organ worked on suction.

Q. Did any other one? A. No, there was no other one I know of.

Q. Well, how many of the American Master Organ Company's organs do you know of that were built? A. Besides these you mention?

Q. Yes. A. There were eleven.

Q. Eleven? A. Eleven, yes, sir.

Q. Orchestral organs? A. No, church and theatre organs.

Q. Oh, orchestral organs I am talking about? A. I believe there was five orchestral.

Q. Five? A. Yes.

Q. And they all used pressure, didn't they? A. Yes, they all used pressure.

Q. How long were you in Butte, Montana, after the organ was completed, as you say? A. I was there about a week or two.

Q. You don't know how long that suction operated, if it did operate at all—if it was suction that it operated on—do you? A. Why, yes; we had trouble with the suction there, I know.

Q. And do you know what caused the trouble? A. Yes, I do.

Q. Well, were you there, or did you only get it from hearsay? A. No, I was there at the time the trouble started in.

Q. And was that caused by the burning of the magnets? A. No, it was not.

Q. Were these magnets that you took out of Mr. Robinson's organ burned, did you say? A. No, they were not.

Q. They were not burned at all? A. They were not burned.

Q. Were the contacts burned? A. Partly, yes.

Q. And what caused that? A. Well, that could be a defective magnet, or it could be poor maining, as we call it, or feeding of the wires.

Q. What do you mean by that? A. That would be insufficient mains—for instance, we might have five or six or probably eight magnets in a series to supply through just a single small wire.

Q. That would be using defective, insufficient or improper amount of current, wouldn't it? A. Well, I wouldn't exactly say that; that was up to the man that installed the organ at the time.

Q. Well, it is improper to use it, is it not? A. Yes, it is.

Q. Now, if you try to operate a current of 15 volts in a magnet designed to only take 10 volts, you get the same result, don't you? A. You do.

Q. Do you know anything about wind pressure and how it is measured? A. I do.

Q. Doesn't the amount of wind pressure determine the measurement of your magnet? A. It does not.

Q. It has nothing to do with that? A. Nothing whatsoever.

Q. In other words, whether you are going to have a 10-inch or a 30-inch wind pressure, it would not make a bit of difference in the size of your magnet—do you mean that? A. No, I understood you to say what has water pressure to do.

Q. No, I did not say "water pressure"—wind pressure? A. Wind pressure?

Q. Yes. A. Well, it makes a difference if it is entirely too high, yes.

Q. Certainly—and the heavier the wind pres-

sure the higher you have got to have your magnet, don't you? A. Yes, you do.

Q. And if you start off with a 10-inch wind pressure, and your magnet is designed for it, and you want to get a 30-inch wind pressure, and you try to do it, with that same magnet you are going to burn it out, are you not? A. No, you are not.

Q. What will happen? A. There is a possibility of the magnet not drawing, if not regulated properly.

Q. If your magnet is designed for only 10 volts, don't you have to have a higher voltage for 30 in wind pressure than you do for 10? A. No, not necessarily.

Q. Without changing the magnet? A. Without changing the magnet. You can change the construction of the operation.

Q. In what way? A. In the line of putting in a smaller primary to take up the load or pulling power.

Q. Does that vary the pressure any? A. No, it does not.

Q. Then if your magnet is only designed for 10 volts, what will happen if you put on 15? A. Nothing will happen, as far as I know.

Q. Would not the magnet fail to operate—if you charged a magnet that could not take more than 10 to 15—wouldn't it fail to operate? A. No, because they are made to take more than 10.

Q. I said to you, if the magnet was designed for only 10 volts? A. If it was designed for only ten volts, I would say yes.

Q. Now, then, have you ever studied the manufacture of magnets? A. Not to a very deep extent.

Q. Did you ever work in a factory where they manufactured magnets, at all? A. Yes, I did.

Q. Where? A. The American Master Company manufactured their own magnets.

Q. What part did you have to do with that? A. Well, simply in the stock room, to see how the parts were made.

Q. But you never had any experience in the construction of magnets, or had any education as to how they should be constructed? A. Yes, I have.

Q. Where? A. In between—since the American Master time.

Q. Where? A. At my own plant.

Q. Such as you have gathered up in your own plant? A. Exactly.

Q. Where is your plant? A. 304-306 Buffalo Avenue, Paterson, N. J.

Q. Did you ever take any course in physics, or in any school? A. I did, partly.

Q. Where? A. Mechanical—in New York.

Q. At what place? A. At a night school in Seventy-fourth Street.

Q. How long did you attend there? A. Oh, for a period of about a year.

Q. What kind of a factory have you there at Paterson? A. A pipe organ factory.

Q. Only? A. Yes.

Q. How many men have you got there, working? A. There is four.

Q. Do you manufacture magnets there? A. No, we do not.

Q. Practically, all you do there is assembling, is it not? A. No, we build, also.

Q. What do you mean by "building?" A. Getting up sections of chest and action.

Q. You mean you annex the mechanical contrivances that are used to produce sound—is that what you mean? A. No, we also make them.

Q. Make what? A. The organ parts.

Q. What parts? A. We make chests; shutter actions, bellows; relays; consoles, and all that pertain to an organ, with the exception of magnets.

Q. Don't you copy designs over there? A. In what respect?

Q. In all respects? A. We do not.

Q. Do you copy in any respect? A. To a certain extent we all do.

Q. Now, then you said that in November when you went to visit this place—this organ of Robinson's—about three or four weeks after it was supposed to be installed, you left that organ in perfect condition when you got through with it? A. As far as I recall, yes.

Q. Were the drums and traps working? A. Well, now, I don't recall exactly, just at that time.

Q. Well, if they were not working, the organ was not in perfect condition, was it? A. No, I should say it would not be.

Q. Now, Mr. White this morning, said the drums and traps were not working for a period of six months—does that refresh your mind any? A. I cannot state.

Q. You were not sent there to do anything on the drums and traps, is that it? A. Nothing outside of the regulating and getting them to go.

Q. Did you know that this organ was designed to operate the drums and traps on pressure—did you know that? A. Originally, yes.

Q. Do you know that it was changed? A. Yes, it was.

Q. When? A. I don't recall.

Q. Do you know what pressure they would operate on? A. The wind pressure?

Q. Yes. A. I believe it was about 30 inches.

Q. Well, I didn't ask you what you believe, I ask you what you know; do you know? A. Well, I didn't have anything to do with the measuring of the pressure.

Q. I see, you saw the magnets in this organ, didn't you? A. I did.

Q. And are you willing to swear that those magnets will take care of a 30-inch pressure? A. They would under the right conditions.

Q. Under the conditions under which they were installed? I don't know what the "right conditions" are? A. Well, I would say so.

Q. Well, you never tried it, however, did you? A. I did.

Q. Well, you say they did? A. I do, yes.

Q. Do you say those magnets will take care of a 30-inch pressure? A. They do.

Q. For how long? A. Well, I couldn't say that, but I believe as far as the organ will last.

Q. As long as the organ will last? A. Yes.

Q. Can you tell how long that will be approximately? A. Well, an organ is variable, as far as the life is concerned.

Q. Well, what would you say is a fair age? A. A fair age would be about 20 years.

Q. And these magnets will take care of a 30-inch pressure for 20 years? A. They will, yes.

Q. Well, can you account, then, for the contacts constantly burning off? A. Well, I can.

Q. How? A. Improper main feed.

Q. And that is a mechanical defect? A. Yes, it is.

Q. Do you find any improper mechanical main feed in this organ? A. Yes.

Q. Was it ever ratified? A. I believe it was.

Q. Did you rectify it? A. Yes I rectified some.

Q. Did you rectify all of it? A. As far as I know—all that appeared at the time.

Q. When? A. At different times, when I was called for fixing the trouble.

Q. And that was all before you went to Butte, Montana? A. No, it was some after, also.

Q. When, afterwards? A. After I came back from Butte.

Q. After you came from Butte, Montana? A. I believe so.

Q. Not what you believe—I want to know, if you know or can recollect? A. No, I don't recall particularly.

Q. Don't you know that you never went to this organ after you went out to Butte, Montana, until you were called to go there by Mr. Robinson? A. No, I can't say that, really; I don't recall.

Q. Didn't you write a letter to Mr. Robinson in which you told him that the magnet action in this organ was insufficient? A. Insufficient?

Q. Yes—that "stronger magnet action was required in this organ" did you use those words? A. No. The action?

Q. Didn't you tell him that?

The Vice Chancellor: Didn't you write Mr. Robinson a letter in which you said that the magnet action of these magnets was insufficient—did you write such a letter?

A. I wrote such a letter, but the exact words, I don't recall.

Q. And didn't you at that time, tell him that the magnet action that was in that organ was not sufficient for that organ, as it was then constructed? A. I told him there was a defect in the action, but I cannot recall the exact words.

Q. And wasn't it the fact that the magnets were not strong enough to take care of the current that was necessary? A. No, I did not say that.

The Vice Chancellor: He has answered that a number of times.

Q. Can you tell me what would be the electrical measurement of a magnet to operate on 10 inches pressure? A. It is about 100 ohms resistance.

Q. What else—anything? A. 10 volt.

Q. And on 15 inches? A. Why, you could give it a little more resistance, but it will work on 15 as well.

Q. On 20 inches? A. Then you will have to increase the resistance.

Q. How much? A. Well, in proportion to the voltage. We never use higher than 10—we use between 10 and 12.

Q. Do you mean, you have to change the magnet from 100 ohms? A. If it was on 20.

Q. Yes? A. Oh, yes, you would have to change it.

Q. Didn't you say a minute ago that a 100 ohm magnet would work on 30-inch? A. Wind pressure?

Q. 40-inch wind pressure? A. Yes.

Q. For twenty years? A. Yes, it should.

Q. In your opinion, do you think that the electrical construction in this organ was a proper mechanical construction? A. No, it could have been better.

Q. Did you ever examine the center piano pedal in this organ? A. The crescendo?

Q. No, the centre piano pedal? A. The crescendo, I did.

Q. No, I mean the centre piano pedal? A. The centre piano pedal, no.

Q. You knew there was one there, didn't you? A. Well, I know there was one there, yes.

Q. What was it that put the piano on and off—do you know? A. Why, the soft pedal—the soft piano pedal.

Q. And which pedal is that? A. I do not recall whether it is the extreme right, or the centre.

Q. There was one pedal that was there for that purpose, wasn't there? A. To shut the piano off, and slow it.

Q. And, if that pedal did not work, you would stop your organ when you attempted to use it, wouldn't you? A. It shouldn't.

Q. But if you let the keys drop, wouldn't it do it? A. That is according to the regulation of the keys; they would cipher.

By the Vice Chancellor:

Q. Then the fact that there was a ciphering there indicated that something was wrong, didn't it? A. Well, yes, surely; they could not use it in that respect, until it was remedied.

By Mr. Morten:

Q. Now this crescendo pedal you have just spoken about a moment ago—how many steps should be employed in crescendo pedal of this organ to bring it on from nothing to full? A. Well, as many steps as there were couplers and stops.

Q. Will you take this contract and tell us how many stops there should be? A. (After examining the contract.) Well, there should be at least 20 steps.

Q. You would say that sixteen would be a minimum, wouldn't you? A. Yes.

Q. And if it should be brought on in three steps, you would say it was an absolute failure, as far as the pedal was concerned—I mean, an absolute failure as far as results were concerned? A. Results—yes, I would say so.

Q. No organist could be expected to play that piano with that crescendo pedal if it only took three steps to do it, could he? A. Well, he might; it just depends on how the organist would want to use it. It would interfere with his playing.

Q. But if he wanted to use it in music requiring 16 steps, he could not get the results on this pedal, if it took only three steps, could he? A. No, surely not.

The Vice Chancellor: How many steps was it in this case?

Mr. Morten: He said 20, and I said a minimum of 16.

Q. Now, I believe you did say the tremolo on the vox humana was very bad—you said that, didn't you? A. Well, yes; there was no tremolo, as far as I can remember.

Q. Do you remember when the organ was originally installed, how many tremolos there were? A. I believe I only seen one tremolo.

Q. I call your attention to the specifications; and you have them in front of you—how many were called for? A. There was two tremolos called for.

Q. And when you first went there, were not the two in there? A. I believe—I don't recall ever seeing more than one tremolo on that job.

Q. And that was this ineffective one on the vox humana—is that the one? A. Yes.

Q. Can you play an organ properly, and play the music as it should be played, without having a tremolo? A. Well, not for theatre use.

Q. Not for theatre use? A. No.

Q. Well, then on the percussion—if the 8 stops on the pedal were either on all the time or off all the time, would you say the piano was in proper condition? A. The piano?

