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# Bergen County Circuit Court.

(Filed June 7, 1918.)

CARMINE SAVINO,  
Plaintiff and Respondent,

10

vs.

DAVID GOLDBERG,  
Defendant and Appellant.

## Notice of Appeal.

To EDWARDS & SMITH,  
Attorneys of Plaintiff.

20

TAKE NOTICE that the defendant, David Goldberg, appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause upon grounds which will be stated later.

A. C. HART & VANDERWART,  
Attorneys of Appellant.

30

Dated, May 24th, 1918.

Service ack. May 25th, 1918,  
EDWARDS & SMITH,  
Attorneys of Plaintiff.

40

**Grounds of Appeal.****BERGEN COUNTY CIRCUIT COURT.**

(Filed October 8, 1918.)

10	CARMINE SAVINO, Plaintiff and Respondent,  vs.  DAVID GOLDBERG, Defendant and Appellant.	}	On Appeal.
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The appellant states the following grounds of appeal:

1. Because the Court refused to non-suit the plaintiff upon the motion of the defendant.

20 2. Because the Court refused to non-suit the plaintiff upon the motion of the defendant for the following reasons:

I.—The proofs in the plaintiff's (respondent's) case did not correspond with the bill of particulars in the Mechanic's Lien Claim, upon which the case was founded.

30 II.—The contract sued upon provided that an architect's certificate should be procured and be presented before any payments were due, and none was procured and presented, and no waiver of the production shown.

40 III.—The action was based upon a Mechanic's Lien Claim, which itself was founded upon a contract providing for certain payments to the plaintiff-respondent, by the defendant-appellant upon the presentation of an architect's certificate, and there is no proof that an architect's

*Grounds of Appeal.*

certificate had been presented, and no proof of waiver of presentation.

IV.—There was no proof in the plaintiff's case of probable profits that might have resulted to the plaintiff-respondent, had he been permitted to proceed with his work.

V.—As to the extra work, there was no written order or evidence of the waiving of the production of a written order to do extra work.

VI.—There was no written order, or any evidence at all of the waiving of a written order to do the extra work with the cost thereof agreed upon.

VII.—The contract provided that the work should be finished on October 10th, 1917, and there was no evidence of an extension of that period.

3. Because the evidence disclosed an abandonment of the work, compensation for which was sued for in this action by the plaintiff-respondent.

4. Because the action was based upon a Mechanic's Lien Claim and proofs in the plaintiff-respondent's case did not correspond with the bill of particulars appearing in the Lien Claim and no special verdict against the premises described in the Lien Claim, is allowable.

5. The proofs did not correspond with the bill of particulars in the Mechanic's Lien Claim, upon which the case was founded.

6. The contract sued upon provided that an architect's certificate should be procured and be presented before any payments were due, and

*Grounds of Appeal.*

none was procured and presented, and no waiver of the production shown.

7. Because there was no proof of probable profits that might have resulted to the plaintiff-respondent, had he been permitted to proceed with his work.

10

8. As to the extra work, there was no written order or evidence of the waiving of the production of a written order to do extra work.

9. There was no written order, or any evidence at all of the waiving of a written order to do extra work with the cost thereof agreed upon.

10. The contract provided that the work should be finished on October 10th, 1917, and there was no evidence of an extension of that period.

20

11. Because the verdict of the jury was against the weight of evidence.

30

12. The plaintiff-respondent's case was founded upon the probable profits to be had from a contract the performance of which it is alleged was prevented by the act of the defendant-appellant. The defendant-appellant appeals because it does not appear from the evidence that the defendant-appellant prevented the plaintiff-respondent from performing the said contract, but on the contrary, that the plaintiff-respondent abandoned the work, and the cost to the defendant-appellant of completing the abandoned work was in excess of any moneys otherwise due the plaintiff-respondent.

40

A. C. HART & VANDEWART,  
Attorneys of Appellant.

Dated, June 17, 1918.

**Lien Claim.**

BERGEN COUNTY CLERK'S OFFICE.

(Filed January 19, 1917.)

<p style="text-align: center;">CARMINE SAVINO,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">DAVID GOLDBERG, Builder and Owner.</p>	}	10
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Be it known, that Carmine Savino, of the Township of Union, Bergen County, claims a lien upon the building and lands hereinafter described, pursuant to the statute, in such case made and provided, for a debt contracted and owing to him for labor performed and materials furnished for the erection and construction of said building; and therefore shows,

FIRST: The said building is a two story brick building on a lot or curtilage situated in the Township of Union in the County of Bergen and State of New Jersey, more particularly described as follows:

Beginning at a point in the Southwesterly line of Valley Brook Avenue, said point of beginning being distant one hundred and one and fifty hundredths feet Southeasterly from the corner formed by the intersection of the Southwesterly line of Valley Brook Avenue with the Southeasterly line of Chase Avenue, and running thence (1) Southwesterly and parallel with Chase Avenue one hundred feet; thence (2) Southeasterly and Parallel with Valley Brook Avenue Forty-eight feet; thence (3) North-

*Lien Claim.*

easterly and parallel with Chase Avenue one hundred feet to said Southwesterly line of Valley Brook Avenue; and thence (4) Northwesterly along said line of Valley Brook Avenue forty-eight feet, to the point or place of beginning.

10 Being a part of the same premises conveyed to David Goldberg by Angelo De Cesare, unmarried, by deed dated February 4, 1915, recorded in the Bergen County Clerk's Office in Book 901 of deeds, page 215.

SECOND: The name of the owner of the land and estate therein on which the lien is claimed is David Goldberg.

20 THIRD: The name of the person who contracted the debt and for whom and at whose request the labor was performed and the materials furnished for which such lien is claimed is the said David Goldberg.

30 FOURTH: The following is a bill of particulars, exhibiting the amount and kind of labor performed and of materials furnished, and the price at which, and times when, the same was performed and furnished, and giving credit for all the payments made thereupon and deductions that ought to be made therefrom and exhibiting the balance justly due to the said Carmine Savino, claimant, from the said David Goldberg, viz.:

*Lien Claim.*

David Goldberg,

To Carmine Savino, Dr.

To payment due under and pursuant to the terms of a contract dated September 16, 1916, between David Goldberg and Carmine Savino for constructing foundation, walls and cellar bottom and water proofing same of new building on south side of Valley Brook Avenue, Lyndhurst, N. J. . . . . 10

\$800.00

To allowance for extra work for excavation 153 cubic yard at \$1.00 a yeard. 153.00

To allowance for extra work furnishing and setting four cellar window frames . . . . . 4.00

Balance justly due claimant..... \$957.00 20

Nine Hundred and Fifty-seven Dollars, with interest from December 18, 1916.

All the above labor was performed and materials furnished between the sixteenth day of September, 1916, and the eighteenth day of December, 1916.

CARMINE SAVINO.

30

40

*Lien Claim.*

STATE OF NEW JERSEY, }  
 County of Bergen, } ss.:

CARMINE SAVINO, of full age, being duly sworn on his oath, says that he is the claimant named in the foregoing claim, that the bill of particulars and statement therein set forth, shown in  
 10 said claim are true; that the same is for labor done and materials furnished in the erection of the building in such claim described, at the times therein specified; and that the amount as claimed therein is justly due and owing, from the said David Goldberg to said Claimant.

CARMINE SAVINO.

Sworn to and subscribed before me }  
 this 19th day of January, 1917. }

20

WILLIAM H. J. ELY,  
 Attorney at Law of N. J.

Lien Claim filed and entered January 19, 1917, at 2.10 P. M. in book No. 5 of Mechanics Liens, Page 245.

Summons was issued on the within claim this  
 19th day of January, 1917, at the suit of Carmine Savino, claimant against David Goldberg,  
 30 owner and builder and the Carlstadt Mutual Loan & Building Association, Mortgagees.

GEO. VAN BUSKIRK,  
 Clerk.

**Summons.**

(Filed January 25, 1917.)

STATE OF NEW JERSEY,

[L. S.]

To David Goldberg and Carl-  
 stadt Mutual Loan & Building  
 Association. You, David Gold-  
 berg, Builder and Owner, and  
 You, Carlstadt Mutual Loan & 10  
 Building Association, as Mort-  
 gagee are summoned to answer the annexed  
 summons and complaint of Carmine Savino, in  
 an action at law in the Circuit Court in and for  
 the County of Bergen, in which the said Car-  
 mine Savino claims a building lien on a certain  
 building and lands of said David Goldberg, in  
 said complaint described.

And take notice, that unless you file your an- 20  
 swer to said complaint with the Clerk of said  
 Court at the Court House in the Village of  
 Hackensack, in the County of Bergen within  
 twenty days after service upon you of this writ  
 and the annexed complaint, the plaintiff may  
 proceed in the suit and judgment may be entered  
 against you.

WITNESS, CHARLES W. PARKER, Judge of the 30  
 Bergen County Circuit Court, at Hackensack,  
 this twenty-first day of January, 1917.

ADDISON ELY, JR.,  
 Attorney for Claimant.  
 GEORGE VAN BUSKIRK,  
 Clerk.

**Complaint.**

## BERGEN COUNTY CIRCUIT COURT.

(Filed January 25, 1917.)

10	<p style="text-align: center;">CARMINE SAVINO, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">DAVID GOLDBERG, Builder and Owner and CARLSTADT MUTUAL LOAN &amp; BUILDING ASSOCIATION, Mortgagee, Defendants.</p>	} Action at Law. On Lien Claim.
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20 Plaintiff, Carmine Savino, residing in Union Township, Bergen County, New Jersey, says that:

## FIRST COUNT:

30 1. At the times hereinafter stated David Goldberg was the owner of a plot of land hereinafter more particularly described, situate, lying and being in the Township of Union, County of Bergen and State of New Jersey, Beginning

40 at a point in the Southwesterly line of Valley Brook Avenue, said point of beginning being distant one hundred and one and fifty hundredths feet Southeasterly from the corner formed by the intersection of the Southwesterly line of Valley Brook Avenue with the Southeasterly line of Chase Avenue, and running thence (1) Southwesterly and parallel with Chase Avenue one hundred feet; thence (2) Southeasterly and parallel with Valley Brook Avenue forty-eight feet; thence (3) Northeasterly and parallel with Chase Avenue one hundred feet to said South-

*Complaint.*

westerly line of Valley Brook Avenue; and thence (4) Northwesterly along said line of Valley Brook Avenue forty-eight feet, to the point or place of beginning.

Being a part of the same premises conveyed to David Goldberg by Angelo De Cesare (unmarried), by deed dated February fourth, Nineteen Hundred and Fifteen, recorded in the Bergen County Clerk's Office in Book 901 of Deeds, page 215. 10

2. The Carlstadt Mutual Loan & Building Association is made a party defendant because it holds a mortgage of record upon said tract of land dated November 28, 1916, and registered on December 15, 1916, in Book 379 of Mortgages on page 393, to secure the sum of \$8,000 upon which mortgage it is hereby admitted \$1,300 has been advanced to and used for the construction of said building, prior to the date of filing the lien claim in this suit, but the balance of which will be cut off by a sale under plaintiff's said lien. 20

3. On December 18, 1916, there became due to the plaintiff upon a contract made by and between plaintiff and the said David Goldberg, the sum of \$800 for work, labor and materials furnished by the plaintiff in accordance with the terms of said contract. Said work, labor, and materials were furnished to the said David Goldberg for the construction of said building. 30

4. The whole of said amount remains due and unpaid. 40

*Complaint.*

5. Said debt is a lien upon said building and lands by virtue of the provisions of the act entitled "An Act to secure mechanics and others payment for their labor and materials in erecting any building."

## 10 SECOND COUNT:

1. Paragraphs 1-2 of the First Count are here repeated.

2. Between September 16, 1916, and December 18, 1916, plaintiff, at the request of David Goldberg, excavated 153 cubic yards of dirt in and about the construction of the building hereinbefore described, and the said David Goldberg, in consideration thereof, undertook to pay the  
20 plaintiff the agreed price and reasonable value thereof.

3. The agreed price and reasonable value thereof is \$153.

4. Said labor was performed and materials furnished to and for the said David Goldberg for the construction of said building.

30 5. The whole of said amount remains due and unpaid.

6. Paragraph 5 of the first count is here repeated.

## THIRD COUNT:

1. Paragraphs 1-2 of the first count are here repeated.

40

*Complaint.*

2. Between September 16, 1916, and December 18, 1916, plaintiff at the request of David Goldberg, furnished and set four cellar window frames in the cellar of the building hereinbefore described and David Goldberg in consideration thereof, undertook to pay the plaintiff the agreed price and reasonable value thereof. 10

3. The agreed price and reasonable value thereof is \$4.

4. Said labor was performed and materials furnished for and to the said David Goldberg for the construction of said building.

5. The whole of said amount remains due and unpaid. 20

6. Paragraph 5 of the first count is here repeated.

PLAINTIFF DEMANDS as damages on the	
First Count .....	\$800
Second Count .....	153
Third Count .....	4
	30

All with interest from December 18, 1916.

CARMINE SAVINO,  
By ADDISON ELY, JR.,  
Attorney for Plaintiff.

## Answer.

## BERGEN COUNTY CIRCUIT COURT.

(Filed February 10, 1917.)

10	<p style="text-align: center;">CARMINE SAVINO, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">DAVID GOLDBERG, <i>et als.</i>, Defendants.</p>	} Action at Law. On Lien Claim.
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Defendant residing in the Township of Union, by way of answer to the complaint of the plaintiff herein says that:

## 20 ANSWER TO FIRST COUNT.

1. The first paragraph is admitted.

2. The second paragraph is admitted, excepting insofar as it sets forth the sum of \$1,300.00 as being the only portion of the sum of \$8,000.00 secured by mortgage upon the property as prior to the amount claimed to be due by the plaintiff, which said fact, namely, that the balance of the mortgage money will be cut off by a sale under the lien of the said plaintiff, is denied.

30

3. The third paragraph is denied.

4. The fourth paragraph is denied.

5. The fifth paragraph is denied.

40 6. This defendant avers that the complaint discloses no cause of action to enforce the lien upon the building and land described in the complaint, because it fails to show that the ac-

*Answer.*

tion has been commenced within the statutory period after the performance of the last work contains no prayer for judgment, and is insufficient and should be dismissed as to this defendant and insofar as it purports to claim a lien upon the said building and land; and this defendant hereby raises and reserves an objection 10  
to the complaint upon those grounds.

## FIRST DEFENSE TO FIRST COUNT.

1. This defendant avers that said building and lands are not liable to said alleged debt mentioned in the complaint.

## SECOND DEFENSE TO FIRST COUNT.

This defendant avers that no amount is due 20  
the plaintiff because of the failure upon his part to perform the contract according to its terms and conditions, in that he failed to supply a sufficiency of materials and workmen according to the Fourth Article of the said contract, and in other respects failed to perform the terms and conditions of the contract on his part to be performed.

## THIRD DEFENSE TO FIRST COUNT. 30

This defendant avers that he has been at all times ready and willing to perform the contract mentioned in the complaint on his part to be performed, and would have done so had not the plaintiff broken the said agreement. And this defendant avers that after an examination of the contract referred to in the complaint, plaintiff entered upon the work and not only failed to 40  
construct the building to be constructed, accord-

*Answer.*

ing to the plans and specifications described in the said contract, but did in a desultory and spasmodic manner delay the completion far beyond reason, and this defendant furthermore says that he endured the same as long as possible and finally, since the plaintiff had not  
10 been upon the work for many days, and on the 12th day of December, 1916, he caused a notice to be served upon the plaintiff, in accordance with the terms of the contract, which said notice stated that, unless in three days from the date of the service of the same upon the plaintiff, this defendant would proceed to have the contract completed by other contractors and materialmen and would charge the same to plaintiff's account. And this defendant further  
20 avers that when the plaintiff failed to comply with the terms of the notice served according to the terms of the contract, this defendant proceeded to hire and contract with other men and materialmen for the completion of the work.

## FOURTH DEFENSE TO FIRST COUNT.

This defendant avers that according to the specifications mentioned in the complaint, the  
30 cellar bottom and walls were to be waterproofed in a certain manner, but that plaintiff has failed to carry out the terms of the specifications in reference to the waterproofing of the said cellar, and at the time of the service of the notice mentioned in the Third Defense herein, the said waterproofing was done in such a defective manner that it became necessary to destroy much of the work done by the plaintiff, in order to  
40 make the cellar waterproof.

*Answer.*

## FIFTH DEFENSE TO FIRST COUNT.

This defendant avers that, according to the terms of the specifications and contract described in the complaint of the plaintiff, it became incumbent upon the plaintiff to furnish a bond for \$1,000 for one year, guaranteeing that the cellar bottom and walls should be waterproof, and this defendant avers that, at the time the bond was given, it being a bond of the plaintiff alone, the defendant insisted that plaintiff should furnish to him proof of his financial ability in making such a guarantee, and he requested plaintiff to inform him what real estate he owned and the extent of his equity in the same. Defendant insisted upon such a statement before the bond should be accepted by him. In reply, plaintiff furnished defendant with a letter—a copy of which is hereto attached and marked “Schedule A”—in which letter he set forth that he was the owner of a one-half interest in a certain house in Kingsland free and clear of encumbrance, but this defendant avers the fact to be that on the date on which the plaintiff wrote the said letter, he was not the owner of the said one-half interest free and clear of encumbrance. Nevertheless, defendant relied upon the said letter, and the statements of the said plaintiff as *bona-fide* and accepted the said bond and entered into the said contract; and because of which statements of facts this defendant avers that the representations were fraudulently made and the contract fraudulently entered into.

## ANSWER TO SECOND COUNT.

1. Paragraphs One and Two of the Answer to 40 the First Count are hereby repeated.

*Answer.*

2. Defendant denies the Second, Third, Fourth, Fifth and Sixth paragraphs of this count.

3. Paragraph Six of the Answer to the First Count, is here repeated.

10

## FIRST DEFENSE TO SECOND COUNT.

This defendant avers that the said building and land are not liable to the said alleged debt or claim mentioned in the complaint.

## SECOND DEFENCE TO SECOND COUNT.

This defendant avers that he never—nor did anyone for him, at any time request the plain-  
 20 tiff to perform the work mentioned in the Second Count. And this defendant further avers that the said work was not included in the specifications made a part of the contract described in the First Count of the complaint herein, nor did he at any time—nor did anyone for him, give any written order for the performance of the work, which is the subject of this Count. And this defendant further avers that the com-  
 30 plaint in this regard discloses no cause of action, because under the terms of the contract a written order for the said work was necessary, which written order is not alleged.

## THIRD DEFENSE TO SECOND COUNT.

This defendant avers further that when he learned that the excavation—the subject of this count—had been made, he ordered the plaintiff to correct and refill which was done.

40

*Answer.*

## ANSWER TO THIRD COUNT.

1. Paragraphs One and Two of the Answer to the First Count, are here repeated.

2. As to the matters and things contained in the Second Paragraph, this defendant has no knowledge or information sufficient to form a belief. 10

3. As to the matters and things contained in the Third Paragraph, this defendant has no knowledge or information sufficient to form a belief.

4. The Fourth, Fifth and Sixth Paragraphs of this count are denied. 20

5. The Sixth Paragraph of the Answer to the First Count is here repeated.

## FIRST DEFENSE TO THE THIRD COUNT.

This defendant avers that the said building and land are not liable to the said alleged debt or claim mentioned in the said complaint.

## SECOND DEFENSE TO THE THIRD COUNT. 30

This defendant avers further that, should there be any amount due under this count to the plaintiff, it is more than set off by the amount due under this count to the defendant from the plaintiff under the counterclaim hereinafter filed.

## COUNTERCLAIM.

By way of counterclaim and set off against 40 the plaintiff this defendant says:

*Answer.*

1: On or about September 16th, 1916, this defendant entered into a contract for the mason work in a three-story brick store, dwelling and lodge-room building on the south side of Valley Brook Avenue in the Township of Union, in the sum of \$1600.00, in accordance with the specifications prepared by one Joseph Kennedy,  
10 Architect, and thereafter, plaintiff entered upon the work.

2: As much of the work as plaintiff did perform, he performed in a defective manner and finally, before the contract was completed, stopped the work.

3: In accordance with the terms of the con-  
20 tract, what is commonly called a three days' notice to quit work was served upon the plaintiff, which was ignored and thereupon, defendant was compelled to ascertain the costs of completing the contract in accordance with the plans and specifications and to secure another party to correct the defects made by the plaintiff, and to complete the contract.

30 4: The amount required to remedy the defective work caused by the plaintiff, is the sum of \$200.00, which said amount is due and owing from plaintiff to this defendant, and which amount has not been paid.

5: The costs of completing the contract, according to the terms and specifications from the time plaintiff ceased his work, is the sum of \$1300.00, which said sum is due from plain-  
40 tiff to this defendant.

*Answer.*

This defendant counterclaims the sum of \$1500.00 damages.

A. C. HART & VANDERWART,  
Attorneys for Defendant,  
DAVID GOLDBERG.

Dated, February 8th, 1917.

10

## SCHEDULE A.

October 28th, 1916.

A. C. Hart & Vanderwart,  
Attys. for David Goldberg,  
Hackensack, N. J.

Gentlemen:

I beg leave to advise that I am the owner of one-half interest in a \$3000 house and lot on Newark Avenue at Kingsland, N. J., free and clear of encumbrance. I also own lots opposite the Kingsland station at Kingsland in which there is an equity of \$1800. I own other property but these two properties alone are more than sufficient to cover any liability that might arise under a bond given you today.

20

Very truly yours,

(signed) CARMINE SAVINO.

30

40

**Answer.**

## BERGEN COUNTY CIRCUIT COURT.

(Filed March 1, 1917.)

10	<p style="text-align: center;">CARMINE SAVINO, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">DAVID GOLDBERG, <i>et als.</i>, Defendants.</p>	} Action at Law. On Lien Claim.
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Plaintiff, in reply to the answer of David Goldberg, says that:

In Reply to Answer to First Count:

20 1. He denies paragraph six.

In Reply to First Defense to First Count:

1. He denies paragraph one.

In Reply to Second Defense of First Count:

30 1. He denies that he failed to supply a sufficiency of materials and workmen according to the fourth article of the said contract, or in any other respect failed to perform the terms and conditions of the contract on his part to be performed, except insofar as he was prevented from performing said contract by the defendant and defendant's agents.

In Reply to Third Defense to First Count:

1. Plaintiff denies defendant has been ready and willing to perform the contract.

40 2. Plaintiff denies that he broke said agreement.

*Answer.*

3. Plaintiff admits that he entered upon said contract, but denies that he failed to construct the building according to the plans and specifications described in said contract.

4. Plaintiff denies that he did in a desultory and spasmodic manner delay the completion of the work far beyond reason, and avers that he worked every day on the job up until the first payment under said contract was due to him, whereupon the defendant delayed payment to this defendant of said first payment for more than three weeks, during which time, by reason of this unreasonable and unnecessary delay on the part of the defendant, plaintiff was unable to proceed with his work. 10

5. Plaintiff admits that a notice was served upon him, but denies that it was served on December 12th, 1916, and avers that at the time said notice was served and for many days previous thereto he had been obstructed in the completion of the work by water let into the cellar by various employees and agents of the defendant. 20

6. Plaintiff avers that at the time said notice was served upon him, he informed defendant that unless the water, which prevented his completing his contract, was removed by the defendant, he could not proceed with and complete the work and that thereupon defendant had the water removed on December 16th, 1916, and on December 18th, 1916, plaintiff, with his mechanics, undertook to complete the said work, but were prevented from doing so by the defendant who drove them out of the building and off of the property and would not thereafter 30 40

*Answer.*

permit plaintiff to complete said contract although plaintiff has always been ready and willing so to do.

7. Plaintiff further avers that defendant waived the terms and effect of the notice served upon him and agreed to remove the water from  
10 the job.

8. Plaintiff has no knowledge of the hiring and contracting by defendant with other men and material men for the completion of the work, but denies that defendant was compelled to hire and contract with other men and material men for the completion of the work by reason of any default upon the part of the plaintiff.  
20

In Reply to Fourth Defense to First Count:

1. Plaintiff admits that according to the specifications mentioned in the complaint, cellar bottom and walls were to be water-proofed in a certain manner, but avers that said work was to be done under and pursuant to the supervision of a certain architect therein named, whose instructions in this matter plaintiff followed until prevented from completing said job  
30 by the defendant.

2. Plaintiff denies that the water-proofing was done in a defective manner or that it was necessary to destroy much or any of the work done by plaintiff in order to make the cellar water-proofed.

40 IN REPLY TO FIFTH DEFENSE TO FIRST COUNT.

1. Plaintiff admits that he was to furnish a bond for One thousand dollars for one year

*Answer.*

under the terms of the contract, and avers that he gave such a bond.

2. Plaintiff denies that defendant had a right to insist that he furnish proof of his financial ability, although he admits that he wrote a letter similar to the one referred to in the answer and avers that at the time of writing said letter he believed said letter to be true. 10

3. Plaintiff avers that defendant has not been injured or damaged by said letter.

4. Plaintiff denies that said representations in said letter caused the defendant to enter into any contract with the plaintiff. 20

5. Plaintiff denies that he entered into any contract fraudulently or otherwise with the said defendant, except said contract upon which this suit is founded.

IN REPLY TO ANSWER TO SECOND COUNT.

1. Denies paragraph three.

IN REPLY TO FIRST DEFENSE TO SECOND COUNT. 30

1. Plaintiff re-asserts the liability of the building and land as alleged in the complaint.

IN REPLY TO SECOND DEFENSE TO SECOND COUNT.

1. Plaintiff re-asserts paragraphs one, two, three, four, five and six of the complaint.

2. Plaintiff admits that no written order was given for said work, but avers that both the 40

*Answer.*

defendant and the architect mentioned in said contract gave orders to plaintiff to do the work, which work was necessary to be done in order that plaintiff might do the work for which he had expressly contracted.

## 10 IN REPLY TO THIRD DEFENSE TO SECOND COUNT.

1. Plaintiff admits that he was ordered by the defendant to re-fill said excavation and avers that said re-filling was done after the work of the plaintiff under the contract sued upon had progressed so that said excavation could be re-filled.

20 2. Plaintiff further avers that the architect and agent of the defendant, who was constantly on the work while it was progressing, ordered plaintiff to proceed with the work and refused to give a written order, stating that such an order was not necessary.

## IN REPLY TO ANSWER TO THIRD COUNT.

1. Denies paragraph five.

## 30 IN REPLY TO FIRST DEFENSE TO THIRD COUNT.

1. Plaintiff re-asserts the liability of the building and land as alleged in the complaint.

## IN REPLY TO SECOND DEFENSE TO THIRD COUNT.

1. Plaintiff denies that there is any money due from him to the defendant under the counter-claim from which the amount due under the third count can be set off.

*Answer.*

BY WAY OF ANSWER TO THE COUNTERCLAIM AND SET-OFF OF THE DEFENDANT AGAINST THE PLAINTIFF, THE PLAINTIFF SAYS:

1. Admits that the defendant entered into a contract with the plaintiff which contract bears date September 16th, 1916, and which provided for plaintiff's finishing the walls of building 10 including areas and steps, and the complete cellar bottom, foundation walls and water-proofing of the same in the building about to be erected on the south side of Valley Brook Avenue, Lyndhurst, N. J., for Sixteen hundred dollars, but denies that said contract was for the mason work.

2. Denies that such work as he performed was done in a defective manner. 20

3. Admits that before the work called for by said contract had been completed, work was stopped, but avers and charges that said work was stopped first by the work being flooded by employees and agents of the defendant, over whom plaintiff had no control, and that thereafter when the water was removed therefrom by the defendant, defendant would not permit 30 plaintiff to complete the work in accordance with the terms of the contract.

4. Denies that a three days' notice to quit the work was served upon plaintiff.

5. Admits a notice was served, but denies that it was ignored and charges that defendant and his agents waived the effect of said notice. 40

*Answer.*

6. Denies that there was any defective work caused by the plaintiff.

7. Denies that defendant was compelled to expend Two hundred dollars, or any other sum for defective work.

10 8. Denies that the cost of completing the contract according to the terms and specifications from the time plaintiff ceased his work was the sum of Thirteen hundred dollars.

9. Denies that the plaintiff is liable for the sum of Thirteen hundred dollars or any other sum for the cost of completing the contract according to the terms and specifications from the  
20 time plaintiff ceased his work.

10. Plaintiff denies that he owes the defendant Fifteen hundred dollars, or any other sum.

ADDISON ELY, JR.,  
Attorney for Plaintiff.

30

40

## Reply.

BERGEN COUNTY CIRCUIT COURT,

(Filed March 2, 1917.)

CARMINE SAVINO,

Plaintiff,

vs.

DAVID GOLDBERG, *et als.*,

Defendants.

On Lien  
Claim.  
Action  
at Law.

10

Defendant, David Goldberg, by way of Reply to the Reply of the plaintiff herein says:

1. He denies each and every allegation contained in the Reply of the plaintiff as expressed 20 in the Reply to the Answers and defenses in the Answer of this defendant filed.

2. Defendant, by way of Reply to the Counter-claim and Set-off against the plaintiff says that he denies each and every allegation contained in the Answer to the said Counter-claim.

R. C. HART & VANDERVORT,  
Attorneys of Defendant, 30  
David Goldberg.

Dated, February 28th, 1917.

**Substitution.**

BERGEN COUNTY CIRCUIT COURT.

(Filed July 27, 1917.)

10 .

CARMINE SAVINO, Plaintiff,
vs.
DAVID GOLDBERG, Defendant.

20 I, the subscriber, attorney for the above named plaintiff do hereby consent that Edwards & Smith be substituted in my place and stead as attorney for said plaintiff.

ADDISON ELY, JR.,  
Attorney of Plaintiff.

Dated, July 9th, 1917.

**Answer of the Defendant Mortgagee.**  
**BERGEN COUNTY CIRCUIT COURT.**

(Filed Oct. 11, 1917.)

<p style="text-align: center;">CARMINE SAVINO, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">DAVID GOLDBERG, Builder and Owner and CARLSTADT MUTUAL LOAN &amp; BUILDING ASSOCIATION, Mortgagee, Defendants.</p>		<p style="text-align: center;">Action at Law. On Lien Claim.</p>	10
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The defendant, the Carlstadt Mutual Loan and Building Association, a corporation whose registered office and so its residence is in the Borough of Carlstadt, Bergen County, New Jersey, answering says: 20

FIRST DEFENSE TO FIRST, SECOND AND THIRD  
COUNTS:

Paragraph 1:

As to the statements contained in the 3rd, and 4th paragraphs of the First Count, the second, 30  
third, fourth and fifth paragraphs of the Second Count and the second, third, fourth and fifth paragraphs of the Third Count, defendant has no knowledge or information thereof sufficient to form a belief.

Paragraph 2:

This defendant denies that its said mortgage or any part of the sum secured thereby will be 40  
cut off by a sale under the plaintiff's said claim, or either of them.

*Answer of the Defendant Mortgagee.*

## SECOND DEFENSE TO ALL THREE COUNTS:

Neither the said building, nor the said lands in the plaintiff's complaint mentioned are liable to the said debts, or either of them.

## THIRD DEFENSE TO ALL THREE COUNTS:

10 The alleged lien of the plaintiff is not paramount, but is subject to the lien of this defendant's said mortgage.

E. J. LUCE and W. A. KIPP,  
Attys.

We consent to the filing of the within Answer as of time.

20 EDWARDS & SMITH,  
Attorneys of Plaintiff.

Filed October 11th, 1917.  
GEO. VAN BUSKIRK,  
County Clerk.

30

40

**Stipulation Amending Complaint.**

BERGEN COUNTY CIRCUIT COURT.

(Filed October 5, 1918.)

<p style="text-align: center;">CARMINE SAVINO, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">DAVID GOLDBERG, Builder and Owner, <i>et als.</i>, Defendants.</p>	}	<p>Action at Law. 10</p>
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It is hereby stipulated and agreed, that the first count in the complaint filed in the above entitled action, may be amended by substituting the following count, to read as follows: 20

FIRST COUNT.

1. That on or about September 16, 1916, plaintiff entered into a contract with the defendant, David Goldberg, whereby plaintiff agreed to do the mason work in a three-story brick building on the south side of Valley Brook Avenue, in the Township of Union, for the sum of Sixteen Hundred (\$1600) Dollars. 30

2. That plaintiff, after the execution of said contract, entered upon the performance thereof and up to the fourteenth day of December, 1916, fully performed and furnished all the labor and material to be by him performed and furnished, and has been and is willing and ready to perform said contract in all things, according to the true tenor and effect thereof.

3. That on or about the fourteenth day of December, 1916, said defendant unlawfully 40

*Stipulation Amending Complaint.*

terminated said contract and ejected and dis-  
possessed said plaintiff and his representatives  
and workmen from said building and premises  
whereon the same was being erected, and did  
prevent plaintiff and his said servants from re-  
entering said premises and threatened them  
10 with arrest should they enter thereon, and did  
refuse and still does refuse to permit plaintiff  
to carry on the work under said contract to  
be by him performed, and did inform plaintiff  
that said contract was terminated and that  
should plaintiff or his employees enter said  
premises or said building, he and they will be  
arrested.

4. That said termination of said contract was  
20 unlawful and was done and performed with  
a purpose and intention of defrauding plaintiff  
of the benefits of said contract and of prevent-  
ing him from receiving and collecting the amount  
due and to grow due to him upon the completion  
of said contract, and otherwise to injure and  
defraud him.

5. That defendant, after said termination of  
30 said contract, did proceed with the work to be  
done under said contract and finished the same.

6. That at the time of the termination of  
the said contract, there had been paid to plain-  
tiff the sum of Eight Hundred (\$800) Dollars  
on account of work performed and materials  
furnished to and upon said building, and that  
the reasonable value of the work and materials  
yet to be performed and furnished thereupon  
40 and thereto, in order to complete and finish said

*Stipulation Amending Complaint.*

contract according to the terms thereof, would not exceed the sum of Eighty Dollars and Fifty-six cents (\$80.56).

7. That upon the completion of said work remaining to be done and the materials to be furnished therefor as aforesaid, plaintiff would be entitled to receive and have from said defendant, the contract price of Sixteen Hundred (\$1600) Dollars, less the sum of Eight Hundred (\$800) Dollars paid to plaintiff as aforesaid, and the sum of Eighty Dollars and Fifty-six Cents (\$80.56) necessary to be expended in the completion of said building as aforesaid, to wit, Seven Hundred and nineteen dollars and forty-four cents (\$719.44).

8. Plaintiff has demanded of said defendant payment of said sum of Seven Hundred and nineteen dollars and forty-four cents (\$719.44) but defendant has refused and still refuses to pay the same to the plaintiff.

Wherefore, plaintiff demands on this Count the sum of Seven Hundred and nineteen dollars and forty-four cents (\$719.44), together with interest thereon from December 14th, 1916.

EDWARDS & SMITH,  
Attorneys of Plaintiff.

We consent to the making of the above amendment.

EDWARDS & SMITH,  
Attorneys of Plaintiff.  
A. C. HART & VANDERWART,  
Attorneys of Defendant.

## Rule for Judgment.

## BERGEN COUNTY CIRCUIT COURT.

	CARMINE SAVINO, Plaintiff,	} Action at Law.
	vs.	
10	DAVID GOLDBERG, Builder and Owner, and CARLSTADT MUTUAL LOAN & BUILDING ASSOCIATION, Mortgagee.	

This cause having been tried before Honorable Willard W. Cutler and a jury in the presence of counsel of the respective parties on April 26th, and April 30th, last, and the jury having returned a verdict in favor of the plaintiff general against the Builder and Owner for the sum of \$719.44, subject to the lien of the mortgagees to the extent of \$6500.00.

It is thereupon ordered that judgment final be entered in favor of the plaintiff and against the defendant Builder and Owner generally and specially against the property described in the complaint for the sum of \$719.44, but subject to the lien of the mortgage of the mortgagee to the extent of \$6500.00, besides costs of suit to be taxed.

On motion of \*

EDWARDS & SMITH,  
Plaintiff's Attorneys.

Dam.	\$719.44
Costs	80.71
	\$800.15

40

**Judgment Entry.**

BERGEN COUNTY CIRCUIT COURT.

<p style="text-align: center;">CARMINE SAVINO,</p> <p style="text-align: center;">vs.</p> <p>DAVID GOLDBERG, Builder and Owner, and CARLSTADT MUTUAL LOAN &amp; BUILDING ASSOCIATION, Mortgagee.</p>	<p>Action at Law. Lien Claim.</p>	<p>10</p>
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EDWARDS & SMITH,  
Plaintiff's Attorneys.

Amount of damages on trial seven hundred and nineteen dollars and forty-four cents generally against Builder and Owner and specially against the lands and building in the complaint described subject to the lien of the mortgage to the extent of Six Thousand Five Hundred Dollars (\$6500), and costs Eighty Dollars (\$80) and seventy-one cents. 20

Judgment signed and entered May 9th, 1918, at 4 p. m.

Damages	\$719.44	30
Costs	80.71	
	\$800.15	

**Clerk's Certificate.**

STATE OF NEW JERSEY, }  
 County of Bergen, } ss.:

10 I, GEORGE VAN BUSKIRK, Clerk of the County of Bergen, and also Clerk of the Circuit Court, in and for said County, do hereby certify that the foregoing are true copies of the papers filed in the case and copy of judgment as the same is entered in Book I of Circuit Court Judgments, page 229, for said County.

In Testimony Whereof, I have hereunto set my hand and affixed the seal  
 (SEAL) of said County and Court at Hackensack, this 8th day of October, A. D., 1918.

GEORGE VAN BUSKIRK,  
 Clerk.

20 WILLIAM S. DOREMUS,  
 Dy. Clerk..

30

40

## BERGEN COUNTY CIRCUIT COURT.

<p style="text-align: center;">CARMINE SAVINO,</p> <p style="text-align: center;">vs.</p> <p>DAVID GOLDBERG, Builder and Owner, CARLSTADT MUTUAL LOAN &amp; BUILDING ASSOCIATION, Mort- gagee.</p>	}	<p>Action at Law.</p> <p style="text-align: right;">10</p>
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Hackensack, N. J., February 13, 1918.

Before—Hon. WILLARD W. CUTLER, Judge, and  
a Jury.

APPEARANCES:

For the Plaintiff: EDWARDS & SMITH. Raymond 20  
Dawson, Esq., of Counsel.

For the Defendant: A. C. HART & VANDERWART,  
LUCE & KIPP. A. C. Hart, Esq., of Coun-  
sel.

The jury was duly empanelled, accepted and  
sworn.

Mr. Dawson opened the case to the jury on  
behalf of the Plaintiff. 30

Mr. Hart opened the case to the jury on be-  
half of the Defendant.

*Carminé Savino—Direct.*

CARMINE SAVINO, called as a witness on his own behalf, being duly sworn, testified as follows:

Direct Examination by Mr. Dawson:

Q. Mr. Savino, where do you live? A. Kingsland, New Jersey.

10 Q. What is your occupation? A. Building contractor.

Q. And how long have you been a building contractor? A. About ten years.

Q. And where have you been engaged in your contracting work? A. In that town.

Q. And any particular line of contracting work? A. General building contractor; build dwellings and other structures from beginning  
20 to end.

Q. Did you enter into a contract with David Goldberg, the defendant in this case on the 16th of September? A. No, sir; not on the 16th of September.

Q. Well, what was the date of your contract? A. We signed that contract on October first.

Q. The contract bears date of the 16th, does it not? A. He said he had to date it two weeks  
30 ahead for some business purpose.

Q. Was the contract that you entered into for the erection of the mason work and the building on Valley Avenue, Lyndhurst? A. Yes.

Q. And is this the contract? I show you this paper bearing date of September 16th? (Handing paper to witness.) A. Yes, sir.

Q. After the signing and execution of this contract, Mr. Savino, did you enter upon the work called for under the contract? A. Yes, sir.

40 Q. And when did you start work, can you tell

*Carminé Savino—Direct.*

us that? A. I started work on the 3rd day of October.

Q. And that was how many days after you say this was delivered? A. Two days.

Q. 1916? A. 1916.

Q. You started work then, two days after the execution of the contract? A. Yes, sir. 10

Q. And what did you do? A. Well, I done some things that I didn't contract to do. I had to do part of the excavating that wasn't my contract, because the excavators were not proceeding with the work in a way that would permit me to start.

Q. Well, what was the excavating you had to do? A. Well, I had to trim the sides right, then I had to trim the sides, and I had to localize the water that was in the excavation, and had to dig a deep hole and dig dikes to that hole to localize the water that filled up the entire excavation. 20

Q. Was this a swampy location or a low piece of ground? A. Not exactly swampy, but it is sloping land, and it drains——

Q. Well, after you did that, what did you do? A. Then I got my lines from the engineer and started to erect a crib for the concrete. 30

Q. That is for the foundation? A. Yes, sir.

Q. All right; go ahead. A. I proceeded that way. We built, erected the crib and mixed the concrete, and all the time I was working the engineer would come there every day and see that the lines were right, and whenever he wanted me to make a change, he designated new lines, and I followed his instructions until on the 12th, on the 12th of the month I was finished with my first part of the contract and asked Mr. Goldberg for a payment. 40

*Carminé Savino—Direct.*

Q. Wait a minute; that was the first payment due under your contract? A. Yes, sir.

Q. How much had you finished up to that time? A. The foundation walls, the cellar walls.

Q. And did you get that payment? A. No, sir; I did about a month later, about three weeks later.

10 Q. And then did you finish, did you go on with the work again? A. I went on after I got my first payment.

Q. What did you do after that? A. After that they wanted me to proceed to do my work, and I said, "There is a good deal of excavating to be done there." "Well," they said, "it is your job now." I said, "It is my job to do what I contracted to do, but the excavating is a separate  
20 contract." "Oh," they says, "go ahead, don't delay the job; go ahead and do your work." And I proceeded to do the excavating.

Q. You say it was a separate contract, you mean someone else had a contract for the excavating? A. Yes, sir.

Q. Who said, "Go ahead and do it"? A. Both Mr. Goldberg and the architect.

Q. Well, what excavating was that that you  
30 refer to? A. The excavating that was necessary to excavate around the foundation walls, to take off the crib, and then to treat the foundation walls with tar, pitch and felt, tar paper.

