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Notice of Appeal.

New Jersey Court of Errors and Appeals.

10

HENRY P. SOULIER and JENNIE A.
SOULIER,

Plaintiffs-Appellants,

vs.

MARTIN DAAB, JR.,

Defendant-Respondent.

Notice of
Appeal.

20

TO JOHN J. FALLON, ESQUIRE,

Attorney of Defendant.

TAKE NOTICE that the defendant appeals to the
New Jersey Court of Errors and Appeals from
the whole of the judgment entered in this
cause.

EBERHARD & SHERIDAN,
Attorneys of Appellants.

30

Service of a copy of the within notice of ap-
peal is hereby admitted.

Dated, April 24, 1913.

JOHN J. FALLON,
Attorney of Defendant.

40

Complaint.**Circuit Court—County of Hudson.**

HENRY P. SOULIER and JENNIE A.
SOULIER,

Plaintiffs,

vs.

MARTIN DAAB, JR.,

Defendant.

Complaint.
Action at
Law.

10

The defendant in this cause was summoned to answer unto Henry P. Soulier and Jennie A. Soulier plaintiff therein in an action at law upon the following complaint.

Plaintiffs residing at Seabright, in the County of Monmouth, State of New Jersey, say that:

20

FIRST COUNT.

1. Plaintiffs being the owners of the lands and premises known as No. 77 Hudson Street, in the City of Hoboken, County of Hudson and State of New Jersey, and situate on the northeast corner of Hudson Place and Hudson Street in said city, on February 7th, 1907, let and rented to the defendant, the first floor and the front parlor and the basement of said premises, by a lease in writing for the term of five (5) years from the first day of May, 1907; a copy of said lease is hereto annexed.

30

2. That by the terms of said lease it was agreed that the parties of the first part, plaintiffs in this suit, were to have all fixtures then in said premises and also that no changes were to be made in the premises without the consent of the parties of the first part, these plaintiffs.

40

Complaint.

3. That after the making of the said lease, the defendant went into possession of said premises described therein and continued in such possession until the thirtieth day of April, 1912, when he quit and surrendered the said premises and his tenancy under said lease.

4. That at the time of the making of said lease there were on the premises certain fixtures, of the reasonable value of Four thousand (\$4,000.00) dollars: 10

5. That when the said defendant quit and surrendered said premises he removed said fixtures from said building and converted the same to his own use.

6. That upon the first day of May, 1912, the plaintiffs demanded of the said defendant the return of said fixtures. That the defendant has refused to return the same. 20

SECOND COUNT.

1. Plaintiffs being the owners of the lands and premises known as No. 77 Hudson Street, in the City of Hoboken, County of Hudson and State of New Jersey, and situate on the northeast corner of Hudson Place and Hudson Street in said city, on February 7th, 1907, let and rented to the defendant, the first floor and the front parlor and the basement of said premises by a lease in writing for the term of five (5) years from the first day of May, 1907; a copy of said lease is hereto annexed. 30

2. That by the terms of said lease it was agreed that the parties of the first part, plaintiffs in this suit, were to have all fixtures then in said premises and also that no changes were to be made in the premises without the consent of the parties of the first part, these plaintiffs. 40

Complaint.

3. That after the making of the said lease, the defendant went into possession of said premises described therein and continued in such possession until the thirtieth day of April, 1912, when he quit and surrendered the said premises and his tenancy under said lease.

10 4. That the defendant, after the making of said lease and before the termination thereof, made certain changes in the said premises without the consent of these plaintiffs in the following particulars; cherry partition with stained glass top was removed; cherry door leading to rathskeller was removed; the bar, back bar, back fixtures, wine closet, working bar, lunch counter, were removed; partition dividing store was removed; partition and door from ladies' toilet was taken
20 down and removed; door in back of bar was removed; all back bar plumbing was removed; brass rails to rathskeller and to toilet were removed; steam pipes and radiators were disconnected; all plumbing in toilets was disconnected and removed; dish washing tubs were disconnected and removed.

THIRD COUNT.

1. Plaintiffs being the owners of the lands and
30 premises known as No. 77 Hudson Street, in the City of Hoboken, County of Hudson and State of New Jersey, and situate on the northeast corner of Hudson Place and Hudson Street, in said city, on February 7th, 1907, let and rented to the defendant, the first floor and the front parlor and the basement of said premises, by a lease in writing for the term of five (5) years from the first day of May, 1907; a copy of said lease is hereto annexed.

40 2. That by the terms of said lease it was

Complaint.

agreed that the parties of the first part, plaintiffs in this suit, were to have all fixtures then in said premises and also that no changes were to be made in the premises without the consent of the parties of the first part, these plaintiffs.

3. That after the making of the said lease, the defendant went into possession of said premises described therein and continued in such possession until the thirtieth day of April, 1912, when he quit and surrendered the said premises and his tenancy under said lease. 10

4. That the said defendant injured and destroyed the walls, floors, ceilings, wood work and metal work of said building and destroyed one of the pillars or columns in said store; and that the defendant quit the said premises and removed therefrom, he removed certain of the fixtures which were in said premises, and injured, damaged and destroyed the walls, floor, ceilings, wood work and metal work of said building; destroyed and removed the toilets, tubs, bar and other plumbing, steam pipes and radiators, and injured damaged and destroyed the water, waste, gas, steam and other pipes, and the walls, floors, wood work and other parts of said building, and that by reason thereof, the said plaintiffs were forced to expend large sums of money and will in the future be forced to expend large sums of money, in the repairing of the same. 20 30

FOURTH COUNT.

1. Plaintiffs being the owners of the lands and premises known as No. 77 Hudson Street, in the City of Hoboken, County of Hudson and State of New Jersey, and situate on the northeast corner of Hudson Place and Hudson Street, in said 40

Complaint.

city, on February 7th, 1907, let and rented to the defendant, the first floor and the front parlor and the basement of said premises, by a lease in writing for the term of five (5) years from the first day of May, 1907; a copy of said lease is hereto annexed.

2. That after the making of the said lease,
 10 the defendant went into possession of said premises described therein and continued in such possession until the thirtieth day of April, 1912, when he quit and surrendered the said premises and his tenancy under said lease.

3. That after the making of said lease, the said defendant placed in said buildings and annexed to the same so that the same became part of the realty, the following fixtures: cherry partition,
 20 stained glass top leading to rathskeller; cherry door to rathskeller, cherry door at stairs, bar, back bar and fixtures, working bar, cigar counter and glass box, show case, lunch counter, back fixtures, wine closet, partition dividing store, partition for ladies' toilets, door in back of bar, brass rails to rathskeller and toilet, three doors at toilets, toilets, dish washing tubs, steam pipes and radiators.

4. That before the defendant quit and surrendered
 30 said premises, said defendant tore up and removed said fixtures.

Plaintiffs Demands.

1. As damages, Four thousand dollars on the first count.

2. As damages, Four thousand dollars on the second count.

3. As damages, Four thousand dollars on the
 40 third count.

4. As damages, Four thousand dollars on the fourth count.

EBERHARD & SHERIDAN,
 Attorneys for Plaintiffs.

*Complaint.***Copy of Lease.**

THIS AGREEMENT, made the seventh day of February, in the year of our Lord, One thousand nine hundred and seven, between Jennie A. Soulier and Henry P. Soulier, her husband, of the City of Hoboken, in the County of Hudson and State of New Jersey, parties of the first part, and Martin Daab, Jr., of the City of Hoboken, in the County of Hudson and State of New Jersey of the second part. 10

Witnesseth, that the said parties of the first part, have hereby let, and rented to the said party of the second part, and the said party of the second part, has hereby hired and taken from the said parties of the first part,

All that certain first floor on the premises known and designated as number seventy-seven (77) Hudson Street, in the City of Hoboken, County of Hudson and State of New Jersey, being the northeast corner of Hudson Place and Hudson Street, in said City, County and State aforesaid, and the front part of basement for the term of five (5) years, to commence on the First day of May, A. D., 1907, at the yearly rent as follows: to wit: For the first year of the said term, the sum of Twelve Hundred (\$1200.) dollars, payable in equal quarterly payments of Three Hundred (\$300.) Dollars, in advance; 20 30

For the second year, the sum of Fifteen Hundred (\$1500.) Dollars, payable in advance as aforesaid, in equal quarterly payments of Three Hundred and Seventy-Five (\$375.) Dollars; for the third, fourth, and fifth years, the sum of Eighteen Hundred (\$1800.) Dollars, per year, payable in equal quarterly payments in advance as aforesaid of Four Hundred and Fifty (\$450.) Dollars. 40

Complaint.

And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained then it shall be lawful for the said parties of the first part to re-enter the said premises, and to remove all persons therefrom.

And the said party of the second part covenants
 10 to pay to the said parties of the first part, the said rent as herein specified, to wit: for the first year, the sum of Twelve Hundred (\$1200.) Dollars; for the second year, the sum of Fifteen Hundred (\$1500.) Dollars, and for the third, fourth and fifth years, the sum of Eighteen Hundred (\$1800.) Dollars per year, all payable as above set forth.

And at the expiration of the said term, or the
 20 termination of this lease, the said party of the second part will quit and surrender the premises hereby demised, in as good a state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.

And the said parties of the first part covenant, that the said party of the second part, on paying the said rent, and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises
 30 for the term aforesaid.

AND IT IS HEREBY FURTHER AGREED between the parties hereto, that the said party of the second part, shall have the privilege of extending this lease for the term of five (5) years, at the yearly rent of Twenty-four Hundred (\$2400.), Dollars per year, payable in equal quarterly payments of Six hundred (\$600.) Dollars, as aforesaid.

40 AND IT IS HEREBY FURTHER AGREED between the parties hereto that the said party of the second

Complaint.

part will not sublet or assign this lease without the written consent of the said parties of the first part.

AND IT IS HEREBY FURTHER AGREED between the parties hereto, that a notice by either party of ninety (90) days, given to either party after the first five (5) years, shall terminate this Lease.

AND IT IS HEREBY FURTHER AGREED between the parties hereto, that the parties of the first part are to have all fixtures now in said premises, and also that no changes are to be made in the premises without the consent of the parties of the first part. 10

AND IT IS ALSO hereby stipulated and agreed between the parties hereto that the parties of the first part shall not, in any wise, have or cause any nuisances upon the premises hereby leased, and in the event of the party of the second part being charged with nuisances or keeping a disorderly place, or the said premises be charged as being a disorderly place, IT IS AGREED HERETO that this Lease shall become void and of no effect, and the party of the second part shall quit and surrender the said premises, or be subject to an ejectment suit in the District Court, as provided for persons occupying houses and being disorderly. 20 30

AND IT IS HEREBY FURTHER AGREED between the parties hereto that the party of the second part shall pay all water rents due on said premises.

IN WITNESS WHEREOF, the said parties hereto have hereunto set their hands and seals, the day and year first above written.

SIGNED, sealed and delivered in the presence of FRED. N. EBERHARD.

Jennie A. Soulier, (L. S.) 40

Henry P. Soulier, (L. S.)

Martin Daab, Jr., (L. S.)

Complaint.

STATE OF NEW JERSEY, }
 County of Hudson. }

BE IT REMEMBERED, That on this eleventh day of February, in the year of our Lord, One Thousand Nine Hundred and Seven, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Jennie Soulier, and Henry
 10 P. Soulier, her husband, and Martin Daab, Jr., who, I am satisfied are the parties named in the within Indenture of Lease named; and I having first made known to them the contents thereof, they did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

And the said Jennie Soulier, being by me
 20 privately examined, separate and apart from her said husband did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, freely, without any fear, threats or compulsion of her said husband.

FRED. N. EBERHARD,
 Master in Chancery of New Jersey.

Filed, Clerk's Office, Oct. 29, 1912,
 Hudson County, N. J.

30 JOHN F. CROSBY, Clerk.

Answer.

The defendant answered as follows:

Defendant, residing at No. 722 Hudson Street, Hoboken, Hudson County, New Jersey, says, that:

DEFENSE TO FIRST COUNT.

1. He admits the first paragraph. 10
2. He admits the second paragraph.
3. He admits the third paragraph.
4. He denies the fourth paragraph.
5. He denies the fifth paragraph. As to the statements in the fifth paragraph defendant says that the fixtures removed by him from said premises were the property of the defendant, and that he was lawfully entitled thereto.
6. He denies the sixth paragraph. As to the statements in the sixth paragraph defendant admits that on the first day of May the plaintiffs demanded of the defendant the return of certain fixtures mentioned and described in a certain demand in writing served upon the defendant, and that the defendant has refused to return the same. That the fixtures mentioned in the notice or demand in writing served upon the defendant by the plaintiffs were not in and upon said demised premises at the time of the making of said lease, but were subsequently placed therein by the defendant, and were the property of defendant. 20
30

DEFENSE TO SECOND COUNT.

1. He admits the first paragraph.
2. He admits the second paragraph.
3. He admits the third paragraph.
4. He denies the fourth paragraph. As to the 40

Answer.

statements in the fourth paragraph defendant admits that he removed cherry partition with stained glass top; cherry door leading to rathskeller; the bar, back bar, back fixtures, wine closet, working bar, lunch counter; partition dividing store; partition and door from ladies' toilet; door in back of bar; all back bar plumbing; brass rails to rathskeller and to toilet; dish washing tubs, and says that the said fixtures, goods and chattels so removed by him were not the property of the plaintiffs and were not in the said demised premises at the time of the making of the said lease, but were purchased by the defendant and paid for by him, and placed in and upon said premises after he entered into possession of said premises under said lease, and were the property of the defendant at the time he removed the same. He denies that he disconnected the steam pipes and disconnected and removed the plumbing in the toilets.

DEFENSE TO THIRD COUNT.

1. He admits the first paragraph.
2. He admits the second paragraph.
3. He admits the third paragraph.
4. He denies the fourth paragraph. As to the statements in the fourth paragraph defendant says that the fixtures removed from said demised premises by him were the property of defendant.

DEFENSE TO FOURTH COUNT.

1. He admits the first paragraph.
2. He admits the second paragraph.
3. He denies the third paragraph except so far as admitted in the following statement; that the

Answer.

defendant did place in said building the fixtures mentioned and described therein, but he denies that said fixtures were placed in said buildings an annexed to the same so that the same became part of the realty.

4. He denies the fourth paragraph except so far as admitted in the following statement; the defendant removed from said premises all of the fixtures mentioned in paragraph three excepting the steam pipes and radiators. He says that said fixtures removed by him were not torn up but were carefully removed from said premises without damage to the realty. That all the goods and chattels removed by defendant from said demised premises were the property of the defendant. 10

By way of counter claim against the plaintiffs, the defendant says: 20

FIRST COUNT.

1. That on February 7th, 1907, by lease in writing a copy of which is annexed to complaint, plaintiffs let and rented to the defendant all that certain first floor on the premises known and designated as number Seventy-seven (77) Hudson Street, in the City of Hoboken, County of Hudson, and State of New Jersey, being the northeast corner of Hudson Place and Hudson Street, in said City, County and State aforesaid, and the front part of basement for the term of five (5) years, to commence on the First day of May, A. D., 1907. 30

2. Defendant hired said premises for the purpose of conducting therein a cafe or saloon and restaurant.

3. After the making and execution of said lease in writing the plaintiffs by verbal agree- 40

Answer.

ments made and entered into with the defendant agreed that in consideration of the defendant paying one half of the cost thereof, that they the said plaintiffs would make the following additions, alterations and improvements to the said demised premises, to wit:

10 (a) Excavate the basement of said demised premises and all necessary mason and cement work to make this basement water tight and ready to be fitted up and used as a rathskeller.

(b) Installation of steam-heating plant.

(c) Iron work, consisting of stairs, beams, ventilator and doors.

20 (d) Painting ceilings in bar and sitting room and gilding same with gold leaf, gilding pipes and painting radiators and pipes.

(e) Lay Terazzo floor.

(f) Extension to store front in front of hall door on Hudson Street, new doors, extend metallic glass dome, extend store cornice with cresting and gutter, painting marble platform and risers, embossed cut glass, four bronze kick plates for doors.

30 4. That defendant, in consideration of the plaintiffs making said additions, alterations and improvements mentioned in the foregoing paragraph, agreed with plaintiffs to pay one half of the cost thereof.

5. That the entire cost of said additions, alterations and improvements was the sum of \$3640.74.

40 6. That by the terms of said agreement the plaintiffs should have paid the sum of \$1820.37 being one half of the cost of said additions, alterations and improvements.

Answer.

7. That plaintiffs paid on account of the said sum \$1820.37 the sum of \$231.12, and the remainder of said sum of \$1820.37, to wit, the sum of \$1589.25 was paid out and expended by the defendant for the use of the plaintiffs at their request.

8. That there is due from plaintiffs to defendant the sum of \$1820.37.

10

9. Plaintiffs have not paid the same.

SECOND COUNT.

1. Defendant paid for the use of plaintiffs at the plaintiffs request, the sum of \$153.00 for work and labor done and performed and materials furnished by C. Riegers Sons on building of the plaintiffs known as St. No. 77 Hudson Street, Hoboken, New Jersey.

2. There is due from plaintiffs to defendant said sum of \$153.00.

20

3. Plaintiffs have not paid the same.

THIRD COUNT.

1. That on February 7th, 1907, by lease in writing a copy of which is annexed to complaint, plaintiffs let and rented to the defendant all that certain first floor on the premises known and designated as number Seventy-seven (77) Hudson Street, in the City of Hoboken, County of Hudson and State of New Jersey, being the northeast corner of Hudson Place and Hudson Street, in the said City, County and State aforesaid, and the front part of basement for the term of five (5) years, to commence on the First day of May, A. D., 1907.

30

2. Defendant hired said premises for the purpose of conducting therein a cafe or saloon and restaurant.

40

Answer.

3. After the making and execution of said lease in writing the plaintiffs by verbal agreement made and entered into with defendant, agreed that in consideration of the defendant paying one-half the cost thereof, that they the said plaintiffs would excavate the basement of the said demised preimises, and furnish and provide the
10 necessary labor and materials for the mason and cement work to make said cellar water-tight, so that the same could be used by the defendant for the purpose of conducting a rathskeller in conjunction with his saloon and restaurant business.

4. By the terms of said agreement plaintiffs agreed that said excavating and mason work would be completed and said basement ready to be used as a rathskeller by the defendant on or
20 before the first day of June, 1907.

5. That defendant, in consideration of the plaintiffs providing said materials and performing said work agreed with plaintiffs to pay one-half the cost thereof.

6. That plaintiffs did not on or before the first day of June, 1907, or at any time, provide the materials or perform the work to make said basement water-tight, so that the same could
30 be used by the defendant for the purpose of conducting therein a rathskeller in conjunction with his saloon and restaurant business.

7. That said water work was so carelessly and negligently performed by the said plaintiffs and their agents, that the basement of said premises was not made water-tight, so that defendant might use the same as a rathskeller, but that the said basement leaked and permitted large
40 quantities of water to come into the same during storms and whenever the tide would change.

Answer.

8. That defendant laid out and expended divers large sums of money, to wit, the sum of \$2,000.00 for such excavating and cement work under said agreement.

9. That defendant laid out and expended divers other large sums of money, to wit, the sum of \$1,000.00 in fitting up said basement as a rathskeller, and that by reason of the failure of the plaintiffs to make said basement water-tight, defendant was unable to use said basement for the purpose of conducting therein said rathskeller. 10

DEFENDANT COUNTER-CLAIMS.

1. \$2500.00 damages on the first count of this counter-claim.

2. \$200.00 damages on the second count of this counter-claim. 20

3. \$5000.00 damages on the third count of this counter-claim.

JOHN J. FALLON,
Attorney of Defendant.

The within answer and counter-claim may be filed as within time.

EBERHARD & SHERIDAN,
Attorneys of Plaintiffs. 30

Filed, Clerk's Office.

Nov. 30, 1912.

Hudson County, N. J.

JOHN F. CROSBY,
Clerk.

Reply.

PLAINTIFF SAYS THAT:

REPLY TO DEFENSE TO FIRST COUNT.

1. They deny that the fixtures removed by the defendant from the said premises were the property of the defendant and that he was lawfully entitled thereto as alleged in the fifth paragraph
10 of the defense of the first count.

2. They deny that the fixtures mentioned in the notice or demand in writing referred to in the sixth paragraph of the defense to the first count were placed in and upon said premises by the defendant and were the property of the defendant.

REPLY TO DEFENSE OF SECOND COUNT.

20 1. They deny that the cherry partition with stained glass top, cherry door leading to rathskeller, the bar, back bar, back fixtures, wine closet, working bar, lunch counter, partition dividing store, partition and door from ladies toilet, door in back of bar, all back bar plumbing, brass rails to rathskeller and to toilet and dish washing tubs were purchased by the defendant and paid for by him, and placed in and upon said
30 premises after he entered into possession under said lease, and deny that the said fixtures, goods and chattels, were the property of the defendant at the time he removed the same.

REPLY TO DEFENSE OF THIRD COUNT.

1. They deny that the fixtures removed from said demised premises were the property of the defendant as alleged in the fourth paragraph of the defense to the third count.
40

Reply.

REPLY TO DEFENSE OF FOURTH COUNT.

1. They deny that the fixtures were removed carefully from said premises without damage to the realty. And they deny that the goods and chattels removed by the defendant from the said demise premises, or any part thereof, were the property of the defendant.

10

BY WAY OF ANSWER TO COUNTER-CLAIMS AGAINST
THE PLAINTIFFS.

The plaintiffs say:

REPLY TO FIRST COUNT.

1. They admit the first paragraph.
2. They deny any knowledge or information sufficient to form a belief of the statements and allegations contained in the second paragraph 20 of the first count.
3. They deny the third paragraph of said first count.
4. They deny the fourth paragraph of said first count.
5. They deny any knowledge or information sufficient to form a belief of the statements and allegations contained in the fifth paragraph of said first count. 30
6. They deny the sixth paragraph of said first count.
7. They deny the seventh paragraph of said first count except they say that they have expended moneys in and about additions and alterations in said premises, but they deny that such moneys were paid on account of said sum of eighteen hundred twenty dollars and thirty-seven cents or any other sum, and deny any knowledge 40 or information sufficient to form a belief of the

Reply.

statement or allegations in said seventh paragraph that the sum of fifteen hundred eighty-nine dollars and twenty-five cents (\$1589.25), was paid out and expended by the defendant; they deny that the defendant expended or laid out any moneys for the use of the plaintiffs at their request, or otherwise.

- 10 8. They deny the eighth paragraph of said first count.

REPLY TO SECOND COUNT.

1. They deny the first paragraph of said second count.
2. They deny the second paragraph of said second count.

REPLY TO THIRD COUNT.

20

1. They admit the first paragraph of said third count.
2. They deny any knowledge or information sufficient to form a belief of the statements and allegations in the second paragraph of said third count.
3. They deny the third paragraph of said third count.

- 30 4. They deny the fourth paragraph of said third count.

5. They deny the fifth paragraph of said third count.

6. They admit the sixth paragraph of said third count, but deny that they ever entered into any agreement, contract or undertaking at any time, to provide the materials or perform the work in making said basement water tight, so that the
- 40 same could be used by the defendant for the purpose of conducting there a restaurant in connec-

Reply.

tion with the saloon and restaurant business, or for any other purpose.

7. They deny any knowledge or information sufficient to form a belief of the statements and allegations contained in the seventh paragraph of said third count, except that they deny that the work *mentioned* therein was performed by the plaintiffs, or either of them, or their, or 10 either of their agents or servants.

8. They deny any knowledge or information sufficient to form a belief of the statements or allegations contained in the eighth paragraph of said third count.

9. They deny any knowledge or information sufficient to form a belief of the statements or allegations contained in the ninth paragraph of said count, except they say that if the defend- 20 ant was unable to use said basement as set forth in said paragraph, it was not by reason of the failure of the plaintiffs to make said basement water tight, and that the plaintiffs deny that they undertook or agreed to make said basement water tight.

EBERHARD & SHERIDAN,
Attorneys for Plaintiffs.

It is hereby stipulated that the within reply be 30 filed as of proper time.

Dated, Jan. 13, 1913.

JOHN J. FALLON,
Attorney of Defendant.

Filed, Clerk's Office,
Jan. 16, 1913,
Hudson County, N. J.
JOHN F. CROSBY,
Clerk.

Proposed Amended Reply.

TAKE NOTICE that in pursuance of the Court's ruling made this afternoon in the trial of the above cause, I will ask that the reply be amended by striking out the third paragraph of the reply to the first count of the counter-claim and inserting in lieu thereof, the following:

3. They deny the third paragraph of said first
- 10 count except as hereinafter admitted, and they say that plaintiffs agreed to tear up the sidewalk in front of said premises on Hudson Street and Hudson Place to the elevator shaft and at the toilets and to excavate to the depth of the cellar or basement floor of the building and to replace the sidewalk at such excavations supported by steel iron beams with brick arches between the beams; to furnish iron stairs to the
- 20 rathskeller, also to the toilets and to pay the cost of the same; to furnish and set up ventilator, patent light doors (galvanized), patent lights for sidewalk over rathskeller and all iron beams and iron works necessary therein, and to excavate and erect brick walls for elevator from sidewalk to cellar; to furnish elevator and provide doors at street; and that in consideration thereof the defendant agreed to cause to be built at his own cost, the outside wall of the rathskel-
- 30 ler and all necessary inside work inside rathskeller. That the plaintiff did tear up and remove the sidewalk in front of and around said building, and did excavate to the depth of the cellar of the cellar floor, and did replace said sidewalk supported by steel iron beams with brick arches between; and did furnish and set up said ventilator, patent light doors, patent lights for sidewalk over rathskeller, and all iron beams and iron works necessary therein, and did excavate and
- 40 erect brick walls for elevator from sidewalk to

Proposed Amended Reply.

cellar, and did furnish and erect and *provide* doors at street and pay the entire cost thereof, amounting to the sum of Two thousand, five hundred and fifty-two dollars and ninety-eight cents (\$2,552.98).

They admit that they agreed to pay one-half of the cost of the installation of the steam heating plant and they say that they did pay one-half 10 of such cost; the entire cost amounting to four hundred and sixty-three dollars and twenty-four cents (\$463.24); that the plaintiffs paid the sum of two hundred and thirty-one dollars and sixty-two cents (\$231.62); plaintiffs further deny that they agreed to pay one-half of the cost of the laying of the terazzo floor—they say that they agreed to pay the whole cost of the laying of the terazzo floor in the kitchen and rear hall of 20 premises, together with two marble saddles and they say that they did pay for the laying of said terazzo floor and said saddles, the sum of sixty-nine (\$69.00) dollars.

Plaintiffs specifically deny that they agreed to pay for one-half of painting the ceilings in the bar or sitting room as alleged in said third count and they say that they agreed to cause to be erected and pay the entire cost of the metal ceiling in the store and that they paid the 30 sum of two hundred and twenty (\$220.00) dollars for such metal ceiling; that they agreed to and did pay the entire cost of putting up the column caps in said store; marble bases for columns, caused said columns to be marbleized and that they did cause said columns caps to be painted in old gold finish, and that they agreed to and did cause the hall ceiling on the ground floor to be painted; the ceiling on the first floor to be repaired and painted and the walls cover- 40 ed with sanitas and a border stenciled on the

Proposed Amended Reply.

walls, the stair way stained and varnished; the store front painted, grained, gilded and varnished, and that they paid for the total cost of such work, the sum of three hundred and eighty-five dollars; that the plaintiffs agreed to and did cause to be erected an extra store cornice with wood backing, tin roof leader, *andsoforth* filling out from the rear of the building and around the hall entrance, connecting cornice of front store.

This action was tried before Judge Benjamin A. Vail, with a Jury at the Hudson Circuit on March 6th, 1913.

The cause having been heard and submitted to the jury they return their verdict as follows:

They say they find in favor of the defendant and against the plaintiff and they assess the damages of the defendant against the plaintiff by reason of the counter-claim of the defendant, at the sum of One thousand five hundred and eighty-two dollars and seventy-five cents.

Judgment.

Whereupon it is adjudged that the complainant of the plaintiff be dismissed and that the defendant recover of the plaintiff the sum of One thousand five hundred and eighty-five dollars and seventy-five cents for his damages found as aforesaid besides his costs which are here taxed at Forty-nine dollars and thirty-two cents making in the whole the sum of One thousand six hundred and thirty-two dollars and seven cents (\$1,632.07). 10

Judgment entered this sixth day of March, A. D., 1913.

BENJAMIN A. VAIL,
Judge.

Attest:

JOHN F. CROSBY,

Clerk.

20

Return.

The answer of Benjamin A. Vail, Esquire, Judge of the Circuit Court, holden in and for the County of Hudson and within named, the record and proceedings and documents made taking or filed therein I send to our Court of Errors and Appeals the last resort in all causes at Trenton at the day and year within contained in a certain schedule to this appeal annexed as within I am commanded. 30

B. A. VAIL,
Judge.

Testimony.

Hudson County Circuit Court.

HENRY P. SOULIER and JENNIE A.
SOULIER,

Plaintiffs,

Action at
Law.

10

vs.

MARTIN DAAB, JR.,

Defendant.

Testimony taken on the 4th day of March, 1913,
before Hon. Benjamin A. Vail, Circuit Court
Judge, and a jury.

A P P E A R A N C E S :

20

EBERHARD & SHERIDAN,
Attorneys for Plainti.

JOHN J. FALLON,
Attorney for Defendant.

MR. SHERIDAN: First, I want to make a motion to amend the fourth count by inserting a new paragraph reading as follows:

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“Prior to the making of such lease and prior to the defendant entering into possession of said premises it was agreed between the plaintiff and the defendant that the defendant, in consideration of the alterations made by the plaintiffs and the rental of the defendant, the defendant would place in said buildings and erect therein all necessary store fixtures at his own cost and expense and annex the same to the realty so as to become part thereof, and the fixtures

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Colloquy.

so placed in the premises of the plaintiff would become the property of the plaintiff on termination of the defendant's tenancy."

THE COURT: You want to substitute that for the third paragraph?

MR. SHERIDAN: No; I want to make the third paragraph the fourth paragraph, and the fourth paragraph the fifth paragraph. 10

THE COURT: Better call it two and a half.

MR. SHERIDAN: Two and a half.

THE COURT: What do you say?

MR. FALLON: I have no objection to an amendment if his amendment is intelligible to me, but I do object to this amendment. I object to it upon the ground that there is no time stated in this proposed amendment as to when this alleged agreement was made. It is not stated whether the agreement was either verbal or in writing. It does not recite any alterations which they mention there were agreed to be made by the plaintiffs. It does not recite that any alterations were made. It does not recite whether or not there was an agreement to make a lease at the time of the renting of the premises. I think we ought to be apprised as to whether they— 20 30

THE COURT: Let me see it. That is what you propose to insert?

MR. SHERIDAN: I will show you.

MR. FALLON: Your Honor will see they start off by saying that prior to the making of the lease and prior to the entering into possession; then they go rambling all over the world and we wouldn't be in position to meet it. They ought to be 40

Colloquy.

required to state a time when this alleged agreement was made. They ought to be required to state whether or not this was in writing or verbal; because, if it was verbal, there may be a rule of law applicable to it that might not apply otherwise. They ought to be required to state, for instance, this was a mutual agreement.

10

THE COURT: Do I understand that this action is under a written lease?

MR. FALLON: Yes.

MR. SHERIDAN: Yes.

20

THE COURT: You propose to show by this amendment, or offer evidence under this amendment that there was some verbal understanding about something or other prior to the execution of the lease. How would that be evidence? If the parties entered into a written contract, all the conversations prior to the signing of that contract are merged in the contract. If there is any change after the contract, they have a right to do that, but not before. If there was a lease covering the whole matter, as I understand you that there was a lease, how could any conversation or any agreement entered into prior to the signing of that lease be binding upon the defendant in this case? Is not the whole thing, as a matter of law, merged in the written contract?

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40

MR. SHERIDAN: I recognize the point, but I say this, this is an oral agreement, and the parties may make an oral agreement upon a matter separate—a collateral matter, distinct from the separate matter of the lease. This placing of the fixtures in the store was a matter which was sepa-

Colloquy.

rate from the tenancy and the term given and the terms of the lease. The only mention of fixtures, in the lease, is that the fixtures now in the premises are to be the property of the landlord; but this other claim is collateral and distinct from the subject matter of the lease.

THE COURT: I understand you propose to show that, although the lease specifies the fixtures in there shall become the property of the landlord at the end of the term, there was a separate agreement for other fixtures to be put in which were not there at the time? Is that your claim? I understood you to say so. 10

MR. SHERIDAN: I say this—that is substantially it—that prior to the time of the making of the lease and during the course of the negotiations the parties entered into this agreement that the defendant would place upon the premises these fixtures, store fixtures, and that they should remain upon the premises and they should be annexed to the realty so as to become the property of the plaintiffs, and therefore there must have been, at the time of the making of the lease, some fixtures on the premises. 20

THE COURT: Let me see the lease. 30

Copy of lease handed to Court.

