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PLATE 1028 1000, 1001

COMPLAINT.

ATLANTIC COUNTY CIRCUIT COURT.

HARRY KOLMETSKY, <i>Plaintiff,</i> v. BERNARD PELLICOFF, OWNER and builder, <i>Defendant.</i>	}	On Mechanics' Lien. 10 Complaint.
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Plaintiff, Harry Kolmetsky, of the City and County of Atlantic, State of New Jersey, says that:

1. At the time hereafter stated the defendant, 20 Bernard Pellicoff, was the owner of a certain lot or curtilage of land situate in the City and County of Atlantic, State of New Jersey, bounded and described as follows:

BEGINNING in the east line of Maryland Avenue at a distance of 875 feet south of the southerly line of Pacific Avenue; thence (1) eastwardly, parallel with Pacific Avenue 130 feet to the west line of United States Avenue; thence (2) southwardly, along said line of United States Avenue 40 feet; thence (3) westwardly parallel with Pacific Avenue 130 feet to the east line of Maryland Avenue; thence (4) northwardly, along said line of Maryland Avenue 40 feet to the place of beginning. 30

2. That on November 4th, 1924, the said Bernard Pellicoff made a contract in writing with this plaintiff for alterations and additions of and to a certain apartment house on the land above described, and also requested this plaintiff to do certain extra work and supply certain extra material in making said alterations and additions of and to said apartment house.

10 3. Said contract was not filed in the office of the clerk of Atlantic County, in accordance with the statute hereinafter mentioned.

4. Between the 5th day of November, 1924, and the 5th day of November, 1925, plaintiff performed all the labor and supplied all the material for the doing of the work referred to in the contract aforesaid.

20 5. Between said dates the said defendant requested plaintiff to make certain other and further alterations and additions to said premises, a list of which are attached hereto and made a part hereof and marked Schedule A *a* through his architect and agent agreed in writing that the prices for the doing of the said work would be adjusted after the building was completed, a copy of which notice is attached hereto and made a part hereof and marked Schedule B. That plaintiff completed said extra alterations and additions and completed said building but the defendant failed to adjust the prices therefor and failed and refused to refer to arbitration the value of said extra work and material, in accordance with the terms of the said contract above referred to; that Schedule A sets forth the reasonable value of said extra work and material.

30

6. That attached hereto and made a part hereof and marked Schedule C is a statement of the amount due from defendant to plaintiff, together with the credits to which defendant is entitled, and showing the balance justly due to said plaintiff.

7. All the material was sold and delivered and all the labor performed were used in the alterations and additions of and to said apartment house.

10 8. The said Bernard Pellicoff has paid \$13,469.00 on account of said claim, leaving a balance of \$13,557.32 justly due and owing to said plaintiff.

9. The said indebtedness is a lien upon the said lands and building by virtue of the statute entitled "An act to secure to mechanics and others payment for their labor and material in erecting any building" (Revision of 1898) and the supplements thereof and amendments thereto.

20 Plaintiff demands as damages the sum of \$13,557.32 together with interest from November 5th, 1925, and costs of suit.

THOMPSON & HANSTEIN,
Attorneys of Plaintiff.

—
SCHEDULE A.
EXTRAS.

30

Fireproofing steps to basement under main stairs. Installing a complete water closet on first floor, a wash basin with hot & cold water, a new stack 3 stories high, tile floor, a window, a door, and a medicine chest.

Built out a bedroom on the 1st floor complete with radiator heat and a 4-ply roof over it;
 Removed partition in dining room of 1st floor and put in an iron girder to support the upper floors, then built a new plastered partition 2 feet away; also a new casement window complete.
 Removed old chimney & built a new one the height of the building;
 Clothes chest with cedar lining in breakfast room;
 10 1st floor: Straightened a bay window to a square corner;
 1st floor: Casement window in bedroom towards Maryland Avenue;
 Tore out and put in a wooden rough floor and finished with a tile floor in rear of vestibule;
 Built top and bottom railing and balusters for the rear porches & side platforms, also painting;
 Built out porch on front of 3rd floor covered with canvas and finished with railing;
 20 Built stairs from 2nd to 3rd floor with an enclosed room;
 Built a bay-window in front with 2 French doors and window
 Built 2 rooms at side front complete with radiator heat and basin with hot & cold water with a 4-ply tar roof on it;
 Built toilet on 3rd floor complete;
 1st floor—2 partitions, a door & 2 windows;
 New floors on the 3rd floor of the bldg.
 2nd floor—4 partitions and 1 closet complete.
 30 2nd floor rear—1 window;
 2nd floor; a ventilated skylight in bath room;
 Vestibule on 2nd floor;
 1st floor: Built out a cold storage closet through the wall with a roof on it, and suttloed over and a closet for brooms & carpet sweeper:

Made imitation stone blocks in the 2 front corners of the house out of stucco, the height of building;
 Wash-boards out of stucco on all the porches;
 Changed doors from 5 panels to 2 panels on 1st and 2nd floors;
 Moving of boiler & enlarging the main;
 Made 9 rooms out of 8 rooms with basins for hot and cold water in each room;
 Gas outlets in each room on 3rd floor;
 Glass knobs in place of plain knobs; 10
 24 extra electric outlets;
 Three hardwood floors on 1st floor;
 1 brick pier to support side of building;
 Scraping wall paper in all rooms thruout the house;
 Plastered up all cracks and holes when papers was removed from ceiling and walls;
 1st floor: put metal lath on 2 ceilings & plastered over them;
 Tile blocks inserted in stucco in front of house;
 Plastered boiler room and put in a new window; 20
 Changing from white pebbles to colored pebbles in outside stucco;
 Difference of price of three gas ranges;
 " " " " " electric fixtures;
 4 double electric bracket fixtures;
 4 corner ceiling fixtures:
 5 ceiling fixtures;
 Relocation of windows, doors and partitions, and closing up old openings of same.
 Total cost \$11,474.56
 10% for supervision of extra work 1,138.76 30
 \$12,613.32

CREDITS.

2 30 gallon boilers & 2 gas heaters	\$40.00	
12 French bevelled plate glass for living room windows	12.00	
Allowance for 2 feet of flooring for the back porches, 500 square feet of lumber	35.00	87.00
		<hr/>
Balance due		\$12,526.32

10

SCHEDULE B.

624 Guarantee Trust Co.
Atlantic City, N. J.
February 27, 1925.

Mr. Harry Kolmetsky:

This is to authorize you to proceed with the extra work at job 172 States Avenue, Atlantic City, N. J. Prices to be adjusted after building is completed. This notice is given in compliance with the contract made between you and Mr. B. Pellicoff, owner.

20

Respectfully yours,
Benjamin Brown,
Architect.

SCHEDULE C.

30 To performing labor and furnishing material as per agreed price in contract dated November 5th, 1924 between Bernard Pellicoff and Harry Kolmetsky.	\$14,500.00
To balance due on extras	12,526.32
	<hr/>
Total	\$27,026.32

CREDIT

Amount paid by cash	13,469.00
	<hr/>
Balance due Claimant	\$13,557.32

Received Mar. 4, 1926. Sheriff.

I hereby deputize and appoint Charles Walters to serve the within writ. Witness my hand and seal this 4 day of March, 1926.

HOWARD R. CLOUD, (L. S.) 10
Sheriff of Atlantic Co.

Duly served within summons and complaint March 5th, 1926, on Bernard Pellicoff by leaving a copy at his residence, 172 States Avenue, Atlantic City, Atlantic County, New Jersey, with a member of his family above the age of fourteen years, to wit, his wife.

20

HOWARD R. CLOUD,
Sheriff.
By CHARLES WALTERS,
Special Deputy Sheriff.

Sheriff's fees \$5.22.
Filed March 9, 1926, at 9 A. M.
WILLIAM A. BLAIR,
Clerk.

30

ANSWER.

ATLANTIC COUNTY CIRCUIT COURT.

10	HARRY KOLMETSKY, Plaintiff,	} Action at Law. On Mechanics Lien Claim. Answer.
v.		
BERNARD PELLICOFF, OWNER and builder,	Defendant.	

Defendant, Bernard Pellicoff, of Atlantic City, Atlantic County, New Jersey, says that:

20

1. He admits paragraph one.
2. He admits paragraph two.
3. He admits paragraph three.
4. He admits paragraph four.

30

5. He admits requesting plaintiff to make certain alterations and additions not comprehended by said contract, as evidenced by the notice attached to the complaint and marked Schedule B, but denies Schedule A, attached to the complaint, sets forth a list of said extra alterations and additions, and also denies, that the price of extra alterations, and additions was not adjusted; the price and value of said

extra alterations and additions having been fully paid by defendant to plaintiff. He further denies that Schedule A sets forth the reasonable value of said extra work and material.

6. He denies paragraph six.

7. He denies paragraph seven.

8. He denies that he paid but \$13,469.00; the amount paid to plaintiff is \$15,333.50; he further denies there is any balance due and owing to plaintiff by defendant.

9. He denies paragraph nine.

FIRST DEFENSE.

1. Said building and land are not nor is either of them, liable to said alleged debt. 20

SECOND DEFENSE.

1. The contract referred to in the complaint included certain work and labor and the furnishing of certain materials in and about the building erected on the lands described in the complaint and which were included in the price \$14,500 for which plaintiff agreed with defendant to fully perform all that was required under the terms and provisions of said contract. 30

2. After the making and execution of said contract it was mutually agreed by and between plain-

tiff and defendant that the work and labor to be performed and the materials to be furnished in and about the alterations and additions to said basement should be omitted and a credit was then and there agreed to in the sum of \$2000 by reason of said omissions and the contract price was thereupon reduced to \$12,500.

3. Defendant has paid to plaintiff the whole of said \$12,500.

THIRD DEFENSE.

1. Plaintiff at the request of this defendant, did certain extra work on the building mentioned and described in the complaint, the fair price and value of which is \$2840 upon which defendant is entitled to a credit of \$250 for the following items stipulated to be furnished by plaintiff and defendant: 2—30 gallon boilers and 2 gas heaters \$100; 12 French beveled plate glass for living room windows, \$50; allowance for labor and material by reason of lessening width of back porches, 2 feet, \$100; making the price and value of said extra work, \$2590.

2. Defendant has paid to plaintiff the whole of said \$2590. By way of counter-claiming against the plaintiff the defendant says that:

1. He repeats all the statements in the foregoing answer.

2. The contract price agreed upon between plaintiff and defendant is the sum of \$12,500.

3. The fair price and value of said extra work, after the allowance to defendant the sum of \$250 the value of said labor and materials omitted by consent of plaintiff and defendant is \$2590.

4. The total amount of said contract price and the value of said extra work is \$15,090.

5. The amount paid plaintiff by defendant is \$15,333.50.

6. Defendant has overpaid plaintiff \$243.50.

The defendant counter-claims \$243.50 damages.

C. C. SHINN,
Attorney for Defendant.

Filed Mar. 31, 1926, at 9 A. M.

WM. A. BLAIR,
Clerk.

REPLY AND ANSWER TO COUNTER-CLAIM.

ATLANTIC COUNTY CIRCUIT COURT.

HARRY KOLMETSKY, Plaintiff, }
v. } Action at Law.
BERNARD PELLICOFF, Defendant. } Reply and Answer to Counter-Claim. 30

The plaintiff replying to defendant's answer says that he denies all the allegations contained in said answer.

ANSWER TO COUNTER-CLAIM.

Plaintiff answering defendant's counter-claim says that he denies all the allegations of the same.

AFFIRMATIVE DEFENSE.

10 Plaintiff, Harry Kolmetsky, says that any payment made, as alleged in defendant's counter-claim was a voluntary payment.

THOMPSON & HANSTEIN,
Attorneys of Plaintiff.

Filed April 7, 1926, at 9 A. M.

WM. A. BLAIR,
Clerk.

RULE FOR JUDGMENT.

ATLANTIC COUNTY CIRCUIT COURT.

HARRY KOLMETSKY,

Plaintiff,

v.

30 BERNARD PELLICOFF,

Defendant.)

On Mechanics Lien.
Rule for Judgment.

This action was tried before Judge William H. Smathers, with a jury at the Atlantic County Circuit Court on November 2nd, 3rd and 4th, 1926.

The Court, upon motion of defendant, directed the jury to bring in a verdict of no cause of action against the defendant as owner and directed the jury to bring in a verdict of no cause of action by the defendant against the plaintiff upon the defendant's counter-claim and submitted to the jury for its determination, the question of the liability of the defendant, as builder, and the jury returned their verdict as follows: Judgment for the plaintiff and against the defendant, generally in the sum of 10 \$9000.00.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of \$9000.00 and his costs, which are taxed at sum of \$51.50.