Q. The organ? A. No, if they were not on all the time.

Q. And that would be due to a mechanical defect of some kind, wouldn't it—it would not be due to the player? A. No, it would not be due to the player.

Q. And if the only time he could use it he would either have to use all, or none, that would

indicate a mechanical defect of some kind, wouldn't it? A. Well, not exactly mechanical.

Q. This specification called for a triangle on the manual, didn't it? A. Yes.

Q. Is there any on the manual?

The Vice Chancellor: There is no dispute about that. No one claims there is.

A. I do not recall that there is, or not.

Q. Did you ever have occasion to examine the percussion on this organ, to correct any defects in it, that you can recall? A. Yes, I did.

Q. Well, now, if the percussion was supposed to work on the second touch and it works on the first touch, what does that indicate? A. That interferes with the player in producing proper music.

Q. Well, that is caused by a mechanical defect, is it not? A. No, it would be improper regulation; it was, perhaps, out of regulation at the time.

Q. You know that the chimes played, don't you, when they were not supposed to play? A. When they were not supposed to play? I don't recall.

Q. The minute you threw on the current, didn't the chimes play, without touching any note, or anything else—didn't you ever have your attention called to that by Mr. Robinson? A. I believe there was an occasion, yes.

Q. What caused that, do you know? A. That was dirt lodging on the magnet, causing the magnet to cipher.

Q. Did you remove the dirt? A. Yes.

Q. After the dirt was removed what caused it to do it?

Mr. Lane: He did not say it did it.

Q. Well, if it did it, what caused it to do it? A. I don't recall that it did it after that; my attention was never called to it.

Q. How many times was your attention called to that, Mr. Peragallo? A. Oh, there might have been another time, but not as far as I can recall.

Q. Well, how many times was your attention called to the fact that the chimes would play as soon as the current was thrown on, without any intention on the part of the player to use it? A. I don't recall more than once.

Q. And if it was more than once, do you know whether or not you remedied that so it did not occur again? A. Yes, I did.

Q. You think you did? A. I believe I did, yes.

Q. And in each and every instance, it was dirt on the magnet? A. On the chimes action; that is all I could see.

Q. Can you tell when you did that—what time? A. I have no idea.

Q. Now, you have been shown Exhibit D-4—if the organ had been put in first class condition in November, the end of November, 1918, would all of these conditions have arisen by January, 1919—say, in thirty or forty days afterwards—if they were there? A. I don't exactly understand the question.

Q. I mean this—supposing someone had gone there to that organ and put in first class condition and in the condition that it should have been

when the contract was finished, so that everything was properly playing—no silent notes—quick responsive touch of the organist—would that condition that is indicated here have arisen within thirty or forty days? A. Why, it is possible.

Q. And, if it did arise, what would cause it? A. (After examining the paper.) The burning of contacts, of course, could happen.

Q. Well, would a constant burning of contacts happen if the organ was in proper condition? A. No, not if it was properly installed.

Q. No; and if the contacts had burned constantly, that would show a mechanical defect, wouldn't it? A. Yes, it would.

RE-DIRECT-EXAMINATION by Mr. Lane:

Q. You know that this instrument had not been used for some time, did you, at that time? A. At what time?

Q. At the time that you replaced it in condition, in November, 1918? A. Yes, I recall that.

Q. Was it being used at that time? A. I believe it was, yes.

Q. Well, it could not be used until you connected it up, or until it was connected up, could it? A. When I installed those magnets the organ was being used.

Mr. Morten: The organ was already in use, at that time.

Q. You disconnected the piano at a certain date in 1918—that is right, is it not? A. I do not recall the day, but I know I disconnected the piano.

Q. Now, you went back there subsequently and helped this man, Peterson? A. I did.

Q. Had the organ been played between that time, or was the organ connected up in shape that it could be played, before you came there? A. No, it was not.

Q. Is it usual for an organ that has not been used for a length of time to be in good tune?

Mr. Morten: We have not said anything about tuning; we haven't mentioned that.

A. Well, it would affect it, to a certain extent.

Q. Does temperature affect the tone of a piano? A. It will.

The Vice Chancellor: It is not a question of the tone being a bit flat, or anything of the kind. All this testimony is addressed to is to show that the thing was not a mechanical success. As I understand it, if you let a violin run down, and do not have it kept up, it is not going to play right—or a piano, either. I do not care what the tone was in six months, or at any time. The question is, was that instrument so created as to play music.

Q. Can most of these things that are included in the letter be caused by dust or ashes? A. A great part of them could.

Q. And, by the way, did you put the tremolo on that organ at that time—do you recollect getting a tremolo and putting it on, in 1918? A. I remember that I did install a tremolo on it.

Q. Do you know, from your experience, that the science of electrical organs has advanced, or

not, in the last five or six or seven years? A. Not in the last five or six or seven years.

Q. It has not advanced? A. Probably just in minor improvements.

Q. Do they use different sizes and different kinds of magnets now than were in general use in 1917, or '16? A. No.

RE-CROSS-EXAMINATION by Mr. Morten:

Q. And the magnet that is in use to-day for the same purpose as was in use in 1917, is still in use, is it not? A. Yes, it is.

Q. And in 1916, too? A. And previous to that, even.

Q. In fact, ever since Hope-Jones first put out this electrical magnet you have used this same magnet practically, for the same work, haven't you? A. Well, I would not say "exactly the same magnet," but the principle was the same, yes.

Q. There is no material change in it? A. No not since Hope-Jones' time.

Mr. Lane: I rest.

LEE P. WOODBERRY, re-called:

Direct-examination by Mr. Morten:

Q. You are playing on this Roosevelt organ, up at Mr. Robinson's theatre? A. I am.

Q. How many pipes has it got? A. Well, the exact number of pipes is somewhere—oh, well I

don't want to testify exactly, because I have not counted them; I am not prepared to say.

Q. How often do you have to call in any assistance to have any mechanical defects corrected? A. Well, I take care of that myself.

Q. Have you had any mechanical defects—I am talking about *mechanical defects,* not tuning or voicing? A. Well, outside of, maybe, one note of a single scale going wrong, which might be caused by a little dust on a magnet; but that might only happen in one rank of stops.

Q. And how many contact points burn off? A. I never have any trouble that way.

Q. Do you know how often Mr. Beach is required to have a man down in this organ, the last year you have been operating it? A. I do it myself.

Q. Do you know how often he has had a man there—do you know? A. He had no man there on any mechanical defect, outside of a little addition I put in myself, that he helped me on; and that was some novelties I wanted put in.

Q. Is it customary, if you have an organ with three thousand pipes, to have seven hundred of them out of tune? A. I would know it very quickly if it was so.

Q. Do you have such a condition in an organ—is that a usual thing? A. I never found it that way. The only thing that would cause that would be long neglect.

Q. Well, is an organ playable that has one-seventh of its pipes out of order—is it playable? A. How can you? It is impossible.

Q. And is it necessary to have a man for an

organ—for instance, you had a Behman organ down at the Summit Theatre? A. Yes.

Q. How often did you have pipes there that required mechanical attention? A. I did not have anybody there—well, I had a man come up and help me tune it; very seldom had any trouble with it. These ciphers will generally occur when an organ is bran new and before you get it broken in and before you turn it over. You will find them in starting a new organ.

Q. How long will it take to break in an organ? A. Well, about two weeks.

CROSS-EXAMINATION by Mr. Lane:

Q. You say neglect of an organ will cause this condition? A. What condition do you mean?

Q. The condition you said that neglect of an organ would cause? What condition will neglect of an organ cause? A. Well, that means if you keep on playing it, day after day, and do nothing to it.

Q. All right; what condition will that cause? A. That is liable to cause ciphers; it is liable to cause pipes to go out of tune so badly you cannot use them.

Q. Now, you say "using the things day after day without taking care of them"—what kind of care do you take of them? A. Well, I usually keep it tuned—the most of it.

Q. How often do you do that? A. It all depends on the condition of the weather. I tuned my organ now at the beginning of September, and I have not touched it since.

Q. And you mean by "neglect of an organ" that

it is not neglect if you have not done anything to the organ since September? A. Oh, little, minor things—nothing to amount to anything.

Q. Have you done anything as far as magnets are concerned, such as blowing dust off? A. I have no trouble like that.

Q. What "minor things" have you done? A. Just as I told you.

Q. You said "dust"? A. Once in a while I get one. We have sixty-one notes—sometimes seventy-three—in one chest, and if one of those notes in that chest would cipher it does not mean the organ is put out; but if you have an additional forty or fifty, that is a bad mechanical condition. There is no organ in the world that don't have one or two notes, once in a while, that would cipher in one chest, but I am talking on a large scale; I don't mean one or two little notes that would cipher, and that is what I am trying to get at. It is the general condition that I found.

Q. Well, one silent note is not bad in each series, is it? A. No.

Q. Or three? A. Well, it all depends—just because you could not use a stop if you had three off, if it was in the middle register, where you use it the most, that stop would be no good to you.

Q. Well, can you tell, by looking at this, whether that is the "middle register," as you call it, or what kind of a "register" it is in (showing the witness an exhibit, but not designating the exhibit number)? A. I could not testify—"lower octave bad."

Q. What does that mean? A. That is in the

lower part of the keyboard—not the upper part, the lower part.

Q. How many keys are there, with that 30 taken out? A. Well, it would depend—about 25 or 26.

Q. How many notes? A. Twenty-six notes—
10 from middle c, down.

EARLE BEACH, re-called.

Direct-examination by Mr. Morten:

Q. You built this organ in the Roosevelt Theatre? A. I did.

20 Q. How many pipes in it? A. 4,100.

Q. How often, during the past year, have you been obliged to send a man to overcome any mechanical defect in that organ? A. At no time did I send anybody to overcome any mechanical defects.

Q. Has there been any burning of contact points on electrical magnets? A. None.

Q. Mr. White, this morning when you were not here, testified that you built the organ for the
30 Montclair Theatre, where he is now playing; is that so? A. It is not.

Q. What did you do? A. I assembled it.

Q. You assembled an organ that was already built? A. I did.

Q. Now, he says that you lost out on repairing that organ because you could not overcome the difficulties in it; is that true? A. It is not.

Q. Did you finish the job? A. I did not.

40 Q. Why? A. I finished the original installa-

tion; I did not maintain it after a period of a year and a half.

Q. He says that they took the job away from you; was that so? A. They did.

Q. And when? A. While I was sick with appendicitis, in the hospital.

Q. Then they gave it to somebody else? A. They did.

Q. He says that in his organ he has about 3,000 pipes, and he says that at times he has 400 pipes silent?

Mr. Lane: He did not say that at all, if your Honor please. I object to the question. The testimony was that at the time Mr. Beach ran this organ out there, he went there and made a list of 400 pipes, or notes, or whatever it was; that at that time he had them; and not that he generally or usually had them.

Mr. Morten: And he said that he can still go on playing the organ, with 400 pipes out of commission—that is what he said, is it not, your Honor?

The Vice Chancellor: I did not pay much attention to it.

Q. Well, if there were 400 pipes, out of 3,000, out of commission, in an organ, would you say that that organ was in any condition to be used as an instrument? A. I would not.

Q. Now, regarding this magnet—you testified on direct-examination before, that the magnet on this organ of Mr. Robinson's was designed for only 10 volts; is that so? A. It is.

Q. And you said that when you went there you found that they were using 15 volts; now, how many volts would they have been obliged to use if they had retained the pressure system that they originally intended to install in this organ? A. Ten.

Q. And when, after seeing Mr. Woodberry's organ, they came back and decided to put in the suction system, how many volts would it require? A. Apparently, 15.

Q. What happened to the magnets?

The Vice Chancellor: That has all been testified to.

Mr. Morten: I want to follow it up by another question—that is why I am asking it.

A. In some instances it burned them out.

By the Vice Chancellor:

Q. Burned the magnet? A. Burned the magnet; yes, sir.

Q. Or the base upon which it was attached? A. No, it caused one of the little, fine wires which constitutes its winding to separate, from overheating.

By Mr. Morten:

Q. Now, in your opinion, what would be necessary to overcome these difficulties that appeared in this organ, as you found them in January, 1919? A. Accepting the organ specification as I found it, with the mechanism as it was installed, it would have been necessary to have installed

a complete new electrical system, to have it operate permanently.

Q. On what voltage? A. On 15 voltage.

Mr. Lane: That has all been gone into.

The Vice Chancellor: Yes; he said it would cost $4,500 to rebuild this organ; that is what he has testified to. (To the witness): Is not that right?

The Witness: That is right.

Q. Now, if you had used the material that is there, how much would it cost?

The Vice Chancellor: He said, "the same thing"—he said it was not usable—is not that right?