THE COURT: You propose to show that there was an agreement that other fixtures than those referred to in this lease were to be put in by the tenant, and you represent the plaintiff?

MR. SHERIDAN: Yes.

MR. FALLON: It would be within the statute of frauds if it was going to be part of the realty. I do not object to amending 40

Colloquy.

the pleadings in any way he sees fit, but I want that amendment to be reasonably certain, so I may know what I am to meet.

10

THE COURT: Yes. I think I will allow the amendment to be made. Whether I will allow the proof when it comes out I am not certain now. But your amendment ought to be certain, so Mr. Fallon will know.

I must say that my present impression, Mr. Sheridan, is now against your offering proof, but if you want to have the question put in such shape that you can raise it I will allow the amendment to be made.

20

MR. FALLON: May I ask counsel then to state on the record for my information and for the court's information something that will be intelligible enough for me to meet in this matter. I say that this proposed amendment ought to state some time, in the first instance, when this agreement was made; we ought to know what we are to meet in that respect. They say "prior to the making of the lease and prior to entering into possession." Might have been a week before or a month before or a year before. We ought to be apprised of that in the first instance. Then I say that you should say whether or not the agreement was verbal or in writing. I understand you to say "No, it was verbal." And I say, too, you mention there that in consideration of alterations being made. I think that the proposed amendment should state whether or not there was any agreement as to what alterations were to be made, and if so, what alterations. The

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Colloquy.

proposed amendment also mentions "in consideration of the rental." I think they ought to be required to disclose whether or not there was an agreement for a lease which was the basis of this proposed agreement.

THE COURT: If it should appear that all these conversations or agreement were held in anticipation of making this lease, and the lease was made, they all go to the ground, because the lease is supposed to express the agreement of the parties when they made it. 10

MR. FALLON: The purpose of my request is that I do not want to be put in the situation of being confronted with something that I may not be able to meet with evidence. I do not want this case to go off, but I would like to be apprised now of that which they intend to prove, so I can meet it. 20

Also they say here "that store fixtures were to be placed in and upon these premises." Your Honor can readily see that might include any blessed thing in the way of fixtures. I want to know what they claim we agreed about. The term "store fixtures" may comprehend many things. 30

THE COURT: As a matter of pleading, your amendment which is a part of the complaint ought to be so definite that the other side would be apprised what they have to meet.

MR. SHERIDAN: What do you want, Mr. Fallon?

MR. FALLON: I am here to point out what I consider to be the deficiencies in your proposed amendment and I ask that 40

Colloquy.

you submit your amendment in such way that I will know what I am to meet.

MR. SHERIDAN: I will do it now.

MR. FALLON: Do it now. I want it on the record.

THE COURT: You want it in the pleadings.

10 MR. FALLON: If he dictates it to the stenographer the stenographer could write it out for him.

MR. SHERIDAN: I move to amend the complaint by inserting a new paragraph in the fourth count, to be known as paragraph 2½:

20 "On the twenty-fourth day of January, 1907, the plaintiffs and the defendant entered into an agreement, an oral agreement, whereby the plaintiffs agreed to perform all the necessary work and labor—"

MR. FALLON: I want to object to that, "necessary work."

30 MR. SHERIDAN: Strike it out. "To alter the first floor or flat of the premises on the northeast corner of Hudson Street and Hudson Place in the city of Hoboken, into a store suitable for a saloon or cafe purposes; that in consideration of said agreement on the part of the plaintiffs to make such alterations the defendant undertook and agreed to place in said building, erect and set up therein the necessary store fixtures to make the premises a saloon or cafe, including back-bar, a bar, lunch counter, cigar counter, partitions, flooring, rails, and all necessary doors, and affix same to the premises so they should become annexed to the realty and become part there-

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Colloquy.

of; and that they should become the property of the plaintiffs upon the termination of the defendant's tenancy; that the plaintiffs duly performed all the promises and agreement on their part to be performed."

MR. FALLON: Is that all? Now I want to interpose, first, a general denial; and secondly, to plead the statute of frauds.

10

THE COURT: Well, this suit is brought under the new practice act?

MR. FALLON: Yes.

THE COURT: Now you move your case.

Jury called and sworn.

Mr. Sheridan opens for the plaintiff, and Mr. Fallon opens for the defendant.

20

THE COURT: Let me see if I understand this case. I understand, as far as the plaintiffs' claim is concerned, the whole gist of the case is the value of the fixtures which you say were put in under an agreement and which were to be left there for the benefit of the landlord, but were removed by the tenant, who is the defendant in this case?

30

MR. EBERHARD: Our case is based this way. We have in our lease that the fixtures were to be there, and that his actions and the whole circumstances from the beginning show that he intended that should be so.

THE COURT: You claim under an oral agreement certain fixtures were put in there by the tenant, who is the defendant in this case, and that they were afterwards removed by him, and that under the agreement they belonged to you?

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Colloquy.

MR. EBERHARD: Yes, sir.

THE COURT: And they are not referred to in the written lease. I will hear you gentlemen upon the question as to whether or not you can offer any evidence varying the terms of the written contract, unless it is subsequent to the making of the contract.

10

MR. EBERHARD: I understand the court is going to hold me strictly to this lease. There is no getting over that; but my contention is there were such changes made afterwards by agreement between the parties—

THE COURT: I shall not prevent you from proving that—

20

MR. EBERHARD: By the parties, that not only with the complainant here himself, but notorious—

MR. FALLON: You do not allege any such thing. You allege only an agreement on January 24th and then this agreement.

30

THE COURT: Yes; that changes the whole form of your action. Now if you had set up in your complaint that that lease was made and reduced to writing, but after it was made the parties got together and made some other agreement practically setting that lease aside, it would be perfectly proper to do so. You are shifting your ground. The basis of your complaint was, as I understood it, that there was an oral agreement made before this written agreement was made and upon that you sought to recover; that is, in that agreement certain fixtures were to be put in there which the tenant agreed to give to the landlord when his lease expired. He is only obliged under

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Colloquy.

his contract as now presented to the court to leave such fixtures as were there at the time the lease was made, and unless you can show there was a subsequent agreement, subsequent to the date of that lease, I would not allow you to prove it, and I could not allow you to prove it in this court.

MR. EBERHARD: That is what I intend to prove, that there was a subsequent agreement. 10

THE COURT: That is not your complaint. Your complaint as filed is that this was an agreement made before that lease was signed. If you want to amend all that, and the other side do not object, I will allow you to do it.

MR. FALLON: I do not object to any amendment he wants to urge, but he will be hoist by his own petard before he is through. 20

THE COURT: It may be unfortunate, Mr. Eberhard, but you must try this according to legal rules.

MR. EBERHARD: There is no question about that, but I think that the circumstances surrounding this transaction are interwoven. 30

THE COURT: You would better offer your proof and I will rule on it.

MR. EBERHARD: I will offer the lease.

MR. FALLON: No objection.

Paper marked Exhibit P-1.

Henry P. Soulier—Direct.

HENRY P. SOULIER, one of the plaintiffs, being sworn in his own behalf, testified as follows:

DIRECT EXAMINATION BY MR. EBERHARD:

Q. Mr. Soulier, do you know the defendant, Mr. Dabb? A. I do.

Q. Now you saw him prior to February, 1907,
10 didn't you? A. I did.

Q. Prior to February 7th did you call upon Mr. Dabb? A. Did I call there?

Q. Yes. A. He sent word he wanted to see me down to his office.

Q. Talk out loud. A. He wanted to see me down at his office.

Objected to; testimony allowed.

20 Q. You saw Mr. Dabb? A. I did.

Q. What was there talked about at the time?

MR. FALLON: I object.

THE COURT: It appears in the case, and I cannot close my eyes to the fact that their conversation resulted in a written agreement and that the only thing which I can consider here is that written agreement.

30 MR. SHERIDAN: Your Honor rules against that question?

THE COURT: I overrule the question.

MR. SHERIDAN: Allow an exception?

THE COURT: You may take an exception. The reason I do that is it appears their negotiations resulted in a written contract, and that both sides are controlled by that written contract.

40 MR. FALLON: The written contract be-

Henry P. Soulier—Direct.

ing the lease which has been offered in evidence.

THE COURT: Yes, which is in evidence.

Q. The premises at Hudson Place and River Street were leased by this lease to Mr. Daab, which you executed?

MR. FALLON: I object. The lease speaks for itself. 10

THE COURT: The lease speaks for itself.

Q. After that lease was made—

MR. FALLON: I ask Mr. Soulier not to answer until I get a chance to object.

Q. After the lease was made, Mr. Soulier, what took place between you and Mr. Daab?

MR. FALLON: I object, on the ground that it is immaterial, irrelevant and not within the issue, the only issue being here an alleged agreement made on January 24th, 1907, and this lease dated February 7, 1907. 20

THE COURT: Yes; the question is rather general; it might allow of a multitude of answers, what took place.

Q. After the lease was made or at the time the lease was made, Mr. Soulier, were there any fixtures upon those premises, and what were they? 30
A. There wasn't anything.

MR. FALLON: What did you say?

A. There wasn't any fixtures whatever, just the bare place, taking the bare partitions out.

Q. At the time this lease was delivered to you there was nothing in those premises? A. Nothing, only the old partitions and I tore them all out 40

Henry P. Soulier—Direct.

and took the front out and put a new front in. There was no fixtures whatever in the place.

Q. There was no fixtures whatever? A. None whatever.

10 MR. FALLON: I want to object to any further examination about fixtures, unless they will tell me what they mean by fixtures. I have a right to know what they are calling fixtures.

THE COURT: What is the time to which you are directing his attention? When the lease was signed?

THE WITNESS: After the lease was signed.

20 THE COURT: If there were none there you could not enlarge it by saying there was something put in. We are bound by the strict written contract, Mr. Eberhard.

MR. EBERHARD: But I could say, if the court please—if this man says, "Why, I will leave these things," that enlarges the consideration.

30 THE COURT: The consideration is expressed. The consideration is the rental, and he agrees to leave all the fixtures which are there. Now if there is nothing there is there is nothing to leave.

MR. EBERHARD: That is very true.

THE COURT: You cannot enlarge it by showing he put something in afterwards under that clause of the contract.

MR. EBERHARD: No, not under the clause, but I can show—

40 THE COURT: If you can show that they got together afterwards by proper consideration put in some fixtures—

Henry P. Soulier—Direct.

MR. EBERHARD: That is what I am leading up to. I want to show there was nothing there at that time, at least Mr. Fallon says there wasn't, and he says there ain't, and swears to it.

THE COURT: The trouble is that Mr. Sheridan opened that this agreement was made on or about the early part of January, that is a week or two weeks before this contract was dated. Now you propose to shift your ground and show this agreement was made after the contract was signed. If the other side do not object to the amendment, of course I will allow it to go in. 10

MR. FALLON: I do object to that amendment, because it seems to me—I asked Mr. Sheridan most specifically to state on the record, so there would not be any misunderstanding, what the alleged occasion was, and he stated it. 20

THE COURT: He said so, and that is the whole case, I suppose. If you object to this testimony on the pleadings, I will rule it out.

MR. FALLON: I do object to it, on the ground that it is immaterial and irrelevant and incompetent. 30

THE COURT: You cannot prove that under the pleadings as you now have them—under the complaint as you now have it, Mr. Eberhard. If you propose to amend your complaint so as to show that after this lease was signed the parties got together and made some additional agreement, you would have a right to do that, and that would be subject to proper proof, but that is not the complaint now. 40

Henry P. Soulier—Direct.

MR. EBERHARDT: I will ask the court to amend that there was an agreement subsequent to the making of the lease whereby the fixtures were to remain, and the consideration was that this plaintiff was to do certain things, such as repair, alter and carry out certain things.

10

THE COURT: What then?

MR. EBERHARDT: And I ask leave to amend to that extent that he did, in consideration of turning over these fixtures, say that those would become part of the premises.

20

THE COURT: Then I understand you to say this: You propose to show, after this lease was signed and the tenant was in possession, he put in certain fixtures, and that afterward the landlord made certain changes at the request of the defendant in the premises, and in consideration of those changes being made the defendant agreed to leave the fixtures in there as part of the realty.

MR. EBERHARD: Yes.

THE COURT: That is the amendment that you want to make?

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MR. EBERHARD: Yes.

THE COURT: If such a contract is proved, of course it would be a legal contract. Are you prepared to meet that, Mr. Fallon?

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MR. FALLON: I am satisfied to have that amendment interposed, because it does not seem to do me any harm. They are floundering around. They do not know where they are at. I want to meet the case now. I would like to ask Mr. Eberhard if he un-

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dertakes in this amendment to say that these fixtures were to become part of the realty?

THE COURT: He did say so. I asked him that. He asks now to amend by setting up in his complaint an agreement, an oral agreement made subsequent to this written lease, whereby, in consideration of the plaintiff making certain alterations in the premises at the request of the tenant, the defendant agrees to put in certain fixtures and leave them there at the expiration of the lease for the benefit of the owner. That is what you propose to do? 10

MR. EBERHARD: Yes.

MR. FALLON: It seems to me then that he should be required to state when this alleged agreement was made, so I shall know what I am to meet, and what fixtures were put in there under the terms of the agreement. This does not apprise me of anything. I am anxious to permit the amendment that he desires to make, so as to enable the trial to proceed, but I want to meet it. 20

THE COURT: It has got to be more in detail; but I want to get at the issue. In order to recover he has got to show that subsequent to the signing of this lease the landlord and the tenant, that is, the plaintiff and the defendant, got together, and the plaintiff, at the request of the defendant, made certain alterations, which, of course, would have to be specified. Those alterations were made, and in consideration of that the defendant, who was the tenant, agreed to leave in the premises for the benefit of the landlord certain fixtures 30 40

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which he was to put in, of course enumerating the fixtures.

10

MR. FALLON: I think counsel ought to be required to state on the record, as Mr. Sheridan was required to state, the time when this alleged agreement was made and what the nature of the agreement was, because otherwise, your Honor can see that when proof is adduced I want to know what to object to.

THE COURT: I am afraid you are getting these pleadings so amended it will be hard to tell what they mean.

20

MR. FALLON: This is their funeral. Unless they state the time and the particulars of this alleged agreement, I won't know when it is proper for me to object.

THE COURT: No. If you will say, Mr. Fallon, that you are not prepared to meet this question, that you might have evidence which you have not here now, and cannot get here, of course I would not compel you to go on, because it really shifts the whole case; it makes a new cause of action.

30

MR. FALLON: I want to go on. I have a counter claim to interpose here; if their case fails I have a right to proceed with my case anyhow.

THE COURT: I only say that if you are not here with proof prepared to meet their claim before we get to your claim, I won't compel you to go on.

40

MR. FALLON: If they will mention to me when this alleged agreement was said to have taken place and the particulars I will say whether I am ready to go on.

THE COURT: Of course I will require

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them to say that, because it is to a certain extent a surprise to you to shift the form of the action. Mr. Eberhard, state when you are going to prove or try to prove this agreement was made, and what the agreement was, and then Mr. Fallon will say whether he is prepared to meet it.

MR. EBERHARD: If the court please, I will give the exact date, or as near the exact date— 10

THE COURT: On or about will be all right.

MR. FALLON: On or about will suit me.

MR. EBERHARD: It was during the month of March—it was about the time when the rathskeller was made there. (Consults with Mr. Sheridan.) It was in the beginning of April. 20

THE COURT: On or about the first of April?

MR. EBERHARD: Yes, about that.

THE COURT: Is that sufficiently definite, Mr. Fallon?

MR. FALLON: Yes, I am satisfied.

THE COURT: On or about the first of April they entered into a certain agreement. State what the agreement was. You state it. 30

MR. EBERHARD: On or about the first of April, or at some time after this lease was made, the parties plaintiff and defendant, entered into an agreement whereby a certain work was to be done by the plaintiff, and in consideration of such work which was done by the plaintiff, such as excavating and making an additional room for the defendant, the defendant then stated that 40

Henry P. Soulier—Direct.

the bar fixtures particularly, and all fixtures that were to go into the place, were to be part and parcel of that real estate and remain there after the expiration of the lease, providing he did not want a continuation.

THE COURT: Proceed.

10 BY MR. EBERHARD:

Q. Now, Mr. Soulier, you remember seeing Mr. Daab after the making of this lease, and about the time of the excavation of the sidewalk? A. Yes, sir.

Q. What was that excavation for?

THE COURT: First give the date as near as you can.

20 Q. About what time was that? A. It was along in April, I should judge, as near as I can recollect. We were digging out the side of the building for a toilet.

Q. Speak louder. A. We were digging out for the toilet to go under the walk, and the place for a little sub-cellar.

THE COURT: The only question is about the date.

30 A. I should judge somewhere around there, as near as I can remember.

Q. It was after the making of this lease, wasn't it? A. Yes.

Q. Long after? A. Yes—

MR. FALLON: I object to that as leading.

THE COURT: This is dated February 7th.

40 MR. EBERHARD: You won't allow me to give dates—

Henry P. Soulier—Direct.

A. Somewheres around there.

Q. That was when, you say, Mr. Soulier? A. Around somewhere in the month of April, I should judge, as near as I can remember.

Q. What was done there? Just state what was done.

MR. FALLON: I object.

THE COURT: No; the question is what was the agreement? 10

MR. EBERHARD: I am rather anticipating.

Q. You saw Mr. Daab at that time, did you? A. Judge, could I tell what brought up this?

MR. FALLON: I cannot hear you

Q. Talk louder, Mr. Soulier. You saw Mr. Daab at this time? A. Mr. Daab was there with me and superintended it just as much as I did and looked the whole thing over. 20

Q. He was there all the time? A. He was there pretty near as much as I was, and it was done to suit him, and he said while we were digging out the toilet—in other words he said, “What is the matter with digging out all the way around and making a rathskeller?” I said, “I just put a new walk around there that cost me eight or nine hundred dollars, that Mr. Egan put down for me,” and I says, “I don’t think it would do,” and he says, “Well,” he says, “see what it is going to cost?” Now I got Mr. Egan to give a figure on it, and I told him half I would stand for the excavation, that is, taking the dirt away, which I did, and put back the sidewalk and the iron girders, and the arching, and he was to do everything else, and there was no rent to be charged for it. That is all there was to that. 30

Q. What did he say about the fixtures at that time?

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MR. FALLON: I object.

A. Well, all those fixtures that was to go in there was to remain there.

MR. FALLON: I object.

Q. Go on. A. Everything that was to go in the place was to remain there.

10 MR. FALLON: I object.

THE COURT: That is a conclusion.

MR. FALLON: I ask to have it stricken out.

THE COURT: Yes.

A. That was a question.

Q. Mr. Soulier, just state the conversation. A. He agreed to leave all the fixtures and everything in there when the—
20

MR. FALLON: I object.

A. If I would consent to pay for the sidewalk and the excavation.

MR. FALLON: I object to all the witness said and ask to have it stricken out.

THE COURT: Yes, that is his conclusion.

A. That was the conversation then.

30 THE COURT: What he said.

A. He said he would leave all the fixtures and everything in the place and fix up outside of the excavating.

Q. How did he express himself? Just tell what he said about the excavation, and about everything surrounding the premises. How he talked about the fixtures, if he said anything about them at all.

A. Well, that is all he said.

40 Q. How did he say it? A. He said, "If you go to work and take it out and put it back there,"

Henry P. Soulier—Direct.

he says, "these fixtures and everything I put in the premises remains as your property." That was the conversation, and I went to Mr. Egan—

Q. Did he ever speak to you about those fixtures after that? After that same conversation?
A. No.

Q. While he was present? A. In what way do you mean? 10

Q. Did he ever speak to you about these fixtures which he was putting in there? A. Nothing, only that first conversation we had there, what he was to stand, and I was not to charge any extra rent or anything, and I was to give him the whole use of the cellar, which the lease called for half a cellar.

Q. You were to give him the whole cellar? A. The whole cellar and under the building proper, besides digging this out, and was not to pay any rent. 20

Q. That was on the sidewalk which was not dug out at the time? A. I had to break up all that sidewalk which cost me near a thousand dollars, in order to do it.

Q. Did he say what kind of fixtures he was going to put in there? A. He said he would put in the best there was.

Q. The best there was? A. The best fixtures he could get. 30

Q. Were there any kind of fixtures there at that time? A. No; but some was not in the place, you know—lying around the place, if I remember right.

Q. And then pursuant to that agreement did you do anything?

MR. FALLON: I object to counsel referring to that as an agreement. 40

THE COURT: He has stated his conversa-

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tion, and it is for the jury to say whether there is an agreement.

THE COURT: Yes, he has testified to that.

Q. After this conversation, Mr. Soulier, were there any fixtures placed in the premises, either fastened to the premises, or on the premises, in the store I am talking about now? A. When we commenced digging out in front?

Q. Yes. A. No.

Q. How long afterwards did those fixtures come along?

MR. FALLON: I object. It does not appear that they ever did come along.

THE COURT: Ask him when.

20 Q. When were they put in? A. They were put in somewheres along in April.

MR. FALLON: I object.

THE COURT: Both sides admit the fixtures were put in and taken out.

MR. EBERHARD: Yes. I want to now lead up to the value, and what was there. I want to show just what was there and how they came there pursuant to this agreement.

30

MR. FALLON: How does he know?

MR. EBERHARD: Because he was there all the time.

THE COURT: That is the gist of the case. Go on.

Question repeated.

MR. FALLON: I object to it as immaterial and immaterial.

40

THE COURT: Upon the ground that it is already admitted by the pleadings?

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MR. FALLON: Yes.

THE COURT: That is true.

Q. Now, Mr. Soulier, how long did he stay in those premises after those fixtures were there?

MR. FALLON: I object upon the same ground as before, that the pleadings disclose it.

THE COURT: He stayed until the end of the lease. 10

MR. FALLON: We admit we stayed there until the end of the lease.

THE COURT: Until the expiration of the lease, and the defendant admits he took out those fixtures.

MR. EBERHARD: The pleadings do not admit when the fixtures came there.

THE COURT: I do not see that that cuts any figure. When they came there, if they got there, and if he was obliged to leave them, you have a right to recover. 20

MR. EBERHARD: All right.

Q. When did you learn of the fixtures being removed from those premises?

MR. FALLON: I object.

Q. When did you know? 30

MR. FALLON: I object to it as immaterial and irrelevant.

THE COURT: They admit their removal, so why is it necessary to go into that? If they had no right to remove them you have a right to recover.

Q. Now after that conversation which you speak of took place, Mr. Soulier, what did you do to make that agreement good? What was done by 40

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you? A. Why, I went right to work and had Mr. Egan go to work and excavate the dirt out, and order the iron.

MR. FALLON: What's that?

10 Q. Talk louder. A. I had the excavating done and dug out and put new iron girders in, I beams and one thing or another, and had it arched with brick and put the cement, concrete walk on top of it again, and new curb all the way around, and Mr. Daab said if I would dig that out, he would build the wall and leave all the fixtures that he put in there, and I was not to charge him any extra rent, and I went to work and done it.

Q. Speaking of this where you dug out, you have already said that was not part of the leased premises on February 7th? A. No; that was
20 outside.

Q. Whereabouts was that part that you dug out? A. Right out in front of the building, out to the curb.

Q. What was it? How far from the house line to the curb was it? A. Yes, from the house line to the curb.

Q. Tell us exactly what distance.

30 MR. FALLON: I object, because it clearly appears that this front part of the cellar is in the lease.

MR. EBERHARD: That does not take in the sidewalk. This is not part of the front part of the basement at all. This is the side part of the house, in under the sidewalk, which I am trying to explain is not part of this lease at all, and which I have a right to explain.

40 THE COURT: Well, I think they would have a right to show what the basement was

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at the time this lease was signed, and if anything was done outside of that, that would be subsequent, because if there was no basement there at the time the lease would not cover it.

MR. FALLON: I will withdraw my objection.

Q. Mr. Soulier, at the time you signed this lease, where was the basement, the front part of the basement? A. Right on the building line of the foundation. 10

Q. What is that? Talk up. A. The foundation of the building. Just an ordinary cellar of my house, when the lease was made.

Q. At the time it was made there was a cellar throughout the house—I may lead to that extent? A. The lease called for that. 20

Q. And at the time you leased the half—it is a large tenement house? A. Yes.

Q. You leased the half part of the basement? A. Of the basement.

Q. There was then no excavation outside of the foundation? A. Not a bit, none at all.

Q. From the foundation to the curb of the sidewalk or to the gutter? A. No, sir.

Q. Was that made by an agreement between you and Mr. Daab? 30

MR. FALLON: I object.

A. Yes, sir.

MR. FALLON: I object.

Q. As stated?

THE COURT: He has already testified to that.

MR. EBERHARD: It was merely explanatory. 40

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THE COURT: Go on.

Q. When you started this excavation and went on, was there any entrance from this basement which would lead to the rathskeller, as you call it, under the sidewalk? A. Could not be, because there was no—only to the wall—to the wall of the building.

10 Q. When this rathskeller that you speak of was dug, was there openings cut through there? A. Yes, sir.

Q. There was. And then there was a connection made? A. Yes.

Q. Was that before the signing of this lease? A. It was after.

Q. After the signing of this lease? A. Yes.

Q. After the making of this lease? A. Yes;
20 quite a while afterwards.

Q. Did you on your part comply with that agreement as made then? A. Yes, sir.

MR. FALLON: I object to that as calling for a conclusion.

THE COURT: That is a conclusion.

Q. What did you do, Mr. Soulier? A. Why, I had the place dug out and dirt taken away, and had the sidewalk put back again with iron beams
30 and arches and everything like that; what I agreed to do with Mr. Daab.

Q. Tell what you did. You had the place arched with brick, with iron beams? A. Yes.

Q. And then the next thing? A. Making arches between the iron beams. I paid for all that.

Q. Was that sidewalk laid? A. Yes.

Q. Wasn't there a sidewalk laid? A. I laid it.

Q. You? A. Yes, sir.

40 Q. And the whole place was finished off? A. Yes, sir.

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Q. Do you remember what day or about what time he was to complete by putting his fixtures in on his part? A. Oh, I couldn't remember the date.

Q. At about what time was it? A. He was to get them in there around May or June, somewhere around there.

Q. He then had this complete? A. I think he had it completed then. 10

THE COURT: Speak louder.

A. I don't think he had it completed then. He had people working there, painting, and putting his electric in, and one thing and another.

Q. And when was it complete, do you know? A. I should think it must have been, I couldn't remember exactly, but might have been done by September, for he was very late opening—in fact, after I got my front and got the fixtures. 20

Q. Were you in the place after it was completed? A. Yes.

Q. Eh? The whole interior? (No answer.)

Q. During the time did this defendant Daab make any demand on you? A. Never made any demand of me.

Q. For any additional improvements? A. No; never made any demand—never brought any complaint in to me while he was there the five years. 30

Q. While he was there you never heard any complaint from him? A. No, sir.

Q. When did you visit that place after the explanation of the lease? A. I think it was about a few days after the first of May, somewhere around there. I think it was around the first of May—the first or second of May.

Q. Did you go in the place? A. Yes. 40

Q. What did you see? A. I see a wreck, that is about all; everything was gone—

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MR. FALLON: I object, and ask to have it stricken out as a conclusion.

THE COURT: Yes.

Q. What did you see? A. I see all the bar fixtures and back bar and glass rails, and part of the toilet, a couple of toilets was taken out, and doors off the toilets, and brass rails going down—
10 put up an old 2 by 4 fence where you go down, where there was an elegant partition going down to the rathskeller, he had 2 by 4's nailed up.

Q. There was nothing remained there that you saw before? A. No, sir.

MR. FALLON: I object to counsel leading the witness and stating conclusions.

THE COURT: Yes.

Q. Did you go in the cellar? A. Yes.

20 Q. What was in the cellar? A. A lot of dirt that was left behind.

Q. At the time of the lease what was in there, prior to the first of May? A. In the cellar?

Q. What was in the cellar prior to the first of May?

MR. FALLON: We admit in the pleadings that we had a lot of fixtures in there, if that is what you are looking at.

30 MR. EBERHARD: You do not say what kind of fixtures.

MR. FALLON: Yes, we do. I believe that we had those fixtures that you charge there.

MR. EBERHARD: A large ice box and a small box?

MR. FALLON: Everything that you have enumerated.

40 Q. After you visited that place the first of May did you find any of the fixtures there that were

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there before when you visited the place? A. No, sir.

Q. Or after the agreement was made in June. You did not find anything there? A. We did not find any.

Q. What was the condition of the pillars, the uprights?

MR. FALLON: I object to counsel leading 10
the witness.

Q. I asked you what the condition was?

THE COURT: Well?

Q. Was there any of the—

THE COURT: Do you make a claim for damages done to the realty after the tenant went out?

MR. EBERHARD: Yes. 20

MR. FALLON: All right.

Q. What did you find the condition of the place? A. I found the top off of one of the posts.

MR. FALLON: Talk louder.

A. I said that I found one of the tops off the posts, and the walls in pretty bad shape where the partition runs in. 30

Q. How in bad condition? A. Nails left there, and in some places the plaster torn down, and he must have used a mason in there plastering it up again after it was torn out, it looked to me—it looked as though the plaster had been torn down and they had some mason in there fixing it up, but there was nothing much left in the place.

Q. You did not speak of the downstairs. What did you see downstairs when you went downstairs—what did you see on your premises? A. I 40
didn't see anything, only dirt.

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Q. What attracted your attention when you went downstairs?

MR. FALLON: I object. The witness has already stated twice—he has been asked this question twice and he has made the same answer.

10 A. I don't understand.

Q. Was there anything else? A. Eh?

Q. Was there anything else that you saw when you went downstairs? A. You mean after he had gone out?

Q. Yes. A. I didn't see anything but the doors taken off the toilet, and the iceboxes gone, a range gone that was down there, and the washtubs and sink, the whole plumbing, a few toilets.

20 Q. Two toilets gone; where were they? A. One was in under the back stairs where the help—and the other one was out in the rathskeller in front.

Q. What did Mr. Daab say that the cost of the fixtures was?

MR. FALLON: I object on the ground that it is immaterial and irrelevant.

30 THE COURT: They are entitled to recover, not the cost, but the value of the fixtures that were taken out.

Q. What was the value of those fixtures?

MR. FALLON: I object unless the witness qualifies.

THE COURT: Unless he says he knows.

Q. Mr. Soulier, have you ever had reason to buy back-bars for saloons before?

40 MR. FALLON: I object.

Q. Did you ever? A. Yes.

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Q. You have fitted up— A. I have fitted up a place once before, yes.

Q. Where? A. Right in the same place, in the theater building—the next building to it.

Q. Any other place? A. No.

Q. No other place? A. No; that is a very small place.

THE COURT: You have specified in your complaint the fixtures. Take those items up and show him each one. You said the following fixtures and then you enumerated them. 10

MR. EBERHARD: Yes.

Q. There is a cherry partition with stained glass top leading to the rathskeller; do you remember that? A. Yes.

Q. What was that worth, do you know? 20

MR. FALLON: I submit the witness has not qualified.

THE COURT: He has got to show that he knows the value of these particular things before he can testify.

Q. Have you ever bought and sold fixtures of this character, saloon fixtures, or fixtures of a similar character? 30

MR. FALLON: I object unless the character is stated.

Q. Saloon fixtures?

THE COURT: Of the character of the articles described in this part of the declaration.

MR. FALLON: All right.

Q. These fixtures described herein, you know 40

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what they are? A. Why, I have bought fixtures and sold them again, but they was not as expensive fixtures as what was in that.

Q. But you have bought and sold fixtures, have you? A. Yes.

Q. Bar fixtures? A. I had to buy them. I bought them second-hand and sold them.

10 Q. How often have you done that? A. I have only done that once.

Q. Only done it once?

THE COURT: Do you mean these particular fixtures?

MR. FALLON: No; he said not.

A. No.

CROSS EXAMINATION BY MR. FALLON:

20 Q. Mr. Soulier, you have not been very friendly with Mr. Daab for quite some time past, have you?

THE COURT: I suppose that is evidence.

A. I have not met him at all to be friendly or not friendly.

30 Q. This talk that you say you had with Mr. Daab about the early part of April, 1907, was in reference to the work to be done and the fixtures that he was to place in the premises, and is that the only talk that you had with him about that matter? A. Well, that was the first talk. We used to sit down and talk when he was there, came around there, and look around when they were progressing—how they were getting along.