WM. H. SMATHERS,
Judge.

Filed and entered Nov. 8, 1926, at 9 A. M.

WM. A. BLAIR,
Clerk.

JUDGMENT.

ATLANTIC COUNTY CIRCUIT COURT.
October Term, 1926.

10	HARRY KOLMETSKY, <i>Plaintiff,</i>	}	Action at Law. On Verdict.
v.	BERNARD PELLICOFF, <i>Defendant.</i>		On Mechanics Lien. Thompson & Han- stein, Attys.

Judgment entered Nov. 8, 1926, at 9 A. M.

	Damages	\$9000.00
20	Costs	51.50

	Total	\$9051.50
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This action was tried before Judge Wm. H. Smathers, with a jury on November 2nd, 3rd and 4th, 1926.

30 The Court upon motion of defendant directed the jury to bring in a verdict of no cause of action against the defendant as owner and directed the jury to bring in a verdict of no cause of action by the defendant against the plaintiff upon the defendant's counter-claim, and submitted to the jury for its determination the question of the liability of the defendant as builder and the jury returned their verdict in favor of the plaintiff and against the defendant, generally.

Whereupon it is ordered that the plaintiff, Harry

Kolmetzky, recover of the defendant, Bernard Pellicoff, the sum of nine thousand dollars damages and fifty-one dollars and fifty cents costs of suit.

WM. A. BLAIR,
Clerk.

County Circuit Judgment Book No. 14, page 507.

NOTICE AND GROUNDS OF APPEAL. 10

ATLANTIC COUNTY CIRCUIT COURT.

HARRY KOLMETZKY, <i>Plaintiff,</i>	}	Action at Law. Notice and Grounds of Appeal.	20
v. BERNARD PELLICOFF, <i>Defendant.</i>			

To the within named plaintiff:

Notice that the defendant appeals to the New Jersey Supreme Court from the judgment entered in this cause, upon the following grounds:

1. Because the Court refused to non-suit the 30 plaintiff.
2. Because the Court refused to direct a verdict in favor of the defendant.
3. Because the Court refused to limit the jury to finding a general verdict against the defendant.

4. Because the Court permitted the jury to find a verdict in favor of the plaintiff if they found there was a new and independent agreement entered into between the plaintiff and the defendant, notwithstanding there was no evidence to support such independent agreement.

5. Because the Court refused to charge the jury that they must allow the defendant a credit of \$738.

10

6. Because the Court told the jury that they must ignore the original agreement on which the action was based and to confine their consideration to an alleged independent agreement.

7. Because the Court after having told the jury that their consideration must be limited to an independent contract, thereafter referred to an arbitration of liens and adjustments by the architect when

20

8. Because the Court permitted the plaintiff over objection to answer this question:

“Do you know how much extra lumber you bought to use in this extra work?”

9. Because the Court permitted witness Kolmetzky to refresh his recollection by looking at a book that he did not make nor keep in order to testify

30

10. Because the Court permitted witness Kolmetzky to answer this question:

“Now, where you do extra work and the price is to be adjusted after the contract is to be completed, what is the usual allowance or arrangement as to profit?”

This was an improper method of proving the amount due and there was no basis laid for it in the complaint.

11. Because the Court permitted to be introduced bills for extras which are not the bills of plaintiff but third parties.

12. Because the Court permitted the plaintiff to offer in evidence bill of particulars without proof of the bill or the particulars.

COLE & COLE,
Attorneys of Defendant.

Service acknowledged this 24th day of June, 1927.
THOMPSON & HANSTEIN,
Attorneys of Plaintiff.

20

Filed June 27, 1927, at 9 A. M.

WM. A. BLAIR,
Clerk.

CERTIFICATION.

(Filed June 29, 1927.)

STATE OF NEW JERSEY.
COUNTY OF ATLANTIC.

30

I, William A. Blair, clerk of the County of Atlantic, and also clerk of the Circuit, etc., Court holden therein, said court being a court of record, having a common seal, do hereby certify, that the

foregoing is a true copy of the complaint, answer, reply and answer to counter-claim, rule for judgment, judgment record and notice and grounds of appeal in the case of Harry Kolmetzky, plaintiff v. Bernard Pellicoff, defendant, as the same are filed in my said office.

In testimony whereof, I have hereunto set my hand and affixed my official seal at May's Landing, N. J., this 28th day of June, A. D. 1927.

10 (Seal)

Wm. A. BLAIR,
Clerk.

20

30

TESTIMONY.

ATLANTIC COUNTY CIRCUIT COURT.

HARRY KOLMETZKY,	}	Action at Law.	10
<i>Plaintiff,</i>			
v.			
BERNARD PELLICOFF,	}		
<i>Defendant.</i>			

Atlantic City, N. J.,
November 1, 1926.

20

APPEARANCES:

MESSRS. THOMPSON & HANSTEIN, for plaintiff.
C. C. SHINN, Esq., for defendant.
CLARENCE COLE, Esq., of counsel for defendant.

(The above entitled case was tried November 1, 1926, before HON. WILLIAM H. SMATHERS, Judge and a jury.) 30

(Testimony of the plaintiff, Harry Kolmetzky.)

HARRY KOLMETZKY, the plaintiff, called as a witness in his own behalf, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hanstein:

10 Q. Mr. Kolmetzky, you are the plaintiff in this suit, are you not?

A. Yes, sir.

Q. And where do you live?

A. Weymouth Apartment.

Q. In Atlantic City?

A. Atlantic City.

Q. And what is your business?

A. Contracting and building.

Q. How long have you been a contractor?

20 A. Eighteen or sixteen years; about eighteen or sixteen.

Q. Do you know Mr. Pellicoff, the defendant?

A. Yes.

Q. You and he entered into this agreement marked P2, did you not?

A. Yes.

Q. Where was the property located on which you were to do the work provided for in that agreement?

A. 172 States Avenue.

30 Q. Did you start in to do the work also by this contract?

A. Yes, sir.

Q. Now, just give us—the jury is not familiar with that property. Will you state what character of building was on there at the time you started to do your work?

A. It was a two and a half story frame building and a brick basement, and a pitched roof like the garages. You know, those old style roofs.

Q. Two and a half story?

A. Two and a half story and a cellar—basement; basement of brick; but the two and a half stories are frame building.

Q. Now, if you had followed these plans which have been introduced in evidence to completion, what kind of a building would it have been then? Would it have been a cottage? 10

A. No; two-family house and about eight rooms on the third floor.

Q. What was the building made of before, frame?

A. Frame.

Q. Well, now, did you start to work under this contract?

A. Yes.

Q. When did you start to work, do you recall?

A. About two days after I signed the contract; as soon as I got the permit out. 20

Q. Now, after you had started that work did Mr. Pellicoff have any talk with you about doing some extra work?

A. No, not the first day.

Q. Well, I don't mean the first day. After you had started—

A. Yes.

Q. Did he have some conversation with you?

A. He did. 30

Q. How soon after you had started to work did he speak to you about changing these plans and specifications?

A. When I had the third floor—the third floor, half story, the roof off, and framed the four sides and put the rough boards on it, he came around and

said that he had his wife there after I finished the work and she said it does not look like a house; it looks like a barn; she wants to have more windows on the side near Pacific Avenue, and she wants bay windows in the front. That is when he told me he wants to make them changes.

Q. Was that the first alteration that he ordered?

A. That was the first alteration.

10 Q. Now, how much of the work that you had done did you have to change in order to make these alterations?

A. Well, all the front, the two stories, second and third floor was completed according to contract, rough, not finished completely with the stucco, only the rough boards and the studs. I did tore up the new work—the work according to the agreement and made it according to the way he wanted with the extras.

20 Q. Now, I have some photographs here. I may be able to make this a little clearer. Now, is this a picture of his house?

A. Yes, sir.

Q. What view of the house is that?

A. This is the side on Pacific Avenue.

Q. Is that States Avenue?

A. That is States and Pacific Avenue side.

Q. That is looking at it—

A. The front and side to Pacific Avenue.

30 Mr. Hanstein: I offer that in evidence.

Mr. Cole: Was that taken before or after?

The Witness: That is after, when it is done, the way it is now.

Mr. Cole: As is?

The Witness: The way it is.

(The photograph offered is received in evidence and marked as an exhibit for the plaintiff P3.)

Mr. Hanstein: I will show these pictures to the jury in just a moment.

10 Q. Now, what view is that?

A. This is the States Avenue and the Ocean side.

Q. That is looking at it from the ocean?

A. Yes.

Mr. Hanstein: I offer that.

(The paper offered is received in evidence and marked as an exhibit for the plaintiff P4.)

20 Q. And it now is?

A. Yes.

Q. What view is that?

A. This is the front, States Avenue.

Q. Showing States Avenue front?

A. Yes.

Mr. Hanstein: I offer that.

(The paper offered is received in evidence and marked as an exhibit for the plaintiff P5.) 30

Q. Now, did you have a talk with Mr. Pellicoff in regards to the price of these alterations?

A. Well, I did say to Pellicoff, "Mr. Pellicoff, our agreement calls that any extra work to be done should be a price on it and an order—"

Mr. Cole: If the purpose is to establish any waiver I object on the ground there is no waiver alleged here. If it is not for the purpose of establishing a waiver, I object to the question as having the appearance of an attempt to show a waiver of the requirements of the contract.

Mr. Hanstein: Go on, complete your answer.

10 A. (Continuing.) And I said, "If it would be on extra work I could give you a price right now, but to tear out the work I done when I don't know what lumber would be waste, and what I could use, and the labor it was done already—and tear it out again and do it over again, it is impossible for me to give you a price, which it was agreed on it that the price should be made after the whole job was completed, extras and according to contract.

20 Q. Who made the agreement that the price would be fixed after the job was completed?

A. Mr. Brown, the architect, and Mr. Pellicoff was there.

Q. What did he say about paying you the price of these extras?

A. Well, he said that when the whole job was completed it should be adjusted by Mr. Brown, reasonable price, and he will pay when the job is all done.

Q. Well, what did he say he would pay you?

30 A. Well, he didn't say any amount, but he said a reasonable price.

Q. He said he would pay you the reasonable price?

A. Reasonable price, what it is worth.

Q. All right. Now, then, will you state what changes you made in these plans and specifications as they went along? But we better put these plans

up. Will that help you any if we put them on this board?

A. No.

Q. Well, the jury has to see them, you know.

A. All right. Put them on the board.

Q. Which plan do you want to put up first? Is there room there for both?

A. (The plans referred to are placed upon the board provided for the purpose.)

Q. Maybe we can use this, (referring to an easel) 10 will that help you any? Now, Mr. Kolmetzky, you said that you had certain of this work done when Mr. Pellicoff came to you and asked you to do some extra work?

A. Yes.

Q. Now, show us on the plans what it is that you had done that you had to take off?

A. This is the third story.

Mr. Hanstein: Can all of the jurors see that? 20 Maybe we can raise this up. It looks like it is going to be better.

The Witness. This is the front which my agreement calls for to do, and there was a pitched roof here like that. This was all torn off and I framed that last story square, and had the windows in. Then when Pellicoff came around this side—the Pacific Avenue side was all finished, the third story. Mr. Pellicoff came around to make me them changes. I 30 tore all this new work out, two stories, the third and the second, and put in bay windows, and when I had the bay windows in he comes again and makes me put in a balcony in between. I tore out again the new work and put the balcony in, and this here shows a glassed porch for the step, enclosed, which it is a

finished room, to make a finished room completely, plaster and so forth.

Q. Let us not go over it too fast because this may be hard for the jury to follow. Now, how high was this building on this plan when you started to work?

A. Two stories and a half. The pitch roof—

Q. This red line that you have drawn?

A. That was the old building, that way.

10 Q. That shows the line of the old building?

A. Yes.

Q. You did what?

A. My contract—I took off the top of the old building and stretched out to make a straight floor on the third floor, which I done that, and when I had all this done then he came around to make me the change.

Q. This business of building it up and putting this roof on was all part of the—

20 A. Of the contract.

Q. Of the contract?

A. Yes, sir.

Q. All right. Now, you had all that roughed in, you say?

A. Here the joists. It was a flat roof, not the way this is. When I made the contract it was arranged to have a flat roof, not a pitched roof like this here. This plan either does not show the way it should show when I signed the contract. It was understood

30 between us that there should be a flat roof—

Mr. Cole: Just a moment. Is that an attempt to change this written contract?

Mr. Hanstein: It is apparently a variance from the plans. All right, if you want that out it is all right.