The Witness: The actual salvage value of the organ, as it stands at the present time, is a question of a few hundred dollars.

Q. But if you used the material that was there at that time, and then you had to put in this new electrical control you spoke of, then how much would it cost to rebuild the organ? A. It would cost then, approximately around $3,500.

Mr. Morten: I thought your Honor had that other idea, so I wanted to correct it. He said $4,500 for the whole thing, but if he used all they have got there—

The Vice Chancellor: He said the only thing he could have salvaged, as I recall it, was the pipes, and he said the pipes and the piano and the mechanism would cost

about $4,500, because it would cost more to do the repair job than to do it new—is not that it?

The Witness: That is a fluctuating affair; it is hard to place it definitely.

Q. Is there any reason why this organ could not have been placed in first-class condition, if they had installed magnets that would have taken care of 15 volts? A. No.

CROSS-EXAMINATION by Mr. Lane:

Q. Has the cost increased any since 1916? A. It has.

The Vice Chancellor: This has all been gone into. He said it is almost double now, didn't you?

The Witness: Yes, sir.

Mr. Lane: I could not allow your Honor to have the idea that this man has testified to $4,500, or $3,500, without cross-examining.

The Vice Chancellor: He has testified to it, but you can go into it; but he has gone into it before. You may go ahead, though.

Q. How much has it increased—what percentage? A. It varies from 25 to 100 per cent.

Q. And your estimate is given as of today, is it? A. As of today.

Q. Now, what would it have been in 1916? A. I was not familiar with organ manufacture in those days, so as to give you the real figure.

Q. Now, it is also the fact that you have im-

proved the magnet since 1916, is it not? A. Not in electrical detail, no.

Q. Well, in what detail? A. In the isolated members attached to the valve and armatures, as it is called—changed its form, size and shape. The electric magnet has stood as it is since 1907.

Q. Is your new magnet the one that is in the new organ in the new theatre, or is it a magnet such as the old one? A. The magnet we employ in the Roosevelt Theatre is the same that is on the market for sale by a concern which manufactures them in Hagerstown, Maryland, under our patent rights.

Q. And are similar magnets to the ones that are in the Master organ in Robinson's building? A. The magnet itself was the same, but the style of cap or valve was slightly different.

Q. Well, what does that do? A. It has no effect upon the magnet—it has no effect upon the electrical apparatus of the magnet.

Q. Well, what is it there for? A. That merely is the wind control at that point where this armature or valve rests, at the point where the electrical energy is converted into pneumatic energy.

Q. Well, that is the principle of the whole magnet, is it not? A. It is part of the principle.

Q. Well, does that not have some effect on the electrical system, at all? A. The shape or size that that particular magnet happens to take has no effect on the magnet itself.

Q. Do your magnets wear out? A. They have.

Q. From what cause? A. From defective workmanship. They slip up in tests once in a while. Sometimes we get 10 or 12 out of a thousand.

Q. They burn out because there is too much voltage? A. No, because they are improperly connected in the windings.

Q. Now, you are talking about the real condition of the organ in 1918, aren't you? A. 1919.

Q. 1919—well now, does the fact that an organ has been torn down and rebuilt have anything to do with the condition of the organ? A. Not structurally, no.

Q. Well, did you hear the organ played in 1919? A. I did.

Q. In 1919? A. I didn't "hear it played"; I operated it myself.

Q. In 1919? A. Yes.

Q. Well, would it have anything to do with the playing of the organ?

Mr. Morten: Would what have anything to do with it?

Mr. Lane: The fact that it had been taken down and rebuilt again?

Mr. Morten: There is no testimony that it has been rebuilt.

Mr. Lane: Well, "reassembled," then.

A. I cannot say that it would have any material effect upon the organ.

Q. Did you testify that you looked at this organ in February, 1919? A. I did.

Q. Did Robinson see you about using this old organ, in putting it in the new theatre—the Roosevelt Theatre? A. He spoke of it.

Q. Yes—well, what was the conversation? A. He wanted to know if this organ could be utilized it by using it, by adding some more pipes and

action, to install in the new theatre, and I told him "No," on account of the past experience I had had in examining the organ; that I would merely allow him $700 for the salvage of the pipes and the action; that he could do as he liked; that I would have nothing to do with it.

By the Vice Chancellor:

Q. How long was that after the organ was installed in the Colonial Theatre? A. Why, that was about 1921, I believe—it was 1921.

Q. Had the organ been taken down at that time? A. I believe it had.

By Mr. Lane:

Q. Did you see the organ at that time, where it was? A. I did not.

Q. Well, were you up there in the Colonial Theatre, to see the piano, or was the organ without the piano? A. My last trip to the Colonial Theatre was in 1919.

By the Vice Chancellor:

Q. At that time the organ was taken apart, or had been taken down? A. No, not at that time, that I went up there to make the examination in 1919.

Mr. Morten: Your Honor, you know, it had been taken apart, and they had put it together again, but he did not know anything about that; he was not there. Your Honor was right in that respect.

The Vice Chancellor: What I went to get at was the time he spoke about re-installing this organ, with some additions, in the Roosevelt Theatre.

Mr. Morten: He (Robinson) wanted to know if it could be done.

The Vice Chancellor: Yes, if it could be done, and I want to know what time that was.

A. Well, that was in the summer of 1921, approximately two years after I had been there, or a year and a half.

By Mr. Lane:

Q. And you were interested in putting up a new organ of your own? A. We re-build, as well as build them, now.

Q. Yes, but you were interested in putting a new one in? A. Yes, indeed.

Q. How much did this new one cost? A. $24,800.

Q. A different type, and much better organ than this American Master Organ, was it not? A. The type is no different.

Q. Well, it is much better, is it not? A. We consider it so.

Q. Now, did Robinson give you any reason as to why he did not want to salvage this organ at that time for a thousand dollars, or whatever it was? A. No, he did not; but I surmised by the expression on his face, that he found it was not very much money.

Q. Was it a thousand, or seven hundred dollars? A. Seven hundred dollars.

Q. Did you know that there was some controversy between Robinson and the Pipe Organ Maintenance Company at that time about the organ? A. I did.

Q. Did it have anything to do with your using the old organ? A. In a way, it did.

Q. In what way? A. We did not care to get into any extra litigation ourselves?

Q. Why?

Mr. Morten: There is no need to ask that.

A. We did not feel that there was a clear title in regards to the matter, so we just kept hands off; but that was not the main reason.

Q. Did Robinson ask how much you would allow him? A. He did.

Mr. Morten: That is our case.

Both sides close.

Mr. Lane: Would your Honor like to hear argument now?

The Vice Chancellor: Not at this hour; I would rather start early in the morning.

Mr. Lane: I will agree, if your Honor please, to take ten minutes in the argument.

The Vice Chancellor: To begin with, I would like to know what this case is about in a court of equity. I don't know how it ever got here.

Mr. Morten: We did not come here because we wanted to come here; we couldn't help ourselves. If you send us back, we will have to go back.

Mr. Lane: Your Honor cannot.

The Vice Chancellor: Oh, yes; I have sent them back.

Mr. Lane: Well, not after you have tried a case for three days, I don't think your Honor would.

Mr. Morten: No, I do not say he will, but I say if he sends us back, we will have to go back.

The Vice Chancellor: What I want to know is whether this is not just a plain, simple action of replevin, or trover and conversion for the recovery of property or damages for breach of the contract?

Mr. Lane: I think that is right, if your Honor please, and I think the only question (I have worked around to it finally after taking a lot of time) in this case is this: First, if we furnished an organ that is in accordance with the contract, we are entitled to get our money; secondly, whether or not that organ was in compliance with the contract, whether the defendant has not waived his objections on that point and has not claimed a breach of the contract, but has rejected the contract; and if that be so, then, of course, it brings it right back to the same point. It is a question whether or not the complainant is entitled to recover the purchase price of this organ, or any part of the purchase price of the organ; and if so, he has got a lien upon the organ for it, or is entitled to have a lien upon it. Now, I think that is the only question in the case. And not only are there so many elements of acceptance—such as payments under the contract—but after he had this organ and knew about the alleged defects as they existed, he claims the benefit of a privilege under the contract, to wit, the privilege of not having another organ of the kind operated in his territory. Now, that is taking the benefits of the

contract; and a man cannot, under the law (particularly in this Wurlitzer case), on one hand, take the benefits of the contract, and, on the other, say, "I am not going to comply with my part of the contract."

The Vice Chancellor: If those are your only points, I will let you give me a brief on the law on them. What are your points, Mr. Morten?

Mr. Morten: I say this, if the Court please—it is practically along the same lines as Mr. Lane has suggested, with this exception—that I think that Mr. Lane has got the wrong idea on rescission. As I view the law, a buyer is not under obligation to rescind. If he don't get what he contracts for, he may retain what he purchases and insist upon performance. That is one of the provisions of the Sales Act. We did not need to rescind. But if they rescind—and I take it in this case, they are the rescinding party—

The Vice Chancellor: They want the money.

Mr. Morten: They have started an action in replevin; now they want the instrument and they cannot get it unless they made a tender of what is coming to us, if the instrument was not what it should have been. Therefore, I say, outside of that, we will agree. If the organ was what it should have been, we would have no defense—there is not doubt about that; and if the organ is not what it should have been, the mere fact that we continued to make payments in the hope that it would be made so, while they had men working on it and promised to make it so, can never be construed as acceptance—especially in view of the letters that they had complaining and

complaining and called their attention to it, and to the fact that we did not accept.

The Vice Chancellor: When was the instrument taken down and stored?

Mr. Morten: I think the testimony shows that that was in May, 1921, wasn't it?

Mr. Lane: Well, the first time it was taken down was in May, 1918.

The Vice Chancellor: Well, I mean when he separated the piano from the organ.

Mr. Lane: I think Mr. Robinson could not say whether it was the latter part of 1919 or 1920, or when it was; that is my recollection.

Mr. Morten: He said that at the time the Roosevelt Theatre was being built, he had to take it out so as to get his theatre in there. That is what he said.

The Vice Chancellor: When was that?

Mr. Morten: March 1st, 1921.

The Vice Chancellor: When was this suit started?

Mr. Morten: Oh, this suit was started long, long before that.

The Vice Chancellor: I see. Well, make your briefs short and just state your points and the law bearing on them and send them in within a couple of weeks.

(Case held for briefs.)

Exhibit D-1.

Exhibit D-1 annexed to Bill of Complaint and will be found printed in full on pages 12-20.

Exhibit D-2.

AMERICAN MASTER ORGAN COMPANY
INCORPORATED

Greenwood A. Robinson, Esq.,
West Hoboken, N. J.

650

679.67

Date due	*Paid*		Interest	Payment	Total		
		250 *400*					
Dec. 11, 1916	Interest on	$5000, 11 days	9.17	150.	~~159.17~~		12/11/16
Jan. 11, 1917	" "	4850, 1 month	24.25	150.	~~174.25~~		1/31/17
Feb. 11,	" "	4700, 1 "	23.50	150.	~~173.50~~		2/10/17
Mar. 11,	" "	4550, "	22.75	150.	~~172.75~~		3/12/17
Apl. 11,	" "	4400, "	22.	150.	~~172.~~	X	
May 11,	" "	4250, "	21.25	150.	171.25	X	
June 11,	" "	4100, "	20.50	150.	170.50		
July 11,	" "	3950, "	19.75	150.	169.75		
Aug. 11,	" "	3800, "	~~19.~~	150.	~~169.~~		8/18/17
Sept. 11,	" "	3650, "	18.25	150.	168.25		9/18/17
Oct. 11,	" "	3500, "	17.50	150.	167.50		
Nov. 11,	" "	3350, "	16.75	150.	166.75		10/5/17

Dec.	11,		"	"	3200,	"	16.	150.	166.
Jan.	11,	1918	"	"	3050,	"	15.25	150.	165.25
Feb.	11,		"	"	2900,	"	14.50	150.	164.50
Mar.	11,		"	"	2750,	"	13.75	150.	163.75
Apl.	11,		"	"	2600,	"	13.	150.	163.
May	11,		"	"	2450,	"	12.25	150.	162.25
June	11,		"	"	2300,	"	11.50	150.	161.50
July	11,		"	"	2150,	"	10.75	150.	160.75
Aug.	11,		"	"	2000,	"	10.	150.	160.
Sept.	11,		"	"	1850,	"	9.25	150.	159.25
Oct.	11,		"	"	1700,	"	8.50	150.	158.50
Nov.	11,		"	"	1550,	"	7.75	150.	157.75
Dec.	11,		"	"	1400,	"	7.	150.	157.75
Jan.	11,	1919	"	"	1250,	"	6.25	150.	156.25
Feb.	11,		"	"	1100,	"	5.50	150.	155.50
Mar.	11,		"	"	950,	"	4.75	150.	154.75
Apl.	11,		"	"	800,	"	4.	150.	154.
May	11,		"	"	650,	"	3.25	150.	153.25
June	11,		"	"	500,	"	2.50	150.	152.50
July	11,		"	"	350,	"	1.75	150.	151.75
Aug.	11,		"	"	200,	"	1.	150.	151.
Sept.	11,		"	"	50,	"	.75	50.	50.75

Exhibit D-3.