Q. That is the first talk, you are sure of that? A. What?

40 Q. In the early part of April, 1907? A. It is about the first one I can remember.

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Q. Then when your counsel, Mr. Sheridan, stated here to-day that the agreement between you and Mr. Daab was on January 24, 1907, that statement was not so? A. That was before the lease was made.

MR. EBERHARD: I object. The witness is not bound by that statement.

THE COURT: He is not bound by that statement. 10

MR. FALLON: I will withdraw the question.

Q. Did you ever make any agreement with Mr. Daab on the 24th of January, 1907, with reference to these fixtures? A. Yes.

Q. What was the agreement then? A. We had a talk there at that time, these fixtures was to go in there, was to go in and remain. He had five years lease with the privilege of five years longer. 20

Q. What was said on January 24th? A. All the fixtures goes in there, would stay there. That was why the word fixtures was put in the lease, as I understand it.

Q. You are sure it was on January 24th? A. Yes; I know we talked about it again. It was when we commenced talking about the rathskeller.

Q. What did you say the conversation was on January 24th? A. We came to an agreement— 30

Q. No; tell us what you said? A. Well, I told Mr. Daab—he made me a proposition, of what the rent would be, so much rent, and then he put the fixtures in there as part—he got it for less than I could have rented it to somebody else.

Q. Yes. A. And the fixtures was to go in there as part rent, that is, all the fixtures upstairs.

Q. Is that what was said on the 24th of January, 1907? A. That was part of the conversation, sir. 40

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Q. If that is so, what was the necessity for a further conversation in the early part of April, 1907? A. Because there was extra fixtures and everything else to go in the rathskeller down cellar.

10 Q. What extra fixtures? A. All tables and chairs, electric fixtures and extra ice box down in the cellar there, and a range, washtubs, and I don't know what else.

Q. Then the talk that you had on the 24th of January—tell us the talk you had on the 24th of January, 1907—where did that take place? A. What talk do you mean?

Q. On January 24, 1907? A. That was down in Mr. Daab's office.

Q. Who was present? A. Nobody.

20 Q. Just you and he? A. Just me and Mr. Daab.

Q. The talk you had in the early part of April, 1907, where did that take place? A. I think we were standing on the sidewalk in front of the building.

Q. Who heard that conversation, if any one? A. I don't think anybody did.

30 Q. Then you want us to understand that all of the talks that you had with Mr. Daab on the subject matter you have alluded to, there was no one present but yourself? A. There never was any business transactions between me and Mr. Daab, but we most generally was alone.

40 Q. If you had a conversation with Mr. Daab on the 24th of January, 1907, to the effect that he was to put in fixtures in this place, which fixtures were to become part of the realty and which were to remain after his lease expired, why didn't you have that inserted in the lease? A. I suppose it is in the lease.

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Q. You suppose it is? You know that the lease does not contain any such recital? A. Yes, it does.

Q. Does it? A. Yes.

MR. FALLON: Let's see that paper.

A. The conversation me and Mr. Dabb had, I went right to Mr. Eberhard and had him draw the lease accordingly. 10

Q. Will you show me in that lease any recital to the effect that the fixtures that were to be put in there by Mr. Daab thereafter were to become part of the realty? A. It is in the lease that all fixtures were to remain there after the expiration of the lease.

Q. Show me anything to the effect that the fixtures that Mr. Dabb agreed to put in there were to become part of the realty and to remain there after the expiration of this lease? A. Wait until I find this clause. 20

MR. EBERHARD: The lease speaks for itself. I object.

MR. FALLON: I will withdraw it.

Q. This lease, Mr. Soulier, says "And it is hereby further agreed between the parties thereto that the parties of the first part are to have all fixtures now in said premises." You say there were no fixtures on the premises at the time this lease was made? A. There was nothing there. How could there be any fixtures? Why would that be in this lease, that there were no fixtures there? 30

Q. You admit there were no fixtures in those premises at the time the lease was made? A. None. I supposed at that time that that was the understanding, that that— 40

Q. I object to your understanding; just state

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the fact. A. You asked me the conversation and I have given it to you.

Q. I want the conversation, but not your understandings. A. The same thing.

Q. Now if you had an agreement with Mr. Daab on the 24th of January, 1907, and you also made an agreement with him in April, 1907, why
10 did you not mention either one of those agreements in the pleadings which were presented to this court in this case?

MR. EBERHARD: I object.

THE COURT: I do not think he is responsible for that.

MR. FALLON: I withdraw the question.

Q. Before this suit was started did you mention to your attorney, Mr. Eberhard, anything about
20 the agreement that you say you had with Mr. Daab on January 24, 1907?

MR. EBERHARD: I object to what statements he made to me. That is a matter of proof here.

THE COURT: Yes; communications between client and counsel.

MR. FALLON: He has a right to decline to answer, or he has a right to object to it, but I have a right to try to put in evidence before this jury whether or not anything was said.
30

THE COURT: That was objected to and the court sustained the objection.

MR. FALLON: Well, that is because it is a confidential communication between counsel and client.

Q. Did you state to Mr. Eberhard, your attorney,
40 before the suit was started, about the alleged

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conversation you had with Mr. Daab in the early part of April, 1907?

MR. EBERHARD: I object.

THE COURT: That is the same thing.

Overruled.

Q. Did you state to Mr. Eberhard before the suit was started, or at or about the time the suit was started that you had no knowledge of the business, of the character of the business that Mr. Dabb was to conduct in and upon the premises which you were leasing to him? 10

MR. EBERHARD: I object to any statement—

MR. FALLON: Go ahead and object.

THE COURT: If the client sees fit to answer he may do so, but it is a confidential communication. 20

MR. EBERHARD: The lease speaks for itself, if the court please.

Q. Did you read through the complaint in this cause before it was filed in the court? A. Yes, sir.

Q. Did you notice in those pleadings that there was no reference to the alleged agreement which you now mention of January 24, 1907? A. Why, I didn't think it was necessary after we had the agreement in the—the first agreement here. 30

Q. Did you note that in the pleadings which you say you read that there was no reference to the alleged agreement that you say you had with Mr. Daab in the early part of April, 1907? A. I don't understand the question.

Question repeated.

A. I don't remember whether there was any in that. I don't think there was. 40

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Q. But you did notice in the pleadings there was a reference to the lease which you made to Mr. Dabb, did you not? A. Yes.

Q. And you did notice that in the pleadings it was claimed that because of the recital in the lease to the effect that the parties of the first part, which were you and your wife, were to have all fixtures now in such premises, and also that no changes
10 were to be made in the premises without your consent; that that was the only matter complained of by your attorneys in your behalf against Daab? A. I remember that as being in the complaint.

Q. If you remember that that was the only matter of complaint alleged in the pleadings why didn't you call Mr. Eberhard's attention to the other agreement which you now mention, so that they might be incorporated in your suit?

20 MR. EBERHARD: I object to that.

A. I answered that.

MR. EBERHARD: I object to it as immaterial and irrelevant, a client instructing an attorney what he should put in at a certain time to be drawn out under his cross examination—it is not a proper cross examination anyhow.

30 THE COURT: Well, it is a question of the accuracy of the witness' statement now, on the question where you really have shifted the ground of your complaint.

MR. EBERHARD: That may be true.

THE COURT: If he wants to answer that question he may, otherwise I will not compel him to.

MR. FALLON: Repeat the question.

Question repeated.

40 MR. EBERHARD: I object.

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THE COURT: I said I will not compel him to answer. If he desires to he may.

Q. What is your answer, Mr. Soulier? A. I refuse to answer.

Q. Why do you refuse to answer?

THE COURT: No; I will not—

MR. FALLON: It seems to me a refusal to answer ought to state some reason. 10

THE COURT: I will say it is a matter of a communication between client and counsel. If the client sees fit to answer he may, but he does not see fit.

Q. Then you refuse to answer that question? A. Yes.

THE COURT: He said so.

Q. Isn't it a fact that the only matter of complaint that you had against Mr. Daab at the time he commenced this suit was with reference to the recital contained in the lease which I have referred to to the effect that you and your wife were to have all the fixtures now, meaning then, at the time of the making of the lease, in the premises; and also that no changes were to be made in the premises without the consent of you and your wife? 20 30

MR. EBERHARD: I object.

THE COURT: I will allow that question.

A. I do not get the drift of your question.

Question repeated.

A. That was right in the lease—I understood that was right in the lease, they could not make any changes after they put the fixtures in there without our consent. 40

Q. That is the only complaint that you had

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against Mr. Daab at the time you started this suit?

A. No; I had the damages for taking out and leaving the place in such bad shape.

10 Q. The damages you claimed because of your having complained against him under this recital in the lease, and your insistent was under that clause that he had no right to take those fixtures out; is that so? A. That is one of them, yes, sir.

Q. Is there any other that you had at the time? A. Yes; conversations I had with Mr. Daab afterwards.

Q. Why didn't you mention that conversation in your pleadings? A. I did, a few minutes ago.

Q. Why didn't you mention it in your pleadings, when you started suit, if it was true? A. If what was true?

20 Q. These conversations.

MR. EBERHARD: I object. He is not charged with those pleadings.

THE COURT: That is going too far, I think.

MR. EBERHARD: Yes.

Q. Now do you say that the toilets in the rathskeller were removed? A. There was one in the front rathskeller was removed.

30 Q. Do you know by whom? A. No. I was not there. I know it was not there after the first of May.

Q. It was not there when you rented the premises to Mr. Daab either? A. No, sir.

40 Q. All of the fixtures that you have mentioned in your suit here were placed in those premises by Mr. Daab some months after the lease was made? Is that not so? A. Well, I cannot remember whether Mr. Daab had the lease three or four months before he signed it.

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Q. Is that so? A. Yes; if I remember right. I know I went to Mr. Eberhard several times to get my lease and he said Mr. Daab had not sent it back.

Q. Are you sure that Mr. Dabb had the lease three or four months before he signed it? A. I wouldn't say how long; I know it was some time.

Q. Would you say it was a month or two months? A. I think it was more than two months. 10

Q. The acknowledgment on the lease is to the effect that on the 11th of February you and your wife and Mr. Daab acknowledged this lease before Mr. Eberhard. Would that refresh your recollection any?

MR. EBERHARD: I object to that, because that acknowledgment was taken by me. If there is any explanation it cannot be done by him. 20

THE COURT: No; that is an acknowledgment and it speaks for itself.

MR. EBERHARD: Yes.

THE COURT: Certainly. Now Mr. Fallon is cross examining as to his accuracy of the time when this agreement was made. He said he thought the defendant held the lease some two or three months before he signed it, and it is perfectly proper to call his attention to the acknowledgment, which cannot be explained. You do not want to impeach that acknowledgment. 30

MR. EBERHARD: I will explain that.

MR. FALLON: Do you dispute that it was on the 11th of February that that acknowledgment was made?

MR. EBERHARD: No; but you are asking a question about an acknowledgment that I took. 40

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Q. Do you wish to change your testimony in any respect as to the time when Mr. Daab signed this lease? A. I cannot say when he signed it.

Q. Do you wish to change your testimony as to the length of time when he held it? A. From the time I told Mr. Eberhard to make the lease it was, I should judge, over two months before I remember going to Mr. Eberhard and asking him why my
10 lease did not come back.

Q. Isn't it a fact that you were in Mr. Eberhard's office nearly every day? A. No; I am not.

Q. Were you ever away from his office as much as a month at a time during the progress of this work? A. Oh, I guess I was.

Q. Will you swear you were? A. Yes, I will.

Q. Around February, 1907? A. Not around then, at that time, for a month or two—I know I
20 went up and asked him for my lease.

Q. In the month of February you were there quite often? A. Yes.

Q. At Mr. Eberhard's office? A. I do not think I was there three times.

Q. In the month of February you were at Mr. Daab's place? A. I was there to eat, but we didn't have more than two or three conversations down there in regard to the fixtures.
30

Q. You had conversations with him down in his office? A. I went down about the plans of front, to see whether he liked it.

Q. Did you know the character of business that Mr. Daab intended to conduct on the premises he was leasing from you? A. Yes, it is right in the lease.

Q. Is it? It is not, as a matter of fact. A. Supposed to be a cafe.
40

Q. Was there anything said between you and

Henry P. Soulier—Cross.

Mr. Daab that it was to be a cafe? A. Certainly, that is the way I had it put in the lease.

Q. As a matter of fact it is not in the lease, Mr. Soulier. There is nothing in the lease as to the character of the business to be carried on there.

A. I think you will find it in the lease, John.

MR. EBERHARD: It is not.

A. It was understood right between us when we were talking— 10

MR. FALLON: I ask that that statement be stricken out. It is not responsive to my question.

THE COURT: Not what was understood, but what was said.

Q. Mr. Soulier, I ask you again whether you were informed before this lease was entered into as to the character of business that Mr. Daab intended to conduct there? A. Why, to run a cafe and saloon. 20

Q. When did that information come to you?

THE COURT: What difference does it make?

MR. FALLON: Because his pleadings say that he never had any knowledge.

THE COURT: He rented the property, and unless fraud is set up it does not make any difference. 30

MR. FALLON: Well—

Q. Is it true that only ordinary fixtures were to be placed in there by Mr. Daab? A. Were to be first-class fixtures put in.

Q. Then you heard your counsel, Mr. Sheridan, relate to the jury in opening here, that ordinary fixtures were to be placed in there? A. I did not hear it. 40

Henry P. Soulier—Cross.

MR. EBERHARD: I object.

THE COURT: I do not think it makes any difference what Mr. Sheridan says.

MR. FALLON: Mr. Soulier is bound by his counsel's opening.

THE COURT: No. Counsel in opening might say a good many things.

10 Q. Was there anything said as to the character of the fixtures to be placed in there by Mr. Daab?
A. Why, he was going to put in first-class fixtures.

Q. What did he say? A. He said he would put the best there was.

Q. Is that what he said? A. Yes, and he showed—I had the plans there, for Mr. Ricker brought the plans there and showed it to me, and
20 I showed him the plans of the front.

Q. When was that? A. Right after we had come to terms.

Q. When was that? A. I think it was in February, January, or some time—

Q. January or February? A. February—when we first commenced there—I don't remember the date.

Q. You stated here in your direct examination that Mr. Daab said that "whatever fixtures I
30 put in will remain." Is that what he said? A. Yes.

Q. Then he did not tell you what fixtures he would put in? A. Oh, he was supposed to put bar fixtures in, that is what we were talking about, and we had plans there and everything else.

Q. Is that what he said to you at that time, "Whatever fixtures I put in will remain?" A.
40 All fixtures was to remain, that was the words used.

Henry P. Soulier—Cross.

Q. Did he say, "Whatever fixtures that I put in were to remain?" A. All fixtures.

Q. Did he not say "whatever fixtures"? A. That covers it.

Q. You are testifying to facts? A. Yes.

Q. Or are you making a guess? A. No, I am not making a guess.

MR. EBERHARD: Let us understand his definition of "whatever," and "all." 10

THE COURT: I have ruled, and I shall continue to rule, that any agreement made before the signing of the lease, or any conversation or claim had before the signing of the lease, is incompetent.

Q. About April, 1907, you said that Mr. Daab said to you that "Whatever fixtures I put in the place will remain." Is that what he said? A. 20 Yes.

Q. Is that all that he said with respect to the fixtures at that time? A. Well, that is all that I can remember now that he said.

Q. Well, that is all that you can remember? A. All that comes to mind.

Q. Isn't it a fact that the fixtures that were put in there by Mr. Daab were put in there after May, 1907—between June and November, in fact? A. I 30 couldn't tell you, John, the exact date.

Q. You were around there most every day? A. I was around there most every day, but I did not take note of what day they came in, or anything of that sort. I never thought that we were going to have any trouble, because I thought that Mr. Daab was all right and I was glad to have him take the place.

Q. Do you mean to say that after Mr. Daab 40 left the premises that the plaster was broken and not in good shape? A. In one place there.

Henry P. Soulier—Cross.

Q. Did you say that there seemed to be evidence to you of it having been fixed up? A. There was somebody in there fixed it up before the keys was handed over to me, when they came in.

Q. Wasn't it fixed up in first-class condition before you got hold of it? A. No, sir, it was not.

10 Q. It was not? In what respect was it in any-wise deficient? A. The walls in several places were in very bad shape, where the partition had gone into it.

Q. In what condition? A. Where they pulled the partitions down and pulled they away from the sidewalls. There was nails in one or two places yet where the partitions were nailed to my walls.

20 Q. Do you complain of the nails being left in the walls? A. Yes; and where they pulled the plaster off with them.

Q. In any place where you think there had been a nail was there an opening left there unplastered? A. How do you mean, an opening?

Q. I will withdraw that. Were there any holes in that wall at the time you went in there the first or second of May, 1912? A. When he gave it up?

30 Q. Yes. A. There were some nails sticking in some places.

Q. That does not indicate—were there any holes in the plastering? A. Yes.

Q. Where? A. Between the—going down to the toilet and right aside of the door going into the kitchen.

Q. What was the character of the holes? A. Where the partition had gone up into it like this
40 and pulled it down.

Q. Where did you see any evidence of replaster-

Henry P. Soulier—Cross.

ing? A. Right back of where the lunch counter was.

Q. Is that all? Is that the only place? A. The only place I remember seeing it.

Q. You did not look very carefully, did you? A. I seen the others around there, where I—

Q. You did not look around to see what the real character of the place was, did you? A. Yes, I 10 did. That is what I went in for.

Q. Who did the excavating? A. Mr. Egan.

Q. Who paid him? A. I did.

Q. How much did you pay him? A. I guess I must have given him eight or nine hundred dollars or somewheres around eight or nine hundred dollars, I forget exactly.

Q. What did you have Egan do? A. Have him dig it out and draw the dirt away, and put the new sidewalk down, and new arches in between the I-beams, and all that. 20

Q. Well, was that all he was to do, just excavate or dig out and put these arches in? A. All he was to do for me. All I ordered Mr. Egan to do for me was to dig a cellar out, the rathskeller. My agreement with Daab—our conversation was—I was to take and dig it out and take the dirt away and rip up this new sidewalk I had put in, and put in new arches, new iron girders, and a new sidewalk, and he was to put in the wall and do everything else to fit the place up A-1, and I was 30 not to charge any rent.

Q. You were to pay him half the cost? A. No, sir; that is all I was to pay. The sidewalk and the iron beams and the digging out cost more than what he spent on it.

Q. When did Mr. Daab go into possession of the premises, do you know? A. He took it the first of May that year, the time I got my rent 40 from him.

Henry P. Soulier—Re-Direct.

Q. Don't you know that alterations were going on up until November of that year? A. I know they were.

Q. And that the place was not taken possession of by him until the alterations— A. His lease had commenced on the first of May, and he paid his rent from the first of May; that is the time he took possession. He could have had it done before that.

Q. You know as a matter of fact that the place was not ready for occupancy until about November, don't you? A. I don't know what date it was he opened.

Q. It was late in the fall, wasn't it?

THE COURT: Is that of any consequence.

MR. FALLON: Only to this—

20 A. If he wanted to push things he could have had it ready to open on May first.

Q. When was the concrete sidewalk laid, was it before the excavation was made or afterwards? A. Yes, this was after, I had a new one down there originally, about six months before, and it cost me eight hundred dollars, and I had to tear it all up in order to put in new arches and iron beams from the building line out to the curb.

30 RE-DIRECT EXAMINATION BY MR. EBERHARD:

Q. You and Mr. Daab were present during all the excavation of this outside parcel called the rathskeller? A. Yes.

Q. He was there frequently with you in consultation? A. Yes.

MR. FALLON: I object to it as leading, and furthermore that it is not re-direct examination.

40 Q. Who was the architect? A. Mr. Steigleiter.

Henry P. Soulier—Re-Direct.

Q. Who was he employed by? A. I paid him. I employed him.

Q. Were there plans made for this—did he make plans for this? A. Yes, I believe there was.

Q. You visited each other, didn't you?

MR. FALLON: I object to it as immaterial and irrelevant.

THE COURT: What difference does it make? 10

MR. EBERHARD: Counsel tried to show they were very friendly. I probably thought I would show they were not friendly.

THE COURT: Did you ever know two people who got into a lawsuit to be friendly?

Q. Mr. Soulier, who was the one that manufactured or placed those fixtures in this place, the bar and back bar, and so on. 20

THE COURT: What is the use of that? The defendant admits that he put them in and he took them out; what is the use of going into that testimony.

MR. EBERHARD: Yes, but there will probably be some testimony as to the valuation of these fixtures, and I would like to know if he knows who put them in, who was the manufacturer. I do not see that it is going to hurt the case any. 30

THE COURT: If that is your object and you want to lay the foundation to prove value, I will allow it.

Q. Who was the one that put in those fixtures?

MR. FALLON: I will admit they were put in by C. Reger & Son. 40

Q. Who was the one—

Charles E. Diaz—Direct.

MR. FALLON: I object. I now withdraw my admission.

Q. Do you know of your own personal knowledge who put those fixtures in? A. Yes.

Q. Who was it? A. Reger.

Q. What is the first name, do you know? A. C., I think it is. I can show his bills; the same
10 one that put the front in.

Q. The same one who put the front in for you? A. Yes.

CHARLES E. DIAZ, called and sworn on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION BY MR. EBERHARD:

20 Q. Mr. Diaz, where are you employed? A. Lyric Theater, Hoboken.

Q. Do you know the premises leased by Mr. Daab at Hudson Place? A. Yes.

Q. And Hudson Street? A. Yes.

Q. How near is that to where you are employed? A. Well, about, I suppose, about thirty-five or forty steps from the door.

Q. Did you see this place which was leased to
30 Mr. Daab running open as a saloon or cafe? A. Yes, I did.

Q. What was in that place? A. It was all fixed up, chandeliers, bar, lunch counter, kitchen, icebox downstairs—

MR. FALLON: We object. We have admitted this.

THE COURT: What is the object?

MR. EBERHARD: And they were taken
40 out.

Charles E. Diaz—Direct.

THE COURT: They say they were taken out.

MR. EBERHARD: I want to show what kind of fixtures they were and what they were afterwards.

THE COURT: If you are going to offer this witness as an expert, qualify him.

MR. EBERHARD: I am not going to offer 10
him as an expert. I want to offer him as a witness who was in this place and can tell how it was furnished.

THE COURT: That does not make any difference, unless he is an expert, this testimony is of no consequence, because they admit what they put in and they admit what they took out.

MR. EBERHARD: If the court so rules—

20

Q. Did you go into this place—when were those fixtures taken out? A. Well, I don't know the exact date. The first time I know of those fixtures being taken out was when I saw a light in the place one night, and I saw some men working in there under the directions of Mr. Toboski. They were tearing out piping and one thing or another.

Q. Did you go into this place? A. No, they wouldn't let me in until they got everything out.

Q. After you went in what did you see in the 30
place?

MR. FALLON: I object on the ground it is immaterial and irrelevant.

THE COURT: Overruled. It is unnecessary, because they admit that they took the fixtures out.

MR. EBERHARD: There are other things besides the mere fixtures taken out; there are damages here, and I want to show 40
them.

Charles E. Diaz—Direct.

THE COURT: Do you offer him as an expert to show damages?

MR. EBERHARD: Not the value of the damages, but what he says he saw. He first saw it fitted up in first class condition.

10 MR. FALLON: I object. The witness has not said that.

MR. EBERHARD: Well, we won't say first class. I will cut that out. The place was completely fitted up, running; he saw it in that condition, and after that, when the things were removed he saw them removing the fixtures, and I want him to state the condition of the premises.

20 THE COURT: The question is overruled because it is unnecessary.

Q. And did you see the excavation that was made under the sidewalk? A. I certainly did,

Q. Do you remember when that was done? A. sir. I could not say the date. I made all the arches for it myself—

Q. About what time was that? A. I could not give the time.

30 Q. What month, do you know? A. I forget that now, but I know I made all the arches for the masons to put—

Q. Was it warm weather or cold weather? A. No; it was warm weather.

Q. It was warm weather? A. Yes, I got the lumber and made the arches myself for the masons to put in the concrete.

Q. You made the arches for them to arch what? A. For them to do the mason work on.

40 Q. Where did those arches go? A. Right on

Charles E. Diaz—Cross.

the sidewalk, all around from one end of the building.

Q. What were the arches made of, wood? A. Iron,—oh, the arches I made were made of wood.

Q. Did you at that time see Mr. Daab around there? A. Yes; I saw him several times.

Q. Was Mr. Soulier present? A. Yes, sir.

Q. Both present there? A. Yes, both there together. 10

Q. Did you hear any conversation between Mr. Soulier and Mr. Daab? A. No, sir; I did not hear any conversation.

CROSS EXAMINATION BY MR. FALLON:

Q. You said, Mr. Diaz, that you saw some one tearing out piping. You do not know what they were— A. Yes. 20

Q. What piping did you see torn out? A. Why, the bar fixtures, the piping for the bar.

Q. Oh, you mean the piping connected with the bar fixtures? A. Yes; I saw Mr. Reed throwing them all out.

Q. Mr. Reed, the plumber? A. Yes.

Recess.

30

40

George J. Froelich—Direct.

AFTERNOON SESSION.

GEORGE J. FROELICH, called and sworn on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION BY MR. EBERHARD:

10 Q. Mr. Froelich, what is your business? A. Manufacturer of bar fixtures, general contractors for erecting cafes and hotels.

Q. Have you estimated and fitted up bars? A. Yes.

Q. Where? A. Well, all over New York City; in fact we fitted up all over town—all over the country.

Q. Your firm—

20 MR. FALLON: I object to the question, his firm.

A. Jacob Froelich Cabinet Works.

Q. You were one of the firm? A. Yes.

Q. Have you fitted up bars in and about Jersey City? A. Yes, sir.

Q. Whereabouts in Jersey City. Mention the places. A. Washington Avenue or Washington Street—Third and Washington, Bernhard, Twelve
30 Washington,—and there are a number of places around here that I cannot think of at the present moment.

Q. What is your special line? A. Well, my special line is estimating, draughtsman, and carrying on the work throughout.

Q. Just explain to the court how you make your estimates, and how that was done? A. Well, I
40 hear of a job and I go out and see the prospective customer, and I introduce myself to the gentleman, and tell him just what I do. He gives me an

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idea of what he wants, and I take my measurements of the building or the liquor store where the cafe is to be located, and I make the plans, get specifications written out, and I figure up the job.

Q. You figure up the job? A. Yes, figure up the job, and I see the gentleman again.

Q. You have done that for how long? A. Two 10
and a half to three years.

Q. Do you know this place that was occupied by Martin Daab at Hudson Place and River Street? A. Yes, sir.

Q. Were you ever in that place while he was running it? A. Yes, sir. I have been in it several times.

Q. Did you see the pictures and furnishings of that place? A. Yes. 20

Q. What inspection did you make of them when you were in there? A. Well, we were in that line of business, manufacturers of bar fixtures, and being interested in that line, why, happened to pass there a few times, stopped in and made a thorough inspection of just what was there, such as bar and lunch counter in the back room, and also went downstairs in the rathskeller.

Q. Went all through it? A. Yes.

Q. Did you go into that place after it was 30
vacant? A. After it was vacant?

Q. Yes. A. Yes.

Q. What was the condition of the sidewalks, base, and entrance to the rathskeller? A. Well, as much as—

MR. FALLON: I object, unless some time is fixed.

THE COURT: When was it?

Q. What time was it you went in there after, 40

George J. Froelich—Direct.

about? A. I don't quite understand the question.

Q. What time did you go in there after the removal of the fixtures? A. How long after the fixtures were removed?

Q. Yes; what time was it, about? A. That I just could not say; I don't know how long the
10 fixtures were removed.

Q. What month did you go in? A. What month did I go in?

Q. Yes. A. I believe it was about April.

Q. April of this year? A. No, sir; last year.

Q. What was the condition of the premises? A. Well, the premises were in pretty bad condition at the time I went there to take measurements of the store—

20 MR. FALLON: I object, because it clearly appears here that Daab was the lessee of these premises up to May 1st of last year. What the condition of the premises before that time was it seems to me is immaterial.

MR. EBERHARD: It was after that he went there.

MR. FALLON: He says April.

Q. The place was vacant when you went in
30 there? A. Yes, sir, the place was vacant.

MR. FALLON: I object on the grounds stated. The witness says he was in in April.

THE COURT: He says he thinks it was in April, but the place was vacant.

MR. FALLON: The fact is we left there in the latter part of March, but we were still entitled to the possession of those
40 premises up to the first of May.

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THE COURT: Yes, but if he was there after you had actually gone out it is competent to testify as to the conditions.

MR. FALLON: All right. Go on.

A. Why, the condition of the store, as I said, was in very poor condition.

MR. FALLON: I object, and ask that it be stricken out. 10

THE COURT: Yes, not what you thought.

Q. In what particulars? A. In regards to the walls and the stairways leading to the rathskeller.

Q. What did you see? A. The walls, the plaster was off the walls; partitions were taken down; railings missing on the stairways, and ladies' toilet removed on the first floor.

Q. Did you notice the base of the first floor, marble base? A. Yes, that was removed. 20

Q. That was removed? A. Yes.

Q. What was the value of the marble base which was removed? That is part of your business, to put marble bases? A. Yes. Well, I just don't know the amount of lineal feet of marble base that was removed, but figuring on the marble base that was removed on the lunch bar, cross partition, and around the walls, well, the amount of lineal feet I just don't know offhand. 30

MR. FALLON: We do not want the witness to guess.

THE COURT: He says he does not know?

A. No, sir.

Q. The toilet was removed, you say? A. Yes, ladies toilet.

Q. What was that worth?

MR. FALLON: I object unless the witness qualifies. 40

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MR. EBERHARD: Do you want to qualify as an expert?

MR. FALLON: As an expert, as to the value of a toilet, to put it up there and take it away.

Q. Have you furnished toilets? A. Yes.

Q. Do you furnish toilets? A. Yes.

10 Q. To those places in fitting them up? A. Yes.

Q. Have you done it in other instances? A. Yes. That toilet I value at forty-five dollars.

Q. What kind of rail was it that led to the rathskeller? A. Brass rail.

Q. How much? A. Two inch.

Q. Larger than these rails (indicating foot rails in jury box)? A. Not as large, not as
20 thick.

Q. And how was that fastened? A. That was fastened—

Q. To the marble? A. Fastened to the marble with arms.

Q. How were the arms fastened into the marble? A. Why, a hole being bored through the marble and these arms were put in there with plaster of paris.

30 Q. Yes, and then? A. The rail was put through the arms.

Q. The rail was put through the arms? A. Yes, and they also had standards, I believe, my recollection is, standards on top and bottom.

Q. And what are those rails worth? A. Well, let's see,—the rails as we found missing on both stairways would be about one hundred and twenty-five dollars.

40 Q. Now the bar and back bar which were there at the time, did you see it? A. Yes.

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Q. What was that worth?

MR. FALLON: I object, unless some time is fixed as to this.

THE COURT: Fix a time.

Q. When were you there when you saw this, what time and what year? A. 1907 and 1908.

MR. FALLON: 1908?

10

A. 1908.

Q. What was the value?

MR. FALLON: I object to the value in 1908.

THE COURT: Haven't you got to show—

Q. Allowing for the five years depreciation?

MR. FALLON: I object.

20

THE COURT: Is a mere arbitrary allowance. The value of the bar, assuming you are entitled to recover, not was the value at the time it was taken out when the lease expired, what it was worth four or five years before that time.

Q. The fixtures as you saw them, when was the last time you saw those fixtures in that place?

A. The last time I saw those fixtures in that place was about 1910.

30

MR. EBERHARD: When did that lease expire?

MR. FALLON: 1912.

Q. The fixtures as you saw them in that place in 1910—

THE COURT: What time in 1910, did you say?

A. It was around February, 1910.

40

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Q. —the bar, the back bar—I think that is what you call it, don't you? A. Yes, sir.

Q. —the back bar and panelling and plumbing, all go together, don't they? A. Yes. Do you want to know the valuation of the bar, the back bar and back fixtures, the beer apparatus—

MR. FALLON: I object to that statement.

10 Q. The bar, the back bar and the beer apparatus? A. Yes.

Q. What would be the value of those fixtures, you having seen them in February, 1910, at the time they were taken out in February, 1912.

MR. FALLON: I object to that as incompetent and irrelevant.

20 THE COURT: I will allow him to testify the value of the fixtures at the time he saw them—and he cannot say what they are worth two years after—and take that for what it is worth.

Q. What was the value of the bar, back bar, beer pump and fixtures there at the time you saw them?

30 MR. FALLON: I object, for the purpose of the record, to this witness answering that question, first upon the ground that the question is too general and does not indicate the character of the fixtures that the witnesses expected to testify to; and secondly that any opinion of the witness as to the value of the fixtures in 1910 is no criterion as to their value in May, 1912.