Mr. Cole: I do not want the contract change.

Mr. Hanstein: Well, I don't think the contract changes the building at all.

Mr. Cole: I thought he said it did.

Mr. Hanstein: The contract does not show the plans of the building. This is a plan that he said he has to work from which the parties agreed should 10 be—

The Witness: A flat roof.

Mr. Cole: But the contract, plans and specifications are all one. How can he vary the plans any more than he could vary the contract by oral testimony?

Mr. Hanstein: I grant you that is a legal rule on 20 it. I do not know just what the effect of this is. I do not think it will matter.

Mr. Cole: Perhaps not. I don't know.

Q. You say that you had built up from—

A. From the second story.

Q. From the second story straight across?

A. Yes.

Q. And that was all new construction?

A. That was all new construction. 30

Q. And had you erected the framework for this pitched roof?

A. No, it was supposed to be a flat roof and the joists were in.

Q. So that you didn't complete this at all?

A. No, I wasn't supposed to build that.

Q. After you had all this framed in, did you have it weather-boarded?

A. No, it was supposed to be stuccoed, but I had the two-by-fours and the rough boards.

Q. You had the rough boards on the outside?

A. Yes, all close in.

Q. What did you have to do when Mr. Pellicoff came along and asked you to make a change?

10 A. Tore all this new work out and put in different lay-out and different material. Couldn't use all that material because it was all broken to pieces.

Q. Did you have to do away with all that material?

A. Yes.

Q. Now, the photograph shows a bay window up there on the third floor, does it not?

A. Second and third.

Q. Well, have you done any work on the second floor?

20 A. Yes. I think this was all done, this here floor; that was done according as it is here now. When he came to tell me to do the extra work, was torn out these two floors entirely and made the way it is there in the pictures now.

Q. Had you built new work on this second floor?

A. Yes. All this wall was new, from here on to the third floor.

Q. You had built an entirely new front wall for two stories?

30 A. Two stories.

Q. And in doing of that you had put up the up-rights?

A. Yes, sir, rough boards.

Q. And rough boards across?

A. Yes.

Q. Had you put in your windows?

A. Window frames.

Q. Window frames?

A. No windows.

Q. Then what change did you make according to Mr. Pellicoff's instructions? How did you change this front as you had then built it?

A. I tore all the front out, two stories, and I re-arranged the building.

Q. Did you tear down—all this new work, because the bay windows start right from the—from corner 40 to corner; from corner to corner. It shows there. Point on the photograph to the bay windows that you built.

A. Well, this is the bay windows from here to there. This is the sides from the building.

Q. Is this the sides of those bay windows?

A. Yes. When I had the bay windows done already, but not all completed, Mr. Pellicoff comes along again and says Mrs. Pellicoff told him she would like to have the balcony, which there is a 20 balcony built up above, and I said to Mr. Pellicoff, "Why don't you make up your mind and tell me what you want to do, because labor and material is very high, and had to pay foreman. They run into too much money." At any rate he told me what to do and I done it.

Q. Now, does this show a porch?

A. Railing, yes.

Q. Shows the porch railing?

A. Yes. This is the extra, see? That porch there. 30

Q. That is an extra?

A. Yes.

Q. Now, what about the front of this building? How did you erect that differently from the plans and specifications?

A. Then he comes on again and he says that it

don't look good to have the full width on the first floor and not on the second and third, which would make more appearance, which would make more appearance on the building to have it straight up, and he made me to build one room here which shows—this is the room where the black spot is, that one there, and I had four-ply roof on that, and the corners which the drawing will show all finished, and it was nothing said. That was all satisfactory.

10 Come then—later Mr. Pellicoff come again, an Mr. Pellicoff said, "Now, Kolmetzky, that doesn't look just good. We will have to have all the way up the building straight," and they want to have another room on top of this one. I said to them again, "Why don't you tell me what to do at one time, the second and the third, which would save the new roofing and the cornice and all that labor and material?" Well, he said, "Anyway, that has to be done. It will make more appearance on the front of the house." I done it. I had the roofers there and that was an extra roof. I had with the roofer an agreement according with the plans and specifications. He charged me extra for that and when he came and tore it out he charged me another roof extra on the third floor story. So all this here is new part.

Q. Just a minute. Let me see if I understand this. On the second floor—this is the second floor?

A. Yes.

30 Q. This room on the second floor you had completed in accordance with this plan; is that correct?

A. Yes.

Q. And how much of that work that you had completed in working under the plan did you have to tear out to build it up a second story?

A. Well, you see, Mr. Hanstein, this room was

set back about sixteen feet. That was the enclosure for the steps to go up. This here has nothing to do with the new room I built, because there was room enough to build another new room. I have placed where that shows here. That sets back about sixty foot from the building. That is there. I am not charging extra for that room.

Q. Can you show us that room on the photograph?

A. Yes, there is three windows in that room and two windows in the front, which it takes its full 10 eight or nine feet by sixteen feet in depth. That is the one room, right to here.

Q. Show us this room on the plan.

A. There is where the room would show? See? And this is where I built that room. This here shows the side elevation for those steps to go up.

Q. This part is back?

A. Yes, it sets back and there was room here to build another room, so there is where the new room come? See? 20

Q. You built this room out as shown here?

A. As shown here up to here.

Q. That is an extra?

A. An extra, yes.

Q. How far back does that room go?

A. About sixteen feet, same length as the old room there, same length of this here room.

Q. So you built a new room out on the front?

A. That is thirteen feet.

Q. You built a new room out on the front sixteen 30 feet deep?

A. Yes.

Q. And how wide?

A. Nine feet.

Q. Sixteen by nine?

A. Yes.

Q. I wonder if this jury can see all this.

A. Here it is fourteen—fourteen and a half feet.

Q. Suppose you get around here so these folks will see it better. Now, how much of the work that you had done pursuant to your contract, did you have to tear out in order to build this?

A. Well, this old wall I broke that out, and I had the bay window there and I took the bay window out to make larger the room, and build the room there.

10 Q. Was this width of this bay window some work that you did—

A. Yes, rough.

Q. Under the contract?

A. Yes.

Q. You had that in rough?

A. Yes.

Q. And you say you had to take that down?

A. I had to take that down and close this apartment to make a door opening here, nearer to the
20 wall.

Q. Then you built this up two stories?

A. I built up one story first there. They didn't want to have two stories, and it was agreed on one story; and I had four-ply roofing down and the cornice iron finished.

Q. Show us on the photograph where that stopped.

A. Right here, after we got the two rooms as high as the balcony.

A. And you had already put roofing on?

30 A. I had already had roofing put on, and the building was finished up, the galvanized iron molding.

Q. And you say Mr. Pellicoff wanted that changed?

A. Mr. Pellicoff came around and he said he was over with his wife again and his daughter, I suppose, and they talked over and said they want to have

another room on the top of this one from the front all the way up straight. So then I tore the new part of the work off and added another room on the top of that room.

Q. Now, can you show me on the plan here about how that is changed—putting in the bay window—changed on that plan?

A. (Witness marking the plan in question.) There is a French door over there, a French door here, and another French door on that side, and two double
10 windows, which it shows there on the plan. That is two stories high.

Q. Now, what other changes did you make in these plans under Mr. Kolmetzky's instructions?

A. Mr. Pellicoff's.

Q. Mr. Pellicoff's?

A. Now, there is the first floor here which it shows a closet for clothes, and he told me he might want this room separately from that so they would have a lavatory and wash stand in there. So I did build
20 that lavatory here and that closet I did make here. That is according to agreement. It doesn't make any difference where the closet was supposed to be built. It shows how this gives him a closet and a closet here, and here I did open a new window for the ventilation which the law requires, and the full equipment of the toilet, wash stand and radiator and tile floor, and a step three story and a half high to the building.

Q. Now, this closet that you say you built here, 30 you didn't charge for that?

A. No.

Q. That was in the contract?

A. That was in the contract, but it doesn't make any difference. We did that.

Q. But this toilet and all the plumbing and tile was extra?

A. This toilet and all the plumbing and tile was extra, when I had the toilet put once in the closet which Mr. Pellicoff showed me how to do it, then later on when it was all plastered and complete he came around and made me another change, which I tore up one side—one part of that partition and moved that a little further out or in. I couldn't remember that. After I had done it the way he wanted he done it over again.

10 Q. This is the first floor plan. This is the second floor plan. This is the third floor plan, isn't it?

A. Yes, sir.

Q. Now, you show us what other changes you made on that first floor plan.

A. On the first floor plan it shows where the dining room and a bedroom and a kitchen and two more bedrooms. Now, they didn't want no bedroom near the kitchen, and they wanted to have a breakfast room up here, which we had maybe ten or fifteen
20 times changed the partitions around before they made up their minds what they want, and they did make a breakfast room in here—here it is—and that old partition was supporting a three story building or two and a half story building they removed that and we put an iron girder in here, the partition is there now, and they made an additional room here.

Q. Now, don't give us too much at once.

A. I will make the marks and I will explain. You see that old partition was supposed to be there. We
30 took that partition out to make that breakfast room in the kitchen, which I did put an iron girder to support the building and build up a new partition in here and another partition in the center, that is between the dining room and that little bay window, another additional bedroom, because this bedroom here was taken up for the breakfast room, so they

made the bedroom here which I tore this old part out—I wasn't supposed to do that—and I extended about five or six feet more of new wall and new roof on it and made all complete, and I think it is one or two closets in there, one—I am not sure if it is not two. So this is an additional new room here and the partition was removed and this here cornice—

Q. Let us go over this much of it. Wait. This plan shows a bedroom?

A. Yes. You see all these white marks? This is
10 all new work. That was supposed to be the new work. But this old mark is supposed to remain as it was—the old partitions there, but by changing this, why, I did remove all the old partition and put new ones instead.

Q. Were you supposed under your contract to remove that?

A. Yes.

Q. You were supposed to remove that partition?

A. Yes.

Q. Now, where were you supposed to build a new partition in connection with that bedroom?
20

A. Take that partition out. There is the old partition and it stays there. This much shows the stair, and this here remains. That partition was supposed to be up and this is a new partition. Now, we put the new partition in here. This was removed. See? And by removing that partition in this new room was too small, and the dining room too large, and I took the old partition out and put an iron girder and
30 built up a new partition, and the dining room was too large the other way, so they squeezed up—

Q. Let me get this straight. How many partitions across that way were you supposed to build under this plan?

A. Only one, that one.

Q. That one?

A. Yes.

Q. Did you build that?

A. I built three in there. I did make this one first, but then by changing around I tore it out again and made partition to suit the way they wanted.

Q. Did you make a partition?

A. Yes.

Q. Did they leave that one stay?

10 A. Yes, afterward they let it stay, yes.

Q. Did you make one here?

A. Yes.

Q. Did they let that stay?

A. Yes, with all the extra.

Q. You built two extra partitions?

A. Yes, sir.

Q. In building those extra partitions did you tear down an old partition?

A. Yes, sir.

20 Q. Did you have to tear down—

A. Only one, and I tore out two or three.

Q. You built some new ones that you tore down?

A. Yes.

Q. How many new ones did you build that you tore down?

A. Three. I was supposed to build one, and tear one out.

Q. I am talking about in connection with this room.

30 A. You see, by making a larger room we tore the old partition out that was supposed to stay there and built another partition to make the rear ends of the room.

Q. And you say you put in a steel girder?

A. Yes, steel girder right in there to support the three-story building. That was the main partition to hold the building.

Q. How far across did you make that steel girder?

A. The full width of the building, from here to the next wall, twenty-four or twenty feet deep.

Q. And that was not called for by the plan?

A. No.

Q. Now, then, when you came over here were you to leave this outside wall remain?

A. Yes, remain as it is, of course.

Q. And what did you do in fact about it?

A. Well, by making two rooms when the dining 10 room was too small, so I did took about five or six feet more to straighten up and tore this out and put a partition in between to make two rooms out of one.

Q. Now, then, this partition that you built was an extra?

A. This was an extra.

Q. Removing this was an extra?

A. Yes, was an extra.

Q. Erecting this was an extra?

A. Erecting that was an extra, and the roof on it 20 and the floors complete. It was a complete room, and new floor to make this here which I couldn't leave the old one. That was the new floor, and new joists and new wall, and plastered the whole four sides and ceiling, and a new roof on it. You see, the roof was all up to here. When I tore this out there was no roof on it.

Q. Can you show us that roof on the photograph?

A. Right there. There is where those three walls are. That is the extension of this drainage. There 30 is where the other rooms were.