AMERICAN MASTER ORGAN COMPANY—Inc.

Lake View—Paterson—New Jersey

Mr. G. A. Robinson,
Colonial Theatre,
734-36 DeMott St.,
W. Hoboken, N. J.

May 2, 1916.

Dear Sir:

Since we saw you last, our company has been reorganized on a very large scale, and we would like to see you at once regarding a proposition for the introduction of our new American Master Organ in West Hoboken.

Anything that will materially increase the patronage and prestige of the Colonial Theatre, you will consider a bargain, but when you hear our special proposition to you, we are sure that you will lose no time in taking advantage of it. We are mailing you under separate cover specification of a much larger instrument than the one you heard in the demonstration room on Broadway, New York. Our introductory offer to you on this instrument is $4750, and the terms can be adjusted to meet your approval.

If you will communicate with any of the Motion Picture theatres that have installed the American Master Organ, you will find that it is a strong advertising asset and a big money-maker that quickly pays for itself in increased box-office receipts.

Exhibit D-3

Your adoption of this remarkable new feature of ultra-modern equipment cannot fail to put your competitors one decided step behind you in their offering to the public.

We hope that you will drop us a line to let us know when our representative may call and discuss this matter with you in detail.

Trusting to hear from you at your earliest convenience, we remain

Yours very truly,

AMERICAN MASTER ORGAN CO.
Frank R. White,
Vice President.

May 26th -6

Mr. Frank K. White, Vice Pres.
American Master Organ Co.,
Paterson, N. J.

Dear Sir:

In answer to your letter of May 2nd, the writer might possibly take a trip out to your factory some morning of next week, will you kindly inform us as to the best way to get to your factory and also let us know if you can be seen during the morning.

Yours very truly,

GAR/L.

Exhibit D-4.

AMERICAN MASTER ORGAN COMPANY–Inc.

Lake View—Paterson—New Jersey

Mr. G. A. Robinson,
Colonial Theatre,
West Hoboken, N. J.

October 18th, 1916.

Dear Robinson:

I have sat here, sweating blood for over an hour, knowing that my duty to you is clear yet realizing that in measuring up to the duty my sincere interest in your business imposes I am going to make myself at least for a time generally un-popular, risk the displeasure of my company and how much more than that depends upon yourself.

Heaven, how hard it is to get this out of my system but believe me, friend Robinson, both Ely and myself are prepared to make the limit of personal sacrifice to show you the sincerity of our purpose and the proposition I submit surely does put some of the burden on myself, but here goes: I have made up my mind that I will do anything rather than be a perty to the fatality to your interests of presenting your beautiful instrument to the public before it is entirely complete and worthy to up-hold your good judgement. It *is* possible for you to have a part of that organ playing to-morrow or the day after but the subsequent injury to your business and prestige will spread its self over the next ten

Exhibit D-4

years and will forfit what otherwise I can promise will be a boost to your business that will make your judgment envied by your competitors. There is a lot of horse-sense in the old adage about the dog and a bad name; let your patrons once leave your theatre feeling that they have heard less than they have reason to expect to hear and no matter how beautiful your instrument is a week later, your bolt is shot.

Now it must be evident to you that we have done everything humanly possible and have fallen short of what we had expected to accomplish by only a very few days. When I suggested the quiet use of the organ before the formal opening, I had in mind the quiet use of the whole organ and not a few stops in it. Now Robinson, I know just how you are going to feel about this and believe me, when I say that I am going to come down and talk the matter over with you to-morrow, I consider that I qualify as a brave man but for Heaven's sake help us first to get the wounded out from under the wheels and afterwards abuse us to your hearts content for being responsible for the accident. That I am responsible for a mistake in judgement I frankly and most regretfully admit but there has been no lack of sincerity on Ely's part, he personally worked at the factory all night last night and was on the job again at noon to-day.

Will you do me the everlasting favor of giving my plan of recovery a trial and I can guarantee that it will close the incident in a blaze of glory

that will sweep everything before it & quickly recover the little you may lose in properly putting it into effect.

(*Pardon my modesty while I shoot this bull*) Get your printer, at our expense, to turn you out a thousand neat inserts for your programme stating that the management regrets to announce the serious illness of Frank R. White, the celebrated artist who had been engaged and advertised to open the American Master Organ. Oweing to the fact that wide publicity has been given this, the first appearance of this artist since his remarkable performances in the Century and Vitagraph theatres, the management heaitates to impose upon its patrons to the extent of presenting a substitute and being assured that Mr. White will be in condition to appear one week from this date, the opening of the new organ is therefore postponed till Thursday evening, October 26th.

Now Robinson, the difference between a big permanent success that will spread itself and its benefits over many years and an indifferent, half-cocked, disappointing affair that will take months to live down is a difference represented by seven days. A year from now you will consider the suggestion I have made an act of true friendship and advice based on lots of experience I have had with half-baked openings. You have it in your power to do a whole lot of things to me for this but I want to tell you that if you will give us just this little grace of seven more days to make a creditable job and have a famous opening, you

can call upon me to play for you any old time you want me and I will not be lacking in gratitude and appreciation, for your success is our success.

Remember that this refers only to the formal opening but I would not permit the use of the organ at even a morning performance if I were you unless it is entirely complete as FIRST IMPRESSIONS ARE LASTING.

Now get out the inserts and then forget about it and go on a honey-moon or something and if you will do the above favor for me I will be your slave for life. By the way, there is no mis-representation in that insert I propose as I sure am seriously sick over this thing but a week from now and you will be amply repaid by an UN-QUALIFIED success and after all our work, let us be satisfied with nothing less.

Sincerely Yours,

FRANK R. WHITE.

Exhibit D-5.

November 13 -6

American Master Organ Co.,
Paterson, N. J.

Gentlemen:

Every cause has its effect. The cause of the delay in the perfecting of our instrument you yourselves know. The effect of that delay we alone know.

Immediately upon receipt of this letter we wish to have you sit down and reduce to writing the cause of your delay and what provisions you are making to place our instrument in perfect working order. It is now over two weeks since the organ was opened and it should have been completed by this time. During the last week we were informed that the entire organ would be in perfect order for last Saturday morning and that you would keep your men working on same until same was finished. We wish to inform you, Thursday there was nobody here, neither was there anyone here until supper hour on Friday at which time very little work could be accomplished by your man.

When I phoned the factory you promised to have a man here on Saturday and to leave this man here until the instrument was in perfect shape. This man worked Saturday, stayed away on Sunday and came again on Monday morning for one hour leaving again at nine o'clock. The following list will give you an idea of how near perfect the instrument is, the Vox-Humana, Oboe

and the Trumpet are all out of tune with at least half a dozen notes on each stop refusing to play. Throughout there are some of the notes that work without any stops on, F sharp, above middle C is off on all stops and has been off for sometime. C. Sharp is off on some stops. The Vox Tremolo is not working, the Glockenspiel is not working, low C pedal is weak and several diaphones are nearly inaudible, the solo octave coupler (4 foot) misses on nearly half its notes, the oboe needs regulating as it is not uniform and the piano has not been tuned. The snare drum does not work and when starting the motor there is a cipher between the chimes and the bells and has been since the instrument was installed.

We are informed of the delay in the installation of the traps and we fully understand the cause in this direction,* but we know of no reason why the organ should be left in the condition it is at the present time (not even the shortage of help on your part) as the instrument is more detrimental to both our interests in its present condition than if it wasn't in at all.

We ask you to give this letter your personal attention and to give us a reply by return stating what you intend to do.

Yours very truly,

GAR/LE

(Note: At point indicated by star in next to last paragraph there is a lead pencil arrow leading to bottom of letter where are the words, "Traps & Drums")

Exhibit D-6.

November 24 -6

American Master Organ,
Paterson, N. J.

Gentlemen:

Unlike our chief executive, I do not care to be continually writing notes and letters. If you remember I wrote you on November 13th and up to the present time have not received an answer from you. Will you at least acknowledge receipt of that letter?

I have no desire at all to become antagonistic to your company, but I do believe that there are some details that require a little more attention on your part. We are the party of the second part of the contract made with you on the 14th of June 1916, and we wish to notify you that this contract has been briken time and time again by the party of the first part, The American Master Organ Company, which is yourselves.

Were it not for the fact that the writer is highly pleased with the general quality of your instrument he would have been as dead timber to you long before this. Being satisfied generally however, with the tone and quality and general make up of the instrument, shows great confidence in both the instrument and yourselves. To hold this confidence it behooves you to do something to improve your system of working.

My regrets at this time are that I paid the four hundred dollars, (which was the second payment

on the instrument) before the instrument was completed, and I wish to state, here and now, that this is not an acknowledgment on my part that the instrument is completed. Under ordinary circumstances and in accordance with contract if the payment of this four hundred dollars was an acceptance of the instrument by me you would of course be entitled to the first month's payment with the interest on the principle sum.

You will pardon me being plain spoken but I want to be understood that the first payment with computed interest will not be made until the instrument is finally completed. While we are in a position to make the payment we believe that by holding same it will have a tendency toward having you complete your instrument. Read over your contract and I believe that we are perfectly justified in our demands.

Awaiting your reply, I remain,

Yours very truly,

GAR/LE

P. S. While reading over the contract we notice that you were to stand the expense of removing our old machine to your factory, this amount has been paid by us and will be deducted the next payment that we make.

Exhibit D-7.

AMERICAN MASTER ORGAN COMPANY–INC.

Lake View—Paterson—New Jersey

November 24th 1916

Mr. G. A. Robinson,
Colonial Theatre,
734 DeMott Street,
West Hoboken, N. J.

Dear Sir:

Referring to your letter of the 13th. Since the receipt of this letter, our man has been giving his attention to the irregularities your letter lists, and his report is that most of them have been rectified. Tomorrow morning one of our men will be at the theatre to continue this work, and we will endeavor to clear up without further delay any remaining troubles, most of which are merely incidental to a newly installed instrument and will disappear with use and regulation. We will do our best to work with you in making this instrument a complete success.

Very truly yours,

AMERICAN MASTER ORGAN COMPANY,
A. C. Ely
Secretary & Treasurer

Exhibit D-8.

Dec. 8th -6

American Master Organ Co.,
Paterson, N. J.

Gentlemen:

We are now prepared to place insurance on the new American Master Organ that has been installed in our theatre and in accordance with contract, clause #8, we now call on you to procure insurance on this instrument.

We would like to ask you at this time to kindly acknowledge having received our Style K Wurlitzer at your factory as we have never received any letter from you stating that you have received same. We would also like to know that this instrument will be fully protected by insurance while in your factory and we would ask you to procure a special policy to the amount of two thousand dollars on this instrument of ours. This policy is to be made out to C. A. Robinson, this insurance we of course will pay for, we would ask you to take care of this matter without any delay.

We wish to further state that on Monday or Tuesday of next week we are hopeful of being able to pay you the first monthly payment on your instrument and would ask you to kindly work out the interest table, as taken up by your Mr. Ely. Will you kindly acknowledge receipt of this letter and attend to the details of same, giving us your answer by return mail.

Yours very truly,

GAR/LE

Exhibit D-9.

AMERICAN MASTER ORGAN COMPANY–Inc.

Lake View—Paterson—New Jersey

December 9, 1916

Mr. Greenwood A. Robinson,
Colonial Theatre,
West Hoboken, N. J.

Dear Sir:

We are in receipt of your letter of the 8th inst., and are enclosing herewith the interest table you mention.

We hereby acknowledge receipt at our factory of your Style "K" Wurlitzer instrument, and we will at once attend to the insurance covering same, to be taken out in your name to the amount of $2,000.

With reference to the insurance on the organ in your theatre, we will procure this at once and forward you invoice covering the premium.

Very truly yours,

AMERICAN MASTER ORGAN COMPANY,
A. C. Ely
Secretary & Treasurer

Exhibit D-10.

AMERICAN MASTER ORGAN COMPANY–Inc.
Lake View—Paterson—New Jersey

March 13th 1917

Mr. G. A. Robinson,
Colonial Theatre,
West Hoboken, N. J.