40 THE COURT: I will allow him to testify as to the value, but I think you must make him specify the particular things which you have set out in your complaint. Go over

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that list and see if he knows about those things, before he gives the value.

Q. Bar and back bar—

THE COURT: Why not take the lease that you have before you, and he would not have to pick them out all the way through. Your first is the cherry partition.

10

Q. Cherry partition, stained glass top, leading to rathskeller.

MR. FALLON: Will your Honor permit me to make my objection now to this whole line of testimony that he is going to put in, on the grounds stated?

THE COURT: Yes.

Q. Did you see them, as you have stated, a cherry partition with stained glass top, leading to the rathskeller? A. Yes, sir. 20

Q. What was the value at that time of that partition? A. A hundred dollars.

Q. One hundred dollars? A. Yes.

Q. A cherry door to the rathskeller, half door? A. You mean the half door, the swing door?

Q. Yes. A. That would be on the style of a summer door? Is that what you mean?

Q. Yes.

30

MR. FALLON: I object to the witness and counsel having any understanding as to what this thing is.

THE COURT: The cherry door is what is described.

Q. You saw that. The one you saw, what was it worth? A. Fifteen dollars.

Q. Cherry door at stairs, at the head of the stairs? A. Thirty-five dollars. 40

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Q. Bar, back bar and fixtures? A. Twelve hundred dollars.

Q. The working bar? A. That is including the working bar.

Q. That is including the working bar? A. Yes.

Q. Cigar counter? A. That is including the
10 cigar counter.

Q. That includes the cigar counter. Glass box? A. That is on the back fixtures?

Q. That is on the back fixtures? A. Fifty dollars.

Q. The show case? A. One hundred and twenty-five.

Q. Lunch counter? A. Four hundred dollars.

Q. What material was this made of? A. Mahog-
20 any—Mexican mahogany.

Q. Back fixtures? A. That was included in the bar and the back bar, and back fixtures, twelve hundred.

Q. Wine closet? A. Two hundred.

Q. That was there. The partition dividing the store? A. Four hundred and fifty.

Q. The partition for ladies' toilets? A. Seventy-five dollars.

30 Q. Door in back of bar? A. Forty dollars.

Q. The brass rails you have already valued, I believe? A. Yes.

BY THE COURT:

Q. How much did you say that door was? A. Forty.

Q. Door of back bar? A. Yes, forty dollars.

BY MR. EBERHARD:

40 Q. Brass rails to rathskeller and toilet, you have

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valued them? A. Valued them at one hundred and fifty dollars.

THE COURT: You gave that before.

MR. FALLON: You said one hundred and twenty-five before. Which is it?

A. One hundred and twenty-five?

MR. FALLON: You now say it is one hundred and fifty, do you? A. Yes. 10

Q. Three doors at toilets? A. Sixty dollars.

Q. The toilets have been valued. Dishwashing tubs, do you have anything to do with that? A. No, sir.

Q. You know— A. Is that behind the lunch bar? A. No; down stairs. A. No, sir.

Q. You had nothing to do with that? A. No, sir. 20

Q. In your value do you include the plumbing in the fixtures in back bar? A. That would be extra. That is an extra figure.

Q. Extra, the plumbing would be? A. Yes.

Q. Did you see the plumbing in this instance? A. Why, I have an idea of what it is like. I have fitted up a good many barrooms.

Q. Did not see this particular plumbing? A. No, sir, not at the time the bar was in. 30

Q. Not at the time the bar was in? A. No, sir.

Q. You went there at the time the place was vacant, you said. What did you go there at that time for? A. To give Mr. Soulier a figure on what it would cost to replace the amount of fixtures which were taken out.

Q. Did you do it? A. Yes, sir.

Q. What was your figure? 40

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MR. FALLON: I object on the ground that it is immaterial and irrelevant to the issue.

THE COURT: I will allow this question.

A. I say the fixtures were valued, or I valued those fixtures in 1910—

10 Q. No; that is not the question. The question is, after you made the estimate for Mr. Soulier, what was the estimated figure that you gave him for the replacing of those fixtures?

MR. FALLON: I object.

THE COURT: No, no; it cannot be what the estimated figure was. What would be the reasonable, fair cost for replacing them.

20 Q. What would be a reasonable, fair cost, for replacing them? A. Four thousand dollars.

THE COURT: For those articles you have spoken of?

Q. Four thousand dollars? A. Yes.

BY THE COURT:

Q. I understand you to say these articles that were worth three thousand one hundred dollars in February 1910, would cost four thousand dollars in 1912? A. There were quite a number of things left out that were not mentioned.

Q. You were asked and you said four thousand dollars, and the figures you gave foot up only three thousand one hundred and twenty—

MR. EBERHARD: I will have the witness mention what was referred to.

MR. FALLON: I object to it.

40 THE COURT: You went over all those

George J. Froelich—Cross.

articles and he testified to the value of everything excepting the washing tubs and the steam pipes and radiators.

A. There was a misunderstanding on my part.

BY MR. EBERHARD:

Q. What would it cost to replace those things that you have recited? A. Just as I stated. 10

Q. Yes, with the labor, you know—

MR. FALLON: I object, unless he can testify as to what the labor would be. I want to know all about that labor.

MR. EBERHARD: You can cross examine.

A. I will give you a figure of thirty-five hundred dollars.

CROSS EXAMINATION BY MR. FALLON: 20

Q. How long were you in business? A. Ten years.

Q. What was your business—you say you have been an estimator and draughtsman for about two and a half or three years? A. Yes.

Q. What was your business before that? A. Carpenter.

Q. Where? A. Father established a business, bar fixtures, and I have been brought right up in that business. 30

Q. What was the occasion for your going into Daab's place in 1908? A. Why, doing some jobs around Hoboken, the vicinity of Mr. Daab's place, and I stopped in there before I went home, being interested in that line of business, to see what the place looked like and how it appealed to me.

Q. Do you mean to tell this jury that on this visit you investigated the whole place, you went 40

George J. Froelich—Cross.

to the rathskeller and looked at all these bar fixtures and all connected with it? A. I do not have to go in there but five minutes to know the contents of the whole barroom.

Q. That is the impression you want to give us, that in five minutes you made up your mind as to the entire value of these fixtures? A. No; that
10 is not what I am trying to tell you. I am trying to tell you that I can go into any cafe in the city and within five minutes tell you the valuation of it.

Q. How long were you in Daab's place in 1908?

A. I stopped in to get a drink or two and went downstairs and looked around and walked out again.

Q. How long do you suppose it took you? A. Undoubtedly about five or ten minutes, perhaps.
20

Q. What did you look at? A. Why, everything that was there. Looked at the back room, and looked at the bar and downstairs in the rathskeller.

Q. Just the general layout of the place? A. Yes.

Q. You did not examine the wood to see whether it was stained or solid? A. I know it.

Q. How could you tell? A. By looking at it; tell by the grain of the wood, tell what kind of wood it was.
30

Q. Did you look at the wood in the back bar? A. Yes.

Q. You were not near it? A. I could not help but looking at the back bar when I was standing in front of the bar.

Q. How many feet were you away from the back bar? A. Right up against the front bar.
40

Q. Five feet away? A. Yes.

George J. Froelich—Cross.

Q. Could you tell from where you were standing whether or not that wood was real or stained? A. Yes, I can.

Q. Which was it, stained or real? A. Why, it was stained mahogany.

Q. Stained mahogany? A. Yes.

Q. What was the color of the other part of the bar fixtures there? A. Why, it was the natural color, natural mahogany. 10

Q. Is there any difference between mahogany and cherry? A. Yes.

Q. What is the difference? A. Difference in wood.

Q. What were the fixtures that you saw there, cherry or mahogany? A. Mahogany.

Q. All of them? A. Yes; all but the cross partition and back room.

Q. All but what? A. The cross partition and the back room. 20

Q. All but the cross partition and the back room? A. Cross partition and the sitting room.

Q. Where was the sitting room located, on the store floor? A. On the store floor, yes.

Q. You have testified to a cherry partition, stained glass top, leading to rathskeller; what does that refer to? A. That is a partition around the stairway. 30

Q. Then that is another cherry partition other than the one that you just mentioned a minute ago? A. Yes.

Q. Then there were two cherry partitions there? A. Yes.

Q. Are you sure? A. Yes.

Q. You are prepared to say that you are sure of that, are you? A. Yes.

Q. One was at the ladies' sitting room and the other was leading to the rathskeller? A. Yes. 40

George J. Froelich—Cross.

Q. There was a cherry door also leading to the rathskeller, wasn't there? A. That is a part of the screen; part of the screen partition.

Q. Then there was a cherry door at the stairs? A. Yes, that is the lower part of it.

Q. It is not a customary thing in fitting up a place to have cherry in one place and mahogany in another? A. Not as a rule, no.

10 Q. Still you are sure you saw cherry in some parts of the store and mahogany in others? A. Yes.

Q. Now in 1910, what was the occasion for you to be there—February 1910? A. Same reason.

Q. Why was it necessary to go there two years later? A. Not necessarily two years; might have stopped in there; I have been in there several times.

20 Q. Are you prepared to swear now that you were there in February, 1910? A. Yes.

Q. What fixes it in your mind? A. In my mind?

Q. Yes. A. Because we were doing a job on Second and Washington Street, and I happened to be around the vicinity, and before I went down in the subway I stopped in.

30 Q. Where was the job of February 1910? A. Second Street and Washington.

Q. Did you do Bernhard's job in Second and Washington, in February, 1910? A. Not Bernhard's. We did some alterations for Bernhard, but just when the job was originally fitted up I can't recall now.

Q. Where was the work you did in February, 1910? A. Bernhard's place.

40 Q. Alterations? A. Yes, alterations and some booths.

George J. Froelich—Cross.

Q. On that occasion you say you again stopped in to Daab's place? A. Yes.

Q. No particular occasion required you to go in at that time? A. No, sir.

Q. What did you on that occasion—general observation as before? A. In the barroom and front room downstairs on that occasion.

Q. So that it was in 1908 that you went downstairs? A. Yes, sir. 10

Q. In February, 1910, you did not take particular notice of any of the bar fixtures, did you? A. Take particular notice? Why I was right in there and I seen all the bar fixtures that were there.

Q. You saw them yourself? A. I can give you a description of the bar fixtures.

Q. You saw them the same as you see a saloon you would go into to get a drink? A. Yes. 20

Q. Now, Mr. Froelich, you have testified here to-day that the brass railing leading to the rathskeller cost one hundred and twenty-five dollars; you have also testified that it cost one hundred and fifty dollars; how do you reconcile those two statements? A. I have not got any—

MR. EBERHARD: I object to the examination. The witness did not testify that way. 30

MR. FALLON: I will go back to the record and convince you he did.

(Previous testimony repeated).

Q. How do you reconcile these two statements that you made, saying that the value was one hundred and twenty-five dollars in one place, and in another place saying one hundred and fifty dollars? A. The figures I am giving you at the present time are approximate figures. 40

George J. Froelich—Cross.

Q. All that you gave us is approximate? A. Yes.

Q. How do you reconcile giving us both of those figures? Which is the most approximate, one hundred and twenty-five dollars or one hundred and fifty dollars? A. As near as I can remember the conditions of that store and the condition of
10 the railing and the length of railing on both stairways, it would come to one hundred and twenty-five dollars.

Q. Why did you say a minute ago one hundred and fifty then? A. Simple reason that I did not think at the time I said one hundred and fifty dollars just as I thought before.

Q. Did you think carefully about the other estimates that you gave? A. Yes, sir.

Q. Are you prepared to say that the railing
20 that was leading to the basement was brass? A. Yes.

Q. Don't you know it was nickel? A. Nickel?

Q. Yes. A. No, sir; it was brass.

Q. You are sure it was? A. I say it was brass.

Q. You say it was brass? A. Yes.

Q. No indication of it being nickel at all to you? A. Not to my estimate.

Q. You are quite clear about that? A. Quite
30 clear, yes.

Q. This ladies' toilet that you saw removed, you do not know when that was removed, do you? Was there any evidence given to you as to when it might have been removed? A. When it was?

Q. Yes? A. No, sir.

Q. Might have been removed a year or two before, as far as you know? A. Yes, sir.
40

Q. You say you would figure the value of those

George J. Froelich—Cross.

fixtures that you saw there at thirty-five hundred dollars to replace them? A. No, just the figures that were specified here.

Q. Those you mentioned? A. Yes.

Q. As I calculate the total of these particular items you have referred to, it seems to me to calculate \$2,870. Do the figures between that amount which you have so detailed and the \$3,500 10 represent all labor? A. Yes, sir.

Q. Do you mean to say it would cost seven hundred dollars in labor to fit up those fixtures there? A. No. The figures I have given you as the things were mentioned to me—I gave you those figures as an idea of what I thought they were valued at.

Q. And you also give a figure— A. And I gave you a figure of thirty-five hundred dollars as an idea of what those items were valued at. 20

Q. What items do you refer to? A. The items that were stated.

Q. The items you were asked about, as I calculate them, total \$2,870? A. Yes, sir.

Q. Now then how do you arrive at the figure of \$3,500 as the value of those fixtures in place? A. I cannot give you an idea of the valuation of each article and not know the exact size of it, and give you an exact figure. 30

Q. But, Mr. Froelich, you have given us an exact figure, or at least you say it was an approximate figure. Do you want us to understand that your figures are as nearly truthful as you can make them? A. Yes, sir.

Q. How do you explain then that difference of seven hundred dollars between that figure and what you say would be the total cost? A. I have just told you that I would replace those 40 fixtures or thirty-five hundred dollars.

George J. Froelich—Cross.

Q. That is what you mean? A. Yes.

Q. You do not mean to say that was their value in February, 1910? A. I would not value them any more if I went to replace them at this time.

Q. As a competitor you would do a good deal for business? A. Yes, I would.

10 Q. You are a competitor of Ricker, the man that put these things up? A. Yes.

Q. You have got a little business jealousy right straight along, to try to compete with each other?

MR. EBERHARD: I object.

THE COURT: I do not think you ought to go into that.

MR. FALLON: All right.

20 Q. Then was it your purpose to go into here to see how well Ricker had put up those fixtures and how good the quality was? A. Yes, sir.

Q. It was also your business in glancing around to see about what the quality of the fixtures would be? A. Yes, sir.

Q. When did you meet Mr. Soulier? A. When?

Q. Yes. A. Sometime in 1912.

30 Q. You say you were in this saloon premises in April, 1912, the early part of April? A. April 1912?

Q. Yes. A. No, sir.

Q. Were you or were you not? A. I was not.

Q. Were you there at all in 1912? A. I was there to see Mr. Soulier in 1912.

40 Q. When? A. I just don't recall what month or day.

George J. Froelich—Cross.

Q. You did say before you were there in April. A. To see Mr. Soulier?

Q. No, but were in those premises in 1912, Daab's premises? A. Mr. Daab was not there in 1912.

Q. Were you in those premises in 1912? A. Yes, sir.

Q. How did you get in there? A. How did I 10
get in?

Q. Yes. A. I believe there was a man in charge there who had keys to let me in.

Q. Who was the man? A. I don't know his name.

Q. Where was the man? Was he inside or outside? A. He was inside.

Q. It was not this man, was it (indicating)? A. No, sir. 20

Q. Was the door locked? A. Yes, sir.

Q. Did you give him any reason for wanting to go in? A. Certainly; I told him my business, to go in there to measure that place.

Q. There were no fixtures in this place at that time? A. No, sir.

Q. It was before May, 1912, that you were in there, wasn't it? A. I was there—yes.

Q. You are sure of that? A. Positive. 30

Q. You are sure that neither Mr. Daab nor this man here, Mr. Lititski let you in that place? A. Oh, positive.

Q. Did Mr. Soulier leave you in there? A. No, sir.

Q. Did he go there with you? A. No, sir.

Q. What time of the day were you there? A. There in the afternoon.

Q. About what time of the afternoon? A. 40

George J. Froelich—Cross.

Would be about half past one or two o'clock, as near as I can recollect.

Q. Was your purpose in going there to measure up this place with the view of making new fixtures for the place? A. Yes, sir.

Q. Not for the purpose of giving him any estimate about the old fixtures? A. No, sir.

10 Q. You had submitted to him a figure on what you would fit up the place new? A. Yes, sir.

Q. According to the way they would want them put up? A. Yes, sir.

Q. Is that a fact, or was it for somebody else? A. No, sir; that is a fact.

PLAINTIFF RESTS.

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30

40

Martin Daab—Direct.

DEFENDANT'S TESTIMONY.

MARTIN DAAB, JR., the defendant, called and sworn in his own behalf, testified as follows:

DIRECT EXAMINATION BY MR. FALLON:

Q. Mr. Daab, you live in Hoboken? A. I do, yes.

Q. You are the person who is mentioned in this suit as the lessee of the premises in question? A. Yes. 10

Q. Did you ever see Mr. Eberhard in connection with this lease that you made with Mr. Soulier? A. No, sir.

Q. Did you have any talk with Mr. Soulier after the lease was made wherein you stated to him that you would leave the fixtures in the place? A. No, sir. 20

Q. Did Mr. Soulier ever have any talk with you about fixtures that were to be put in that place? A. Fixtures? No, sir.

Q. Did Mr. Soulier talk with you about fixtures, about March, 1907? A. 1907? No, sir.

Q. A month after the lease was made. Did you tell Mr. Soulier that if he would make alterations in the way of excavating in the front of the cellar, putting in brick arches, putting in iron stairway and laying concrete sidewalk, that you in consideration of that would put into your premises any store fixtures and allow those store fixtures to become a part of the realty and remain in those premises after your term of lease had expired? 30

MR. EBERHARD: I object. Mr. Fallons puts his question about the front of that store. The excavation was not in the front of that store. I have no objection to the 40

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question, providing it is right. The excavating was done under the sidewalk outside of the premises.

Q. I will change my question so as to refer to the excavation made in the Hudson street side of the premises.

MR. EBERHARD: Under the sidewalk.

10

Q. As Mr. Eberhard says, under what was the sidewalk. Having listened to my question, did you have any such conversation with Mr. Soulier? A. In regards to the fixtures?

Q. Yes. A. Why, no.

Q. Did Mr. Soulier ever say anything to you about fixtures at all at any time? A. No.

20 Q. At the time you rented this place from Mr. Soulier where did you meet Mr. Soulier? A. At the time I rented the place?

Q. Yes. A. I guess right in front of his place; right in front of the place there; he was excavating or refilling the front.

Q. What was the character of the place before you rented? Was it apartments or store or what? A. Well, apartment—flat.

30 Q. After the lease was made did you have any talk with Mr. Soulier as to your doing work there in any particular in and about any payment being made for it? A. I doing any work?

Q. Yes, any work? A. I knew the bar fixtures end was up to me, that part, but I don't know of any other work, only what he had said that the would go halves in.

Q. You tell us just what he said and when it was said? A. In what particular.

40 Q. After the lease was made tell us any conversation that you had with Mr. Soulier about

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this thing that you have just mentioned? A. Why, after—well, the fact is we were very close friends—

(Objected to).

Q. No. A. I want to start in right.

Q. Never mind that. A. Well, I passed the door, his door, and he said, "Dabby, this would be a nice place for you." I says, "All right". 10

Q. Eliminate that. You made a lease with him. After you made the lease tell us what conversation you had with him during the progress of any further work to be done, if anything was said. Did you have any talks with him? A. Yes; had lots of talks.

Q. About the place? A. Yes.

Q. Tell us what was said? A. Well, I can't—I don't just seem to understand what you are trying to get at, but I will tell you that there was no floor there and there was nothing; the place was in—the place was a flat— 20

(Objected to).

Q. I will put the question this way. Describe the place as it was at the time you leased it and tell then of any conversations you had with Mr. Soulier thereafter? A. Well, the conversation in this way. Simply it was among us two; he start in, "Dabby, I will let you have this place right." "All right." And it got to the fixing up; these was no front in; there was nothing in; the place was bare; it was a flat; and he says, "The lease will be made out". Says I, "All right". I was to get the store floor. 30

Q. No; but after—well, go ahead. A. I was getting the store floor, which was all right; the lease was made out the first of May. Well, there was no chance—why, the front was not in place, 40

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there was nothing in the place the first of May; I couldn't—I didn't get any goods, I didn't get any furniture in there until the middle of July, I think, somewhere around there, bar fixtures; there was no floor in the place; and we started on the floor question. I says, "How about the floor?" Says I, "I don't want no wooden floor
 10 there; the place will be fixed up so nice, put a terrazzo floor in there;" says he, "I will go you halves on that." Says I, "All right" Steam heat was the same way—go halves, and halves he paid on that; it was all right; and after the lease had been signed and everything he turns and takes a stairway away from the store and puts the stairway up on the first floor, compelling me to hire that first floor. He says, "You know you will want that after a while for a restaurant."

20 (Objected to).

Q. Did you rent the other store too? A. I did.

Q. The other floor? A. Yes.

Q. That is separate and apart from this lease?
 A. All right. That was in the—

Q. That is another lease? A. All right.

Q. Go on and tell us whatever conversation you
 30 had with Soulier with respect to the store premises and the basement? A. Well, I was to fix the basement up as a rathskeller. All right. Stand half. All right. Paid Mr. Egan two thousand dollars—

MR. EBERHARD: I object to the payment of Mr. Egan. There should be this two thousand dollars or whatever he has paid—his proof is general—there should be some proof.

40

THE COURT: He is going on to state it.

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He said he paid it. Of course, they have to go into details of it afterwards. Proceed.

A. It was down there to the rathskeller part—two thousand dollars—I don't know to-day what I paid two thousand dollars for. I paid him.

Q. What was said about the building of the rathskeller between you and Mr. Soulier? A. 10
Why, to go halves on the—

Q. What was to be done? Tell us what he said and what you said. A. I can't just—

Q. Well as you remember. A. Why, I can't understand what you mean on that. What did he say?

Q. Did you and Mr. Soulier have a talk about his putting in condition the lower apartment? A. Oh, for the two thousand dollars? Mr. Egan 20
was going to give me a waterproof cellar completely, and, gentlemen, I couldn't put anything in there—

(Objected to).

Q. Let me understand this. Who employed Egan, you or Soulier? A. Mr. Soulier did.

Q. Who paid Egan two thousand dollars? A. I did.

Q. What did Soulier say to you if anything 30
about his paying you any part of that two thousand dollars before you contracted that debt? A. Halves as usual on everything.

MR. EBERHARD: I object. If he would only confine himself to some time. He has gone along generally with a statement and there is no time or nothing; I want to know whether it was done before or after.

MR. FALLON: He said it was about July, 40
I think.

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A. This is all after.

Q. Tell us when; about when? A. After the—
I can't—

MR. EBERHARD: You paid the bills, you ought to know.

A. I have everything down. I paid the bills—
10 certainly I paid all the bills.

Q. I want to know when the conversation was between you and Mr. Soulier. A. Whenever there was a job come up, or when it was finished up to that part—I couldn't get into the place—

MR. EBERHARD: You are not answering your attorney.

Q. When did the conversation between you and Mr. Soulier take place; in the first place, about
20 the rathskeller or building of the rathskeller and making it watertight? A. Well, between that and the first of May.

Q. Between what? A. Between—well, we will see. Why, the lease was in February and up to the first of May. The lease was to take effect the first of May.

Q. Did you pay Egan by check or cash, do you know? A. Oh, I paid Mr. Egan by check.

30 MR. FALLON: Mr. Egan, have you got those books that you were to produce here?

Q. Now what else was it Mr. Soulier and you talked about—

MR. EBERHARD: I want to prove the payment of two thousand dollars. If Egan says it was paid to him, all right.

40 MR. FALLON: He says all right.

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MR. EBERHARD: I will take—

MR. FALLON: I will call Mr. Egan.

Q. Did Mr. Soulier ever pay you any part of that two thousand dollars? A. No, sir.

Q. What else was it that you and Mr. Soulier talked about with respect to work to be done there for which he agreed to make payment? A. Radiation. 10

Q. Who did that? A. Schroeder, I believe, Jersey City.

Q. How much was paid for that, do you remember? A. A half of \$440 or \$431, something of that kind—\$260 and some odd dollars, I think.

MR. EBERHARD: If the Court please, in this matter of two thousand dollars, I reserve the right to have that testimony stricken out as far as Mr. Dabb is concerned, unless they connect it with these premises and prove what it was for. 20

THE COURT: They haven't got through.

MR. EBERHARD: I understand that, but in so far as this witness is concerned—

THE COURT: They haven't finished.

Q. Will you try and tell us, Mr. Dabb, in your own way just the entire conversation you had with Mr. Soulier after the making of the lease, with respect to improvements, alterations or additions that were made to those leased premises, in which you and he were to share the cost? A. Well, there were only a few. That is, the floor— 30

Q. How much was paid for the floor? A. Three hundred and thirty odd dollars.

Q. Who did that? A. Saxonia Brothers, West Hoboken. 40

Q. What did Saxonia Brothers do? A. Put

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terrazzo floor in back of the—the front part of the store and back of the partition, what they call the ladies end of it, the back part of the store.

Q. Yes. Now what next did you talk about with him, in which he agreed to make payment?

A. Part of that front; the extra doorway.

10 Q. Who did the work? A. Ricker.

Q. How much was paid Ricker for that? A. Four hundred and some odd dollars—\$455, I think.

Q. And the ceilings inside the saloon, in the barroom, was there anything done to the ceilings? A. Yes; the ceilings—Mr. Soulier had put the ceilings in.

20 MR. EBERHARD: If the Court please, he puts the word "agreement" in the witness' mouth. He says, "the agreement you made with him." Let him testify.

MR. FALLON: He said it.

THE COURT: He is giving the details.

MR. EBERHARD: He says, "You made the agreement for half." Let the witness state it.

30 Q. Was there any iron work done there that you and he talked about, you and Soulier? A. Stairway and the front part.

Q. What did the iron work in all consist of, if you remember? A. Why, I cannot remember.

Q. That you and he talked about? A. I don't remember the details. The only thing I do correctly remember is the stairway.

Q. What was the amount? Do you remember the amount? A. Amount of my end of it?

40 Q. No; the amount of the entire cost that you and Soulier talked about—the iron work? A. Well, the iron work?

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Q. Yes. A. Oh, I can't—I didn't get no bill for that, sir.

Q. Who did the work? A. Egan.

Q. You say you didn't get any bill from Egan Iron Works for any iron work that was done? A. I did for the stairway, for the patent stairway.

Q. How much was that? A. That was one hundred and thirty odd dollars, I think. 10

Q. Do you know a man named Oswald Drescher? A. Yes; he is a decorator.

Q. What did he do? A. Rathskeller, he done everything, painted models on the side of the wall.

Q. How much was paid to him, if you remember? A. Close on to four hundred dollars, or something of that kind.

Q. Was there any talk between you and Mr. Soulier after the making of the lease with respect to the doing of that work? A. Only the ceiling end of it and part of the work; the decorations downstairs. 20

Q. What conversation did you have with Mr. Soulier? A. The same. It was simply the same—halves.

Q. You have to tell us what was said. Saying "simply the same" does not help matters any. A. Well, I told Mr. Soulier I want this and I wanted that and he said, "All right. If you do this all right; go on and go ahead; it will be halves—the same." 30

MR. EBERHARD: I object.

Q. Unless you particularize—saying this and that, that means nothing. Was anything said between you and Mr. Soulier with respect to the ceiling? A. Yes. 40

Q. Tell us what was said as to what?

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(Objected to as leading. Question allowed).

Q. Tell us what was said as to that, Mr. Daab? A. Drescher done the painting to the ceiling, and that really was up to Mr. Soulier, the ceiling part of it, and of course I paid half of it. And the chances are the whole if it was
10 charged to me.

Q. Did you have any talk with him about it? A. Certainly. Certainly. It was all talk. We were going there every day; it was all talk.

MR. EBERHARD: I object to it and move to strike it out. Of course he says the chances are the whole of it was charged to him.

THE COURT: You cannot recover unless
20 he testifies specifically that there was an agreement.

MR. FALLON: I want him to testify to the entire conversation. That is the only way we can find out there was an agreement. If there was an agreement that they were to divide the cost you can recover, otherwise you cannot recover.

Q. Try and tell us, Mr. Daab, will you, the
30 conversations you had with Mr. Soulier with respect to these different matters which you charge him with here in your countersuit? That is what I want. A. Yes.

Q. Tell as you remember them what they were and what moneys you paid and what conversation was that you had with Mr. Soulier before you did them and what he said? A. Well, there was a ceiling—

40 Q. Tell us about that first. What was said? A. Well, the ceiling—couldn't agree about the colors—

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Q. You are telling us now the conversation you had with Soulier? A. With Soulier, yes, and he says, "Go on, go ahead." He want this and I want that—

Q. You mustn't say this and that. A. He wanted gold put on and I wanted it decorated something different in my own way. Is that proper?

Q. I want you to tell us as near as you can 10
just the conversation you had with him? A. That was the conversation, just that way.

Q. What further was said between you and him as to who was to bear the cost of it? A. Half.

Q. What did he say? You have to give details, what he said. A. Well, half of what the bill was. The bill was about a hundred and forty-nine dollars for that ceiling.

Q. What did he say before the talk ended? A. 20
That was supposed to take the same course, sir.

Q. No; tell us what he said. A. To pay half.

Q. When did he say he would pay half? A. Before the job was done; right—it was all during this time. This was about July, I judge.

Q. When you were putting in the installation— 30
when you were installing the steam heating plant and before you actually did install it, did you have a talk with Soulier as to who was to pay for it? A. Yes, certainly.

Q. Tell us what was said between you and Soulier and when it was said, if you recall? A. He simply put in the radiators and were supposed to get—the same way.

MR. EBERHARD: I object. That is ad- 40
mitted.

Martin Daab—Direct.

MR. FALLON: I know it is admitted, but I think it ought to be what he says.

Q. Mr. Daab, I don't want to be asking questions. Please tell us the conversation you had with Soulier, when they were, about, and what was said concerning the work which you are charging him for in your suit. First of all, installation of steam heating plant; what was said, and when was it said? A. Well, it is all mixed up; I can't possibly get on the date, but it was all the way through from the time—from the first of May on the first of November, when I opened my business.

Q. What was said by him to you about the steam heating plant? A. Now we talked about steam. Well, we had no steam plant in there and he said the steam will come from the other part; he said Schroeder could install it. He got a price. All right. I said all right, and he said it will be half too. I said all right, I will pay half.

Q. Had you had a talk before that about paying half of anything—before that steam heating plant was put in? A. Talk before on what?

Q. On anything, about his paying half of something else? A. Yes.

Q. Well, what? A. The floor was in that.

Q. What else? A. The floor and the stairway.

Q. Did you have a separate talk with him about each one of these things? A. As they came along on the job, yes.

Q. Egan proposition? A. Egan was excavating the front part when this other proposition was made.

Q. Tell us what was said between you and Soulier while Egan was so working which led to the talk of further work by Egan for which

Martin Daab—Direct.

you paid? A. The Hudson Place side was open. There was cellars there on his part, he had nothing to do with excavating end of it that I know of, but still that cellar was to made watertight.

Q. Who said that? A. Mr. Soulier and Mr. Egan, both, so I could do business in it. He had a certain kind of cement he talked about putting on there which would really be the thing. All right. But it never materialized. For that I was charged two thousand dollars and I paid Mr. Egan, but I never got no response for half from Mr. Soulier. 10

Q. Did Mr. Soulier say anything to you about paying one-half of it? A. He did. That was all in there.

Q. That was arranged? A. Yes, sir.

MR. EBERHARD: One-half of what? You paid two thousand for something, he don't tell what. 20

A. For making the cellar watertight, sir.

Q. You mean the work that Mr. Egan did in the way of making the cellar watertight? A. In the rathskeller.

Q. For that you paid two thousand dollars? A. I paid two thousand dollars—two thousand and I never got a bill or never got anything from Mr. Egan. I asked him for it. 30

Q. You did not receive one thousand of it from Mr. Soulier? A. No, sir.

Q. You say he promised to you that he would make a payment of one thousand? A. Half—not of the one item—of course, I didn't know what would be the full amount, but I did pay him two thousand dollars.

Q. The extension in the front of the store, 40

Martin Daab—Direct.

who had that made? A. Mr. Soulier—extension?

Q. Yes; the extension to the store front in front of the hall door on Hudson street? A. I did.

Q. At your own expense, or whose expense? A. That was cost of extending his part and my part too, on which was half too. I think the bill
10 amounted to about \$455.

Q. What was said between you and Mr. Soulier about payment of that bill? A. Same thing.

Q. What? A. Half. Half.

Q. Same thing means what? A. Half payment.

MR. EBERHARD: Better say "ditto."