Q. So you built that room there which if it had not been for the extra you would not have been obliged to build?

A. No.

Q. All right.

A. Then we took this corner out to have a straight roof, so that was extra—taking this out and having it straight.

Q. Did that require doing any extra work inside of that room?

A. Sure, material and labor.

Q. How much of this room were you supposed to do under your contract?

A. Well, I was putting in a new partition and
10 closet. The closet is not there now, but it is some-
where else, but it does not make any difference. I
put two or three closets in there and I straightened
this room out and all that old ceiling was so bad
when they started to take the paper off, it became
damp, so he told me to put in good new plaster and
which I did. I put new chicken wire around and
plaster over.

Q. Was that extra?

A. Extra.

20 Q. How about this room? What were you sup-
posed to do in connection with that room?

A. This room is only one closet and this one parti-
tion I was supposed to put in for two rooms, and
there was an old chimney here. There is the old
mark. He make me to remove the chimney and
build a new chimney in here. I tore all that old
chimney out and fix up the floor and walls and ceil-
ings and roof and I built a new chimney in this here
side of the building.

30 Q. Were you supposed to do anything about that
chimney under the contract?

A. No, it was supposed to remain there.

Q. It was supposed to remain there?

A. Yes.

Q. What did that chimney go to?

A. For the heating plant.

Q. For the heater? And you changed that?

A. Yes.

Q. To over here, as an extra, is that it?

A. Yes.

Q. Did you make any change—

A. One minute. By changing the chimney from
the middle to the side of the house we did remove
the heating system, the boiler, because the boiler has
to be near a chimney. So on account of moving the
chimney we removed the boiler, too, you see, and 10
reinstalled the pipe in there.

Q. How about this room? Did you do anything
about that?

A. This room is only one window there, because
of the partition I put in there. I haven't got the rear
view.

Q. You haven't got the rear view. You put that
window in as an extra?

A. Yes.

Q. Now, did you complete the kitchen as the plans 20
call for?

A. Well, I did make once the way the plan called
for; but the kitchen and the breakfast room were
changed about half a dozen times.

Q. Now, tell us how it is now.

A. Now, the kitchen (witness marks with red pen-
cil upon the blue print on the board.)

Q. You will have to explain the marks.

A. Anyway, it shows the plumbing on that side,
and the plumbing comes here now on this side. 30

Q. When you say the plumbing, what do you refer
to?

A. The combination sink and wash tray and the
gas range. It was supposed to be on that side there
and Mrs. Pellicoff and Mr. Pellicoff said on this
side was more suited to have it. So we put it over

here and the kitchen "dresser" here, right where the wash stand was supposed to be, and the little closets for brooms and carpet sweeper and all different things—so that closet was put in there and this here when the house was all stuccoed and plastered and painted some of the wood work, Mr. Pellicoff comes with his wife and daughter and said there is no closet in the kitchen for cold storage, for food and different things, and they looked around

10 the place there to make a closet, and couldn't find, and they decided to open up the wall which it was completely finished, absolutely stuccoed, even the paper hanger—the paper hanger was ready in the house to paper it, and I did break through that wall and build a closet, and measured up this, stuck a roof on it. That is where the closet shows there.

Q. Now, these white lines show the work that you were supposed to do?

A. Yes, and I done it and changed over again.

20 That partition is not here. It is about a foot away because it makes smaller the bathroom. Made more room for the kitchen.

Q. Now, had you built this?

A. That partition was up.

Q. How far was that partition completed?

A. It was ready for plastering.

Q. You had it lathed?

A. Lathed and electric lighting, which the electric lighting was moved, too. You know, by removing

30 the partition, we did move the wires, too.

Q. Then you moved it over here?

A. Yes.

Q. And you had to do all that work over again?

A. Yes, and this here door that shows it is about three foot away. Before we had it here and then they come around and said there is more room for an

ice box, or table, and they made me put the door over there. They changed around about half dozen times, in each room worse. Windows and doors were laying out, which will be the best way for them to put the furniture and different things in.

Q. Did you charge for putting that door over there as an extra?

A. I did, because I done it according to the agreement first.

Q. You had already completed it?

A. I had already done that place with the door and window there, and they came around and made me to put the window on this side and the door over there.

Q. And you had already completed that work?

A. Yes, and the door does not show there now. It shows but it is away from there, and that window is here.

Q. Now, when you changed these partitions in here around the breakfast room, which you say you changed a number of times, how much of the work on those partitions had been done when you made your change?

A. It was ready for plastering. It was lathed.

Q. It was lathed?

A. Yes, sir.

Q. How many times have you gotten those partitions ready for plastering when they were changed?

A. I couldn't tell you that. Many times. I couldn't tell you exactly.

Q. Had it reached that stage of completion every time they wanted it changed?

A. No. Some of the parts were completed, some of the parts weren't.

Q. Sometimes you had not gotten as far as the plaster?

A. Yes.

Q. Now, have you pointed out all the changes that have been made on this first floor for which you are making claim as extras?

10 A. The enclosure—I don't know how you call it, the vestibule or what, the entrance as you come into the house—there was supposed to be a tile floor from the front door to the steps which they make me to put in a tile floor all the way to the back, from here to there, all the way through. So I tore all that wooden floor out and put in a rough floor about three inches lower with cinders and concrete in and tiles it up. That was extra.

Q. You tiled it?

20 A. This was according to contract, was supposed to give me the front tile—I couldn't exactly give you the measure. I think 3-6 by 6, and from here on all the way back was another tile all the way through—tile floor, which I tore the whole floor to the back and lowered down three inches for concrete and cinders. You have to have a foundation where you put tile in, and there was no opening for steps and no opening to the basement—which I did not make—

Q. You say you tiled as a extra all the part of what is marked "enclosed porch for vestibule" from the red line back to the line that you are now marking in red?

A. Yes.

30 Mr. Hanstein: Might we state on the record here that witness is marking out on the exhibit with red lead pencil the changes which he says he has made, so that it appears?

Q. Now, then, you were saying something about a staircase.

A. This here plans and specifications is according to the Atlantic City law for two apartment house and as many rooms as you can have. When I had done work there about four or five weeks the state inspector came along and asked me what is going on in the building and I told him that is a two apartment house, and which he said to me somebody told him it was going to be a three apartment house under the tenement house, and he did give me notice. He said that I should not come on the job without getting a new plan and new permit from Trenton. Well, I did stop the job and I think Mr. Brown did make a new set of plans. I never saw the plans but he told me he did, and he went himself to Trenton or he mailed it there, and he took a permit out according to the tenement house law. Then when Brown told me that everything is o. k., I should go back to work, which I did, I asked for the plans and I haven't got them yet. I never even looked at the plans the way they looked, which rearranged to make with the law from the tenement house law.

Q. Now, Brown was the architect who prepared these plans?

A. Prepared these plans, and he come around pretty near every day and two days on the job to see what was going on.

Q. Now, you started out to tell us about a staircase.

30 A. When they took out the permit, so the inspector usually comes here every two weeks. So he used to watch the job to see they make according to law, the tenement house law. So he asked me in the first place if I took the plans on the job. I told him no because I never saw the plans. Well, he told me I must have different plans, which I went to Brown and I never got the plans. So he said to me, "All right. I

will explain to you what has got to be done according to the tenement house law," and he told me then to make here fireproof steps to go down to the basement. So I built a door and wooden partition on the first floor and a brick wall and steps into the basement.

Q. Did you have any conversation with Mr. Pellicoff in regard to that?

A. Yes, all the extra work. Mr. Pellicoff was there when the state inspector was there.

Q. He was there?

A. Yes.

Q. And did he tell you to go ahead and do that?

A. Yes, positively.

Q. Now, you built the stairs into the basement then?

A. Yes. A new step going down to the basement and a brick wall, which it calls for fire-proof, and a finished door here, and finished partitions, plastered on both sides, and washboards and painting and so forth.

Q. Did you tile that room?

A. Yes, yes.

Q. You say that stairway just led into the basement?

A. Yes. You see, this shows going from the first floor to the second and it was supposed to be open in the bottom of the step.

Q. You better not draw on everything. (Counsel referred to the witness marking up blue-print.)

A. This was floored off there. He made me open from the floor, make an opening and build another step into the basement, and that was an extra step; and this here wall was an extra, and the door in the brick wall in the basement which is called fire-proof.

Q. That was all extra?

A. Yes.

Q. Now, have you finished pointing out the extras on the first floor?

A. And there was extra lights put in the dining room under the ceiling. Mr. Pellicoff and Mrs. Pellicoff were there and they told me they would like to have four lights in the ceiling and two or three brackets on each side of the wall, which that was extra, and I done that.

Q. They were electric lights?

10

A. Yes, electric lights and fixtures.

Q. Now, did these changes require any different plumbing or heating?

A. Yes. All this heat changes was required—not the plumbing, but mostly heating; because it was radiator there and by changing the rooms, the radiator couldn't stay in the middle of the room, which we moved to the corner of the room.

Q. I see. What other changes were made there? Can you think of any?

20

A. I got so many, I don't know. I think it is all there; the most part, anyway.

Q. All right. Start on the second floor.

(Recess to 1.00 o'clock P. M.)

30

AFTER RECESS.

HARRY KOLMETZKY, the plaintiff, recalled.

Direct examination. (Resumed.)

By Mr. Hanstein:

10

Q. Suppose you start to point out what your changes were on the second floor.

A. On the second floor it shows here a stariway to go out to the third floor.

Q. Just a minute.

Mr. Hanstein: Can all of the jurors see this?

(No audible reply.)

20

The Witness: (Continuing.) Right in the middle of the house, see? Now, by having the steps here they couldn't make two apartments, which they wanted to make two apartments, and one on the first floor would make three. So they make me to remove that stuff and build up the steps somewhere that should interfere on this middle floor, that they could have two good apartments, front and rear. So Mr. Brown, the architect, did suggest to have the steps going on the outside which—there is a window there. He said we should take the window out and have a door and a step leading to the third floor, not a building step. So my own carpenter which he was the foreman, he did make a plot for me and laid out the steps for him, and when they came around Pellicoff and Mr. Brown, they see that it was a mistake be-

30

cause it would not be nice to have an open entrance for the third floor, and it did not make out very good the steps there. So we talked again and we did find a way to have another room built up and the steps leading from the first floor to the second to go around to the third floor. So by doing this we did build a new addition room, for the third floor steps, and by building it another room here, we took away the ventilation from the bathroom, which that is not according to law. So we did build that with a ventilated skylight for the bath room. So that skylight here was extra, and then this new room addition and a new complete set for the third floor. And then by a rear entrance—

10

Q. Just a minute, Mr. Kolmetzky. Let us see if we can't put this thing some place where the jury can see it better. Suppose we try to put it over here. That will be about an equal distance from each of the jurors. (Referring to the easel containing the plans referred to by counsel and the witness.)

20

Mr. Hanstein: Does that help the jury any?

(No audible reply.)

Q. Now, let us see if we understand this correctly. Which was the staircase—was this staircase the staircase that led from the second floor to the third floor?

30

A. Yes.

Q. Was that new construction?

A. No.

Q. That was already there?

A. Yes.

Q. Now, go on and explain what you did about the staircase.

A. By taking the stair, we did enlarge the rooms for the two apartments, and a different way out—Pellicoff suggested making up a step, which it was made. It was not completely finished but it was ready like you could walk on it, but it was not completely finished, and when they saw it was not ready to have another step, they decided to have a built-in step, a different place, so we did find a place to build up this step from the first to the second floor. We
 10 built up another room, completely a new room here and a new step going up to the third floor, finished two steps, plastered and painted and floors and walls and electric lights, and by doing this here to put up a room here to let off the air from the bathroom, which we did make a ventilated skylight for the bathroom, that was extra.

Q. Now, let us see if we get this: this is the stairway leading from the first floor to the second?

A. Yes.

20 Q. And that stairway was there before?

A. That is the way I was supposed to make it. That is the step according to the agreement.

Q. You didn't make anything extra?

A. No.

Q. Now, where did you place this stairway from the second floor to the third floor?

A. From the top of this one, but we did build up a one-story high room for the step.

Q. Can you show us that on the picture?

30 A. It shows on the first floor, the new addition, and this was the first and second front and all the rear, between the rear and front addition is another extra room there, which shows right there on this side of the building.

Q. Can you see it?

A. Yes, you can see if you take the picture down. (Referring to photograph.)

Q. All right, suppose we take the picture down. (P4.) Now, suppose you point out to the jury what you built in order to enclose the staircase?

A. There is a white spot from here to there—there is a window there, and there it shows the room. This is the extra room for the steps. From here to there is the step leading from the first to the second floor, and the additional room for the step from the second to the third is from there to there.