Dear Mr. Robinson:

On March 1st we ordered suction blower for your traps to be sent direct to the theatre. In ordering this, we were guided by the markings on the suction blower which came with the Wurlitzer machine, which showed 110/220 volts. We expected that this would reach you before this time, but this morning are in receipt of a letter from the Company stating that they were unable to furnish the blower to operate on both 110 and 220 volts and asking if 220 volts was the available current. Upon phoning your theatre this afternoon we find that your current is 220 volts and have wired the company to this effect. You can therefore look for this blower within the next few days now, as they have promised quick shipment.

Very truly yours,

AMERICAN MASTER ORGAN COMPANY,
A. C. Ely,
Secretary & Treasurer.

(*Written on face*)

Blower received April 24 C O D and refused
Delivered on Thursday Apl 26

Exhibit D-11.

May 2nd -7

American Master Organ,
Paterson, N. J.

Gentlemen:—

I want you to read over your contract made by you on the 14th of June with myself, and I want you to note the different clauses therein. First of all I call your attention to the date that was originally set for the installation of the organ which was September 4, 1916; in the second place I want to call your attention to the manner of payments on my part for this instrument. You will notice in clause five of your contract that the second payment of 400 dollars was to be made by me upon completion of the instrument in accordance with contract. Further, in section nine of the contract regarding the interest of six per cent per annum this interest is to be computed from date of complete installation.

Yours attention is now called to my letter to you of November 24th wherein I informed you that my payment of four hundred dollars to you was not an acknowledgment on my part that the instrument was completed at that time. Since this letter was written I have made payments to you amounting to six hundred dollars with accumulated interests of $79.67 and I think that you will agree with me that in accordance with your contract you have no just demands on my for these payments.

Exhibit D-11

These payments were made to you on account of the numerous requests that were made upon me, and before going any further with this letter I want you to distinctly understand that any payment that I have made to your company has not been made with any acknowledgement on my part of the completion of the instrument.

It is now seven months since the date set for the installation and completion of this instrument, and you know that the attempt on your part towards complete installation has been a miserable failure, now I demand to know by return how much more time you require to perfect this instrument. I want you to be careful in stating this date, because I shall withhold any and all payments on this instrument until that time. Further, I am going to insist on you crediting me with the payments that I have already made, with the accumulated interests as of, and from the date that you are willing to set for the completion of the American Master Organ in this theatre.

I desire an acknowledgement of this letter.

Yours truly,

GAR/L

Exhibit D-12.

AMERICAN MASTER ORGAN COMPANY-Inc.

Lake View—Paterson—New Jersey

May 4th 1917

Greenwood A. Robinson, Esq.,
Colonial Theatre,
734 DeMott Street,
West Hoboken, N. J.

Dear Sir:

In accordance with your expressed desire, we hereby acknowledge receipt of yours of the 2nd inst. With regard to the work that we have been doing on your organ in accordance with the *upkeep* clause of our contract, we beg to inform you that we expect to complete same at a very early date.

Very truly yours,

AMERICAN MASTER ORGAN COMPANY,
A. C. Ely
Secretary & Treasurer

(Note: A pencil mark drawn from the italicized word upkeep above leads to the words, written with pencil at bottom of letter, "What does this mean")

Exhibit D-13.

(Receipt for Registered Letter)

Received and Registered Article No. 1858
.....class postage paid. 8/6, 1917

From Colonial Theatre
Transfer Station West Hob N J

Addressed to American Master Organ Co
Paterson N J

Delivery restricted To addressee in person....

To addressee or order....

Postmaster, per A D MATTES

Stamped: Postmark West Hoboken Stat 1 N J Jun 8 1917

Silent Notes on Solo 6/8/17

Vox Humana	3
Obloe	3
Clarinet	5
Flugel Horn	19
Picolo	2
4 ft Flute	4
Celeste	12
String	9
8 ft Flute	1
Diapason	9
Cello	7
Bourdon	3

On the Solo there is one note that plays without any stops on and also plays with any stop

---

On the Accompaniment the Flute Stop Stays on all the time

Exhibit D-13

On Pedals	
7 Diaphones	The temperature now being higher than when the organ was installed requires the piano tuned to the present pitch of the organ
2 Bourdon	
2 Cello	
8 Diapason	
4 Clarinet	
2 Chimes Silent	At this time there is no results from either drum or traps
2 Glock	

Registered

June 8th -7

American Master Organ,
Paterson, N. J.

Gentlemen:

I want to know by return mail when you expect to complete my American Master Organ in accordance with the terms of the contract. I have been away for the past two weeks, and was very much surprised to find upon my return that you had made absolutely no progress on the instrument, and I take this means of informing you that unless you show some decided action in this matter before next Friday June 15th I shall find some other means of having this instrument completed in accordance with the plans and specifications at your expense.

Exhibit D-13

I am enclosing a list of minor troubles that I find show up on the instrument at the time of looking over the instrument this morning, these troubles are of course seperate and apart from the connecting up of the drums and traps.

Relative to the drums and traps you asked my permission to use the motor that was connected with my Wurlitzer instrument that is in your factory, stating at that time that you wanted to determine the amount of power that was necessary to work the traps satisfactory. I granted this permission, and in my own time and at my own expense connected up this motor over two weeks ago and since that time you have not even put in an appearance to make any attempt to have the drums and traps work satisfactory. I shall accept no more excuses, but in justice to all concerned I give you another chance to make good and failing this, I shall, as stated previously in this letter make other provisions for the completion of this instrument at your expense.

Awaiting your reply, I remain,

Yours very truly,

G A R

GAR/L

Exhibit D-14.

Vox { 1 C
25 C#

Oboe { 1-11 C side
6-25 C#

-P pipe

Ely

Aug 23

Clarinet { ~~16~~ 30-28 C
P P
6-~~18~~-30

Trump { 4-6-9-10-14-16-19-20-23-4-5-6-7-30 C
14-18-19

Bourd { 1
1

Flute 8 { 1-37-C
P
-26-36 C# 25 at Relay—

Celeste { 1-2-3-4 C
1-2-3-4-5-6-24-25-30-C#

String { 1-C
P
3-17-29 C#

P P

Open { 4-5-7-11-21-C

P

Cello { 4-28-31 C
21-26-29-(30 slow) C#

Diaphson { 4

No Tremolo flute on Acc
2 Picolo Aug 25th
2 Notes on oboe
3 " Trumpet
6 " 4 ft flute
Celeste 2 " Celeste
run throu 2 " 8 ft flute
on all stops 2 " Bourdon
1 " " Pedal
1 " Clar "

Exhibit D-14

AMERICAN MASTER ORGAN COMPANY-Inc.

Lake View—Paterson—New Jersey

August 17th 1917

Mr. Greenwood A. Robinson,
Colonial Theatre,
Transfer Station,
West Hoboken, N. J.

Dear Mr. Robinson:

Confirming our telephone conversation of the other day, I will meet you at the theatre on Saturday morning at 10 o'clock.

Very truly yours,

AMERICAN MASTER ORGAN COMPANY,
A. C. Ely

ACE-BS

Exhibit D-15.

AMERICAN MASTER ORGAN COMPANY-Inc.

Lake View—Paterson—New Jersey

September 14th 1917

Mr. Greenwood A. Robinson,
Colonial Theatre,
West Hoboken, N. J.

Dear Sir:

We hereby acknowledge receipt of your check of August 18th for $150.00 on account and regret our oversight in failing to acknowledge it sooner.

With reference to the cipher on the traps, to which you refer, it is difficult to give instructions by letter just how to make the necessary adjustments to overcome this. Within a very few days we will have someone call to remedy it.

With reference to Mr. Gutschmidt's bill, would say that we have received communications from an attorney in Jersey City who says he has this claim in hand. Some steps of course will be taken to clear up this matter, but in the absence of Mr. Jordan to-day, we are not in a position to authorize you to make this payment, although we are sure that the matter will be taken care of very soon.

Very truly yours,

AMERICAN MASTER ORGAN COMPANY,
A. C. Ely
Secretary & Treasurer

ACE-BS

Exhibit D-16.

AMERICAN MASTER ORGAN COMPANY-INC.

Lake View—Paterson—New Jersey

September 26th 1917

Mr. Greenwood A. Robinson,
Colonial Theatre,
West Hoboken, N. J.

Dear Sir:

With reference to the bill of Wm. H. Gutschmidt amounting to $93.55 for metal work done in connection with the installation of our organ in your theatre, we hereby authorize you to pay this bill and we will credit the amount of same against the balance due us on your contract.

Thanking you for handling this matter for us, we are

Very truly yours,

AMERICAN MASTER ORGAN COMPANY,
A. C. Ely
Secretary & Treasurer.

ACE-BS

Exhibit D-17.

AMERICAN MASTER ORGAN COMPANY-Inc.

Lake View—Paterson—New Jersey

October 4th, 1917

Greenwood A. Robinson,
c/o Colonial Theatre,
734 DeMott Street,
West Hoboken, N. J.

Dear Sir:

You are hereby informed that the contract of this company with you covering the organ at the Colonial Theatre, 734 DeMott Street, West Hoboken, N. J. has been assigned to John B. Mason of Paterson, N. J. and you are hereby authorized and directed to make all further payments under this contract direct to the said John B. Mason, care of Quackenbush & Co., Paterson, N. J. and all such payments will be duly credited to you the same as if they had been made direct to this Company.

Kindly consider this effective immediately.

Yours truly,

AMERICAN MASTER ORGAN COMPANY,
Augustus C. Ely
Secretary & Treasurer.

Exhibit D-18

(*Written across face*)

Mr. Mason home phone 2613 Paterson

Bill	93 55
Costs of Court	10 57
	104.12

2401 Paterson

Exhibit D-18.

Registered

American Master Organ Co.,
Paterson, N. J.

Attention of Mr. A. C. Ely.

Gentlemen:

Your letter under date October 4th, 1917, advising me that my contract with your company, covering the organ at my theatre has been assigned to John B. Mason of Paterson, N. J., and that further payments are to be made to him by me, has been duly received.

Before any further payments are made some understanding will have to be arrived at as to my rights under this contract. On September 3rd, 1917, after your man had done some work

on the organ, it seemed to work satisfactorily. This, however, lasted for a period of less than two weeks, as I again pointed out to you in my letter of September 3rd, 1917, and under date September 14th, you promised to have conditions remedied but you have not as yet done so.

My own opinion is that you have never placed this organ in the condition it should have been placed in, and that you are only trying do to as little as possible, so as to obtain an acceptance.

I have never accepted the organ and I do not intend to accept it until it is placed in the condition it should have been placed in, under the terms of our contract.

Inasmuch as I am not permitted to have the organ examined without your written authorization, and in view of the most unsatisfactory service which the organ has given, I now request you to authorize me to have someone admitted to the interior of the organ for the purpose of investigation, to ascertain the cause of the failure of the organ to work as it should work, and of making a complete examination to ascertain what it would cost to put the organ in the condition it should have been on or before September 4th, 1916, as provided for in our contract.

Due to the pleadings and representations on the part of the representative of your company that you were in dire straights for money, and upon their promises to see that the terms of the

contract were carried out if I would make payments, I have done so in the past, but I do not intend to make any further payments now until the organ has been put in proper condition and works satisfactorily. I might add that what I believe to be one of the serious troubles is that the generator which you furnished is not furnishing a satisfactory amount, and the proper kind of current. Of course this could be demonstrated by an investigation by a competent man.

I also call your attention to the second clause in our contract, which provides that the organ, when complete, should be free from defects in material or workmanship and that if defects do develop within 5 years after completion, they are to be remedied at your expense.

Inasmuch as this organ has never been completed you must thoroughly understand that the 5 year period is not to commence until you have done your work in accordance with this contract. It is because of all of these conditions mentioned in this letter that a final and definite understanding must be arrived at before anything further will be done by me.

In my letter to you of May 2nd, 1917, I referred you to my letter of November 24th, 1916. In your reply of May 4th you referred to the fact that you have been doing work on the organ in accordance with the up-keep clause in the contract.

Exhibit D-18

None of this work which was done by you was in accordance with the up-keep clause and I distinctly repudiate such an assertion on your part. All of the correspondence that has passed between us is ample proof that this work was not done under the up-keep clause but was an endeavor on your part to complete the organ in accordance with the terms of the contract, which to the present writing you have never done.

I would also call your attention to the fact that inasmuch as I became surety for the payment of the work which you ordered from Mr. W. H. Gutschmidt, and you failed to make payments as you promised, suit was brought against me as surety, and I was compelled to pay the amount of the bill, to wit, $93.55, together with costs of court amounting to $10.57, all of which must necessarily be credited to my account against the payments as they fall due. Your authorization of September 26th, 1917, to pay the bill was not given until after suit was started, and therefore the costs of court had to be paid. Theretofore I had repeatedly requested permission to pay the bill or to have you pay the bill, and your failure to authorize the same incurred the costs of court.