Q. And what was the object of that? A. To waterproof the foundation.

Q. And did you do that excavating? A. I did.

Q. And was that an item of extra work? A. Yes, sir.

40 Q. That you charged for? A. Yes, sir.

Q. And what was said about the price that was to be paid for that? A. Well, I told him that I

*Carminé Savino—Direct.*

wanted to be paid for it. They said, "Oh, that's your work." I asked him why that was my contract. They said, "You have the entire job; you have got to do that job." He says, "That excavating is necessary for you to do, for you to treat those walls." I says I did not think it was my job; my job was to do the waterproofing, but the excavating was a separate contract. 10

Q. Well, how much excavating did you have to do; did you keep any record of it? A. Yes, sir.

Q. How much did you have to do? A. About 150 cubic yards.

Q. And what was the charge for excavating? A. \$1.00 a cubic yard.

Q. Did you ever get paid for that? A. No, sir. 20

Q. Now, after you finished the excavating, what did you do? A. When I finished my excavating, I was waiting for the water-proofers, and the architect came there one day, and he says, "Savino, why don't you back up and fill in the trenches around your walls"? I says, "I am just waiting for the water-proofers." He says, "Don't be childish; fill them trenches in." 30

Q. Who said that? A. Mr. Kennedy, the architect.

Q. Well, what did he tell you to fill in the trenches for? A. Because he said the waterproofing should be done from the inside.

Q. And was that in accordance with the contract? A. Well, no; my contract was to do that water-proofing.

Q. And you were proceeding to do it on the outside? A. Yes, sir. 40

*Carminé Savino—Direct.*

Q. And after he told you to fill in the outside of the wall did you do that? A. I had to do it.

Q. Well, then what did you do after you filled in— A. After I filled in those trenches, I dug up the area ways and put up my foundation walls around the area ways. When I got finished with that, I said to Mr. Kennedy, I said,  
10 “Now,” I says, “the water-proofing ought to have went on the outside; it won’t hold on the inside.” He said, “Well, we will use that method of water-proofing that Mr. Bianca used on the building opposite, the integral water-proofing.”

Q. What is that? A. That is a composition used by a—

Q. Just tell us the method of use. A. Well,  
20 you mix two pounds of this composition with every bag of cement that you use in the mixture.

Q. Is that supposed to be the water-proofing?

A. The architect thought that, and I had faith in it also.

Q. And did you start that method of water-proofing? A. Yes, sir.

Q. And was that under the supervision of the architect? A. Yes, sir.

30 Q. Was Mr. Goldberg there too? A. He was there all the time.

Q. Well, you say all the time; you do not mean every minute? A. I don’t mean every minute, but he was there numerous times every day. He was only across the street, and he kept running over every few minutes.

Q. What do you mean he was over across the street? A. He had his saloon over across the street, within one hundred feet from the job.  
40 He would come from his saloon back and forth all day long.

*Carminé Savino—Direct.*

Q. Did he ever make any comment about this change in the method of water-proofing? A. No.

Q. When you say he was there and observed the working of this new process, what do you mean by that; you mean he was right there by you? A. He was there, and he noticed what I was doing, and he oftentimes had a little something to say, and he said it. For instance, one time my man that was doing the mixing, Mr. Goldberg thought he wasn't putting in the proper quantities. He came over and told him he ought to put a little more of this in it. 10

Q. And after you put this water-proofing in, how much of it did you lay? A. I laid about—

Q. How much of the work did you treat with this? A. All of the floor bottom, all of the floor bottom and the sides of the walls four feet from the bottom. 20

Q. Well, you stopped work though before you were finished. A. I stopped work when I got to where I was to put down the one inch finishing coat on top of the concrete.

Q. Why did you stop work then? A. I stopped work then because they were laying tile flooring on the first floor, and water kept dripping down on my work. 30

Q. Wait a minute; just explain this tile flooring and why water would drop down? A. Tile flooring is laid on wet concrete, and tile is also flushed in the process of laying it, and water kept dripping down from this work onto mine.

Q. Well, did that interfere with your work? A. Well, it interfered—I did not want to put the finishing coat down when this was coming on top of it; that would ruin it. 40

*Carminé Savino—Direct.*

Q. Well, what did you do then? A. Well, then I stopped off until the conditions were better.

Q. Did you tell Kennedy or Goldberg why you stopped? A. I told them. There was also other difficulties there. The men were all working upstairs, the carpenters and the masons  
10 were working, and they were letting their rubbish come down on my work, and I said if I finish this up now, it will only be ruined. I would have to do it over again. I said, "You can wait a few days. This isn't necessary to finish it right now. That is usually the last work done on the job."

Q. Well, was there any other water that came in there except dripping through the floor? A. Yes; the plumber made borings through the  
20 cellar walls to put his pipe there, and they hadn't been calked or plugged. One of my men came to me and said—

The Court: No.

Q. What did you see there? A. I see a lot of water in the cellar that had come in through this hole in the wall.

Q. Did you say anything to Goldberg about  
30 that? A. I simply says, "You see it wouldn't do for me to put my finishing coat down and this coming on it."

Q. Did he say anything about taking the water out? A. No, he said, "That aint—I don't care nothing about that," he says.

Q. Then what was the next thing that happened? A. The next thing, I went there every morning to see whether the conditions were good  
40 for me to proceed, and they weren't until the Monday following; on a Saturday of that week

*Carminé Savino—Direct.*

he took the water out, and I went there on the Monday morning with my men to finish up the work.

Q. Prior to that you had received a notice from him hadn't you? A. Yes, sir.

Q. Relative to stopping the work? A. Yes, sir.

Q. What was the date of the notice you received? A. I think it was the 12th of December. 10

Q. Do you remember what day that was? A. Yes; it was on a Tuesday.

Q. And you say that you went there every day? A. Yes, sir.

Q. To see if conditions were right to finish your work? A. Yes, sir.

Q. And what did you find there from day to day? A. Well, I found water coming in. There was a faucet in the cellar out of which the other workmen in the building were taking their water with no drain passing under it, and the water fell to the floor, and I found that the workmen that were working up above were letting their rubbish down into the cellar. 20

Q. Well, what did you find on Saturday? You said you found the conditions were better on Saturday? A. Men were bailing the water out.

Q. On Saturday? A. Yes, sir. 30

Q. Did you see whether they got it all out on Saturday or not? A. Well, no, I did not see whether they had it all out or not.

Q. Do you remember what hour of the day on Tuesday you got this notice. It was about four o'clock in the afternoon.

Q. And on Saturday you found they were taking the water out? A. Yes, sir.

Q. And when did you next go there? A. Monday morning. 40

*Carminé Savino—Direct.*

Q. And what did you go there Monday for?

A. To finish my job.

Q. Did you have any material on the job? A. Yes, sir.

Q. Did you have any workmen with you? A. Yes, sir.

10 Q. Who did you have? A. I had Joe Kusho and his brother, and a carpenter.

Q. What time did you get there Monday? A. Seven o'clock.

Q. Did you find anyone else there? A. Goldberg sweeping off the sidewalk.

Q. And what did you do; did you go to work?

A. I says—I started to open the cellar doors to go downstairs, and he says, "Get out of here." I says, "Why?"

20 Mr. Hart: This is not clear to my mind. The notice was served on a Tuesday?

The Witness: Yes, sir.

Mr. Hart: And when did you go to the place?

The Witness: I went there Friday.

Mr. Hart: And when did you start work again?

30 The Witness: I wanted to start work on a Monday morning.

Q. All right, he said "Get out of here." Then what took place? A. I said, "you cannot throw me away from here. I am working under the supervision of the architect." He says, "The architect has nothing to do with this; I am the boss. If you don't want any trouble, get out of here."

40 Q. And did you leave the work then? A. I had to.

*Carminé Savino—Direct.*

Q. How much was there to be done under your contract remaining after that Monday? A. There was remaining about sixty-five cubic foot of cellar steps and about eighteen hundred square foot of cellar bottom of this one inch finishing coat.

Q. You had to put one inch coating on the cellar? A. Yes, sir. 10

Q. And lay how many steps? A. About twenty-one steps, two foot, six inches.

Q. And what would be the cost to you of laying that one inch surface on the cellar bottom? A. About \$54.00.

Q. And what would be the cost of putting in the cellar steps? A. About \$30.00.

Q. Mr. Savino, you never got a final estimate from the architect in this case, did you? A. No, sir. 20

Q. Did you ever have any disputes with Goldberg about the form of the work or the materials to be used under the contract? A. No, sir.

Q. Did you ever have occasion to go to him about any of the provisions of the contract? A. Oh, yes.

Q. What did you do or what did you say? A. I said, "Mr. Goldberg, this, you know, this excavating is not my job, you know that." "Well," he says, "Go to the architect. I ain't got nothing to do with that." 30

Q. It was stated here that you agreed to give a bond. Did you give that bond? A. Yes, sir.

Q. What was the bond, for how much? A. A thousand dollars.

Q. And who did you deliver it to? A. I delivered it to Mr. Kennedy, the architect. 40

Q. And did he keep the bond? Where is the

*Carmine Savino—Direct.*

bond now? A. Why, Mr. Goldberg has got it to my knowledge and belief.

Q. It was never surrendered to you, was it?

A. No, sir.

Q. And it was a bond for a thousand dollars? A. Yes, sir.

10 Q. What did Goldberg say about accepting that bond? A. Why, he didn't want that bond. He says, "That ain't the kind of a bond I want. I want a surety bond." I says; "The contract don't call for a surety bond."

Q. Mr. Hart says that you wrote a letter on the 28th of October, 1916, saying that you were half owner, and the owner of a one-half interest of a three thousand dollar house and lot in Kingsland, New Jersey, free of encumbrances.  
20 Did you write that? A. Yes, sir; that is, I sent it. I also own lots opposite the station in Kingsland in which there is an equity of \$1,800.00. I own other property, but these properties alone are sufficient to cover the bond given you.

Q. Who did write that? A. Mr. Ely, my attorney at the time.

Q. And you signed it? A. Yes, sir.

Q. Mr. Hart says now he found there was a  
30 judgment against you? A. Yes, sir, there was.

Mr. Hart: Three judgments.

Q. What were the judgments? A. I do not remember exactly what they were, but I owed money.

Q. How much were they? A. All told, about \$400.00.

Q. And why didn't you tell Mr. Hart about  
40 those? A. Because I thought they had been paid off.

*Carminé Savino—Cross.*

Q. What made you think they had been paid off? A. Just previous to this, I fell in arrears in payment of interest on a mortgage that I owed the North Jersey Title & Guaranty Company of Hackensack, and I said to them, "I can't pay this." They were going to foreclose, and I says, "I will turn this property over to you and save the expense of foreclosure." They says, "That is very good." But they found several judgments against me. 10

Q. Were those the same judgments? A. Yes, sir. They says they have got to be taken care of. I says, "Why, I am giving you the property without any consideration." They says, "All right, that will do." They took that property without giving me a dollar for it, and they explained that they were going to take care of these judgments and these ounstanding debts against me. 20

Q. Is that all there is against this property you mention here? A. That is all, yes, sir.

## Cross-Examination by Mr. Hart:

Q. Which of the properties that you mention in this letter of October 28th, were the properties which you turned over to the Title Company? A. It wasn't in that letter at all. 30

Q. It was another property? A. Yes, sir.

Q. When you wrote this letter of October 28th, it was for the purpose of inducing the defendant to accept this bond, was it not? A. No, sir.

Q. Why did you write it? A. I wrote it because my attorney said this is the easiest way out of it.

Q. Way out of what? A. Out of this squabble. 40

*Carminé Savino—Cross.*

Q. What squabble? A. We couldn't get our money.

Q. Answer my question. A. I call it a squabble; the difficulty of getting our money.

Q. Oh, you had difficulty in getting money?

A. From—

10 Q. From Goldberg? A. Yes, sir.

Q. And it was because you didn't give him a bond to water-proof the cellar, wasn't it? A. Yes.

Q. And the easiest way to get out of the difficulty was to give a bond signed by yourself alone with a letter which was false, is that it? Answer the question yes or no. A. That is what my attorney said.

20 Q. And you did what your attorney said?  
A. Yes, sir.

Q. Your attorney is Mr. Ely who is in Court now? A. Yes, sir.

Q. And he will support you in that, will he?  
A. I do not know.

30 Q. Did you change the character of your treatment of Mr. Goldberg when you built this foundation from your character of when you tried to induce him to accept a bond under false pretenses? A. I do not know what you mean by that. I always treated him fair. I wish he had treated me the same.

Q. So the easiest way to get out of building a water-proof cellar was to leave the job altogether? A. I never left the job.

40 Q. But you say you waited from one Tuesday until Monday morning and did not bring your men to work there, isn't that true? A. Yes; that is true.

Q. And you knew when you got this notice on

*Carmine Savino—Cross.*

Tuesday, you knew that the law required you to start work before Friday? A. I didn't think the law required me to start work where the conditions were impossible.

Q. If you had known that you would have started work within that time, wouldn't you?

A. Yes; I would have started.

10

Q. Then you were able to start it within the three days, weren't you? A. Well, I could have started it; it wouldn't have been a good job.

Q. Answer my question. You were able to start your work then within three days, were you not? A. Able?

Q. Yes. A. I do not know what you mean by that.

Q. You do not know the meaning of the word "able"?

20

Mr. Dawson: Does he mean the man was able or the work was able?

Mr. Hart: I do not know. I haven't any difficulty in understanding the meaning of the word "able."

The Witness: Neither have I.

Mr. Hart: Then if you understand it, answer the question.

30

(Question read.)

A. I could have started.

Q. And you did not start? A. I did not start, no.

Q. I ask you whether this letter signed Carmine Savino addressed to A. C. Hart & Vanderwart, dated October 28th, 1916, is signed by you? A. Yes, sir.

40

*Carminé Savino—Re-direct.*

Mr. Hart: I offer it for identification.  
(Marked D-1 for Identification.)

Q. I show you a signature attached to a bond dated October 20th, 1916, and ask you whether that is your signature? A. Yes, sir.

10 Mr. Hart: I offer that for identification.  
The Court: So marked.  
(Marked D-2 for Identification.)

Q. Is this the bond and this the letter which you have referred to in your testimony? A. Yes, sir.

Q. I show you a notice to proceed with work signed David Goldberg, dated December 12th, 1916, marked "Served, December 12th, 1916."  
20 Is that a true copy of the notice which you received? A. Yes; I received it.

Mr. Hart: I ask to have that marked for Identification.

Mr. Dawson: I would like to mark that in evidence.

Mr. Hart: All right.

The Court: Yes.

30 Mr. Dawson: That can be marked in my case.

The Court: Yes; your case.

(Marked P-2.)

Mr. Hart: That is all.

Re-Direct Examination by Mr. Dawson:

Q. You say you could have started work within three days after you got the notice? Why didn't you start that work?  
40

Mr. Hart: I object; that is immaterial, sir. The witness testified he received a

*Carminé Savino—Re-direct.*

notice to proceed within three days, and he testified that he could have proceeded with the work and that he did not proceed with it, and I object to this, sir.

Mr. Dawson: The question was why he did not.

The Court: That is allowable.

Mr. Hart: I respectfully ask exception? 10

The Court: Yes.

A. If I proceeded with it, what I understand by proceeding, is physically I could have done almost everything; I could have kept bailing water out of that cellar and taking rubbish out of that cellar indefinitely; but would it have done the owner or me any good? It was useless for me to put the finishing coat on that work 20 when there was water and rubbish and everything coming down on it.

Q. Now, in regard to this bond which has been marked as an exhibit here? After you delivered that to Goldberg, did you have any dispute or argument with him about it? A. Not about the bond.

Q. Well, you say that he said that wasn't the bond he wanted? A. He wanted a surety com- 30 pany bond.

Q. What did he say then and what did you say then? A. He says, "Do you think if a little fellow signs a bond, do you think I am going to accept it?" I says, "Why, I signed it, and I am perfectly willing and able to make good if I default."

Q. Did he say anything about stopping the work? A. He afterward said, "You do this job, and for money you are going to get honey." 40

Q. When did he tell you that? A. Oftentimes

*George A. K. Sutton—Direct.*

I go to him to explain this thing. He says, "You do this job and for money you are going to get honey."

Q. Did you get the honey? A. (No answer.)

Q. Mr. Savino, who was the architect of this job? A. Joseph Kennedy.

10 Q. And was Mr. Kennedy there on the work?

A. Yes, sir.

Q. How often? A. Well, he was there every day, and when he wasn't there his son was there mostly all the time.

Q. And what was his son's name?

Mr. Hart: William H.

Mr. Dawson: That is all.

20

GEORGE A. K. SUTTON, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Dawson:

Q. Mr. Sutton, where do you live? A. Lyndhurst.

30 Q. You are the Recorder there? A. I was; I am not now; until last June.

Q. You were until last June? A. Yes, sir.

Q. And do you remember the erection of this building of Goldberg's on Valley View Avenue?

A. Yes, sir.

Q. And you were Recorder at that time, were you not? A. Yes, sir.

Q. And did you have any occasion to go down there and look over the work? A. Yes; I had.

40 Q. What took you down there? A. Why, there had been complaint coming in from the police

*George A. K. Sutton—Direct.*

station that the construction of the building was blocking the sidewalk. The Chief of Police and I went down to look at the job.

Q. What did you find on the sidewalk? A. I found the sidewalk was piled full of dirt about two feet high.

Q. What was the dirt; where did it come from? A. The dirt came from around the foundation wall of the building. 10

Q. Who else did you see there that day when you went down there? A. Well, Mr. Goldberg was there and Mr. Savino.

Q. And did you hear any conversation about that dirt? A. Well, I asked Savino how it was that this sidewalk was blocked. He said he—

Mr. Hart: I object to what Savino said. 20

The Court: Unless the other parties were there.

Mr. Dawson: He says Goldberg was there.

Mr. Hart: Was Goldberg there and heard you?

The Witness: I couldn't say whether he was there all the time and heard every word; he was flitting around the building. 30

Mr. Hart: I object. 30

The Court: I think for the present it is incompetent.

Q. Well, what did you say to Savino?

Mr. Hart: I object to that.

The Court: In Goldberg's presence.

A. I asked if he knew how long he had had the dirt there. 40

*George A. K. Sutton—Direct.*

Mr. Hart: I object to that, if your Honor please. The witness has already testified that Goldberg was not there continuously and the Court has ruled that out.

Mr. Dawson: He is testifying now what happened when Goldberg was there.

10 The Court: You may testify to any conversation that took place when Mr. Goldberg was there, but not otherwise.

The Witness: I remember the general import of the conversation, but it did not impress me at the time to remember whether Mr. Goldberg was there when this particular thing was said, or whether he wasn't.

20 Q. What did Goldberg say then, in the presence of yourself and Savino? A. I might add to my testimony that Mr. Kennedy was there.

Mr. Hart: If your Honor please, the witness is a lawyer and an able man mentally, and I suppose he knows that it is not right for him to suggest things of that sort to his counsel.

30 Mr. Dawson: I do not think that his remark is at all called for. He says another man was there.

Mr. Hart: He says he might suggest that Mr. Kennedy was there, the architect.

The Court: Proceed.

Mr. Dawson: Do you want to conceal his presence there?

40 Mr. Hart: I do not want to conceal his presence.

*George A. K. Sutton—Direct.*

The Witness: I asked Mr. Savino about the dirt, and how long it would be there.

The Court: Was Mr. Goldberg there at the time?

The Witness: I couldn't say whether he was there all the time or not; that is, at the time every word was said. He was there, and he was away a few minutes; then he came back again. The Chief of Police and I were around the job perhaps fifteen minutes. 10

Q. Well, can you tell us anything that Goldberg said about this excavation? A. Well, he had very little to say.

Q. Well, what did Kennedy say about it? A. Savino said something first before Kennedy. 20

The Court: What did Kennedy say?

The Witness: Well, Kennedy told him that he should pile the dirt back and waterproof it on the inside.

Q. And did you hear anything more than that, I mean in the presence of these people. Let us don't have any question about this; I want to be perfectly fair about it, and you do —if there was anything else said in the presence of these men, the jury is entitled to hear it, and the Court is entitled to hear it. 30

Mr. Hart: Is that a question?

Mr. Dawson: Yes.

A. I went there to investigate because of the trouble, and I found the cause of the trouble was dirt piled on the sidewalk, and I looked 40

*Otto Kiesweather—Direct.*

to see where the dirt came from, and I saw it came from around the foundation wall. I asked Savino how long it would be before he piled it back, and he said—

Mr. Hart: I object, if your Honor please.

10 The Court: That is the same thing again.

Mr. Hart: The witness knows that; he is an accomplished lawyer.

Q. Mr. Sutton, you heard someone order Savina to put the dirt back? A. Yes.

Q. And was it put back? A. Why, the next time I saw it, two or three days afterward, it had been put back.

20 Q. When you saw it a few days after that, did you go into the building, or have any occasion to go into the building? A. I had nothing to do with the building at all.

OTTO KIESWEATHER, called as a witness on behalf of the plaintiff, being duly sworn, testified  
30 as follows:

Direct Examination by Mr. Dawson:

Q. Mr. Kiesweather, where do you live? A. At Lyndhurst, New Jersey.

Q. And what is your business? A. Mason materials, building supplies, mason material.

Q. And in the concrete block business? A. Manufacturing cement blocks, yes, sir.

Q. How long have you been in that business?  
40 A. For the last eight years.

*Otto Kiesweather—Direct.*

Q. And do you have a plant? A. Yes, sir.

Q. And where do you carry on your business? A. At Rutherford.

Q. Do you know the building here in question on Valley View Avenue? A. Yes, sir.

Q. And did you visit that building— A. Yes, sir.

Q. (Continuing.) during the course of the work there? A. Yes, sir.

Q. Do you know Savino here? A. Yes, sir.

Q. How long have you known him? A. Oh, ten or twelve years.

Q. Did you visit the building, or not, during the month of December when he was working on the cellar? A. Yes, sir.

Q. And did you see the work, the mason work in the cellar? A. Yes, sir.

Q. And how often did you see that? A. I would drop in to see that about three or four times a week.

Q. Did you observe the materials he was putting in the job? A. Yes, sir.

Q. What were they? A. Why cow-base sand, three-quarter trap rock and Portland cement.

Q. What is cow-base sand, what does that mean? A. That is considered the best sand we have.

Q. And what was the cement? What grade of cement did you use? A. Portland cement.

Q. A good grade of cement, was that? A. Yes, sir.

The Court: Is there more than one grade of Portland cement?

The Witness: No, sir.

Q. There are different makes? A. Oh, yes; different manufactures.

*Otto Kiesweather—Direct.*

Q. And what about the trapped rock; what is that? A. That is crushed blue stone.

Q. And what do they use that for? A. For cellar bottoms and side wall purposes, and so forth.

10 Q. It is one of the ingredients in the concrete, isn't it? A. Yes, sir.

Q. What was the quality or grade of the trap rock? A. Three-quarter inch.

Q. Was it in good condition? A. Yes, sir; it was clean, clear they call it.

Q. Did you observe the condition of the cellar bottom any time there after Tuesday, preceding the 12th of December? Do you know of that occasion when Savino got this stop notice? A. Yes, sir.

20 Q. Did you have occasion to observe it at that time? A. Yes, sir; I went into the building for to look for Savino, and I noticed that the cellar bottom was down, and that there was a lot of water and rubbish laying in the cellar.

Q. Did you observe where the water came from? A. I noticed a faucet in the right-hand corner of the building, and a big hole around it as though they drilled a hole through the wall  
30 in order to put the pipe through.

Q. Did it appear as though there was any water coming in there? A. Yes.

Q. Did you see it in any other place? A. I don't know as I remember any other place.

Q. How much water was on the bottom; was there enough to interfere with the work there? A. Oh, yes.

40 Q. Do you remember Savino giving a bond in this case? A. Yes, sir.

*Otto Kiesweather—Direct.*

Q. Was anything said to you by Goldberg about this bond? A. Yes, sir; he says, "If you endorse this bond, I will accept it." I says, "I cannot endorse that bond." He says, "For money, you will get honey."

Q. He said that to you, too, did he? A. Yes, sir.

Q. What did you want the money for? A. Why, he owed me for material furnished.

Q. Some of your material? A. Yes, sir.

Q. Well, was anything said, further said, about the bond? A. Yes, there was; I says, "Now, let us talk this over in a very soothing manner; don't get mad. Let me read the contract." I read the face of the contract where it said he shall furnish a bond.

Q. Who showed you the contract? A. Mr. Goldberg, and I read the paragraph where it says the contractor shall furnish a bond. I says, "This is a bond. If you wanted a surety bond, you should have stipulated it in the contract." He says, "That bond ain't no good; but" he says, "if you endorse it, I will take it." And I says, "I cannot do that." Then he got mad again, and Mr. Savino and I went out. That is when we went in for the first payment.

Q. For the first payment? A. Yes, sir.

Q. And did you ever talk about the bond with Goldberg after that? A. No, sir; I did not talk to him after that.

Q. Did he ask you if you considered Savino good for the bond; was there any talk about that? A. Yes, he did, while we were talking, and I says, "I think he is."

*Otto Kiesweather—Cross.*

Cross-Examination by Mr. Hart:

Q. Now, Mr. Kiesweather, at the time you told Goldberg that you thought Savino was good for the bond, you didn't know that there was a judgment against him of \$45.89 held by a man named Kern, another of \$245.60, held by one Ford, another of \$78.44 held by Shafer & Conkling, and that the taxes upon his real estate had not been paid for 1913, 1914 and 1915, did you? A. Why, I talked with Savino several times, and we talked about his financial affairs when he wanted credit from me, and I asked him how he stood. I thought he had judgments against him also, and he says he has, but the title company in Hackensack has taken care of them by reason of a transfer he had made to them.

Mr. Hart: I ask that that be stricken out.

The Court: Yes, strike it out.

(Question read.) A. I knew there was something there.

Q. You knew those things were there, and yet you told Goldberg you thought Savino was good financially? A. I did, yes, sir.

Mr. Dawson: They have the bond, and if there is any liability on the bond, they can sue on it.

The Court: Proceed.

Q. You gave credit to Savino and sold him some stuff? A. Yes, sir.

Q. He owed you money? A. Yes, sir.

Q. And he still owes you money? A. Yes, sir.

*Otto Kiesweather—Cross.*

Q. And the only way you and your concern can get the money is for him to get a judgment in this case? A. Oh, no.

Q. Isn't that one of the ways? A. No; I don't know.

Q. If he loses this case, there isn't any chance of getting the money? A. Yes, there is. 10

Q. How much chance? A. I think so.

Q. The same sort of thing you had in your mind when you told Goldberg that he was good?

A. I think so yet.

Q. Haven't you an assignment of this claim?

A. No, sir.

Q. Have you got a lien on this claim? A. No, sir.

Q. Have you put a stop notice on this claim?

A. No, sir. I have absolute confidence in him. 20

Q. Even now? A. Yes, sir; even now.

Q. You think it will help his conscience considerably if he gets money to pay you in this case? A. I think he is entitled to his money, the same as you would be.

Q. And you are entitled to yours? A. Yes, sir; I am.

Q. Did you sell this man Savino any concrete for the bottom of the cellar? A. No, sir; not for 30 the bottom.

Q. You didn't have any concrete there at all for the bottom? A. I didn't have the cow-base sand, and he insisted upon getting it.

Q. You didn't sell him any cow-base sand? A. No, sir; I did not sell cow-base sand: I sell pit sand.

Q. Where did he buy it? A. From a firm named Wurdemann Company.

Q. Whose Portland cement was it you sold? 40

*Aniello Di Maso—Direct.*

A. At that time I sold the French Portland cement.

Q. Who is the manufacturer? A. H. B. French & Company, Philadelphia.

Q. You had to give it up because it was no good? A. No, sir.

10 Q. Why did you give up selling that cement?  
A. I did not give up selling it; I am selling it right along.

Q. Then you are still selling it? A. Well, I am selling Phenix, too.

Re-direct Examination by Mr. Dawson:

20 Q. You didn't sell him the cement used for the cellar bottom? A. No, sir; I didn't, and the reason was because I did not have the cow-base sand.

Q. Did you know where he bought the cement that he used for the cellar? A. He told me he was going to buy it all at one place.

Q. Did he buy the trap rock from you? A. No, I didn't have that, either.

30 ANIELLO DI MASO, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows through an interpreter:

Direct Examination by Mr. Dawson:

Q. What is your full name, Mr. Di Maso? A. Aniello Di Maso.

Q. Did you work for Mr. Savino on the building he was erecting for Mr. Goldberg on Valley View Avenue, Lyndhurst? A. Yes, sir.

40 Q. And what work did you do on the building? A. Mixing the stuff.

*Aniello Di Maso—Direct.*

Q. Well, what stuff do you mean, the water-proofing stuff? A. I had bags there, paper bags, and the other kind of bags, and I had to wet this stuff and I would put two pounds of one kind of stuff into a bag of the other stuff, and I would mix it up on the sidewalk.

Q. Do you know Mr. Kennedy, the architect, and Mr. Goldberg, the owner? A. One of them sits over there and another one sits there, and the man who sits there is the man who said to me that the stuff is fine, the stuff was good that I was mixing on the sidewalk. 10

Q. Which man said that? A. Some young man sitting over there with a red face.

Q. What is his name, do you know? A. I don't know his name.

Q. Mr. Kennedy, stand up, will you please? 20  
Is that the man? A. Yes, sir; that's the man.

Q. And was his father there too, this boy's father there? A. No, his father would come there; he would come there; he would always be on the job.

Q. And was Mr. Goldberg there any of the time while you were mixing the cement? A. He was in his saloon, and he didn't bother about my work. He was attending to his own business 30  
in there and not bothering about our work.

Q. Then the man that had charge of your work was this young man Kennedy, was he?

Mr. Hart: I object to that; the contract in evidence shows that.

A. Yes, sir; that's the man, he was in charge.

Q. Did anybody tell you about how to mix this stuff? A. Yes, sir; Savino told me how to mix it. 40

*Aniello Di Maso—Cross.*

Q. And who got the material for you? A. Other people would bring it there.

Q. Do you know what this material was that you put two pounds in a bag, as you say, do you know what you call it? A. Why, rock, cement and sand; I would throw it into a machine and mix it.

10 Q. Who also worked with you there, mixing the cement? A. Why, there was other people that were working in the cellar there; I was working up on the sidewalk mixing it up and putting it in the machine and so forth.

Q. Was Joe Curcio working there with you? A. No.

Mr. Dawson: That is all.

20 Cross-Examination by Mr. Hart:

Q. How often before this time had you mixed cement in the same way? A. At no other time; only that time.

Q. This is the only time you ever mixed cement, isn't it? A. Yes, sir. Why, it was so strong that it was choking me; I couldn't hardly breathe from the stuff that I was mixing.

Q. When had you a job before this time? A. 30 I worked four or five years before, but not at this work.

Q. Then you hadn't worked for four or five years, had you? A. I worked for four or five years, but not at this work. I worked at making concrete, but not at this kind of work.

Q. Just as a laborer, was it not? A. Why, 40 when I would get some work to do mixing this here stuff, I would work; and other times I would do anything, and some other times I would do some light work.

*Aniello Di Maso—Re-direct.*

Q. Now, you mixed this all on the sidewalk, did you not? A. Yes, on the sidewalk we would mix it.

Q. Leaves and dirt and everything that was there all went into it, didn't it? A. Why, there was no dirt there, it was very clean there.

Q. It was a very clean, nice sidewalk was it? 10  
A. Yes, sir.

Re-Direct Examination by Mr. Dawson:

Q. How long have you been mixing concrete?  
A. For five days.

Q. How long have you ever been working at that work in your life? A. Why, for four or five years; my sons didn't want me to do much work.

Q. Who were the men that were there mixing 20  
the concrete when you were mixing the materials? A. I don't know; I cannot tell you; I haven't got them before me. They know who was working there.

Q. Was Michael Genetti mixing cement? A. No.

Q. Well, wasn't Michael Genetti running the machine, the mixer? A. Yes; Genetti was running the machine. 30

The Court: Do I understand from this witness that this cement was mixed in a machine or on the sidewalk?

Mr. Dawson: They mix the ingredients together and dump them into a machine, and then the machine revolves and mixes them.

The Court: That's what they did in this case? 40

*Joseph Curcio—Direct.*

Mr. Dawson: Yes.

The Court: The witness seems to be rather indefinite.

Q. How many men were working in the cellar?

10 Mr. Hart: I object; that is not proper re-direct, sir.

Mr. Dawson: I withdraw it.

The Court: Did you mix it on the sidewalk and then put it in the machine?

The Witness: They would first mix it on the sidewalk, and then they would put it in the machine.

20

JOSEPH CURCIO, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Dawson:

Q. Mr. Curcio, where do you live? A. Lyndhurst.

Q. And what is your business? A. Oh, every-  
30 thing.

Q. Labor, general labor? A. Yes.

Q. Did you work on Mr. Goldberg's new building down on Valley View Avenue? A. Yes.

Q. And what were you doing there? A. Well, digging, everything.

Q. Who did you work for? A. Well, first I worked for myself; afterward I work for Savino.

Q. First you worked for yourself, and then for Savino? A. Yes.

40 Q. And what were you doing for Savino? A. I mix concrete; put a concrete bottom.

*Joseph Curcio—Direct.*

Q. You were working on a concrete bottom?

A. Yes.

Q. Were you there when Goldberg told Savino to leave the place— A. No.

Q. (Continuing) and not to finish the work?

A. No.

Q. Did you go down there with Savino to work? A. Yes, sir; I was work for him. 10

Q. Now, how far did you get along with the work on the cellar bottom when you stopped work? A. How far we—

Q. How much had you finished, I mean? A. We had the concrete, the rough in.

Q. What else remained to be done? A. To finish—

Mr. Hart: I object to this witness testifying unless he is experienced and unless he is qualified, sir. He says he has worked at everything, and seems to be a jack-of-all trades, and hasn't mastered any in all probability. 20

The Court: You can tell the way it stood at that time.

Mr. Hart: I shall object, because he is not qualified.

The Court: He knows what has been done, I presume. 30

Mr. Hart: He has described the work as rough work. It was all rough work. He seems to distinguish it technically by rough work.

The Court: Proceed.

Q. You had a brother working there too, hadn't you? A. Yes; he is a brother of mine. 40

*Joseph Curcio—Direct.*

Q. Did you go down there with Savino on Monday morning— A. Yes.

Q. (Continuing) to finish the work? A. Yes; we started on a Saturday night, and he told me I should go up on Monday to work.

Q. He said on Saturday you have to go to  
10 work Monday? A. Yes.

Q. And did you go to work Monday? A. Yes, sir.

Q. And where did you go? A. I went back to the job again.

Q. Who else was there on the job? A. I cannot remember.

Q. Was Savino there? A. I come in; I met him on the corner. He no was on the job.  
20 When I got on the job, he say, "Nothing to do today; leave it to tomorrow.

Q. You went to the job on Monday morning did you? A. Monday morning.

Q. Well, was your brother there? A. Yes; he was there.

Q. And who sent him there on the job? A. Who, my brother?

Q. Yes; who told him? A. The two of us were working together.

30 Q. And did you go to work Monday morning; did you do anything? A. No.

Q. Well, why didn't you? A. I do not know; he had some trouble with him. Goldberg said he can't work.

Q. Savino told you there was trouble and he couldn't work? A. Yes.

Q. Did you see Goldberg there? A. No.

Q. You don't remember seeing him? A. No.

40 Q. Did you leave the job then; did you quit

*Joseph Curcio—Re-direct.*

and go away? A. I quit and look for another job.

Cross-Examination by Mr. Hart:

Q. Mr. Curcio, what is your brother's name?

A. John is his name; he don't live in the town.

Q. He isn't your brother at all, is he? A. No; 10  
a relation.

Q. You just call him brother? A. Yes.

Q. When Savino hired you on Saturday night, what did he say to you? A. It was on Saturday noon at the time he said, "You should come to work Monday; if there be no work I pay you for the day."

Q. And if you don't work "I pay you for the day." He told you that, didn't he? A. Yes. 20

Q. Did he tell you why you might not be able to work on Monday? A. No, he never tell me anything about it.

Re-direct Examination by Mr. Dawson:

Q. You are a pretty close friend of Mr. Goldberg, aren't you? A. No; the friends of mine is my money. I ain't got no friends.

Q. Well, you spent a good deal of time in Mr. 30  
Goldberg's place, didn't you?

Mr. Hart: I object to that.

A. I went all over the place I wanted to.

Mr. Hart: Is counsel attempting to attack the veracity of his own witness?

Mr. Dawson: Does it sound so?

Mr. Hart: I think so, when he is attempting to associate him with the de- 40  
fendant.

*Discussion.*

I ask for a non-suit; first, this is a mechanic's lien claim, and the title of the property has not been shown, nor has the lien claim been produced. Second, I ask for a non-suit on the ground that the contract in evidence, P-1 provides that an architect's certificate shall be presented before  
10 any monies may be required to be paid by the defendant, and no such certificate is produced, and there is no evidence which would show that the architect acted in an unreasonable way in not granting the certificate. There is no evidence that the certificate was asked for and was ever refused, and further, that there is no evidence that this contract sued upon has been complied with. Furthermore, a stop notice was  
20 served, which is marked P-2, upon the plaintiff, to proceed with the work, and he did not proceed. The witness has said that while he received the notice, he was able to proceed within three days, and he didn't proceed. On re-direct he tried to explain by saying that he was able to do anything. In the hands of his counsel, replying to adroit questioning, he answered that he was able to do anything, but it would have been wrong to have proceeded in the condition  
30 of the cellar at that time, for he said it would have been wrong as against the defendant Goldberg to have proceeded at that time.

The Court: Mr. Dawson, I will hear you.

Mr. Dawson: If your Honor please, it seems to me the whole thing resolves itself down to the giving of the stop notice. There is no question we did not receive a certificate, and we did not receive a certificate because the stop notice  
40 intervened, and we put off the work. The question is, the work was stopped; of course, we

*Discussion.*

couldn't get a certificate that the work was finished, because it wasn't finished. We were stopped from finishing it, and the whole issue is, were they justified in putting us off the work by giving us a stop notice.

The Court: Do I understand you that there was no payment due at the time this notice was given? 10

Mr. Dawson: No.

The Court: The first payment had been paid.

Mr. Dawson: Yes, and the final payment was due when the work was completed, which we say we did not complete because we were put off the work, because of this stop notice.

The Court: What have you to say about not showing the ownership of your property?

Mr. Dawson: It is admitted in the pleading. 20

The Court: Is that so, Mr. Hart?

Mr. Hart: That item isn't of material consequence. I don't care very much about that, sir, because Mr. Goldberg is a responsible man.

The Court: Isn't that the only question now before the jury? If there is no payment due, and you put the man off the job, you could not get a certificate, could you?

Mr. Hart: The notice itself is in evidence 30 requiring him to proceed with the work, and his own evidence that he was able to proceed and he did not proceed with it. There is nothing at all to support his contention that the cellar was in any condition rendered such by the defendant himself that he was unable to proceed.

The Court: Didn't he say he drilled a hole through the wall?

Mr. Hart: He said there was a hole in the wall, and he saw water coming in that hole in 40

*Discussion.*

the wall, but he didn't say the defendant had done that; and he said there was stuff, remnants of other contractors, that came into the cellar. He is obliged under this contract to keep that work clean and clear, sir.

The Court: Read that section of the contract.  
10 You haven't read that contract; I haven't any idea what the contract calls for.

Mr. Hart: (Examining paper.) I do not know; it is somewhere around there.

The Court: Find out where it is; that seems to be the only question.

Mr. Hart: Another question arises, and it is this: This suit is not at all, as I remember—  
Mr. Dawson will correct me if I am wrong—  
20 this suit is based upon the contract itself, and not at all for monies due. If it is based on the contract, the contract is the controlling factor, and the suit should be for loss of profits because the work was not completed. The prosecution is for monies due upon a contract; it is alleged that the whole of said amount remains due and unpaid, and there is no evidence that this contract has been completed.

The Court: What do you say to that, Mr. Dawson, so far as your first count is concerned?  
30 Isn't it true as the cause now stands, so far as your first count is concerned, you should sue for the profits and not for the amount due?

Mr. Dawson, Well, that would all depend, I suppose, whether there is a substantial performance there or not. It seemed to me, as I looked at the case, we ought to say there was a contract. It is admitted there was a contract, and we say there was so much due under the  
40 contract.

*Discussion.*

The Court: But under your evidence, you do not show any such thing as that. You show your contract is not completed, and therefore you wouldn't be entitled to that, would you? You would be entitled to your profits.

Mr. Dawson: We have said here that there was the sum of \$800.00 due for the last payment, and if we were prevented unlawfully from performing the contract, we would be entitled to that payment. 10

Mr. Hart: On December 18th, 1916, there became due to the plaintiff upon a contract, the sum of \$800.00, work, labor and material furnished by the plaintiff in accordance with the said contract. Such materials were not furnished to the said defendant Goldberg for the construction of said building, and there is no evidence that they were furnished. 20

The Court: What is your contract for, the amount?

Mr. Dawson: \$1,600.00.

The Court: You have had \$800.00?

Mr. Dawson: Yes, sir. We divided it into two payments, one when the walls were up, and one when it was completed.

The Court: I think the point is well taken so far as your first count is concerned. 30

Mr. Dawson: The issue seems so plain from the pleadings, I will ask permission to amend.

Mr. Hart: I have moved for a non-suit on the ground that the contract was not completed, notwithstanding the fact that a three days' notice was served.

The Court: If counsel say they are not ready to proceed with an amendment, I would not force them on. 40

*Discussion.*

Mr. Hart: No, sir, I do not like to take that position, but I——

The Court: That would be the position you would have to take.

10 Mr. Hart: I have got to have one or the other of the horns of this dilemma. I am not prepared at all as to the reasonable value of this work, and I must meet that issue of reasonable value of the work done.

The Court: That's what you have to meet.

Mr. Hart: I am not prepared to do that, sir. Under the circumstances, inasmuch as there are two items for extra work, counsel might feel like accepting a non-suit, or declaring a mistrial.

20 The Court: The Court will allow you to amend on terms. I do not suppose counsel would want to go on with the two small items?

Mr. Hart: I do not want any terms.

The Court: I will allow the jurors to be withdrawn and the plaintiff to amend his first count. The jury may be withdrawn and the plaintiff may have leave to amend. Gentlemen, you may take your seats in the audience.

30

40

## BERGEN COUNTY CIRCUIT COURT.

<p>CARMINE SAVINO, Plaintiff,</p> <p>vs.</p> <p>DAVID GOLDBERG, Builder and Owner, CARLSTADT MUTUAL BUILDING &amp; LOAN ASSOCIATION, Mortgagee, Defendant.</p>	}	<p>Action at Law.</p>	<p>10</p>
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Hackensack, N. J., April 26, 1918.

Before:—HON. WILLARD W. CUTLER,  
*Judge*, and a Jury.