Q. Were you ever able to use this rathskeller?
20 A. No, sir.

Q. Well? A. Well, I have just had about two foot of water in it most of the time. Had my furniture in there and had to take it all out; couldn't leave it there.

Q. How much money did you expend in fitting up that rathskeller? A. The rathskeller itself?

MR. EBERHARD: Fitting up?

MR. FALLON: The furniture? Well, I
30 will withdraw that now. I am not going to bother my head about that.

Q. When did you actually cease doing business in these premises Mr. Daab?

MR. EBERHARD: I object, and ask that the testimony in so far as the rathskeller and the payment of that two thousand dollars be struck out, for this reason,
40 that he says he paid it to Egan.

THE COURT: He said the plaintiff agreed

Martin Daab—Direct.

to pay half of whatever the cost was, and he couldn't tell what the cost was until he got the bill.

MR. EBERHARD: I say he hasn't shown what that two thousand dollars is for. He says he paid two thousand dollars to waterproof the place. That ain't so at all.

THE COURT: Doesn't that show what it is for? 10

MR. FALLON: You can cross-examine him.

MR. EBERHARD: The mere fact of a man saying he paid two thousand dollars to improve something—

THE COURT: The witness says he agreed with the plaintiff to have, this cellar made waterproof and he had the work done and he paid two thousand dollars for it and the plaintiff agreed to pay half of it. You can cross examine when you get to it. 20

MR. EBERHARD: What I am getting at is this. This man, the defendant, is talking about the rathskeller and the attorney is talking about the basement.

MR. FALLON: Isn't it all basement?

MR. EBERHARD: No. 30

Q. Is the rathskeller any different from the basement? Isn't it all in the basement? A. Sure.

Q. When did you cease doing business in the premises?

THE COURT: What difference does it make?

MR. FALLON: As to the young man who says he was in there. 40

Martin Daab—Direct.

A. Why, when I left the premises?

Q. No; when you closed it up. Did you close it up before your lease expired? A. Why, sure.

Q. How long before that lease expired did you close the place up? A. About the end of March.

Q. Who had the keys to those premises after
10 you closed it up? A. I did.

Q. Was there anybody authorized by you to go into that place, other than your manager, at any time after that? A. No, sir.

Q. Your manager was Mr. Lapinski? A. Yes.

Q. You caused the fixtures to be removed, didn't you? A. Sure.

Q. When you removed the fixtures or caused
20 them to be removed did you send any one to the place to plaster up and repair any damage that may have been done to the walls or property? A. Yes.

THE COURT: There is no occasion for you going into that. They have not proved any damage. He said there was some damage, but they didn't prove the value.

MR. EBERHARD: We did not prove damages.

30 MR. FALLON: Then we won't bother with that.

Q. Did you make any agreement with Mr. Soulier with respect to these premises or with respect to any fixtures which were to be placed by you in and upon those premises other than the agreement expressed in the lease made between you and Mr. Soulier?

40 MR. EBERHARD: I object; he has gone all over that, in the first place.

Martin Daab—Cross.

THE COURT: You may ask the question.

A. No, sir; none whatever.

CROSS EXAMINATION BY MR. EBERHARD:

Q. Mr. Daab, you know me, don't you? A. Yes, sure.

Q. You know that lease, don't you? (Paper shown witness). A. I do. 10

Q. This here identical lease? This is yours? A. Yes.

Q. Who wrote that on the back? A. Don't know anything about that.

MR. FALLON: Who wrote what?

Q. That on the back, that writing? A. I never knew it. I never thought of that until it was pointed out to me. 20

Q. Who put that in there? (Indicating). A. I don't know.

Q. Huh? A. I don't know.

THE COURT: Are you going to prove alteration of the lease?

MR. EBERHARD: No; this is cross-examination. He says he never saw me.

THE COURT: No; he says he did know you. 30

MR. EBERHARD: No; he said he never saw me in connection with this lease.

THE COURT: Both sides have admitted that lease in evidence, so I don't see what difference it makes. Neither side can go back to that evidence.

MR. EBERHARD: It is cross-examination on the veracity of the witness. I want to go on with this thing. 40

Martin Daab—Cross.

THE COURT: It doesn't make any difference.

MR. EBERHARD: There is my acknowledgment taken in the lease.

10 THE COURT: You have to contradict him on some material point, if you want to do that, but there is a lease which on the face is valid. If you want to contradict the lease that is one thing; if you do not want to there is no use of going into it.

Q. Who had possession of this lease other than me—what lawyer? Who was your lawyer at that time?

(Objected to as immaterial. Question overruled).

20 Q. Now when were these agreements made that you speak of between Soulier and you; when were they made? A. On different dates; I can't possibly give you the real date, but after the lease was signed; all after the lease was signed.

Q. All these agreements were entered into that you speak of? A. Had no business with him before.

Q. You had no business with him before, and that was after this lease was signed and executed?

30 A. Yes.

Q. How long after the lease was signed was the Rathskeller subject gone into? A. Perhaps a month—well, it was always—we always had spoke about it.

Q. Can't you tell how long afterwards it was? Was it six months afterwards? A. Couldn't have been.

Q. Was it three months? A. Might have been.

40 Q. Was it in May? A. It was in and before May and after.

Martin Daab—Cross.

Q. Wasn't it during May? A. Yes, during May.

Q. Then you entered into an agreement whereby he was to pay half under your statement of making that rathskeller? A. Of excavating it and making it watertight.

Q. No; in making a rathskeller; that would include everything?

10

MR. FALLON: He didn't say that.

MR. EBERHARD: What did he say?

THE COURT: Making the rathskeller waterproof, he says.

Q. Then you were to pay half of making and Mr. Soulier was to pay half of making the rathskeller waterproof? A. Yes.

Q. And the rathskeller at the time the lease was made was not in existence? A. No, no.

20

Q. The only part of the premises that was in existence was the house and the basement, that is, your floor and the basement? A. Yes.

Q. And the basement? A. And under the walk.

Q. How far under the walk? A. Partly under the walk on Hudson place there.

Q. On Hudson Place side? A. Large vault.

Q. A small vault? A. Large vault.

30

Q. Your agreement between Soulier and yourself took in the whole side of the house. What is the depth of the house; do you know? What is the depth on Hudson street of that house? A. I don't know.

Q. What is it, about? Can't you tell? A. No; I never measured it.

Q. It is a long distance, isn't it? A. Yes; it is about fifty feet, I guess, or sixty-five feet somewhere.

40

Martin Daab—Cross.

Q. About sixty-five feet? A. Yes.

Q. That excavation extended from the foundation of the house to the curb, the part that you wanted made waterproof? A. No, sir.

Q. How far did it go? A. Waterproof question was there—

Q. No; but how far did you want it to go? A.
10 All the way around.

Q. How far did it go from the house out? A. To the curb, I suppose; the line of the curb.

Q. That is what I said. If you had said yes you would have saved all that trouble. Now the two thousand dollars which you paid, what did you pay it for? A. That is what I want to know. I am trying to find that out.

Q. You don't know? A. No, sir—Mr.—

20 Q. That is all; you don't know what you paid it for? You paid it to Mr. Egan? A. I paid it to Mr. Egan. He was Mr. Soulier's agent.

Q. You paid to Mr. Egan, didn't you direct? A. No, sir.

Q. You paid it to Mr. Soulier? A. I paid it to Mr. Soulier's man; he received it.

Q. You paid it to whom? A. Riggs.

Q. Who was the check payable to? Payable to
30 Mr. Egan.

Q. It was made payable to Egan? A. Yes.

Q. He gave it to Mr. Riggs? A. Mr. Riggs was acting for Mr. Soulier.

Q. To deliver it to Mr. Egan? A. Yes.

Q. Who got that check? A. Both of them, I guess.

(Mr. Fallon produces two checks).

40 A. There is two there.

Q. I show witness two checks, dated June 28,

Martin Daab—Cross.

1907, First National Bank pay to the order of John Egan, contractor, one thousand dollars; signed.

A. My signature.

Q. By Martin Dabb? A. Yes.

Q. And endorsed? A. By Egan.

Q. By John Egan? A. Yes.

Q. And another check dated September 20th?

A. Same amount. 10

Q. And payable to John Egan, contractor? A. Yes.

Q. So it was not made payable to anybody else?
A. No, sir.

(Two checks offered in evidence and marked exhibits P-2 and P-3).

Q. I show you a receipt dated September 20th?
A. Yes, sir. 20

Q. Did you get a receipt for your two thousand dollars? A. Yes.

Q. What is it for?

MR. FALLON: The paper speaks for itself; why not offer it.

Q. All right. "Received from Martin Daab, Jr., one thousand dollars on account of mason work at No. 44 Hudson Place, Hoboken. Signed, John Egan." First National Bank, January 28th, and so on. That was given to you by John Egan, wasn't it? A. No, sir. 30

Q. Who was it? A. By Mr. Riggs.

Q. That is Mr. John Egan's signature? A. Yes, sir, as far as I know.

Q. That was given to you by the same man that you gave the check to? A. Yes, sir.

(Offered in evidence and marked Exhibit D-5). 40

Martin Daab—Cross.

Q. "Received from Martin Daab, on account, one thousand dollars, for work done at 44 Hudson Street," signed John Egan. That was delivered to you? A. Yes.

MR. EBERHARD: Any objection to that?

MR. FALLON: No.

10 A. The writing was done by Mr. Egan and signed by Mr. Egan.

Q. Mr. Egan signed that, but he got the money?

A. Yes, sir.

(Paper marked Exhibit P-6).

Q. During the five years that you were in that place did you see Mr. Soulier? A. On and off, yes.

20 Q. Make a demand for any money from him? Do you ever present him a bill? A. Spoke to him about it.

Q. Did you ever present him with any demand for a certain amount? How much did you ask him for? A. I don't know as I asked him for anything, but he knew.

Q. You never asked him for anything during the five years? A. Yes, sir, I did ask him why he didn't pay half of what he promised.

30 Q. How much did you ask him for? A. He knew what the bills were amounting to—

Q. That is what I am asking you. How much did you ask him for? A. I did not get my bills all at once; I got bills from—

Q. How much did you ask him for? Did you ask him for anything? A. I did; and I have asked him for money for half payment of the bills I paid.

40 Q. Was there no amount stated for what you asked him for? A. Well, he knew the amount.

Martin Daab—Cross.

MR. FALLON: No. Answer my question.

Q. Answer my question. I talk plain to you.

A. I cannot give the full amount of what he asked me for.

Q. What you asked him for? What you asked him for? A. For instance, half payment for Egan's bill, part payment of—

MR. FALLON: No. He is asking you if you mentioned to Soulier the amount which you required him to pay you. 10

A. The full amount?

Q. Yes. A. No, sir.

THE COURT: Any sum in dollars and cents?

A. I did ask him for some, for the stairway and the floor and part of the front, and the amounts were about—why, I can't possibly give the figure. 20

Q. Did you ever tell him what he owed you; how much he was in your debt? A. Yes.

Q. Well, what was it? A. About eighteen hundred dollars.

Q. Did you ask him for eighteen hundred dollars? A. I certainly did.

Q. Did you make a demand for eighteen hundred dollars? A. No; not just to go and ask him for the money, no, but I told him that he owed me the money and why he didn't pay it. 30

Q. Did not Soulier call at your place frequently? A. Yes.

Q. Did you ever say to him "You owe me eighteen hundred dollars and I want it?" A. I did not, no.

Q. Did you ask him for eighteen hundred? A. 40
I asked him for money at different times, half

Martin Daab—Cross.

of the—what is this—the payment for one hundred and thirty dollars.

Q. I ask the witness to answer. The answer is yes or no. I asked him if he ever made a specific demand.

10 THE COURT: I think he was going to answer your question. He said no, but about the particular things he was going on to say what he asked for and you interrupted him.

MR. EBERHARD: I did not understand that.

Q. You said you presented him with particular items? A. I did not present him with bills. no. I asked him for one hundred and thirty—half of one hundred and thirty for the floor; half of the
20 painting, Drescher. I had my book there entered down the same way. If I started on the things I can tell.

Q. I will start you off in a minute. You had a large business, hadn't you, Mr. Daab? A. Yes, sir.

Q. Quite a business man in Hoboken? A. Yes.

Q. A big business man? A. Yes.

30 Q. You have a bookkeeper, don't you? A. No.

Q. Don't you have any bookkeeper? A. No.

Q. Nobody to keep accounts? A. I take care of them.

Q. Take care of all your accounts? A. Almost all of them, yes.

Q. All your accounts? A. Yes.

Q. Have you got the accounts anywheres? A.
40 I have, and I am sorry I forgot them—what I paid out, yes.

Martin Daab—Cross.

Q. Have you got them anywheres? A. Yes.

Q. Where are they? A. They are down in my office, rent and everything.

Q. You have not them here? A. No.

Q. Now you generally asked him for money, I understand, and you thought it was about eighteen hundred he owed you. When were those demands made for that money? A. Oh, on and off during the year—between the years of 1907 on, right on. 10

Q. Whereabouts was it done? A. Right down around the place.

Q. Right down around the place? A. Yes; I have been away for two years, you know.

Q. Right down around my place? A. Around his place, around in there. The only time you could see possibly the landlord was the time when the rent was due, and the rent was different. 20

Q. Did you pay your rent to Mr. Soulier? A. Every time.

Q. To Soulier? A. To Riggs, his man.

Q. Then you did not see him when his rent was due? A. I heard of him in a barber shop. Never came to see me though.

Q. You saw Mr. Riggs? A. I saw him off and on. 30

Q. You did not see him when your rent was due? A. To talk to?

Q. No; when your rent was due did you not see Mr. Soulier? A. Not to me. I seen him outside though. Saw him around the streets.

Q. Now have you ever said to anybody that those fixtures were not yours?

MR. FALLON: What's that?

Q. That these fixtures—those fixtures are the same fixtures that were in there in 1907; they 40

Martin Daab—Cross.

stayed there in 1910, and they were moved out in 1912 by you or by your orders, weren't they? He is nodding his head. Say yes or no. Was it so? A. Did I ever do what?

Q. I asked you if those fixtures—

(Question repeated).

10 A. Certainly.

Q. That they were the same fixtures? A. Same fixtures.

Q. Same fixtures in there from the beginning? A. Sure.

Q. Now the first question that I asked you, if you made statements that those fixtures spoken of here now, were not your property? A. I certainly did not.

20 Q. To nobody? A. To nobody, no, sir.

Q. Do you know that gentleman, Mr. Schumann? A. I do, yes.

Q. That is all.

THE COURT: If you propose to contradict that statement you have to call his attention to the particular matter and the time, otherwise you cannot contradict him.

30 MR. EBERHARD: If the Court rules that way I want to tie him to the fact.

Q. Do you remember Mr. Shuman? A. Yes.

Q. What is his business, do you know? A. Insurance business.

Q. What did he call on you for?

MR. FALLON: When.

A. When was this?

40 Q. When did he call on you? A. When?

Martin Daab—Cross.

Q. Any time during the— A. To get the insurance on the store?

Q. On these particular fixtures? A. On everything?

Q. On these particular fixtures I am speaking of now? A. I didn't have anything else but those in there.

Q. On these fixtures? A. Yes, on everything; 10 chairs and everything in there.

Q. He called on you to insure these fixtures, did he? A. Yes.

Q. When did he last call? A. Well, I suppose the last time had expired and I didn't have no insurance the last time. I took no insurance.

Q. When was that? A. Oh, when the last one ran out; I can't remember; maybe three years ago—up to three years ago. I thought I would save that expense. Paid enough as it was. 20

Q. Then this man called on you three years ago? A. Oh, well, yes. I can't—he took my insurance from the start.

RE-DIRECT EXAMINATION BY MR. FALLON:

Q. Mr. Dabb, there has been a ladies' toilet spoken of here as having been removed from part of the leased premises. Tell us when that was removed? A. Oh, I don't know; that was removed a long while before. 30

Q. Just about? A. Three or four months before. I couldn't do no business down in the basement. Well, say—

Q. Your best recollection as to when it was removed? A. Six months before or so.

Q. Before what? A. Before my lease—before I gave up the business. I couldn't use the basement. 40

John Egan—Direct.

BY MR. EBERHARD:

Q. You don't know, do you, when it was removed? A. Oh, my plumber may know.

Q. I mean you do not know? A. No.

BY MR. FALLON:

Q. Who removed the toilet? A. Mr. Reed.

10

JOHN EGAN, a witness called on behalf of the defendant, being sworn, testified as follows:

DIRECT EXAMINATION BY MR. FALLON:

Q. What is your business, Mr. Egan? A. Mason and plasterer.

Q. You live in Jersey City? A. Yes.

20 Q. Do you recall having done some work on the premises that have been testified about, corner of Hudson place and Hudson street, Hoboken? A. Yes.

Q. Remember receiving two thousand dollars from Mr. Dabb? A. Yes; I remember receiving it. I don't know if I received the last one thousand dollars from Mr. Dabb, but I received the first one personally from himself. The next one I couldn't recall whether he handed it to me or
30 who gave it to me; I couldn't recall that.

Q. What work did you do that which two thousand dollars represented? A. Well, the first part of the work. When I started in I started to dig about the walls.

Q. No; for this two thousand dollars, that is all I am concerned about. A. Well, all right.

Q. What did you do for that? A. I excavated the sidewalk from the building to the curb.

40 Q. Yes. A. All the way from the toilet rooms around, and up to the theater wall.

John Egan—Direct.

Q. Yes. A. Both on Hudson Street and Hudson Place,—excavated that. I built the 2-foot wall all the way around to enable me to damp-proof the wall on the outside, and I put in a concrete floor, that is underneath the sidewalk again—I put in a concrete floor there.

Q. Is that what the two thousand dollars was paid for? A. No; I got quite a little more.

10

Q. Tell us all you did? A. I placed the ceilings underneath; I cement-plastered the ceilings underneath, and I plastered the walls all around with Keen cement and put it in imitation tiling all the way underneath. Then I was told to repair the ceiling.

Q. By whom were you told? A. Mr. Daab; to repair the ceiling in the old building, in the cellar ceiling of the old building. I had that repaired, and after I had that repaired they came to the conclusion to make it a part of a rathskeller.

20

Q. You say they come to—who did? A. That is the way I got it.

Q. Who did you get it from? A. From Mr. Brown. Brown says, "This is going to be part of the—"

Q. Who? A. The electrician. "This is going to be a part of the rathskeller." After I got through with the ceiling Brown came in and started to run his wires all the way through, so they made me put a new ceiling altogether in there, after I had it fixed up in there before that.

30

Q. Is this all included in the two thousand? A. I cemented the whole cellar of the old building.

Q. Is that all included within the two thousand? A. And I plastered the walls of the old cellar.

40

John Egan—Cross.

Q. Is that what we are now speaking of, all included within the expenditure of two thousand dollars? A. Yes, sir.

Q. The two thousand covered all that? A. Yes.

MR. EBERHARD: The witness does not understand. It does not cover it.

10 Q. Mr. Eberhard says you do not understand my question. A. Well, I spoke about the excavation before that.

Q. For all of the work you have detailed was the sum of two thousand dollars paid to you by Mr. Daab? A. Two thousand dollars I received from Mr. Daab.

Q. That was reasonable pay for the work? A. That would not pay for the work. I am not paid
20 for the work yet, either.

Q. You are paid for the work you did for Daab? A. I am paid for the work that was done there. That first part Daab paid.

Q. Is there an agreement between you and Mr. Daab that that is the work you were to do for two thousand dollars? A. No agreement between Mr. Daab and I.

Q. Did you send a bill to Mr. Daab for some
30 of the other work? A. No, sir, I did not.

Q. Was the two thousand dollars that you received reasonable compensation for the work that you did, that you have detailed? A. That part that went through did, but the extra work would not count for it at all.

CROSS EXAMINATION BY MR. EBERHARD:

Q. Now, Mr. Egan, Mr. Daab paid you two
40 thousand dollars, but you had excavation there. How much did that amount to? A. Well, I forget what the excavation was at present.

John Egan—Cross.

Q. You excavated that, didn't you? A. Yes.

Q. Can you tell the amount of that? A. I guess it was six hundred, anyway, or over six hundred.

Q. Now you had the arches to make, didn't you?
A. Yes.

MR. FALLON: Is this all included in
the two thousand? 10

MR. EBERHARD: I want to show that it is not. If the court please, I want to show that this man more than made his two thousand. I want to get the detail of it. The witness has not understood Mr. Fallon properly, and I have a right to cross examine so as to bring it out straight.

THE COURT: No; but it appears that he received two thousand dollars. 20

MR. EBERHARD: That did not cover one half of this work, and I want to know what was done there.

MR. FALLON: I submit that he has a right to show that as his own witness.

MR. EBERHARD: I am willing to do that. My own witness. I will accept him as my own witness now.

THE COURT: Then you propose to show, Mr. Eberhard, that he did more work, and that if he was paid by the owner it goes to pay the owner's one half, assuming they had such a contract? 30

MR. EBERHARD: Yes sir.

BY MR. EBERHARD:

Q. There was excavation, and it amounted to how much? Over six hundred—I know it was over that, but I cannot place it now, the cost figure of it. 40

John Egan—Cross.

Q. There is lumber from arching walls, wasn't there? There had to be lumber arches? A. Yes; I put up arches, supported from underneath.

Q. How much? A. Of course I am not a carpenter, and I could not place them.

Q. You can tell how much lumber there was there?

10

MR. FALLON: I object. I understood the court's question to Mr. Eberhard and Mr. Eberhard's reply to the effect that he undertook now to show items which would offset the amount that Mr. Daab would claim in his counter claim. I submit as to that that is not admissible under these pleadings, that Mr. Eberhard's client here has denied any indebtedness under this counter claim, and he has not set up any such offset as he is now endeavoring to prove.

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MR. EBERHARD: It would be an improper way to prove the thing before the court and jury if this man was allowed to testify that he received the two thousand dollars for the building, in the construction of that whole place, and allow that, it would not be justice to the plaintiff, and I submit that a cross examination as to where that thousand dollars went is proper.

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THE COURT: The defendant sets up that he had an agreement with the plaintiff in which certain work was to be done and paid for by him, and one-half was to be paid back to him by the plaintiff. He has sworn to such an agreement, or series of agreements, and he said that he paid certain sums of money, amounting, as far as I have the figures, to about twenty-

40

John Egan—Cross.

eight hundred dollars, and that the plaintiff agreed to reimburse him for the one half of that. Now, if the plaintiff saw fit to do other work there he could not charge that against the defendant, could he, in payment of this half of the claim?

MR. EBERHARD: The defendant says here that he agreed to pay for half of the work— 10

MR. FALLON: The work which was mentioned.

THE COURT: He says the work that he paid for, and he says this is what he paid for, and he says he paid four different items, amounting to twenty-eight hundred dollars, and he says that these specific things he did by an agreement with the plaintiff that he should do that and the plaintiff would reimburse him for half of the cost. Suppose the plaintiff himself had told this witness or any of the other contractors, to go on and do the other work outside of the alleged agreement which the defendant said he had with him; he could not charge that against the defendant, the tenant, in order to get rid of paying half of it. 20

MR. EBERHARD: We do not make any charges against him at all, but we do say this two thousand dollars which he speaks of and which he testifies to is to pay half, is already settled. I want to prove by this witness that that is so. 30

THE COURT: How are you going to prove by this witness that the plaintiff reimbursed the defendant for half of the cost? The mere fact the plaintiff owed 40

John Egan—Cross.

this money for some other work would not do it.

MR. EBERHARD: This is part of the same job.

MR. FALLON: You did not set it up in the pleadings.

10

MR. EBERHARD: Even allowing that, we can go in and show what the two thousand dollars is for.

20

THE COURT: By your own proof you put in those two checks of the defendant, which the defendant said he gave to this witness, for work which was then under contract to the plaintiff, and he says the plaintiff agreed to reimburse him to the extent of one half. I do not see how you are going to get around that.

MR. EBERHARD: Does the court say I cannot show the entire cost of that excavation and what this man did for the two thousand dollars?

THE COURT: I do say that you cannot show that this plaintiff authorized this witness to do any other work and charge it against the defendant in this case.

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MR. EBERHARD: No; I am questioning him now as to the two thousand dollars, how much he did for it.

THE COURT: Do you propose to show that these two checks were a gift to this witness by the defendant?

40

MR. EBERHARD: No; I propose to show that those checks for the two thousand dollars were part of this very constructive work and that it did not go all the way along.

MR. FALLON: What constructive work.

John Egan—Cross.

MR. EBERHARD: The rathskeller.

THE COURT: And do you propose to show the plaintiff himself paid some part of the work?

MR. EBERHARD: That is for the jury to determine.

THE COURT: Some part of this work which was to be done under the agree- 10
ment?

MR. FALLON: They are met by these pleadings because I set up this in the pleadings, and they deny the agreement.

THE COURT: I have allowed both sides to amend the pleadings, and I will allow them again to amend and set this up, if they desire to. You can consider that matter between now and to-morrow morning, and if you want to do it you may do it. 20

MR. FALLON: I thought we might finish it to-night.

THE COURT: You cannot sum it up to-night. Have you any other witnesses to put on?

MR. FALLON: I have no other witness.

MR. EBERHARD: I want to rebut, that is all. But I will go on with this witness though. We have a defense on the counter- 30
claim here.

THE COURT: You may go on with this witness, and I will allow you to put in an amendment to cover the testimony.

MR. FALLON: Will the court require counsel to submit to me a statement of that amendment, so I will know just what it is.

THE COURT: Yes. They will submit it 40

John Egan—Cross.

to you to-night or otherwise I will strike out the testimony to-morrow morning.

Proceed.

BY MR. EBERHARD:

Q. Mr. Egan, what was the work done there at this rathskeller for the defendant?

10 MR. FALLON: I object on the ground that it is not proper cross examination.

THE COURT: It is not proper cross examination. He is making him his witness, he said.

MR. FALLON: I will withdraw the objection.

Q. What was the work done there? A. The work was done there after the wall was built.

20 Q. What work was done there at the rathskeller? A. All mason work and iron work.

Q. Yes. A. You want to know what work was done there. It was mason work was done there and plastering iron work and concrete work.

Q. Walls? A. Yes; mason work, we call it.

Q. Walls? A. Yes.

Q. What were the walls made of? A. Brick—two foot brick wall all the ways there.

30 Q. At the time you undertook this work—you were the one that undertook this work? Did you dig out the cellar? A. Yes.

Q. The whole place? A. The whole place.

Q. What distance was it you dug out? A. Well, as I explained before, I dug all the way, from the toilet entrance down to the cellar—all the way, over and adjoining theater wall.

40 Q. Where was that digging done? A. On Hudson Place and Hudson Street—both on Hudson Street and Hudson Place.

John Egan—Cross.

Q. From the foundation of the house? A. From the foundation of the house out to the curb. Built two foot wall all the way around there and waterproofed the wall.

Q. Waterproofed the top? A. Not the top, but the wall all the way through. Built it so it could be waterproofed. Then after we had the wall built up we laid the steel beams in there and then we put in wooden arches and turned brick arches on top and put a cement walk on top with patent lights at intervals to show light to the rathskeller. 10

Q. Before the top was turned up for this basement, what kind of sidewalk was there? A. There was a new sidewalk there I put in, I guess, a year or so—about two years before—maybe not two years.

Q. What was the width of the rathskeller, from where to where? A. Well, the latter part of it is I think over thirteen, and the other would be sixteen. 20

Q. Where did it begin from? A. From the entrance to the toilet on Hudson Place side.

Q. Where did it begin, from the side of the house? A. Yes, out to the curb.

Q. Out to the curb? A. Yes.

Q. All the way around? A. Yes; I took the curb away and put a cement curb there. 30

Q. You said you built a waterproof sidewalk there? A. Waterproof wall, I said.

Q. Where was that waterproof wall? A. On the outside.

Q. On the outside? A. Yes; that is the reason we had to build a two foot wall there, to keep away, so the tracks of the trolley company would not get in on it. A lighter wall would not be any use there. 40

John Egan—Re-Direct.

Q. How did you know it was waterproof? A. How did I know?

Q. Yes. A. Because I built it so it would be water proof. I built it up from the foundation and done the waterproofing. I came up six courses and I laid back four inches—laid back sixteen inches before I came up six courses more; 10 laid back twelve inches, came up six courses more; laid back eight and came up four inches on top, and then we put a wall, building all around, and waterproofed the whole thing around.

Q. You laid a sidewalk? A. Yes sir; on top.

Q. Was that to be waterproofed. A. No question about waterproofing on the sidewalk at all.

Q. No question about that? A. Not on the sidewalk, but the wall was.

20 Q. Did Mr. Daab ever charge you with not making that waterproof? A. I had nothing at all to do with Mr. Daab. I had no dealings at all with Mr. Daab. I never told Mr. Daab I would make a waterproof sidewalk, and I told Mr. Soulier would make a waterproof wall, which I did.

Q. That is what you agreed to do? A. That is what I agreed to do with a wall.

30 RE-DIRECT EXAMINATION BY MR. FALLON:

Q. All you had to do with Daab was to get the money from him, but Mr. Soulier gave you the order for the work? A. Whatever arrangement they made, I don't know, Mr. Fallon.

Q. That is all.

MR. EBERHARD: He has not answered it.

Q. You had no dealings with Mr. Daab? A. 40 No, no dealings.

John Egan—Re-Cross.

Q. You did receive the money from Mr. Daab?
 A. Yes, I received that one thousand check from him, but I wouldn't say for sure whether I received the second one thousand from him or the other party.

Q. You recognize your signature on the back of the checks? A. Yes. I know I received that two thousand.

10

Q. Exhibits P-2 and P-3? A. Yes.

Q. And these two receipts, marked Exhibits P-4 and 5? A. Yes sir.

Q. They are your receipts? A. Yes.

Q. Now the orders for the work for the waterproofing and the excavating that you were paid for by Mr. Daab, you say you received from Mr. Soulier ?

MR. EBERHARD: I object. He didn't say 20
 anything of the kind.

Q. Didn't you say it? Isn't it a fact that you received the orders for the waterproofing and the excavating for which Daab paid you from Soulier?

A. Yes Sir. Well, I was telling you—

Q. Yes or no. A. Which one?

Q. Did you receive the orders from Mr. Soulier?
 A. From Mr. Soulier I received orders.

Q. You received no orders from Daab? A. 30
 No, I did not. While I was digging the other part—

Q. That answers the question.

RE-CROSS EXAMINATION BY MR. EBERHARD:

Q. Did Daab pay you for the excavating, taking out the earth?

MR. FALLON: I object. The witness has 40
 already said he did.

John Egan—Re-Direct.

A. Did he pay me for the excavating?

Q. Yes. A. I received two thousand dollars from Daab.

Q. Did that pay for the excavating? A. Oh, that would pay more than the excavating.

MR. FALLON: The witness started off by saying it was excavating.

10

Q. But was that for the payment of the excavation? A. I don't know what payment it was for. I had a big lot of work done.

Q. You got a lot of money from Mr. Soulier for the same thing? A. Yes. I got money from Mr. Soulier.

Q. Do you know how much it was?

MR. FALLON: I object.

20

THE COURT: Under the amendment I will allow them to ask it.

Q. Do you know how much it was? A. One thousand.

Q. How much did you receive from him? A. One thousand, and I received two hundred and fifty from him for the first part entering down in the cellar, for the house, and for the toilet room.

Q. That did not include the iron or steel? A. No, that did not include the iron—only in part the lumber—only in part the shoring up.

30

Q. You received a thousand? A. Only in part of the shoring up, that don't include.

Q. You received a thousand? A. Yes sir.

RE-DIRECT EXAMINATION BY MR. FALLON:

Q. In March 1907 you made an arrangement or agreement with Mr. Soulier for five hundred and
40 fifty dollars, didn't you, to knock out a wall and

John Egan—Re-Direct.

do a lot of work? A. Yes, that was the first part of the work?

Q. You afterwards made an arrangement with him to do some other work? A. Yes.

Q. For which you were to receive about five hundred dollars? A. No; two hundred and fifty I received from the next one.

Q. How much does that make in all? A. The 10 first part had nothing to do at all with the outside. That was digging out the wall of the front building. That was preparing it for the iron work.

Q. Do you remember you made an agreement first for five hundred and fifty dollars? A. That was the first contract.

Q. In the early part of March, 1907? A. Yes sir.

20

Q. That was work Hughes, the house-mover, did? A. Yes; that was the time.

Q. Then afterwards you did some other work which you were directed to do for which you received one hundred and forty dollars from Mr. Soulier? A. One hundred and forty, correct.

Q. Well, the thousand dollars you say you got from Mr. Soulier was other than that work that you did for the Daab payment? A. That is all 30 on the outside, what I received from Mr. Soulier.