I request you to advise me as to whether or not you have placed my Wurlitzer Organ in first class condition, as you promised to do. Please advise me upon this subject and also advise me as to what efforts you have made to dispose of the Wurlitzer Organ, in accordance with your promise to me that if I would allow you to put

the organ in first class condition you would endeavor to find a purchaser therefor.

If you have not done anything to this Wurlitzer Organ and do not intend to carry out your promise with respect both to the placing of the Wurlitzer Organ in first class condition and to the sale thereof, please advise me at once.

You will, of course, recall that the representations made to me at the time the Wurlitzer Organ was given to you was that the cost of placing it in first class condition would only be a few dollars, and if I remember correctly it was not to be over $50.00. If the Wurlitzer Organ has been put in first class condition please send me an itemized bill of the cost of same.

I am sending a copy of this letter to Mr. Mason for his information and I am ready to have the matters herein referred to settled and to have a thorough understanding arrived at as soon as you can make it convenient so to do. The sooner these matters are settled the better it will be for all of us.

Yours very truly,

Exhibit D-19.

(Following matter is on the regular card issued by the Post Office Department upon the registration or insuring of mail.)

Post Office Department Official business Registered Article No. 1245 Insured Parcel No. .... Penalty for private use to avoid payment of postage, $300 Postmark of Delivering Office and Date of Delivery (not filled in) Return to Colonial Theatre (Name of sender.) Street and Number or Post Office Box ..... Post Office at ..... State West Hoboken, N. J.

(On reverse of card): Return Receipt. Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card. American Master Organ Co. Wood McKee Receiver (Signature or name of addressee.) per J. Bush (Signature of addressee's agent.) Date of delivery, 11-13-1917

(Written with pen and ink on this side of card is the word "Duplicate")

(Following matter is on the regular card issued by the Post Office Department upon the registration or insuring of mail.)

Post Office Department Official business Registered Article No. 1246 Insured Parcel No. .... Penalty for private use to avoid payment of postage, $300 Postmark of Delivering Office and Date of Delivery (not filled in) Return to Colonial

Exhibit D-19

Theatre (Name of sender.) Street and Number, or Post Office Box, ... Post Office at ..... State West Hoboken, N. J.

(On reverse of card): Return Receipt. Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card. J. B. Mason (Signature or name of addressee.) J D Quackenbush (Signature of addressee's agent.) Date of delivery, Nov. 13 1917

(Written in pen and ink on this side of card is the word "Duplicate" and the figure "26704")

November 12 -7.

American Master Organ Company.,
Paterson, N. J.

Gentlemen:—

I have had no reply to my letter of October 6th. I now notify you that the organ must receive attention at once or else it may be ruined. I have had one of the best mechanics ever employed by the American Master Organ Company give me a figure on what it will cost to put the organ in shape, and he informs he as follows:

That the organ is in bad shape and that it will need a more reliable magnet action on traps, drums &c, which will cost approximately $45.00

installed, that two pipes are missing on the piccolo stop and that it will require considerable time to put the organ in first class condition, and that his charges will be $1.10 per hour for himself and his helper from and to his home.

I now give you notice that unless you comply with the terms of my contract to purchase, I shall have this work done and the same shall be credited to the contract. I have waited for over a month for a reply to my former letter and a failure on your part to notify me within ten days from the date hereof that you will comply with the terms of my contract, will be considered by me as an admission and consent on your part that I may have this work done and credited to the contract.

It is also essential that the organ be tuned and revoiced without further delay. Under the terms of my contract this was to be done without expense to me, and I shall likewise have this done at your expense and consider it as a consent on your part to have it done and credited to the amount due on my contract, unless I hear from you to the contrary within ten days from the date hereof.

Yours very truly,

Exhibit D-20.

GEORGE J. KILGEN
ATTORNEY AND COUNSELLOR
165 Broadway
New York
Telephone, Cortlandt 5337

May 30, 1918.

Greenwood A. Robinson,
Colonial Theatre,
Hoboken, N. J.

Dear Sir:

By an order of the Court of Chancery, of New Jersey, I am authorized and by the assignee I am directed to proceed to collect the amounts due the American Master Organ Company, or take such steps in the premises as the law provides.

I find that you owe Four thousand, one hundred and ten ($4,110.00) dollars.

Unless all or a substantial portion be paid at this office within a reasonable time, I will proceed as the law provides.

Yours very truly,

GEORGE J. KILGEN

Exhibit D-21.

June 1, 1918.

Genrge J. Kilgen,
Counsellor at Law,
165 Broadway, N. Y. City.

Dear Sir:

Your letter under date May 30th, 1918 addressed to Mr Greenwood A. Robinson, Colonial Theatre Hoboken, N. J. has been referred to us by his wife.

We are informed that Mr Robinson is now in Military Service and has, or is about to leave Newport News, Va., with his Unit, for foreign service.

Under these circumstances and in view of the fact that Mr Robinson seems to have an absolute defense against any action that might or could be instituted against him by the American Master Organ Co., or its assignee, we shall therefore be obliged to ask for the benefit of Chapter 128, Laws of 1918 of New Jersey which extends protection to civil rights of members in the Military Service, in case any action is instituted as threatened in your letter.

Yours very truly,

(sgn) MELOSH AND MORTEN.

Exhibit D-22.

GEORGE J. KILGEN

ATTORNEY AND COUNSELLOR

165 Broadway

New York

Aug. 17, 1918.

Telephone, Cortlandt 5337

Mr Greenwood A. Robinson,
S. E. Cor. Charles & West Sts.
West Hoboken, N. J.

Dear Sir:

It seems impossible to connect with you or get some definite understanding as to the American Master Organ built for you in the Colonial Theatre in West Hoboken, New Jersey in October, 1916.

You have only paid $1,550, although you had the use of the organ up to, and within a few weeks ago, since which time you had the use of the piano, being part of the organ. At that rate you have paid less than $15. a week for the use of the organ, which is just one half for what other people are paying for the use of a similar organ, and it is only about what the rent of a grand piano would cost you.

You say that the organ is unsatisfactory; but you do not specify in what respect. You indicate

that the generator does not furnish a satisfactory amount and proper kind of current. That is a small matter and can easily be remedied. You further state, that you have never accepted the organ. Of course, we don't propose to make you accept it. We do, however, propose to get the organ, or the payments provided for in the contract.

You cannot refuse to let us see what is to be done on the organ and at the same time refuse to pay for it. It is neither reasonable or honest business dealing. An organ is like an automobile, needs constant attention. The temperature and climate has a great deal to do with the sound and operation of an organ and it requires adjustment and tunning from time to time.

We have sent men to the theatre to take the organ to the factory, to put it in thorough working order and if satisfactory to you, return it to the theatre upon the payment of the amount due, or provision made for the payment of the unpaid balance.

Our workmen tell us that they cannot very well do the work in the theatre without interfering with your performance; for that reason we thought it best to remove it to the factory and give it a thorough test. The magnet action on the traps, drums etc. very seldom need more than adjustment. The two pipes that are missing on the piccalo stop, can be replaced at a trifling cost.

Exhibit D-23

If you will fix a day and time when I can meet you at the theatre, I will have with me "the best workman ever employed by the American Master Organ Co." as you described one of the men we have for outside work, and we will go over the items to be done and see if it is possible to do them at the thwatre.

Awaiting your reply, I remain,

Yours very truly,

GEORGE J. KILGEN

(*Written in upper left-hand corner*):

Ans 8/22/18 L G M

Exhibit D-23.

Aug. 22, 1918

George J. Kilgen,
Counsellor at Law,
165 Broadway,
New York, N. Y.

Dear Sir:

Mr. Greenwood A. Robinson has handed us your letter of the 17th inst., for reply.

Without at this time pointing out several errors contained in the letter, may we ask you to

advise us as to how your client has derived any title or claim originally held by the American Master Organ Co.

In your letter of May 30th, 1918 you say that by an order of the Court of Chancery of New Jersey you are authorized and by the assignee you are directed to collect the moneys due the American Master Organ Co.

Under date October 4th, 1917 we were notified by the Secretary and Treasurer of the American Master Organ Co., that this account had been assigned to John B. Mason.

Will you please, therefore, advise us as to the name of your client and as to the method by which he acquired the whole or any part of the rights formerly held by the American Master Organ Co., in so far as the same relates to its contracts with our client Mr. Greenwood A. Robinson.

At the present time we have nothing before us upon this subject and it is for the purpose of knowing with whom we are dealing that we make this inquiry.

Yours very truly,

Exhibit D-24.

Sept. 10, 1918.

Messrs. Melrose & Mortens, Esqs.
79 Montgomery St.,
Jersey City, N. J.

Gentlemen:

I have been waiting patiently since the 22nd of August, to hear from you what Mr. Robinson wishes in the matter of the organ in the Colonial Theatre.

I have no doubt satisfied you beyond any question, that I am acting by proper authority in endeavoring to get a settlement from Mr. Robinson. Although, I am not disposed to put Mr. Robinson to any unnecessary expense or injury; but must insist on an immediate response to my letter to him on August 17, 1918. That is to say, he must either pay what is due at once, or turn over the organ.

We are ready and willing to do any and every thing the contract calls for. I am informed that the Wurlitzer organ which is still at the old factory, Lakeview, N. J. was to be removed by Mt. Robinson, which he has failed to do.

I will to-day again inform him, that if he does not remove the organ within a reasonable time, it will be placed in a storage warehouse at his expense, and if there is anything missing from the organ, it was caused by the failure of Mr. Rob-

inson to remove it when he was ordered to do so by the receiver.

Awaiting your reply, I am

Yours very truly,

GEORGE J. KILGEN

ATTORNEY AND COUNSELLOR

165 Broadway

New York

Telephone, Cortlandt 5337

Sept. 10, 1918.

To the Watchman in charge of the building formerly, occupied by the AMERICAN MASTER ORGAN COMPANY, Lakeview, New Jersey:

Dear Sir:

Please deliver to Greenwood A. Robinson, the Wurlitzer Organ in the Factory.

If there is any question as to the authority of this order, you can telephone to Mr. Wood McKee, Receiver of the American Master Organ Company. Telephone number 371, Paterson New Jersey.

Yours very truly,

GEORGE J. KILGEN

Exhibit D-24

GEORGE J. KILGEN

ATTORNEY AND COUNSELLOR

165 Broadway

New York

Sept. 10, 1918.

Telephone, Cortlandt 5337

Mr. Greenwood A. Robinson,
S. E. Cor. Charles & West Sts.
West Hoboken, N. J.

Dear Sir:

Enclosed you will find a copy of a letter sent to your attorneys Melrose & Mertens, Esqs. Also an order on the watchman in charge of the old factory, Lakeview, N. J. directing him to turn over to you, your Wurlitzer organ.

I hereby notify you, that unless the same is removed within a reasonable time, the same will be stored at your expence and risk. I further notify you, that unless I get some reply to my letter of August 17, 1918, or payment on your organ, I will take the necessary steps to take the same out of the theatre

Yours very truly,

GEORGE J. KILGEN

Exhibit D-25.

WOOD McKEE,

LAWYER,

Paterson, N. J.

Rooms 24 25 26 Paterson Savings

Institution B'ld'g

Telephone 371.

Paterson, N. J. Dec. 1st, 1917.

G. A. Robinson,
Hoboken, N. J.

Dear Sir:

As receiver of the American Master Organ Co. I have your communications which you sent regarding organ installed in the Colonial Theatre of Hoboken, and particularly in your letter of Nov. 12th you refer to the condition of the organ. Upon investigation I find that your contention that the organ will need a more reliable magnet action on traps, drums, &c and that the organ is in need of tuning, is correct. Other than these two items, except possibly the piccilo stuff, they are about the only things needing attention and these you are authorized to have done, and for which I will allow you credit on your contract. Further, some arrangement will have to be made by which your contract is to be carried out regarding the tuning, etc. for which, of course, you will be allowed on the balance due on your contract. You can either secure a contract from a reliable organ builder to keep your

organ in tune in compliance with our contract or I shall do the same. You know your payments are long overdue, and as my position as Receiver compels me to move quickly in these matters I desire something on account of your contract as soon as possible. If you wish to see me any time I will be glad to talk with you regarding the matter further.

Yours very truly,

W. McK.

(*Written in margin of letter*):

5 years guarantee

Exhibit D-26.

527 Charles St.,
West Hoboken, N. J.

Nov. 23, 1918.

George J. Kilgen,
Counsellor at Law,
165 Broadway,
New York, N. Y.

Dear Sir:

I have just been informed that the proprietor of the Colonial Theatre is playing the organ at the Colonial Theatre and that you have given him permission to do so.