Q. Now, had you at the time you built this extra
 10 room completed this outside wall?

A. You mean from the extra room?

Q. Had you built this wall here?

A. Oh, yes, this was built.

Q. Was that in accordance with the contract?

A. That was in accordance with the contract?

Q. And did you have to change that wall any?

A. No, I didn't change that wall.

Q. Well, what did you have to do in order to enclose that?
 20

A. What I done I took the part of the roof off. See? And I built up the top of this here another story, one story high more, and enclosed that with a roof, and whatever was necessary to have in that room to enclose it, and a new complete step.

Q. Did you say that this step as shown on the plan had been completed by you when they changed it?

A. I was supposed to leave the old step.

Q. Which step was it that you said you had practically completed when they asked the change?
 30

A. Well, I say from the second to the third floor step which I made I completed; but there was no step from here to here.

Q. Where was that step?

A. Right from the top of this one. You see, there

is one, two, three stories. There is a step from one to the other and a part to go around.

Q. Was that the step you had practically completed?

A. Completed.

Q. And then changed it?

A. No. You see, she just had a step made—the step which it was made but not complete. You see, I had the rough work done, and that is a step which

10 Q. How much had you done on that staircase when you had to tear it out?

A. It was ready to finish. It was all the rough work in so you could walk up and down.

Q. What do you call the rough work?

A. The rough work is the trusses and the risers and treads and the supporting platform, and the doorway from this here room leading to another door so you can go to the third floor.

20 Q. You had all that work done?

A. Yes.

Q. And you had to tear it all out?

A. Had to tear it all out and close up the opening.

Q. Were you able to use the lumber in that staircase for the new one?

A. No, it was a different layout, a different measure. It was eight by nine, and then it was seven by eight a different layout of the step. It was like a turn step, not a straight, but a turn step.

30 Q. You couldn't use that?

A. No.

Q. Now, what other changes did you make?

A. This here railing, we were talking about before, it shows on the second floor. Now, by having a separate entrance into the front apartment we made another hallway. It shows there. It does not show

on the plan. See? They put a door here, when people go in the rear apartment they should not interfere with the front apartment, and they had an extra door here, two partitions and another door going into the front apartment. So that is extra. And they made a kitchen. Where the step was there before they made up a kitchen. See? And there was a covered closet there for dishes made and put in extra, and a radiator and plumbing necessary for a kitchen, and a door to extend this here step. We 10 made a platform from here all the way to the back. See? It shows in the picture there. So these people in the front apartment could take down their garbage. And another door for the rear apartment to go out.

Q. What is this? A sort of porch, or what?

A. There is the platform.

Q. That platform up there, you built that as an extra?

A. Yes, all this from here to the back. 20

Q. And in building this room which you referred to as the kitchen, where the old staircase was, how many walls did you have to put up for that?

A. Three. We only left that right wall, so three walls were new.

Q. You had to put in three new walls and threw out the old walls?

A. The step was between the two old walls. That was torn out and we patched up the ceiling and walls and different things, and this here entrance, it shows 30 to the back apartment—we took that partition out and put it over here. See? So there is no extra for that partition because it does not make any difference where I was supposed to build it. It was an entirely new partition and this room belonged to this front apartment and then another room come

to this apartment. So there was a window there, an extra built in. They had to have a window there.

Q. You made no charge for building this extra partition?

A. No. Whenever any closet was supposed to be according to the agreement and made a change, there was no extra for that; but if the material was here or there I made according to the agreement.

10 Q. Was there any of the work involved in this outside of the staircase that you did and had to tear out again in order to comply with their revised ideas?

A. Yes, there were two or three partitions here where the steps came out—

Q. I am afraid this lady over there—

A. Can I go over on that side? There were three partitions for the front apartment taken out and fixed up, patched up the ceilings and floors and whatever it was there. I don't remember exactly now.

20 Q. Well, I am asking you if you did any of this work under the contract that you had to tear out?

A. Yes. There were doors and windows were put in there according to the plan and the next day or the same day—I couldn't tell you exactly—they came around and looked around again the way to put up the furniture, where would be the best place to put it up, and they did make me change it over again, doors and windows.

Q. Now, how about the back part of that second floor? Did you make any changes in that?

30 A. The back part—you see it shows where a kitchen was supposed to be, but there is no kitchen there. Now, there is an old wall where this wall was supposed to be removed and built up a new partition about eighteen inches away from that one south and about five foot up north another partition to make a kitchen out of that. I went and tore out the whole

partition which I was supposed to tear out and put up a new partition and was ready for plastering, all lathed.

Q. All what lathed?

A. All lathed ready for plastering, and they came around and made me take that new stair out and place in the same position where the old kitchen was which was in the rear apartment.

Q. This white shows new work?

A. That white shows new work.

Q. When you built that partition that was not extra, was it? 10

A. No, I tore the old partition out and put the new one up according to the agreement and when it was ready for plastering they came around and laid out the different lights by seeing the front and the rear, and they made me put back in the same place the new partition where the old partition was before, and I tore all the extra new work out and made it in the place they wanted to suit themselves. 20

Q. How about the partition over there? Did you build that partition in accordance with the contract?

A. This partition was supposed to be there. All this mark shows the old work should be there. Now, this partition was taken out and moved away—I can't tell you exactly—to make this four or five feet, to make into two rooms here and the kitchen here; that was a kitchen from the rear apartment and make two rooms out of this here place; and they left one room there the same as the plans showed before. It was tearing out a couple of rooms, putting up the partitions there and taking out and putting up again. 30

Q. How many partitions did you build there by way of extras?

A. Well, it was tearing out two extras.

Q. You tell me how many you built and how many you tore out?

A. Three partitions.

Q. You built up three partitions?

A. Yes, and took down three.

Q. Took down three?

A. Yes.

Q. That you were not supposed to take down?

A. No, they were supposed to remain there.

Q. Now, were there any other changes?

A. You see, it shows here only one closet for clothing, and I put another closet in there by making this room into a bedroom instead of dining room. So I put another clothes closet there, in the rear apartment.

Q. Now, you had to put plumbing—

A. Oh, yes, changing the radiators on account of changing the partition.

Q. You had to change the radiators?

A. Sure, positively, and the electric light, too. You see, it was in the center of the room, the outlet.

20 Q. Had you completed any of that work, the electrical work, before they made the changes?

A. Yes, yes, wiring for fixtures they put up.

Q. What changes did you make in the electrical work after you had done the work under your contract?

A. Well, same as I told you before. The fixture was in the room in the center, and when I changed the partition that left the fixture not in the center any more. So I spoke to the electrician there to make the lights right in the center again. And some of the wiring was in the partitions built in already. It was taken out and put in the new partition.

30 Q. How about plumbing? Did you have to make any changes in that?

A. Well, you see, in the plumbing the changes wasn't much, because there was a kitchen supposed

to be in the rear, and when they took five or ten feet away from there there was no charge for that. The most charge was in the heating, and the extra plumbing is the new two toilets and the two wash stands.

Q. Did you build some toilets on this second floor?

A. Not on the second floor; on the third floor.

Q. It is on the third floor?

A. Yes. In the first I showed already one, and there is one on the third floor. Now, this here railing for the steps on the side and in the rear of the porch was supposed to be two by three, three foot high, and in between from the floor to the top railing another one eighteen inches, which Mr. Pellicoff didn't want that. He wanted to have top and bottom railing and balusters, two balusters, which it shows there. That is the side. See? And that matches up with the back porch the same as this side. It was supposed to be two by three, eighteen inches from the floor, and along there, and they said it would not look good and they made me put in the top and bottom railings and all balusters.

Q. Were there any other changes on that floor?

A. I don't remember. There were plenty, I know.

Q. Suppose we go to the third floor until you think of something else for the second.

A. Well, I would not be able to make a picture out of that because there are too many partitions. See? And it is shut all around. You see there are one—two—three—four—five—six—seven—eight—eight rooms and two baths, and those steps supposed to be leading to the third floor, and we made additional room on the steps for the side. So by taking this out and changing around when Mr. Pellicoff and his daughter was there, and they did made—that was done after these all partitions were up already.

Q. How many rooms were there supposed to be in accordance with this plan?

A. Eight.

Q. Eight rooms?

A. Yes.

Q. How many rooms are there up there now?

A. Ten and this here room makes eleven, extra for the steps; but I don't call it a room that you can live in, but it is a room because it is for the step.

Q. What is this you have drawn outside of the front?

10 A. This shows the railing all the way up. It didn't show here but it shows here. It connects all the way up to the roof and it was all done according to the agreement and was torn up, the front, for the bay window. This here shows the third floor room. That is the second floor.

Q. Is this the room you testified to before?

A. Yes, that is one. That is the room there, nine by fourteen.

20 Q. How many of these partitions as shown on this plan did you have in at the time—when they made changes?

A. I had exactly the way the plan shows, and when they came in—you see, there is two closets here. These two closets weren't built, and the steps come right here. That is the new step going up and going into the third floor. So that was open for the entrance to go to the third floor. There was an entrance to go all the way around, the same as it shows here exactly. Now, by looking around and laying
30 out here they said two additional rooms could be made here, which all the partitions were taken and laid out the way through, and put in two extra rooms.

Q. How much work had been done on those partitions when you tore them down?

A. All the partitions were up and the electric light was in.

Q. And you tore them down completely?

A. Completely, and laid a different way altogether. As the partition shows here it is about two feet away. One is six inches away and one is ten or fourteen something, and there is no entrance like this to go around. As soon as you come in there is one hallway here, that is all, and there is another is another hallway in between here which it leads from one door to go into this room, and there is a door from this one to that one, and that is the front. But there
10 was no entrance there. The chimney comes all the way through the roof here and there is a step open here for the first floor toilet all the way up, and another step here, which shows only a part here; but we put a complete toilet on the third floor.

Q. That was extra?

A. Extra.

Q. How many extra toilets on the second floor?

A. On the second floor was not extra.

Q. I mean on the third floor?

20

A. On the third floor one, this one here. There is supposed to be a wash stand in each room, so they made me put in two extra wash stands, extra complete toilets and two wash stands.

Q. Extra?

A. Yes, to put in a gas light from the cellar to the third floor, to make them in each room in case they want to have a gas connection for heat; because there was no heat on the third floor, only the two floors, and that was an extra charge.

30

Q. Did you take these partitions down more than once?

A. Yes. I would not say all the partitions, but a big part of the partitions I did, by changing around, and all this shows here. The doors leading to the partitions were changed a dozen times.

Q. Now, did you make any other changes—have you completed your description of the third floor?

A. No. Well, then I tore down a half story of the building. The pitched roof was at an angle on a part of the floor, which the joists of the building weren't level, it was ceiling settled in the middle. So I leveled all the joists and put in about three-fourths of the building new flooring.

10 Q. Well, wasn't that called for by the contract?

A. No, no. There was nothing said about joists—well, as much as I can tell you, that every little bit of extra went into this building I didn't do anything before I did call Mr. Brown and Pellicoff. He knows as much as I know on the extras, because some of the buildings was papered and plastered and you can't find in this part; but he knows all the openings that were changed time and time.

20 Q. Were there any other changes that you know about other than those you have referred to?

A. I cannot remember, hard to tell.

Q. All right. Suppose you take the chair. Mr. Kolmetzky, did you make up a list of these changes?

A. Yes. There is one more thing I want to tell you. When I went ahead with the extra work and I always said to Brown that my agreement calls for an order in writing and a price on it, they promised me—

Mr. Cole: I object. There is no question pending.

30 The Witness: All right. I want to bring out this here thing.

Q. Did you make up a memorandum of the extra work you did?

A. Yes.

Q. Is this a copy of it?

A. Yes.

Q. Would referring to that refresh your recollection as to the work that you did?

Mr. Cole: I object, may it please your Honor. He has testified to everything that was done. He does not need to have his recollection refreshed.

The Court: I think he ought to have covered everything that was done. He has been on long 10 enough.

Mr. Hanstein: All right. I just wanted to be sure we had it all in there.

Q. Now, Mr. Kolmetzky, what record did you keep of the cost of doing this extra work?

A. Well, as soon as I started in on the extra work—I will have to bring it again by Mr. Brown.

Mr. Cole: The question is what record did you 20 keep?

Mr. Hanstein: I will withdraw that question for the moment.

Q. Did you have any conversation with Mr. Brown relative to records of extra work?

A. Yes.

Q. Well, all right. What was that conversation? 30

Mr. Cole: I do not know whether this conversation he intends to relate can bind the defendant. It all depends on whether it was in the terms of the contract or not. I would not suppose any conversation he had with Mr. Brown would relieve him of the necessity of keeping records to make competent proof of the claim against Mr. Pellicoff.