MR. EBERHARD: Will the court allow me to call one witness in rebuttal? It will only take a second.

THE COURT: If you will only take two or three seconds you may put him on.

40

Herman Shuman—Direct.

PLAINTIFF'S REBUTTAL.

HERMAN SHUMAN, called and sworn on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION BY MR. EBERHARD:

10 Q. Mr. Shuman, what is your business? A. Insurance business.

Q. Do you know Mr. Daab? A. Yes, I do.

Q. Do you know this place, corner of Hudson—
A. Yes, I do.

Q. —Hudson Place and River Street? A. Yes.

Q. Did you inquire of Mr. Daab about the fixtures to have them insured?

20 MR. FALLON: I object to this line of testimony on the ground that it is immaterial, irrelevant and not the proper subject of impeachment.

THE COURT: If you want to contradict Mr. Daab on that you have to lay a foundation for it. You merely asked him if he knew this witness, and he said he did.

Q. Did you have a conversation about the fixtures in the —

30 THE COURT: If you want to contradict him you ought to have asked him whether or not he did not say certain things or make certain statements to this witness. You did not ask him that question. He might have admitted it. If he denied it then you have laid the foundation for contradiction. If you want to do that you have got to recall Mr. Daab and ask him the question whether he did not make that statement to this witness, and then you can call this witness to contradict.

40

MR. EBERHARD: I will recall Mr. Daab.

Martin Daab—Direct.
Herman Shuman—Direct.

MARTIN DAAB, recalled.

FURTHER CROSS EXAMINATION BY MR. EBERHARD:

Q. Did you make a statement to this witness, Mr. Shuman, that you did not know whether you owned that property or not, the fixtures in this place, while they were in that place? A. No. 10

HERMAN SHUMAN, recalled.

FURTHER DIRECT EXAMINATION BY MR. EBERHARD:

Q. You are in the insurance business? A. Yes.

Q. Do you know Mr. Daab? A. Yes sir.

Q. You have done insurance for him? A. Yes.

Q. Know these fixtures in this particular place? 20
 At what time were you there? A. What do you mean, the time I called on Mr. Daab?

Q. Yes. A. Well, if you will allow me to refresh my memory from this memorandum, I will explain it.

BY THE COURT:

Q. When did you make the memorandum? A. I have a memorandum right here.

Q. When did you make it? A. I did not make 30
 any memorandum at the time.

THE COURT: Then you cannot use that paper.

BY MR. EBERHARD:

Q. About what time was it?

MR. FALLON: Do not look at that paper.

Q. What year? A. 1911, I think it was. 40

Q. Yes. Then you called on Mr. Daab to insure him, and what did he say to you? A. I called on Mr. Daab and I asked him whether he wanted that insurance on those fixtures, and Mr.

Herman Shuman—Direct.

Daab said that no, he didn't think he would want the policy; he wanted it returned.

MR. FALLON: I object to the conversation with Mr. Daab.

Q. What did he say in relation to these fixtures?

10 MR. FALLONS I object to the form of the question.

THE COURT: You have to call his attention to the particular things that you asked Mr. Daab about in order to contradict Mr. Daab, that is all.

Q. Did Mr. Daab make a statement to you about this property?

20 MR. FALLON: I object to it as being immaterial and irrelevant.

THE COURT: That is not the proper form for the question.

Q. What did Mr. Daab say about this property to you?

MR. FALLON: I object to it as being immaterial and irrelevant.

30 THE COURT: Overruled. You have asked Mr. Daab a certain question, and you have to ask the witness whether he used those particular words. That is the regular form. There is no question about it.

Q. Did Mr. Daab say that he was doubtful if he owned these fixtures?

MR. FALLON: I object, as no such question has been put to Mr. Daab.

40 THE COURT: (To stenographer.) Read the question that was asked Mr. Daab. (Stenographer repeats question.)

Q. Did Mr. Daab say to you that he did not

Herman Shuman—Cross.

know whether he owned these fixtures or not? A. He said he believed they did not belong to him.

MR. FALLON: I object. Just say yes or no, whether he said that.

THE COURT: I will allow the answer.

Q. Go on. A. He said that he did not believe the fixtures belonged to him according to the conditions of the lease. 10

CROSS EXAMINATION BY MR. FALLON:

Q. You had them insured for three years before? A. Yes sir.

Q. In 1911 he did not insure them. The insurance ran out and he did not re-insure them with you? A. He told me he did not want the insurance.

Q. I am not talking that. I said you had them insured prior to 1911? A. Yes. 20

Q. And he insured it through you? A. Yes.

Q. And in 1911 he wanted to have it renewed and he did not renew it? A. I renewed the policy without his asking.

Q. You asked him if he wanted to renew this insurance and you brought him a policy of insurance? A. Yes.

Q. And you wanted him to give you the money for the renewal, and he told you he did not want it? A. I did not ask for the money. I called there and wondered why I did not get a check or a premium, because it had been about due, and Mr. Daab handed me the policy and said he did not want it. 30

BY THE COURT:

Q. Before that time they had been insured in his name personally? A. Yes sir. 40

Colloquy.

SECOND DAY, MARCH 5, 1913.

10 MR. SHERIDAN: Yesterday the court grantel leave to the plaintiff to submit an amendment, provided we submitted it Mr. Mr. Fallon last night. I have prepared a rather lengthy amendment, which I have submitted to Mr. Fallon, and I have a copy of it here, if the court wishes to read it. I do not know what objection Mr. Fallon has to it.

20 MR. FALLON: I stated to Mr. Sheridan there was some matter contained in it that has no relation whatever to this controversy. It relates to the private hallway leading to the upstairs, and also to the stairway leading upstairs. It has no relation whatever to this case, and he has items charged in there in relation to that. Otherwise I have no objection to it at all.

 MR. SHERIDAN: The only reason I included that was my recollection of the testimony yesterday was that Mr. Daab stated that Mr. Soulier forced him to rent this building upstairs.

30 MR. FALLON: He might have made such a remark, but if he did I do not recall it.

 MR. SHERIDAN: I won't insist on it.

 THE COURT: He did make that remark, but still it is not in evidence and it has no bearing on the case whatever.

 MR. SHERIDAN: I will strike it out, the paragraph.

40 MR. FALLON: That relates to the upstairs part of it and the work done in the hallway, and the work done in the stairway leading to the upstairs apartments.

Henry P. Soulier—Direct.

HENRY T. SOULIER, recalled.

DIRECT EXAMINATION BY MR. EBERHARD:

Q. Mr. Soulier, you heard the statement made by Mr. Daab yesterday— A. Yes sir.

Q. In which he stated that you were to pay half? A. Yes.

Q. —of the cost of making the rathskeller? A. ¹⁰
Yes.

Q. And the ceiling in the saloon proper? Is that so?

MR. FALLON: I object. That is not strictly so, because we do not claim he was to pay one-half of the ceiling in the saloon. It is only the painting, if they will go over these items, item by item—

THE COURT: All the items I have, are ²⁰
the floor, \$330, the front \$455, the stairs \$130, and the cellar, \$2,000.

MR. FALLON: Yes, there was iron work mentioned, but the figures were not given.

THE COURT: No; so that is out. It is only those four items you claim that the defendant paid for.

MR. FALLON: And also, I don't know ³⁰
whether you had the installation of the steam heating plant, but the other side admit we paid one-half of that.

THE COURT: Yes. So that is the condition of this case. You only claim one-half of those four items, \$2,000, for the cellar stairs \$130, front \$455, and the floors, \$330?

MR. EBERHARD: Yes; that is the statement he makes.

THE COURT: Yes, that is what he claims. ⁴⁰

Henry P. Soulier—Direct.

MR. EBERHARD: Generally he says he was paid for half of the whole.

THE COURT: Yes. He did not testify to anything else, so they are restricted to those four items. The claim is they are entitled to one-half of the four items.

MR. FALLON: Yes.

10 THE COURT: So that is all you have to direct your attention to. That is \$2,915.

BY MR. EBERHARD:

Q. Did you agree to pay one-half of the bills that Mr. Daab paid for the excavation of the basement? A. No sir.

20 Q. Did you agree to pay for one-half of the excavation of the basement? A. No sir—what do you mean? Excuse me, what do you mean by excavation? You mean digging the dirt out?

Q. Yes. A. Well, I paid for all that.

Q. What's that? A. I paid for all that.

Q. And all necessary cement work? A. And I paid for all the digging out, that is the excavating, taking away, and I paid for all the lumber for making the arches between the iron girders—

30 MR. FALLON: I object. That is not my claim. Our claim is that the part we paid for was the excavating of the rathskeller which has been spoken of, and for the waterproofing. They are talking about matters that are not claimed.

MR. EBERHARD: I am asking questions—and he has denied it—as far as he agreed to pay one-half or what he paid.

40 THE COURT: Yes, but what they claim they paid the two thousand dollars for was for these matters which Mr. Fallon has

Henry P. Soulier—Direct.

spoken of, not the matters which this witness is now speaking of. Do not confuse it.

MR. EBERHARD: And he denies agreeing to pay for them. That is proper.

THE COURT: Yes.

Q. Did you agree to pay for the one-half of the installation put in of the heating plant, steam heating plant? A. Yes; I paid one-half. 10

THE COURT: One moment. That is not in. That is not part of their claim.

MR. FALLON: That was admitted.

THE COURT: That is out.

Q. Did you agree to pay for the one-half of repainting—is it?—or painting the ceiling?

MR. FALLON: Painting the ceiling.

Q. —painting the ceiling of the bar and sitting room and gilding same with gold leaf and gilding pipes and painting radiators and pipes? A. No, sir. 20

Q. Did you agree to pay for one half of the laying the terrazzo floor in the saloon? A. No sir.

Q. Did you agree to pay for the one-half of the extension of the store front or hall on the Hudson Street side, new doors, extending metallic glass dome—that is a continuation of the front. A. No, sir, I did not, but I had the front in around there. 30

Q. That is all; you say no. A. Do you want me to explain it?

Q. That is enough. Painting the marble platforms and risers?

Q. The marble what? A. Painting the marble platform and risers; embossed cut glass and four bronze gate plates for doors? A. No, sir.

Q. What agreement did you have in relation to the rathskeller? 40

Henry P. Soulier—Direct.

MR. FALLON: I object.

THE COURT: You went all over it.

MR. EBERHARD: I did go over it.

THE COURT: Do not go over it again. This must be only in rebuttal of the new matter.

10 MR. EBERHARD: I understand it was for the purpose of introducing the amount of bills he paid.

MR. FALLON: I object.

MR. EBERHARD: He says we were to pay one-half.

THE COURT: No; he says you were to pay only one-half of the items he has testified to, not of the other items.

MR. EBERHARD: Yes.

20 Q. Did you pay for the excavation of the rathskeller? A. Yes.

MR. FALLON: I object.

THE COURT: That is part of the claim?

MR. EBERHARD: That is part of your claim and we paid for it, so my client says.

Q. How much did you pay, Mr. Soulier? A. I think it was seven hundred dollars—something
30 around seven or eight hundred.

MR. FALLON: I object to his expressing thoughts. If he knows, he can testify to facts.

Q. Who was it you employed to take that out?
A. Mr. Egan.

Q. Did you have a bill from Mr. Egan? A. No; I made a contract with him for so much for taking
40 it out.

Q. Are these receipts he gave you.

John Egan—Direct.

MR. FALLON: I object. If there is a contract.

A. No; it was a verbal contract between Mr. Egan and myself.

MR. EBERHARD: I just want to show the payment, that is all. We have nothing else from Mr. Egan but receipts.

MR. FALLON: What is this receipt for? 10

MR. EBERHARD: I am going to ask him.

THE COURT: Show it to Mr. Fallon.

MR. EBERHARD: I did show it to him and he did not want to see it.

A. On account of some of the work he done there.

THE COURT: No; you must not read it unless it is offered. 20

Q. What did you pay?

MR. FALLON: I object on the ground that it is immaterial and irrelevant to this issue.

MR. EBERHARD: I will withdraw Mr. Soulier and will put Mr. Egan on the stand.

JOHN EGAN, recalled.

30

DIRECT EXAMINATION BY MR. EBERHARD:

Q. Mr. Egan, what excavating did you do at this corner for the rathskeller? A. I explained yesterday that I excavated from the wall adjoining the toilets, around to the corner of Hudson Place, from Hudson Place corner to the adjoining wall of the theater; from the building line to the curb. Before that I had a contract from Soulier to excavate for the—that was before that—excavate for the toilet and for a hoist. 40

John Egan—Direct.

MR. FALLON: I object to it as irrelevant.

A. Yes.

MR. EBERHARD: That has nothing to do with this. That is what I maintain.

10 THE COURT: I understand your claim is that this seven hundred or whatever it was that the plaintiff paid was for part of this excavation that the witness is now testifying about.

MR. EBERHARD: No; it was for the entire, not part. There is no division.

MR. FALLON: The entire excavation?

A. No.

20 Q. Now what other work did you do there to make this place water tight?

MR. FALLON: I object to his going over that.

BY THE COURT:

Q. These two checks, for a thousand dollars each, you received from Mr. Daab. What did they pay for? A. That did not have anything at all to do, your Honor, with the first part of the toilets.

30 Q. What did it pay for. What work did you do for this two thousand dollars? A. For the order I got I excavated all that I specified. I excavated all that and then I built a wall, and I water-proofed it.

40 Q. That was all for the rathskeller? A. Then I put in the iron beams; we put wooden arches in first and then brick arches, and then cemented the top and then I cemented the floor to the rathskeller, the floor on the old cellar inside all together; plastered the ceiling of the rathskeller, and then had the ceiling of the old build-

John Egan—Direct.

ing plastered when they made a change in putting in the electric light, as I said yesterday, and after that the ceiling was all destroyed, so I had to re-plaster that over again.

Q. That is what you were paid two thousand dollars for? A. That is what I got the two thousand for.

BY MR. EBERHARD:

10

Q. Did you do all that work for two thousand dollars? A. How could I do all that work for two thousand?

Q. How much did it cost, all the work?

MR. FALLON: I object.

A. That would not pay for all that work.

BY THE COURT:

Q. That is all you got from the defendant? A. That is all I got from him.

20

BY MR. EBERHARD:

Q. What did you get from the plaintiff then?

MR. FALLON: I object.

THE COURT: The question is whether under the contract which the defendant has testified to, on which he said he paid two thousand dollars,—whether that paid for all of that work or whether some of it was paid for by the plaintiff. If so, he is entitled to credit to the amount of the payment. The first thing you want to determine is whether the work which the defendant testified to was paid for entirely by him or whether something was assumed by the plaintiff.

30

BY MR. EBERHARD:

Q. Did the two thousand dollars pay for the amount of work that you recited? A. Not at all.

40

John Egan—Cross.

Q. Who paid you the difference on that work?
A. Mr. Soulier.

Q. What did he pay it for? What did Mr. Soulier pay you for? A. Just a part of that. It is some—

10 MR. FALLON: I object. We are only interested in this one thing that he testified to.

BY THE COURT:

Q. How much did he pay you? A. A thousand dollars, your Honor.

BY MR. EBERHARD:

Q. One thousand dollars? A. Yes, one thousand dollars.

20 BY THE COURT:

Q. In addition to these two checks of Mr. Daab's? A. Yes.

BY MR. EBERHARD:

Q. Did you pay for the iron work?

MR. FALLON: I object to all this.

A. No.

30 THE COURT: Why do you object?

MR. FALLON: Well, he said no.

MR. EBERHARD: The iron work is part of the whole job, the iron ceiling; it was in his contract, and I thought probably he paid for it, that is all. He denies paying for it.

CROSS EXAMINATION BY MR. FALLON:

40 Q. Now, Mr. Egan, how did you know what amount of money you were to receive from Mr. Daab? A. Well, I was working on the first part,

John Egan—Cross.

that is, the excavation for the toilet and the hoist—

Q. You were working under instructions from Mr. Soulier? A. That is the first part. While we were working there Mr. Soulier came to me, and he said that he was speaking to Mr. Daab about putting a rathskeller in there and then he wanted us to not go ahead with the work any further until he heard from Mr. Daab. We waited, and then I told him the weather would be getting warm again, and I wanted the work finished, that contract I had, that is the separate contract with Mr. Soulier first. Well, in a day or so he came to me and told me to go ahead and get prices to excavate, and I got the prices to excavate, and he said to go ahead and excavate. 10

Q. What was the additional work in Mr. Soulier's place that you were to do in accordance with the arrangement with Mr. Daab? A. That was digging, excavating of the whole rathskeller around the building, and the wall, the steel beams and the glass, wall lights, concreting of the top, concreting of the rathskeller floor, plastering of the cellar of the rathskeller floor, the plastering of the walls, finishing in Keen cement and cutting imitation tiling. That was under the place. Afterwards then he told me they wanted a part of the old cellar—after that he said go ahead and plaster the whole—repair the ceiling of the old cellar inside. 20 30

Q. If you did this work that you have testified to now in accordance with the direction of Mr. Soulier why did you go to Mr. Daab for the—
A. I did not go to Mr. Daab.

Q. You received one payment? A. Yes.

Q. You received a payment of a thousand dollars 40

John Egan—Cross.

from Mr. Riggs, who is Mr. Soulier's manager, by Mr. Daab's check? A. By Mr. Daab's two checks.

Q. This first check of one thousand dollars you got from Mr. Daab you received on June 28, 1907—A. Was the first one.

Q. Just look at the paper. A. Yes.

Q. That check is signed "Martin Daab, Jr.,"
10 and made to the order of John Egan, contractor?
A. Yes.

Q. You receipted for that as received from Mr. Martin Daab? A. Yes.

Q. Who did you actually receive this check from? A. I don't know which of the checks I received from Mr. Daab himself.

20 THE COURT: I do not see that it makes any difference. It is the defendant's check and the defendant paid that check.

MR. FALLON: This man had no dealings with Mr. Soulier evidently, and I want to know why he went to Daab for two thousand dollars or any money, and if Mr. Soulier told him that Mr. Daab was to pay this money in the first instance and he was to share with him thereafter. I want to know whether Egan did not submit the whole bill to Mr. Daab.

30 THE COURT: That is not the question it seems to me, in this suit. It is apparent from the testimony of this witness that he was doing some work before the alleged agreement was made between the plaintiff and the defendant, because he says the plaintiff came to him and said he had had a talk with the defendant, and then told him to go on and do that work. Now then, the other
40 work was apparently a contract of the plain-

John Egan—Cross.

tiff and the defendant, and it is only the additional work under that direction that was given that they have a right to divide, assuming this contract was made.

MR. FALLON: Yes, but I want to know what prompted him to look to Daab for this money. He had no dealings with Daab, and nobody told him.

10

THE COURT: It seems to me that it confuses the issue. The question is what was the value of the work done afterwards.

MR. FALLON: Isn't it material in this respect? This man was on the stand yesterday and he said that the cost of the work that he did—at least this two thousand dollars paid for the work that he did on that particular job under the direction of Mr. Soulier in the making of this rathskeller. To-day he comes here and he says, in answer to the question of Mr. Eberhard, that the entire cost of the work was three thousand dollars. I want to know why he did not say so yesterday. And I want to know too if the cost of the entire work was three thousand dollars why he did not ask Daab for three thousand dollars instead of two.

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30

THE COURT: I don't understand. He says so. He says he was doing other work—

A. That is right.

THE COURT: —before this time, and that he got from the plaintiff a thousand dollars.

BY MR. FALLON:

Q. I ask you this then, Mr. Egan, the two thou-

40

John Egan—Re-Direct.

sand dollars which you received from Mr. Daab, did that pay for all of the work which you did on this rathskeller, which Mr. Soulier told you you were to do in accordance with his talk with Mr. Daab? A. I told you yesterday, Mr. Fallon, it did not. I plainly told you yesterday it did not, and when I started and I want to tell you about the iron work, you said—you cut me off then.

10

Q. If it did not, why did you not seek from Mr. Daab more than this two thousand dollars? A. Because I had nothing to do with Mr. Daab.

Q. Why did you go to him for this two thousand? A. I did not go to him for this two thousand either.

Q. You said yesterday that one thousand you got direct from Mr. Daab? A. That is while I was working at the place, when I was working—

20

Q. Didn't you think it was unusual for a man to pay you money if you had done no work for him? A. I took it off of him the same as any man, I don't care who it is.

Q. You want this jury to understand that you took this thousand dollar check from Mr. Daab when he did not owe you any money? A. I gave him a receipt for it.

30

THE COURT: I do not think that is the question. He had done some work for somebody, and somebody came there and paid him for the work. He naturally would take it.

MR. FALLON: Well, I won't ask any more questions.

RE-DIRECT EXAMINATION BY MR. EBERHARD:

40 Q. The three thousand dollars paid all told, did that pay for the entire work?

Henry P. Soulier—Direct.

MR. FALLON: I object. The witness has already answered Mr. Eberhard's question yes.

MR. EBERHARD: He did not say yes.

THE COURT: Go on, I will allow it.

Q. Did it pay for the entire work? A. The three thousand dollars?

Q. Yes. A. No; it would not pay for the whole work. 10

MR. EBERHARD: That is all.

MR. FALLON: I ask the stenographer to look back to this witness' testimony where he said it did.

(Testimony repeated.)

MR. FALLON: I have no further questions.

20

HENRY P. SOULIER, resumed.

BY MR. EBERHARD:

Q. Now, Mr. Soulier, what work did you pay for in the construction of that rathskeller? A. I paid for the excavating of it, that is drawing the dirt away and digging out—

Q. What work? Just simply straight, direct. Just exactly what work did you pay for? 30

MR. FALLON: I object. I would like to have this witness say what he considers as the rathskeller proper, because it appears he entered into a contract with Egan. Mr. Egan said he had a contract and he was stopped in this work by Mr. Soulier because of a talk that Mr. Soulier had with Mr. Daab. It would appear from that as though he had contracted previously with Egan to do some excavation. 40

Henry P. Soulier—Direct.

A. If you will allow me a minute I will explain. That is not in the—

Q. What is the— A. —excavating.

Q. I am talking about the rathskeller particularly. Confine yourself to the rathskeller. A. That is it.

Q. Just tell what work you paid for in the rathskeller? A. I paid for excavation. I was to pay for the excavation, putting wooden arches up to make the arches between the iron girders, take the old sidewalk off, which was virtually new, have that all taken off in order to excavate and put in all the new I-beams, that is, large beams running from the building proper out to the curb. Then they had to be brick arched in there and had to have wooden arches made to do this brick work, and then the concrete, and then the dressing on top,
20 and the iron. These round glasses put in, all those skylights—I don't know what you call them.

Q. Who did you have do the mason work? A. The mason work?

Q. Or, rather, the excavation work? A. The contract?

Q. The excavation? A. Mr. Egan.

Q. Did you pay him for that? A. Yes.

Q. Who furnished the iron there which you
30 paid for? A. Mr. Fagen.

Q. The steel? A. Fagen.

Q. And the skylights? A. Yes, sir.

Q. Or glass? A. Yes, sir.

Q. Fagen Iron Works? A. Yes, sir.

Q. Who done the concreting? A. Mr. Egan.

Q. What other work was done there? Who done the carpenter work? A. Why, the carpenter at the theater. He built all the carpenter
40 work.

Henry P. Soulier—Direct.

Q. The arching was done by the carpenter? A. That is all the woodwork there was in it. It was all concrete and brick.

Q. What was the cost of the excavation? A. Seven hundred dollars.

MR. FALLON: What excavation?

MR. EBERHARD: Of the rathskeller only.

MR. FALLON: I object. Mr. Egan is the best witness to testify to that. What he paid for the excavation I have no objection to. 10

Q. What did you pay? A. Seven hundred dollars.

Q. What did you pay for mason work; the arches on the rathskeller?

THE COURT: Restrict your testimony entirely to the rathskeller. 20

MR. EBERHARD: I am confining myself to that.

Q. The lumber arches, what did they cost? A. With the lumber and all I think about two hundred dollars.

Q. Do you know?

MR. FALLON: I object to this kind of testimony, because there was a witness on the stand yesterday from whom they could have got the bills, the carpenter of the Lyric theater, who said he made these arches. 30

THE COURT: The witness who paid the bills, if he can testify, is the best evidence.

MR. FALLON: We are not chargeable with what he paid. We are chargeable with the reasonable value of the work. 40

Henry P. Soulier—Direct.

THE COURT: If you can question he paid too much of course you can cross examine him about it.

Q. What did you pay, Mr. Soulier? A. Two hundred dollars at least, if not more.

10 MR. FALLON: I object and ask that the answer be stricken out.

A. I know it was more, but I couldn't tell exactly; I could not remember.

MR. FALLON: I ask to have his testimony stricken out.

THE COURT: He has to make it definite, Mr. Eberhard; of course he cannot guess.

Q. Did you pay for the mason work? A. Yes.

20 Q. What did you pay for that? A. I think that cost about four or five hundred.

MR. FALLON: I object to the witness testifying in that manner.

Q. You have to say positively? A. I don't remember right to the point.

MR. FALLON: Mr. Eberhard will appreciate that this is not admissible.

30 MR. EBERHARD: All right.

A. It is five or six years; I can't—

Q. Do you know what you paid? A. I think it is about four hundred and fifty dollars.

Q. Do you know what you paid exactly? A. I could tell if I looked at the books and receipts.

Q. What other work was done there besides the iron beams? A. That is all. That is all I was to furnish, was the excavating and putting the roof
40 back again on the sidewalk.

Henry P. Soulier—Cross.

MR. EBERHARD: Is the Fagen Iron Works here?

MR. FALLON: Yes.

MR. EBERHARD: Let them come along.

CROSS EXAMINATION BY MR. FALLON:

Q. Mr. Soulier, a moment ago you said to Mr. Eberhard that you did not make any agreement with Mr. Daab as to the payment of one-half of the cost of the extension to the store front in front of the hall door on Hudson Street, new doors, extending metallic glass dome, extending store cornice, painting, marble platform and risers, embossed cut glass, four bronze gate plates for doors; is that so, that you did not agree with him as to that? A. No, sir. 10

Q. Don't you know, Mr. Soulier, that you with your own man made arrangements for the entrance to the rathskeller from the outside? A. Yes. 20

Q. And that that entrance was exposed? A. Well, that was after the lease, and Mr. Daab came to me and we had the door and everything in there, the exit was to come there from the street, to go right direct into it, and Mr. Daab came to me and said, "Mr. Soulier—" I had my front all in, and he says, "I would like to extend that to cover that door going upstairs," and I says, "I will give my permission to do it." He says, "I will pay for it." That is all there was to it. 30

Q. Then there was work done for you in there with that part of it, in extending this door, which has been mentioned? A. What say?

Q. There was work done by Mr. Daab in extending the door in accordance with a talk he had 40

Henry P. Soulier—Cross.

with you? A. He came and asked my permission, whether I would object, after I had my front up, whether I would object if he paid for it, to extend that over the hall door.

Q. It was about nothing but extending the front? A. No; this was after the new front was in.

10 Q. It was extending the front. It was not as high class as that put in afterwards? A. Same thing exactly. They just pushed the end on and put a piece about six feet in—that was part of the corner, and they pushed the corner around and put a piece about the width of the door in between that and the other front.

Q. You say you had no talk with him about your bearing one half of the cost of the extending of that door? A. No, not a bit, and he said he
20 would pay for it if I would give him permission to do it.

Q. Without that door being extended there was no way of getting down to the rathskeller inside? A. Not unless you go back of the bar.

Q. That was to get an entrance to the rathskeller on the inside? A. He could have gone out the door and walked outside; the door was there and he could have gone down where the door is to
30 go to the rathskeller too.

Q. The seven hundred dollars you paid on account of excavation you paid on account of the contract you had with Egan? A. With a separate—not with a contract I had with him for other work he done. This was separate.

Q. You had a contract with Egan for excavating? A. I had a contract for excavating for the rathskeller.

40 Q. How much was the amount of that contract? A. Seven hundred dollars.

Henry P. Soulier—Cross.

Q. That is the seven hundred dollars that you paid him? A. That is what I paid him.

Q. He was doing this work at the time you stopped him, was he not? A. Doing what work?

Q. Excavating that seven hundred dollar contract? A. No, sir; he was doing other excavating. I gave him two hundred and fifty dollars, if I remember right, for it. 10

Q. You stated in the amended plea that you filed here this morning, that you furnished and set up a ventilator. Is that true? A. We put a ventilator there, yes.

Q. Isn't it a fact that Daab paid for that ventilator and paid forty dollars for it? A. No; I think it is in my bill.

Q. Are you sure? A. I don't know. The bill is there. I would not say positive. I think— 20

Q. If you won't say positive, why do you say it in these pleadings? A. I did not know it was in the pleadings.

MR. EBERHARD: I have a bill for it.

Q. These pleadings then— A. There is all the bills of Mr. Fagen. They will tell for themselves better than I can remember.

Q. Then you were not talked to in making up these pleadings, were you, last night? A. No, sir; only some parts of it. 30

Q. When they set up that you had paid for the cost of a ventilator, is that part of it? A. No, sir.

Q. Did not tell you? A. Unless it is in those bills there of Mr. Fagen. The bills tell just exactly what I paid.

MR. FALLON: I ask that this be stricken 40

John H. Brunig—Direct.

out, what the witness has stated. It is not an answer to a question.

THE COURT: Yes.

Q. You never asked Mr. Daab to pay any moneys to you on account of moneys that you paid to Egan or any one else, did you? A. No, I did not.

10 Q. You have not regarded that Mr. Daab was in anyway indebted to you for any of these moneys? A. I never asked Mr. Daab to give me any money.

Q. You never at any time considered that Daab was indebted to you for any part of the moneys you paid to Egan? A. Not a bit of it.

20 JOHN H. BRUNIG, called and sworn on behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. EBERHARD:

Q. Are you one of the members of the Fagen Iron Works? A. Yes.

Q. What is your position? A. Secretary and Treasurer.

Q. You have charge of the collections and the books? A. Yes.

30 Q. Did you have an account with Mr. Soulier? Have you got an account with Mr. Soulier? A. Yes, sir.

Q. Will you turn to that account? A. Yes, sir, (Witness turns to account in book.)

THE COURT: You better look at this and see. Maybe you can cut corners on it.

(MR. FALLON examines book.)

40 MR. FALLON: I cannot tell what is paid. This book says merchandise.

John H. Brunig—Direct.

Q. Do you know.

MR. EBERHARD: I will connect it.

MR. FALLON: I will object to your proving payment at all until you tell what it is for.

THE COURT: Yes, Mr. Fallon objects to your going backwards.

MR. EBERHARD: I will do that.

10

Q. Do you know the rathskeller that was built at Hudson Place on Soulier's property? A. Yes.

Q. Do you know the steel that was furnished to build that rathskeller? A. Yes, sir.

Q. Will you tell what steel was furnished there to Mr. Soulier to build that rathskeller? A. Let me have the other book there, the sales book.

(Book produced.)

20

A. Begins a patent light.

THE COURT: Better refer to that book.

A. Which you see on this bill here.

MR. FALLON: I refer to the book.

A. Patent light, amounting to \$252 and \$348; cast iron beam—don't want that—and a steel beam \$44; that would make a total of—will you kindly let me see that bill, I am not sure on this. (Examines bill). I am not sure on these beams, whether they went into the sidewalk of the rathskeller or not. I can tell in a minute. (Examines ledger.)

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THE COURT: If you are not sure you better strike it out.

MR. EBERHARD: He says he can tell in a minute.

40

A. This went into the rathskeller.

John H. Brunig—Direct.

MR. FALLON: Mention what it is.

A. The patent light.

MR. FALLON: The amount.

A. \$252, and patent light \$348, and a bill to Mr. Egan—

10

MR. FALLON: I object to that.

THE COURT: Yes; just give us the items which went into the rathskeller, no matter whom you charged them to.

A. The items?

THE COURT: No; just give the items, the material which went into the rathskeller, no matter whom you have got them charged to.

20

Q. What was the Egan item then?

MR. FALLON: I want to object to the item of \$250 that they have not put down here. There is no reference yet to the minutes. My impression is it is taken from the Egan contract. I don't know what it refers to.

30

MR. EBERHARD: The witness was given instructions, no matter who it was charged to, and as long as it went into that rathskeller. Egan has already sworn he has not paid for the steel, and so it must have been paid.

MR. FALLON: My objection is that there is no foundation to have the court say what the two hundred and fifty dollars was for.

40

THE COURT: This witness testified to this, and of course it is subject to cross examination. What does he give the total?

John H. Brunig—Cross.

MR. FALLON: Eight hundred and fifty dollars.