I have also seen your men at times making repairs but as to just how they are being made or what is being done I cannot say.

Exhibit D-26

I am writing only for the purpose of informing you as to my position. You must understand that the organ is in your charge for the purpose of allowing you to perform the terms of the contract of purchase and that you are responsible for whatever may happen to that organ during the time that your men are working on it and until the contract has been performed, in accordance with the terms thereof, of which fact due notice is to be given to me.

Of course the organ is not to be removed from the theatre without my consent in writing.

Yours very truly,

Attached to above is a card upon which is printed and written the following: Post Office Department Official Business Registered Article No. 3453 Insured Parcel No. .....33816 New York, N. Y. City Hall Sta. Nov 25 4:30 P. M. 1918 Penalty for private use to avoid payment of postage $300. Return to G. A. Robinson (Name of sender) Street and Number or Post Office Box 527 Charles Post Office at West Hoboken State N. J.

On back of said card as follows: Return Receipt. Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card. George J. Kilgen (Signature or name of addressee.) M. Green (Signature of addressee's agent.) Date of delivery, ..., 191

Exhibit D-27.

GEORGE J. KILGEN
ATTORNEY AND COUNSELLOR
165 Broadway
New York
Telephone, Cortlandt 5337

Dec. 4th, 1918.

Mr. G. A. Robinson,
527 Charles Street,
West Hoboken, N. J.

Dear Sir:

Your letter of November 23rd, 1918 was duly received, and in answer will say, that the organ in the Colnial Theatre West Hoboken N. J. is now put in condition as provided for in your contract. The Tremulant on the Vox Human and the bird whistle were put in yesterday. John Paragolla yesterday was going to go over the reeds and traps again but the manager of the Theatre refused to permit him to use any more power until that used up to now by our workman amounting to $25.00 had been paid. The work to put the organ back in the condition it was before you had it removed cost $350.00. The interest due on the unpaid balance amounts to $246.60 to date. I trust you will send me a check within a reasonable time for amount due to-wit: $4731.60 payable to me as the Attorney of Mr.

Exhibit D-27

Mason and the Pipe Organ Mantenance Co. The only permission we gave to your tenant to use the organ was to assist the workman to discover any thing that might appear while they were working there. Under your contract you were to furnish light, heat and power for the workman for regulating and tuning the organ. Trusting that you will find every thing satisfactory and that you will send a check for the whole or a substantial part of the same and be assured that we will do all that can be done to make you feel that you got the best organ for Theatre use now to be had.

Yours truly,

GEORGE J. KILGEN

Exhibit D-29.

Telephone Cortlandt 5337. Room 502.

PIPE ORGAN MAINTENANCE CO.
Pige Organs Tuned, Repaired, Removed and Rebuilt. Organ Blowing Machines Sold and Repaired. Tuning, etc., by Yearly Contract. Sales Agents for the Leading Organ Manufacturers.
165 Broadway,

New York, Jany. 31st, 1919

Mr. G. A. Robinson,
527 Charles Street,
West Hoboken, N. J.

Sir:

The PIPE ORGAN MAINTENANCE COMPANY, INC. hereby demands of yoy the following goods and chattels, which are its property, to wit: One American Master Organ Company Pipe Organ, with Grand Piano Consols and all its equipments, and now in use at the Colonial Theatre West Hoboken New Jersey; and unless you delever the same forthwith legal proceedings will be commenced against you to recover possession of the same and damages.

THE PIPE ORGAN MAINTENANCE CO. INC.
By George J. Kilgen President

(*Written at top of letter*)

Sec. of State Trenton N J Name of agent or authorized to do business in N. J.

Exhibit D-30.

February 6, 1919.

Pipe Organ Maintenance Co.,
George J. Kilgen, President,
165 Broadway, New York, N. Y.

Gentlemen:

I did not know until the receipt of your letter dated January 31st, 1919 that Mr George J. Kilgen was President of your Company but inasmuch as he is the President of your Company my reply to your letter of January 31st 1919 can be found in my letter addressed to him under date January 14th, 1919 which was delivered to him on January 15, 1919.

Inasmuch, therefor, as you have this letter I do not deem it necessary to send you a copy thereof, but if you feel that you want a copy of that letter I will be very glad to furnish it to you upon request.

Neither you nor the American Master Organ Co., nor anyone else is entitled to take this organ from me. I have always been ready and willing to do my part and have done more than I was obliged to do under my contract, while neither the American Master Organ Co., nore any of its successors in title have performed the conditions on their part to be performed as contained in the contract of all of which you have due notice.

Your recent attempt to place the organ in the condition required by the contract was a most

dismal failure and it does not require an expert to ascertain that fact.

Will you please advise me as to whether or not you have assumed all of the liabilities of the American Master Organ Co., as contained in the contract, as I have suffered considerable damages already through the failure of the American Master Organ Co., to carry out its contract and only because it has gone into bankruptcy and is absolutely worthless have I been obliged to refrain from instituting proceedings to recover the damages I have sustained, and which I have partially referred to in my letter of January 14th, 1919.

If you are ready to carry out the contract of the American Master Organ Co., you are at liberty to do so but you must not expect to make me pay you for an organ that is almost worthless and yet not be able to get the benefit of the contract that I made with the American Master Co. in 1916.

Yours very truly,

527 Charles St.
West Hoboken, N. J.

27 MAY.T.1927

New Jersey
Court of Errors and Appeals

Between GREENWOOD A. ROBINSON, Complainant-Appellant, and PIPE ORGAN MAINTENANCE COMPANY, Defendant-Appellee.	On Bill, &c.

BRIEF FOR APPELLANT.

On June 14, 1916, Complainant and American Master Organ Co. entered into a contract whereby Complainant agreed to purchase an organ upon the terms therein stated.

1. The company agreed to construct and erect the organ according to specification annexed to contract (12).

2. The company warranted that the organ, when completed, should be free from any defects in materials or workmanship and if any developed within five years it would remedy the same at its own expense (12-13).

3. Within one year thereafter the company failed and went into the hands of a receiver (60).

4. On May 27, 1918, Court of Chancery directed receiver to sell and transfer the right, title and interest of the insolvent company to the Pipe Organ Maintenance Co. upon the company assuming any obligations of the insolvent company upon its contracts (25).

5. On June 30, 1918, the receiver attempted to assign to complainant's contract, without his consent, to the Pipe Organ Maintenance Co., by assignment in writing, but the assignee did not assume thereunder the obligations of the insolvent company under its contract with complainant (27).

6. During the year 1918, George J. Kilgen, a New York lawyer claiming to be acting for the Pipe Organ Maintenance Co., attempted to do some work upon complainant's organ (see correspondence, Exhibits D 20, 21, 22, 23, 24, 26, 27, pp. 487-501) to remedy defects therein.

7. The defendant was not incorporated until January 30, 1919 (384), seven months after the alleged assignment.

8. The defendant has no factory (385); its office stated on its letter head (501) is the law office of Mr. Kilgen (499). It does not appear that it has any assets or is financially able to assure the complainant of its ability to carry out the obligations of complainant's contract with the American Master Organ Co. or that complainant ever agreed to accept its guarantee.

Reasons for Reversal.

1. The contract between the American Master Organ Co. and complainant could not be assigned without his consent, which was never given.

2. The sale by the receiver was not made in accordance with the order of the Court of Chancery in that it did not require the defendant, as it was not incorporated until eight months thereafter, to assume the obligations of the American Master Organ Co. with complainant, nor does it appear that the defendant had any notice of the conditions of such sale or ever assumed them.

3. The organ in question was never constructed and erected in accordance with specifications annexed to contract.

4. The organ was never completed and free from defects in material and workmanship, as required by contract.

5. The defendant never completed said organ nor did they ever tender any guarantee against defects for five years after completion, as required by the contract.

6. The complainant's offer to return the organ was rejected by the defendant, and having elected to stand on the performance by it of the contract, it must fail if the contract has not been performed.

The contract between the American Master Organ Company and the Complainant could not be assigned without his consent, which was never given.

The right of the American Master Organ Co. arising out of complainant's contract were coupled with a liability, namely, the five-year guarantee.

Long before this period expired, the company was dissolved by insolvency.

Rights arising out of a contract cannot be transferred if they are coupled with liabilities.

> Worster v. Crane & Co., 73 N. J. Eq. at p. 25.

This principle was approved by this court in

> Schlesinger v. Forest Products Co., 78 N. J. L. at p. 644.

The defendant does not aver in any of its pleadings that the complainant ever consented to any assignment of his contract.

On the contrary, the only issue raised by the pleadings upon this subject is as to whether or not the complainant's contract was assignable.

In paragraph 19 of complainant's bill he avers that his contract was incapable of assignment, without his consent, and that he never consented to the assignment by the receiver to the defendant (17) and the denial thereof by the defendant's answer (47).

The question as to whether complainant's contract was assignable in law, without his consent, is purely a legal question and we submit that under the authorities above stated, it must be answered in the negative.

Nowhere in the pleadings has the defendant made any claim that the complainant consented to an assignment of his contract to the defendant, or anyone else, and if there is no such issue raised, there is no such issue to be decided, nor was the Court below justified in finding that he did so consent, in view of the fact that there was no claim on the part of anyone that such consent was given.

His conduct in permitting defendant to try to overcome the defects in his organ surely cannot be deemed as consent, because it would be idle to presume, in view of his experience, that he would waive his right to five-year guarantee after completion, even if defendant had been successful in its endeavor, and there is no pretense that he did so waive or that it was offered to him.

Perhaps if the defendant had remedied the defects in the organ and made its construction comply with complainant's contract, he would have been willing to accept a guarantee from defendant for five years and paid the balance of the purchase price, if satisfied that defendant was responsible, but the evidence in this case is far from convincing that defendant was a responsible financial concern.

The assignment by the Receiver was invalid because it was not made in accordance with the order permitting it.

The order of the court directed that the receiver sell and transfer to defendant certain contracts, including that of complainant, upon the defendant assuming any obligations of the insolvent company to the contractors upon their contracts (25).

In the first place, the Court of Chancery could not make such an order without consent of complainant herein and no consent was ever given.

In second place, the defendant herein never signified its consent to assume the obligations of the insolvent company, and such an assumption on its part was a condition precedent to the right of the receiver to sell and transfer complainant's contract.

The order did not provide that the defendant assume the obligations as a part of the sale, but made such assumption a condition precedent.

The defendant has never conceded that it agreed to assume such obligations; in fact, it could not have done so, because it was not incorporated until more than eight months after the order and bill of sale were made.

And the bill of sale itself contains no provisions whereby defendant assumes such obligations, nor does it appear that it ever had notice of the terms of the sale or ever assented thereto.

Under the contention of defendant, it has acquired all the rights of the insolvent company, and none of its liabilities.

This cannot be done under our law and therefore it took no rights against the complainant under its bill of sale.

The organ was not constructed and erected as per contract, and it was never completed free from defects in material and workmanship.

In the first place, it had no separate tremulo, no triangle and no tambourine (123)—no 8-foot open diapason (33) (118).

This organ was examined by Mr. Beach, an expert organ builder, and his explanation of the defects is nowhere contradicted.

He testifies that the main structural defect in material lies in the electric control.

That magnets installed on this organ were intended to be used on a 10-volt pressure; that they were being operated on a 15-volt pressure, causing the metal to burn off and thereby that particular note would become silent (130). Temporary repairs could be made by replacing contacting wires as fast as they burn off, but this would only be temporary relief (131), and the expert for the defendant, Mr. Peragallo, admits that if there was a constant burning of contacts, the organ would be mechanically defective (432).

Originally the percussion instruments were designed to operate on wind pressure, but this had

been subsequently changed to "vacuum" or "suction" (133). Because of this change, the magnets originally installed were not fit to be used. The voltage of the magnets should have been increased and contacts should have been provided for handling the excess current (132) (139).

There are about 3,000 magnets in this organ and unless they are all removed and magnets of greater power put in to meet the increased pressure, the organ as at present designed, cannot be put in usable condition (150-151).

If we read the direct testimony of Mr. Woodbury (79 to 83) and his cross-examination (87-93); Mr. Sprackling, direct (113-125); Mr. Robinson (202-219), and Mr. Beach, we find that they all testify to practically the same conditions, and that these conditions were present when the organ was being played by a representative of the American Master Organ Co.

These conditions were, generally speaking, that the organ would not respond to the touch of the organist. When he would touch certain notes, they were silent and when he would touch other notes, these would be a "ciphering" and all the notes of the organ would play at once, when a piano key was touched by the organist, or other discord would be produced.