Mr. Hanstein: In the first place, this conversation I am referring to was made subsequent to the contract so that no parole evidence will be involved, and, in the second place, I do not suppose there is any doubt—I do not suppose you dispute that Mr. Brown, the architect, was the architect on this job?

Mr. Cole: Of course we do not. The contract you put in evidence shows that, but that does not mean
10 that Mr. Brown may do or say anything that would bind the owner.

Mr. Hanstein: I do not see how the Court can rule on it unless he hears it.

Mr. Cole: I anticipate from this question that the purpose is to institute some evidence of a statement made by Mr. Brown that would relieve this gentleman from doing something that he ought to
20 have done, and, first I say it cannot be done, and, second, there is no plea of any waiver of any right on our part.

Mr. Hanstein: Your assumption of this is entirely wrong. We are going to establish the reverse—that Mr. Brown did tell us to keep a record and we did.

The Witness: Yes.

Mr. Cole: Well, why can't we produce what he
30 kept?

Mr. Hanstein: I have a right to proceed in an orderly way.

Mr. Cole: I object on the ground that nothing that Mr. Brown said to him touching what he was to keep can bind this owner.

The Court: I think the objection is well taken, Mr. Hanstein. I will sustain the objection.

Mr. Hanstein: I ask an exception.

Q. Mr. Kolmetzky, did you keep a record of your costs in regard to this extra work?

A. Yes, sir.

Q. What was the nature of the record that you
10 kept?

A. Well, when I started with the extra work I did mark down every day what mechanic worked from the extra work, we will say a carpenter, a lather, an electrician, a plasterer or a common laborer, and whatever material was used, we will say ten two by fours or one hundred square feet of roofers, or door or window, and by the end of the week I did ask my son, which I couldn't read English very good—the marks I make, everything is good enough for me, I understood it—but I explained to him and he put in
20 the books the mark of labor and materials every end of the week.

Q. Now, did you keep it by day or week by week, whichever it may be—

A. Every day I did copy that, but I did give that to my son every end of the week, Saturday evening.

Q. And you wrote down every day—

A. I did.

Q. Now, what did you write in this record?

A. In the record was—if I had three carpenters
30 working on the extra work like, we will say, changing partitions or windows or doors or flooring, there day, the date and the year, and the same as I said were only three carpenters or eight carpenters that before—if there was any lumber used it was marked down on lumber.

Q. Now, did you keep this record as to the work that was done under the contract?

A. No, the extra work.

Q. Just extra work?

A. Yes.

Q. Do you know what your son did with this record of time that you kept?

A. No, I don't know. I know he put it in a book.

Q. Well, you know he put it in a book?

10 A. Yes, in the presence of me, because he was in my house.

Q. Do you know where the book is?

A. Yes, with me. I have the book.

Q. Have you got it now?

A. Yes.

Q. Let us see the book.

A. (Witness produces the book.)

Q. Now, did you see your son make these entries?

A. Yes.

20 Q. Where did you say he got the data from which he made up these entries?

A. I used to keep on a piece of paper and hand it over to him every end of the week.

Q. And have you gone over this book since he got it up?

A. Yes.

Q. What about the material?

A. The material is in the book, too.

Q. Where did he get the record of the material?

30 A. Off the slips, and then if it was a delivery of a thousand feet of lumber on that day and there was used only five hundred extra, there was five hundred marked down used for the extra.

Q. Who determined how much of that material went into extras and how much went into the contract itself?

A. Well, like I did mark down on the slip if it was used up five hundred square feet for the extra, and by the end of the month I used to get a bill from the material man. From them all the slips are made. See? So when it was a thousand square feet, forty-five dollars, so I did make only one thousand feet of floor, windows, and so forth, or any material.

Mr. Hanstein: I offer this book for identification.

(The book referred to is marked as an exhibit for identification for the plaintiff P6.) 10

Q. Now, were you obliged to pay money in order to procure this lumber and other materials that you used in the work?

A. Say it again.

Q. Did you pay out money for this lumber and other material that you used for the extra work?

A. Part of that material, not all. I didn't pay 20 for no lumber, but I paid for part of the bill from the cement, lime and stucco.

Q. Well, did you buy extra lumber? Did you buy any extra lumber?

A. Sure I did.

Q. Well, didn't you pay for it?

A. No.

Q. You still owe for it?

A. Yes.

Q. Do you know how much extra lumber you 30 bought to use in this extra work?

A. Yes.

Mr. Cole: Just a moment. If he intends to express that in dollars and cents I want to object that that is not the correct way to show what he is en-

10 titled to have for alleged extras. I think that is not the proper measure. He was under obligation to make certain alterations and additions for \$14,500. Now he claims that changes were made and as a result of those changes he was required to expend more money than he would have done if the contract had been performed as originally required. Now, my claim is that the amount he is entitled to have is the difference between the contract price and what it finally cost as a result of this extra work and extra labor that was done, and that he cannot charge against us every piece of lumber he put in there and every piece of cement.

The Court: What is your position in respect to the contract? Is this suit to recover any portion of the contract price?

20 Mr. Hanstein: I think this all on extras, if I am not mistaken.

Mr. Cole: No, it is combined in the bill of particulars and credit given, and then claim made for the balance due. These extras rest upon the contract. It says so in the complaint itself. They must rest upon the contract.

30 Mr. Hanstein: We are undertaking to show what this extra work cost us to do. I am talking about extra work.

Q. (Repeated by the stenographer.) Do you know how much extra lumber you bought to use in this extra work?

The Court: I will permit it.

Mr. Cole: Exception.

A. Yes, between fifteen and sixteen hundred dollars.

Q. What other material did you buy that you used in the extra work?

A. Plaster, cement, sand, stucco, pebbles, and wire—metal wire.

Q. Well, now suppose you tell us how much plaster you were obliged to buy extra? 10

Mr. Cole: Objection for the same reason, and I ask an exception to this line.

The Court: Yes.

A. The whole bill amounts, for the plastering and the metal wire and sand and stucco and pebbles, I think around seven hundred dollars.

Q. Did you do any extra brick work in connection with the extras? 20

A. The chimney, that part of the steps, the fire wall, and the brick pier.

Q. How much did that brick work cost you?

A. You see, the brick work was not given out as a contract. It was day's work. So I hired my own bricklayers and hod carriers and I paid them by the day union wages.

Q. Did you buy any materials for the extras?

A. Yes, bricks.

Q. How much did they cost you? Do you know? 30

A. I think about one hundred dollars.

Mr. Cole: How much?

The Witness: Around one hundred.

- Q. Did you have extra plumbing work done?
 A. Yes.
 Q. How did you have that done?
 A. Well, by adding the two extra toilets—
 Q. No, how much—how did you have that done, by day's work or week or contract?
 A. No, that was contract.
 Q. All right. How much extra work did you have to pay for? How much extra did you have to pay for the plumbing work?
 10 A. Well, the plumbing and heating was eleven hundred, or little over eleven hundred dollars, the extra plumbing and heating.
 Q. Did you have any extra roofing work done?
 A. Yes.
 Q. How was that done, by contract?
 A. Yes.

Mr. Cole: I think you ought to ask this witness what he did, Mr. Hanstein. Every question you ask him is leading and suggests the answer.
 20

- Q. What other work did you do there?
 A. Painting.
 Q. How was that done?
 A. That was a contract price, and then we had extra work on it.
 Q. How much was the extra work for painting?
 A. \$265 or \$260; something like that. I couldn't tell you exactly the figures but I know it is \$265. I think it is \$265.
 30 Q. What other items of extra work did you have done by contract?
 A. Wiring, electric light work.
 Q. Electric work?
 A. Electric wiring, yes.

- Q. All right. How much was that?
 A. Between fifty and sixty dollars.
 Q. What other work did you have done by contract?
 A. Roof and metal work.
 Q. Roofing and metal?
 A. Yes.
 Q. How much did you pay for the extra work there?
 A. \$210 or \$212—\$212, I think. 10
 Q. \$212. Now, what other work?
 A. And I was supposed to give him a white pebble stucco, which Mr. Pellicoff told me he would like to have a colored pebble. So I called up the Hudson supply man and told him to come over and find out just what is the difference between white pebble and colored pebble and he came over and he told me it would cost I think ten dollars a ton more. I couldn't remember exactly what he did give me the price, but it is more than the white pebble, and I said to him, "You go over and see Mr. Pellicoff," which he went and came back with Mr. Pellicoff on the job and Mr. Pellicoff decided on the colored pebble stucco. So I said to Pellicoff, "Now, here is the man. He tells me the colored stucco will cost more than white stucco," which he agreed on to pay me extra whatever it would be when the job is completed, and I did give him colored pebble stucco. 20
 Q. How much is that?
 A. It runs I think \$95 to \$100. 30
 Q. Do you recall any other work that you had done by contract for which you had an extra charge?
 A. Yes. It shows in the picture there. The two front corners of the full height of the house shows like stone blocks, one in and one out, like a stone building. When I had the pebble on it

all completed, Mr. Pellicoff told me he would like to have something like Atlantic Avenue. He told me to go over and see it. There was a pebble stucco with a nice corner made out of colored block, imitation, which I went and saw that, and he did give me an order to do that, and I did the two front corners three stories high. I think it is—no, it is two stories high; this here corner and the corner over there. It shows right there. And on each balcony on the
10 platforms and the back porches he did tell me to make a wash-board of stucco, same as a wooden wash-board, with cement stucco, when the pebble was all completed.

Q. Well, was this imitation stone done by contract?

A. Yes, it was done by plasterer at day's work. But it looked like stone, but it is imitation.

Q. Well, it was done by day's work?

A. Yes.

20 Q. Was all of this outside pebble effect put on by day's work?

A. Yes, and in the front of the building there it shows in the picture tile fixtures, square and all kinds of designs, which I did put in by the order of Mr. Pellicoff. That was extra. It shows in the pictures.

Q. How much did that cost?

A. \$25 to \$30, except labor, except the putting on.

Mr. Cole: What was that for?

30 The Witness: In front of the house, set in between the stucco tile fixtures, square blocks and round ones designs in it.

Q. Now, what other work did you have done by contract there for which you had to pay extra?

A. By moving the chimney—taking out the old chimney I mean and building a new chimney, and moving the heating boiler into different location, I did build a window for that room, for the boiler room. I did break through the brick wall and put in a frame and a sash complete, and I plastered the ceiling and three sides of the room. That was on the ground floor. There was no cellar there.

Q. Did you include the charge for that in the day's work? 10

A. I think it is day's work, yes.

Q. I am not talking about day's work now. I am talking about contract work.

A. No, no more, that is all.

Q. You have given us all the items that you did by contract?

A. Yes.

Q. Now, did you buy any extra material other than what you have given us that you needed in the doing of this extra work? 20

A. Well, the only extra material was I bought for the extra work was lumber and plasters and sand, lime, stucco and pebble and wire lath, and the other extra work was sublet to the contractor, like the paper-hanger, he had a contract for painting and he charge me so much for the extra, and I didn't buy any extra material for the painting, roofing or plumbing. That was sub-contracting, and I did sublet that.

Q. Now, how much did you pay for the extra labor that was required for the making of these changes? 30

A. I think it is between \$6000 and \$7000, if I can remember exactly.

Q. Does this book your son kept show the amount of labor that you used?

A. Yes.

Q. If I show you this book, will that refresh your recollection at all?

Mr. Cole: I object. The book was not kept by him. He cannot refresh his recollection by what somebody else kept.

Mr. Hanstein: The rule is you can use any paper to refresh recollection if it will have that effect.
10 There was a case not very long ago where the doctor was permitted to use an X-ray plate to refresh his memory, that had been taken by another doctor and he had never seen it before. That is the general rule—that you can use any paper to refresh your recollection if it will have that effect.

The Court: I will permit it.

Mr. Cole: Exception.

20 Q. (Repeated by the stenographer.) If I show you this book will that refresh your recollection at all?

A. I cannot understand.

Q. I say if I show you this book will it refresh your recollection as to how much you spent for labor for extras?

A. Yes.

Q. (Counsel hands P6 to the witness.)

30 A. (Referring to P6.) The total amount of the labor is \$7047.25.

The Court: Is that item of labor for the work done in performing the alterations alone?

The Witness: All the extra work.

The Court: Extra alterations alone?

The Witness: Extra alterations and additions.

The Court: Does not apply to the contract at all?

The Witness: No, no.

Q. Is this the notice that Mr. Brown gave you?

A. Yes, that is the order for all the extra work. 10

Mr. Hanstein: I offer it in evidence.