Q. Were you paid for this material? A. Yes.

Q. By whom? A. Paid part by Soulier and part by Egan.

Q. Part by Soulier and part by Egan?

THE COURT: Does this witness say positively that all these matters went in the rathskeller? 10

MR. FALLON: Ask him that.

THE COURT: If he knows.

Q. Did all this steel that you furnished go into that rathskeller? A. Yes, and more besides.

Q. And more besides? A. Yes.

THE COURT: That is eight hundred and fifty dollars. 20

A. Some charges to Mr. Daab.

Q. Never mind that.

MR. FALLON: Get that out.

MR. EBERHARD: Never mind that. You know the stairs went in there.

MR. FALLON: That is all I am suing for.

MR. EBERHARD: You proved that yesterday. The stairs went in there. 30

CROSS EXAMINATION BY MR. FALLON:

Q. Mr. Brunig, you have got a charge of \$380.50 against Martin Daab for work furnished to the rathskeller too, haven't you? A. Yes.

MR. EBERHARD: I object: that is not proper cross examination.

THE COURT: I will allow him to use him as his witness if he wishes to. 40

John H. Brunig—Re-Direct.

MR. EBERHARD: As his witness.

MR. FALLON: I am doing that to expedite the thing.

MR. EBERHARD: That is part of the defense. He is trying to prove his case.

THE COURT: He has a right to prove it by the book. We want to get at this.

10 MR. FALLON: I am glad you brought the facts here.

MR. EBERHARD: It is a repetition of the proof yesterday.

THE COURT: It is an endorsement of the proof yesterday.

MR. EBERHARD: Yes; that is all he is doing now.

20 MR. FALLON: I want to straighten it for you.

Q. The \$380.50, will you tell us what items there are that make that up, that went into the rathskeller? A. There was a pair of stairs with cast iron risers and steps with non-slip treads—

Q. Give us the items? A. That was \$120.

30 Q. Yes. A. Another pair of stairs with non-slip treads \$97; time of men drilling holes in risers, \$10; beams for stair holders, \$73.50; setting of the beams \$15; one ventilator \$40; making patent light doors and galvanizing the same in place of sheet iron doors \$25.

Q. That is all? A. Makes a total of \$380.50.

RE-DIRECT EXAMINATION BY MR. EBERHARD:

Q. Who paid you? A. It was paid.

Q. Who paid? A. Mr. Daab.

Grant S. Riggs—Direct-Cross.

GRANT S. RIGGS, called and sworn on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION BY MR. EBERHARD:

Q. Do you know Mr. Daab? A. Yes.

Q. Did you ever receive that check, or the second check, to give to Mr. Egan? A. I never seen those checks before to know them. 10

Q. Never seen them? A. No, sir.

CROSS EXAMINATION BY MR. FALLON:

Q. Do you recognize there the handwriting of either one of these receipts, the body of it? A. I know it is—well, I figure it is John Egan's handwriting.

Q. In whose handwriting is this, do you know? A. It is not mine. 20

Q. Well, you gave John Egan one of these checks, didn't you? I show you two checks now. You gave John Egan one of these two checks? A. Not that I know of.

Q. You would not say you did not? A. I won't say that I didn't?

Q. Will you? A. Yes, I will, because I do not believe I did.

Q. You never saw either one of these two checks before? And you never saw either one of these two receipts before? A. That receipt is made out in my handwriting. 30

Q. Oh! I asked you before if you recognized the handwriting of either one of the receipts, and you said you did not. A. I thought you meant the signatures.

Q. That is all I want to know. This receipt dated June 28, 1904, "Received from Martin Daab, 40

Martin Daab—Direct.

Jr., one thousand dollars for work done at 77 Hudson Street, signed John Egan." Marked Exhibit P-5. Is the body of it in your handwriting?

A. The body of it is in my handwriting, yes.

Q. You were manager for Mr. Soulier at the time, were you not. A. Yes.

10

PLAINTIFF RESTS.

PLAINTIFF'S TESTIMONY IN SURREBUTTAL.

MARTIN DAAB, JR., recalled.

DIRECT EXAMINATION BY MR. FALLON:

Q. Mr. Daab, did Mr. Soulier make any agree-
 20 ment with you in connection with the work at
 Hudson Place and Hudson Street, whereby he was
 to tear up the sidewalk in front of the premises
 to the elevator shaft and at the toilets and to ex-
 cavate to the depth of the cellar or basement floor
 of the building and to replace the sidewalk at the
 excavated point, supported by steel beams with
 brick arches between the beams, and to furnish
 iron stairs to the rathskeller, also to the toilets,
 and to pay the cost of same? Did he make any
 30 such agreement with you? A. No, no sir.

Q. Did you hear of any such matter before this
 morning? A. No, no, no, no.

Q. Did Mr. Soulier agree with you to furnish
 and set up ventilator, patent light doors, gal-
 vanized patent lights for sidewalk over rathskeller
 and the iron beams and iron work necessary there-
 in, and to excavate and erect brick walls from
 elevator—from sidewalk to cellar, to elevator, in
 40 compliance with plans to street, and in considera-
 tion thereof you agreed to cause to be built at

Martin Daab—Cross.

your own cost the outside of the rathskeller, and all necessary inside work inside the rathskeller?

A. Don't know anything about that, sir.

Q. Did you hear of such an arrangement before to-day? A. No.

CROSS EXAMINATION BY MR. EBERHARD:

Q. What did you hear? 10

MR. FALLON: I object.

Q. In relation to this?

MR. FALLON: I have no objection to that.

THE COURT: The question is rather broad.

A. I could really explain things as you go along, but you don't give me a chance. 20

MR. FALLON: Answer the questions.

Q. Did you agree with Mr. Soulier to pay half and he pay half of that rathskeller, as you said yesterday? A. No, sir.

Q. Did you state that yesterday? A. Not the rathskeller, no, sir.

Q. What were you to pay half for? A. Part as we went along.

Q. For what? A. For part of the excavation and the cement. 30

Q. Wasn't that the rathskeller? A. In the rathskeller—not the rathskeller—in—

Q. In the rathskeller? A. Yes.

Q. You were not to pay half of the cost of the rathskeller? A. I beg your pardon; no, sir. I didn't know anything about it. It was all his own work. I could explain what I meant to pay for if you will give me a chance. He knows. 40

Q. That's all.

Direction for Verdict.

(Mr. Fallon asked that Mr. Eberhard open the plaintiff's case. Mr. Eberhard opened to the jury, and at the conclusion Mr. Fallon moved for a direction of a verdict on the opening. The court stated that it would not direct a verdict on the opening but would allow it to go to the jury.)

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Court's Charge To Jury.

GENTLEMEN OF THE JURY:

You have listened patiently for nearly two days to a good deal of testimony which has been presented in this case, and it is now my duty to give you what I consider the law which is applicable to the case, and then you must apply that to the facts as you find them.

It appears that the plaintiff and the defendant 10
entered into a contract for the renting of some property belonging to the plaintiff to the defendant, and a written lease was made between the two parties, which you will have before you; but the controversy which you have to decide does not depend upon that lease at all, in fact the lease is eliminated from this case, because the plaintiffs claim that the defendant, after he entered into possession under the lease, put certain trade fixtures into the place for the purpose of his business, under an agreement that those fixtures 20
should be left there after the lease expired. If that agreement had been made, assuming it was signed, it could not have been offered in evidence at all, because the law says that where parties talk over matters and then see fit to put their contracts in writing, the writing expresses their agreement and no evidence would be proper to show that the agreement was anything different 30
from what is expressed in writing; but they have a right to get together after the contract is signed and change it, to modify it; to rescind it or do anything which they may agree to do in relation to the subject matter of the contract. The plaintiff now says that after the contract was signed he and the defendant got together; the defendant asked that certain changes should be made upon the property, and he agreed to do 40
that in consideration of the defendant leaving

Charge.

the trade fixtures which he might put in the property, on the property, after the lease expired.

In order to sustain that contention, of course, the burden of proof is upon the plaintiff, because trade fixtures, under the law, a tenant has a right to take away, in the absence of any agreement to leave them there. He may fit up a prop-
 10 erty to the extent of thousands of dollars, and if it is merely in trade fixtures, at the expiration of his lease he has a right to remove them, unless there is some positive agreement entered into between him and the owner of the property that the fixtures should be left. So, before the plaintiff in this case would be entitled to ask you to give him a verdict for the value of those fixtures he must satisfy you by preponderance of proof
 20 that there was an agreement made by the defendant that those fixtures should be left after the lease expired. Unless he has satisfied you by preponderance of proof of course you cannot give him a verdict for the value of the fixtures at all. The only parties who testified to this alleged agreement are the plaintiff and the defendant. The plaintiff says there was such an agreement, and the defendant says there was not, and the defendant sets up another agreement which he says
 30 he made with the plaintiff at the time. Of course, in deciding that question you have a right to take into consideration all the circumstances surrounding it which have been detailed to you by the witness, and gather, if you can, whether there was any such agreement made, and unless you find there was such an agreement made, of course, the plaintiff has failed.

He says that the consideration for that agree-
 40 ment was certain work which the defendant wanted done, making certain excavation and other

Charge.

work which he did and which he paid for to the extent of \$1,550. That was the consideration the plaintiff says which he paid for the agreement upon the part of the defendant that these trade fixtures should be left there. An agreement of that sort, made without consideration, is not a binding agreement at all in law. If the defendant had merely said to the plaintiff, after this lease was signed and they had gone into possession, "I am fitting this place up handsomely and when I go out I will leave everything here for you"—he might have said that and might have gone out, and yet there is no consideration for that agreement which will support it so as to enable the plaintiff to rely upon it if the tenant failed to leave the fixtures there after his lease expired. So, in order to support that agreement, there must be some consideration. The plaintiff says the consideration was his agreeing to do certain work to the building, which he did, and that it cost him \$1,550, which he paid. In order to sustain his claim for recovery of the value of the fixtures you must be satisfied that that agreement was made and that consideration was paid by the plaintiff, or there is no legal claim here against the defendant for the value of the fixtures. If you should be satisfied from the evidence in the case that there was that agreement of course the defendant is bound to keep his bargain. When parties make contracts they are bound to keep them, and neither one can back out when he finds the contract is not going to be as good for him as he thought it was going to be when he made it. So if you find that agreement was made for a good consideration, then you will come to the value of the trade fixtures which were there, which the tenant put in the property and which he failed to leave.

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Charge.

The only evidence as to the value of these fixtures is that offered by the witness who was upon the stand yesterday, who said he was in the place about two years prior to the time the lease expired, and he was in there for a few minutes and he looked over the fixtures that were there, and he gave you a detailed statement of the value of them, which amounts to \$2940. He said afterwards he made an estimate to re-fit the place and put in other fixtures that was \$3500. That you cannot consider at all, because if the plaintiff is entitled to recover at all, he is only entitled to recover the value of the fixtures, not what it would cost somebody else to put in other fixtures to fit up the store in place of the fixtures taken out. That, you will recollect, was two years prior to the time when the lease expired. There is no evidence in the case to show what the value of the fixtures was at the time the lease expired, when they were taken out by the defendant. So if you find that the plaintiff has sustained his case by preponderance of proof, and there was such a contract made, and you think he is entitled to recover the value of the fixtures, you must say from the evidence that you have before you what in your judgment would be a fair value of the fixtures at the time they were taken out, which was in March or April, 1912; and the only guide you have to that is the value of the fixtures as given by the witness who saw them two years before; that is the only evidence you have upon that point.

But the defendant comes in and not only says that he did not agree to leave any fixtures, but, on the contrary, that there was a distinct bargain between him and the plaintiff that certain changes should be made, which the tenant wanted to have made, and they should divide the cost;

Charge.

that certain changes were made in evident; and additions or alterations were made in the premises, and the tenant, who as the defendant in this case, testifies that he paid for those changes or alterations \$3,165.50, and that that was under the agreement that he should do the work and pay for it and the plaintiff should divide the cost with him, and that no part of that has ever been paid back to him. The burden of proof is upon him, because it is really a counter suit brought by the tenant against the owner, and before he is entitled to recover for one-half of the amount of money which he paid he must satisfy you by preponderance of proof that that agreement was made; because a tenant may go into a property and he may spend thousands of dollars upon the property, and unless he has an agreement with the owner that the owner was to reimburse him for the amount of his payments or for part of the payments it is for the owner's benefit when the tenant leaves, and he has got no claim against the owner whatever unless it was done under some positive agreement with the owner, and if the owner has made an agreement he is bound to do what he contracted to do.

The defendant says that his disbursements amounted to \$3,165.50; one-half of that would be \$1,582.75; so, if his contention is correct, that he made no agreement to leave these fixtures in the property and that the agreement was made with the landlord that the tenant should have these changes made and pay for them and divide the cost with the owner, then he would be entitled to recover against the plaintiff for \$1,582.75.

The plaintiff says further that he paid, himself, for a part of that. He says that he paid \$1,550, that is, that he paid Egan \$700 and he

Charge.

paid Fagen Iron Works \$850, which makes \$1,550, and that was part of the work which was to be done under the arrangement. The plaintiff says that that was the consideration for the leaving of the fixtures, but if that \$1,550 was paid under the agreement which the defendant says he made with the plaintiff; then the plaintiff, of course, would be entitled to a credit of that for his half of the payment. That would leave a balance due the defendant of \$807.75

So the first thing you have got to determine in this case is whether the agreement was made by the tenant with the owner for the consideration of the changes being made by the owner to leave the fixtures. If you are not satisfied that that agreement was made, then, of course, the plaintiff's case fails, completely fails, and you will give the plaintiff nothing whatever. Then that would bring you to the defendant's claim that he made this positive agreement with the owner to have this work done and pay for it and the owner should divide the cost with him; and if you find that that agreement was made and that the owner paid nothing towards it, then the defendant would be entitled to a verdict of \$1,582.75; but if, in your good judgment, you think under the evidence that the \$1,550 which the owner paid was a part of that contract, then, of course, the owner would be entitled to a credit for that upon his half of the payment; that would reduce the defendant's claim to \$807.75.

Now the facts, gentlemen, you have to decide. I have only gone over these figures as they have seemed to me to be presented, and seemed to me to be proven, but you have to say who says just what the contract was between these two parties.

Charge.

There was some claim made by the plaintiff of damage to the building at the time that the tenant moved out. If any damage had been made to the building by the tenant, of course he is liable for it, but there is no evidence offered to show what that was in dollars and cents. There is some evidence to show walls were torn to pieces and some of the doors were off the hinges, or something of that sort, but you cannot give any verdict for that in the absence of testimony showing what it cost him to replace it; so that you will eliminate entirely from your consideration in this case. 10

It also appears in the case that there were certain items which the plaintiff did pay half the cost of, that is, the steam-fitting. He paid half the cost of that, and I think there was one other item perhaps he paid half the cost of. Those are circumstances you have to take into consideration in deciding whether or not the contract that the defendant testifies to was made, because if there was such a contract and the owner agreed to pay one-half of the cost, then, as I have said, the defendant is entitled to a verdict either for \$1,582.75 or a verdict for \$807.75, unless you find that the plaintiff was entitled to recover for the amount of the fixtures. Of course if the plaintiff is entitled to recover the amount of the fixtures your verdict would be for just such sum as in your good judgment the fixtures were worth, and then you would have a right to take into consideration whether there was any agreement made as the defendant testifies to; because if you should find that the plaintiff was entitled to a verdict for the fixtures and the defendant was also entitled to a verdict for one-half of the cost of making the repairs, then you have got to take 20 30 40

Charge.

one from the other and whatever the balance would be so would be your verdict.

Let an officer be sworn.

MR. FALLON: Will your Honor call the jury's attention to the state of the pleadings as they are, because it appears in this case these pleadings are so mixed up the jury ought to have some
10 enlightenment as to that.

THE COURT: As far as the pleadings are concerned, the Court has admitted the evidence under the pleadings. Of course, the jury have a right to take into consideration that the pleadings have been changed, and that only goes to the credibility of the testimony offered.

MR. FALLON: No; the only reason I call your attention to it is this, that this morning they
20 stated specifically that in consideration of Soulier doing certain work, Daab on his part, in consideration of that, agreed to do certain work and pay for it. Now there is no claim made in any of the pleadings as they are now before the Court to the effect that Soulier was in any wise entitled to the fixtures; and in Mr. Eberhard's opening he does not claim anything except as damage to the fixtures.

THE COURT: Yes, I know; but I left this case
30 to the jury under the evidence which I have admitted. Whether the pleadings are in proper shape to support that is a matter for the court.

You have the figures, gentlemen, so you may now come to a decision.

(The foreman of the jury asked the Court at this point, if the jury could have the Court's figures, and counsel agreed that the paper should be handed to the jury.)

40 THE COURT: If you should find for the plain-

Charge.

tiff, and you come to estimate the value of the fixtures, you cannot guess at it or speculate on it; you have to take the only testimony in this case that there is, that the value of the fixtures two years before was \$2,940, and then say whether in your good judgment that would be the reasonable worth two years after.

THE JURY RETIRED.

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Exhibit P-1.

THIS AGREEMENT, made the seventh day of February, in the year of our Lord, One Thousand Nine Hundred and Seven,

BETWEEN JENNIE A. SOULIER and HENRY P. SOULIER, her husband, of the City of Hoboken, in the County of Hudson and State of New Jersey, party of the first part,

10 AND MARTIN DAAB, JR., of the City of Hoboken, in the County of Hudson and State of New Jersey of the second part.

WITNESSETH, that the said party of the first part, have hereby let, and rented to the said party of the second part, and the said party of the second part, has hereby hired and taken from the said party of the first part,

ALL that certain first floor on the premises
20 known and designated as number Seventy-seven (77) Hudson Street, in the City of Hoboken, County of Hudson and State of New Jersey, being the northeast corner of Hudson Place and Hudson Street, in said City, County and State aforesaid, and the front part of basement for the term of five (5) years, to commence on the first day of May, A. D., 1907, at the yearly rent as follows, to wit: For the first year of the said term, the sum of Twelve Hundred (\$1,200) Dollars,
30 lars, payable in equal quarterly payments of Three Hundred (\$300) Dollars, in advance;

For the second year, the sum of Fifteen Hundred (\$1,500) Dollars, payable in advance as aforesaid, in equal quarterly payments of Three Hundred and Seventy-five (\$375) Dollars; for the third, fourth and fifth years, the sum of Eighteen Hundred (\$1,800) Dollars, per year, payable in equal quarterly payments in advance as
40 aforesaid of Four hundred and fifty (\$450) dollars.

Exhibits.

AND it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said parties of the first part to re-enter the said premises, and to remove all persons therefrom.

AND the said party of the second part covenants to pay to the said parties of the first part, the said rent as herein specified, to wit: for the first year, the sum of Twelve Hundred (\$1,200) Dollars; for the second year, the sum of Fifteen Hundred (\$1,500) Dollars, and for the third, fourth and fifth years, the sum of Eighteen Hundred (\$1,800) Dollars per year, all payable as above set forth. 10

AND at the expiration of the said term, or the termination of this lease, the said party of the second part will quit and surrender the premises hereby demised, in as good a state and condition as reasonable use and wear thereof will permit, damages by the elements excepted. 20

AND the said parties of the first part covenant, that the said party of the second part, on paying the said rent, and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

AND IT IS HEREBY FURTHER AGREED between the parties hereto, that the said party of the second part shall have the privilege of extending this lease for the term of five (5) years, at the yearly rent of Twenty-four Hundred (\$2,400) Dollars per year, payable in equal quarterly payments of Six Hundred (\$600) Dollars, as aforesaid. 30

AND IT IS HEREBY FURTHER AGREED between the parties hereto that the said party of the second part will not sub-let or assign this Lease without 40

Exhibits.

the written consent of the said parties of the first part.

AND IT IS HEREBY FURTHER AGREED between the parties hereto, that a notice by either party of ninety (90) days, given to either party after the first five (5) years, shall terminate this Lease.

10 AND IT IS HEREBY FURTHER AGREED between the parties hereto, that the parties of the first part are to have all fixtures now on said premises, and also that no changes are to be made in the premises without the consent of the parties of the first part.

20 AND IT AS ALSO hereby stipulated and agreed between the parties hereto that the parties of the first part shall not, in any wise, have or cause any nuisances upon the premises hereby leased, and in the event of the party of the second part being charged with nuisances or keeping a disorderly place, or the said premises be charged as being a disorderly place, IT IS AGREED HERETO that this Lease shall become void and of no effect, and the party of the second part shall quit and surrender the said premises, or be subject to an ejectment suit in the District Court, as provided for persons occupying houses and being disorderly.

30 AND IT IS HEREBY FURTHER AGREED between the parties hereto that the party of the second part shall pay all water rents due on said premises.

IN WITNESS WHEREOF, the said parties hereto have hereunto set their hands and seals, the day and year first above written.

JENNIE A. SOULIER, (Seal.)

HENRY P. SOULIER, (Seal.)

MARTIN DAAB, JR., (Seal.)

Signed, sealed and deliv-
40 ered in the presence of, {

Fred W. Eberhard.

Exhibits.

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

BE IT REMEMBERED, that on this Eleventh day of February, in the year of our Lord One Thousand Nine Hundred and Seven, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Jennie Soulier, and Harry P. Soulier, her husband, and Martin Daab, Jr., who, 10
 I am satisfied are the parties named in the within Indenture of Lease named; and I having first made known to them the contents thereof, they did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed. And the said Jennie Soulier, being by me privately examined, separate and apart from her husband did further acknowledge that she signed, 20
 sealed, and delivered the same as her voluntary act and deed, freely, without any fear, threats or compulsion of her said husband.

FRED W. EBERHARD,
 Master in Chancery of New Jersey.

Grounds of Appeal.

New Jersey Court of Errors and Appeals.

HENRY A. SOULIER and JENNIE
SOULIER,

Plaintiffs and Appellants,

vs.

MARTIN, DAAB, Junior,

Defendant and Respondent.

Grounds of
Appeal.

The appellants state the following grounds of appeal:

1. The court refused to allow plaintiffs to prove an agreement, made prior to the making of the lease, whereby the plaintiffs agreed to alter the first floor or flat in the premises mentioned in the lease into a store suitable for a saloon or cafe and the defendant agreed to erect and set up therein store fixtures and that they should become the property of the plaintiffs on the termination of the defendant's tenancy under the lease for said store executed after the making of said agreement.

2. The court overruled the following question.

To the plaintiff: Q. What was there talked about at the time?

Ruling: It appears in the case and I cannot close my eyes to the fact that there conversation resulted in a written agreement and that the only thing which I can consider is that written agreement.

3. The following question was overruled:

To the Witness Charles Diaz: Q. After you went in what did you see in the place?

4. The court refused to permit the plaintiffs to prove that the sums alleged to have been paid

Grounds of Appeal.

by the defendant under his counterclaim did not pay for all the work which he alleged was to be done and paid for by the defendant and plaintiffs in equal shares, and refused to permit the plaintiffs to show that they had expended moneys in payment for work included in the work which the defendant alleged was done under an agreement whereby each party was to pay for one-half. 10

5. The jury rendered a verdict for the defendant and against the plaintiffs on the defendant's counterclaim although there was no evidence to charge the plaintiff Jennie A. Soulier therefore.

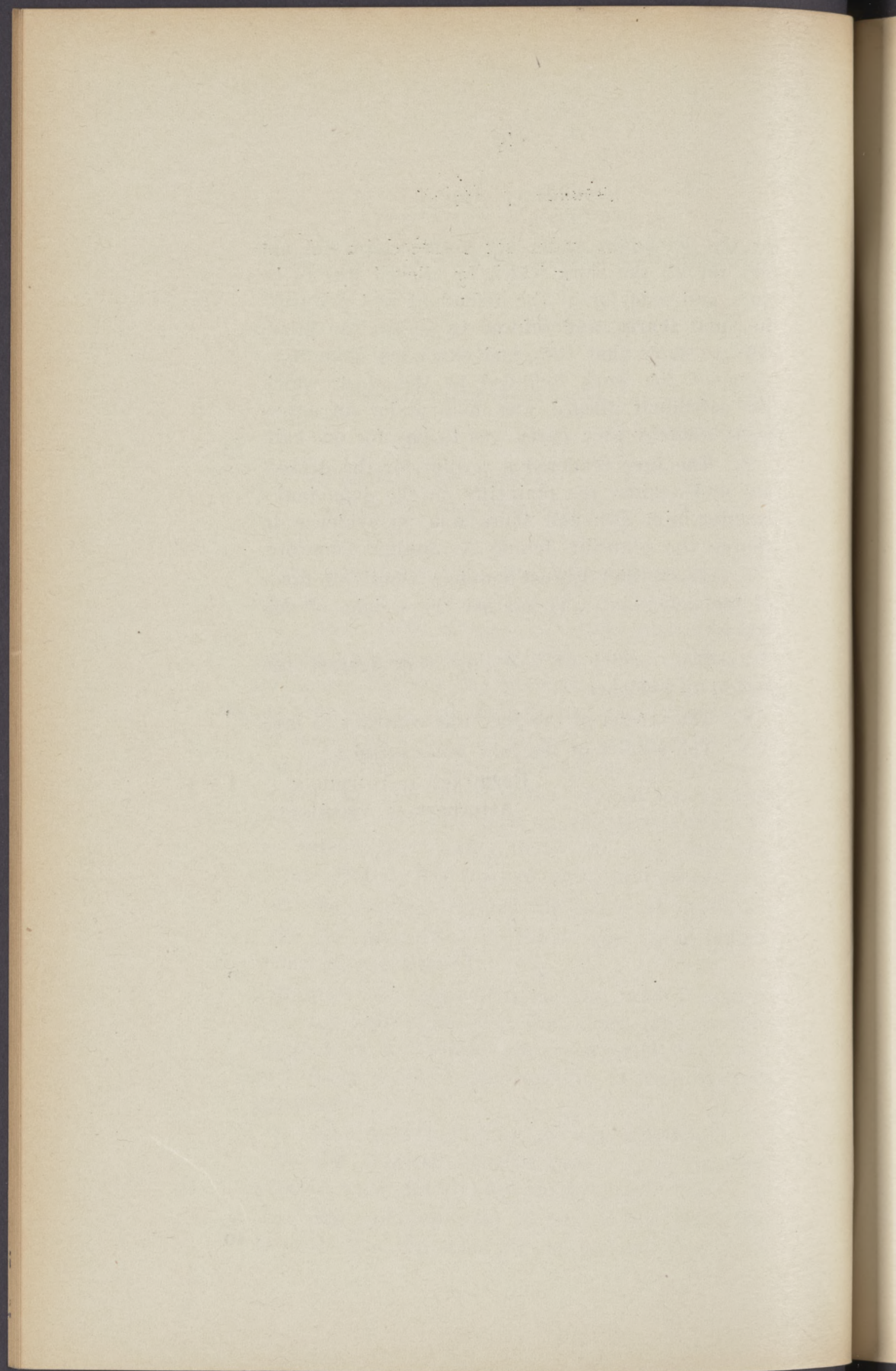
6. The verdict against Jennie A. Soulier in favor of the defendant was against the weight of evidence.

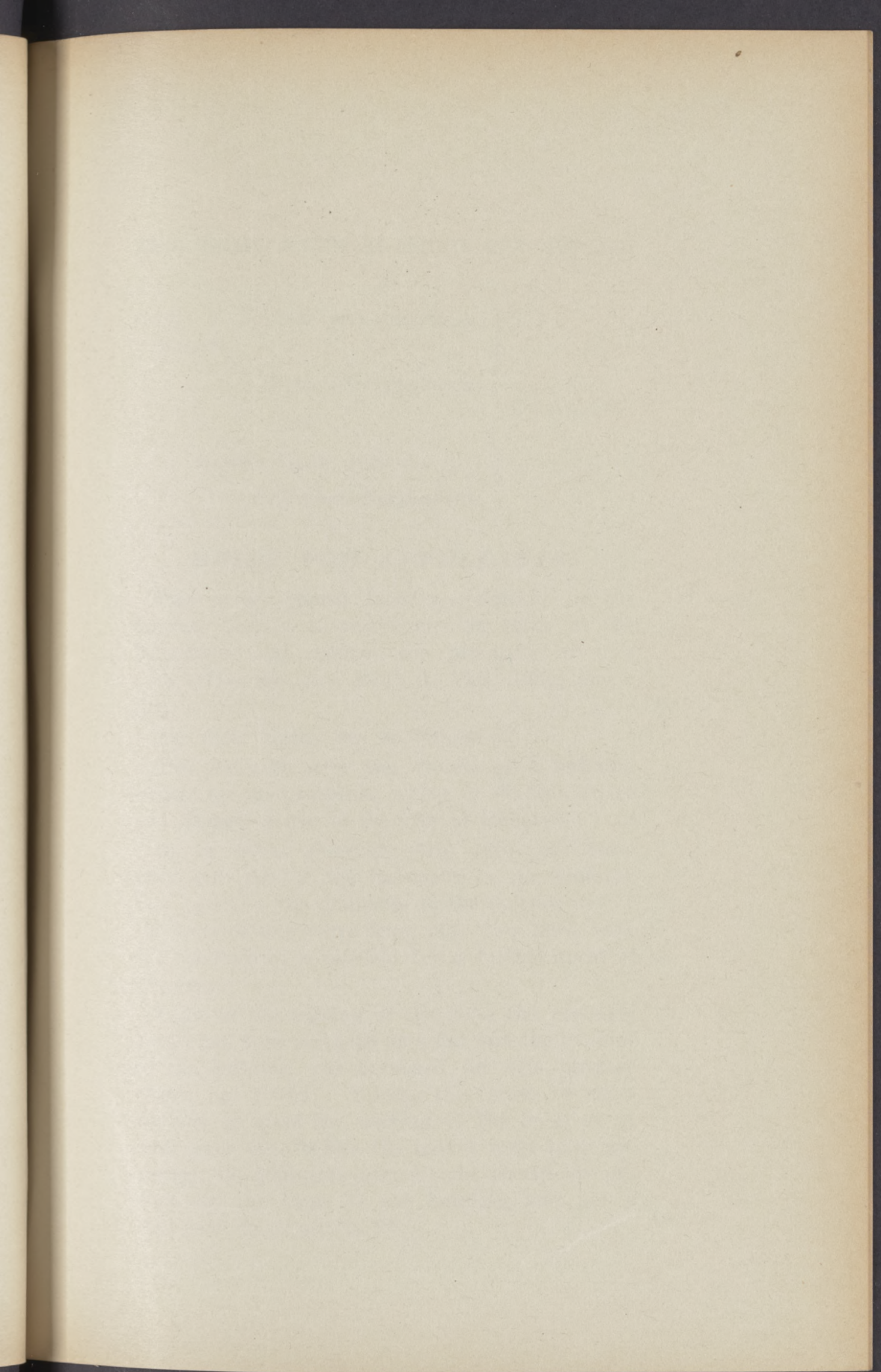
7. The verdict of the jury was against the weight of evidence.