APPEARANCES:

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For the Plaintiff: MESSRS. EDWARDS & SMITH,  
RAYMOND DAWSON, Esq., and HARRY WEIN-  
BERGER, Esq., of Counsel.

For the Defendant: MESSRS. HART & VANDER-  
WART, A. C. HART, Esq., of Counsel.

The jury was duly empanelled, accepted and  
sworn.

Mr. Dawson opened the case to the jury on be-  
half of the plaintiff. 30

Mr. Hart opened the case to the jury on be-  
half of the defendant, during which the follow-  
ing statement was made:

Mr. Hart: This contractor tried to build a  
building eleven inches shorter than called for in  
the specifications, and that is some saving in  
war times.

Mr. Dawson: I object to that. That is not in 40  
the pleadings, and another contractor was re-  
sponsible for that.

*Carminé Savino—Direct.*

CARMINE SAVINO, the plaintiff, called as a witness on his own behalf, being duly sworn, testified as follows:

Direct Examination by Mr. Dawson:

Q. Mr. Savino, you are the plaintiff in this case? A. Yes, sir.

10 Q. Where do you live? A. Kingsland, Lyndhurst Township.

Q. What is your occupation? A. Building contractor.

Q. And what particular line? A. I build from foundation to painting; in other words, the entire building.

Q. And how long have you been in the contracting business? A. About eight years.

20 Q. Do you know the defendant, David Goldberg? A. Yes, sir.

Q. Did you have any conversation with him prior to October 1st, 1916, relative to building a building? A. Yes, sir.

30 Q. And what was said prior to the making of a contract, relating to the formation of a contract? A. He said he was going to build a three-story building across from where he was, from where he was in business and live on Valley Brook Avenue, and he wanted me to figure on the building, and I did, on the entire building.

40 Q. And after you figured, did you enter into a contract with him? A. Not immediately then. Then, when I brought my figures, I waited a couple of days, and they told me they had changed their minds about building a three-story building. They were going to build a two-story building, and they wanted me to figure on the foundation for that, and I did.

*Carminé Savino—Direct.*

Q. And these negotiations, did they ultimately result in the formation of a written contract?

A. Yes, sir.

Q. I show you an instrument bearing date of September 16, 1916, purporting to be a contract between David Goldberg and Carminé Savino, and ask you if that is the contract for the erection of this building, or the mason work of this building? A. (Referring): Yes, sir; this is the contract. 10

Q. And was that signed by you? A. Yes, sir.

Q. And also signed by Mr. Goldberg? A. Yes, sir.

Mr. Dawson: I offer this contract in evidence.

The Court: Let it be marked. 20  
(Marked Exhibit P-1.)

Q. Did you start work under that contract? A. Yes, sir.

Q. And did you start work immediately after September 16th? A. No. We never signed that contract until October 1st.

Q. You mean that it was signed on October 1st? A. Yes, sir.

Q. And when did Kennedy sign it as a witness? A. The same day. 30

Q. Well, when did you say you started work? A. I started work on the third of October. I was there on the third. I was there on the 2nd of October. I purchased my lumber for the cribbing on that day, and I was over on the job, but the job was not ready for me.

Q. Well, when did you actually get down to work? A. I got down to work on the 4th. 40

*Carminé Savino—Direct.*

The Court: Fourth of what?

The Witness: October.

10 Q. And what did you do? A. Why, I seen that the excavators who were not employed by me were working in a sea of mud, and I put my men to dig trenches from the sides of the foundation to a deep hole out of which that water could be pumped out.

20 Q. Well, go ahead; what else did you do? A. And the following day I took measurements to see how the foundation had been dug, and I found the building was to be 40 x 50, and they dug exactly 40 x 50, and I called Mr. Kennedy's attention to the fact that they had not made any allowance for the cribbing, or to work around the foundation.

Q. All right; who is Kennedy? A. He is the architect.

Q. He is the architect mentioned in your contract? A. Yes, sir.

30 Q. And what did Kennedy do, and what did you do? A. He called the engineer on the job and he, the engineer, verified what I had said, and they ordered the excavators to trim the sides of the foundations to make the allowances that I had spoken of.

Q. Well, did they do that? A. Well, as they were doing that, the sides of the foundation would cave in.

40 Q. The banks, you mean? A. The banks, yes, sir. Then when Mr. Goldberg seen the sides cave in, he came to me, and he says, "Mr. Savino, please do something." I says, "I am doing all I can, but I can't do my work until the excavation is finished." He says, "You must do something or the whole thing would fall in."

*Carminé Savino—Direct.*

I could see that that was the only reasonable thing to do at the time. At the time I started my men to dig the trenches for the footings, put down the footings and followed it right up with the cribbing.

Q. Did you finish that? A. Yes.

Q. What else was done? A. Then I called Mr. Kennedy's attention to the fact that the foundation would not be 40 x 50 for the reason that they hadn't excavated for that, and then Mr. Kennedy said, "Well, we will have to do the best we can," and he consulted with Mr. Goldberg and then he came over again and he says, "Go right ahead." 10

Q. You put the cribbing up then as it was? A. Yes, sir.

Q. Now, did that cause a shortage in the total length of the building? A. Yes, sir. 20

Q. How much? A. Well, about 10 inches.

Q. How do you account for that? A. Well, you know, the upright, the studding takes four inches, and the pressure board is five inches; it would be five inches if the foundation had been dug exact to allow for five inches; but, in some places, it might have been an inch more or less.

Q. In other words, your cribbing would take up five inches on each end? A. Yes, sir. 30

Q. What else did you do? A. Well, when I was told to proceed, to go right ahead, I started to mix the concrete, and I went ahead filling up my crib.

Q. You say, Savino, you put up the cribbing and went on with the work? A. Yes, sir.

Q. How far did you go with it, and what did you do? A. I went right ahead. Of course, Mr. Goldberg was there interfering all the time, but in spite of that, I proceeded right along until I 40

*Carminé Savino—Direct.*

was pretty near towards the finishing of the walls, and then I asked Mr. Kennedy to send the engineer to give me the top lines, and he did. The engineer came there and marked out on the cribbing where I should finish up, and I did. When I got that done, I stopped. I waited two  
10 days and took the form off as far as I could, and then went to Mr. Goldberg for my first payment.

Q. Your first payment was due then, was it?

A. Yes, sir.

Q. What happened then? Did you get it? A. Mr. Goldberg then said, "You will have to get it off the architect." Then I, of course—that day, the architect happened to be absent that day, and I telephoned him, and he said, "I will  
20 be down there tomorrow." So he came there the next day, inspected the work. Then he told me to point up in several places. "Well," I says, "Mr. Kennedy, you know that is the finishing process." "Well," he says, "go ahead and do it." I says, "All right."

Q. What do you mean by pointing up? A. In some parts of the wall there would be a caving.

30 Q. Smoothing up the rough spots? A. Yes. So to please him I was doing that, and Mr. Goldberg came, and he says, "I want you to do that work with union men." "Why," I says, "I am doing it myself." "Well," he says, "you can't do it yourself; you have got to do it with union men." And I had to go and hire a union man to do that job to please him, although I felt at the time that I had a perfect right to do that  
40 work myself.

Q. Then what happened after you pointed up?

A. Then I asked for my payment again, and

*Carmine Savino—Direct.*

Mr. Kennedy said, "I will be down here tomorrow in Mr. Goldberg's saloon," and I went there on that day and Mr. Kennedy's handed me a check for \$500.00. I said, "Mr. Kennedy," I says, "I have got to have \$800.00. That's what my payment calls for." He says, "You are supposed to furnish a bond," and I says, "Here it is," and I filled out my bond and handed it to him. 10

Q. Had you had it prepared? A. Yes, sir.

Q. Who prepared it for you? A. Mr. Ely.

Q. And you submitted the bond to him? A. Yes, sir.

Q. Proceed with your story? A. Then Mr. Kennedy talked to Mr. Goldberg and they went upstairs and they came back in twenty minutes and said, "We can't accept this bond. We want a surety bond." I says, "The contract calls for a bond; I am perfectly good for a thousand dollars." "Oh," he says, "we won't take it." Then I said, "If I don't get it, I can't do any more work." And the matter rested that way. 20

Q. They didn't give you the money? A. No, sir.

The Court: You got \$500.00?

The Witness: No, sir; I didn't take it. 30

Q. Well, what was the next you did? A. Two days later, I was called, I was called on the telephone to see Mr. Goldberg, and this time Mr. Kieswetter happened to be going the same way, and I asked him to go along with me, and when we got there, Mr. Goldberg said, "Now, if you get somebody to endorse this bond—"

Q. Where was this conversation? A. Mr. Goldberg's saloon. 40

*Carminé Savino—Direct.*

Q. The same place? A. Yes, sir. "Did you get somebody to endorse that bond? I will take it and give you the money." I says, "Mr. Goldberg, that is an imposition. I am not required to get any endorser on my bond. I am perfectly good for a thousand dollars." "Well,"  
 10 he says, "do you suppose if a cat signs a piece of paper, I am going to take it"? Then he asked Mr. Kieswetter to endorse it, and then Mr. Kieswetter says, "No," and he says, "Then for your money you are going to get honey," and we went away.

Q. Did you see him later on? A. A few days later, Mr. Goldberg called me up on the 'phone, and told me to meet him at the First National Bank in Lyndhurst. When we went there, he  
 20 was standing alongside the cashier, and he handed me a stack of bills, and he says, "Here is five hundred dollars," and he says, "Will you take it"? I says, "No, I have got to have eight hundred dollars now." He says, "You can go to hell."

Q. All right. Did you see him again about the bond? A. No; I went to a lawyer then.

Q. And was that when you began the suit?  
 30 A. I told my lawyer to collect the money.

Q. And did you get it? Did you collect it?  
 A. A couple of days later I got a telephone message from my lawyer, Mr. Ely, saying that he wanted to see me, and when I went to his office he says, "Now, you know Archie represents Gold-  
 berg, and Archie says if you will give him a statement of your net worth, I think I can fix  
 40 it." I says, "I don't have to give him anything but my bond," but to please him I am satisfied to give him anything he wanted, and he

*Carminé Savino—Direct.*

prepared a statement of my worth and signed it. About three days later Mr. Ely writes me that he had got a check of \$800.00 for me.

Q. That was your first payment? A. Yes, sir.

Q. What had become of the bond in the meantime? A. Why, it was sent to—Mr. Ely sent it to Mr. Archie Hart. 10

Q. And then did you resume work on the contract? A. Yes, sir.

Q. And what did you do after that? Let us get this plain so that the jury will understand it. How much had you completed on your contract up to that time? A. The foundation walls.

Q. And that was the situation that called for the first payment of \$800.00? A. Yes, sir.

Q. All right. Now, start from there and tell us what you did? A. I said to—In the meantime they had served me with a notice to proceed with the work, and I told them I wouldn't do it until I got my first payment. 20

Q. And then your payment came along? A. When my payment came along then I went to the architect, and I says, "Now, Mr. Kennedy, you know where there is nothing there for me to do, because I have got to waterproof those walls, and I can't do that until the excavation is done around the walls. He says, "That is up to you. You have got to do the water proofing, and I don't care how you do it," and I started my men to do the digging after telling them, Mr. Kennedy and Mr. Goldberg, that that was extra work. 30

Q. What do you mean, doing the digging? A. The excavating around the sides of the building so that I could get down and treat the walls. 40

*Carmine Savino—Direct.*

Q. Well, who had the excavating contract? A. I do not know.

Q. Well, that was a separate contract, was it?  
A. Yes, sir; that was understood on signing the contract.

10 Q. Your contract expressly says that the excavation shall be taken out of your work?

Mr. Hart: The contract speaks for itself, doesn't it?

Q. The clause excavation for building, size and depth of plans, and remove all earth; that was stricken out of your contract? A. That was stricken out, and at the time inserted, "separate contract."

20 Q. Who wrote that in there? A. Mr. Kennedy.

Q. Now, you say that you objected to doing the excavation? A. Yes, sir.

Q. Well, what was the objection, and how did you overcome it? What was done there? A. My objection was that I was doing work that I was not required under the contract, and I expected to be compensated extra for that.

Q. And how much was that extra excavation?  
30 A. About 150 yards or cubic yards.

Q. And what did it cost you to excavate it?  
A. \$1.00 a cubic yard.

Q. And did you tell that to Goldberg and Kennedy? A. Yes, sir.

Q. And what did they say about it? A. "Oh, no," they says, "we don't pay that; that's up to you."

Q. Then, what did you do? A. Well, then I telephoned my lawyer again and he said, "Well,  
40 that'll be something that will be taken care of between me and Archie Hart."

*Carminé Savino—Direct.*

Q. Well, did you have any further conversation about the excavation? A. Yes, I again appealed to my lawyer, and he says, "Archie Hart is now busy in Washington, and we will have to wait until he came back. He promised to come down and inspect the work and we will settle it there and then."

10

Q. Did you have any further conversation with Kennedy or Goldberg about this work? A. Yes, sir.

Q. Well, what was that? A. About the excavating, do you mean?

Q. Yes, about this extra excavating? A. Always told them that that was extra work and expected to be compensated for it.

Q. And after you did this extra excavating preparatory to waterproofing, what did you do? A. Why, the moment I got finished excavating, Mr. Kennedy said, "Fill up those trenches." I says, "No. Why." I says, "I am waiting for the waterproofer to treat those walls." He says, "You are going to treat those walls from the inside. You are foolish."

20

Q. Who do you mean, you were waiting for the waterproofer? A. I had a contract with a man who puts tar and tar paper.

30

Q. And he said then that you were foolish; that you were going to put it on the inside? A. Yes, sir.

Q. Then what happened? A. And I filled up the trenches.

Q. And what did you do about the waterproofing of the walls? A. Then, when I got the trenches filled up, I was ready to proceed with the work inside, and then I said again to Mr. Kennedy, "Now," I says, "you know tar and

40

*Carminé Savino—Direct.*

felt won't hold on the inside of a wall, the water will keep oozing through from the outside, and when the water comes through nothing on earth will stop it." "Well," he says, "that's so. I don't think that will be advisable. We will waterproof with this system of waterproofing that they put in that they mix with the cement,"  
10 and he told me of it, and I says, "All right, then, I will go and see the people that sell that composition," and then I did.

Q. What is that composition? A. They call it the Integral waterproofing.

Q. That does away with the tar, does it? A. Well, it is a system of waterproofing, you mix that with the cement, and that is supposed—

Q. To make the cement tight? A. To make the  
20 cement tight.

Q. And how did you come to get this brand know as Integral? A. This is the only one I know of, and this is the one we agreed upon with Mr. Kennedy.

Q. Did you get this Integral stuff on the premises? A. Yes, sir.

Q. And after it arrived, what happend? A. Well, I then proceeded to do my work and work  
30 this composition into my concrete according to the Integral Company's specification.

Q. Did Kennedy know anything about how to apply it? A. Yes, sir.

Q. Did he have any conversation with you about it? A. He not only had a conversation with me, but gave me a written description as to how to do it.

Q. And where did he make these instructions for you? Where were you? A. Sitting on Mr.  
40 Goldberg's front steps.

*Carminé Savino—Direct.*

Q. And who else was there? A. Why, no one immediately close, but there were two or three men, two or three of the other contractors on the job, which was right across the street.

Q. After you got the Integral and started to mix it, then what did you do? A. Then I proceeded and done my—concreted the cellar bottom. Then I concreted the sides up four feet from the floor, put one inch of finishing coat on the sides, and ten inches of concrete on the cellar bottom. 10

Q. And this cellar bottom, the waterproofing hadn't been applied there yet, had it? A. Oh, yes, the waterproofing was in with the concrete.

Q. You put that in all the concrete? A. Yes, in all of it.

Q. Not only in the finishing coat, but in all of it? A. Yes, sir. 20

Q. Did you see the concrete put on the cellar bottom? A. Yes, sir.

Q. How many inches did you say it was? A. Ten inches.

Q. And what was the composition that you put down? A. It was four wheelbarrows of stone, two wheelbarrows of cow-base sand, and two wheelbarrows of cement. 30

Q. And what kind of cement? A. Lehigh.

Q. Lehigh what? A. Lehigh cement; it is a brand of cement.

Q. I understand that your contract calls for Portland cement; did you use that? A. That's Portland cement, yes, sir.

Q. And did you do any other work there? A. No, sir.

Q. Well, tell us from the point where you stopped now, where you put the concrete bot- 40

*Carminé Savino—Direct.*

tom in the cellar, tell us from there on what happened? A. When I got finished with that, I built the areaways for the stairs leading to the cellar, and then it began to rain, and I stopped.

Q. Well, do you remember when it began to rain? A. I think it was—the day I stopped it was raining.

Q. Well, that don't fix it as to date very well. Can you give us anything definite? A. I guess it was around the 10th of December.

Q. Can you fix it by the notice that you said was served upon you? If I show you the notice, would that help you to fix it in your mind? A. Yes.

Q. I show you a paper directed to Carminé Savino, contractor, dated December 12, 1916, signed by David Goldberg, and ask you if that is the notice you received? A. Yes, sir.

Q. And do you know when you received it? A. I received it on the 12th of December.

Q. There appears a notation on the bottom of this notice, Mr. Savino, written in lead pencil, whose writing is that? A. (Referring.) Mine.

Q. And when did you put it there? A. Immediately when I received it.

Mr. Dawson: I offer this notice in evidence.

Mr. Hart: I object to it, if your Honor please.

The Court: Why?

Mr. Hart: Because it bears writing of the witness which is merely notations of his which he now testified were written at the time he received the notice, and which are evidently separate and apart

*Carminé Savino—Direct.*

from the notice, and only used to enliven the memory of the witness. I also tender for the use of the plaintiff the original notice which was served.

Mr. Dawson: I don't want that; I want the one that was served on us.

Mr. Hart: Which has no such notations, so that the information contained in the notice itself may be communicated to the jury in the proper form. 10

The Court: Yes, I do not think the notice with all that writing on it ought to go in evidence.

Mr. Dawson: I will tear that off.

The Court: All right.

Mr. Hart: It was offered before in the other trial; it is marked P-2. 20

Mr. Dawson: I offer this paper in evidence and ask to have it marked.

The Court: Yes, it may be marked.

(Marked Exhibit P-2.)

Q. Mr. Savino, by looking at this—or is this the notice that was served upon you, a copy of the notice that was served upon you? A. (Referring.) Yes, sir. 30

Q. Now, looking at that notice, can you give us the date that you say that you stopped work on account of the rain? A. Well, it was three or four days previous to that.

Q. It was raining when you were digging the areaway, you say? A. Not only raining, but there was other conditions there that prevented me from proceeding.

Q. Well now, we will take this up as we go along. You say you were digging the area-way, and it was raining? A. Yes, sir. 40

*Carminé Savino—Direct.*

Q. Well, what was the condition inside the cellar at that time? A. Well, they were putting the tile floor on.

Q. Who were they? A. They were tile men; different contractors.

10 Q. Not your men? A. No, sir; and they lay tile on wet concrete and the water kept oozing down on my work, and besides, there was a faucet there out of which all the workmen in the building were getting water, and every time they would turn the water on and off there would be a certain amount of it leak down to the floor. There was no catch basin to catch this water that flowed out.

20 Q. And that was the only service pipe that came into the building? A. No, there was other pipes in the rear of the building; there was pipes, the other plumbing that came through the wall, like the soil pipe.

Q. I mean water pipes? A. That was the only water pipe, yes, sir.

Q. How many men did you have working on this job while you were there? A. Sometimes three; sometimes four; and the time when I quit I had six.

30 Q. What kind of men were they? A. They were good men.

Q. I mean what was their business? Were they masons or mechanics, or what were they? A. They were only supposed to be laborers, concrete mixers.

Q. Who was the boss on the job? A. Me.

40 Q. Now, you say that there was no catch basin around under this faucet and the water kept leaking out there. To what extent? A.

*Carminé Savino—Direct.*

Quite a little; not much, but quite a little in the course of a day, I should judge maybe forty or fifty gallons.

Q. Would that interfere with your work? A. It certainly would.

Q. Why? A. Because you cannot put a finishing coat down while water is coming down on it. It would ruin it. 10

Q. Is that all you had to do on this floor? A. That was all there was, yes, sir.

Q. And the walls had all been finished? A. All had been finished; yes, sir.

Q. Ordinarily, when is the finishing coat put on? A. Always the last thing on a building.

Q. And why is that? A. Because the workmen are all the time going into the cellar, and you cannot put a finishing coat on until you are all alone and there is no one around to interfere with your work until your finishing coat settles. 20

Q. Then, after you received this notice bearing date of December 12th, what did you do?

A. I went to the job every day to see if the conditions were well for me to proceed.

Q. Well, did you have any conversation with Goldberg? A. No.

Q. At the time you got this notice? A. Yes. 30

Q. Well, what did you say? A. I told him actually that I couldn't do it; it was impossible.

Q. Tell us just what you said? A. I says, "If you will take the water out and fix the faucet there, I will come and work."

Q. Well, what did he say? A. He says, "That ain't my business."

Q. Then, what did you do after that? A. Well, then I went there every day and I went 40

*Carminé Savino—Direct.*

there of a Saturday, and they were taking the water out.

Q. Well, who were they? A. Two or three men.

10 Mr. Hart: May I interrupt counsel? That is the Saturday which followed the service of this notice?

The Witness: Yes, sir.

Mr. Hart: Expiring on Friday?

The Witness: Yes, sir.

Mr. Hart: That was after the expiration of three days?

The Witness: Yes, sir.

Q. And you say you were there every day after you were served with this notice? A. Yes, sir.

20 Q. And on Saturday they started to take the water out? A. Yes, sir.

Q. And when did you next see it? A. I went there Monday morning then to finish my work.

Q. And did they have the water out then? A. I couldn't see. The doors were left down then, and as I was going to lift up the doors, Mr. Goldberg came over and he says, "I don't want you on the premises any more. I want you to go away from here." I says, "You can't do that; the architect has got to tell me that." "No," he says, "I am the owner; I tell you what I want."

Q. Was there anything said about the quality of your work? A. No, sir.

Q. Where was Goldberg's place of business in relation to the new building? A. Right across the street.

40 Q. And how often was Goldberg in the new

*Carminé Savino—Cross.*

building? A. Why, four or five times a day, at least.

Q. And was Kennedy on the job, too? A. Yes, sir.

Q. How often was Kennedy there? A. Well, he was—either he or his son was there all the time.

Q. You spoke about having a concrete mixer. Who was that? A. A man by the name of Michael Germetta. 10

Q. And what was his business; what did he do? A. He is a concrete man.

Q. Well, just mix it? A. Oh, he makes all kinds of concrete work. He builds sidewalks.

Q. Well, what was he doing for you? A. He was mixing the concrete with his machine.

Q. Is he in court now? A. No, sir. 20

Q. And what kind of a machine did he have to mix it with? A. He had a machine that mixes about a yard and a half at a time.

Q. How do you operate it? What do you do? A. By gasoline.

Q. It is a regular mixer? A. A regular mixer, yes, sir.

Q. And where was that mixer? A. Right on the sidewalk. 30

Q. After it was mixed, what did you do with it? A. We slid it down sort of a board run to the cellar, and took it from there to various parts of the cellar.

Q. And who supervised the placing of it? A. Me.

Mr. Dawson: Cross-examine.

Cross-Examination by Mr. Hart:

Q. Mr. Savino, you have referred to a man 40

*Carminé Savino—Cross.*

by the name of Kieswetter who was a witness to one conversation, one or more conversations?

Mr. Dawson: One.

Q. I ask you whether Mr. Kieswetter you named is the gentleman who now sits alongside  
10 of examining counsel? A. Yes, sir.

Q. That is Mr. Kieswetter (indicating)? A. Yes, sir.

Q. You testified at one time you presented a written bond to your counsel and asked him to communicate with the defendant's counsel and procured a first payment of \$800. I show you what purports to be a bond signed by you alone, and ask you whether that is the bond to which  
20 you referred? A. (Referring.) Yes.

Q. You know whether it is your signature? A. Yes.

Mr. Hart: I have it marked for identification.

(Marked D-1 for Identification.)

Q. You testified that when you sought, through your lawyer, payment of this \$800.00, you said that if you gave a statement of your financial  
30 condition and that you owned real estate free from encumbrance that the bond might be accepted. Is that true? A. I didn't say I had property free of encumbrance. He said, "Give me a statement of your net worth."

Q. Then you wrote a letter, did you not, addressed to— A. I signed a letter.

Q. You didn't write it? A. No, sir.

Q. You signed it? A. Yes, sir.

40 Q. But in signing it, you were satisfied with what it contained, were you not? A. Yes, sir.

*Carmine Savino—Cross.*

Q. I show you a letter dated Oct. 28, 1916, addressed to Hart & Vanderwart and signed C. Savino, and ask you whether that is the letter to which you have referred? A. (Referring.) Yes, that is the letter.

Mr. Hart: I offer it for identification. (Marked D-2 for Identification.) 10

Mr. Dawson: I should like to have it in evidence now also, D-2 for Identification.)

Mr. Hart: All right. Mark them P-3 and P-4. (Marked P-3 and P-4.) (Reading Exhibit P-4):

“Know all men by these presents that I, Carmine Savino, of the Township of Union, County of Bergen, and State of New Jersey, am held and firmly bound unto David Goldberg, of the same place, in the sum of One Thousand Dollars, lawful money of the United States of America, to be paid to the said David Goldberg or to his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made I bind myself, my heirs, executors and administrators firmly by these presents. Sealed with my seal and dated the twentieth day of October in the year of our Lord One Thousand Nine Hundred and Sixteen. 20 30

“Whereas, the above bounden Carmine Savino is constructing the foundation, walls and cellar bottom and water proofing of the same of the new building being erected on the south side of Valley Brook Avenue, Lyndhurst, New Jersey, agreeably to the drawings and specifications made by Joseph Kennedy, Architect, for the above named 40

*Carmine Savino—Cross.*

10 David Goldberg, owner, according to the terms of a certain contract, made between the parties hereto bearing date September 16, 1916, wherein it is provided that the said Carmine Savino shall furnish bond guaranteeing the said cellar to be water proof for a period of one year from the date hereof;

20 Now, the condition of this obligation is such that if the said cellar shall be water proofed in accordance with the plans and specifications attached to said contract, and said cellar bottom and walls shall thereafter remain water proof for a year from the date hereof, then this obligation to be void, or else to be and remain in full force and virtue.

Carmine Savino. (SEAL.)

Signed, Sealed and  
Delivered in the presence of  
Addison Ely, Jr.”  
(Reading Exhibit P-3):

“October twenty-eighth, 1916.

30 A. C. Hart & Vanderwart,  
Attys. for David Goldberg,  
Hackensack, N. J.

Gentlemen:

40 I beg leave to advise you that I am the owner of one-half interest in a \$3,000 house and lot on Newark Avenue at Kingsland, N. J. free and clear of encumbrance. I also own lots opposite the Kingsland station at Kingsland, in which there is an equity of \$1,800.00. I own other property, but these two properties alone are more than

*Carmin Savino—Cross.*

sufficient to cover any liability that might arise under a bond given you today.

Very truly yours,

Carmin Savino."

Q. Mr. Savino, do you own in your own name a one-half interest in a three thousand dollar house and lot in Kingsland, New Jersey, free and clear of encumbrance? A. It is not free and clear of encumbrance. 10

Q. Are you also owner of lots opposite the station in Kingsland in which there is an equity of \$1,800? A. Yes, sir.

Q. Are those lots in your name, the title?

Mr. Dawson: Just a moment. I don't see how that has any relevancy in this case. The bond has been accepted. They have got the bond and never returned it to us, and never asked to have a different bond. 20

The Court: You may cross-examine.

Q. Are those lots—is the title to those lots opposite the Kingsland station at Kingsland in which you said there was an equity of \$1,800, in your name? A. I own them on contract. 30

Q. The title is not in your name? A. I don't know what you mean.

Q. You have a contract to purchase them; that's what it is? A. Yes, sir.

Q. You had judgments against you at the time you wrote your letter in which you said that the property was free and clear of encumbrance? A. I thought they were paid.

*Carminé Savino—Cross.*

Q. That was October 28, 1916? A. Yes.

Q. They are still against you? A. No, sir.

Q. You have had them cancelled? A. Right away.

Q. Since the trial of this case? A. No, sir; they were cancelled immediately when I was told there was judgments against me.

10 Q. You paid them then, didn't you? A. Yes, sir.

Q. Because you knew that you had given a letter to induce the defendant to take a letter—to take a bond which letter was false? A. No, I didn't know it was false.

Q. Was the letter true? A. No, sir.

Q. Then it was false? A. Then it was true.

Q. You know when a thing is true or false  
20 without counsel telling you, don't you? A. I sure do.

Q. That was false when you wrote it, wasn't it? A. Not to my knowledge; I believe it wasn't.

Q. You still insist that while the lots that you said you also owned, aren't actually owned by you, but you only have a contract to purchase them? A. Yes; and I am paying on them all the time.

30 Q. And you won't own them until you pay for them, will you? A. I own them until I default in my payments.

Q. The issues in this case were tried before this Court, weren't they? A. Yes.

Q. Last February? A. Yes.

Q. And you testified then, didn't you? A. Yes, sir.

Q. And you testified that when you wrote that letter these judgments were against you and  
40 there were also taxes against them? A. No.

*Carminé Savino—Cross.*

Q. Will you say that you didn't, Mr. Savino?

A. What?

Q. Will you say you didn't; now come? A. What?

Q. Say you didn't testify that way at the last trial? A. I testified at the last trial that when I signed that letter for Mr. Ely, I believed to my knowledge, I believed there was no judgments against me. 10

Mr. Hart: I ask that it be stricken out as not responsive.

The Court: Read the question, please. (Question read. )

Mr. Hart: The answer to that is Yes or No. Did he or did he not testify?

The Court: Do you remember what you testified to? 20

The Witness: In a general way, I do, your Honor.

The Court: Unless you read it to him.

Mr. Hart: Unless I read his evidence?

The Court: You may ask him whether he testified to a certain thing or not.

Mr. Hart: I have asked that, if your Honor please. 30

Q. Can you remember anything—you are smiling—I thought perhaps you could remember something? A. What do you want to know?

Q. What you testified about your statement at the last trial of this case. Did you say at that time that you knew when you signed that letter that there were taxes upon the property and that there were judgments against you?

A. No, sir.

Q. Well, anyway, you paid the judgments and 40

*Carminé Savino—Cross.*

taxes, didn't you? A. As soon as I found out there was judgments against me, I paid them, yes.

10 Q. I read you questions, what purport to be questions propounded to you and replies made by you at the previous trial of this case on February 13, 1918 (Reading):

“When you wrote this letter of October 28th, it was for the purpose of inducing the defendant here to accept this bond, was it not? A. No, sir. Q. Why did you write it? A. I wrote it because my attorney said this is the easiest way out of it. Q. Way out of what? A. Out of this squabble. Q. What squabble? A. We couldn't get our money. Q. Answer my question. A. I call it a squabble; the difficulty of getting our money. Q. You had difficulty in getting money? A. From Goldberg; yes, sir. Q. And it was because you didn't give him a bond to waterproof the cellar, wasn't it? A. Yes. Q. And the easiest way to get out of the difficulty was to give a bond signed by yourself alone with a letter which was false, is that it? Answer the question yes or no. A. That is what my attorney said.”

20  
30

Now, is that a correct transcription of the testimony you gave at that time? A. I don't remember; I can't remember every particular thing I said.

Q. Is it true or false? A. What do you want to know?

40 Q. If those questions were propounded to you today would your answer be the same? A. Ask me any question that you want to.

*Carmine Savino—Cross.*

Mr. Hart: I ask that that be stricken out as not responsive.

The Court: The answer may be stricken out.

(Question read.) A. I think they would, yes.

Q. Then, the easiest way to get your money was to write this letter, whether it be true or false, is that true? A. Well, if I thought it was false, I wouldn't write it. 10

Q. Then your statement today is different from what it was the time you testified before, isn't it? A. No.

Q. Now, look here, Mr. Savino. You said the reason you did not go ahead—several of the reasons you didn't go ahead with the water-proofing or the finishing of that cellar was that on December 12th there was water in the cellar? A. Yes, sir. 20

Q. And there was rubbish in the cellar? A. Yes.

Q. Are those the only two reasons that you didn't go ahead with the cellar? A. Those are the only two reasons.

Q. Then, Mr. Savino, didn't your contract with Mr. Goldberg provide for the removal of that water and the removal of the rubbish? A. No. 30

Q. I show you a paper dated November 18, 1916, signed C. Savino, and ask you whether that is your signature? A. (Referring.) Yes, that's my signature.

Q. Will you read that paper out loud, if you please? A. Yes.

Mr. Dawson: I object to that. I want to see what it is. 40

*Carminé Savino—Re-direct.*

Mr. Hart: I will read it out loud.

Mr. Dawson: I am not going to have it read at this time; I don't know whether it is relevant or not.

Mr. Hart: As a matter of courtesy I will let you read it.

10 Mr. Dawson: I think you will as a matter of right.

Mr. Hart: I mark it for identification.

(Recess at 2:00 P. M. until 10:00 A. M. April 29th, 1918.)

Trial Continued, April 29, 1918.

20 Cross-Examination by Mr. Hart (continued):

Q. Mr. Savino, your trade was a tailor, was it not? A. No, sir.

Q. Did you never make any suits of clothes or coats? A. No, sir.

Q. You never did any tailor work at all? A. No, sir.

Q. What is your trade? A. My trade is builder.

30 Q. It surely isn't masonry, is it? A. Well, I won't say that.

Mr. Hart: No; you don't say it is masonry. That is all.

Re-direct Examination by Mr. Weinberger:

Q. Have you done mason work? A. Yes, sir.

Q. How many years? A. About eight years.

Q. And have you been a general contractor during the whole of that time? A. Yes, sir.

*George A. K. Sutton—Direct.*

GEORGE A. K. SUTTON, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Weinberger:

Q. Mr. Sutton, what is your business? A. I am a lawyer.

Q. And have been how many years? A. Thir- 10  
teen years.

Q. Do you know the plaintiff in this case, Mr. Savino? A. Yes.

Q. Do you know the defendant, Mr. Goldberg? A. Yes.

Q. Were you present at any time when there was a conversation had between these parties concerning the building in question? A. Yes, I was once.

Q. Where was that conversation had and what was the subject-matter discussed at that time? A. It was while the building was being built. There were complaints which had been made. I was recorder of Lyndhurst at that time. Complaints had been made that owing to the excavation around the building, dirt was thrown on the sidewalk, and I went there with one of the police officers to look the thing over. While I was there Mr. Savino and Mr. Goldberg and Mr. Kennedy were there. 20 30

Q. What did Goldberg say at that time? A. Goldberg didn't say anything. The conversations that were had were between Mr. Savino and Mr. Kennedy.

Q. Will you just state what those conversations were, or the conversation?

Mr. Hart: I object to that, unless it appears that these conversations were in the presence of Mr. Goldberg. 40

*George A. K. Sutton—Direct.*

Q. Was Mr. Goldberg present? A. Why, Mr. Kennedy was there at the time. I can't absolutely state whether Mr. Goldberg was there or whether he wasn't when this particular conversation took place between Mr. Kennedy and Mr. Savino.

10 Q. And Mr. Kennedy is the architect, is he?

Mr. Hart: I object, the witness is a lawyer and the question of counsel was whether Mr. Goldberg was present, the witness interjected the fact that Mr. Kennedy was present in answer to a question that should not have been responded to.

The Court: Do you think it competent if Mr. Goldberg was not there?

20 Mr. Weinberger: I think it is admissible on two theories; the first is that Mr. Kennedy is the man who actually had charge of the building, and, as a matter of fact, was the architect, and his contract so showed, and I believe any act or statement made by him in the performance of his duty would be admissible.

30 The Court: You are not asking what Kennedy said; you are asking what somebody else said.

Mr. Weinberger: Will you read the question? (Question read.)

Mr. Weinberger: I will reframe the question.

The Court: Yes.

Q. Will you state whether or not—was this conversation relating and concerning the building in question, Mr. Sutton? A. Yes; it was.

0 Q. And what did Mr. Kennedy say on that occasion concerning that building?

*Otto Kieswetter—Direct.*

Mr. Hart: I object to that for the same reason, sir.

Q. Will you state what that conversation was?

Mr. Hart: I object for the same reason.

The Court: I will allow it.

10

A. Well, could I—Mr. Savino said that he would fill in the excavation of the dirt excavated around the foundations as soon as he had the waterproofing done on the outside and Mr. Kennedy said, "Fill it in at once; I want you to waterproof the sides of the cellar on the inside."

Q. What did Mr. Savino say about waterproofing it on the inside? A. He said nothing.

20

Q. Did he proceed to fill it in, do you know?

A. I presume he did, for it was filled in the next day.

Mr. Weinberger: That is all.

Mr. Hart: No questions.

OTTO KIESWETTER, called as a witness on behalf of the plaintiff, being duly sworn, testified 30 as follows:

Direct Examination by Mr. Weinberger:

Q. Mr. Kieswetter, what is your business?

A. Mason material, supplies.

Q. How long have you been in that business?

A. For the last ten years.

Q. Where do you live at? A. At Lyndhurst.

Q. And how long have you lived at Lyndhurst?

A. For the same period.

40

*Otto Kieswetter—Direct.*

Q. Do you know the plaintiff in this case, Mr. Savino? A. I do.

Q. Do you know the defendant, Mr. Goldberg? A. I do.

Q. Were you present at any time at the premises in question, the building in question? A. Well, not at the building in question, but at the  
10 place of business of Mr. Goldberg.

Q. And what were you doing there? When were you there first? A. I was asked by Mr. Savino to accompany him when he was to receive his first payment.

Q. Did you go down there? A. I did.

Q. Will you just tell the Court and Jury what happened there at that time? A. We went in the store, and Mr. Goldberg was there, and Mrs.  
20 Goldberg, and Mr. Savino says, "Well, Mr. Goldberg, I would like to have my payment;" Mr. Savino says, "I would like to have my payment," and Mr. Goldberg says, "Well, if you give me the bond, you will get your money." So Savino says, "I did give you—here is the bond." He pulled it out of his pocket, and Mr. Goldberg says, "Do you call that a bond?" He says, "Yes, I do." "Why," he says, "that  
30 ain't no bond to me; I want a surety bond," patting the bar with his hand. They talked some more, and then I says to Mr. Goldberg, "Now," I says, "Why insist upon not paying Mr. Savino when he has complied with the contract as I can see it? The contract reads, 'he shall furnish a bond,' and he has done that, Mr. Goldberg, and I think he is entitled to his money." He says, "I will tell you what I will do. If you will endorse that bond I will give  
40 him his money." "Well," I says, "I can't do

*Otto Kieswetter—Direct.*

that; I can't do that." "Well, then," he says, "for money he gets honey." "Well," I said, "I am not interested in it any more if that's the case." So, we talked some more and he said something about a cat scratching a bond, or something like that, and Savino and I left the premises.

Q. Do you know whether subsequently Mr. Goldberg paid the first payment? A. Mr. Savino told me later that he received something. 10

Q. Did you see Goldberg again on any occasion? A. No, I didn't; I seen him, but I didn't talk about the——

Q. Were you down at the premises to see whether the work had been completed? A. I was down there to find a man by the name of Arthur Clay who was working there, and I was down in the cellar of the building, yes, sir. 20

Q. What was still to be done on those premises concerning that job that was unfinished? A. Only that I could see was the top dressing of the finishing coat of the concrete floor.

Q. And have you had experience in work of that character, other than to see it done and to supply the different jobs? A. Yes, sir.

Q. What, in your opinion, would the cost be? 30

Mr. Hart: I object, if your Honor please, unless the witness qualifies.

The Court: Yes.

Q. Do you know what the prices are of materials, construction work of that character, concrete? A. Yes, sir.

Q. What is the price per square foot?

Mr. Hart: I object. 40

*Otto Kieswetter—Direct.*

Q. The top coating?

Mr. Hart: Unless the witness is qualified.

Mr. Weinberger: I withdraw that for the moment.

10 Q. Are you familiar with the specifications in question? A. Yes; I have read them.

Q. Have you supplied materials of this character and sold materials such as used in top dressings in concrete flooring? A. Yes, sir.

Q. How long have you been in that business? A. Ten years.

Q. Are you familiar with the market prices of materials? A. Yes, sir.

20 Q. At the present time, and were you during the last year? A. Yes, sir.

Q. Do you know what the size of the cellar in question was? A. Well, I don't know the exact measurements, about 40 x 50; something like that.

Q. And what was the price per square foot of top dressing of cement and sand such as is prescribed in the contract and specifications? A. I might say—

30 The Court: I do not think so far he has qualified as an expert.

Q. Have you personally built or had built for your own purposes, or for any other purposes— A. Yes, sir.

Q. For other people, cellars of this kind? A. I am a manufacturer of cement blocks, and I handle a lot of cement every day.

40 Q. And how long have you been manufacturing cement blocks and handling cement daily? A. Eight years.

*Otto Kieswetter—Cross.*

Q. I show you specification and direct your attention to that part of the specification referring to the cellar bottom, annexed to Exhibit Marked P-1, and ask you to read that? A. Out loud?

Q. No; to yourself. A. Yes, sir.

Q. Have you done work such as is specified in that particular specification? A. Yes, sir. 10

Q. How long have you done work of that character or supplied materials for work of that character? A. Ever since I have been in the business.

Q. Will you not state what, in your opinion, a square foot of top dressing such as is called for in that specification is worth?

Mr. Hart: I object, if your Honor please. He has not qualified. 20

The Court: You may cross-examine as to his qualifications.

## Cross-Examination by Mr. Hart:

Q. How many cellars such as this have you built? A. Well, I personally directed—why, I guess in the course of eight years, about five or six I personally directed.

Q. In the course of eight years? A. Yes, sir.

Q. Using the specifications precisely as they appear in this— A. Oh, no, not exactly of that character. 30

Q. And you furthermore know that this cellar was not built according to these specifications, don't you? A. I do not know that.

Q. Don't you know that the Integral system of waterproofing was used in the cellar? A. I know that from what—

Q. How many cellars have you built yourself, using the Integral system of waterproofing? 40

A. I have not used any waterproofing at all.

*Otto Kieswetter—Cross.*

Q. Then, as a matter of fact, you haven't built any cellars according to those specifications? A. Not according to them specifications.

Q. How much is Integral waterproofing material used? A. I never heard of it.

Q. You don't know anything about it, do you?

10 A. No, sir.

Q. You don't know how it is mixed? A. I do not know how that is mixed.

The Court: I understand the question was asked about the floor bottom?

Mr. Hart: The Integral is mixed with the cement for the floor bottom.

The Court: Does it call for that mixture on the floor bottom?