(The paper offered is received in evidence and marked as an exhibit for the plaintiff P7.)

Q. When did you finish this work?

A. A year or year and a half—I think it is in May, 1925 or April. I couldn't remember.

Q. Now, by the way, how much did you receive 20 from Mr. Pellicoff on account of this contract and extras?

A. Well, I had the figures in a book, which the trouble starts, and I went to Lawyer Bloom to handle him all my papers, which part of the papers you got now, and since that time I can't get that little book which I had, was all the payments made by Mr. Pellicoff to me.

The Court: Well, how much money was it, do you know? 30

The Witness: But I think it was \$13,000 or little over \$13,000. It was some papers in Bloom's office which when I took the papers over to Mr. Hanstein—I don't know if I lost them or it was lost in Mr. Bloom's office, but I couldn't get them. There were some more papers in that office.

Q. Now, is Mr. Pellicoff entitled to any credit that you know of outside of the credit for the payments?

A. Yes; there was some—for plumbing. I think it was supposed to be put in a boiler for hot water and he did put in some kind of gas system. See? So I did give him an allowance. It is right there on my list there. It was an allowance for plumbing and different things there. I can't remember now. I think it was an allowance for \$85 or something.

10 Q. Is this a statement you made up showing that?

A. (Paper shown to and examined by the witness.) Yes. That is \$87.

Q. What is he entitled to that credit for?

A. Well, because I didn't put it in.

Q. What item goes to make up this credit?

A. It was two thirty-gallon boilers was supposed to be put in and gas heaters. There is an allowance on that. I took the price from the plumber. He did give me the price which I think it is \$40 or \$42.

20 Q. What other credit?

A. There is an allowance on the back porches. They were supposed to be eight feet and I made them six foot six or seven, something. It was a foot or foot and a half shorter, only the platforms, which I did give him an allowance for the lumber and the labor.

Q. Was there anything else for which you allowed him a credit? Any other credit that you allowed him?

30 A. Yes, but I cannot remember what it was.

Q. What was the total amount of the credit?

A. \$87 something.

Q. Now, where you do extra work and the price is to be adjusted after the contract is completed, what is the usual allowance or arrangement in regard to profit?

Mr. Cole: Objected to.

A. Ten per cent.

Mr. Cole: I ask that that be stricken until I get the benefit of my objection.

The Court: It may be stricken.

Mr. Cole: I object to it on the ground that the plaintiff must rely on the case made by his complaint, and he has not suggested any such a right as to add ten per cent to anything in this complaint.

The Court: I will permit it.

Mr. Cole: Exception.

Q. (Repeated by the stenographer.) Now, where you do extra work and the price is to be adjusted 20 after the contract is completed, what is the usual allowance or arrangement in regard to profit?

A. Ten per cent.

Mr. Hanstein: Cross-examine.

Cross-examination.

By Mr. Cole:

Q. How wide was this building in front before you 30 began the alterations?

A. I think about twenty feet.

Q. How wide is it now in front?

A. Twenty-six or a little over.

Q. Did the contract provide for an addition in front?

A. No.

Q. No widening?

A. No. About sixteen feet away from the front, but not on the front, not on the front elevation and the front wall; sixteen feet back I was supposed to build.

Q. Please watch my question. I want to know how wide that building was on its front, directly front, before you began any work?

10 A. What do you mean about the building? Including the porch, the open porch, or the amount of the rooms? Which is the building? You know a porch comes out the house.

Q. Do you know what I mean by width? That means the width of the front.

A. Not including the open porch? There was a side porch there.

Q. Now, forgetting this side porch, how wide—

A. About twenty feet.

20 Q. Now, how wide was it to be by the terms of your contract?

A. The same. There was no additions on the side of the building of the front.

Q. How wide was the building in the rear before you began work?

A. I think the full width is there now; about twenty-six or twenty-five.

Q. About twenty-six feet. Was that added to? In width now, I mean.

30 A. No.

Q. Was there any lengthening of the building? Is it any longer now than it was before you began work?

A. Yes, sir, on account of the bay windows.

Q. What?

A. On account of the bay windows coming out two feet.

Q. Are they front or rear?

A. Front.

Q. Well, they are not from the ground up, are they?

A. No.

Q. Where do the bay windows begin?

A. The bay windows from second and third floor.

Q. And the bay windows do not cover the entire front of the building, do they?

A. No.

Q. Well, now, you say, do you, that the building is now twenty-six feet wide in front?

A. The second and third floor.

Q. Not on the first floor?

A. No.

Q. Did your contract provide for widening this building on the second and third floors front?

A. Only where the stairway was supposed to be made from the first to the second, about sixteen feet back from the front line.

Q. Well, that was provided for back of the front line, a widening of how many feet?

A. Yes, for the staircase.

Q. And how much?

A. About sixteen feet.

Q. So that it is twenty-six feet in width back of the front and that was provided for in the contract?

A. Not in the front; sixteen feet away from the front line.

Q. Well, has it been widened directly in front? 30

A. Not from the first floor; second and third.

Q. And that widening is what?

A. The additional rooms that I made.

Q. Were they provided for in the contract?

A. No.

Q. Then your contract didn't provide for widening

at all either in the front or any distance back of the front except in the rear, is that correct?

A. No, on the side.

Q. On the side?

A. Yes, sixteen feet away from the front line.

Q. How much was it widened?

A. Six by fourteen, I think.

Q. From the second story?

A. From the first story, going up from the first
10 to the second.

Q. Now, tell us again what was that widening, what occasioned it?

A. There was a new stairway to build on the side of the building, taking out from the middle of the floor, first floor, and building up on the side of the building, which I was supposed to make a glass enclosure for it sixteen feet back from the front line on the ocean-way side.

Q. Are you familiar with the contract?

20 A. Yes.

Q. Do you remember it pretty well?

A. Yes.

Q. Will you tell the jury what you were to do under the main contract?

A. It was according to the plans and specifications.

Q. But now you tell them what you were to do without the plans and specifications.

A. I don't know if I want to tell you.

Q. What?

30 A. I don't know if I will be able to.

Q. Do you mean to say you cannot tell this jury

A. There was so many changes—

Q. Pardon me. Let's get along slowly. You went well enough for your lawyer. I want to know if you can tell this jury without looking at the plans and

specifications, what you contracted to do for Mr. Pellicoff?

A. I would not be able to give you every detail.

Q. No, but give us the best you can.

A. First, second and third story I was supposed to make alterations and additions, but I couldn't point out to you exactly what, but according to the plans and specifications.

Q. Is that the best you can do?

A. That is the best I can do.

Q. That is the best you can tell this jury what you were to do for \$14,500?

A. According to the plans and specifications.

Q. And you cannot recall—

A. It was impossible for me because there were so many changes.

Q. You had no trouble remembering about these extras, did you?

A. Well, you know—

Q. If you couldn't recall what you had to do under
the main contract any more than you have already
testified to, how can you testify so completely about
all these extras? 20

A. I couldn't keep in my mind all the extras, if I wouldn't look upon the plans and specifications which it says it is marked there "Removed and build"—I couldn't keep it in my mind, absolutely not.

Q. Was there anything provided for in the contract that you were to do that you did not do?

A. No.

Q. What about the basement? 30

A. There was never mentioned any basement, was never one thing, any basement on any plan.

Q. You had no basement plan?

A. No.

Q. Sure about that?

A. Yes.

Q. Was there ever any arrangement between you and Mr. Pellicoff after the main contract was made that you were to deduct two thousand dollars?

A. No.

Q. Never any conversation of that sort?

A. There was a conversation about three or four weeks when I start the job. Mr. Pellicoff took me down in the basement and he said, "Kolmetzky, do
10 you think you could make five rooms out of that basement?" I said, "We will call up the architect and if he will make a sketch I will be able to give you a price." "Well," he said, "how much do you think it would cost to make five rooms? There is four walls there already, except partitions and floors and the plastering and all the necessary finishing." I told him I thought it would run about two thousand dollars. That was a conversation about three or four weeks later when I start the job. I was working
20 four weeks there already. So he told me he was going to talk over with his wife and let me know. Then he told me his wife said it would not pay to spend two thousand dollars on the basement there; she thinks they will never be able to rent it. That was three or four weeks later.

Q. Did you ever get from the architect a certificate that you had done this extra work—yes or no?

A. No, sir, but I did ask him for it. I asked for the certificate.

30

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

Q. I ask if you got it? You said you didn't

A. He didn't give it to me. He refused.

Q. That is all I want to know—did you ever get it?

A. He didn't give me. He only told me when I needed I would get it.

Q. Let us get it clear. I ask you again did you ever get it?

A. He never gave it to me because he didn't want.

Q. Did you ever get from the architect a certificate for the extra work as provided in the contract?

A. I asked him for it but he didn't give me that, but he told me when I need it I will absolutely get me the certificate. That was his promise.

Q. Well, you knew, did you not, that this contract provided that you were to get a certificate from the architect before you were entitled to have your money? Did you know that? Answer that "yes" or "no." 10

A. I am telling you I did ask him for a certificate and he didn't deliver it.

The Court: When a question calls for it, answer "yes" or "no."

Q. (Repeated by the stenographer.) Well, you knew, did you not, that this contract provided that you were to get a certificate from the architect before you were entitled to have your money? Did you know that? Answer that "yes" or "no." 20

A. I did know it.

Q. Did you ever get it?

A. No.

Q. Did you ever furnish Mr. Pellicoff with a release of liens?

A. He was not entitled to it. 30

Mr. Cole: Will your Honor require the witness to answer my questions?

Q. Did you ever give it to him?

A. No.

Q. You know, do you, that your contract provided that you had to furnish him with a release of liens?

A. By settlement.

Q. Now, you testified that there was something, some change that you made ten or fifteen times?

A. Yes.

Q. Will you please point out on that map the thing that you changed ten or fifteen times?

A. This here front was made according to the plans and specifications and agreement. Then when Mr. Pellicoff asked me to change that I tore all that new work out and I built up a two-story bay window. When the bay window was done Mr. Pellicoff comes again and tells me that his wife wants to have a balcony in between the two windows, which it shows right there. Now, I tore out again the new work.

Q. Is that the thing you did ten or fifteen times?

A. No; it is three times.

Q. Three times?

20 A. Yes.

Q. Why did you say ten or fifteen times?

A. It is part of the partitions and windows and doors.

Q. Well, you mean that there was ten or fifteen changes in all or that you made the same change ten or fifteen times?

A. No. We will say on the front here I did three times—and some of the partitions I changed five or six times, and some of the windows when they 30 wanted to have a window where it belongs according to the plans and specifications and they come and changed that, I did cause that and took the window out and set in a different place, and then they come back again and told me to take it out of that place and set it in the same place before. That I mean fifteen times—it is more than fifteen times.

Q. All I want to know, Mr. Kolmetzky, is what you meant when you said that you had made a change ten or fifteen times. Now, did you make the same change ten or fifteen times or were there ten or fifteen changes made? I think there is a difference. Now, which do you mean, so the jury won't misunderstand it?

A. I didn't get you, Judge.

Q. Well, you testified also that you made some change a half dozen times. 10

A. Yes.

Q. Now, what change did you make a half dozen times?

A. Like we will say take the first floor in the rear, that kitchen, which was supposed to be a kitchen and next to the kitchen a bedroom. Then they changed their mind and wanted to have instead of bedroom a breakfast room, and I took the partition out. I put the partition, the open space, six inches away; then the next time a foot away. They couldn't 20 find exactly the right size of the kitchen and breakfast room, and that partition was shoved around a dozen times and different things; not exactly that one.

Q. Did your contract provide for a balcony?

A. No—which one do you mean? I am talking about the front balcony between the second and third floor.

Q. Did it provide for balcony anywhere?

A. Yes. This here balcony was provided, this 30 here first floor; but there is a balcony between this first floor and the roof. There is another one there. That was the extra. I am talking about that, not this one here. That was not provided for in the plans and specifications.