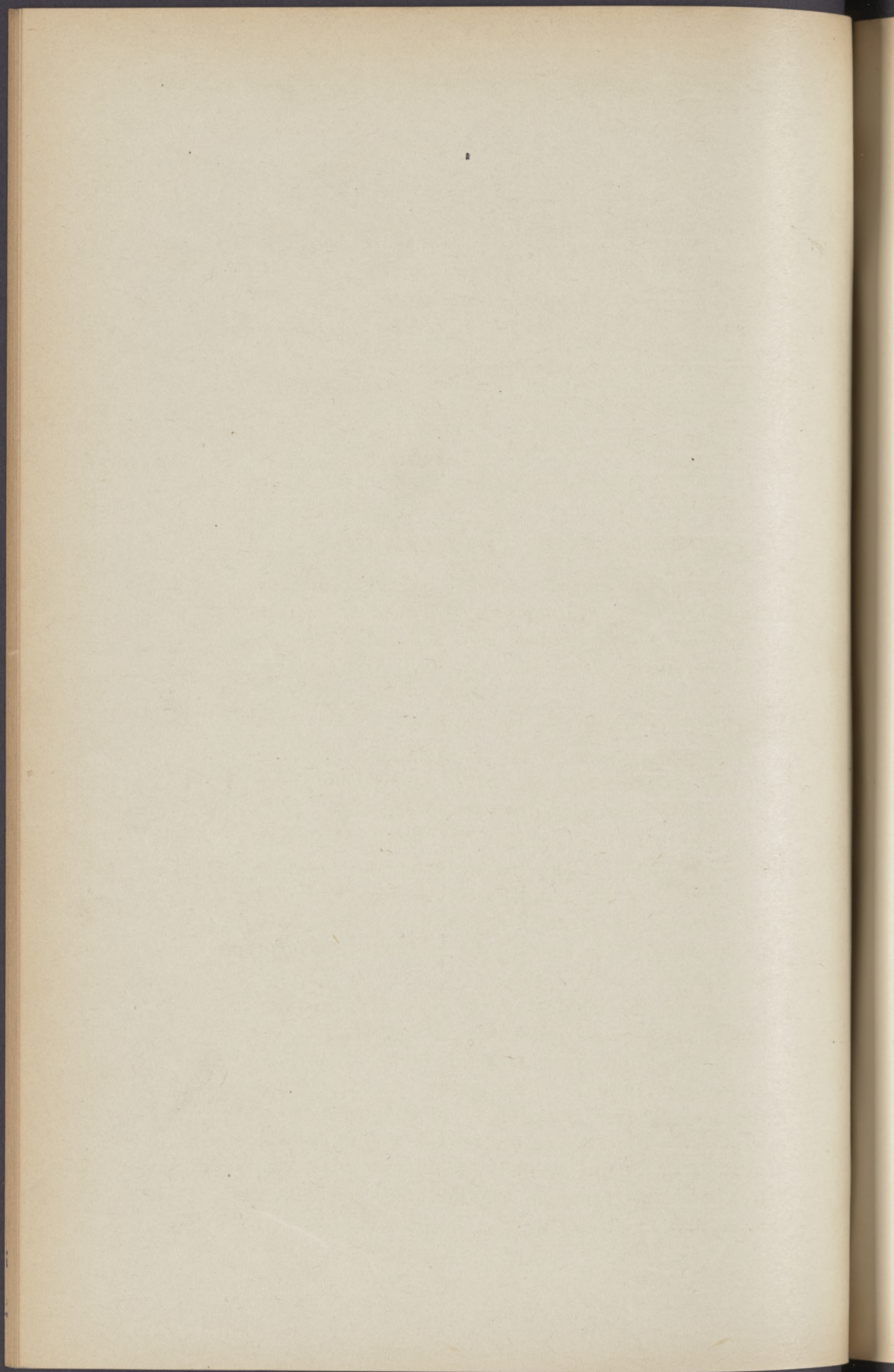
8. The verdict of the jury was contrary to law. 20

9. The verdict of the jury was excessive.

EBERHARD & SHERIDAN,
Attorneys of Appellants.







New Jersey Court of Errors and Appeals.

HENRY P. SOULIER and JENNIE A.
SOULIER,

Plaintiffs-Appellants,

vs.

MARTIN DAAB, Junior,

Defendant-Respondent.

On Appeal.

10

BRIEF FOR APPELLANTS.

This is an appeal from a judgment in the Hudson County Circuit Court in favor of the defendants and against the plaintiffs after a trial before the Hon. Benj. A. Vail, Judge and a jury.

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The facts briefly are as follows:

The plaintiffs were the owners of a building situate on the northeast corner of Hudson Place and Hudson Street in the City of Hoboken.

On or about February 7th, 1907, the store floor and part of the basement in the building was leased by the plaintiffs to the defendants for the term of five years from May 1st, 1907, with the privilege of a renewal for a further term of five years.

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Prior to the making of the lease the premises leased had been occupied as a flat and the interior of the building was arranged for this purpose (Case, pp. 37-102). During the course of negotiations or after the making of the lease or at least some time before the tenant went into possession, the plaintiffs tore all old partitions out, took out the front of the building and put a new front in (Case, p. 37).

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The defendant afterwards went into possession, and the cafe or saloon fixtures at the termination of his tenancy, or shortly before were removed. The lease, provided "that the plaintiffs were to have all fixtures then on said premises and that no changes should be made in the premises without the consent of the parties of the first part."

10 A suit was brought for the purpose of recovering the value of the fixtures on the premises at the time of the making of the lease, for changes made in the premises without the consent of the plaintiffs consisting of the removal of the fixtures, for damages done to the realty in the removal of the fixtures and for the value of the fixtures placed in the premises after the making of the lease alleged to have become affixed to the realty.

At the time of the making of the lease none of the store fixtures were in the premises.

20 On the trial the plaintiffs were permitted to amend their complaint by inserting a new paragraph in the fourth count to be known as paragraph No. 2½ setting up an agreement made on the 24th day of January, 1907 whereby the plaintiffs agreed to alter the first floor or flat of the premises into a store suitable for a saloon or cafe purposes and in consideration thereof the defendant agreed to erect and install the necessary store fixtures to make the premises a saloon or cafe, affix the same to the premises so that they should become annexed to the realty and become part thereof and that they should become the property of the plaintiffs upon the termination of the defendant's tenancy and that the plaintiffs had performed their part of the agreement.

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To this amendment the defendant interposed a general denial and secondly the statute of frauds.

40 The defendant by his answer set up as a counter-claim an agreement made after the making

and execution of the lease whereby the defendant agreed to make certain additions, alterations and improvements in said premises and in consideration thereof the plaintiffs agreed to pay one-half the costs thereof and that the entire costs of said additions was the sum of \$3,640.74.

The plaintiffs in their reply to the counter-claim denied the making of the agreement, denied any knowledge or information sufficient to form a belief of the statement as to the costs of the additions and improvements and denied that they should have paid the sum of eighteen hundred twenty dollars and thirty-seven cents, they admitted that they had expended moneys in and about alterations and additions in said premises but they denied that it was paid on account of said sum of money and denied that there was due from them to the defendant the moneys mentioned. 10

After the amendment was made and allowed and after the opening for the plaintiffs, the court ruled that it would not allow the plaintiffs to prove the agreement set forth in their Amendment to their Complaint. 20

In order to prove the agreement alleged in his counter-claim the defendant testified to conversations had with the plaintiffs Henry P. Soulier wherein Henry P. Soulier agreed to pay one-half of the costs of alterations and improvements and that these improvements cost \$3,165.50. 30

This agreement was denied by Mr. Soulier but he testifies that he paid the sum of \$1,550 in and about alterations and improvements at the rathskeller.

The grounds of appeal relied upon by the Plaintiffs-appellants are:

1. The court refused to allow the plaintiffs to prove an agreement, made prior to the making of the lease, whereby the plaintiffs agreed to alter the first floor or flat in the premises mentioned in the lease into a store suitable for a saloon or cafe 40

and the defendant agreed to erect and set up therein store fixtures and that they should become the property of the plaintiffs on the termination of the defendant's tenancy under the lease for said store executed after the making of said agreement.

The court saying (case, page 34)

10 "The basis of your complaint was as I understood it that there was an oral agreement made before this written agreement was made and upon that you sought to recover; that is, in that agreement certain fixtures were to be put in there which the tenant agreed to give to the landlord when his lease expired. He is only obliged under his contract as now presented to the court to have such fixtures there as were there at the time the lease was made, unless you can show that there was a subsequent agreement to the date of the lease, I would not allow you to prove it and I could not allow you to prove it in this case."

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2. The court overruled the following question (case, p. 36) :

"TO THE PLAINTIFF:

Q. What was there talked about at the time? Ruling: It appears in the case and I cannot close my eyes to the fact that their conversation resulted in a written agreement and that the only thing which I can consider is that written agreement.

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The following question was overruled (case, p. 77) :

"TO THE WITNESS CHARLES DIAZ:

Q. After you went in what did you see in the place?

The object of this as will be seen (case, page 78) was to show the condition of the premises under the plaintiff's claim for damages to the premises.

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4. The court refused to permit the plaintiffs to

prove that the sums alleged to have been paid by the defendant under his counterclaim did not pay for all the work which he alleged was to be done and paid for by the defendant and plaintiffs in equal shares, and refused to permit the plaintiffs to show that they had expended moneys in payment for work included in the work which the defendant alleged was done under an agreement whereby each party was to pay for one-half.

The court afterwards permitted the plaintiffs to prove the amounts expended for work so done but not until their reply was amended setting up the amounts paid. 10

5. The jury rendered a verdict for the defendant and against the plaintiffs on the defendant's counterclaim although there was no evidence to charge the plaintiff Jennie A. Soulier therefore.

The principal ground relied upon is the first ground. 20

POINT I.

The court should have permitted the plaintiffs to prove the agreement set up in the amendment to their complaint.

The agreement set up in this amendment was made prior to the signing of the lease and was an agreement whereby the plaintiff agreed to make alterations and the defendant agreed to leave the store fixtures after he went out of possession. The only mention of fixtures in the lease is the clause referring to the fixtures then in the premises. 30

It is unquestionably true that the courts will not permit the introduction of evidence tending to vary the terms of a written instrument and it was on the strength of this rule that the court below refused to permit the plaintiff to prove the agreement. There are certain exceptions to this 40

rule however, one, where the written contract is not complete and on its face does not purport to contain the whole agreement between the parties and 2, where the parties in negotiating the agreement which is reduced to writing have also entered into an agreement by parol, which is collateral to the written contract and on a subject distinct from which the written contract relates.

Naumberg v. Young, 15 Vr. 331.

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It is true that this alleged agreement was made during the course of negotiations. It is true that a written lease of the premises was afterwards executed and delivered. It is contended however, that this agreement comes within the second exception noted above. Of course, it is true that an agreement on a subject which is not mentioned in the contract is not solely for that reason collateral and distinct under this rule. The test is rather as laid down in the case of *Seitz v. Brewers Refrig. Mach. Co.*, 141 U. S. 518 "that is, it must not be so closely connected with the principal transaction as to form part and parcel of it," at the same time evidence of a prior and separate oral agreement is not excluded simply because it has some connection or relationship or bearing upon the subject matter of the written agreement.

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In the case of *Lindley v. Lacey*, 17 C. B. (N. S.) 578 the court permitted oral evidence of an agreement on the part of the defendant to pay a certain judgment, the consideration for which was the execution of a written agreement by the plaintiff for the sale of fixtures and the good will of a business.

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In *Drew v. Wiswall, et al.*, 183 Mass. page 554 the court admitted oral evidence of an agreement to construct certain streets, the consideration for which was the purchase by the plaintiff from the defendant of lands, although the deed was silent on the subject.

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In *Van Brunt v. Day*, 81 N. Y. 251, which was a suit to foreclose a mortgage assigned to the plaintiff, the court held that evidence of a contemporaneous oral agreement on the part of the plaintiff to keep the buildings on the lands insured, which was supported by a separate consideration, was admissible although the assignment of the mortgage was silent on the subject.

In the case of *Lewis v. Seabury*, 74 N. Y. 409 the court held that parol proof of an oral agreement, founded on a separate consideration, that certain fixtures should remain on the premises which were at the same time leased by written lease to the plaintiff by the defendant, was admissible. 10

In all these cases there can be no question but that the subject matter of the oral agreement had some relationship to or bearing on the subject matter of the written agreement but they are not so closely connected as to form part and parcel of the written agreement. 20

Now then it is contended that the agreement sought to be proved in this case was such a collateral agreement and on a subject distinct from that of the written contract. It is true that it is connected with the subject matter of the written lease but it is not so closely connected as to form part and parcel of it. In fact the lease could not have been operative as far as the defendant's occupancy was concerned until the plaintiffs had performed their part of the agreement. It is true that the agreement added something to the obligation of the defendant but no more so than the agreement in any of the cases above cited. 30

The rule is laid down by Greenleaf on evidence as follows:

"where the parties have clearly intended to cover the whole of a subject having many 40

possible details, the promisor may not purport to make an engagement as to one of the possible details and thus an oral engagement on that precise point is not in strictness inconsistent with the written memorial nor does it vary the latter; yet it may be inadmissible if the memorial apparently intended to embrace the whole of the promise on the general subject to which the detail belongs. It seems more accurate in practice and more correct on principle to avoid such phrasings of the test and to inquire, more broadly, whether the subject of the offered agreement has been intended to be wholly disposed of by the written memorial."

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GREENLEAF'S EVIDENCE, 16 Ed. Sec., 305 f.

Under the above rule it would seem to be a question of intention of the parties. This I take it is in accord with the Naumberg case where Justice Depue at page 339 says "but in what manner shall it be ascertained whether the parties intended to express the whole of that agreement in the written contract?" The Justice goes on to say that the only safe criterion of the completeness of a written contract is the contract itself, but this, it is contended should not be taken too literally, because there could never arise the question under this exception to the parol evidence rule for a written contract is complete in itself where it specifies something to be done by one party and for a consideration passing from the other.

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In each one of the cases above mentioned the written contract was a complete contract. In the Naumberg case the lease itself was a complete contract and logically that should have been a conclusive answer to any offer of parol evidence of a prior agreement. It should seem that there must be something more. It is contended that the completeness of a written contract should be measured by the intentions of the parties and

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that intention gathered from the relationship of the alleged oral agreement to the written agreement, that is, whether from the nature of the alleged oral agreement the subject matter of the oral agreement was one of those details which the court will say the parties intended to embrace in their written agreement.

Aside from all this, however, it should be noticed that in most of these cases where this evidence of prior agreements has been sought to be introduced the agreement was based on the same consideration as the written agreement, for instance in the Naumberg case an oral agreement sought to be introduced was a warranty as to the fitness of the boiler and engine, which warranty was based upon the same consideration as the other covenants in the lease. There is some apparent attempt in the case to show that the consideration for this warranty was the signing of the lease but that does not seem to have been successful and the court evidently does not proceed on that theory. 10 20

So that the point in most of those cases is that there was but one contract and the oral agreement sought to be proved was a part of that contract, and naturally could not have been collateral and distinct from the subject-matter of the written contract.

In the case of *Lindly v. Lacey* there was a written contract and a separate oral agreement on the part of the defendant to do a certain thing supported by a valid consideration, the signing of the written agreement, that is, two agreements. 30

Now, I cannot conceive of any limitation upon the right of persons to make several agreements at one and the same time supported by separate considerations and the enforcement of those agreements even though all of those agreements are not in writing. 40

I do not understand that the rule prohibits

the making of two agreements at the same time; but only that where two parties have made an agreement and have reduced that agreement to writing they cannot show by oral testimony that there was some other terms and conditions which were not included in writing; this seems to be borne out by all the cases, particularly the Naumburg case where the court used the term "agreement and contract" in the singular, evidencing the theory in the court's mind that there was one contract which had been reduced to writing.

In this connection it is contended that the act of the parties in making two separate and distinct agreements supported by two separate and distinct considerations shows conclusively an intention on their part that each agreement should be separate and distinct from the other and that the written agreement should not supersede the oral.

It should be further noted that it would be reasonable not to insert this oral agreement in the written lease because the lease could not take effect unless the plaintiffs had performed their part of the agreement.

It is contended that this was error which substantially effected the rights of the plaintiffs and for this reason judgment should be reversed and a new trial granted.

POINT II.

The agreement sought to be proved by the plaintiffs was not an agreement that was void under the statute of frauds.

The only provision of the statute which would make this agreement void is section five (5) of the act for the prevention of frauds and perjuries (2 Compiled Statutes, Title "Frauds and Perjuries" p. 2612), the fifth subdivision of which prohibits an action being brought upon any agree-

ment that is not to be performed within one year from the making thereof. It was held in the case of *Berry v. Doremus*, 1 Vr., pages 399-403, that the statute only applies where neither party is to perform the contract within one year; at least it does not apply to cases where one of the parties is to perform and does in fact perform immediately. That is identically the situation here.

The plaintiffs have actually performed their agreement and their performance was within one year after the making of the agreement (Case, pp. 37-53). 10

It certainly cannot be contended that the act is for the sale of goods and even if it could be construed as a contract for the sale of goods, the plaintiffs have not only paid part of the consideration but the entire consideration. And it certainly cannot be construed as a contract for the sale of real estate. 20

POINT III.

The verdict and judgment against the plaintiff Jennie A. Soulier on the defendant's counter-claim was erroneous.

It was encumbered upon the defendant in order to charge the plaintiff, Jennie A. Soulier, with the agreement to pay one half of the costs of the improvements, to show that she had personally agreed to this or that Henry P. Soulier was her agent or that his action was afterwards ratified by her. 30

There is absolutely no proof of any of these propositions. All that the defendant testified to is the conversations had with Henry P. Soulier; and nowhere is there any testimony showing any agency on the part of the defendant or any ratification by her, both the defendant and Henry P. Soulier seemed to have acted as though the property belonged to Henry P. Soulier alone. 40

POINT IV.

The trial court should have permitted the plaintiffs to prove that the work done and paid for by them was included in the work of which the defendant alleged the plaintiffs were to pay one-half the cost.

10 The agreement set up by the defendant was that the plaintiffs agreed that certain improvements were to be made; to excavate the basement of the premises, which was afterwards amended so as to include the excavation under sidewalk, and all necessary mason and cement work to make said basement water tight and ready to be fitted up and used as a rathskeller, installation of steam heating plant; iron work, consisting of stairs, beams, ventilator and doors; painting ceiling in
20 bar and sitting room, and gilding, laying terrazzo floor and extension to the store front.

The defendant testified that the entire cost of this work was a certain sum and the plaintiff should have been permitted to prove that the sum mentioned by the defendant was not the entire cost but that it cost a sum in addition thereto and that they paid for this other work. It is true that the plaintiffs were permitted to prove
30 this after an amendment to their reply setting up these payments, but it is contended that this amendment should not have been insisted upon, that it was part of the plaintiff's defense on their original reply.

POINT IV.

The verdict of the jury was excessive.

40 The defendant testified that the entire cost of the work was \$3165.50 and that one half of this would be \$1582.75, the amount of the judgment.

The plaintiff Henry P. Soulier testified that he had paid \$1550, for part of the work mentioned

in the defendant's counter-claim and that his disbursements amounted to \$1550.00.

There was no denial of the fact that he had paid that sum and the jury were not warranted in disregarding his testimony.

If the plaintiff was allowed for the work he testified he did at the price he testifies he paid the amount due to the defendant under his agreement was only \$807.75 and the verdict of the jury should not have been for more than this sum. 10

POINT V.

The court erred in refusing to permit the plaintiffs witness Diaz to testify as to the condition of the premises after the defendant had surrendered possession.

Witness was asked this question: "After you went in what did you see in the place?" This 20 was objected to by defendant's counsel and the court overruled the question because it was unnecessary although it was explained that the question was asked in order to show the condition of the premises.

It is unquestioned that the plaintiff had a right to show the condition of the premises in order to show how it had been damaged by the removal of the fixtures. 30

It is respectfully submitted that the judgment should be reversed and a new trial granted.

Respectfully submitted,

EBERHARD & SHERIDAN,
Attorneys of Plaintiff-Appellant.

JOHN H. SHERIDAN,
Of Counsel.

New Jersey Court of Errors and Appeals.

HENRY P. SOULIER AND
JENNIE A. SOULIER,
PLANTIFFS - APPELLANTS.

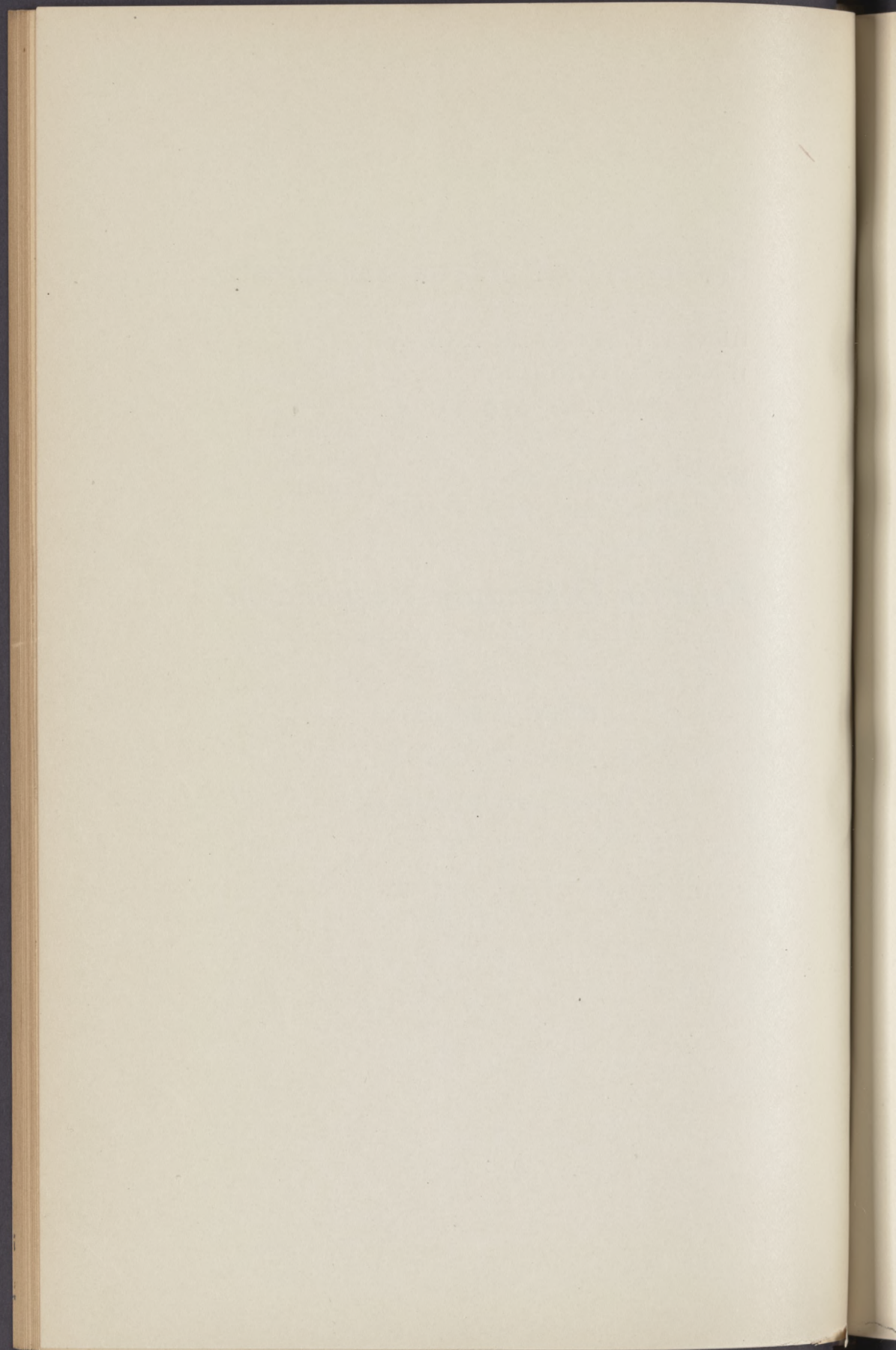
vs.

MARTIN DAAB, JR.,
DEFENDANT - RESPONDENT.

On Appeal
from
Hudson
Circuit
Court.

Brief for Defendant-Respondent

JOHN J. FALLON,
ATTORNEY AND COUNSEL FOR
DEFENDANT - RESPONDENT.



New Jersey Court of Errors and Appeals.

HENRY P. SOULIER AND
JENNIE A. SOULIER,
PLAINTIFFS: APPELLANTS,
vs.
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10

This is an appeal from a judgment entered in the Hudson Circuit Court in favor of the defendant, Martin Daab, Jr., on a counter-claim filed by him against the plaintiffs.

The state of the case shows (Exhibit P. 1, p. 184-187) that on February 7th, 1907, the plaintiffs leased to the defendant certain premises in the City of Hoboken which the defendant was to occupy as a cafe and restaurant, with rathskeller. The lease contained a provision which reads as follows: "And it is hereby further agreed between the parties hereto, that the parties of the first part are to have all fixtures now in said premises, and also that no changes are to be made in the premises without the consent of the parties of the first part."

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The testimony of Henry P. Soulier shows (p. 48) that the defendant Daab did not place any fixtures upon the demised premises until "somewheres along in April."

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The plaintiffs' suit, as appears by the original complaint, was based upon the aforesaid provision of the lease. (See original complaint pp. 2 to 10; see also p. 28 lines 9 to 12), the plaintiffs claiming thereunder that they were entitled to all of the saloon and bar fixtures which the defendant placed upon the demised premises several months, at least, **after the making of the lease.**

At the trial of the case the plaintiffs amended their complaint (case p. 32) and therein claimed that on **January 24th, 1907**, the plaintiffs and defendant entered into an oral agreement whereby the plaintiffs agreed to do certain things therein mentioned. **The lease was made two weeks thereafter.**

10 The plaintiffs during the course of the trial again shifted their grounds of action, and further amended their complaint (case p. 43-44) by claiming that an agreement was made between the parties on or about **April 1st, 1907**, whereby certain work was to be done by the plaintiffs, such as excavating **and making an additional room for the defendant**, and that in consideration thereof the defendant then stated that the bar fixtures, particularly, and all fixtures that were to go into the place, were to be part and parcel of the real estate, and remain there after the expiration of the lease.
20 The plaintiffs did not prove or attempt to prove at the trial of the case that an additional room for the defendant was made by the plaintiffs.

The plaintiffs based their claim upon the fixtures in question **first**, upon the aforesaid provision of the lease of February 7th, 1907; **second**, upon the alleged agreement of January 24th, 1907, **and finally, upon the alleged agreement of April 1st, 1907.**

30 The case was tried by the parties and submitted to the jury by the court, on the alleged agreement of **April 1st, 1907**, and the defendant's counter-claim.

The only parties who testified as to the alleged agreement of April 1st, 1907, were the plaintiff, Henry P. Soulier, and the defendant, Martin Daab, Jr.; plaintiff affirming that there was such an agreement, and the defendant denying same.

40 It is manifest, therefore, that the consideration of the lease and the alleged agreement of January 24th, 1907, was excluded from the case by the plaintiffs setting up and relying upon the alleged agreement of April 1st, 1907.

The plaintiff, Henry P. Soulier, testified (case p. 36, &c.) that the alleged agreement was the result of talks had between him and the defendant, at which no persons were present, (case p. 60), and plaintiffs' case was based solely upon the testimony of said plaintiff, Henry P. Soulier, there being no corroboration thereof. The defendant denied such alleged agreement. Not only did the defendant deny the agreement alleged by the plaintiffs, but by way of counter-claim against the plaintiffs claimed that after the making of the lease in question there was an agreement between himself and the plaintiff Henry P. Soulier that certain changes be made in the demised premises, changes which were talked over between said parties, and that they should divide the cost thereof equally.

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The testimony of John Egan is to the effect (p. 138) that he had nothing at all to do with Mr. Daab; that he had no dealings at all with Mr. Daab; that he told Mr. Soulier he would make waterproof walls, as he agreed to; that he received the sum of \$2,000 from Mr. Daab (p. 139).

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The testimony of Mr. Egan as to the payment to him of the sum of \$2,000 by Mr. Daab is corroborated by the testimony of Grant S. Riggs (p. 171). The plaintiffs offered in evidence the two receipts evidencing the payment of said sum of \$2,000 by Daab to Egan, through Grant S. Riggs, who was the manager for Mr. Soulier at the time (p. 172). The testimony of Martin Daab evidences (case p. 101, &c.) that he and the plaintiff Henry P. Soulier had agreed that Soulier was to make certain alterations, for which he and Daab were each to pay one half. The testimony of John H. Bruning, Secretary and Treasurer of the Fagan Iron Works, evidences that Mr. Daab paid to said company \$380.50 for items mentioned (case p. 170).

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In addition to the aforesaid item of \$2,000 paid to John Egan, and \$380.50 paid to Fagan Iron Works, the defendant's testimony evidences that he paid to Rieger \$445.00 (case p. 108), and to Saxonia Brothers \$330.00. The aforesaid items aggregate \$3,165.50 of which the plaintiffs were to pay one half, to wit, \$1,582.75.

10 The jury returned a verdict in favor of the defendant and against the plaintiffs, on the defendant's counterclaim, for the aforesaid sum of \$1,582.75.

Notwithstanding that the plaintiffs abandoned their alleged agreement of January 24th, 1907, by setting up and relying upon the alleged agreement of April 1st, 1907, nevertheless the court properly excluded the oral testimony offered in behalf of the plaintiffs of conversations and negotiations between the parties leading up to the making of the lease.

POINT 1.

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THE COURT PROPERLY EXCLUDED ORAL TESTIMONY OF CONVERSATIONS AND NEGOTIATIONS BETWEEN THE PLAINTIFFS AND DEFENDANT LEADING UP TO THE MAKING OF THE LEASE.

30 Oral testimony of what was said between the parties during the negotiations for the lease could not have been received by the Court to amplify or alter the provisions of the lease, or to supply terms with respect to which the lease was silent. As was said in *Naumberg v. Young*, 15 Vr. 331-338, "This rule of the common law may be traced back to a remote antiquity. It is a rule founded on the obvious inconvenience and injustice that would result if matters in writing, made by advice and on consideration, and intended finally to embody the entire agreement between the parties, were liable to be controlled by what Lord Coke expressively calls "the uncertain testimony of slippery

memory." And in Grueber Engineering Co. v. Waldron, 42 Vr. 598, the Court says: "That the rule in New Jersey is so well settled that it is axiomatic that prior negotiations and oral testimony of what was said during such negotiations will not be permitted in evidence either to contradict the final written contract or to supply terms with respect to which the writing is silent."

POINT 2.

THE COURT PROPERLY EXCLUDED THE QUESTION ASKED OF THE WITNESS CHARLES DIAZ: "Q. AFTER YOU WENT IN WHAT DID YOU SEE IN THE PLACE?" 10

This question was clearly immaterial and irrelevant. The defendant admitted that he took the fixtures out of the premises, claiming them as his own property, trade fixtures, and it appears (case p. 78) that the Court asked whether said witness was offered as an expert to show damages: "Q" Do you offer him as an expert to show damages?" Mr. EBERHARD: "Not the value of damages but what he says he saw * * * " 20

POINT 3.

THE COURT DID NOT EXCLUDE TESTIMONY OFFERED BY THE PLAINTIFFS TO PROVE THAT THE SUMS ALLEGED TO HAVE BEEN PAID BY THE DEFENDANT ON HIS COUNTER-CLAIM DID NOT PAY FOR ALL THE WORK WHICH HE ALLEGED WAS TO BE DONE AND PAID FOR BY THE DEFENDANT AND PLAINTIFFS IN EQUAL SHARES. 30

A reference to the case (p. 161; also 168-169) will evidence that the plaintiffs proved that the sum of \$700 was paid by the plaintiffs to John Egan, and the sum of \$850.00 was paid by them to the Fagan Iron Works. The trial judge made mention thereof in his charge to the jury (case p. 179-180).

The testimony throughout evidences that the plaintiffs were given ample opportunity to submit such proof as they might wish to offer with respect to the work done, and payments therefor.

The plaintiffs in Point 4 of their brief admit that the plaintiffs were permitted to offer such proof after an amendment to their reply. **But no objection was made in the trial Court on this point, and the same cannot be now questioned**
10 **before this Court.**

The jury doubtless believed the testimony of the defendant and his witnesses and disbelieved the testimony of the plaintiff Henry P. Soulier, which was uncorroborated. It also appears that Soulier did pay one-half the cost of the steam fitting and Daab paid the other half. **The Court in charging the jury fairly pointed out the respective claims of the parties so as to enable the jury to intelligently consider the respective claims.**
20 (case p. 175-183).

POINT 4.

THE VERDICT OF THE JURY WAS NOT EXCESSIVE.

The defendant testified to expenditures made by him which he and the plaintiffs were to share in half and half, to the amount of \$3,165.50. There were other moneys paid out by the plaintiffs, and by the defendant which were aside from the agreement alleged by the defendant.

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POINT 5.

THE VERDICT AND JUDGMENT AGAINST THE PLAINTIFFS ON THE DEFENDANT'S COUNTER-CLAIM WAS NOT ERRONEOUS.

The plaintiffs claim that it was incumbent upon the defendant in order to charge the plaintiff Jennie A. Soulier with the agreement to pay one-half of the cost of the improvements which were
40 referred to by the defendant, to show that she

had personally agreed to same, or that Henry P. Soulier was her agent, or that his action was afterwards ratified by her.

The state of the case evidences, however, that no claim was made by the plaintiffs in the Circuit Court of such alleged error; no objection was made thereto; nor was any motion made for a non-suit in behalf of said plaintiff Jennie A. Soulier.

It is respectfully submitted that the plaintiffs cannot now complain of the alleged error in entering judgment against said plaintiff Jennie A. Soulier, together with her co-plaintiff Henry P. Soulier. But if this Court considers that the judgment below was erroneously entered as against said Jennie A. Soulier, the defendant will submit to a setting aside of the judgment as against said Jennie A. Soulier, and be content with the judgment being affirmed as to the plaintiff Henry P. Soulier alone.

After an examination of the whole case it will clearly appear that there is no injurious error, affecting the substantial rights of the plaintiffs (see Practice Act of 1912, Section 27).

The defendant submits that the judgment of the Circuit Court should be affirmed, with costs.

JOHN J. FALLON,
and counsel
Attorney for Defendant-Respondent.



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