20 Mr. Hart: That was what Mr. Savino testified about.

The Court: Does the contract call for that?

30 Mr. Hart: The specifications and the contract call for waterproof cellar; at the foot of the specifications there was a sketch, as an incident, a method of waterproofing, but this was just for the aid of the contractor rather than binding; after this was proposed, your Honor may recall that Savino testified—this will be denied in part—he went to Kennedy, the architect, and Kennedy said to him, “I would like you to use the Integral material in the cellar bottom,” and he said, “We did that instead of these specifications.” We are going to deny that by saying that Savino was the man who suggested the Integral.

40

*Otto Kieswetter—Cross.*

Mr. Weinberger: I won't press the question any further.

Direct Examination by Mr. Weinberger, continued:

Q. Was there any dispute of any kind made, or contention that the work wasn't completed properly at the time you were there, at the time of the first payment? A. No, sir. 10

Mr. Hart: I object to that as immaterial.

The Court: I will allow that.

Mr. Weinberger: That is all.

Cross-Examination by Mr. Hart:

Q. Who were you employed by at the time of the erection of this building? A. Whom was I— 20

Q. By what concern? A. Employed by?

Q. Your own concern, Mr. Kieswetter? A. Yes, sir.

Q. And you supplied materials, did you not, for this building? A. I did; yes.

Q. To Savino? A. Yes.

Q. Savino has never paid you for those materials, has he? A. Yes; he has. 30

Q. You were present at the trial of the last suit, were you not? A. Yes, sir.

Q. I read your testimony, questions that were propounded then, the date of your examination being February 13, 1918, and answers that were given by you, and ask you whether they are correct:

Reading: "Q. You gave credit to Savino and sold him some stuff? A. Yes, sir. Q. He owed you money? A. Yes, sir. Q. And 40

*Otto Kieswetter—Cross.*

he still owes you money? A. Yes, sir. Q. And the only way you and your concern can get the money is for him to get a judgment in this case?"

Now, isn't that so? A. No, sir.

10 Q. Do you testify that you did not answer those questions? A. I testified that—I said he owed me money, but you asked me did he owe it on this building, and I said he doesn't.

Q. He owed you money at the time of that trial, didn't he? A. Yes, he does on other work; not on that building.

Q. He owed you money? A. On other jobs, yes.

20 Q. And that was February of this year? A. Yes, sir.

Q. And he has paid you since? A. Well, he—you might call it a payment; he paid it in the form of a note.

Q. He signed the note and, thank heavens, that bill is paid? A. Well—

Q. You know the only way you can get your money from Savino is if Savino gets a judgment in this case again Goldberg? Isn't that true?

30 A. No, sir.

Q. That is one of the ways? A. No, sir.

Q. You have come forward as a witness in this case, haven't you, Mr. Kieswetter? A. I want to see justice done.

Q. Why don't you sit in every other case that is in this Court? A. I don't have to.

40 Q. You are not interested in other people getting justice, but you are interested in Savino getting justice? Isn't that your interest in having Savino get a judgment, so that you can get the money he owes you? A. No, sir.

*Aniello Di Massi—Direct.*

Q. Why did you ask him for a note? A. I received it prior to the last trial.

Q. Then the bill has been no more paid since you testified in that last trial that Savino owed you money, has it? A. As explained, he owes me money on another building.

Mr. Hart: No, I think we have enough 10  
from you, Mr. Kieswetter.

Mr. Weinberger: That is all, Mr. Kieswetter.

ANIELLO DI MASSI, called as a witness on behalf of the plaintiff, being duly sworn, testified through the Interpreter, as follows:

Direct Examination by Mr. Weinberger: 20

Q. Mr. Di Massi, what is your business? A. Laborer; do mason, any kind of work.

Q. Where do you live? A. Kingsland.

Q. Do you know Mr. Savino? A. Yes, sir.

Q. Do you know Mr. Goldberg? A. I know him; he is inside of the saloon.

Q. Did you do work on a building owned by Goldberg? A. Yes, sir. 30

Q. What kind of work did you do there? A. Mixing stuff there for Mr. Savino.

Q. What kind of stuff did you mix? A. Stuff that comes in bags.

Q. For what? A. We would mix it up and other men would throw it into a machine.

Q. Did you do any work there yourself? A. Yes, sir.

Q. What kind of work did you do there? A. Work at everything around there. 40

*Aniello Di Massi—Direct.*

Q. Now, what kind of stuff did you mix and where was the stuff used that you mixed? A. I say they used it at a different part of the place there, and also mix it there.

10 Q. Well, where did they use the stuff that you mixed? A. Why, Carmine Savino gave me a box and gave me the stuff and he would tell me how to mix it; he would say, "You have to put so much of this and so much of that."

Q. Then, with this stuff that you mixed, what did they do with that? A. I would mix it and the others would throw it into the machine; put it into the machine.

Q. Then, when you got through with the machine, where was the stuff taken and used? A. In the cellar.

20 Q. Do you know Mr. Kennedy? A. No.

Q. Do you know who the architect was on that job? A. Yes, sir.

Q. Do you see him here in Court? A. It isn't him; it is his son that I saw there. The young man would pass there more than once and he said that the stuff was being mixed well.

Q. And would he watch the job as it was being done? A. Yes, sir; he would go and come.  
30 He wouldn't always be present, but he would go and come.

Q. Now, was all the work finished there in the cellar? A. I didn't go there the last day.

Q. How many men were working on that job at the time while you were there?

Mr. Hart: I object to that, if your Honor please, because there are other departments of work, such as plumbing and carpentry.  
40

Mr. Weinberger: I will qualify that question.

*Frank Bierman—Direct.*

Q. How many men were working there for Savino while you were there? A. Seven or eight, and maybe more.

Q. Was that always at one time? A. All at one time; who would take stone, who would take the sand, and so forth.

Mr. Weinberger: That is all. 10

Cross-Examination by Mr. Hart:

Q. You say the architect's son told you you were mixing the stuff well? He didn't tell you it was good stuff you were mixing, did he?  
A. I was mixing it, and he said that I was going all right.

Q. He was joking you, wasn't he? A. I don't know whether he was joking or not; I know that I was going ahead working, and minding my own affairs. 20

Mr. Hart: That is all.

FRANK BIERMAN, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Weinberger: 30

Q. Mr. Bierman, where do you live? A. I live in North Arlington.

Q. And what is your business? A. Mason contractor.

Q. How long have you been a mason contractor? A. Ten years.

Q. Do you work on jobs yourself? A. Yes; I have been building big houses; I built a big apartment, too, for myself. 40

Q. Where? A. In Arlington.

*Frank Bierman—Direct.*

Q. Are you doing all the mason work there?  
A. Yes.

Q. How many family apartment is that? A.  
Sixteen.

Q. Did you work on this building in question?  
A. Yes.

10 Q. What work did you do there? A. I was the  
mason contractor on the building.

Q. Do you know Mr. Savino? A. Yes, sir.

Q. Did you work on that job from time to  
time yourself? A. Yes, sir.

Q. Were you present on the day that Mr.  
Goldberg chased Mr. Savino from that job,  
and wouldn't let him work? A. Yes.

Q. Do you remember what day that was? A.  
I couldn't remember.

20 Q. Do you remember what Goldberg said to  
him? A. Well, Goldberg said to him if he  
wouldn't finish the job, why he will let him go  
out of there, and they make me go there and put  
a sidewalk, because he said the water run in the  
cellar. Then I put a sidewalk; then they have  
then to rip it up.

30 Q. Who told you to do that? A. Goldberg  
sent me notice to put up a sidewalk before he is  
entitled to put up a sidewalk because the water  
is running onto the concrete. Mr. Savino put  
some concrete in there and then the water is  
running in there. Mr. Kennedy come up to me  
and he said, "If you put the walk down—

Mr. Hart: May I interrupt? This wit-  
ness has not replied to the last question.  
Evidently this man has some grievance  
against Mr. Goldberg.

40 Mr. Weinberger: I think it is a respon-  
sive answer, and telling us all that Mr.

*Frank Bierman—Direct.*

Goldberg did on that day. I think it is more than I asked for, but I think it should stand.

The Court: Go ahead.

Q. Mr. Bierman— A. Yes, sir.

Q. You say that there was always water in that cellar? A. Yes, sir. 10

Q. Could Mr. Savino proceed to complete the job while the water was in the cellar? A. No, sir.

Q. Now, as a result of that, Mr. Kennedy, the architect, asked you to build what?

Mr. Hart: I object to that as leading, sir.

Q. What did Mr. Kennedy ask you to build so as to prevent this water accumulating in the cellar? 20

Mr. Hart: I object to that as leading.

The Court: You may ask him what he did.

Q. What did Mr. Kennedy ask you to do there? A. He asked me to put a sidewalk over—

Q. When he asked you to do that work, was that work at that time— A. No, sir. 30

Q. (Continuing.) to be done by you? A. No, sir.

Q. How much water was there in that cellar always? A. Always about three or four inches.

Q. What effect, if any, did that have on Mr. Savino's work? A. Well, I told you because the water was in the cellar he couldn't go ahead with the job, because there was a faucet through the wall and everybody was going there and water was running in the cellar. 40

*Frank Bierman—Direct.*

Q. Were you ever present at any time when Mr. Savino asked Mr. Goldberg to have that water taken out of there? A. Yes, a good many times.

Q. What did Goldberg say? A. He says he got nothing to do with it.

10 Q. When Mr. Goldberg chased Savino and his men off the job, were you present there at the time?

Mr. Hart: I object to that as not properly predicated. It was Savino and his man, one man, not men. You don't know that, do you?

Q. Was it one man, or men? A. Oh, there was about three men on the job.

20

Mr. Weinberger: I think the objection is not properly predicated now?

The Court: Proceed.

Q. Now, Bierman, at that time how much of the job had been completed by Savino when Goldberg chased him off the job? A. Well, he had the concrete in, except the finishing coat in.

30

Q. The finishing coat of what? A. Of the concrete.

Q. And how big a concrete floor was that? A. There was 50 x 52, I guess, the building.

Q. And it was only necessary to put on that? A. Finishing coat.

Q. What would that be worth a square foot?

Mr. Hart: I object to that; the witness is not properly qualified.

40

The Court: You may go into particulars. He says he has been in mason work for eight years.

*Frank Bierman—Cross.*

Q. Are you familiar with the specifications for this building? A. Yes, sir.

Q. Do you know what the top of this concrete floor was to be made of? A. Yes, sir.

Cross-Examination by Mr. Hart:

Q. What is Integral waterproofing material? 10

A. They call it "Hydran" they use mostly sometime.

Q. They use that mostly sometime, but we are talking about Integral. What is Integral? A. "Hydran" waterproofing, that is what they use to waterproof a cellar.

Q. Do they call that Integral? A. "Hydran" waterproofing.

Q. I am not asking you about that. Have you ever heard the word Integral? A. Well, I heard 20 a good many names of waterproofing, yes.

Q. You know there are a good many waterproofing materials too, don't you? A. Yes.

Q. I am asking you about Integral. Have you ever heard about Integral waterproofing material? A. Yes.

Q. You have? A. Yes.

Q. Who makes it? A. The laborers mix it.

Q. Who manufactures it? 30

Q. Who manufactures it? A. I don't know who manufactures it.

Q. Where do you get it? A. Mason supplies.

Q. Does every mason supplies sell it? A. That place I buy, he has got it.

Q. How much is it a gallon? A. \$3.50.

Q. Now, don't you know it comes by the pound and not by the gallon? A. Yes; this comes in a white bag; cement bags.

Q. Why did you tell me how much it was a 40

*Frank Bierman—Cross.*

gallon when it comes by the pound? A. Because the gallon comes by the pound; don't you tell me I don't know my business.

Q. How much Integral have you used? A. If I need it, I build a house now, I use it if I need it.

10 Q. You have used Integral waterproofing material? A. Yes.

Q. Where did you buy it? A. Builders Material Supply Company.

Q. Where is their place of business? A. Well, in Center Street, Newark.

Q. When did you buy that? A. About a couple of years ago.

Q. And how much did you pay for it? A. Well, I couldn't remember how much I paid  
20 for it.

Q. What house did you use that in? A. For plastering outside the building, mixing cement.

Q. You used that waterproofing outside of the building? A. Yes.

Q. What street? A. Belmont Avenue.

Q. What is the name of the owner? A. Gordon.

Q. And were the specifications recorded in  
30 the Clerk's office here? A. I don't know; this is in Newark.

Q. Now, how much Integral did you mix with a given quantity of plaster for the outside of this building? A. Cement and a quarter of a bag of that Hydran, that stuff what you call it there, mix this stuff with the cement together.

Q. Don't you know, Bierman, as a matter of fact, you didn't use Integral at all? You used an entirely different kind of waterproofing material?  
40 A. How do you know I didn't use it?

*Frank Bierman—Direct.*

Q. But I am asking you? A. I used what I have put in with the specifications.

Q. What was it? A. I don't know the name; I couldn't remember. Because you are a lawyer you have got a paper, and you see what it calls for. I bet you if you didn't have a paper, you wouldn't know what it calls for. I couldn't have in my mind always to say what it is. Every lawyer has got his paper and sees it and looks at it. 10

Mr. Hart: I do not know what it all means, but I suppose I ought to object on general principles. I object to the witness testifying about the Integral.

The Court: You have asked him and he has tried to tell you about what he has done. 20

Mr. Hart: I object; the witness is not qualified.

The Court: I will allow him to testify.

Direct Examination by Mr. Weinberger (continued):

Q. What would that be worth a square foot to build that floor? A. With concrete and all?

Q. Just a square foot, the part that wasn't done? A. About 30 cents a foot finishing. 30

Q. I am speaking of the top dressing only? A. Yes, that's the top coat; one inch or one and a half inch thick.

Q. How big is that cellar? A. 50 x 52; I couldn't remember exactly.

Q. You mean a cubic foot? 30 cents a cubic foot?

Mr. Hart: Now, if your Honor please, 40 he testified to 30 cents a square foot.

*Frank Bierman—Direct.*

Q. Mr. Bierman, did you mean a square foot or a cubic foot, 30 cents? A. square foot.

Q. You say that there was generally water in that cellar. For how long a period did that continue to remain in the cellar? A. Well, always had water in the cellar, because people went out to the water drain, drinking water,  
10 and they always had water; there was water running into the building.

Q. Did you say anything to Goldberg about that yourself? A. I ain't got nothing to do with the cellar; I work on the masonry.

Q. Was it possible for him to finish that job in the condition that you found that cellar? A. No, sir.

Q. As to the other parts of the work necessary  
20 to be done by Savino other than the top coat of this cellar flooring, was the rest of the work completed by him? A. This was the finishing; this would make him finished.

Q. What kind of a job was that, in your opinion, that he had completed? A. Well, he was finished, would be all right; but he didn't let him finish.

Q. What was the work he had done, what kind  
30 of a job? A. He had the foundation for the floor——

The Court: He is asking you whether the work was good or bad?

The Witness: He was doing the work under the architect's supervision. He had his boy there all the time, and showing him how he wanted the mixture. He was there all day long from morning until

*Frank Bierman—Direct.*

night, because he is engineer just as well as Mr. Kennedy.

Q. He was there every day? A. Every morning, from night to the job; he was mixing on the other side of the building, and then put it in the machine.

10

Mr. Weinberger: Take the witness.

Cross-Examination by Mr. Hart:

Q. Mr. Bierman, you don't like Mr. Goldberg, do you? A. Well, I got nothing to do with him; why shouldn't I like him?

Q. When you worked upon this building, he finally owed you money, didn't he? A. No.

Q. He never owed you money A. Oh, he 20  
owed me money.

Q. Some people worked for you, you didn't pay, so they served a stop notice on him to make him keep the money that he owed you? A. No, because he didn't pay not one contractor on the job, not even the architect.

Mr. Hart: (Addressing a person other than the witness.) Stand up, please.

Q. He (indicating) worked for you, didn't he? 30  
A. Yes.

Q. You didn't pay him and he served a stop notice on Mr. Goldberg not to pay you until he was paid, yes or no? A. He didn't have to get stop—

Mr. Hart: I ask that that be stricken out.

A. (continuing) No, he— 40

Q. Will you swear that he did not serve a

*Frank Bierman—Re-direct.*

stop notice on Mr. Goldberg? A. I don't know if he did or not; he didn't serve me; he served him.

Q. And eventually you hired a lawyer to see Mr. Goldberg? A. If somebody don't pay, what you going to do?

10 Mr. Hart: I ask that that be stricken out.

Q. And you sued Mr. Goldberg for your money, didn't you yourself, and then Mr. Goldberg paid the money as soon as you paid the men you owed? A. No; he didn't pay himself.

Q. He paid through his lawyer and your lawyer, Mr. Ely? A. Yes.

20 Q. As soon as you paid the men that worked for you on that job, he then gave the money that was owing to you, but he wouldn't—

Mr. Weinberger: With a minute; let him answer your question.

Q. (Continuing.) But he wouldn't pay you until you had paid the men that were working for you that you had tried not to pay, isn't that true? A. No.

30 Mr. Hart: That is all.

Re-direct Examination by Mr. Weinberger:

Q. He didn't even pay the architect, did he? A. No.

Mr. Hart: I object to that, if your Honor please.

40 The Court: We will not try to show that.

*Joseph Curcio—Direct.*

Q. Mr. Goldberg paid you what you claimed he owed you after you sued him, didn't he? A. Sure he did.

Mr. Hart: But deducting the monies

The Witness: You know a settlement must always come last. 10

Mr. Hart: Did you get all the money that was owing to you from Goldberg?

The Witness: No.

Mr. Weinberger: How much did he deduct from you?

The Witness: Well, I guess Ely took the rest.

20

JOSEPH CURCIO, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Weinberger:

Q. Joe, where do you work, what is your business? A. Laborer.

Q. And what kind of work do you do or work at? A. Well, I do everything. 30

Q. Everything? A. Sure.

Q. Do you know Mr. Savino? A. Yes.

Q. Do you know Mr. Goldberg? A. Yes.

Q. Did you work for Mr. Savino or do work at that building? A. Yes.

Q. What kind of work did you do there, general labor too? A. Laborer.

Q. Were you there on the day when Mr. Goldberg chased Savino off the job? A. No. 40

Q. What? A. No, he tell him.

Q. What is that? A. It was on a Saturday

*Joseph Curcio—Direct.*

I see him; he tell me come up Monday morning. We got to finish the job. I went down Monday morning where the job is. He tell me, "Joe, there is nothing to do," and I want to go home again.

Q. Who told you that? A. Mr. Savino.

10 Q. Were you ordered to be on the job to do work in the morning, Monday? A. Oh, yes; he tell me to be on the job.

Q. Did you go on the job? A. I come for work; yes; in one hundred feet of the job.

Q. Who did you see on the job? A. I see nobody.

Q. Did you see Savino there? A. I see Savino when I came back, but me go home again.

20 Q. Where was Savino coming from? A. He came from the job.

Q. That was on Monday morning, about what time? A. Oh, well, I can't say the time; before eight o'clock, I know.

Q. And then you went home? A. Yes.

Q. Savino says, "No work." Who else was there with Savino? A. I was all alone myself.

Q. Who else did Savino have? A. I cannot remember, it was about two years ago.

30 Q. How much work did Savino have to do yet?

Mr. Hart: I object to this. Mr. Curcio is a laborer.

The Court: Well, he might know what condition the building was in.

Q. How much of the work was finished? A. Well, he had some of the concrete in.

Q. He had the concrete all in? A. Yes.

40

Mr. Weinberger: That is all.

*Joseph Curcio—Cross.*

Cross-Examination by Mr. Hart:

Q. On this Saturday, Mr. Curcio, Savino hired you to come there Monday? A. Yes.

Q. What did he tell you? A. He said if I ain't got anything to do for Monday, "I pay you for a full day."

Q. You should come to work Monday; if there 10  
be no work, "I pay you for the day," is that what he said? A. Yes.

Mr. Hart: That is all.

Mr. Weinberger: That is all, Mr. Curcio.  
We rest.

Mr. Hart: I respectfully ask for a non-suit, sir.

The Court: On what ground? 20

Mr. Hart: As to the lien claim filed in the action, because the proofs do not correspond to the bill of particulars in the lien claim generally.

The contract provides that an architect's certificate must be presented. There is none produced, and there is no evidence of a waiver of the production.

Again, that there is no proof of ouster from 30  
the job.

Furthermore, there is no proof of the probable profit that might have resulted to the plaintiff, had he been permitted to proceed with his work.

As to the extra work, there was no written order or any evidence at all of the waiving of a written order for the extra work.

Again, that while the contract provides that this work shall be finished on October 10, there 40  
is no evidence of a prolongation of that period.

*Motion for Non-Suit.*

The Court: Well, what do you have to say?

Mr. Weinberger: Why, if your Honor please, I think my friend is not familiar with the law concerning mechanic's lien suits. Point Number one, if your Honor please, I believe that a recent case decided by the Court of Errors and Appeals, in the language of Mr. Justice Parker is dispositive of the question as between the proof and the mechanic's lien suit. I think in that case it was held that the bill of particulars need not be complied with in every respect, and that you could recover for the actual amount of work done. Now, as to the production of the architect's certificate, ordinarily it would have to be a condition precedent, and it would have to be produced in Court. That fact stands uncontradicted in the case at this time. There would be a question involved as to whether they hadn't and if it had been then we wouldn't have to produce an architect's certificate because the act of the owner was an act which precluded us from completing the work. So the ordinary rule of law would not apply with relation to the production of a certificate.

In reply to point Number three, concerning the profits which he would have made, surely, sir, that is not the basis of a motion for non-suit. I take it that the rule would be that this plaintiff would be entitled to recover for the work actually completed, which amounted to \$800.00, less the amount of this top trimming cost, amounting to \$80.56, leaving a balance of approximately \$818.00, plus the item of \$153.00, the amount due for the excavation, and this work which he had to do to put in the waterproofing from the exterior, plus the \$4.00 for

*Motion for Non-Suit.*

window frames set in by him. I submit that the rule of law is plain on the proposition of extras. The fact that one orders the work to be done is sufficient an acceptance of that work.

The Court: There must be not only an order, but there must be an agreement as to price. A written contract may be changed by a verbal one. 10

Mr. Hart: But it must be complete in the details of the change. Perhaps counsel doesn't recall that the bill of particulars attached to the lien claim in this transaction alleges that a final payment was due of \$800. The pleadings today include profits.

Mr. Weinberger: Of course, if your Honor please, concerning the pleadings, I submit that the amendment which I believe is before your Honor, and which the Court will take notice of, provides that after the execution of said contract under his bond, and up to the 14th of December, furnish all the labor and material, and is ready and willing to perform said contract, and on or about the 14th day of December, 1916, he was unlawfully ejected from the said building wherein the same was being erected, and did prevent the plaintiff from entering the said premises, and threatened them with arrest for entry thereon and does still refuse to permit him to carry on the work. 20 30

Mr. Hart: Might I suggest that the complaint states, so far as these extra items are concerned, this paragraph, concerning the first item: "The alleged price and reasonable value," and the second, that the agreed price was \$4.00, and there is no evidence at all that there was any such agreement. 40

*Motion for Non-Suit.*

Mr. Weinberger: The point I make, if your Honor please, is that Mr. Dawson has proved nearly all of the points urged by counsel, and I believe, if your Honor please, that they are all covered in his brief; and, concerning the proposition as to the waiver, concerning the point, referring your Honor to the cases in point, I think  
10 Mr. Hart urges that the contract was not completed in time. I do not think that was material. That has been held so——

The Court: You need not argue that point.

Mr. Weinberger: Now, there is only one point, I think, that perhaps requires answer, and that is as to the extra work, a waiver required in writing. I would ask your Honor to——

The Court: I could not grant a non-suit on  
20 that proposition. I might direct a verdict, and direct the jury that they should consider it.

Mr. Weinberger: The point I mean is this: Whether that item should be presented to the jury. I submit, your Honor, on the case as it stands now, the plaintiff should not be non-suited, because, I submit, as a matter of law, the production of the certificate is not necessary, because the defendant's act prevented him from  
30 procuring the certificate, so that he would be entitled under the case of *Bozart v. Dublin* to recover for the work which he did do. I submit, if your Honor please, for that reason the case of the defendant should be put on.

The Court: I shall refuse a non-suit, and allow Mr. Hart an exception.

*Joseph Kennedy—Direct.*

JOSEPH KENNEDY, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Hart:

Q. Mr. Kennedy, you are the architect covering this proceeding, are you not? A. Yes.

Q. I show you Exhibit P-1 and ask you whether you know Savino, the plaintiff in this action, the contracting party, with the defendant Goldberg, in that contract? A. Yes. 10

Q. How soon after the signing of this contract did Savino begin his work? A. What was that question?

Q. How soon after the signing of this contract did Savino begin his work? A. Within a few days. 20

Q. You are a registered architect of the State of New Jersey, are you not? A. Yes; a registered architect.

Q. Just describe to the Court and Jury how Savino progressed with his work under this contract, as to the point of time and character of work? A. Mr. Savino started within a few days after the contract was in effect. He started to put up his forms, and when he got part of the forms up, he started in to mix concrete and fill the walls, put in the forms to form the walls. Eventually he got the walls through. When he got the walls through he said he was finished, and I told him he was not finished, that the walls were not level, and he raised such a time about it that I decided to—We had to get the building done in a certain time because we had other contracts. I decided to give him a certificate. I gave him a certificate with a check for 40 30

*Joseph Kennedy—Direct.*

\$550. The amount of the certificate was \$800, and he said, "What's this for?" I told him it was according to agreement, as he had not produced a bond. Then he handed me over a bond which the owner objected to.

10 Q. I show you Exhibit P-4 and ask you whether that is the bond which he handed you?  
A. (Referring.) Well, that is, as far as I remember. It looks like it.

Q. Proceed, Mr. Kennedy? A. Then there was some question as to the bond and as to the amount of money he was to receive, and I just left, and it seemed to have gone through the hands of Mr. Savino's lawyer. And then I was instructed to issue a certificate for the first payment of \$800. Now, I don't know whether he  
20 was paid that amount of money or not.

Q. Now, what was the condition and character of Mr. Savino's work at the time of the payment of this \$800? A. Why, it was very—the material he started in with I objected to, and that was the story he told me, they couldn't get any sand in that location, the cow-base sand, and we had to get it from East Orange. Now, the character of his work: Mixing the batches was  
30 O. K., but sometimes very irregularly mixed; it showed when the forms came off crevices and unfilled parts where the cement didn't come to the outside surface.

Q. He testified that he had from time to time three or four men working on the job at one time, and that they were laborers. They weren't finished mechanics or masons, were they? A. Not that I could see and—

40 Q. And you didn't object as architect to the character of the side walls, did you? A. Well,

*Joseph Kennedy—Direct.*

I asked him if he wouldn't have the walls pointed and put in some kind of presentable condition. Personally I spoke to him and told him it would be much better. It was unfinished work, and I asked him if he wouldn't have it put in some respectable condition. So eventually he brought a man there somewhere near twelve o'clock on a Saturday, if I remember right. 10

Q. Did he deny that the work had been done imperfectly? A. Well, he must have when he started a man to point it up.

Q. He testified that after the walls were raised, you directed him, as architect, to do certain excavations on the outside of the walls as extra work, is that true? A. No, sir.

Q. Did he actually excavate on the outside? A. Yes, a man excavated. 20

Q. Describe why it became necessary for him to excavate the outside walls? A. The man I seen excavating the outside of the walls, but as, of course, it was none of our business, we don't interfere with the manner of constructing the buildings so long as they produce the goods. We don't direct him as to his scaffolding or anything, as to the material, the wheelbarrows or planks, or anything that he should use; and I take it that if a man excavated the outside walls, it would be to take out the wood in these forms that he had put there to mark the concrete walls. 30

Q. These concrete walls were built between wooden forms, were they not? A. Yes.

Q. And he built one wooden side next to the earth, the other inside and filled between with concrete mixture? A. Yes. 40

*Joseph Kennedy—Direct.*

Q. And then he had to excavate the outside to get his wood out? A. Yes.

Q. Did you tell him he would pay him, that you or that Goldberg would pay it? A. No.

Q. Did you order him to do it? A. Never.

10 Q. I observe at the foot of Exhibit P-1 a design of water-proofing and ask you whether that was the design that was followed in the final construction of the work? A. No.

Q. Was it changed by agreement? A. It was changed by Mr. Savino, telling me that he thought he would not be able to make a water proof with that specification, and that he would suggest a 10-inch waterproof, concrete, stone, sand, cement waterproofing, concrete, with a top dressing, and the side walls to be done four foot  
20 high with waterproofing  $\frac{3}{4}$  inches thick, water-proofed cement and mortar.

Q. Did he suggest the waterproofed cement that was to be used? A. Oh, yes.

Q. What was the name of it? A. Well, I didn't tie him down to any particular water-proof.

Q. Did he tell you the waterproofing that he was going to use? A. He may have; I didn't—

30 Q. You remember the word "Integral?" A. Well, there are several, but I—I presume it was that, because that—what he did say was he was going to use the waterproofing that was used by Mr. Bianchi on a cellar that Mr. Bianchi had just waterproofed, and that was the waterproofing he used.

Q. Did he attempt to proceed according to those changed specifications in the construction of the cellar? A. He went ahead.

40 Q. Just what was the result? A. The result

*Joseph Kennedy—Direct.*

was that he delayed, deserted and delayed. One day he would have one man working, another day he would have two or three, and the result was that the—we were going ahead with the building, got away up; we were getting ready for finishing up, and still he was away behind in his contract. We tried every inducement, kindly talk to him and all that. He agreed very nice, no question about that. Then eventually he deserted the job entirely, and we served him with a three days' notice. 10

Q. Now, Mr. Kennedy, as to this cellar bottom; did he actually make a waterproof cellar bottom? A. I had, after the three days' notice was served and Mr. Savino didn't come, I had the water taken out and examined the cellar bottom, and found the water bubbling up through the cellar bottom. 20

Q. Then, as a matter of fact, that cellar bottom was not water tight? A. Oh, no; far from it.

Q. Mr. Savino complained that there was water and rubbish on the floor of the cellar which prevented his laying the finishing coat on the cellar bottom. Where did that water come from?

A. Water—water came from the underside of his concrete, because it wasn't heavy enough to hold the water pressure down. 30

Q. It came right through that cellar bottom?

A. Right through the cellar bottom.

Q. He testified there was one hole in the wall through which the water poured? A. If that was so, then it was up to him to close that hole so he could do his work.

Q. But that was true? A. I don't know. 40

*Joseph Kennedy—Direct.*

Q. Was any water coming through the side walls of the cellar? A. No; maybe a sweat.

Q. He testified, furthermore, that men engaged in laying a tile floor above flooded the tile and the cement with water, and that water got into the cellar. Is that true? A. Well, there  
 10 may have been enough to come through there. There might have been a sprinkling, covering an area that a few gallons of water might sprinkle.

Q. What would you say the maximum quantity was? A. Oh, probably three gallons.

Q. Was there any rubbish in the cellar? A. Yes, there was some rubbish; it was removed.

Q. I show you a paper marked for Identification, D-1, and which is signed by the name, Carmine Savino, and acknowledged by him to be  
 20 his signature, and ask you whether you have seen that paper before? A. (Referring.) Yes.

Q. Mr. Savino testified that the sole reasons for his not proceeding with that work were because of rubbish in the cellar and water in the cellar. Did Mr. Savino, at any time, contract to remove that rubbish and water if any was there? A. Yes, that's the contract to remove it.

Q. I offer it in evidence.

30 Mr. Weinberger: No objection, if your Honor please.

The Court: It may be offered.

(Marked Exhibit D-1.)

Q. November 18, 1916. I propose to dig cellar, remove water and put in concrete as per original contract, six feet two inches, fix up piers and make six feet two inch headroom on  
 40 Mr. Goldberg's building for the sum of \$75.00.

*Joseph Kennedy—Direct.*

It is agreed that the \$75.00 is to paid when the digging is done and cinders are being put down. Carmine Savino. Did you pay \$75.00? A. Yes.

Q. I show you a check for \$75.00, by means of which you paid it? A. (Referring.) Yes.

Mr. Hart: I offer it in evidence.

Mr. Weinberger: No objections, your 10 Honor.

(Marked Exhibit D-2.)

Q. You testified that there were several delays in the course of this work by Mr. Savino. How many times did it become necessary to serve three days' notice upon him to proceed? A. Twice.

Q. I show you a notice to proceed dated Oc- 20  
tober 26, 1916, and ask you whether that is the first notice that was served upon him? A. (Re-  
ferring.) That was the first notice.

Mr. Weinberger: No objection to it go-  
ing in.

(Marked Exhibit D-3.)

Mr. Hart: (Reading Exhibit D-3):

“To Carmine Savino.

Sir: Take notice that under the terms of 30  
a contract entered into between yourself and myself, dated September 17, 1916, in which you agreed, for the consideration therein mentioned to well and sufficiently erect and finish a foundation, walls and cellar bottom and water proofing of same.

You agreed to prosecute the work with diligence, and should you refuse or neglect to supply a sufficiency of materials or work- 40  
men, the owner, the undersigned, had power

*Joseph Kennedy—Direct.*

to provide materials, and workmen after three days' notice in writing being given.

10 You are hereby notified that you have neglected to supply a sufficiency of materials and workmen to proceed with the work according to the terms of said contract, and should you fail to supply the same within three days from the receipt of this notice, the undersigned, the owner, shall provide the materials, workmen, and so forth to finish the said works, the expense thereof to be deducted from the amount of this contract.

October 26, 1916.

DAVID GOLDBERG."

20 Q. When was that served upon Mr. Savino, what date, Mr. Kennedy? A. That I couldn't say.

Q. You will find it written. A. (Referring.) Well, according to this, it was served on October 26th, 1916.

Q. After the service of this, what did Savino do? Did he proceed with the work within three days? A. He must have started.

30 Mr. Weinberger: Now, not what he must have done. Do you know whether he did or did not? I object to the witness concluding that he must have, if your Honor please.

Q. Are you able to answer that, Mr. Kennedy? A. Well, he started.

40 Q. I show you Exhibit P-2 and ask you whether that is the second notice to proceed with work which was served upon Savino? A. Yes.

*Joseph Kennedy—Direct.*

Q. When was that served, Mr. Kennedy? A. On December 12, 1916.

Q. December 12th was a Tuesday, was it not, 1916? A. Yes.

Q. What did Savino do, so far as you know, after the service of this second notice upon him, December 12, 1916? A. As far as I know, Mr. Savino never went there to complete his work. 10

Q. Was the work taken away from him? A. The work was taken away from him, yes.

Q. And who was it given to? A. To Mr. Bianchi.

Q. I show you what purports to be a contract between David Goldberg and Romeo Bianchi, dated January 2, 1916, and ask you whether this is a contract between Mr. Goldberg and Mr. Bianchi for the rectification of the improper work of Savino, and the completion of the work according to the contract between Savino and Goldberg? A. (Referring.) Yes. 20

(Marked Exhibit D-4.)

Q. Mr. Kennedy, this contract, the consideration was \$1,300.00. Is that what it cost David Goldberg for correcting the irregularities and errors in the work of Savino, and for completing the work that Savino was to have done? A. Yes. 30

Q. \$1,300.00? A. Yes.

Q. Did Mr. Bianchi proceed with his work under contract D-4? A. Yes.

Q. What did he do in order to ascertain whether Savino had done his work correctly? A. Mr. Bianchi with myself examined the cellar and found water covered with ice, and we found that 40

*Joseph Kennedy—Direct.*

the water was oozing up in the heart of the cellar.

Q. Through what? A. Through the concrete put in by Mr. Savino; that water was gradually rising in the cellar, and if it kept on it would have been flowing over into the street.

10 Q. How deep did the water become in the cellar? A. At that time I had my rubbers on, and in some cases it was over my rubbers; we had to use a 2 x 4 to walk on.

Q. At the time that Savino complained there was water in the cellar, where did that water come from? A. Why, I presume it came from the same place.

Q. You have testified it didn't come from the side walls? A. Oh, no.

20 Q. At that time was the house complete above the foundation? A. The house complete; the roof was on.

Q. It couldn't have been rain? A. Well, if it was raining, it was his place to keep the rain out.

Mr. Weinberger: I ask that that be stricken out on the ground that it is a conclusion of this witness.

30 The Court: Yes; I think so. Strike it out.

Q. Then what did you do to Savino's work in the bottom of the cellar? Ripped it out, didn't you? A. We had to rip it out.

Q. That added to the extreme cost of this. Then in replacing it, did you replace it in the way that Savino had agreed to originally put it down? A. Yes.

40 Q. And has the cellar been dry since then?

*Joseph Kennedy—Cross.*

A. Perfectly, up to the last time I was there; that was in February; then it was dry, that is——

Q. The contract requires that a house, I believe, 40 x 50 shall be built. Is that not true?

A. Whatever the size the plans show. I build so many.

Q. Does the size of the cellar appear there (referring to Exhibit D-4)? A. No, the size of the cellar is in the plans. 10

Q. I show you what purports to be a building of Goldberg's. Are those the plans governing this work? A. (Referring.) Those are the plans.

Q. What is the size of those foundation walls that Savino agreed to build according to the plans? A. The size of the foundation walls were 39 x 50. 20

Q. Centers, inside measurement? A. No, 39 foot, outside measurement.

Q. And 50 feet outside measurement? A. Yes; the building itself is larger, but there is a driveway outside.

Q. What size foundation did Savino actually lay, do you know? A. Well, the exact size I couldn't give you, but measuring the work I found it shy. 30

Mr. Hart: That is all.

Cross-Examination by Mr. Weinberger:

Q. I think you sued Mr. Goldberg for your fee, did you not? A. Oh, yes.

Q. You had trouble with him too? A. Oh, yes.

Q. What was the matter with your work? A. Well, I don't know that there was anything. 40

*Joseph Kennedy—Cross.*

Mr. Hart: Just a little difference of opinion that has been settled.

Q. He disputed your work too, did he, Mr. Kennedy? A. He——

Mr. Hart: I object to that.

10 A. Not that I know of.

Q. Well, he didn't pay you when your payment was due?

The Court: What difference does it make?

Mr. Weinberger: Well, he went into Bierman's—I want to show that this dispute took place.

20 Q. I show you a check marked Exhibit D-2.

A. Yes.

Q. What was that check paid for? A. That check was paid for the cleaning up of the cellar, putting in some piers and taking the water out at that time.

Q. So that there was water in there before he started the job there in that cellar? A. Oh, yes; there was water in there before he signed  
30 his contract.

Q. And he was to remove what was there for the purpose of enabling him to begin his work, is that right? Yes or no. A. He was to remove the dirt to enable him to begin his work.

Q. And that was why he received the \$75.00? A. Yes.

Q. That had absolutely no bearing on the contract, in question, did it? A. No.

40 Q. Now, I show you Exhibit marked Exhibit

*Joseph Kennedy—Cross.*

D-3, a notice dated October 26, 1916, a three-day notice, as it is called, served upon Savino. Do you know why that was served? A. Because he was dilatory in progressing with his work.

Q. Wasn't he entitled to a payment at the time that notice was served, and he wouldn't work until he got his money? A. That was on the 26th. I don't know whether he got his money at that date or not. I gave him a certificate before that date. 10

Q. Answer my question, sir. Isn't it a fact that he refused to work until he received his first payment of \$800, and, as a result of that, he received this notice marked D-3? A. I wasn't aware whether he was paid the money or not.

Q. Will you say that it isn't a fact that he refused to work until he got his \$800? A. Mr. Savino refused many times— 20

Q. Yes, or no? A. Mr. Savino never refused me whether he would go on with his work or not.

Q. Do you now say that he didn't get his payment? A. I don't know whether he got it or not.

Q. A few days after this notice was served? A. He may have; I don't know. I gave him the certificate before that. 30

Q. Will you say, that is, on the date he got this notice, October 26th, he wasn't entitled to a payment of \$800, and refused to go on with the work? A. He may have got his money; I don't know.

Q. Then he wasn't dilatory with his work when this notice was served? A. He must have been if the notice was served.

Q. Do you know that of your own knowledge? 40

*Joseph Kennedy—Cross.*

A. Yes, as the architect. I gave him the certificate, and he didn't go on with his work.

Q. Don't you know, Mr. Kennedy, that after you had this notice served on Mr. Savino, three days after that he got his check for \$800 and then he went to work? A. That I don't know.

10 Q. You won't say that is not the fact? A. No, I will not, because I didn't see no transaction passing between the owner and the contractor.

Q. Then he wasn't dilatory if he got his payment of \$800 after he got this notice served on him, was he? A. According to my estimation, he was.

20 Q. What work did he do at that time that should have been done? A. He started to put in his cellar bottom.

Q. That was his first payment, wasn't it? A. He got a certificate from me.

Q. Did your certificate pay his debt? A. I don't know; I don't know when he was paid.

Q. Don't you think it was material to know when he got his money? A. When did he get his money?

30 Q. On October 30th? A. I didn't know anything about that.

Q. If he didn't get his money until October 30th, he wasn't dilatory, was he? A. He was according to my observation, yes.

Q. You mean to say as architect you weren't interested to find out whether this man got his payment or not? A. It isn't necessary for the architect to know whether a man got his payment or not.

40 Q. Don't you think it important for a man to serve a notice without knowing whether he was

*Joseph Kennedy—Cross.*

dilatory or not? A. The man never notified me that he never was paid.

Q. Do you mean to say that he never told you he didn't get his money? A. He never told me he didn't get his money.

Q. Didn't you say on direct examination that Savino insisted on getting his payment, and you insisted upon a bond? A. In the first place, yes. 10

Q. Then you did have knowledge? A. We offered \$550.00.

Q. There was a dispute about the payment? A. Why, I said so in my evidence.

Q. Don't you know that that bond was delivered? A. I didn't know at that time.

Q. Wasn't there a bond delivered? A. You will have to ask someone else. 20

Q. Was there a bond delivered, do you know? A. I don't know.

Q. Was there a dispute about the bond? A. Yes, I said so in my evidence.

Q. When was this dispute, after that notice or before that notice? A. Before that notice.

Q. And didn't he insist on getting his money before he went on with his work? A. He insisted on getting— 30

Q. Did he? A. He insisted on getting \$800.00.

Q. Before he went on with his work? A. Not to me.

Q. You knew about the bond talk, didn't you? A. But he had brought it up to his lawyer then, and it was out of my hands.

Q. Now, there was considerable water in the cellar after he started on his work, wasn't there? A. Oh, yes. 40

*Joseph Kennedy—Cross.*

Q. How did it get there? A. Up through the bottom of the cellar.

Q. How do you know? A. Because I seen it.

Q. Do you say that there wasn't some water that was admitted there through pipes into that cellar? A. There was no pipes into the cellar.