These conditions are substantially admitted, but the defendant tries to excuse them by saying they *could be* produced by dust or moisture. The defendant, however, has *failed to produce* any proof that there actually was any dust or moisture which caused the existing conditions. Even their expert, Mr. Peragallo, who worked on

the organ, does not testify that he actually found these conditions.

The witness for complainant testifies not only what could produce the existing conditions, but what actually *did produce* them, namely, the burning out of the contact points on the electrical control, due to the fact that the 3,000 magnets used therein were designed to carry only 10 volts, whereas, because of change in construction by the builder, it was necessary to operate on 15 volts of current.

Stress is laid by defendant on the fact that after they had sent men to restore contacts, the organ would operate. While this is true, to some extent, yet the drums and traps never operated, and it does not negative the mechanical defect in magnets.

The fact that the contacts would last a day or two before burning out does not mean that there was no defect. In some instances where a particular note was not used, the magnet might last a year.

But that does not gainsay the fact that the magnets were not of sufficient size to carry the current required.

It is not denied by any witnesses for the defendant that there was a constant burning of contacts. Their failure to deny must be taken as an admission of the truth of the statement.

Defendant's witnesses do not deny that magnets were built for only 10 volts of current.

They do not deny that 15 volts was used.

They do not deny that 15 volts would cause the burning of contacts, and the expert for the defendant admits that the conditions found in the organ could have been caused by the burning of contacts and that the constant burning of contacts would show a mechanical defect (432).

Complainant's contract provided for an organ free from defects in material and workmanship.

A mechanical defect can be attributed only to material or workmanship.

In this case it is material, to wit, magnets of too small capacity to carry 15 volts, and therefore the organ was never in conformity with the terms of complainant's contract.

And this is the claim made by complainant and his witnesses and their explanation for the failure of the organ.

As to Acceptance.

Defendant claims that complainant accepted the organ by making payments and by using the organ. Complainant contends that payments made under promise to complete contract are not an acceptance, and that the correspondence and conduct of complainant are conclusive that he never accepted the organ.

Merely playing on and using the piano while there in complainant's theatre does not show acceptance of the complete instrument, the organ part of which could not be used. The complainant had no alternative. He must either use the organ he had, such as it was, or none at all. He

had paid on account and was hoping to receive what he had contracted for and what had been promised, but how can this be deemed an acceptance in view of the correspondence and appeals of complainant to have this organ completed?

In *Wurlitzer* v. *United Realty, &c. Co.,* 87 L. 656, it appears that the contract entered into was fully completed; that thereafter the purchaser made five payments without protest and the court held that an acceptance could be drawn from his conduct.

In the present case we have no such circumstances. The correspondence and conduct of complainant shows conclusively that he never accepted the organ from the insolvent company, nor did he ever accept it from defendant.

Neither can it be said that complainant, by permitting defendant to do some work on the organ in 1918, accepted the organ.

The fact that defendant restored some of the burned contacts, and that the notes responded then, was not a completion of the organ.

Just as soon as the current at 15 volts had passed through the magnets for a few days' playing, the contacts again burned off, and the organ was in the same condition it was previously.

Complainant admits that if the defendant had overcome the defects in the organ and complied with his contract, which means not only that defects were to be remedied, but also he was to have his guarantee for five years and there is no claim anywhere by the defendant that complainant ever received or waived his five-year guar-

antee, he was willing to accept the organ. He wanted the organ he had contracted for, with his guarantee, but not the organ that was furnished, and that, without a guarantee.

Rescission.

The theory of the court below, and upon which this decision rests, will be found on pages 275 and 276 of the record.

The court was under the belief that a purchaser, if dissatisfied with his purchase, was obliged to return the article purchased and sue for damages (275 bottom of page), and from the failure or refusal of the purchaser to return this organ and sue for damages, he found as a matter of law, that there was an acceptance on the part of the purchaser.

We respectfully submit that this is an error.

Under Compiled Statutes, p. 4663, Sec. 69 (1-d) and 4, the complainant, upon a justified rescission, had a right to demand a repayment of the moneys paid by him on account of the purchase price concurrently with the return of the goods. No offer to return to complainant the moneys paid by him has ever been made by anyone.

Effect of Defendant's refusal to accept Complainant's offer to return organ.

The complainant offered to return the goods and was always willing to do so, the offer being re-made in the bill of complaint (9), but defendant refused to accept the offer, claiming that complainant was not in a position to return the organ.

The defendant, therefore, having refused a return of the organ, must stand on the contract.

If the contract has not been performed, in other words, if the magnetic action in the piano is a mechanical defect and cannot be overcome unless magnets capable of carrying 15 volts are substituted, then the defendant herein cannot recover from complainant because it has not fulfilled its contract.

It is, therefore, respectfully submitted that the decree of the Court of Chancery should be reversed and that a decree should be made adjudging and declaring that the defendant is not entitled to enforce, as against the complainant, any of the provisions of the contract made between the complainant and the American Master Organ Company, Inc., on June 14th, 1916.

MELOSH, MORTEN & MELOSH,
Of Counsel with Appellant.

New Jersey
Court of Errors and Appeals

IN CHANCERY OF NEW JERSEY

Between GREENWOOD A. ROBINSON, Complainant, and PIPE ORGAN MAINTENANCE COMPANY, Defendant.	On Bill, etc.

Memorandum.

For the Complainant, Messrs. Melosh, Morten & Melosh.

For the Defendant, Messrs. Ziegener & Lane.

GRIFFIN, V. C.:

This case was presented in a very confusing manner. It seems that Robinson entered into a contract with the American Master Organ Company for the building and installation of a pipe organ which was connected with a piano, and the organ was virtually an orchestra. $250, as I understand it, was paid down when the contract was signed, and by its terms $400 was to be paid on the completion and installation of the organ.

This was also paid. And $150 a month for six months thereafter, was paid monthly, making the total amount paid $1,550. Numerous failures on the part of the organ to respond to the player were discovered, and the organ company attempted to correct them, and did make corrections from time to time, which defects were said to be largely minor.

The contention is that the contract called for a result, namely, that this organ would properly function; and there is some evidence to show that there were structural defects which could not be remedied, except at a very great expense, running up to thirty-five hundred or four thousand dollars. The only salvage they could claim was the Kranich and Bach Baby Grand Piano (which cost a thousand dollars) and some piping which would amount to about $750. Some witnesses swear in this fashion and others swear to the contrary, saying that they were minor defects, such as would appear in any organ, and that they require constant care. The evidence of the Pipe Organ Company to the effect that Robinson had allowed the dust from his furnace to get up into the organ, I think is hardly proven.

Some time afterwards, without any leave or license from the Organ Company, Robinson cut the cables and used the piano detached from the organ. Later on, the organ was again connected up to the piano, and I think it was used for some time and repairs were made to it. Later on, Robinson built the Roosevelt Theatre, adjoining the former theatre, and which was a much larger and more commodious one, and put in a new organ worth upwards of twenty thousand dollars. Robinson spoke to the engineer about using parts

of this organ for salvage. This was in 1921, some five years after the Organ Company's organ had been installed; but he says the salvage would not save him anything. In the meantime (and I do not recall now how long the organ remained installed in the Colonial Theatre of Robinson) the organ was removed and was put in storage, and Robinson did not care to tell where it was stored until he was directed by the court to answer. Robinson made a lease of the Colonial Theatre to someone else and, I think, sold everything he had there to him, at any rate, he delivered possession of everything with the right to use the piano; and thus, down to the present time, they are holding the piano, as it is being used.

I think before the Roosevelt was opened up, a suit was begun in replevin, I believe in the Circuit Court, and the Court there, thinking that it was without jurisdiction, referred it to the Court of Chancery; and now that the case is closed, it seems to me that it is a plain case at law involving the question of damages, or the possession of this organ under the conditional contract of sale entered into between the American Master Organ Company and Robinson; but, being here, I will decide it.

It is a significant fact that after Robinson had knowledge of all these defects, he declined to allow the Organ Company to build an organ for someone else in his neighborhood, claiming the sole right to have such an organ in that vicinity; and thus he elected to stand under the contract. He also made payments under the terms of the contract, and, as I recall it, never at any time down to the commencement of the suit, did he by any act elect to treat the contract at an end and

demand a return of his money. Again, the contract was not divisible; and he is continuing to this day, even, to take the benefit of the contract by using the piano. His notion is that he was not bound to return the organ and piano until he is reimbursed for the moneys he paid. And yet, I think that the case is devoid of evidence showing that he ever so informed the Organ Company prior to the commencement of the suit, unless it appears in the letters. Thus, as I see it, until the commencement of the suit, he never notified the Organ Company that its organ did not comply with the terms of the contract, but continued to use the organ down to the time that he finally dissembled it, which was about the time that he went into the Roosevelt Theatre, excepting the period when the cables were cut, and he used the piano alone. And during this period (unless it appears in the letters) there is nothing in the case that shows that he then elected to treat the contract as at an end and seek a return of his money. I am rather inclined to the view that, covering a long period of time from the installation of the organ down to the commencement of this suit, the conduct of Robinson shows an election to accept the organ as in compliance with the contract, and therefore he is bound to pay.

The parties have agreed to sell the organ and all the stuff in reduction of the damages, and the money will be paid into court pending decision.

The parties will submit briefs within ten days—Mr. Lane his within five days, and Mr. Morten his within ten days. I might add that it is very difficult to determine whether the defects were

structural, or ordinary or minor defects. The strong leaning of the testimony, I think, is towards their being minor defects.

Messrs. Ziegener & Lane, 75 Montgomery Street, Jersey City.

Messrs. Melosh & Morten, 1 Exchange Place, Jersey City.

Gentlemen:

At the close of the trial of the above cause, I dictated the above memorandum and held it for decision because of a memorandum I had as follows, "Testimony not written up. Memo. dictated. Briefs. None July 17/23."

On the foregoing memorandum, which I find to be the facts, I will decide the case in favor of the defendant Pipe Organ Maintenance Company. Counsel may agree upon the form of decree, and, if they cannot agree, it may be settled on motion.

The foregoing memorandum, being merely for the guidance of counsel in ascertaining the views of the Court, is not to be printed, published, nor filed; if an appeal is taken, however, counsel will notify me in writing to that effect, whereupon I will prepare and file a formal opinion.

Dated, Jersey City, N. J., December 19-1923.

Yours truly,

JOHN GRIFFIN,
V. C.

COURT OF CHANCERY OF NEW JERSEY

JOHN GRIFFIN, VICE CHANCELLOR

921 Bergen Ave., Jersey City, N. J.,

October 19-1926.

Robinson v. *Pipe Organ Maintenance Co.*

Louis G. Morten, Esq., No. 1 Exchange Place, Jersey City, N. J.

Harry Lane, Esq., 76 Montgomery St., Jersey City, N. J.

Geo. J. Kilgen, Esq., 165 Broadway, New York City.

Gentlemen:

I have carefully examined the brief of Mr. Morten. The following are the points and the conclusions which I have reached:

1. The first point made by the complainant is that the validity of the sale is challenged because the receiver has not complied with the terms of sale as directed by the Court of Chancery. This provision in the order was not made for the benefit of the purchaser; it was made for the benefit of the insolvent corporation, and the defendant says that it is living up to the terms of the order and intends so to do. Counsel has cited no case to support his theory, and I know of none. I will decide against the complainant on this point. It may be, also, that the complainant is estopped by reason of dealing with the defendant, without

protest, for a long period after the bill of sale was made.

2. The next point is that the contract between the American Master Organ Company and the complainant was an executory contract of such a nature as to be incapable of assignment without the consent of the complainant. This probably is the rule, but after the defendant took over the contract, it proceeded to do the work which the American Pipe Organ Company was bound to do under the contract, without protest from the complainant, who thereby acquiesced in the transfer and is now estopped from settling it up.

3. The complainant also, I think, sets up that although the defendant is named as the purchaser in the bill of sale made by the receiver, dated June 30th, 1918, yet the defendant did not become a corporation until January 13, 1919, a period of seven months later. The validity of this sale, so made by the receiver, is therefore challenged because the receiver has not complied with the terms of sale as directed by the Court of Chancery. This, while not directly raising the question as to the validity of the bill of sale before the incorporation, yet, as the persons who bought for the corporation and took it in the corporate name, I do not understand that this is invalid; on the contrary, it is my view that when the corporation was formed, it took over the property. This is testified to by Mr. Kilgen.

This memorandum is additional to the one I sent counsel on December 19, 1923. I will advise a decree for the complainant.

The foregoing memorandum, being merely for the enlightenment of counsel in ascertaining the views of the court, is not to be printed, published or filed; if an appeal is taken, counsel will notify me of that fact in writing, whereupon I will prepare and file a formal opinion.

Yours truly,

JOHN GRIFFIN,
V. C.