10 Q. Are you sure of that? A. Sure of it.

Q. No pipes, there was no water in that building? A. No pipes.

Q. At all? A. No.

Q. Was there any place where you could get water in that cellar? A. The water came from the bottom.

Q. Was there any place where you could get water in that cellar? A. Where you could get water?

20 Q. Yes. A. Through a faucet.

Q. Where was the faucet? A. In the front of the building.

Q. Will you say that that faucet was not running one night all night, turned on by some children, and the cellar was filled with water? A. I will not.

Q. You don't know that, do you? A. No.

30 The Court: How do the water pipes come into that building?

The Witness: The water faucet was put in, a trap put in to the building from the street to supply this contractor with water to mix his concrete.

The Court: Was that pipe through the cellar wall?

The Witness: Through the cellar wall from the street.

40 The Court: How did you manage that to keep water from seeping in around that pipe?

*Joseph Kennedy—Cross.*

The Witness: When the man built his concrete wall he should see that the water was kept—that it was water tight.

The Court: The pipe was put in before the cellar walls were put in?

The Witness: It must have been because we had to use the water there to mix the concrete to make the bottom. 10

The Court: There was water through the building, was there not?

The Witness: No, only for construction purposes.

The Court: When your building was completed was there not water in the building?

The Witness: The water was entered into the building after the completion, 20 yes.

The Court: Where did it come in?

The Witness: From the street, in through the cellar walls, where it was put in by the plumber.

Q. His Honor just asked you a question whether there was any water around the pipes when it was put in and you answered no? A. I didn't; I didn't say anything of the sort. 30

Q. Was there any wall around this piping?

A. That pipe was put in, and this man built the wall around the pipe.

Q. Was there any catch basin there? A. For what? To catch what?

Q. Don't you know what a catch basin is? A. Yes, I know.

Q. How long are you an architect? A. To catch what? 40

*Joseph Kennedy—Cross.*

Q. Under that faucet? A. Under the faucet?  
I don't know.

Q. Weren't you down there? A. Yes; but it is  
not my place to see whether there is catch basins  
put up by a laborer or anyone else.

10 Q. Who did you say was to put a catch basin  
there? A. There was nobody to put a catch  
basin there.

Q. Wouldn't that have an effect on the water  
that came out of that faucet? A. On what water  
that came out of the faucet?

Q. Mr. Kennedy, this water which was in-  
stalled there for the purpose of feeding all the  
necessary contractors with water necessary for  
the erection of that building led into what part  
of the cellar? A. Into the front part of the  
20 cellar.

Q. Now, was there any catch basin there? A.  
I don't know. Is there any called for.

Q. Now, when you issued your first certificate,  
the work had been complied with in every re-  
spect and detail, had it not? A. No.

Q. Do you mean to say as architect you issued  
your certificate without having this man comply  
with his work? Do you mean that? A. His  
30 work—It was agreed that he would plaster up  
that point.

Q. Do you mean that? A. I mean that I gave  
him a certificate when it wasn't really in good  
shape.

Q. Do you mean that now? A. I do; yes.

Q. How long are you an architect? A. I am  
an architect for over thirty years.

Q. Do you mean to say that you were trying  
to favor this man and give him a certificate to  
40 the disadvantage of the owner? A. No, sir; no,  
sir.

*Joseph Kennedy—Cross.*

Q. Well, what do you mean? A. The building had to progress, and by holding this man up for to complete the leveling up of the walls, would mean more delay in the construction of the building.

Q. Why did you want to hold up the certificate, on account of the bond, then? A. I didn't hold up the certificate on account of the bond. 10

Q. Didn't you insist on giving him a certificate for only \$550? A. I gave him a certificate for \$550 according to his agreement because he had never presented me a bond.

Q. Then you did hold up the certificate? A. I didn't hold up the certificate. He refused the check.

Q. The first payment, when the cellar walls are up, \$800? A. Yes. 20

Q. Did you go according to that contract? A. I went according to the contract.

Q. When you gave him your certificate for \$800.00, did you mean that that certificate indicated that the work necessary to be done by him was done? A. I meant that it was done.

Q. Did you mean at that time when you issued that certificate that he was entitled to his payment of \$800? A. Yes. 30

Q. And did you mean the time that you issued that certificate that the work was done in good, workmanlike and substantial manner, and in accordance with that contract marked P-1? A. No.

Q. You didn't mean that? A. No.

The Court: Is there a clause in there about a final certificate required work to be done, covered by other certificates? 40

*Joseph Kennedy—Cross.*

Mr. Weinberger: I don't think there is any in this one.

Mr. Hart: You mean that the preliminary certificate must not be conclusive as to the work done?

The Court: Yes.

10 Q. At the time you issued this certificate, what work was done improperly? A. Why, the walls were not level on top, and the stone was showing where it had been improperly mixed, and it was agreed with him and I that he would plaster up the face of the walls.

Q. I am only asking you what work was not done properly? A. I am telling you.

Q. Is that all? A. That is all.

20 Q. You were not on the premises on December 16th, were you? A. I do not know, I have been there so often.

Q. Well, the last day that Savino came there, you weren't there? A. I couldn't say.

Q. You don't know? A. No.

30 Q. Do you mean to say that the contract made between Goldberg and Bianchi called for the same kind of a cellar that was specified in the contract between Goldberg and Savino?

Mr. Hart: If your Honor please, I object to that because it is not properly predicated. The testimony is that the specifications indicated on the original Savino contract were modified. That is the testimony of Mr. Savino and Mr. Kennedy and everybody, that they were changed.

40 The Court: Yes; I understand that. I suppose you should ask him now whether

*Joseph Kennedy—Cross.*

the contract with this Mr. Bianchi was of the same character as the one that was modified.

Q. Will you state whether or not the contract made with Bianchi calls for the same kind of work that was contemplated by the modified contract between Savino and Goldberg? A. Mr. Savino— 10

Q. Yes, or no? A. I have got to give some explanation, sir.

The Court: Was it the same thing or not?

The Witness: It was the same idea, yes.

Q. The same idea? A. Yes.

Q. Was it the same contract? A. Ten inches of concrete and top dressing. 20

Q. What is that? A. Ten inches of concrete and top dressing, and waterproofing the side walls.

Q. Was there any conversation ever had or any contract ever made with Savino that he was to make a cellar of this character, supply all material necessary to complete the work, as follows: Remove all the cellar bottom now in the building and cart away from premises, clean the cellar bottom, and when dry and water removed, put in a concrete waterproofed bottom ten inches thick, two thousand pounds of reenforcing. Did he ever make any such agreement? A. Who? 30

Q. Did Savino ever make such an agreement? Yes or no. A. Savino? No, not the reenforcing. Now, I can explain—

The Court: Counsel will let you explain. 40

*Joseph Kennedy—Cross.*

Q. Did Savino ever agree to anything of this character: One inch thick of waterproofing on top, continue the finished waterproofing four feet high on cement waterproofing inside of cellar walls, build alley-ways and steps with the above materials; did Savino ever agree to anything like that? Yes or no? A. Yes.

10 Q. He did? A. Yes.

Q. Four inches of side wall, four feet of it? A. Yes.

Q. Did he agree to that? A. Yes.

Q. What did you do with the old side walls? A. What old side walls?

Q. That he did build there? A. You mean the waterproofing, or walls?

Q. What was done with the walls that he built? A. The walls are there today.

Q. They are? A. Yes.

Q. Now, what was done with the walls; anything? A. They were waterproofed.

Q. Waterproofed? A. Yes.

Q. Did his contract call for any such waterproofing as was done there now? A. Why, yes.

Q. Did it? A. Yes.

Q. Do you know whether he used any waterproofing? A. Well—

Q. Yes or no? A. I don't know.

Q. You were there every day, weren't you? A. Well, I won't say I were there every day; I don't say I was there every day.

Q. Well, a minute ago you said you were? A. Well, I said very often.

Q. What were you there for? A. For to inspect the building.

40 Q. During the time that you came there to inspect the building, will you say that you didn't

*Joseph Kennedy—Re-direct.*

notice that man use waterproofing in the work he was doing there? A. Oh, yes; he used waterproofing.

Q. Did you ever make any objection to the waterproofing he was using? A. No.

Q. Did you ever make any objection to the work he was doing in connection with the waterproofing? A. No. 10

Q. If it was not under the contract, why didn't you object? A. He was under bond to give the man a waterproof cellar.

Q. Is that the only reason you didn't object? A. Why should I object?

Q. Is that the only reason that you didn't object? A. The man had his own ways of doing his work.

Q. Is it a fact that the only reason you did the work or character of the work he was doing there was because he had furnished a bond? A. Well—— 20

Q. Yes or no? A. Well, the man——

Q. Yes or no? A. They had to get a waterproof cellar.

Q. Will you answer my question? A. I am answering.

Q. Is it a fact that you made no objection to the work or character of the work he was doing here, was due to the fact, entirely to the fact that he had furnished a bond guaranteeing the work he was doing? A. Why, yes. 30

## Re-Direct Examination by Mr. Hart:

Q. Explain the difference, Mr. Kennedy, the essential differences, between the Savino and Bianchi contracts? A. Mr. Savino, in making a contract with Mr. Goldberg, guaranteed to give 40

*Joseph Kennedy—Re-direct.*

him a waterproof cellar. Knowing the character of the ground, it had to be. The owner requested a bond, and Mr. Savino agreed to do so. We asked him how he would do his work and he described how he would do his work. I then inserted his ideas of how he would waterproof that cellar in the original contract which shows  
10 by a sketch. I didn't tell him how to do this; this is his own ideas, his own suggestions. When we got along with the building a certain time, Mr. Savino suggested a change, and he didn't think he would be able to hold the water with the original idea of construction. He had seen Mr. Bianchi, he told me, put in a cellar, and he thought that that was a good idea. He thought it was a good idea, and he would follow that  
20 idea out. He suggested ten inches of concrete, waterproofed, with a top dressing waterproofed, and four feet high on the side walls, waterproofed. I was satisfied, I wouldn't hinder him in any way, shape or form from putting in a cellar that was absolutely waterproof, and he went ahead with the work.

Q. And this Bianci contract was— A. When we came up to the Bianchi part, Mr. Bianchi  
30 claimed that he couldn't give a waterproof cellar with ten inches of concrete without a reinforcing, and the contract was made then with Mr. Bianchi.

Q. That reinforcing was not in your original contract with Savino? A. No; no reinforcement.

The Court: Why would the reinforcement of this concrete make it waterproof?

The Witness: The concrete was made  
40 waterproof; the reinforcing idea was to put it through the concrete to bind it.

*David Goldberg—Direct.*

The Court: Why does that make it waterproof?

The Witness: To keep the water from raising the concrete and bursting the concrete through the force of the water.

(Recess at 1:02 P. M., until 2.00 P. M.) 10

## After Recess.

DAVID GOLDBERG, the defendant, called as a witness on his own behalf, being duly sworn, testified as follows:

Direct Examination by Mr. Hart:

Mr. Hart: I offer the plans in evidence. 20

Mr. Weinberger: I object unless it is shown they are the plans under which the plaintiff worked.

Mr. Hart: The witness Kennedy testified that these are the plans under which Savino worked.

The Court: Yes; he testified to that.

(Marked D-5.)

Q. Mr. Goldberg, you are the defendant in this action, are you not? A. Yes, sir. 30

Q. Do you remember when Savino came to your house to do the work there, the side walls?

A. Yes, sir.

Q. Just describe how he worked, the number of men he had on the ground, and how he conducted his operations there? A. He came there and started to put up his foundation. The first thing as soon as he took possession of the 40

*David Goldberg—Direct.*

cellar, a bank caved in right into the cellar, that tore out the whole wall from under the house.

The Court: Who dug the cellar?

10 The Witness: Another contractor, but he is supposed to take care of it according to the contract. He is supposed to take care of the walls, and as soon as he took possession of the cellar, the whole wall banked in from the other house. Then, Mr. Kennedy, the architect, came over and he said he would'nt go ahead with the work because the bank fell in, see? Then that they should clean out the cellar for him, take that bank out and clean it out; if not, he wouldn't go ahead with the work. I guess Mr. Kennedy went to work; he didn't want any trouble. He went ahead and paid the fellow to clean out the bank.

20

Q. That is \$75.00, wasn't it? A. I don't know exactly. He cleaned out the cellar, and started to put up the foundation. He couldn't get no cow-bay sand, he says he going to make it pit sand because he can't get no cow-bay sand, he says.

30

Q. Cow-bay sand? A. Yes, he couldn't get it. He says the plans and specifications calls for cow-bay sand to be used. Well, he stopped working again. I called up the architect which has his office in Harrison, and the architect says—

Mr. Weinberger: I object to that.

Q. Did you finally get the cow-bay sand?  
40 A. Yes; and he called up even from my telephone which he didn't pay for the telephones, either.

*David Goldberg—Direct.*

Q. Did Savino put his crib up, his forms, for this cement wall? A. He put up boards, one against the earth, and the other one on the other side.

Q. When he got through with the wall, how did he get the wood that was in the outside, out? A. He couldn't take it out; he was working about four weeks to dig around the house, started to go down around the foundation and dig out the boards. He couldn't take out all of them; some of the wood is there yet laying there in the foundation. 10

Q. Did you tell Savino to dig the outside? A. No, sir.

Q. Did you tell him you would pay him anything for it? A. No, sir.

Q. Did you speak to him about it at all? A. Absolutely nothing. 20

Q. Did he do any other excavating for you at all? A. He ain't supposed to do any excavating at all.

Q. After the side walls were built, what happened? A. When the side walls was built, well, he went to work; he is supposed to produce a guaranty bond for the waterproof cellar, and I was ready to pay him. He brings me a bond just signed by himself. I says, "Mr. Savino, you know that the bond is no good; if you give me another endorsement, bring me your father-in-law's endorsement or Mr. Kieswetter's, and I will accept the bond." He says, "My bond is good for it," see? Then I took the bond over to my counsel, Mr. A. C. Hart. I had the money ready for him. A. C. Hart told me I should pay him \$550.00 which the contract calls for the first payment; if he cannot give me the guaranty 30 40

*David Goldberg—Direct.*

bond, I should take off \$250.00 of the first payment, and \$250.00 for the second payment for the guarantee for six months, and 6% interest. I called him up after in the bank, and I cashed a check with the cashier and I gave him \$550.00 in bills in the bank. He says, "I don't want it, but \$800.00." I went over to my counsellor, A. C. Hart, and he says, "We will see about it."

Mr. Weinbereger: Now, wait a minute.

Q. Finally this bond was taken with a letter?

A. Yes; after I came over Saturday, Mr. Ely was his counselor; he write that letter to my lawyer and A. C. Hart told me I should pay off according to that letter.

Q. And that letter was P-3? A. Yes, sir; and we did pay him off on that account. Then he sent a bond that was absolutely no good.

Q. But the \$800.00 had been paid then, hadn't it? A. Yes, sir.

Q. Did Savino proceed with the laying of the cellar floor? A. After he was through with the foundation, he didn't go ahead with the work at all, absolutely nothing. I went over and we served him with a three days' notice to go ahead with the work.

The house was finished all the way through. The house was standing on wooden beams. The whole house was caving in all ready. Then we served him with three days' notice, and then when we served him with three days' notice, Mr. Kieswetter sent his team and took all the supplies away. Mr. Savino wanted to lick me. The architect was on hand and he said, "Mr. Goldberg, don't bother with him. Let him take it."

*David Goldberg—Direct.*

That was the first three days' notice. Before the three days' notice was expired, he came with a man and started to pump the water out of the cellar; then he took possession again for the first three days' notice; then he started to pump the cellar, and then he went ahead with the job, started to put the rough concrete in, and the water—the cellar was full of water. He took the contract with the agreement that he should lay the concrete in a clear, dry cellar bottom. He was supposed to have the water out all the time. He started to mix the concrete and laid it in the mud. He took the pump away in the morning and started to lay the concrete in the water in the cellar. They were walking around in boots, and they didn't know whether they were laying it on the bottom of the cellar or in the water. When he seen he didn't have no sense, he stopped work altogether, see? Then we served him with the second notice. 10 20

Q. That was on a Tuesday? A. Yes; he didn't show up until Monday morning. He brought one man and wanted to go on the job. I had already started to clean out that cellar. It was full of water, coming through the walls, through the bottom, and all over. Then he says to another fellow, "I will pay you for it anyhow, you just"—— 30

Q. You must not say what other men told you. You took possession of the property on a Saturday? A. On a Saturday. I hired a man and he pumped out the water because the water was coming in fast.

Q. And on Monday Mr. Savino came with one man? A. Yes, and I told him I pumped out the water, cleaning out everything, and Monday or 40

*David Goldberg—Direct.*

Tuesday we had a man by the name of Mr. Bianchi who is an experienced man, see? And he went to fix the bottom of the cellar the way it was, but he worked about four days with four men, mechanics, but he didn't see no chance to fix it.

10           Mr. Weinberger: I ask that that be stricken out.

          The Court: What he saw may be stricken out.

          Q. Were you there? A. Yes; I been there, and the architect was there.

          Q. Now, is there water in that cellar, Goldberg? A. No, sir.

20           Q. Was there water in the cellar at the time Savino left? A. Certainly there was water.

          Q. Where did that water come from? A. Right from the bottom through the walls.

          Q. Did you see it coming through the walls? A. Yes, and everybody seen it.

30           Q. Was the water coming through any hole where there was a pipe in the side wall? A. The water pipe where he claims the water was coming through I lent him even my hose, he didn't have no hose to use for water, and that hose was connected until the whole building was finished.

          Q. How wide was the pipe in diameter? A. A regular water pipe.

          Q. Just show with your fingers? A. A regular water pipe connected from the street, connected with the house. That was attached from the street before they started to build.

40           The Court: You would not get much

*David Goldberg—Direct.*

supply through a half inch pipe for a house.

Mr. Hart: We think there wasn't much water let in by that pipe.

Q. At least, it was one of these ordinary water pipes? A. I couldn't tell you exactly how big, but I had the water connected before they started. 10

Q. Did water come through the wall alongside of the pipe? A. Not alongside the pipe; the water was coming all around.

Q. Didn't Savino place the concrete around that pipe? A. Certainly, the pipe was put in before he put in the walls, so they shouldn't need to dig a hole afterward.

Q. Then, Mr. Goldberg, when you found this water coming through the cellar, you contracted with Bianchi? A. Yes, sir. 20

Q. As appears by the evidence? A. Yes, sir.

Q. The consideration was \$1,300.00? A. Yes, sir.

Q. Now, what did he do? A. He had to rip out the whole bottom. First he worked there about four days. He thought he was going to finish it the way it is here. He worked there with four men, four mechanics, cleaning the water, doing everything. They thought they could finish it the way it was. 30

Q. Was the cellar bottom when it was taken up of uniform thickness of concrete? A. It was some places two inches, some places six inches, and some places eighteen inches.

Q. And that was all pulled out? A. All pulled out and taken away. 40

*David Goldberg—Cross.*

Q. And today the cellar is dry? A. Today the cellar is perfectly dry.

Q. How many men had Savino in any one day, the most he had in any one day? A. The most what he had when he was laying the bottom with concrete? He didn't have a mechanic on the job, see?

10 Q. Well, he testified himself? A. He is supposed to have a mechanic, and I don't understand the work myself the way it looks, see? And the most he had it was four men in one day, and I could figure them up everyone of them he had.

Mr. Hart: That is all.

20 Cross-Examination by Mr. Weinberger:

Q. Mr. Goldberg, when did you start to build this building? A. Well, I couldn't tell you exactly the date.

Q. You don't know? A. I didn't know it was going to go so far.

Q. When did Savino start on that work? A. After the contract.

Q. When? A. I guess on a Tuesday, some day.

30 Q. Well, do you remember that date? A. I don't know exactly the date, but on a Tuesday I guess he start up.

Q. Now, when he got entitled to his first payment, did you pay him the money? A. I was willing to pay—

Q. Did you pay him? A. I was willing—

Q. Did you pay him?

Mr. Hart: What is the question?

40 The Witness: If he was entitled to his money, did I pay him.

*David Goldberg—Cross.*

Mr. Hart: No, let the stenographer read the question. (Question read.)

A. I wanted to pay him.

Q. Did you? A. Not when he is entitled because he is supposed to give me a bond.

Q. Did you offer to pay him \$800 when he became entitled to the first payment? A. Yes, sir. 10

Q. You did offer him? A. Yes, sir, provided he give me a bond that he water-proof the cellar.

Q. How long after you offered to pay \$800.00 was it before you actually paid it? A. Right the first day he came in, and I said, "If you have the——"

The Court: Ask the question; you are wasting time. 20

Q. How long was it that you paid the money from the time that you first offered to pay it?

A. I guess it was three or four days.

Q. Have you got the check there? A. The check is right there (indicating).

Q. Did you serve the first three-day notice before or after you paid that check? When did you pay the money, the \$800.00, before or after you served this first stop notice, Exhibit D-3? 30

A. Well, I couldn't tell you.

Q. You cannot tell? A. I couldn't tell you.

Q. Didn't you pay the money after you served that notice? A. I was willing to——

Q. Did you? A. Well, I couldn't tell you exactly.

Q. On direct examination, you said that he stopped doing the work, and for that reason you served him with a stop notice, was that true? 40

A. Yes, sir.

*David Goldberg—Cross.*

Q. What work didn't he do? A. He is supposed to put up the columns for—what do you call it? The concrete for the columns. The house was finished, there was no columns there at all.

10 Q. Now, from the day you gave him this notice to the day he got the check, did he do any work at all? A. I don't know.

Q. What? A. I couldn't tell you.

Q. You know whether he did any work, don't you? A. I couldn't tell you whether he did or not.

Q. You know that he didn't do any work? A. I couldn't tell you.

20 Q. I show you a check for \$800 made payable to David Goldberg, and ask you whether that is the first payment that he got? A. (Referring.) Yes, sir.

Q. What is the date on that check.

Mr. Hart: The check speaks for itself.

A. October 28th.

Q. Look at the date of this notice. What is the date on the notice? A. (Referring.) October 26th.

30 Q. What was Savino waiting for from the time that you served the notice up to the time he got the check? Why didn't he go on with the work? A. If he would give me—

Q. Look at those two and tell us why? A. If he—

Q. Can you tell us why? A. If he would give me a bond, he would have his check the same day which I had the money ready for him.

40 Q. Then you didn't serve the notice because

*David Goldberg—Cross.*

he wasn't doing the work, it was because you wanted the bond that you served the notice, is that right? A. No, sir.

Q. Well, when he gave you the bond, you gave him the check? A. He produced that letter to his counsellor Ely, then he had his check.

Q. Is it a fact that the only reason you didn't pay him the check for \$800 is because you didn't get a bond, is that true? A. I wanted to take— 10

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

Q. Then, it wasn't because he didn't do his work that you didn't want to pay him the \$800, entire? A. He didn't do his work.

Q. You just said he didn't do the work, and that is why you didn't want to give him the \$800? 20

Mr. Hart: I object.

The Court: It is cross-examination of one of the parties to the suit.

Q. Am I right when I say that you just said that the reason you didn't give him the \$800 check was because he didn't finish his work for the first payment, is that right? Yes, or no? A. When he came in there I gave him cash money \$550, as soon as he came in there in the Union National Bank. 30

Q. Is it a fact that the reason you didn't give this plaintiff Savino his money was because he didn't earn the money for the first payment? A. He did earn the money, but I wanted to take off of the bond \$250.00 which I offered him \$550.

Q. Is it true that the only reason that you 40

*David Goldberg—Cross.*

didn't want to give him the check then, was because he didn't give you the bond? A. Why, certainly.

Q. Why did you give him the notice to go on with the work then? A. Because he had to do the work.

10 Q. You just said the work was completed, the bond was all you wanted? A. I went according to the contract.

Q. You just said a minute ago, the only reason you didn't pay that \$800 was because he didn't give you a bond, is that true? A. Yes, sir.

Q. Then why did you give him notice to go on with the work if he was entitled to the payment? A. I was paying him; I even had him  
20 in the bank the day the money was due.

Mr. Hart: Does counsel mean, go on with work up to the time of delivery of this notice, or is this notice for work that was to be done to complete the entire contract?

Mr. Weinberger: The notice reads for itself, and the witness knows perfectly  
30 well what I mean, Mr. Hart.

Q. I again ask you, sir, when you served this notice on October 26, 1916, had he become entitled to his first payment, yes, or no? A. I offered him the money in the bank, and he refused to take \$550.00 according to contract.

Q. He refused to take money, did he? A. In the First National Bank of Lyndhurst, which I could have the clerk for a witness here, and  
40 I cashed a check there.

*David Goldberg—Cross.*

Q. Where is the check that you cashed, the \$550? A. In the First National Bank, of Lyndhurst.

Q. Where is the check for \$550? Have you got it here? A. Yes.

Q. Have you a check here for \$550? Now, do you say you made out a check for \$550? A. 10  
In the bank, and I cashed it and I offered him the money right in hand.

Q. Did you make a check out for \$550? A. In my name.

Q. Have you got it here? A. Not here; but I cashed it in the bank, and offered it to him in the bank, which he didn't accept.

Mr. Hart: Now, if your Honor please, here is a certificate that you might like 20  
to have, Mr. Weinberger.

Mr. Weinberger: I am not interested in your papers.

The Court: The witness says he does not have the check for \$550.

Q. When did you first notice water in that cellar? A. The water was in the cellar before he started to work.

Q. And where did it come from? A. From 30  
the ground; it is no sewers in there, the water is in the ground.

Q. And you wanted to have a waterproof cellar made? A. Yes, sir.

Q. Were you on the job every day while Savino was working there? Did you come down to look at the job? A. I come down, but I didn't interfere.

Q. Was Mr. Kennedy on the job every day? 40  
A. He was there once in a while.

*David Goldberg—Cross.*

Q. Almost every day? A. Not every day, sometimes he was there in the morning, and after he came the next day, or two days later.

Q. Did you see them making this concrete floor in the cellar? A. I have seen it, but I didn't interfere at all.

10 Q. You made no complaints or objections to the work that he was doing or making there, did you? A. I should make—I am not an expert.

Q. Did you? A. I didn't say nothing.

Q. You didn't? A. No, sir.

Q. Did you hear Mr. Kennedy say that the work was going on wrong or anything of that kind, while you were there? A. Kennedy—

Q. Did you? A. Mr. Kennedy was arguing with him all the time he was there.

20 Q. About what? A. That the work didn't go on right.

Q. Poor workmanship, did Kennedy say? A. Well, he—

Q. Did he? A. He told him always what he had to do, and he didn't listen to him.

Q. Goldberg, do you understand English? A. Yes, sir.

Q. I wish you would answer my questions.

30 Did Mr. Kennedy tell Savino that this work was not done right? A. Many times.

Q. Did he tell him the material was not right? A. The material was good material.

Q. Was it waterproof material? A. I don't know nothing about that.

Q. Did Mr. Kennedy make any objection to the material? A. I don't know; I wasn't around there.

40 Q. Well, you just said that he did object? A. When he was putting on the walls.

*David Goldberg—Cross.*

Q. About the cellar floor? A. I don't know; I didn't interfere with him. He is supposed to get a waterproof guaranteed cellar.

Q. Why did you change your mind, to have a reenforced cellar floor made there? A. I didn't change my mind.

Q. Didn't you change your contract at all that you made with Bianchi, that you made with him for this floor? A. I made— 10

Mr. Hart: I object; the contracts speak for themselves.

The Court: The substance of the contract, if it is shown by the contract itself.

Q. Did you change the character of the work that Savino was to do as compared with what Bianchi did? A. I didn't change at all. 20

Q. Why, didn't you agree to have a reenforced cellar there, wall and floor? A. I wanted to have a waterproof cellar; I didn't know nothing about waterproof or reenforced, or anything.

Q. You don't know anything about reenforced? A. No, sir; that's the first reenforced cellar I got.

Q. You got a bond, did you not, from Mr. Savino? A. Yes, sir. 30

Q. Did you accept it? A. No, sir.

Q. Have you got it yet? A. Yes; but I didn't accept it.

Q. Have you got it yourself? A. The counselor got it.

Q. Did you get a bond from him, Goldberg? A. Yes, sir.

Q. Did you keep it from that time until this day? A. He sent a— 40

*David Goldberg—Cross.*

Q. Did you? Did you keep that bond from that day down to this day? A. Yes, sir.

Q. And where is that bond?

Mr. Hart: It is in evidence, marked.

Mr. Weinberger: May I have it, please?

10 Q. When you got this bond, of course, you read it, didn't you? A. I read it—

Q. Did you read it? A. I read it and went over to the counsellor right away.

Q. And when you read the bond, you showed it to your attorney after you read it yourself? A. I told Mr. Savino that bond can't be any good; he should have it endorsed by his father-in-law.

20 Q. After you read this bond, did you show it to your attorney or not? A. Yes.

Q. Now, after you showed it to your attorney, did he give it back to you, your attorney? A. Yes, sir.

Q. And you kept it from that time until today? A. I told—

Q. Did you? A. Yes, sir.

The Court: Is there any use wasting any time on the question of the bond?

30

Mr. Weinberger: No.

Q. Now, Mr. Goldberg, when you told Savino to get out of the place, do you recall what day that was? A. That was on a Monday morning.

Q. And you told him he had no right to come in there and do any more work? A. Yes, sir.

40 Q. Now, who was with him at the time you told him that? A. He came with one fellow by the name of Joe Curcio.

*David Goldberg—Cross.*

Q. You were cleaning the sidewalk at that time? A. We pumped out the cellar.

Q. Were you cleaning the sidewalk yourself at that time? A. No, sir; I didn't clean no sidewalk.

Q. Now, the only thing he didn't finish at the time he came back to do that work was the top trimming of the concrete floor? A. Yes, sir. 10

Q. Then after you chased him from the job that Monday morning, you got Bianchi to tear up the whole concrete floor? A. We had Bianchi there, four days work, and——

Q. Did you have Bianchi tear up the whole cellar floor? A. Not then.

Q. At any time? A. After he tried to fix it, and he couldn't.

Q. Did you tear it up eventually? A. Yes, sir. 20

Q. And then you had a reenforced waterproof cellar made? A. Right.

Q. You found that the water pressure was too strong for the kind of a cellar that Savino made? A. I didn't find nothing. I found that the water was coming in.

Q. You found that the water pressure was too strong for the kind of cellar he made, is that right? A. I didn't—— 30

Q. Is that right? A. The water was coming in gradually through the bottom floor and through the walls.

Q. Now, someone chiseled off a part of that floor, didn't they, to see if there was any water underneath? A. Not that I know of.

Q. Didn't Mr. Ely go down there? A. Mr. who?

Q. Mr. Ely, Mr. Savino's attorney in this case, and look at the place? A. How could he—— 40

*David Goldberg—Cross.*

Q. Did he? A. Mr. Ely couldn't go down because there was two foot of water in the cellar. He was there, Mr. Ely himself; he couldn't go down in the cellar at all.

Q. Did Mr. Savino tell you that he wants that water out of the cellar so that he can complete the job? A. He didn't told me nothing.

10 Q. Didn't tell you that, ever? A. No, sir.

Q. Now, concerning these window frames, did he set the window frames for you? A. He had nothing to do with no window frames.

Q. He didn't do that? A. Not for me; that was up to the carpenter.

Q. Did you ask him to? A. No, sir.

Q. Did you see him do it? A. I got nothing to do with the window frames.

20 Q. Did you see him putting them in? A. He was putting them in; that wasn't my business.

Q. You knew that that wasn't up to him to do, didn't you? A. I got nothing to do with it.

Q. Didn't you know that? A. If he took the contract from the carpenter, I got nothing to do with that.

Q. Do you know who was supposed to put those window frames in? A. I don't know.

30 Q. You just said it was up to the carpenter, didn't you? A. I got nothing to do with the windows.

Q. Was it up to the carpenter or up to this man? A. I don't know.

Q. Did you have any carpenter work there? A. The carpenter was there, but who gave him the order to do it?

Q. Why didn't you tell him that at the time?

40 A. I don't know.

*William H. Hall—Direct.*

Q. Were you present when Mr. Kennedy told him to put back this sand and fill up the excavation he made for the waterproofing of the cellar?

A. Yes. Whereabouts?

Q. Outside? A. Yes, sir.

Q. You were there? A. Yes, sir.

Q. You heard Savino tell Mr. Kennedy that he ought to do it that way, to make this cellar waterproof? A. I didn't hear that. 10

Q. Yes or no? A. I didn't hear that.

Mr. Weinberger: That is all.

WILLIAM H. HALL, called as a witness on behalf of the defendant, being duly sworn, testified as follows: 20

Direct Examination by Mr. Hart:

Q. Mr. Hall, what is your profession? A. Civil Engineer.

Q. How long have you been a civil engineer? A. Fifteen years.

Q. Do you know Mr. Savino, the plaintiff in this action, and Mr. Goldberg, the defendant? A. Yes, sir.

Q. Do you know the building in Lyndhurst, New Jersey, erected by Mr. Goldberg, for whom Mr. Savino worked? A. Yes, sir. 30

Q. Were you there during the progress of the work being done by Mr. Savino upon that building? A. Well, part of it.

Q. Have you prepared a tracing indicating the size of this building as finished? A. Yes, sir.

Q. You surveyed and measured it on the ground, did you? A. Yes, sir. 40

Q. I show you what purports to be such a trac-

*William H. Hall—Cross.*

ing surveyed for D. Goldberg, August 14, 1917, Scale 1-30, and ask you whether that is the tracing you prepared, and whether that truly represents the size of the building? A. Yes, sir, it does.

10 Q. I point your attention in this tracing to the measurement 49-30 and 47-50, and applied to a two-story brick house, and ask you whether those are outside measurements? A. Outside measurements, yes, sir.

Mr. Hart: I offer it in evidence?

Mr. Weinberger: No objection. (Marked Exhibit D-6.)

Q. While you were upon the ground and Savino was there, did you observe any water in  
20 the cellar at this place? A. Yes, sir.

Q. Where was it coming from into the cellar?

A. I am not positive about it, where the water came from, but there was at least eighteen inches or two foot of water in the cellar at the time I——

Q. Did it come through a pipe in the side wall? A. That I am not positive about.

30 Cross-Examination by Mr. Weinberger:

Q. You don't know where the water came from? A. No, sir; I couldn't absolutely say.

Q. You made the lines, did you not, for Mr. Savino? A. Yes, sir; I did.

Mr. Weinberg: That is all.

*Romeo Bianchi—Direct.*

ROMEO BIANCHI, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Hart:

Q. Mr. Bianchi, what is your business? A. Building cement work.

Q. How long have you been in that business? 10  
A. Oh, about eight or nine years.

Q. Doing cellar cement work and waterproofing work of that character? A. Yes.

Q. Are you the Romeo Bianchi who is described in contract D-4? A. (Referring.) Yes.

Q. Do you know Savino, the plaintiff in this case? A. Yes, sir.

Q. You know Goldberg, the defendant? A. Yes, sir. 20

Q. And the property that is being discussed, the building being erected by Goldberg at Lyndhurst, New Jersey? A. Yes, sir.

Q. Did you work upon that building while Savino was there? A. No.

Q. Did you take his place after he left? A. After; yes.

Q. Just describe what you found the condition of the cellar floor in when Savino abandoned the work? A. Mr. Kennedy and Mr. Goldberg came and told me to go ahead if I could finish the cellar. I worked about three and a half or four days with my gang of men and tried to finish the cellar. It was an impossible thing to do it. I go back and tell it to Mr. Kennedy and Mr. Goldberg, the property owner. 30

Mr. Weinberger: Never mind what you told them. I object to whatever this witness told to Kennedy or the owner. 40

*Romeo Bianchi—Direct.*

Q. What was the trouble with the cellar? A. I told them—

The Court: Not what you told them, what did you find the matter with the cellar?

10 The Witness: The water coming through too fast; you couldn't finish the cellar.

Q. The water came through the cellar floor?  
A. Through the cellar bottom.

Q. Why? A. It must be the concrete wasn't done right when he done it.

Q. Was it waterproofed floor or not? A. Yes, it was waterproofing.

20 Q. Was the floor of the cellar waterproofing, or how did it come through? A. He didn't use it right.

Q. You finally tore that floor up, did you? A. Yes.

30 Q. What did you find when that floor was torn up? Was the cement laid the same thickness throughout? A. Some places it was thick, about 18 inches; some places it was 6 inches, some places it was 2 inches; it was all mixed up with mud and everything in the cellar; wood and a piece of board, and everything in.

Q. Did any water come through the side walls? A. Yes, sir.

Q. Did you notice a pipe passing through the cellar walls? A. Yes, sir.

Q. Was there water coming through the wall around that pipe? A. No; no water coming through in there.

40 Q. You were paid \$1,300.00 weren't you, for doing this work? A. Yes, sir.

Q. You have waterproofed a great many cellars, haven't you? A. Yes.

*Romeo Bianchi—Cross.*

Q. About how many? A. Oh, about twenty in the town.

Mr. Hart: That is all.

Cross-Examination by Mr. Weinberger:

Q. This cellar which you made here was a re-enforced cellar? A. It don't make any difference, I put it reenforced to be sure of my work. 10

Q. Isn't the price different between the re-enforced cellar, and just an ordinary cellar? A. The price is different, yes, sir.

Q. You thought it was necessary to have a re-enforced cellar? A. I thought to guarantee my work, yes.

Q. Ordinary waterproof you wouldn't guarantee? A. Well, except to myself; I got to do my work. 20

Q. You wouldn't guarantee an ordinary waterproof? A. Yes, sir.

Q. You told that to Goldberg? A. Yes, sir.

Q. And in order to put in a reenforced cellar, he told you to tear up the whole cellar? A. Yes, sir.

Q. Then you tore up all the work there, the whole floor, and you put in reenforced cellar, is that right? A. Yes, sir. 30

Q. You also fixed the walls? A. Yes, sir.

Q. And there wasn't any water coming through the walls, was there? A. Yes, sir.

Q. Did you reenforce the walls too? A. No; only the plaster.

The Court: Why was it necessary to re-enforce the cellar and not the side walls.

The Witness: It was only necessary to waterproof the walls, plaster and waterproof. 40

*Romeo Bianchi—Cross.*

The Court: Then the wall was better than the cellar floor?

The Witness: Yes, the wall was better, only he never plastered it right. When he waterproofed it, he never plastered it right.

10 Q. How can you tell if he did or did not? A. Because I take the hammer, every time I hit it with a hammer, about a piece of a square foot come out.

Q. Well, wouldn't water affect it if water was on the outside of those walls? A. The waterproof came out too.

Q. Wouldn't water affect the walls, that is, standing there, fresh concrete? A. If you ham-  
20 mer fresh concrete with a hammer, yes.

Q. And water was between it and the outside, wouldn't it break? A. Yes, the waterproofing, the plaster, and waterproofing.

Q. When you came there, what was still to be done? A. Only put the finish on top.

Q. What would that cost? A. Well, the prices it would cost—

Q. You know what the contract called for? A.  
30 Yes.

Q. What would that finish cost? A. The finishing coat on top of the concrete?

Q. Yes. A. Between eight and ten cents a square foot.

Q. How much would that be, about? A. \$135, \$140 or \$150.

Q. Well, how many square feet were there there, do you know? A. About 2,000 square feet.

Q. Wouldn't it cost about three cents a square  
40 foot? A. Three cents, no waterproofing.

*Romeo Bianchi—Re-cross.*

Q. Eight cents a square foot? A. Between eight and ten cents, the waterproofing would cost.

Q. What would it cost a cubic foot? A. All good finish and concrete?

Q. Yes. A. Well, about sixty and sixty-five.

Q. Cents? A. A cubic foot.

Q. How long after he left this job did you start on it? About three weeks, or two weeks, or a month? A. Well, I can't tell exactly now. It was a little while after. 10

Q. About three weeks after, wasn't it? A. I can't tell exactly.

Q. You don't know how the water got in there between the time he left the job and you came back, do you? A. I never looked in there; the water came from the bottom. 20

Mr. Weinberger: That is all.

Re-Direct Examination by Mr. Hart:

Q. What was the additional cost of reenforcing the cellar floor to laying a cellar floor not reenforced? A. So much a thousand it cost, so many hundred.

Q. Well, approximately how much more did it cost to reenforce the floor than to lay it not reenforced? A. Well, I got about \$80.00 to reenforce it. 30

Q. About \$80.00? A. Yes; to reenforce.

Mr. Hart: That is all.

Re-cross-Examination by Mr. Weinberger:

Q. \$80.00 for whatt? A. To reenforce.

Q. You mean for the material? A. Yes; for the material. 40

Q. The work is harder too, isn't it? A. Yes.

*Enrico Bianchi—Direct.*

Q. Much harder? A. No, no.

Q. There is a big difference in labor? A. Oh, well, there is not much difference.

Q. But there is a difference. A. It don't take long to put the reenforce down.

Q. There is a difference? A. A little difference; not much.

Mr. Hart: The process is simply to lay the iron on the concrete?

The Witness: Yes.

ENRICO BIANCHI, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

20 Direct Examination by Mr. Hart:

Q. Mr. Bianchi, what is your business? A. Mason.

Q. How long have you been a mason? A. For about 20 years; I start when I 20 years old.

Q. You worked for your brother, the last witness, upon this Goldberg job, didn't you? A. Yes.

30 Q. What did you find the condition of the floor when you went there? A. It was awful bad condition.

Q. Just describe that condition? A. Because some places I find sixteen inches, twenty inches, the concrete; some places it was two inch.

Q. That is, thickness of the cellar floor? A. Yes.

Q. How was it mixed? A. It was "bum" mixed, because it have dirt, rags and piece of  
40 wood.

*Enrico Bianchi—Cross.*

Q. Now, why did you have to tear that floor out? A. I got to tear it out because it was impossible to stop the water.

Q. The water leaked through? A. Through the floors and the wall too.

Q. Was any water coming through the pipe in the side walls? A. Oh, no.

Q. Around outside the pipe? A. No water. 10

Mr. Hart: That is all.

## Cross-Examination by Mr. Weinberger:

Q. You don't know where the water came from? A. The floors and the wall.

Q. There was a lot of water in there when you came there? A. Oh, yes, some places six inch, some places eight, because the concrete in there was—— 20

Q. And when you came to the job there was water there? A. Sure there was.

Q. But where it came from you don't know. You waited to try it first? A. Yes; put a pump in it.

Q. When you got there the only thing necessary to finish was the trimming there? A. The trimming there, the finish. 30

Q. Concrete? A. Yes, and the stairs too.

Mr. Hart: The areas, you mean?

The Witness: The area and the cellar stairs.

Mr. Weinberger: That is all.

*Karl Hillamael—Direct—Cross.*

KARL HILLAMAEL, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Hart:

Q. Did you work in this Goldberg house at Lyndhurst when Mr. Savino was there? A. Yes.

10 Q. What is your business? A. Plasterer.

Q. Did you see the cellar floor that was laid there by Savino? A. Yes.

Q. Were you there when the cellar floor was pulled up, dug up? A. Yes.

Q. What was the thickness of the floor that you dug up? Was it all one thickness? A. 16 inches; 4 inches; 2 inches; 10 inches.

20 Q. Why did you dig it up? A. Because the water came in.

Q. Came in or through? A. From the sides and from the bottom.

Q. Any water come through the pipe in the side wall? Not through the middle of it, but through the outside? A. No.

Mr. Hart: That is all.

Cross-Examination by Mr. Weinberger:

30 Q. Did you tear up the floor? A. Yes.

Q. How did you take it out? A. With chisels and picks.

Q. And what else did you use to get it out? A. Shovels.

Q. How many days did it take you to break that up? A. I don't know.

Q. You don't know how many days? A. No.

40 Q. Pretty tough job, wasn't it? A. In some places it went easy and some places it didn't.

Mr. Weinberger: That is all.

*Mark Eldridge—Direct.*

MARK ELDRIDGE, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Hart:

Q. Mr. Eldridge, what is your business? A. Mason.

Q. How long have you been a mason? A. 10  
Oh, about fourteen or fifteen years.

Q. Did you work upon this Goldberg place?  
A. Yes, sir.

Q. Who did you work for? A. For Mr. Savino.

Q. Was it while he was building the side walls or the floor? A. While he was putting in the concrete and waterproofing, the side walls up four feet. 20

Q. And putting the concrete in the cellar floor?  
A. Yes, sir.

Q. Were you doing that work? A. I had nothing to do with the concrete of the cellar floor; I was only putting on the plastering on the cement four feet above the level.

Q. While you were doing that work on the side walls for Savino, was the water leaking through the side walls? A. At the bottom; yes, 30  
sir.

Q. It wasn't a waterproof job then, was it?  
A. No, sir.

Q. Did you speak to Savino about it? A. I spoke to Savino about putting down—I made several suggestions to him, but they wasn't carried out, about putting down a base along the wall, leaving it there a certain time. You couldn't apply the waterproofing to the walls where the water was coming through, because the water 40  
would wash it away.

*Mark Eldridge—Direct.*

Q. What did he say to you then when you made the suggestions? A. I don't just recollect, only I know the suggestions were not carried out.

Q. He told you to go ahead? A. I did just what I was told to do, that is all.

10 Mr. Weinberger: Just a minute; I don't think counsel ought to lead the witness.

The Court: Do not ask leading questions; that is the objection.

Q. Were the suggestions carried out, or were they not carried out? A. They were not.

Q. Do you think they were good suggestions to make? A. I did think so.

20 Q. Do you think they were necessary in order to do a good waterproofing job? A. Well, to make the best of the job, yes; of course, they wouldn't need to be done if things were carried out right in the first place.

Q. Well, was this work carried out right in the first place? A. Well, I wouldn't like to say that. I don't like to say anything to the detriment of anybody, but it could be done different from what I have seen done as far as water-  
30 proofing is concerned.

Q. Were you there when the concrete was laid in the floor? A. Yes, sir.

Q. Was the floor pumped dry before it was laid? A. No, sir; it was impossible to be dry. Through Lyndhurst we have what we call a water level, and the digging of that foundation was below at certain times, below the water level, and there is where most of the water  
40 come from, and things had to be done first to pump that out.

*Mark Eldridge—Cross.*

Q. Was it laid in the water? A. There was water in the cellar when it was laid. Why, we had a pump there; there was a low spot in the cellar and he was trying to pump it out, and if he kept a man at the pump all the time, he could have proceeded with his work.

Q. Did he keep a man at the pump all the time? A. During the day he would have a man pumping there, but what's the use? The water came back in the night. 10

Q. How about the concrete in the bottom? Was that mixed with earth? A. Well, it would be when it was dropped down on top of it.

Q. Did you see the concrete bottom after it was laid? A. Well, I had never seen it when it was perfectly set, I didn't, but I was there while a good part of it was being laid there. 20

Q. Was the water leaking through it then? A. Bound to come through, for the cement wasn't set.

Q. While you were plastering the side walls, how deep was the water you were standing in? A. I was working in boots.

Q. And how deep was the water? A. Well, I don't know, about up to—Oh, in some places it was all right on a plank, and other places it wasn't. 30

Q. Well, about how deep? A. Oh, I don't know; some places a couple of inches; other places eight or ten inches; something like that.

Cross-Examination by Mr. Weinberger:

Q. You are a mechanic, are you not? A. Yes, sir.

Q. You worked on this job how long? A. One 40

*Mark Eldridge—Cross.*

day I went there and pointed up the foundation. Mr. Savino came down after me; he had to have a union man, and he came down after me, and asked me as a favor if I wouldn't come up and I says, "Yes." And I went up and pointed up the foundation. Then Mr. Savino came down  
 10 one night to my house and asked if I wouldn't come up and apply this plastering.

Q. How long in all did you work there? A. I worked there one-half of a day; then I worked there, I think, it was two days after, if I ain't mistaken.

Q. You weren't there when he finished the job, were you? A. No, I was there—I wasn't there when the top coat was put on.

Q. You don't know what the condition was  
 20 when the top was completed? A. No; I don't; I wasn't there, no, sir.

Q. You don't know whether any water came in there at that time at all, when he completed the job, I mean? A. Unless they treated the walls some different, the water was bound—

Q. You don't know? A. No; I don't know.

Q. You do know he had a man there pumping out the water? A. At certain times.

30 Q. Well, when you were there during the day? A. Part of the time; not always while I was there.

Q. And Mr. Kennedy was there right along when he was doing this work, the architect? A. Mr. Kennedy or his son.

Q. They were generally on the job? A. Mostly when I was there, the son was there.

40 Q. No complaints were ever made about Mr. Savino's work by either of them in your presence? A. I had no conversation whatsoever

*Joseph Curcio—Recalled—Direct.*

with them. As far as I could see, all the material, and all and everything was A-Number 1.

Q. And about the waterproofing material? A. Of course, you see there is several different grades of waterproofing material.

Q. You say it is A-Number 1? A. It has to be when there is broken rock and cement and cow-base sand. It cannot be otherwise, because that is the best ingredients. 10

Q. It was A-Number 1 water proof? A. As far as I could judge; as far as what the producers claim.

Mr. Weinberger: That is all.

JOSEPH CURCIO, recalled as a witness on behalf of the defendant, having been duly sworn, testified as follows: 20

Direct Examination by Mr. Hart:

Q. Curcio, you were Savino's foreman on this job? A. No; I never was a foreman.

Q. Weren't you in charge of the work? A. No, he gave me my wages.

Q. Well, who was in charge of the work there? 30  
A. Savino.

Q. Anybody else? A. No.

Q. Did you do any digging for him around the outside of the wall? A. No.

Q. Did you do any digging anywhere else for him? A. I dig the cellar, where the contractor build the cellar.

Q. What did he tell you about digging holes in the cellar to let the water run in? A. No; I no dig hole there. 40

*Joseph Curcio—Recalled—Cross.*

Q. Did he tell you to dig any hole in the cellar to let the water run in? A. I dig the cellar, and he dig a hole.

Q. How about the outside? A. He no had no hole outside.

Q. You didn't dig around the foundation? A. I never dig; no.

10 Q. Did you see that cellar when the concrete was down and when Savino left the job? A. Yes.

Q. Was there any water coming through the cellar floor? A. Sure; because they no pump it out. The water had to come out.

Q. If you didn't pump it out, the water would come right through that cellar floor? A. Because they had no pump.

20 Q. Was the water coming out through the side walls, too? A. All over.

Mr. Hart: That is all.

## Cross-Examination by Mr. Weinberger:

Q. Who put the concrete floor down? A. He did.

Q. Savino himself? A. Yes.

30 Q. How did he do that? A. He put it on a chute and levelled it up. Who levelled it up? A. He did.

Q. Did he have board there ten feet long? A. Yes.

Q. How long were the boards? A. About eight or ten foot.

Q. And between those two boards did he put the cement? A. I don't know, because I never looked at it, because I stayed in front of the door.

40 Q. Don't you know that he went to work and put boards there twenty feet long, two by ten,

*James Ronzo—Direct.*

to fill in the concrete? A. Well, they got to have a board; they can't run a wheelbarrow without a run.

Q. Were you there every day? A. Yes.

Q. Now, when he did the work and finished the job except the top trim, was there any water there then? A. I never go in since. When they 10 stop Saturday?

Q. Yes? A. I never went in after that.

Q. Then you don't know whether there was any water in there after that, do you? A. where?

Q. After that Saturday when you stopped, you don't know whether there was any water in the cellar? A. He stopped me, and he said it was water in, and "you can't work any more."

Q. That was from the 7th to the 14th, wasn't 20 it? A. I don't know.

Mr. Weinberger: That is all.

JAMES RONZO, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Hart:

Q. Ronzo, you know Savino and Goldberg? 30

A. Yes, sir.

Q. You have worked in Lyndhurst, haven't you, for Savino? A. Yes, sir.

Q. What is your business? A. Carpenter.

Q. What did you do there? A. I do the forms for the concrete.

Q. And when you made these forms for the concrete for the side walls, did you put the wood right against the earth on the outside? 40

A. Well, I put one piece on the bank and another one in the cellar.

*James Ronzo—Cross.*

Q. Then you threw the stuff inside? A. Yes, sir.

Q. Were you there when the concrete was laid on the cellar floor? A. Yes.

Q. Did the water come through that? A. Oh, sure, it was coming through.

10 Q. Did it come through the side walls? A. It comes all over.

Q. Do you remember a time when the stakes were removed and there was a mistake of eleven inches in that wall? A. Why, I had my steel tape line, and me and Carmine Savino measured it, and he told me it was supposed to be forty foot front. Then I says to him, "On a distance of forty foot, how we going to put our forms in?" Then he started putting the form  
20 from the back, and then we had to shovel about eleven inches.

Q. And when you pointed out that he was putting his forms down eleven inches narrower, what did he say to you? A. He says, "We got no more room to put it; we got to put it here."

Q. That was his answer, was it? A. Then, the engineers, they gave me another distance altogether.

30 Q. The engineer gave you several distances, didn't he? A. Yes, sir.

Q. The stakes moved? A. Yes, sir.

Mr. Hart: That is all.

Cross-Examination by Mr. Weinberger:

Q. How long does it take for concrete to dry, do you know? A. What do you mean?

Mr. Hart: He is not a mason.

40 Mr. Weinberger: That is all.

Mr. Hart: That is the case, sir.

*Carmine Savino—Recalled—Direct.*

CARMINE SAVINO, recalled as a witness in his own behalf, having been duly sworn, testified as follows:

Direct Examination by Mr. Weinberger:

Q. Mr. Savino, I show you a check dated October 28, 1916, and ask you whether that was the date on which you got the money? A. I got my money October 30, 1916. 10

Mr. Weinberger: I offer that check in evidence. (Marked Exhibit P-5.)

Q. Now, I show you notice dated October 26, 1916. At the time that you were served with that notice, were you entitled to your payment of \$800? A. Yes, sir.

Q. Was there any work that you ought to have done which you did not do at the time that notice was served on you? A. No, sir. 20

Q. Why didn't you proceed at that time with the work? A. Because my contract called for a first payment of \$800 when the walls were up.

Q. And were you waiting for the payment? Yes, sir.

Q. Now, concerning this floor which was made by you, will you just state to the Court and Jury how long it would take for the concrete to dry so as to prevent water flow? A. Thirty days. 30

Q. How long was that on before you were chased from that job, or driven from the job? A. About six days.

Q. Now concerning the top coating or drifting that you put on there, is that also made of waterproof material? A. Yes, sir; that would strengthen the waterproofing.

Q. Did Mr. Goldberg permit you or give you privilege to put that on? A. No, sir. 40

*Carminé Savino—Recalled—Cross.*

Q. You wrote a letter, did you not, to Messrs. A. C. Hart & Vanderwart? A. I signed that letter; yes, sir.

Q. And why was that letter sent? Will you just state? A. We had been trying—

10 Mr. Hart: I submit that that is not proper rebuttal testimony.

Mr. Weinberger: I wasn't there at the time the witness testified on direct, and I don't just know what the evidence was.

The Court: Do not get it in a second time.

20 Q. When you left that job, what was the condition concerning water in the cellar? A. It was water dripping down from the ceiling, water dripping out of this faucet that was in the cellar out of which all the workmen in the building were getting their water.

Q. Where was that faucet? A. In the front of the cellar wall.

Mr. Weinberger: That is all.

## Cross-Examination by Mr. Hart:

30 Q. Mr. Savino, when were the side walls of this building finished? Before you got your \$800 payment, were they not? A. Yes.

Q. About how long? A. About 18 days.

Q. 18 days? A. Yes, sir.

Q. Then, we will assume that it was about the 10th of October that those side walls were finished, isn't that true? A. They were entirely finished on the 12th.

40 Q. Mr. Ely was your first lawyer in this case, wasn't he, Addison Ely, Jr.? A. Yes, sir.

*Carmino Savino—Recalled—Re-direct.*

Mr. Hart: With permission of counsel for the plaintiff, I offer in evidence the certificate of Joseph Kennedy for the \$800 payment which was made to Savino, the certificate being dated October 19, 1916, upon which certificate the \$800 represented by Exhibit P-5 was paid? 10

Mr. Weinberger: That goes in as a defendant's exhibit?

The Court: Yes.

(Marked Exhibit D-7.)

Re-direct Examination by Mr. Weinberger:

Q. Did the gentleman who was on the stand, the mechanic, make any suggestions to you that you wouldn't approve of, or didn't do, about the way the work ought to be done? A. Why, I don't remember him telling me anything. I was hiring him; I was telling him what to do. 20

Mr. Weinberger: That is all.

The Court: Where does the mortgage stand?

Mr. Hart: I propose to present my motion again on the lien claim, that the bill of particulars is entirely different from 30

the proof. There is no proof as to the mortgage.

The Court: What do you want done with that mortgage?

Mr. Hart: As a matter of fact, it is of little consequence, but I think it should be dismissed.

Mr. Weinberger: If I understand your Honor's point correctly, the question is whether we ought to offer proof as to priority? 40

*Carmine Savino—Recalled—Direct.*

The Court: That is it, exactly.

10 Mr. Weinberger: I will ask for that, but I assume that the money was in the hands of the attorneys for the building and loan association, depending upon this judgment, so that if there should be a verdict rendered by this jury in favor of the plaintiff, the mortgagee would turn over this money; so that it is of little consequence.

Mr. Hart: May I show counsel personally whether there is any money held or not? The building cost \$18,000 to build.

The Court: I think you ought to get something so you get your records right.

20 Mr. Weinberger: May we not stipulate that the mortgagee will pay this money?

Mr. Hart: I cannot very well stipulate as to anything, but I can show you.

Mr. Weinberger: May I offer Mr. Savino to show that this money is in the hands of the mortgagees?

The Court: Mr. Stenographer do not take this.

30

CARMINE SAVINO, recalled as a witness on his own behalf, having been duly sworn, testified as follows:

Direct Examination by Mr. Weinberger:

Q. Mr. Savino, do you know how much money was paid out on account of this building by the mortgagees? A. By hearsay, I do.

40 Q. Well, how much money has been paid out?  
A. \$6,500.

The Court: That is hearsay.

*Carminé Savino—Recalled—Direct.*

Q. Well, do you know from Messrs: Luce & Kipp? A. Yes, sir.

Q. Are they the attorneys of the company? A. Yes, sir.

Q. And how much money did they tell you they had in their hands to protect you in this matter? A. They asked me what my claim was, and they said they would hold out enough to protect me. 10

Q. How much did they hold out? A. I think they said they held out \$6,500.

Q. And this was money due on this mortgage executed by Goldberg and his wife to the building and loan? A. Yes, sir.

The Court: How about you offering your lien claim? It is admitted that if there is any judgment, there should be a general and special judgment? 20

Mr. Hart: Yes.

The Court: Then the lien claim may be considered in evidence.

Mr. Hart summed up the case to the Jury on behalf of the defendant.

Mr. Weinberger summed up the case to the Jury on behalf of the plaintiff.

30

40

**Charge.**

CUTLER, J.: Gentlemen of the Jury, there is very little law in this case. It is one largely of fact for you to determine, and determine the credibility of the witnesses, because the story of the two parties, and the witnesses which they have produced, differ materially, and it will depend largely upon which story you believe as to  
10 how your judgment should go.

There is no dispute in this case that on the 16th of September, 1916, the plaintiff and the defendant, Goldberg, entered into a written contract, and that contract, gentlemen, is before you, and is the contract which bound both those parties. That is what they agreed to do. Mr. Savino can compel Mr. Goldberg to live up to that written contract, and Mr. Goldberg can com-  
20 pel Mr. Savino to live up to that contract, unless that contract has been modified and changed, not by one of the parties, but by mutual consent. That contract provides that if there is to be any extra work, the order must be given for that extra work in writing. So as long as that contract stands, unless there has been some change made, the extra work, unless in writing, cannot be recovered for; but there is no law that two people cannot change a written con-  
30 tract provided they agree to it. But if they do not agree to a change, why, of course, the contract stands.

Now, there are two items of extra work which you have to consider, and you might as well consider them now. One is for the excavating around the outside of that building, and you are to say, gentlemen, whether there was any order to do it. If Mr. Savino excavated around the  
40 outside of that building without the consent and the order, the positive and direct order of the

*Charge.*

owner of the building, Mr. Goldberg, or of his architect, he cannot recover, because he agreed in writing that no extra work should be done except by written order, and the law then says that that written order may be modified by a verbal agreement of both the parties. Now, was there an agreement of that kind? You may look at the contract, and it may throw some light upon it. If you look at the portion of the contract which refers to the waterproofing, you are to say whether or not the contract, as signed, did not call for the waterproofing on the inside of that building, so far as the outside wall is concerned. You have the contract before you, and you will notice the diagram at the bottom, and you are to say whether or not the original contract (I am not speaking of the cellar floor, but of the side walls) did not call for the waterproofing on the inside. If it did, why should the parties excavate to put the waterproofing on the outside? That is a question for you to consider.

So far as the windows are concerned, you have heard the evidence on that. It is a small item, an item of \$4.00. If it was ordered and agreed to be paid for by Goldberg, he ought to pay for it. If there was no specific order given under the contract, Savino cannot recover for it. So much for the extra work.

Now, as to the contract itself: Savino was to do certain work. He was to build a wall that was waterproof. He was to build a cellar bottom that was waterproof; but right here, gentlemen, when you come to look at that contract, it had to be built in a particular way; certain depth; certain thickness of certain material, and if he did

*Charge.*

all of that, put it in according to the contract as specified, and it did not prove to be waterproof, and it required a reenforced cellar to make it waterproof, Savino was not responsible for that. He was bound to do what they told him to do in that contract and what he agreed to do, and to  
10 waterproof it in the manner in which he agreed to do. If he did that, that was all that he was required to do, because that was the contract work which Mr. Goldberg and the architect would require him to put in. Now, they say that after the work was begun, it was mutually arranged that that should be changed, the water-  
proofing, and that they should use other material instead of the paper and pitch that was  
20 originally called for, and that is admitted, as I understand it, by both parties. It was agreed upon. If, in doing that, Savino did what they required him to do, and the wall was not waterproof after he had done what the contract required him to do, he could recover. But he did not complete the work, and the contract says that before he could recover the whole amount, he must complete his contract. He gives you as  
30 an excuse that he did not complete it because they gave him a three days' notice, and that when he went back there to do the work, they would not let him complete it. If that is true, gentlemen, and without any acts on their part, they refused to let him complete the work, they cannot prevent him from recovering money that is due him by their own action; but they say that they prevented him from doing the work because the work was improperly done; that the  
40 water came right up through this cement, and when they took it up, instead of being six inches in depth as they called for throughout the whole

*Charge.*

cellar bottom, it was only two inches in part, part of it ten inches, some two inches, some four inches. That was not the kind of a cellar he agreed to put down. According to this contract, he agreed to put down a cellar bottom that was six inches of cement and cracked stone, and then a top dressing over it, and if the water came through into that cellar because of that defect in the building of it, why, he cannot compel this gentleman, Mr. Goldberg, to accept a work of that kind. And so, gentlemen, you see it is a question of fact for you to determine just exactly what was done. 10

Then comes another proposition. There was a mortgage on this property given by the owner to the building and loan association. The statute of New Jersey, in reference to lien claims, says: 20

“Every mortgage given, or to be given upon lands in this State, shall have priority over any claim that may be filed in pursuance of this Act, to the extent of money actually advanced and paid by the mortgagee and applied to the erection of any new building upon the mortgaged lands, or any alterations, repairs or additions to any building on the said lands, provided said mortgage be registered or recorded before the filing of any such claim.” 30

Now, in this case, it appears that the lien claim was filed on the 19th day of January, 1917. That is when the lien claim was filed. The building was begun on the 16th day of September, 1916, and the mortgage was dated November 28th, 1916, and was recorded on the 15th day of December, 1916, and it was for the sum of Eight Thousand Dollars. Now, that mortgage would be a prior lien to the lien of Mr. Savino, 40

*Charge.*

provided the money had been advanced, all of it; but it appears here that only Sixty Five Hundred Dollars had been advanced, so that, if you find for the plaintiff in any amount, his claim would be subsequent to that mortgage to the extent of Sixty Five Hundred Dollars; that  
10 is to say, the building and loan association has a mortgage there of Sixty Five Hundred Dollars ahead of Mr. Savino's claim of Eight Hundred, as called for, because Fifteen Hundred of the Eight Thousand has not been advanced.

You are to take this case and consider the facts. The contract price calls for Eight Hundred Dollars still to be due. If the plaintiff has failed to carry out his contract without any excuse for so doing, he cannot recover anything.  
20 If the plaintiff has complied substantially with the terms of the contract, but certain work has been ill done, or improperly done, the plaintiff is entitled to recover, but the defendant should be allowed such sum as it will cost him to complete the contract. Now, if you consider that this contract was done, completed, by Mr. Savino, except so far as the cellar bottom is concerned, then you are to determine how much  
30 should be allowed the defendant to make good the defects that Savino left in his work. If the contract has not been substantially complied with, and the plaintiff has been prevented from doing so by the defendant, he can recover for the work done, such proportion of the entire price as the fair cost of that work bears to the fair cost of the whole work, and in respect to the work not done, the profits that he would  
40 have earned in completing it, and there is no

*Charge.*

evidence in this case what the profits would be in putting down this extra cellar bottom, the outside cellar bottom. That, gentlemen, is the plaintiff's case.

Now, the defendant in this case denies that he owes the plaintiff anything. On the contrary, he says the work was so improperly done that he had to enter into a contract to have it done over again, and that instead of costing him Eight Hundred Dollars, it cost him some Thirteen Hundred Dollars. You have the contract. And that he is entitled to recover the difference between the two sums, the sum that he would have paid Savino, and the sum he paid to have the work done by way of a counter-claim; in other words, in round numbers, he would be entitled to recover Five Hundred Dollars in round numbers against Savino.

Now, you are to take the case. If you believe the work was substantially done, then he is entitled to recover that amount, less whatever you say it cost to complete this cellar bottom, and that would be a general verdict against the defendant, and specially against the building, but subject to the mortgage to the extent of Sixty Five Hundred Dollars. If you believe that the work was not done, has not been completed, that the defendant had to do the work over again at the cost of Thirteen Hundred Dollars, then the defendant would be entitled to a verdict against Savino for those two amounts.

You are to take the case, consider it carefully, and then render such verdict as you think the evidence warrants.

I have been requested to charge you as follows, as a proposition of law:

*Charge.*

The jury may not find a verdict to compensate the plaintiff for the items alleged extra work, unless they find that the work was done because of a written order from the owner, approved by the architect, and an express agreement in writing as to the cost. I refuse to charge you that, gentlemen, except as I have already said. That would be the law unless the parties agreed mutually to change the contract so far as the extra work is concerned. Now, gentlemen, you may retire.

You will note, Mr. Stenographer, that the mechanic's lien claim was offered in evidence, but was not marked.

20

30

40

**Exhibit P-1.**

2901—AGREEMENT FOR BUILDING

## ARTICLES OF AGREEMENT

Made the Sixteenth day of September, One  
Thousand Nine Hundred and Sixteen,

BETWEEN David Goldberg of the Township  
of Union, County of Bergen, and State of New 10  
Jersey, of the First Part;

AND Carmine Savino of the Township of  
Union, County of Bergen, and State of New  
Jersey, of the Second Part;

WITNESSETH, FIRST,—The said party of the  
second part, does hereby for himself, his heirs,  
executors and administrators, covenant, promise 20  
and agree to and with the said party of the  
first part, his executors, administrators or as-  
signs, that he the said party of the second  
part, his executors or administrators shall and  
will for the consideration hereinafter mentioned,  
on or before the 10th October, 1916, Finish  
the walls of Building including Areas and Steps,  
and the complete Cellar Bottom Nov. 1st, 1916,  
well and sufficiently erect and finish the Foun-  
dation walls and Cellar Bottom and waterproof- 30  
ing of same of new Building about to be erected  
on the south side of Valley Brook Ave., Lynd-  
hurst, N. J., agreeably to the Drawings and  
Specifications made by Joseph Kennedy, Arch-  
itect, and signed by the said parties and here-  
unto annexed, within the time aforesaid, in a  
good workmanlike and substantial manner, un-  
der the direction of the said Architect, to be tes-  
tified by a writing, or certificate, under the hand 40

*Exhibit P-1.*

of the said Architect, as hereinafter mentioned, and, also, shall and will find and provide such good, proper and sufficient materials of all kinds whatsoever, as shall be proper and sufficient for the completing and finishing of all the Foundations and Cellar Bottom (waterproofed) works of the said BUILDING mentioned in the Foundation Specification for the sum of Sixteen Hundred Dollars (1600.00).

AND the said party of the first part does hereby, for himself, his heirs, executors and administrators, covenant, promise and agree, to and with the said party of the second part, his executors and administrators, that he, the said party of the first part, his executors and administrators, shall and will in consideration of the covenants and agreements being strictly performed and kept by the said party of the second part as specified, well and truly pay or cause to be paid unto the said party of the second part his executors, administrators and assigns, the sum of \$1600.00 Sixteen Hundred Dollars, lawful money of the United States of America, in manner following:

30	1st when Cellar Walls are up,	\$800.00
	2nd " Complete	800.00
		<hr/>
		\$1600.00

PROVIDED, that in each of the said cases, a certificate shall be produced, signed by the said Architect, to the effect that the work is done in accordance with said Drawings and Specifications, said certificate, however, in no way lessening the total and final responsibility of the

*Exhibit P-1.*

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

AND IT IS HEREBY FURTHER AGREED BY AND BETWEEN THE SAID PARTIES: 10

FIRST.—The Specifications and Drawings are intended to co-operate, so that any works exhibited in the Drawings; and not mentioned in the Specifications, or VICE VERSA, are to be executed the same as if they were mentioned in the Specifications and set forth in the Drawings to the true meaning and intentions of the said Drawings and Specification, without any extra charge whatsoever. Copies thereof certified by the Architect to be true copies shall be furnished to the Contractor. 20

SECOND.—The Contractor, at his own proper costs and charges, is to provide all manner of materials and labor, scaffolding, implements, moulds, models and cartage, of every description for the due performance of the several erections. 30

THIRD.—Should the owner at any time during the progress of the said BUILDING, request any alterations, deviations, additions or omissions, from the said contract, he shall be at liberty to do so, and the same shall in no way affect or make void the contract, but will be added or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation. 40

*Exhibit P-1.*

## MASON'S SPECIFICATION:

MASON'S SPECIFICATION for a three story Brick Store, Dwelling, and Lodge room Building also Barn to be Erected on Property on the south side of Valley Brook Ave., Township of Union (Lyndhurst) Bergen County, N. J.

10

David Goldberg:

Owner:

Joseph Kennedy Architect  
#6 North Fourth street  
Harrison, N. J.

August 24th 1916.

Scale of Drawings  $\frac{1}{4}$ " to the foot.

## CONDITIONS:

20

All material to be the best of the respective kinds. All work to be done by expert workmen. Supply all scaffolding, ladders, tackle, etc., necessary in the erection of the said building.

Protect all stone and masonry and plaster from damage, and replace or repair all destroyed and damaged parts.

30

The building is to be delivered up broom clean by this contractor and this contractor is to remove all surplus material from the premises belonging to him self or other work men.

Comply with the Town Ordinances and the state Laws relating to buildings.

When Estimating this building, any errors or omissions should be found; the Architect's attention is to be called to same, so that he can rectify it as no extras will be allowed.

40

The owner will procure the building permit and this contractor will procure all other permits.

*Exhibit P-1.*

## INSPECTOR:

Supply secure ladders and give all facilities necessary for the Architect or his assistant to properly inspect the work.

## BACK FILL:

After the walls are dry and set, back fill 10 against walls.

## SHORING:

Properly shore up the banks, protect the excavating by a wood guard and lights at night.

## BUILDING ON NEXT LOT:

Notify owner of this building according to State Laws so that they can properly protect 20 their property.

## FOOTINGS:

Under all walls, piers, chimneys, etc., etc., put in a concrete footing course 12" thick, and 24 wide. Piers 16" square x 12" thick composed of one part of portland cement two parts of Cow Bay sand and 4 parts of crushed stone 1½" well mixed and tamped in trench. 30

## CELLAR WALL:

Build cellar walls up to first story beams with concrete composed of one part of portland cement and two parts of Cow Bay sand and 4 parts of crushed stone. Build all forms for concrete strong and well braced all concrete to be measured in boxes to be well mixed, Dry then mixed wet and well tamped in trenches and forms. 40

Exhibit P-1.

CELLAR BOTTOM:

The cellar floor is to be covered with concrete 6" thick and one part of portland cement, three parts of sand and 5 parts of cracked stone 1/2" mesh well tamped, on top of this, put a 1" top dressing of cement and sand, 1 of portland cement and 1 of sand, Grade to any floor traps and form any boxes around all clean cuts, traps, fresh air traps, etc., and put wood covers on same. Window areas concrete in same manner.

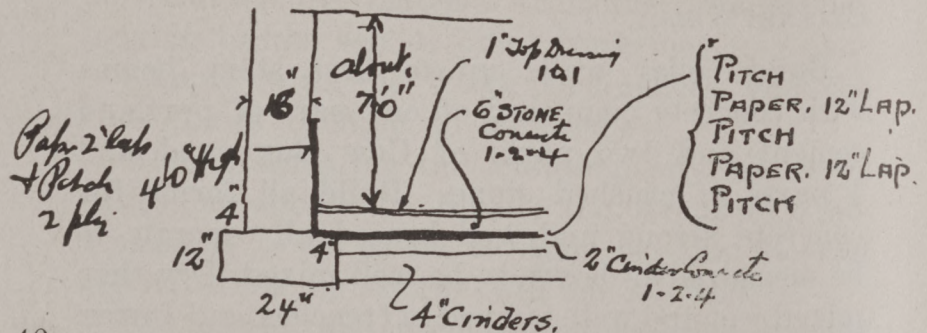
CELLER AREARS:

Build the outside areas and celler steps with concrete walls and steps same as celler wall. The coping will be formed by the side walk contractor.

The area gratings are to be made Angle iron frame 2" x 2" x 5/16".

WATERPROOFING:

The Cellar Bottom and walls are to be waterproofed in the following manner. And a Bond of one Thousand Dollars given owner for one year guaranteeing the Cellar Bottom and walls waterproof.



*Exhibit P-1.*

FOURTH.—Should the Contractor, at any time during the progress of said works, refuse or neglect to supply a sufficiency of materials or workmen, the Owner shall have power to provide materials and workmen, after three days' notice in writing being given, to finish the said works, and the expense shall be deducted from the amount of the contract. 10

FIFTH.—Should any dispute arise respecting the true construction or meaning of the Drawings or Specifications, the same shall be decided by Joseph Kennedy and his decision shall be final and conclusive; but should any dispute arise respecting the true value of the extra work, or of the works omitted, the same shall be valued by two competent persons—one employed by the Owner, and the other by the Contractor—and those two shall have power to name an umpire, whose decision shall be binding on all parties. 20

SIXTH.—The Owner shall not, in any manner, be answerable or accountable for any loss or damage that shall or may happen to the said works, or any part or parts thereof respectively, or for any of the materials or other things used and employed in finishing and completing the same. 30

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

EIGHTH.—The Owner will insure the building in the joint names and interest of himself and 40

*Exhibit P-1.*

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

NINTH.—All work and materials, delivered on the premises to form part of the works, are to be considered the property of the Owner, and are not to be removed without his consent; but the Contractor shall have the right to remove all surplus materials after the completion of the works.

20 TENTH.—Neither the Contractor nor the Architect shall, without the written consent of the Owner, have authority to vary, alter, amend or change this contract, or any of the Plans or Specifications herein referred to.

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

A Bond of one Thousand Dollars for one year guaranteeing the cellar to be waterproof, or a cash Bond of \$500.00 to be furnished for 6 months @ 6%, \$250.00 to be taken out of the 1st payment, and \$250.00 taken out of the 2nd payment.

*Exhibit P-1.*

Nov. 18, 1916.

I propose to dig cellar, remove water and put in Concrete as per original contract, fix up piers & make 6'-2" Headroom on Mr. Goldberg Building for \$75.00 Seventy five Dollars.

It is agreed that the \$75.00 is to be paid when the digging is done and cinders are being put 10  
down.

C. Savino.

O. K. go ahead at once.

Joseph Kennedy,  
Architect.

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

20

Signed (L. S.) DAVID GOLDBERG.

Signed (L. S.) CARMINE SAVINO.

Signed, Sealed and Delivered }  
in the presence of }

JOSEPH KENNEDY,  
Sept. 16, 1916.

30

40

*Exhibit P-1.*

## MASON'S SPECIFICATION:

MASON'S SPECIFICATION for a two story brick Building, Store, Dwelling and Lodge Room's. Also Barn to be erected on the property on the South Side of Valley Brook Ave., Township of Union (Lyndhurst), Bergen County, N. J.

10

David Goldberg  
Owner.

Joseph Kennedy, Architect,  
#6 North Fourth Street,  
Harrison, N. J.

*August 24th, 1916.*

*Scale of Drawings 1/4" to the foot.*

20 All material to be the best of their respective kinds, all work to be done by expert workmen, Supply all Scaffolding, Ladders, Tackle, etc., necessary in the erection of the said building.

Protect all stone and masonry and plaster from damage, and replace and repair all destroyed or damaged parts.

30 The building is to be delivered up broom clean by this contractor and this contractor is to remove all surplus material from the premises belonging to him-self or other workmen.

Comply with the Town and State Laws relating to buildings. When estimating this building, any errors or omissions should be found the Architect's attention should be called to same, so that he can rectify it so that no extras will be allowed.

40 The owner will procure the Building Permit and this contractor will procure all other permits.

*Exhibit P-1.***INSPECTOR:**

Supply secure ladders and give all facilities necessary for the Architect or his Assistant to properly inspect the work.

**EXCAVATING:**

Excavate for rear porch wall 3' deep also 10  
grade off the cellar bottom 6" deep to give head  
room in cellar and remove all earth away.

**WALLS:**

Build the walls above concrete wall with hard  
burnt brick, Headers every 5th course to be car-  
ried up level, plumb and to a line. Strike the  
joints in all exposed places to be laid up in  
limeoid portland cement and sand mortar, one 20  
part limeoid and one part portland cement and  
sand mortar and three parts of sand. The walls  
on Valley Brook Ave. front lay up with select  
front brick.

\$30.00 per M. in color mortar racked out  
joints Architect to select brick. Back up the  
work with hard Jersey brick, build in all wood  
brick necessary and leave dry joints every 9th  
course for nailing furring to. 30

**WASH DOWN:**

Wash down the front brick walls at completion  
with Muriatic acid and clean all lime and cement  
off brick, using scraper and brick and brick, and  
properly point up.

**COLORED MORTAR:**

The mortar for face brick work on Valley 40  
Brook Ave. is to be colored.

*Exhibit P-1.*

## ANCHORS:

Supply and set all necessary iron anchors for brick work and wood beams.

## STEEL:

10 Supply and set all steel beams and lintels, size and weight as plans show.

## RECESSES:

Leave recesses for plumber's pipe in walls.

## CENTRES:

Set all wood centres for arches; Carpenter will supply.

## 20 ARCHES:

Turn all arches over; all rear and side openings with three rowlocks.

## CHIMNEYS:

30 Build chimneys as plans show, and line with Terra Cotta flue lining supply all tile thimbles for ranges and steam boilers. Carry up 4' above roof in cement and sand mortar lining to be carried 8" above coping. Brick work above roof to be laid in portland cement. The fireplaces in kitchen to be laid up with Keene's cement laid in squares, cement chimney cap.

## HEARTH:

Cinder concrete hearths and 1" to dressing.

## IRON GRATINGS:

40 The area gratings are to be made Angle iron frame 2" x 2" x 5/16" anchored to cement and

*Exhibit P-1.*

fill with  $\frac{3}{8}$ " x  $1\frac{1}{4}$ " bars set  $1\frac{1}{2}$ " centres. All iron work to receive two good coats of paint two of these are to hinged to allow coal to pass through. Checker plate iron door in iron frame concealed hinges.

## STONE:

10

8" x 10" and 8" x 6" water table, chamfered edge 10" door sill size all rubber templets for girders. All side and rear, 2nd story windows also 5" door sills to be blue stone 5" lime stone sills and sill course 5" coping, and lime stone caps as per detail all tooled No. 10 and properly bedded and set supply and set all other lime stone shown.

## PLASTERING:

20

Cover with plaster boards the soffit of stairs, lath all other walls and ceilings with #1 clear spruce lath, well nailed to all bearings with lath nails. Joints broken every 10th course, then give one coat of Adamant  $\frac{3}{8}$ " thick, then give one of white patent plaster approved by the Architect, after all other work men are out of the building clean the walls of all surplus dirt, and point up all cracks. 30

The ceilings and walls of two stores, dining room and toilets of 1st floor the 2nd floor toilet, and lodge room also ante room to be metal so there will be no plaster. Mason to set own grounds.

## WHITE WASH:

White wash the cellers walls one coat of waterproofing white wash that will not rub-off. 40

*Exhibit P-1.*

## COLUMNS:

Supply and set all Lally columns with top and bottom plates proper size and length.

## CORNICE:

Build in any false-work that the carpenter or  
10 cornice man may require.

## TILE FLOOR &amp; WAINSCOAT:

The tile floor and wainscoat of store and bath rooms, also concrete and lath and scratch coat are under a separate contract.

## WAINSCOAT:

Wainscoat the kitchen and bath rooms 4' high  
20 with Keene's Windsor cement laid off in squares.

## SIDE WALK:

Cover the whole of the front sidewalk across the property with a cement side walk also alley 9" factory cinders, 5" cinder concrete and 1 $\frac{1}{4}$ " top cement and dressing, laid in squares to be approved.

## FIRE STOPS:

30 Provide all the fire stops as per code.

## CESSPOOL:

Excavate for and build a cesspool with dry-stones 6' x 8' x 8', done over with flag stone on top.

## BARN:

Trenches 18" x 3' deep fill in with gravel concrete one of portland cement and three of gravel.  
40 The floor cover with 4" cinder concrete and 1" top dressing 1 of portland cement and 1 $\frac{1}{2}$ " of cow-bay sand.

*Exhibit P-1.*

## CARPENTER'S SPECIFICATION:

CARPENTER'S SPECIFICATION for a two story brick store, Dwelling and Lodge Rooms, also Barn, Building to be erected on property on the South Side of Valley Brook Ave., Township of Union (Lyndhurst) BERGEN COUNTY, N. J.

David Goldberg

10

Owner.

Joseph Kennedy Architect  
#6 North Fourth Street  
Harrison, N. J.

*August 24th, 1916.*

*Scale of Drawings 1/4" to the foot.*

## CONDITIONS:

20

All material to be the best of their respective kinds. All work to be done by expert workmen. Supply all scaffolding, Ladders, tackle, etc., necessary in the erection of the said building.

Protect all work from damage and repair or replace all destroyed or damaged parts.

The building is to be delivered up broom clean by this contractor and he is to remove all surplus material from the premises belonging to himself or other workmen. 30

Comply with the Town Ordinances and the State Laws relating to buildings.

When estimating this building if any errors or omissions should be found the Architect's attention is to be called to same so that he can rectify it, as no extras will be allowed.

The owner will procure the building permit and this contractor will procure all other permits. 40

*Exhibit P-1.***LUMBER:**

All lumber throughout the building to be 1st quality of its different kinds, free from unnecessary defects and blemished, and to be spruce edge throughout.

**10 BEAMS:**

First story beams, 3" x 8"—12" centres.

Second story beams, 2" x 12"—16" centres.

CEILING story beams, 2" x 6"—16" centres.

ROOF story beams, 2" x 10"—20" centres.

20 All headers and trimmers beams around all openings and chimneys to be 3" thick; put in headers for plumbing where necessary. Hang all headers and tail beams with approved stirrups all beams spruced. The 1st ties of beams to be hung with stirrups flush top and bottom with girder.

**GIRDERS:**

30 Girders in cellar spruce 8" x 8" long splices on columns set so that centres of beams will be crowned, all beams to have proper fire cut and bearing on walls.

**BRIDGING:**

Bridge each tie of floor beams twice in width with 2" x 2" spruce bridging, 2—10d nails each end.

**WALL FURRING:**

40 Furr the outside walls of 1st and 2nd story vertically with 1" x 2" spruce lath, set 16" on centres and well nailed to brick work.

*Exhibit P-1.*

## ROOFING:

Cover the roof beams with  $\frac{7}{8}$ " ship-lap N. C. pine joints broke on each beam and double nailed to each bearing.

## PARTITIONS:

The 1st story bearing partitions, 3" x 4" 10 spruce, set 12" centres, 4" x 6" plates. catt once in height start all studding on plate, doubled at all openings and trussed heads; all angles solid. all set plumb and to a line run up studding to roof beams, all other studding 2" x 4"—16" centres. Top story catt once in heighth.

## WINDOW FRAMES:

Supply and set all window frames, care to be taken that they are square when set and set plumb. 20

Make of white pine, box frames for double hung sash, sill 2" weathered. Pulley style  $1\frac{1}{4}$ " yellow pine, also head  $\frac{5}{8}$ " parting strip.  $1\frac{1}{2}$ " outside casing; all put together strong.  $2\frac{1}{2}$ " axle pulley, ball bearing, bronze.

Celler window frames make of  $1\frac{1}{4}$ ", sill  $\frac{7}{8}$ " heads and stiles rabbated for sash. Side and rear frames segment frames. 30

## SASH:

All sash throughout make of white pine best quality, size and thickness as plans show, glaze with best quality double thick American glass well tinned well tinned and puttied, and hung with samson spot sash cord and iron weights sash locks and two sash lifts to each bottom sash, cut up the sash as elevation shows. 40

*Exhibit P-1.*

The cellar sash to be 1½" thick glaze with single American glass hinged on top with butts and hooked to ceiling and buttoned down when closed.

## DOOR FRAMES:

- 10 All outside door frames make of white pine 1½" thick, rabbeted for door.

## FLOORING:

- 20 Properly prepare the store, toilet and bath rooms floor for a tile flooring by cutting both edges off the top of beams 3" deep to a feather edge nail a 7/8" x 1½" furring cleat 5" below the top of beams both sides then place between these beams 7/8" N. C. pine resting on these cleats and well nailed to same. The rear room and small store of 1st floor and 2nd and floors to be laid with 7/8" by 2½" face #1 N. C. pine well blinded nailed to all bearings. All joints and rough places dressed down and all the floor protected by paper from other workmen, the parlor dining room and reception room, surface 3' margin of these floors are to be scraped and left ready for painter.
- 30

## GUTTER:

Form gutter of 1¼" white pine moulded and bracket and 7/8" lining 1¼" verge boards.

## WINDOW PLATFORM:

Form window platform with 2" x 4" studding 7/8" N. C. pine boards.

## 40 REAR STAIRS:

Floor beams 2" x 8" dressed spruce 16" cen-

*Exhibit P-1.*

tres,  $\frac{7}{8}$ " x  $2\frac{1}{2}$ " #1 white pine flooring, both sides dressed,  $\frac{7}{8}$ " beaded ceiling handrail  $\frac{7}{8}$ " strings and  $\frac{7}{8}$ " risers and  $1\frac{1}{4}$ " treads, N. C. pine well and securely put together the under side of roof beams ceil with  $\frac{5}{8}$ " ceiling.

## TRIM:

All openings throughout to be trimmed with cabinet cypress trim, all hand sand papered at factory. Casings  $\frac{7}{8}$ " x  $4\frac{1}{2}$ " moulded, head casings  $\frac{7}{8}$ " x 7" with a solid cap and moulded apron to all windows,  $\frac{5}{8}$ " stop beads, base  $\frac{7}{8}$ " x 7",  $1\frac{3}{4}$ " moulding,  $\frac{7}{8}$ " wall moulding  $1\frac{1}{4}$ " picture moulding in all rooms, including kitchen and bath room and 1st floor jambs  $\frac{7}{8}$ " with stop planted on and hinge blocks,  $\frac{7}{8}$ " x  $2\frac{1}{2}$ " chair rail in kitchens. Corner beads to all shape angles. Hardwood saddle and rubber tip stop to all doors. Hardwood strips around hearths. All trim to be selected clear cypress all hand sand papered, the trim of parlor and bath room and kitchen to be bass trim wood.  $\frac{7}{8}$ " x 7" base with wall moulding in store and meeting room.

## DOORS:

All interior doors to be veneered birch, 6-panels size and thickness as plans show and hung with approved 1st quality hardware and locks, all outside doors to be clear pine, panelled and raised mouldings, size and thickness as plans show, hung with two approved butts and approved locks and keys and bevelled edged plate glass.

*Exhibit P-1.*

## STORE AND FRONT DOORS AND VESTIBULE:

The store and vestibule doors to be 1st quality white pine, moulded panelled, size and thickness as plans show. Headlights 1 $\frac{3}{4}$ " white pine glaze hinge with butts and patent opener.

10

## STAIRS:

All stairs from first to second floor make of 1 $\frac{1}{4}$ " strings,  $\frac{7}{8}$ " risers and 1 $\frac{1}{4}$ " treads, mounding nosing and cove, all to be gained glued and wedged into strings; all to be clear N. C. pine-wall mounding along string and out side string to be panelled and have cap on top 3" x 4" carriage string to all stairs, newels 5" sq.; not  
 20 turned balusters, 2 $\frac{1}{2}$ " x 3 $\frac{1}{2}$ " hand rail; all ash platforms to be 1 $\frac{1}{4}$ " T. & G. N. C. pine. Do all necessary furring 2" x 6" spruce platform beams. The hand rail leading up 1st flight main stairs is to be 2 $\frac{1}{2}$ " dia. and supported on bronze brackets.

## SCUTTLE:

On rear porch roof form a scuttle and supply  
 30 light ladder to same, also form for vents in roof.

## CLOSETS:

Form closets as shown on plans with 2" x 4" spruce studding, clothes closets to have plain trim, base and hooks strips and 10 hooks and 1 shelf 14" wide of pine, Kitchen closets to have 5 shelves.

## 40 CUTTING:

Do all necessary cutting for plumber and put

*Exhibit P-1.*

up any strips for plumber to fasten his pipes to, box in all pipes with cypress where necessary.

## CELLAR PARTITIONS:

Build partitions as shown on the plans with 2" x 4" studding sills and plates  $\frac{7}{8}$ " hemlock boards, 5 high and balance 1" slates, 5" apart 10  
batten doors, tee hinges hasp, locks and keys.

## CLOTHES POLE:

Erect in rear of building a 25' approved clothes pole with climbing spikes and two pulley hooks.

## MANTLES; SHADES AND CHANDALIERS:

Allow \$180, Architect will select. 20

## HARDWARE:

Allow \$80.00 for furnishing hardware; Architect will select, carpenter will put in place, This does not include nails, spikes, window cords and weights and other rough hardware.

## CELLAR:

The cellar stairs to be 2" x 12" spruce, strings 30  
and treads, hand rail to stair.

## CENTRES:

Furnish and set all centres for mason.

## VENTILATORS:

Supply and set two wood slat in wood frame ventilators as plans show build in wall.

40

*Exhibit P-1.*

## MEDICINE CLOSETS:

In each bath room put in a medicine closet, complete with shelves and beveled plate glass on door.

## COLUMNS:

- 10 Between parlor and dining room and rear store rooms put in neat turned patent columns as plans show.

## PLATE RAIL AND BEAM CEILING:

Supply and set neat moulded and bracket plate rail, 6" x 6" in the dining room, supply and set a 5" x 6" beam ceiling as shown.

## 20 BARN:

- Build the barn in the rear of lot with 4" x 4" sill bolted to the concrete with  $\frac{5}{8}$ " x 16" long bolts 12 of these with washers 4" x 4" corner post, 4" x 4" intermediate posts 4" x 4" cap and 2" x 4" studding 16" centers doubled at all openings, cover the frame with  $\frac{7}{8}$ " white pine, novelty boards  $1\frac{1}{4}$ " x 3" corner boards  $\frac{1}{4}$ " round in all angles, 2" x 8" roof beams 16" centres Hemlock,  $\frac{7}{8}$ " ship-lap N. C. pine roof boards, partitions 2" x 4"—16" centres Hemlock. Cover inside of storage and stall and partitions with  $\frac{7}{8}$ " T. & G. N. C. pine 6" x 6" post 2" spruce dressed plank, C. I. feed & wood hay rack slat floor, doors and windows as shown, hung with approved hardware, roofing by roofer.

*Exhibit P-1.*

## GATE:

Frame 2" dressed white pine gate made of 2" white pine frame chamfered edge and  $\frac{7}{8}$ " T. & G. Beaded white pine ceiling. The frame is to be halved spliced and secured with screw nails and all other nails to be countersunk hinge with heavy strap hinge. Bolts and locks and keys 2" oak bar with hardware. 10

## FENCE:

Build a fence 6 boards high around lot as plans show. 4" x 6" rough Chestnut post, let in ground 3' 0" set 5' 0" apart. The boards to be 1" x 10" 6 high well nailed to all bearings.

## SOILED CLOTHES CLOSET:

In the 2nd floor build a clothes closet lined with Galv iron with a 18" x 18" door 6' above the floor and a 18" x 18" door at the floor line to hold soiled clothing. 20

## SKYLIGHT:

Supply and set 6 skylights 4' x 6' properly glazed to have movable vents and cords to work each, frame out for same and trim around.

## MARQUIES:

Provide and erect a galv. iron mark. of neat design by the Architect, with Galv. iron chains, anchor to wall and Rozette  $\frac{3}{8}$ " wire glass. 30

## INTAKE:

Sheet iron vent to 1st story watercloset 2' 6" wide and 12" high, angle iron stiffeners with wire frame on outside.

## REAR PORCH:

Build rear porch as shown with 4" x 5" spruce 40

*Exhibit P-1.*

posts with  $\frac{3}{4}$ " pipe dowel 12" long let into piers, posts to be dressed spruce girts 4" x 6" plate and 4" x 4" floor beams and 2" x 10" Hemlock ceiled on under side with  $\frac{5}{8}$ " ceiling.

10 Beams to be anchored into wall, flooring  $\frac{7}{8}$ " T. & G. white pine flooring 2" x 4"—16" centres  
 10 studding, sheath the frame with  $\frac{7}{8}$ " ship-lap well nailed to all bearings and cover with building paper on which place a clear clap boards 1" lap, Countersunk nails  $1\frac{1}{4}$ " corner boards  $\frac{1}{4}$ " round in angles  $\frac{5}{8}$ " N. C. pine ceiling on inside walls and ceiling, 2" x 4" ceiling beams and 2" x 8" roof beams and  $\frac{5}{8}$ " ship-lap roofing from gutters  $1\frac{1}{4}$ " full size, 1st quality wire mosquito Screens full size of windows as shown.  
 20 Supply all hardware.

## DEAFENING:

Between the beams of 2nd floor over alley lay a deafening felt 3 ply this will slop between the beams 3" cover the under side of beams with same material.

## FIRE CUT AND ANCHORS:

30 All beams to have a fire cut of 4" and every third beam to have a tee iron anchor well nailed to the beams this includes roof beams and ceiling beams.

## STORE FRONT:

40 Supply and set complete a wood store front 2" white pine, plate glass and leaded glass, wood panels with wire glass 2" x 4" frame for platform and  $\frac{7}{8}$ " ceiling boards, 4" x 4" post head-

*Exhibit P-1.*

lights to open with transom bars, metal corners and 3 ways bars in leaded glass.

## PANNELLING:

The dining rooms and Entrance halls to be pannelled with  $\frac{7}{8}$ " by 3" strips set 18" centers with wall moulding cypress. 10

All work to be done in a workmanlike manner satisfactory to the Architect and under his supervision.

## PLUMBING SPECIFICATION:

PLUMBING SPECIFICATION for a two story brick building store, dwelling and Lodge rooms and also barn to be erected on property on the south side of Valley Brook Ave., Township of Union (Lyndhurst) Bergen County, N. J. 20

David Goldberg

Owner.

Joseph Kennedy Architect  
#6 North Fourth Street  
Harrison, N. J.

August 24th 1916.

Scale of Drawings  $\frac{1}{4}$ " to the foot. 30

All plumbing is to be done as per the Board of Health code.

This contractor is to deliver to the Architect the Board of Health Certificate when applying for final payment.

This contractor is to submit to the Architect for his approval the board of health plan before filing it.

All material to be of the best made, no old material to be used on this job. 40

*Exhibit P-1.*

Notify the Architect when the pipes are laid in trenches so that he can inspect same before trenches are filled up.

**WATER:**

10 Tap the water main in street with a  $\frac{5}{8}$ " tap and run into curb a  $\frac{5}{8}$ " A.A. lead pipe with stop cock at curb and from there run into building a  $\frac{3}{4}$ " Galv. iron water main, supply all fixtures run these pipes on the cellar ceiling.

**METER:**

Supply and hang a  $\frac{5}{8}$ " water meter on a convenient place on the walls.

**RISERS:**

20 Independent rising mains  $\frac{3}{4}$ " Galv. iron to each floor with stop cock in cellar and tag on same and from these risers run a  $\frac{1}{2}$ " branches to each fixture with stop on each.

**SEWER:**

The sewer to connect to cesspool through 6" glazed earthen pipe 15' from building.

**30 SOIL PIPE:**

From the earthen pipe on the outside of building run into building a 4" extra heavy cast iron soil pipe, placed where shown, with all necessary branches, Y. & S. bends, and clean outs with brass screw caps, continue this pipe above third story fixtures 4" diameter up through roof, with all Y. & S. branches, bends for connections and vents, also vents for other fixtures, if this  
40 pipe is hung on the wall build cement pier un-

*Exhibit P-1.*

der same. Supply and set under the floor a 4" X. H. C. I. soil pipe all complete with trap but not connected with new soil pipe with grating in outside wall.

## TRAP:

Trap to leader connection and fresh air trap 10  
clean-outs and fresh air inlets on soil pipe with  
grating on inside wall.

## VENT:

From below the cellar fixtures run up a 3"  
extra heavy cast iron vent pipe and connect  
above 3rd floor fixtures with all necessary con-  
nections for Galv. iron vents which will be con-  
cealed in partitions. These Galv. iron vents 20  
are to be connected the fixtures to the main vent.

## LEAD FLASHINGS:

Where any plumbing pipes run through roof  
flash around same with "D" lead well caulked  
in.

## JOINTS AND CONNECTIONS:

All joints to be caulked with lead and oakum 30  
well and closely packed. All lead connections  
to iron to be made with brass ferrules. All iron  
pipe is to be properly hooked to wall with syckle  
hooks, and other pipe with proper Galv. iron  
fasteners.

## GAS:

Pipe the building for Gas as per rules of the  
gas company raising mains to each floor. Gas  
range connection properly tested. 40

*Exhibit P-1.*

## GAS FIXTURES:

No gas fixtures in his contract.

## LEADERS:

Two 4" diam. #16 copper corrugated leaders,  
well and securely hooked up and connected to  
10 soil.

## ROOFING:

No roofing in this contract.

## RANGE:

Supply and set in 2nd floor kitchen a #88  
THATCHER complete with top warming closets,  
properly clean and blacken same at completion,  
20 connect to chimney through black iron pipe and  
damper in same with water back.

## BOILER:

Supply and set in kitchen 2nd floor an extra  
heavy Galv. iron boiler, 35 Gal. on iron stand.  
Connect range with water pipe through  $\frac{3}{4}$ "  
brass pipe and couplings and brass cocks sedi-  
ment clean out. Supply with cold water with  
30 stop on same, also, supply hot water to fix-  
tures through Galv. iron pipes with stop on  
same.

## SINK:

Supply and set in each kitchen a Standard  
porcelain enameled 20" x 30" roll rim sink  
with back in one piece and supported on con-  
cealed brackets. Supply with hot and cold water  
40 through heavy brass compression cocks and con-  
nect to soil with 2" DW lead pipe trapped,  
tapped, and vented to vent pipe, concealed air

*Exhibit P-1.*

chambers and white china drain board with wall support.

Supply and set two ice box receptacles. Connect with 2" galv. iron soil and run into cellar 2" x 16" connect with soil and vent.

## WASH TRAYS:

10

In each kitchen place a two compartment porcelain enameled tub with p 7340 D overflow, brass chain and rubber plugs, galv. iron covers in frames, fitted by this contractor, connect to soil with 2" "D" lead pipe trapped and wasted with water seal on, trapped and vented to vent as required, supply with Hot & Cold water through  $\frac{3}{4}$ " galvanized water pipe and heavy brass compression cocks all complete.

20

## CLOSET FLANGE:

Each water closet to be fitted with Standard bell joint closet flange.

## BATH:

Supply and set a porcelain Enameled Alibion pattern bath on base with  $4\frac{3}{4}$ " roll rim, fitted with P1007 Imperial top supply and waste fitting with rubber hose and sprinkler  $\frac{3}{4}$ " supply pipes with unions at floor, compression valve china cross handles with indexes and china knob and waste. Connect with soil and vent and supply with hot and cold water. Standard Manufacturing company make.

30

## N. P. PIPE:

All exposed water piping and vents and traps on 1st floor to be heavy brass nickel plated pipes, trapped to have clean outs at water seal.

40

*Exhibit P-1.*

All pipes to run from floor to fixtures. 2nd and 3rd floor bath rooms to have Galv. iron piping.

## CLOSET PARTITIONS:

10 1" Italian marble closet partition on 1st floor, also hardwood slate doors and N. P. Hardware connect with soil and have a trough and brass floor drain brass perforated flushing pipe with stop on some.

## LAVATORY:

20 Supply and set into position in bath room, as plans show an enameled iron Lavatory, 4" apron and 8" back supply with Hot and Cold water through  $\frac{3}{8}$ " N. P. compression bibbs and connect to soil through brass N. P. wasted and vented. Plate P 5305. Standard Mfg. Co. make, also small on in toilet.

## WATER CLOSETS:

30 Supply and set into position six Hamilton jem or equal plate #875 "MECCA" china tank and fig. #26 can't break seat and cover connect with soil through 4" "D" lead and supply with water through  $\frac{3}{4}$ " pipe with stop on same 2nd floor toilet to have a white enameled seat and cover and also tank.

## LAVATORY:

Leave soil and vent connection for a Lavatory in the store.

## GAS BOILER:

40 Supply and connect a 10 gal. galv. iron boiler in 1st floor in kitchen the owner has a lion gas heater connect it to this boiler.

*Exhibit P-1.*

## URINALS:

Supply and set complete with brass floor straining and brass perforated supply pipe and stop cock and white marble urinal 2" floor slab and 1" side and back.

## FAUCETS:

10

Place a faucet in barn with stop cock in celler, pipe to be placed 3' 0" below ground  $\frac{3}{4}$ " Galv. iron pipe, also place a faucet in alley to be controlled from bar.

## GAS RANGE:

Connect up the gas range owner now has. Fittings allow \$30.00 for Bath room fittings owner will select and have fitted to wall.

20

## BAR CONNECTIONS:

Supply water to bar through  $\frac{3}{4}$ " galv. iron pipe and two heavy brass faucet connect up to bar with 3" extra heavy cast iron soil pipe with 2" Y branches, clean out in each bend. Each rinse tank cooler and bar fixtures to have a separate 2" extra heavy lead trap, wiped on brass ferrules, water seal in trap, leave one 5" x 2" (Y) on soil pipe in celler to connect waste from coil box in cellar to sewer same to be trapped connection for tile floor trough and brass floor trap supply and set.

30

## OUTSIDE FAUCETS:

Supply and set a brass faucet for hose connection on side of building the water supply to be controlled behind bar.

All work to be done in a workmanlike manner satisfactory to the Architect and under his supervision.

40

*Exhibit P-1.*

## PAINTER'S SPECIFICATION:

SPECIFICATION for work and material necessary to complete the Painting work in the erection of a Two story brick store and dwelling and Lodge Room also barn to be erected on property on the South Side of Valley Brook Ave., Town ship of  
 10 Union (Lyndhurst) Bergen, County, N. J.

David Goldberg.

Owner.

Joseph Kennedy Architect  
 #6 North Fourth Street  
 Harrison, N. J.

*August 24th, 1916.*

*Scale of Drawings 1/4" to the foot.*

20

## MATERIAL &amp; LABOR:

The materials used in this work are to be the best of their several kinds in quality.

All Labor to be performed in a thorough, neat, and workmanlike manner, by expert mechanics. All windows, walls, and floors to be left free from paint by this contractor.

30 PRELIMINARY:

Properly prepare the wood work by shellacing all knots, puttying all nail holes and other imperfections, sand paper all rough places, and remove stains.

## EXTERIOR WORK:

All exterior wood work to receive two good coats of best Atlantic White Lead and Pure  
 40 Linseed Oil, two shades; color to be selected by the Architect.

*Exhibit P-1.*

Galvanized iron work of cornice, etc., to receive (1) one good coat of strong Vinegar, one (1) good coat of Red Lead in Oil, and one (1) coat of Atlantic White Lead and Pure Linseed Oil, two shades; color to be selected Architect.

All tin work to receive two (2) good coats of Prince's Metallic Paint; 10

Main Roof will be composition slag roof; no painting.

## INTERIOR WORK:

All interior wood that is not other wise called to receive 1 good coat of liquid filler and then sand papered give 2 when dry coats of Murphys \$3.00 per gallon. Varnish. And all to be sand papered This includes all stairs. 20

## VESTIBULE:

To be covered with Oat Meal paper.

## WAINSCOAT:

Give the wainscoat of kitchens and bath rooms one coat of Linseed Oil and Atlantic white lead and two coats of white enamel. 30

## PARLORS AND COLUMNS:

Give the parlors one coat of shellac, two coats of Linseed oil and Atlantic white lead paint and one coat of white enamel of approve make.

No Screens.

## STORE FRONT:

Paint the store front and doors and door frames three coats of Linseed Oil and Atlantic white lead in a select color and striped with gold leaf. 40

*Exhibit P-1.*

## DINING ROOM &amp; ENTRANCE HALL:

The wainscoat and beam ceiling and other wood work of dining room and entrance hall to receive one coat of mission stain and one coat of dull varnish.

## 10 BARN &amp; ENTRANCE GATE:

Paint the barn and entrance gate two coats of Linseed Oil and Atlantic White lead in color.

## METAL WORK:

The ceilings and walls of two stores, kitchen, dining room, toilets, and passage, 1st floor. And the ceilings and walls of Lodge rooms, toilets 2 ante rooms are metal to a wood base 7" high  
20 and are to be painted two coats of Linseed Oil and Atlantic White Lead paint two shades color to be selected by the Architect.

## FLOORS:

Parlor, dining room and reception room floor give one coat of filler and two coats of Murphy's floor varnish after all other workmen are out of the building.

30

*Exhibit P-1.*

## ELECTRIC SPECIFICATION:

Specification for the Electrical work that is to be installed in the new Two story brick store and dwelling to be erected on the property on the south side of Valley Brook Ave, Township of Union (Lyndhurst) Bergen County, N. J.

David Goldberg

10

Owner.

Joseph Kennedy Architect  
#6 North Fourth Street  
Harrison, N. J.

August 24th, 1916.

Scale of Drawings  $\frac{1}{4}$ " to the foot.

All wiring for electric light to be done in "Knob & Tube System" 2 x in a first class workmanlike manner, in strict accordance with the rules of the "Fireunderwriters" in this locality for which a certificate shall be furnished to the Architect. All outlets as shown on plan to be wire for electric light unless other wise stated.

20

## METERS:

Provide space in celler for Four meters as follows: saloon, apartment on second floor, lodge rooms, and store.

30

## PANEL SWITCHBOARD:

To be placed in saloon as directed to controll all lights on 1st floor. Also one on 2nd floor to control all lights in lodge rooms.

## BELLS &amp; ETC.:

Install a bell in kitchen of apartment on sec-

40

*Exhibit P-1.*

ond floor to be operated from first floor bell with letter box in vestibule.

One button to be installed in dining room and rear door, to operate indicator at bar.

Put in all plugs and outlets for Electric fans.

10 Install a two station telephone system to operate between lodge room hall on third floor to bar room.

Install a bell and speaking tube system between bar room and hall bed room on 2nd floor. Speaking Tube and Letter Box Front Door to Kitchen.

All bells and buzzers including ringing system circuit of telephone system to be operate on bell ringing transformer. This trans. to be connected to saloon meter.

20

## TILE SPECIFICATION:

TILE SPECIFICATION for work and material necessary to complete the tile work in the erection of a Two story brick building stores, and dwelling to be erected on the property on the south side of Valley Brook Ave., Township of Union (Lyndhurst) Bergen County, N. J.

30

David Goldberg

Owner.

Joseph Kennedy Architect  
#6 North Fourth Street  
Harrison, N. J.

August 24th, 1916.

Scale of Drawings  $\frac{1}{4}$ " to the foot.

40 The 2 store floors, vestibules, toilets rooms of 1st floor, and one bath room on the 2nd floor, tiled with vitreous cermic floor tile #1, to have a 6" white marble base.

*Exhibit P-1.*

All the above mentioned work is to be done in good workmanlike manner and the material to be of 1st class quality.

The tile contractor is to include the concrete for floor tiles and metal lath and scratch coating in his estimate.

Marble saddle for doors in conjunction for tile floors. 10

Marble wainscoat in vestibule 5' 0" high with cap.

Form Trough along Bar in store.

#### ROOFING SPECIFICATION:

ROOFING SPECIFICATION for a Two story brick store, dwelling and lodge rooms and also barn, to be erected on the property on the south side of Valley Brook Ave., Township of Union (Lyndhurst), Bergen County, N. J. 20

David Goldberg

Owner.

Joseph Kennedy Architect  
#6 North Fourth Street  
Harrison, N. J.

August 24th, 1916.

30

Scale of Drawings  $\frac{1}{4}$ " to the foot.

Cover the roof of main building and rear piazza with five ply felt and Slag roofing, line rear gutter and flash around chimneys, skylights, scuttle and along the back of the front parapet brick wall, with felt stuck and coated with hot asphaltic cement; put in copper leader tubes and put galv. iron slag stop where required. 40

*Exhibit P-1.*

## BARN:

Cover the roof boards of barn with five (5) ply felt and slag roofing, line rear gutter and flash around ventilator with felt stick and coated with hot asphaltic cement; put in copper leader tube and put galv. iron along slag stop where  
10 required.

## GUARANTEE:

Contractor must furnish a (10) year guarantee:

## METAL CEILING SPECIFICATION:

METAL CEILING SPECIFICATION: for the work in the building to be erected on property  
20 on the south side of Valley Brook Ave., Township of Union (Lyndhurst) Bergen County, N. J.

David Goldberg

Owner.

Joseph Kennedy Architect  
#6 North Fourth Street  
Harrison, N. J.

30 August 24th, 1916.

Scale of Drawings  $\frac{1}{4}$ " to the foot.

The ceilings and walls above base in the barber shop and toilet, dining room, bar room and passage, kitchen and toilet 1st floor, lodge room passage ante room and toilets 2nd floor to have stamped metal, finished of approved design, selected by the Architect.

40 The ceilings to have furring strips applied and the walls to have  $\frac{1}{2}$ " wood sheathing.

*Exhibit P-1.*

The ceilings and all wood partitions to be covered with plaster boards before metal is erected in place.

All metal to be primed on both sides before delivery to the building.

All work to be performed in a workmanlike manner and satisfactory to the Architect and 10  
under his supervision.

20

30

40

*Exhibit P-1.*

## SPECIFICATION

of work to be performed and materials furnished in constructing a Low-Pressure Steam Heating Apparatus in building to be erected on the south side of Valley Brook Ave 101'—6" East of Chase Ave Lynhurst Township of Union, N. J.

10

David Goldberg

Owner

Joseph Kennedy Architect  
#6 North Fourth Street  
Harrison, N. J.

*August 19 1916.**Scale of Drawings 1/4" to the foot.*

20

## GENERAL TERMS.

All of the work and materials to be strictly in accordance with the specifications. All materials to be of the best of their respective kinds, and the workmanship to be first-class in every particular. The apparatus to be a Low-Pressure System, returning all water of condensation to Boiler, Apparatus to be noiseless in operation, perfect in circulation, capable of  
30 heating the building with a pressure not to exceed two (2) pounds, indicated at the boiler, and it is to be tested in the presence of architect, owner, or their authorized representative.

## BOILER.

Furnish and erect near smoke flue in room provided, #628 S Steam Boiler manufactured by the THATCHER FURNACE Co., 135 West 35th  
40 St., New York City, having a rated Capacity of 1550 square feet of direct radiating surface.

*Exhibit P-1.*

Boiler to have sectional shaking grates, shaker, cleaning tools, and fire tools.

## FOUNDATION.

Contractor is to erect boiler on proper foundation of brick or cement, furnished by owner.

10

## TRIMMINGS.

The boiler to be fitted with one low-pressure steam gauge, one safety valve, combination water column with gauge cocks and glass water gauge, automatic damper regulator and fire tools.

## SMOKE FLUE.

The owner is to provide a flue of sufficient capacity and draught, with opening in boiler room of proper size for connection with boiler.

20

## SMOKE CONNECTION.

Boiler to be connected to smoke flue in boiler room with smoke connection constructed of No. 24 gauge B. B. galvanized iron, with tight fitting damper between boiler and chimney.

## FITTINGS.

30

All fittings to be heavy pattern beaded gray cast iron. No malleable fittings to be used in the work.

## PIPING.

All piping to be of good quality, standard weight and thickness and of sizes necessary to supply steam to all radiators at the same time.

All horizontal steam mains to grade, not less 40

*Exhibit P-1.*

than  $\frac{1}{2}$ " in ten feet from highest point above boiler, to extreme end of main, unless otherwise specified and to be not less than 20' above water line of boiler, at any point. At end of steam line and at such other points, as may be necessary, to insure a perfectly free circulation, unimpeded by accumulation of water, drip and relief pipes are to be connected to return line, which is to be run below the water line, where possible, to and connected with the outlet on boiler provided for that purpose.

All lines are to be carefully run, rising lines are to be perfectly plumb and horizontal lines straight. All main supply, return, branch lines and connections to radiators are to be erected in a first-class workmanlike manner in accordance with methods of authorities approved by architect or owner.

## PIPING, CONTINUED.

The entire system of piping is to be constructed, so as to deliver steam to each radiator and return condensation to boiler without noise, when all radiators are entirely filled with steam and the entire apparatus is being run at maximum capacity and maintaining temperature, in all rooms and halls to which heat is applied, at degree Fahr. indicated in schedule of radiation on following page.

## COVERING.

The boiler is to be covered with plastic asbestos cement  $1\frac{1}{2}$ " thick. Rough coat to be put on and allowed to thoroughly dry before finishing coat is applied. The finishing coat is to be trowelled down to a hard smooth surface. All

*Exhibit P-1.*

steam and return pipes not used for heating purposes are to be covered with three ply asbestos sectional air cell covering.

All risers in walls are to be covered with sectional coverings of same quality as specified for steam and return pipes. All cast iron fittings in covered lines are to be neatly covered with plastic asbestos cement. 10

## RADIATION.

All radiators to be of Cast Iron Sectional for steam, of make approved by architect or owner, to be of sizes and heights indicated in schedule, arranged as follows:—

## SCHEDULE OF RADIATING SURFACE

Room	No. Rads.	Style & Height	Sq. Ft.	Rad.	Temp.	
STORE	1	2 Col. 23	56	1¼"	70	20
"	1	2 Col. 38	44	1¼"	"	
Toilet	1	2 Col. 38	20	1"	"	
Bar Room	2	13 Col. 23	156	1½"	"	
"	1	2 Col. 38	48	1¼"	"	
Dining Room	1	2 Col. 38	40	1¼"	"	
Kitchen	1	2 Col. 38	28	1¼"	"	
Hall	1	2 Col. 38	28	1¼"	"	
Bed Room	1	2 Col. 38	24	1¼"	"	
"	1	2 Col. 38	20	1"	"	
2nd Floor	1	2 Col. 38	44	1¼"	"	
Parlor	1	2 Col. 38	40	1½"	"	
Dining Room	1	2 Col. 38	48	1¼"	"	
Bed Room	1	2 Col. 38	24	1"	"	
"	1	2 Col. 38	20	1"	"	30
Ante Room	1	2 Col. 38	20	1"	"	
Office	1	2 Col. 38	24	1"	"	
Bed Room	1	2 Col. 38	16	1"	"	
Bath	1	1 Wall	9	1"	"	
Toilet	1	4-2 Col. 38	180	1½"	"	
Meeting Room	4					
Porch	1	2 Col. 38	44	1¼"	"	

913

Heating Contractor to wrap steam mains to Lodge Rooms with Mineral Wool Securely bound with Brass Bands. All pipe to be concealed in Partitions as directed by the Architect. 40

*Exhibit P-1.*

## PIPE HANGERS.

Horizontal piping to be properly supported by adjustable hangers not more than ten feet apart, securely fastened to floor beams and properly arranged to provide for expansion and contraction of piping.

10

## SLEEVES, FLOOR AND CEILING PLATES.

Where pipes pass through walls, floors, partitions or ceilings, they are to be covered with galvanized iron sleeves and the openings are to be fitted with adjustable floor or ceiling plates, properly secured in place.

## VALVES.

- 20 Connect each direct radiator with a nickel-plated, wood-wheel, male union, radiator valve of proper size fitted with Jenkins' or other approved disc.

## AIR VALVES.

Each radiator is to be fitted with a automatic air valve, placed at proper point.

30

## PAINTING AND BRONZING.

All radiators and exposed piping to be neatly painted or bronzed as directed, by architect or owner. Boiler to be neatly painted one coat of black asphaltum, unless covered.

## WATER CONNECTION AND DRAW-OFF.

- 40 Boiler to be fitted with a  $\frac{3}{4}$ " draw-off cock, arranged so that water may be entirely drawn from the boiler and piping system, also a water connection of proper size fitted with a gate valve.

*Exhibit P-1.*

## GUARANTEE.

The boiler, radiators and apparatus complete, as specified is guaranteed by the contractor to be noiseless in operation, perfect in circulation and of ample capacity to heat all rooms and halls to which heat is applied, to temperature indicated in schedule in zero weather, with proper care and attention and with proper size, quantity and quality of fuel. 10

## FINALLY.

This specification is intended to provide a complete apparatus in every respect, and to cover all work and material necessary to insure a perfect working steam heating apparatus. The contractor is to furnish and erect all necessary materials to make the apparatus complete in every detail. In the event of any necessary part being omitted from this specification it is to be furnished by the contractor the same as if shown on plan or called for by specification. 20

30

40

**Exhibit P-2.**

To Carmine Savino Contractor:

10 You are hereby notified to proceed and complete the contract heretofore entered into between you and David Goldberg Lyndhurst, Township of Union, N. J. Said contract being dated Sept. 16th, 1916, and being for the construction and erection and completion of the waterproof,  
Concrete cellar, walls and floors, also areas and steps and etc., work of building located at #508 & 510 Valley Brook Ave., Lyndhurst, Township of Union, Bergen County, N. J., and you are hereby notified that unless you proceed forwith to supply sufficient material and Labor for completing the said contract in three day's  
—3 Days from the service of the notice upon  
20 you the said owner of the said premises will proceed to have the same completed by other contractors and material men and charge the same to your account.

Date Dec. 12th, 1916.

David Goldberg.

Served. Dec. 12th, 1916.

4:30 P. M.

30

40

**Exhibit P-3.**

October twenty-eighth, 1916.

A. C. Hart & Vanderwart,  
Attys. for David Goldberg,  
Hackensack, N. J.

Gentlemen:—I beg leave to advise that I am the owner of one-half interest in a \$3000 house and lot on Newark Avenue at Kingsland, N. J., free and clear of encumbrance. I also own lots opposite the Kingsland station at Kingsland, in which there is an equity of \$1800. I own other property but these two properties alone are more than sufficient to cover any liability that might arise under a bond given you to-day. 10

Very truly yours,

Carmine Savino. 20

SCHEDULE A.

**Exhibit P-4.**

Know All Men by These Presents, that I, Carmine Savino, of the Township of Union, County of Bergen and State of New Jersey, am held and firmly bound unto David Goldberg, 30 of the same place, in the sum of One Thousand Dollars, lawful money of the United States of America, to be paid to the said David Goldberg or to his certain attorney, executors, administrators or assigns; for which payment well and truly to be made I bind myself, my heirs, executors and administrators firmly by these presents. Sealed with my seal and dated the twentieth day of October in the year of our Lord One Thousand Nine Hundred and Six- 40 teen.

*Exhibit P-4.*

Whereas, the above bounden Carmine Savino is constructing the foundation, walls and cellar bottom and water proofing of the same of the new building being erected on the South side of Valley Brook Avenue, Lyndhurst, New Jersey, agreeably to the drawings and specifications made by Joseph Kennedy, Architect, for the above named David Goldberg, owner, according to the terms of a certain contract made between the parties hereto bearing date September 16, 1916, wherein it is provided that the said Carmine Savino shall furnish bond guaranteeing the said cellar to be water proof for a period of one year from the date hereof;

Now, the Condition of This Obligation is Such, that if the said cellar shall be water proofed in accordance with the plans and specifications attached to said contract, and said cellar bottom and walls shall thereafter remain water proof for a period of one year from the date hereof, then this obligation to be void, or else to be and remain in full force and virtue.

Carmine Savino. (SEAL)

Signed, Sealed and Delivered  
in the presence of  
Addison Ely, Jr.

**Exhibit P-5.**

THE FIRST NATIONAL BANK

No. 654 . Lyndhurst, N. J. Oct. 28, 1916.

Pay to the order of David Goldberg, \$800 00/100  
Eight Hundred 00/100 Dollars.

David Goldberg.

Safe Deposit Boxes 10

(Stamped across face of check.) Paid, Oct. 30,  
1916. The First National Bank, Lyndhurst, N. J.  
Cash.David Goldberg  
507 Valley Brook Ave.(Endorsed:)—David Goldberg, Addison Ely, Jr.,  
Nat. Ely, E. R. Miles. Endorsement O. K., 20  
A. Ely, Jr.

30

40

**Exhibit D-1.**

Nov. 18, 16.

I propose to dig cellar, remove water, & put in Concrete as per original Contract fix up Piers, & make 6'-2" Headroom, on Mr. Goldberg Bldg. for the sum of 75 00/100 Seventy Five Dollars.

10 It is agreed that the \$75 00/ is to be paid to when Digging is done and cinders are being put down.

C. Savino.

20

30

40

**Exhibit D-2.**

No. 1681 Harrison, N. J., November 29th, 1916.

55-402

WEST HUDSON COUNTY TRUST COMPANY,

Pay to the order of Carmine Savino \$75 00/100  
(Excavating Cellar Bottom at Goldberg.)

Seventy Five no/100 Dollars.

10

Joseph Kennedy.

(Perforated across face of check.) Paid, 12-2-16.

Joseph Kennedy  
Architect

(Endorsed:)—Carmine Savino.

Pay any Bank, Banker or Trust Co., or Order,  
Prior Endorsements Guaranteed, The First 20  
National Bank of Lyndhurst, N. J., H. D.  
McCraney, Cashier

55-469

55-469

Received payment through collection department, new form, Clearing House, Endorsements Guaranteed. Dec. 1, 16. The National City Bank of New York, G. E. Gregory, Cashier.

30

**Exhibit D-3.**

TO CARMINE SAVINO,

10 SIR: TAKE NOTICE that under the terms of a contract entered into between yourself and myself, dated September 17, 1916, in which you agreed, for the consideration therein mentioned to well and sufficiently erect and finish a foundation, walls and cellar bottom and water proofing of same.

You agreed to prosecute the work with diligence, and should you refuse or neglect to supply a sufficiency of materials or workmen, the owner, the undersigned, was to have power to provide materials, and workmen after three days' notice in writing being given;

20 You are hereby notified that you have neglected to supply a sufficiency of materials and workmen to proceed with the work according to the terms of said contract, and should you fail to supply the same within three days from the receipt of this notice, the undersigned, the owner, shall provide the material, workmen, and so forth to finish the said works, the expense thereof to be deducted from the amount of this contract.

October 26, 1916.

30

DAVID GOLDBERG.

Notice served by David Goldberg to above Carmine Savino in the presence of Otto Kiese-wetter at 5:45 P. M., Oct. 26th, 1916.

40

**Exhibit D-4.**

2901—AGREEMENT FOR BUILDING

**ARTICLES OF AGREEMENT**

Made the Second day of January, One Thousand Nine Hundred and Seventeen.

BETWEEN David Goldberg, of the Township of Union (Lyndhurst), County of Bergen, and State of New Jersey of the First Part; 10

AND Romeo Bianci, of the Township of Union (Lyndhurst), County of Bergen and State of New Jersey, of the Second Part:

WITNESSETH, FIRST.—The said party of the second part, does hereby for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said party of the first part, his executors, administrators or assigns, that he the said party of the second part, his executors or administrators shall and will for the consideration hereinafter mentioned, on or before the Twenty Four working days well and sufficiently erect and finish the Cellar Concrete work of new building now erecting at 508-510 Valley Brook Avenue (Lyndhurst) N. J. agreeably to the Drawings and Specifications made by Joseph Kennedy, Architect, and signed by the said parties and hereunto annexed, within the time aforesaid, in a good workmanlike and substantial manner, under the direction of the said Architect, to be testified by a writing, or certificate under the hand of the said Architect, as hereinafter mentioned, and, also, shall and will find and provide such good, proper and sufficient materials of all kinds whatsoever, as shall be proper and sufficient for the completing 40

*Exhibit D-4.*

and finishing of all the Cellar Concrete work of the said BUILDING mentioned in the Concrete Specification for the sum of Thirteen Hundred Dollars no/100 \$1300.00.

10 AND the said party of the first part does hereby, for himself, his heirs, executors and administrators, covenant, promise and agree, to and with the said party of the second part, his executors and administrators, that he the said party of the first part, his executors and administrators, shall and will in consideration of the covenants and agreements being strictly performed and kept by the said party of the second part as specified, well and truly pay or cause to be paid unto the said party of the second part, 20 his executors, administrators and assigns, the sum of Thirteen Hundred Dollars lawful money of the United States of America, in manner following:

1st when the work is complete \$1300.00.

This contractor will provide the owner with a Personal Bond guaranteeing the work waterproof for one year. This bond to be indorsed by a property owner acceptable to the owner.

30 PROVIDED, that in each of the said cases, a certificate shall be produced, signed by the said Architect, to the effect that the work is done in accordance with said Drawings and Specifications, said certificate, however, in no way lessening the total and final responsibility of the Contractor; neither shall it exempt the Contractor from liability to replace work, if it be 40 afterwards discovered to have been done ill, or not according to the Drawings and Specifications, either in execution or materials.

*Exhibit D-4.*

AND IT IS HEREBY FURTHER AGREED BY AND  
BETWEEN THE SAID PARTIES:

FIRST.—The Specifications and Drawings are intended to co-operate, so that any works exhibited in the Drawings; and not mentioned in the Specifications, or VICE VERSA, are to be executed the same as if they were mentioned in the Specifications and set forth in the Drawings to the true meaning and intentions of the said Drawings and Specification, without any extra charge whatsoever. Copies thereof specified by the Architect to be true copies shall be furnished to the Contractor. 10

SECOND.—The Contractor, at his own proper costs and charges, is to provide all manner of materials and labor, scaffolding, implements, moulds, models and cartage, of every description for the due performance of the several erections. 20

THIRD.—Should the owner at any time during the progress of the said BUILDING request any alterations, deviations, additions or omissions, from the said contract, he shall be at liberty to do so, and the same shall in no way affect or make void the contract, but will be added or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation. 30

*Exhibit D-4.*

## SPECIFICATION.

Specification for Concrete Waterproof Cellar at the GOLDBERG BUILDING, Valley Brook Ave., Lyndhurst, N. J., Union Township, N. J.

10

David Goldberg.

Owner.

Joseph Kennedy architect  
#6 North Fourth Street  
Harrison, N. J.

Scale of Drawings  $\frac{1}{4}$ " to the foot.

20 Supply all Labor and Material necessary to complete the work as follows. Remove all the cellar bottom now in building, and cart away from premises, clean the cellar bottom from mud, and when dry and water removed put in a Reinforce Concrete Waterproof bottom, ten inches thick 2000 pounds of Reinforcing.

30 One inch thick waterproofing on top, continue this finished waterproofing four feet high of cement waterproofing around inside of cellar walls, build all Areas and steps with the above Mterial. The windows and door jambs the side walls of Areas are to be finished with a coating of cement in a workmanlike manner. Plaster the Brickwork and all other dangerous spots, where the water may come into the cellar, plug up all holes and make this job tight and waterproof in a 1st class manner.

Back fill earth against all the walls and tamp same in place.

40

*Exhibit D-4.*

Use Cow-bay sand and American Portland Cement.

Signed, DAVID GOLDBERG, [SEAL]

Signed, ROMEO BIANCI, [SEAL]

Witness:

JOSEPH KENNEDY,

Jan. 2-17.

10

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

20

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

30

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

40

*Exhibit D-4.*

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

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

20 NINTH.—All work and materials, delivered on the premises to form part of the works, are to be considered the property of the Owner, and are not to be removed without his consent; but the Contractor shall have the right to remove all surplus materials after the completion of the works.

30 TENTH.—Neither the Contractor nor the Architect shall, without the written consent of the Owner, have authority to vary, alter, amend or change this contract, or any of the Plans or Specifications herein referred to.

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

*Exhibit D-4.*

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

Signed, (L. S.) DAVID GOLDBERG,

Signed, (L. S.) ROMEO BIANCI.

Signed, Sealed and Delivered }  
in the presence of }

10

JOSEPH KENNEDY,

Jan 2-17.

20

30

40

**Exhibit D-7.**

Amount \$800 00/100. Certificate No. One.

October 19th, 1916.

Owner, David Goldberg. Address, Lyndhurst, N. J. Carmine Savino Contractor for Concrete Cellar, Halls, Areas and Floors, having furnished labor and material on Building located at Valley Brook Ave., Lyndhurst, under terms of contract dated Sept. 16, 1916, and amounting to \$1600 00/100 is entitled to the first payment of Eight Hundred no/100 Dollars.

This payment is not an acceptance of the work done until final payment is made and does not form any legal obligation on the part of the architect.

20	SUMMARY	{	Amount of contract \$1600 00/100	
			Extra Work                   xx	\$1600 00/100
		Previous payment \$   xx		
		}	Present payment       800 00/100	\$800 00/100

Balance \$800 00/100

Joseph Kennedy,  
Architect.

.....191

30 Received the amount of the above certificate.  
(Endorsed:)—

Face of #1 Certificate	\$800 00/100
less for guarantee as per Contract.	{ 250 00/ } 250 00/
	\$550 00/

October 19th, 1916.

40 Received payment of above Five Hundred and Fifty Dollars.

Received the within payment this Oct. 28, 1916.

Addison Ely, Jr.,  
Atty. for Carmine Savino.

NOV. 1, 1916

New Jersey Court of Errors and Appeals.

CARMINE SAVINO,

*Plaintiff-Appellee,*

*v.*

DAVID GOLDBERG,

*Defendant-Appellant.*

Action at **10**  
Law.  
On Appeal.

**BRIEF OF PLAINTIFF-APPELLEE.**

**Facts.**

This action is based upon a mechanics lien claim for labor performed and material furnished by the plaintiff in the erection of a building for the defendant owner, under a contract dated September 16, 1916. Under this contract plaintiff agreed to do the mason work in said building for the sum of \$1600. This sum to be divided in two payments, as follows: \$800 when cellar walls are up the balance of \$800 when work is completed. Plaintiff proceeded with the work to the point where the first payment was due and after some delay \$800 was paid to him. He continued the work until about December 12, 1916, when he was served with a notice that unless he proceeded forthwith to comply with the terms of said contract, that the owner would, at the expiration of three days, proceed to have the work completed and charge the same to the account of the plaintiff. Plaintiff denied the necessity for said notice but within three days appeared on the prem- **20**  
**30**  
**40**

ises to proceed with the work, but was denied admission to the building. At the time he stopped work an entire contract had been performed by him, except some small plastering work in the cellar, which would cost about \$80.56 to complete. Plaintiff sued for \$800 less \$80.56, or \$719.44, plus two items for extra work, amounting to \$157. The jury returned a verdict for the plaintiff for \$719.44.

10

**The motion for a non-suit was properly denied.**

The first question raised by the defendant is, was the motion for a non-suit properly denied by the trial judge. The defendant divides his argument on this point into seven sub-divisions, numbered one to seven, and we will answer them in the same order.

20

**Sub-Division One.**

**The proof did not correspond with the Bill of Particulars in the mechanic's lien claim, upon which the case was founded.**

30

This statement is based on the fact that the bill of particulars claimed the balance of the contract due, to wit: \$800, while the actual proof discloses that the little cement work in the cellar costing \$80.56, was not actually completed. This small discrepancy the plaintiff claims was not a material variance, and if it is not a material variance, of course, it is not fatal to plaintiff's right to recover. Defendant quotes under this heading: "A complaint or petition which contains *material* allegations that are substantially different from those claimed in the lien claim, is usually held paid." "What is alleged must be proved and a variance between pleading and proof at a

40

*material point* is fatal. Thus where an action to enforce a mechanic's lien claim, the contract alleged was to furnish materials and erect a certain building on defendant's land, while the proof showed that the work done was to raise up and move back and repair two houses, it was held the plaintiff would not recover", and cites numerous citations to these propositions. With this law we do not disagree. We call the Court's attention, however, to the necessity, even under plaintiff's own argument of showing the materiality of the variance. Defendant recognized the futility of attempting to show materiality under the facts in this case, has refrained from even making the attempt. The test of materiality is as to whether it was such as to mislead the defendant to his prejudice and we submit that it positively could not mislead him. After the plaintiff's case had been completed counsel moved for a non-suit on the ground of the variance between the \$800 set up in the lien claim and the proof which showed that there remained some minor items of patch work in the cellar, amounting to \$80.56 in order to complete the contract. Counsel for the plaintiff asked leave to amend and defendant's counsel said that he was not ready to produce proof as to the cost of completion.

"The Court: If counsel say they are not ready to proceed with an amendment, I would not force them on.

"Mr. Hart: No, sir; I do not like to take that position, but I—

"The Court: That would be the position you would have to take.

"Mr. Hart: I have got to have one or the other of the horns of this dilemma. I am not prepared at all as to the reasonable *value of this work*, and I must meet that issue of reasonable value of the work done.

"The Court: That's what you have to meet.

"Mr. Hart: I am not prepared to do that,

sir. Under the circumstances, inasmuch as there are two items for extra work, counsel might feel like accepting a non-suit, or declaring a mistrial.

"The Court: The Court will allow you to amend on terms. I do not suppose counsel would want to go on with the two small items?

"Mr. Hart: I do not want any terms.

10 "The Court: I will allow the jurors to be withdrawn and the plaintiff to amend his first count" (p. 78).

Thereafter, after a considerable discussion between counsel, the foregoing amendment was agreed upon and it was stipulated that the first count of the complaint should be amended by setting up the fact that the amount due was \$800 less \$80.56, or \$719.44 (p. 33).

20 Later the case again came to trial on the said amended complaint. Plaintiff put in his case and defendant fully answered it. He was not misled or injured, the only difficulty experienced was the jury accepted plaintiff's figures as to the costs and rendered a verdict accordingly.

30 Whether the omission of an item of credit in the bill of particulars of a mechanic's lien was or was not "willful or fraudulent" is a question of fact depending upon the particular circumstances of each case, where the trial judge, sitting as a jury, finds as a fact that it was not, and there is evidence to support him, the finding will not be disturbed.

*Buchanan & Smock v. Einstein*, 87 N. J. L., 307.

### Sub-Divisions Two and Three.

These points require no argument by plaintiff as defendant does not press them.

### Sub-Division Four.

**There was no proof in plaintiff's case of probable profits that might have resulted to the plaintiff had he been permitted to proceed with the work.** 10

This was clearly a jury question. Plaintiff's proof was that after he had put the water-proofing in the cement he proceeded with the work.

"A. I proceeded and done my—concreted the cellar bottom. Then I concreted the sides up four feet from the floor, put one inch of finishing coat on the sides, and ten inches of concrete on the cellar bottom.

"Q. And this cellar bottom, the water-proofing hadn't been applied there yet, had it? A. Oh, yes; the water-proofing was in with the concrete. 20

Q. You put that in all the concrete? A. Yes, in all of it.

"Q. Not only in the finishing coat, but in all of it? A. Yes, sir.

"Q. Did you see the concrete put on the cellar bottom? A. Yes, sir" (p. 91).

Speaking about water dripping in on the cellar floor, plaintiff was asked:

"Q. Would that interfere with your work? 30

A. It certainly would.

"Q. Why? A. Because you cannot put a finishing coat down while water is coming down on it. It would ruin it.

"Q. Is that all you had to do on this floor? A. That was all there was, yes, sir.

"Q. And the walls had all been finished? A. All had been finished; yes, sir."

The jury at this point would undoubtedly have given plaintiff a verdict for the full amount due under this installment, to wit: \$800, had not the 40

complaint as amended admitted the fact that it would require \$80.56 to complete the work to the letter of the contract. Plaintiff was clearly entitled to a recovery of the amount due on the contract less the cost of completion.

10

“When an entire contract for the laying of a concrete sidewalk has been substantially performed even though not completed in a workmanlike manner, the contract price may be recovered less a fair allowance to make good the defects although the work has not been accepted.”

*Dyer v. Lintz*, 76 N. J. L., 204.

20

“It was held that if the contractor did not substantially comply with the contract he could not recover, but if there had been a substantial performance of the contract then though there was a failure in some minor particulars the contract price might be recovered less a fair allowance to the owner to make good the defects. This we think is a true rule. That the contract in question had not been substantially complied with, the plaintiff was entitled to a judgment for the contract price, less an allowance sufficient to make good any defective workmanship. What this allowance should be is the duty of the defendant to establish, if he sought to take advantage of the defect relied upon as a defense.”

*Feeney v. Bardsley*, 37 Vr., 239.

30

“Substantial performance of a contract entitles the contractor to recover the contract price, less the cost to complete.”

*Porters Screen Co. v. United Contractors*,  
80 N. J. L., 115.

40

“Where the plaintiff may be excused from fully performing, the jury should be instructed that the amount recoverable is the contract price less what it would cost for defendant to complete the work, according to contract.”

6 Cyc., 783.

### Sub-Division Five.

**As to extra work, there was no written order or evidence of the waiving of the production of a written order.**

### Sub-Division Six.

**There was no written order or any evidence had of the waiving of a written order to do the extra work with the cost thereof agreed upon.** 10

These two sub-divisions are based upon the contract requirements of an order in writing for extra work and an agreement as to the price thereof. It is fundamental law that either or both of these provisions could be waived or nullified by a subsequent agreement. Plaintiff says that he took the matter up both with Mr. Kennedy, the architect, and the owner. 20

“Q. Now you say that you objected to doing the excavation? A. Yes, sir.

“Q. Well, what was the objection, and how did you overcome it? What was done there? A. My objection was that I was doing work that I was not required under the contract, and I expected to be compensated extra for that.

“Q. And how much was that extra excavation? A. About 150 yards or cubic yards. 30

“Q. And what did it cost you to excavate it? A. \$1.00 a cubic yard.

“Q. And did you tell that to Goldberg and Kennedy? A. Yes, sir \* \* \* (p. 88).

“Q. Did you have any further conversation with Kennedy or Goldberg about this work? A. Yes, sir.

“Q. Well, what was that? A. About the excavating; do you mean?

“Q. Yes, about this extra excavating? A. Always told them that that was extra work and expected to be compensated for it” (p. 40 89).

"No matter how stringent the contract provisions may be worded the clause may be modified upon consideration."

*Headley v. Cavileer*, 82 N. J. Eq., 635.

Argument on these sub-divisions, however, does not seem important as apparently the jury disregarded plaintiff's claim for extra work. We submit, however, under the evidence, the judge at the trial was justified in submitting the question to the jury.

#### Sub-Division Seven.

**The evidence discloses the abandoning of the work, compensation for which was sued for in this action by the plaintiff.**

Plaintiff makes no argument under this heading because the point is not pressed by the defendant.

We do not gather the force of the defendant's argument under this heading. Defendant says that the plaintiff delayed the work and on December 12 served him with notice that unless the work was proceeded with, that the defendant would finish the same and charge the expense thereof to the plaintiff. Plaintiff on the other hand said there had been no delay in the work except in so far as it was delayed by the other workmen in the building and within the time limited by the said three day notice, he went to the building for the purpose of finishing up the small amount of work to be done by him, and that he was refused admission to the building. The question presented to the jury was whether defendant was justified in ousting plaintiff from the work. Their verdict was based upon the testimony and they found for the plaintiff. Had they found on the contrary, for the defendant,

and had justified his expulsion of the plaintiff, then defendant would have been allowed the cost of completion. It was clearly a jury question and the jury properly found for the plaintiff. We admit defendant's argument that severity of weather conditions would not justify the abandoning of the contract by plaintiff. But plaintiff did not abandon the contract; he was delayed in putting the finishing coat on the cellar floor because of water dripping into the cellar from the floors above, caused by the other workmen about the building and by the severity of storms. Plaintiff testified as follows:

10

"Q. It was raining when you were digging the areaway, you say? A. Not only raining, but there was other conditions there that prevented me from proceeding.

"Q. Well, now, we will take this up as we go along. You say you were digging the areaway and it was raining? A. Yes, sir.

20

"Q. Well what was the condition inside the cellar at that time? A. Well, they were putting the tile floor on.

"Q. Who were they? A. They were tile men; different contractors.

"Q. Not your men? A. No, sir; and they lay tile on wet concrete and the water kept oozing down on my work, and besides, there was a faucet there out of which all the workmen in the building were getting water, and every time they would turn the water on and off there would be a certain amount of it leak down to the floor. There was no catch basin to catch this water that flowed out.

30

"Q. How many did you have working on this job while you were there? A. Sometimes three; sometimes four; and the time when I quit I had six" (p. 94).

Frank Bierman says:

"Q. There was always water in the cellar. Savino could not complete the job while the water was in the cellar.

40

"Q. What effect, if any, did that have on Mr. Savino's work? A. Well, I told you because the water was in the cellar he couldn't go ahead with the job, because there was a faucet through the wall and everybody was going there and water was running in the cellar" (p. 121)

10 The most that could have been argued from the testimony was that plaintiff was delayed by reason of the water dripping in the cellar. That he didn't abandon the work is evidenced by the fact that he appeared with his men to proceed with the work and was prevented by the defendant from entering the building.

20 **Because the action was based upon mechanic's lien claim and the proofs in the plaintiff's case did not correspond with the Bill of Particulars appearing in the lien claim and no special verdict against the premises described in the lien claim was.**

30 In the case at bar Goldberg, the defendant, is the builder and owner. If the builder and owner were different persons, there might be some argument based on the form of the verdict whether it should be general or special; however, we think under any circumstances, the defendant is estopped from raising this question. He admitted at the trial that if there should be any judgment it should be a general and special judgment.

"The Court: How about you offering your lien claim? It is admitted that if there is any judgment, there should be a general and special judgment.

"Mr. Hart: Yes.

40 "The Court: Then the lien claim may be considered in evidence" (p. 199).

Under paragraphs 6, 7 and 8, on page 16 of Defendant's Brief he makes no argument, neither does he make any argument under paragraphs 8, 9 and 10 on page 17, other than by reference to the previous argument. The plaintiff therefore does not answer these points further than he already has answered them.

**Because the verdict of the jury was  
against the weight of the evidence. 10**

The language of the trial court, we think, well expresses the controversy in this case. The Judge said as follows:

"Gentlemen of the Jury: There is very little law in this case. It is one largely of fact for you to determine, and determine to the credibility of the witnesses, because the story of the two parties, and the witnesses which they have produced, differ materially, and it will depend largely upon which story you believe as to how your judgment should go" (p. 200). 20

There is nothing in the testimony or in the verdict to indicate that the jury had been influenced by prejudice, passion or sympathy. The facts clearly appeared that plaintiff had not only performed work but had supplied materials to the extent of \$719.44 and for this amount the jury gave plaintiff a verdict. This verdict we submit should not be disturbed. 30

It is true the plaintiff sought to interject a counterclaim, which as a matter of law could not possibly be allowed. He claims that it was necessary for him to take up the floor laid by the plaintiff because it was not thoroughly waterproof and sought to establish as the counterclaim the alleged cost of taking up and relaying this floor. We say that he was not justified in doing this without giving plaintiff an opportunity 40

to relay the same, if the same was not in accordance with the contract, as plaintiff had given a bond to the defendant in the sum of \$1,000.00 to guarantee this waterproofing.

In *Kennedy v. Philadelphia Watch Co.*, 76 Law, 736, the Court held:

10 "Defendant had no right to demolish the chimney without giving the plaintiff a chance to repair. He was under a five year guarantee to keep the chimney in repair. Whether the contract has been substantially performed is a jury question. The plaintiff should be given a reasonable time to repair defects."

20 We submit that the defendant has nowhere shown error sufficient to disturb the judgment herein entered. He was not deprived of his day in court; if there was a variance between the lien claim and the proofs this was known to him on the first trial, when, for this very reason and for the purpose of permitting the amendment, to which amendment he consented, he again went to trial and fully met the plaintiff's case. A new trial would not in the least alter or change the issue. It would merely mean that defendant would have an opportunity to have these facts presented to another jury and in view of the small amount involved and the heavy costs, this would be a distinct detriment and should not be permitted unless there has been committed somewhere an error which was prejudicial to the defendant. We submit that no such error appears. The case was properly submitted to the jury and the verdict should not be disturbed.

Respectfully submitted,

EDWARDS & SMITH,  
Attorneys of Plaintiff-Appellee.

EDWIN F. SMITH,  
RAYMOND DAWSON,  
40 Of Counsel.

## New Jersey Court of Errors and Appeals.

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CARMINE SAVINO,

*Plaintiff-Appellee,*

v.

DAVID GOLDBERG,

*Defendant-Appellant.*

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*On Appeal.*

### BRIEF OF DEFENDANT-APPELLANT.

This action is founded upon a lien claim. Issue was joined, and on February 13th, 1918, trial was moved (p. 39). An amendment of pleading was allowed and mistrial was ordered (p. 78). Some question arose as to whether the pleadings of the plaintiff had been properly amended, and because of this the testimony produced on February 13th, 1918, is printed.

On April 26th, 1918, the trial was again moved (p. 79). While the pleadings had not been actually amended the case was tried upon the theory that the first count in the plaintiff's complaint had been amended as appears (p. 33), and that issue had been joined by a complete denial on the part of the defendant—Goldberg.

The jury found in favor of the plaintiff a judgment of \$719.44, and from it the defendant appeals.

#### 1.

The first ground of appeal, "Because the Court refused to non-suit the plaintiff upon the motion of the defendant," will be discussed under the various sub-divisions of the second ground.

## REFUSAL TO NON-SUIT

## SUB-DIVISION 1.

THE PROOFS IN THE PLAINTIFF'S (RESPONDENT'S) CASE DID NOT CORRESPOND WITH THE BILL OF PARTICULARS IN THE MECHANIC'S LIEN CLAIM, UPON WHICH THE CASE WAS FOUNDED.

The Mechanic's Lien Law provides (P. L. 1898 p. 538, Sec. 16) :

“Every person intending to claim a lien under the provisions of this Act, shall within four months after the labor is performed, or the materials furnished for which such lien is claimed, file his claim in the office of the Clerk of the County where the building and land subject to such lien is situate, which claim shall contain \* \* \* \* \*

IV. A bill of particulars exhibiting the amount and kind of labor performed and materials furnished, and the price at which and times when the same was performed and furnished and giving credit for all the payments made thereupon and deductions that ought to be made therefrom, and exhibiting the balance justly due to such claimant \* \* \* \* \* and when such claim shall not be filed in the manner or within the time aforesaid, or if the bill of particulars shall contain any wilful or fraudulent misstatement of the matter above directed to be inserted therein, the building or land shall be free from all liens for the matters in such claim.

The plaintiff herein specified in the lien claim which is the foundation of this action, the following bill of particulars :

“To payment due under and pursuant to the terms of a contract dated September 16th, 1916, between David Goldberg and Carmine Savino for constructing foundation, walls and cellar bottom and water proofing the same of new building on south side of Valley Brook Avenue, Lyndhurst, N. J.....	\$800
To allowance for extra work for excavation, 153 cu. yds. at \$1.00 a yard.....	153
To allowance for extra work furnishing and setting four cellar window frames.....	4
	<hr/>
	\$957

He filed a complaint containing the identical particulars. This was subsequently amended.

That a variance exists between the lien claim, pleadings and proofs is apparent. The variance which existed between the pleading and proof was perhaps cured. We will not dispute this.

The variance which existed between the Mechanic's Lien Claim and the pleadings and proofs, could only have been corrected by an amendment of the claim.

The statute (P. L. 1911, p. 47) provides the procedure.

Sec. 19. At any time before judgment on a lien claim, a Justice of the Supreme Court, or any Judge of the Circuit Court, on application of the lien claimant, and on reasonable notice to all parties interested, may order such lien claim to be amended, in matter of substance as well as in matter of form, whenever it shall appear to him that such amendment can be justly made, and whenever such amendment shall be ordered the same shall be put in writing and signed by said Justice or Judge and shall be then filed in the office of the County Clerk.

This amendment was never made, notwithstanding which a special judgment was allowed against the owner and the land described in the Lien Claim.

“A complaint or petition which contains material allegations that are substantially different from those contained in the lien claim is usually held bad”:

Boisot on Mechanics' Liens, pp. 560, quoting  
Frazer v. Barlow, 63 Cal. 71.

Malone v. Mining Co., 18 Pac. 772.

Palmer v. Lavingue, 37 Pac. 775.

Bristow v. Evans, 124 Mass. 548.

“The requirements of a mechanic's lien statute cannot be waived.”

Boisot on Mechanics' Liens, pp. 588 n, quoting  
Burnside v. O'Hara, 35 Ill. app. 150.

“What is alleged, must be proved, and a variance between pleading and proof on a material point, is fatal. Thus where an action to enforce a machanic's lien, the contract alleged was to furnish materials and erect a certain building on defendant's land, while the proof showed that the work done was to raise up, move back and repair two houses, it was held that plaintiff could not recover. Where the petitioner sets up and relies upon an express contract, he cannot afterwards rely upon another state of facts. Nor can he abandon the contract set out in his petition and recover upon a quantum meruit.”

Boisot on Mechanics Liens, pp. 638, quoting  
Bottomly v. Rector, 2 Cal. 90.

Eaton v. Malataska, 28 Pa. 54.

Kimball v. Cook, 6 Ill. 423.

Hauptman v. Halsey, 1 E. D. Smith (N. Y.) 668.

Belanger v. Hersey, 90 Ill. 70.

Kimball v. Cook, 6 Ill. 423.

Carroll v. Craine, 9 Ill. 563.

“If the case proved be not in substance the case al-

leged in the petition, the latter should be dismissed for variance.

Ruggles v. Blank, 15 Brad. 436.

“If the lien claim is for repairs and the proof is the erection of a new building, there is a fatal variance.”

Cox v. Flanagan, 2 Atl. 33.

“The only judgment that can be rendered against the owner as such is the special judgment founded upon the lien claim.

James v. Van Horn, 10 Vr. 353.

“A variance between the description in a lien claim and the proofs is a misdescription that is fatal.”

Cox vs. Flanagan, 2 Atl. 33.

“The Mechanics’ Lien Law is to be construed strictly, so far as it established an encumbrance upon the property of one person for another person’s debt.”

Franklin Society v. Thornton, 85 E. 37 aff’d 85 E. 525.

“In a suit to enforce a lien claim, as in any other the plaintiff’s right of action must be complete before he begins.”

Titus v. Gunn, 40 Vr. 410.

Moreover, the variance discloses a demand in excess of the amount due the claimant, and this alone is fatal to the lien claim.

“ \* \* \* \* \* if the bill of particulars shall contain any wilful or fraudulent misstatements of the matters

above directed to be inserted therein, the building or land shall be free from all lien for the matters in such claim."

Mechanics' Lien Act P. L. 1898, p. 538, Sec. 16.

"The whole claim is impaired by claiming more than is due."

McPherson v. Walton, 42 N. J. Eq. 282.

"The policy of the law does not favor forfeiture, and the provisions in Section 16 of the Mechanics' Lien Act which invalidates the entire claim if the bill of particulars shall 'wilfully or fraudulently' misstate any of the matters directed to be included therein, is to be construed strictly."

Buchanan & Smock L. Co. v. Einstein, 87 Law 307.

"A demand knowingly was made by the claimant for more than was due him, and this was fatal":

Reeve v. Elmendorp, 9 Vr. 125.

Kirtland v. Moore, 13 Stew. 106.

McPherson v. Walton, 15 Stew. 282.

Hall v. Baldwin, 18 Stew. 858.

Flaherty v. Atlantic Co., 44 Atl. 186.

Donnelly v. John, 44 Atl. 180.

"Wilful misstatements in the lein claim, will not be permitted to be amended."

Bartley v. Smith, 14 Vr. 321.

2.

## REFUSAL TO NON-SUIT.

## SUB-DIVISIONS II AND III.

The amendment of the complaint destroys the usefulness of these two grounds, and they are not pressed.

2.

## REFUSAL TO NON-SUIT.

## SUB-DIVISION IV.

THERE WAS NO PROOF IN THE PLAINTIFF'S CASE OF PROBABLE PROFITS THAT MIGHT HAVE RESULTED TO THE PLAINTIFF-RESPONDENT, HAD HE BEEN PERMITTED TO PROCEED WITH HIS WORK.

The Plaintiff attempted to prove his probable profits by showing work remaining undone at the time of the alleged ouster and its "cost" and deducting that from the balance of the consideration remaining unpaid, the result representing the "probable profits."

We submit that this method is not approved.

"Where under a building contract, the contractor has been prevented from completing his work by the fault of the owner, the legal measure of damages is such a proportion of the entire price as the fair cost of the work done bears to the fair cost of the whole work, and, in respect to the work not done, such profits as the contractor would have realized by doing it."

Wilson v. Borden, 68 N. J. L. 627.

Kehoe v. Borough of Rutherford, 56 N. J. Law 23.

Assuming, however, that this method is the proper one of measuring damages, the verdict does not conform to the

testimony, strangely it conforms only to the complaint.

The demand of the Plaintiff, excepting for the extra work, was \$719.44, he making allowance of \$80.56 for the "cost of finishing."

Nowhere in the testimony in this figure named. And the only evidence at all upon this subject is of Bierman (p. 125-30) who testified that "it would be worth a square foot to build that floor—about thirty cents." He estimated the cellar floor as 50x52 in size—or 2,600 square feet. This witness testified in effect that it would have cost the Plaintiff \$780.00 to finish his work, hence leaving but \$20.00, as the probable profits due the Plaintiff.

And the second and only other witness who testified was R. Bianchi (p. 182-30) who estimated the "cost" of finishing the work at about \$135, \$140 or \$150, showing by this method about \$650.00 as the probable profit.

Yet neither—and no one else—testified *what the reasonable cost of finishing the work would be, or that the cellar finishing was the only work remaining to be done.*

## 2.

### REFUSAL TO NON-SUIT. SUB-DIVISION V.

AS TO THE EXTRA WORK, THERE WAS NO WRITTEN ORDER OR EVIDENCE OF THE WAIVING OF THE PRODUCTION OF A WRITTEN ORDER TO DO EXTRA WORK.

### SUB-DIVISION VI.

THERE WAS NO WRITTEN ORDER, OR ANY EVIDENCE AT ALL OF THE WAIVING OF A WRITTEN ORDER TO DO THE EXTRA WORK *WITH THE COST THEREOF AGREED UPON.*

The contract provides (p. 209-30).

“Third: Should the *owner* at any time during the progress of the said building, request any alterations, deviations, additions or omissions, from the said contract, he shall be at liberty to do so, and the same shall in no way affect or make void the contract, etc.”

The mason’s specifications provide, (p. 213-30) :

“Seventh: No alterations or extra work shall be done without a *written order from the owner*, approved by the architect, and an express agreement *in writing* as to the cost.”

The items of extra work are:

1. Excavating 153 cu. yds. of dirt at an “agreed price” (12.20) of .....\$153
2. Setting 4 cellar window frames at an “agreed price” (13-10) of ..... 4

The Plaintiff himself testified (p. 87-30) that when he discussed the work which he now calls “extra work” with the Architect, the latter told him “that is up to you.” This work is described by the Plaintiff as “Excavating around the sides of the building so that I could get down and treat the walls.” This was clearly a part of the Plaintiff’s undertaking. The Plaintiff quoted (p. 88-30) the Architect and Owner as saying about this work “oh, no, they says, we don’t pay that; that’s up to you.”

There is no testimony supporting the plaintiff.

The Architect (p. 137) denied that he directed the Plaintiff to do this, and (p. 137-30) indicated that when building his forms for the walls, he laid one against the side of the excavation, and when the concrete was set, was obliged to excavate the outside of the wall in order to *recover his wood*.

The Architect (p. 138-10) further denied agreeing to pay the Plaintiff.

The Owner supported this (p. 161) as did the carpenter who made the form—Ronzo (p. 193-40).

This case comes within the rule expressed in *Van Buskirk v. Board of Education of Passaic Twp., Morris Co.* (75 Atl. 909).

“The Architect could not alone waive those clauses in the contract which required that any order he might make was to be in writing, and have the written approval of the owner.”

“Under a building contract providing that no alteration shall be made except on the written order of the Engineer, a recovery cannot be had for the expense of alterations, unless an order is produced, or it is shown that the stipulation was waived, or the contractor fraudulently lured into making the alteration without an order.”

*Sheyer v. Pinkerton Const. Co.*, 59 Atl. 462.

## 2.

## REFUSAL TO NON-SUIT.

## SUB-DIVISION VII.

We shall not press this ground.

## 3.

BECAUSE THE EVIDENCE DISCLOSED AN ABANDONMENT OF THE WORK, COMPENSATION FOR WHICH WAS SUED FOR IN THIS ACTION BY THE PLAINTIFF-RESPONDENT.

The contractor engaged (207-20) to “on or before the 10th October, 1916, finish the walls of building including areas and steps and the complete cellar bottom November 1st, 1916, well and sufficiently erect and finish the

foundation walls and cellar bottom and waterproofing of same" of the building described in the lien claim herein, "agreeably to the drawings and specifications made by Joseph Kennedy, Architect," and under the Architect's direction.

And the contract further provides: (213-10) "Should the Contractor, at any time during the progress of said work, refuse or neglect to supply a sufficiency of materials or workmen, the owner shall have power to provide materials and workmen, after three days' notice in writing being given, to finish the said work, and the expense shall be deducted from the amount of the contract.

The contractor began the work required by this contract on October third, 1916.

Mr. Kennedy (135-20) testified that the side-walls were first erected, and imperfectly, so, and this was recognized by Plaintiff; inasmuch as he corrected the imperfection (137-10); furthermore, that the men were not efficient workmen (136-40) and that in his work (138-139) Savino "delayed, deserted, delayed. One day he would have one man working, another day he would have two or three and the result was that we were going ahead with the building got away up; we were getting ready for finishing up, and still he was away behind in his contract \* \* \* \*. Then eventually he deserted the job entirely, and we served him with a three days' notice."

Goldberg testified (162-20) "after he (Savino) was through with the foundation, he didn't go ahead with the work at all, absolutely nothing."

Goldberg on page 163 described the expiring efforts of Savino to perform his contract, and Savino—"stopped work altogether. Then we served him with a second notice."

This notice (Ex. P-2) was served on the Plaintiff at 4.30 P. M., December 12th, 1916, a Tuesday!

The Plaintiff made no effort to proceed with the work until the Monday following, December 18th, 1916.

And his effort then was insincere. He described it (page 96-30) but Curcio, the one man he employed to go to the work on Monday, the 18th, evidenced Savino's insin-

cerity, for when he was employed, Savino told him "If I ain't got anything to do for Monday, I pay you for a full day" (p. 131-10).

The Plaintiff explained his abandonment of the work on account:

I. Rain (93-40).

II. They (other contractors) were putting the floor on, and they laid tile on wet concrete, and the water kept oozing down on their work (94-10), and

III. There was a faucet out of which all of the workmen in the building were getting water, and every time they would turn the water on or off, there would be a certain amount of it leak down on the floor. (94-40) forty or fifty gallons a day (95-10) it interfered with the work.

#### I.

#### RAIN.

This could scarcely have been the Plaintiff's reason for not continuing his work, inasmuch as the building had been well-nigh completed above the cellar, and the floors—the finished tile floors were being laid (94-10) and little rain could have entered the cellar.

"Weather conditions \* \* \* \* do not excuse delay under ordinary conditions."

Schuler v. Golder, 37 Nev. 281.

"Severity of the weather insufficient as excuse if the work could have been carried on by exercise of extra means or effort."

Reichenbach v. Sage, 43 Pac. 354, Cyc. Vol. 6-73 and cases cited.

## II.

Tile floor being laid and water oozing down:

None of the Plaintiff's witnesses testified about water alleged to have come from the floor above, except the plaintiff himself.

The Defendant's witness, Kennedy, (Architect) testified that a maximum of three gallons may have come through (140-10).

## 3.

Faucet: Men using it, and allowing the water to drip.

The Plaintiff's testimony was supported alone by the witness, Frank Berman (121-40), who testified that water was in the cellar (3 or 4 inches) and it *came through the faucet*.

These witnesses denied this Kennedy (150-10), R. Bianchi (180-30) and E. Bianchi (185-10).

When the Plaintiff undertook the work, there was water and rubbish in the excavation (146-20).

He contracted and was paid \$75.00 to remove this. (140-141).

Yet he did not remove it (149-40). Mark Eldridge (a fellow workman of Plaintiff) testified (189-10) that there was water in the cellar when it was laid. Some places two inches, some eight or ten inches. Also Ronzo (194-10) testified that when the concrete was laid by Savino water came in "all over." Savino, himself, testified that when he started the work the excavators were working "in a sea of mud." Goldberg testified (163, etc.) "He started to put the rough concrete in, and the water—the cellar was full of water. He took his contract with the agreement that he should lay the concrete in a clean, dry cellar bottom \* \* \* he laid the concrete in the mud in the water in the cellar. They were walking around in boots, and they didn't know whether they were laying it on the bottom of the cellar or in the water!"

His failure to do the work according to contract and specifications resulted in an imperfect and leaky job.

When the work was ripped up, it was found that the cellar was of irregular thickness, and this I believe is not denied by the Plaintiff. These witnesses testified the depth was: Goldberg (165-30) Some places two inches, six inches, eighteen inches. R. Bianchi, (180-20) Some places eighteen inches, six inches, two inches, all mixed up with mud and everything in the cellar; wood and a piece of board and everything in."

E. Bianchi—sixteen inches, twenty inches, two inches (184-30) "it have dirt, rags and a piece of wood."

K. Hillamael (186-20) sixteen inches, four inches, two inches, ten inches.

It was this that caused water to be in the cellar, and it came from the cellar bottom.

Joseph Kennedy (144-10) "the water was oozing up in the heart of the cellar—through the concrete put in by Savino—sometimes it was over my rubbers."

Goldberg (164-20) "Q. Where did the water come from? A. Right from the bottom through the walls," and (175-30) "The water was coming in gradually through the bottom floor and through the walls."

R. Binanchi (180-20) "Q. What was the trouble with the cellar? A. The water coming through too fast."

\* \* \* \* "Q. The water came through the cellar floor? A. Through the cellar bottom."

En. Bianchi (185-10) "Q. The water leaked through? A. Through the floor and the walls, too."

K. Hillamael (186-20) the water came "from the sides and from the bottom."

M. Eldridge (187-30) "Q. While you were doing that work on the sidewalls for Savino, was the water leaking through the sidewalls? A. At the bottom, yes, sir." And he further testified—"You couldn't apply the waterproofing to the walls where the water was coming through, because the water washed it away."

J. Curcio (192-10) "Q. Was there any water coming through the cellar floor? A. Sure, because they no pump

it out." Also, "Was the water coming out through these sidewalls too? A. All over."

Furthermore, Kennedy testified (139-30) that the water came "right through the cellar bottom."

And it was because of this that Savino could not finish his work, and it was abandoned, and the notice of December 12th, served.

The accident of the water in the cellar did not excuse the Plaintiff from completing his contract. The water could have been and indeed was removed by the other contractor, Bianchi, and the work finished. Its removal was a contractual duty of Plaintiff.

"The law will not alter a contract for the benefit of one party to the detriment of the other.

School Trustees of Trenton v. Bennett, 27 Law 513.

Kupfersmith v. Delaware Ins. Co., 84 Law, 271.

"Delay in performance is not excused because the builder's work is retarded by the happening of a contingency possible at the time the contract was made, such as the difficulty of performance or the occurrence of a strike, unless there is a provision exempting the builder from the consequences thereof, nor is the delay excused where it resulted from the condemnation of materials furnished by the builder or from the faultiness of his workmanship \* \* \*."

6 Cyc. 73 and cases cited.

Savino had abandoned the work, and it became necessary for Goldberg to take hold and complete.

It is true that on a Monday after the three days had expired, the water was pumped out and the work examined by Kennedy and Bianchi and Bianchi entered into contract D-4 and it cost Goldberg \$1,300.00 to rip up the improper work (165-30) and do it correctly—"for the rectification of the improper work of Savino, and the completion of the work according to the contract between Savino and Goldberg" (143-20).

It is true that the contract between Bianchi and Gold-

berg called for a re-enforcing of the cellar floor, a feature additional to the Savino contract, but the additional cost of this was \$80.00 (183-30). This should not be charged against the Plaintiff (Isaacs v. Reeve, 44 Atl. 1).

## 4 and 5.

BECAUSE THE ACTION WAS BASED UPON A MECHANICS LIEN CLAIM AND THE PROOFS IN THE PLAINTIFF-RESPONDENT'S CASE DID NOT CORRESPOND WITH THE BILL OF PARTICULARS APPEARING IN THE LIEN CLAIM, AND NO SPECIAL VERDICT AGAINST THE PREMISES DESCRIBED IN THE LIEN CLAIM IS ALLOWABLE.

The reason appearing under Ground No. 2, Sub-Division I (page 2) are here repeated.

## 6.

THE AMENDMENT OF THE COMPLAINT DESTROYS THE USEFULNESS OF THIS GROUND.

## 7.

BECAUSE THERE WAS NO PROOF OF PROBABLE PROFITS THAT MIGHT HAVE RESULTED TO THE PLAINTIFF-RESPONDENT, HAD HE BEEN PERMITTED TO PROCEED WITH HIS WORK.

The reasons appearing under Ground No. 2, Sub-Division IV (page 7) are here repeated.

## 8.

AS TO THE EXTRA WORK, THERE WAS NO

WRITTEN ORDER OR EVIDENCE OF THE WAIVING OF THE PRODUCTION OF A WRITTEN ORDER TO DO EXTRA WORK.

## 9.

THERE WAS NO WRITTEN ORDER, OR ANY EVIDENCE AT ALL OF THE WAIVING OF A WRITTEN ORDER TO DO EXTRA WORK WITH THE COST THEREOF AGREED UPON.

The reasons appearing under Ground No. 2, Sub-Division V and VI (page 8) are here repeated.

## 10.

We shall not press this ground.

## 11.

BECAUSE THE VERDICT OF THE JURY WAS AGAINST THE WEIGHT OF EVIDENCE.

The plaintiff demanded for loss of probable profits \$719.44. It is admitted that had he finished the work as required by the contract, he would have then been entitled to \$800.00. In estimating his demand, he allowed \$80.56 as the cost of finishing.

He demanded \$157.00 for extra items. Evidently the jury disallowed this demand for its verdict allowed the Plaintiff only—and the exact amount demanded as probable profits—\$719.44.

Bozarth v. Dudley, 44 Law, 314-315.

If the Counterclaim be disregarded, this verdict is not

sustained. We respectfully point to the reasons urged under Ground 2, Sub-Division IV (page 7).

We submit that the Plaintiff clearly abandoned the work (reasons presented under Ground 3, page 13) and it became necessary for the owner to take possession and complete it.

## 12.

THE PLAINTIFF'S RESPONDENT'S CASE WAS FOUNDED UPON THE PROBABLE PROFITS TO BE HAD FROM A CONTRACT THE PERFORMANCE OF WHICH IT IS ALLEGED, WAS PREVENTED BY THE ACT OF THE DEFENDANT APPELLANT. THE DEFENDANT APPELLANT APPEALS BECAUSE IT DOES NOT APPEAR FROM THE EVIDENCE THAT THE DEFENDANT APPELLANT PREVENTED THE PLAINTIFF RESPONDENT FROM PERFORMING THE SAID CONTRACT, BUT ON THE CONTRARY, THAT THE PLAINTIFF RESPONDENT ABANDONED THE WORK, AND THE COST TO THE DEFENDANT APPELLANT OF COMPLETING THE ABANDONED WORK WAS IN EXCESS OF ANY MONEYS OTHERWISE DUE THE PLAINTIFF RESPONDENT.

The reasons appearing under Ground 3 (page 13) and 11 (page 17) are here repeated.

Goldberg's method of taking possession was strictly according to the contract.

In order to complete the work according to the Plaintiff's contract, it became necessary to tear up the cellar floor and relay it. While doing this a re-enforcement was used, and in this respect alone the contract with Bianchi for finishing differed from the one with the Plaintiff.

The consideration of the (Bianchi) contract was \$1,300 (Ex. D-4) and the cost of the re-enforcement \$80.00 (p. 183-30) leaving a correct and lawful charge against the Plaintiff's contract \$1,220.00. The amount credited to

the Plaintiff had he done the work correctly was \$800.00.

We respectfully submit that the Jury should have awarded a verdict for the Defendant in the sum of \$420.00.

A. C. HART & VANDERWART,  
Attorneys of Defendant-Appellant.

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