Q. From whom did you buy your lumber?

- A. West Side Lumber Company.
 Q. All of it?
 A. Yes, sir.
 Q. Did you remove any lumber from that job that had been brought there to be used in this work?
 A. On the dump I did.
 Q. What?
 A. On the dump.
 Q. On the dump?
 10 A. Yes, fire-wood I couldn't give away.
 Q. Well, where was it?
 A. There was some lumber I couldn't give away, so I took it on the dump. It was broken in pieces.
 Q. What lumber was that?
 A. Two-by-four, the rough board. Some part of the trim that was torn down and broken to pieces and couldn't be used.
 Q. Well, was that lumber that you bought for the extra?
 20 A. Oh, no. You didn't ask me about the extra. You said what lumber did I take down and I am answering you.
 Q. Well, now, I am asking you if that was any of the lumber for the extra work? You said you removed lumber.
 A. Fire wood. That is lumber, too.
 Q. What lumber was that?
 A. Some of the lumber that was destroyed by tearing it down
 30 Q. You mean the lumber in the house before you began to remodel it?
 A. It does not make any difference. When I started to tear it down some part of the trim and different things was broke so I couldn't use it, and then the new work which I done according to the contract when that was torn down, it was some of it damaged—I mean that lumber.

- Q. Well, that was in your contract, wasn't it?
 A. But some of the extra work which was done when I tore down and done it over again, which it was destroyed, then I did take that lumber on the dump.
 Q. Well, did you charge us with that?
 A. No.
 Q. Why not? You have charged us with the entire lumber bill, haven't you, that was extra?
 10 A. Yes.
 Q. Well, did you say that some of that work had to be torn out?
 A. Some of the lumber, yes.
 Q. Well, what became of that lumber that you tore out?
 A. I am telling you some of the lumber went on the dump.
 Q. Wasn't that the lumber of Mr. Pellicoff? Hadn't he paid for it? Aren't you charging him with it?
 20 A. I am charging him with it, yes; but that doesn't make any difference, if I will take a job in the Title Guarantee Building and any lumber gets destroyed, that is not any good, the Guarantee Building pays for the lumber anyway. You don't mean to say that I should pay—the contractor.
 Q. Well, didn't that lumber belong to Mr. Pellicoff?
 A. Well, I think it will belong to him when he will pay for it.
 30 Q. Well, you are charging him with it?
 A. Yes, I am charging him with it but it is not paid for yet.
 Q. What?
 A. It is not paid yet.
 Q. Did you think that because he had not yet paid

for it you had a right to remove it and put it on the dump?

A. Well, fire-wood is supposed to be removed. The agreement says the job has to be cleaned. Any rubbish or any dirt has to be cleaned off the place.

Q. Did you remove any lumber from that work that was not fire-wood?

A. No, it was all in his basement, left there.

10 Q. Did you remove any lumber from that work that you put there for the purpose of putting in the building and was bought to put in the building.

A. No.

Q. Sure of that?

A. No—yes; I know that much—

Mr. Hanstein: Now, wait a minute. There is no question, Mr. Kolmetzky.

20 Q. Now, you were asked by your counsel whether by looking at this book, which has been marked in evidence P6, you would be able to refresh your recollection of the amount due? Do you remember that? Do you remember that question put to you?

A. Yes.

Q. And you testified you would be able to refresh your recollection, didn't you?

A. Amount, yes.

Q. Simply as to the amount?

A. Yes.

30 Q. Is that right?

A. Yes.

Q. That was all that you looked at when you refreshed your recollection, wasn't it, the amount you claimed to be due?

A. No, only the labor I think it is.

Q. I understand the amount you claim to be due for labor?

A. Yes.

Q. And that was all you looked at when you said you were about to refresh your recollection?

A. That was asked for, nothing else.

Q. That was all you were asked, and that is all you refreshed your recollection about—was what you were claiming?

A. For labor.

Q. For labor?

A. Yes.

Q. And you simply looked at this book and saw the figures and said that was the amount?

A. Well, I thought it was between six and seven thousand. I couldn't remember. And when I looked at the book it showed seven thousand and some hundred dollars.

Q. Did you do the writing in the book?

A. No. I wish I could write like that.

Q. Did you see your son do all this writing?

A. I did only give him—

Q. Did you see your son do all this writing?

A. No. When it was done—

Q. That is a plain question. You have answered it "no."

A. All right.

Q. Did you see him do any of this writing?

A. Yes, sometime.

Q. Can you point out which you saw him write?

A. That is already over a year. It is a year and a half already.

Q. Can you point out to the jury what you saw your son write?

A. Absolutely not. It is impossible for me.

Q. Now, where did your son get the information that he put in this book?

A. I did give him on a piece of paper which I keep a record every day.

- Q. Well, where is that?
 A. Well, I suppose you will have to ask him when he will be on the witness stand. I did turn it over to him.
 Q. You turned the slips over to him?
 A. Yes.
 Q. Do you think he still has them?
 A. I don't know.
 Q. Did you write the slip yourself?
 10 A. Well——
 Q. Did you write the slip yourself?
 A. Nobody would be able to know it except myself. I did.
 Q. I am asking you whether you wrote on the slip?
 A. I did.
 Q. So that all the slips that you turned over to your son were in your handwriting, is that correct?
 A. Yes, sure, in my handwriting.
 20 Q. And so far as you know he still has them?
 A. I don't know.
 Q. Have you ever looked for them since you brought this suit?
 A. The book——
 Q. Have you ever looked for the slips since you brought this suit?
 A. No. This is what I looked for. He turned it over to me, the book, when he was done with it. It is a year and a half already.
 30 Q. What in fact was on those slips?
 A. I couldn't remember. It is so long. It is more than a year.
 Q. How often were they made out?
 A. I used to give him—hand it over to him every end of the week, Saturday.
 Q. How many slips did you give him each week?

- A. There was one slip of paper, whole labor and material for every week.
 Q. You mean at the end of each week you gave him a slip on which you put down the number of men and the time they made?
 A. Yes.
 Q. Gave them to him?
 A. Yes.
 Q. Now, did you determine each week how much time to charge against the extra work? 10
 A. Well, say in the beginning of the week, on a Monday morning, when I had three carpenters working on extra work—I did mark down our three carpenters working on the extra work, and if it was a different mechanic I did mark down the other mechanic or the common laborer. That is the way I did mark down on a piece of paper.
 Q. Have you any book or any writing that has to do with the work that you did on this job or the materials you furnished other than this book I hold in 20 my hand?
 A. This is for the extra work.
 Q. Have you any book or extra writing that had to do with the work that you did on this job or the materials which you furnished other than this book which I hold in my hand?
 A. This book.
 Q. You have nothing else except this book?
 A. I kept track of the extra work in that book, work and material.
 Q. Have you any record of the work that you did 30 under your contract?
 A. No, I don't have to.
 Q. How did you pay your men, that is, cash or check or how?
 A. Cash. They don't take no check.

Q. And did you draw the money from bank each week?

A. No, sir.

Q. How did you get it?

A. Used to get Pellicoff's check and cashed it and brought the cash to the men on the job.

Q. Then you used the money which Mr. Pellicoff was giving you on account of the contract to pay for the extra labor, did you? Now, did you or didn't
10) you? Answer that "yes" or "no," please.

Mr. Hanstein: I do not think the witness should be limited to that.

The Court: What is your answer?

The Witness: I couldn't answer that.

Q. All right. Do you know whether in point of
20) fact your son did all the writing in this book at one time? Now, do you know whether he did or not? If you do not, say so.

A. Let me hear it again.

Q. Do you know whether your son did all the writing that is in this book at one time?

A. I positively know that he didn't.

Q. All right. Now, you said that you have contracts for certain things by way of extras. Were they in writing?

A. I had contracts?
30)

Q. Yes. You testified—or your lawyer did—that you had contracts for certain things that were extras in the way of lumber, plaster, and so on. I want to know whether any of those contracts was in writing?

A. The contract according to the plans and specifications—

Q. I am not talking about that—

A. —was in writing, but the extras were not. You produced the bill when it was done.

Q. Didn't you testify in answer to Mr. Hanstein's questions that you had contracts for these extras?

A. On the top of the original contract, yes.

Q. Where are they?

A. The people are here.

Q. Have you got the contracts, is what I want to
know? 10

A. No, I haven't got it now.

Q. Did you ever have a contract in writing?

A. Sure.

Q. For the extras?

A. Yes

Q. What did you do with them?

A. I don't know. I had them in the house. I don't know—I had a contract with the roofer and I had a contract with the painter and he did give me a price
for the extras. 20

Q. Have you hunted for them?

A. Yes, I did.

Q. When did you hunt for them?

A. About a week ago.

Q. Where did you hunt?

A. In my house, and I went over to lawyer Bloom to ask him if he has it. Mr. Bloom had that case before.

Q. Did you turn them over to Mr. Bloom?

A. I think every paper that I had I did turn over
to Mr. Bloom. 30

Q. How is that?

A. Every piece of paper that was supposed to be with Pellicoff's case, Mr Bloom had it. I did turn it over to him.

Q. You did not turn this book over to him, did you?

A. No.

Q. Have you subpoenaed Mr. Bloom to produce those papers here?

A. I was over by Mr. Bloom last week and I asked him if he has the rest of the papers which he had and he says he thinks he did give me back all of them, but I haven't got them.

Q. Well, did he give them—any of them back to you?

10 A. He said at that time, six or seven months ago or eight months ago.

Q. At all events, you haven't any of these papers that you have been talking about, have you?

A. No.

Q. Now, when did you first know how much money was due you for extras?

A. As soon as the job was done.

Q. That was in May?

20 A. May or April. I couldn't exactly remember.

Q. Of 1925?

A. Yes.

Q. You knew it then?

A. Sure.

Q. Now, you are sure about that, are you?

A. Yes.

Q. You knew in April or May, 1925 how much money you were entitled to have for extras?

A. I couldn't exactly tell the months. I don't know if it was May or—

30 Q. Well, what month do you think it was when you first knew how much money you were entitled to have?

A. I couldn't answer that.

Q. Well, did you know it by July, 1925?

A. I couldn't answer that.

Q. Did you know it by November, 1925?

A. Yes, sure.

Q. What?

A. Yes, sure.

Q. You are sure about that, are you?

A. I think so.

Q. Well, you think so? Don't you know?

A. Yes, I did.

Q. You knew in November, 1925, how much money was due you for extras?

A. Yes.

10

Q. And you knew it was \$13,000?

A. Around that.

Q. Now, by the way, have you kept in a book anywhere a charge against Mr. Pellicoff for these extras?

A. No.

Q. What?

A. No. What I—

Q. I want to know whether you have a charge anywhere in any book against Mr. Pellicoff for what you are now claiming.

20

A. No, in my head.

Q. All in your head?

A. Yes.

Q. Did you carry your contracts and that sort of thing in your head?

A. Well, the contract is on the paper; but the rest of the business is in my head.

Q. Don't you keep books?

A. I am not educated very much—

30

Q. I am not asking you about your education, because sometimes a man who is not educated can employ somebody to keep his books. I want to know whether you keep any books?

A. No.

Q. Now, is that right?

- A. No.
 Q. You don't keep books at all?
 A. No, only sometimes on a piece of paper I make a record, that is all.
 Q. What do you do with the piece of paper?
 A. Well, sometimes—I put them away.
 Q. Put them away where?
 A. In a place in a drawer or anywhere in the house.
- 10 Q. How old are you?
 A. Forty-one.
 Q. You have been contracting how long?
 A. About sixteen or eighteen years.
 Q. Did you have any other work at the time you had this work?
 A. Yes, sure I did.
 Q. How many other pieces of work did you have?
 A. Well, I couldn't remember now.
 Q. About how many?
- 20 A. I think about two or three jobs. I don't know exactly.
 Q. Can you tell how much money you make during the year?
 A. I know that myself.
 Q. You know that yourself in your head?
 A. Yes.
 Q. Exactly how much money you make on all the contracts you have?
 A. Yes.
- 30 Q. And how much did you lose?
 A. I am not a very big contractor to have a book-keeper.
 Q. You have several contracts running during a year, don't you? Let's take the year 1924, for example. How many contracts had you during that year?

- A. I couldn't remember.
 Q. It is all in your head?
 A. Yes.
 Q. In 1925 how many contracts did you have? You are carrying that in your head.
 A. Yes.
 Q. Is that right?
 A. I think it is two or three—I think it is three or four.
 Q. Do you carry all that in your head? Did you carry all your 1925 contracts in your head?
 A. I don't keep no bookkeeper.
 Q. Now, how do you manage, if you do, to make up an income tax return?
 A. It is very hard.
 Q. Very hard?
 A. But you take anything—
 Q. Since it is so very hard for you to make up an income tax return, why don't you employ somebody to keep books for you?
 A. That brings it to big expense.
 Q. Well, you would rather save the expense than to have the United States government understand whether you made any profit or not?
 A. Well, they got from me last year fourteen dollars.
- Mr. Hanstein: I object. That is not proper cross-examination.
- Q. You didn't put down anywhere in a book what you were paying out to the men that worked for you under the main contract?
 A. Well, you didn't let me explain before and that is the reason why I would not know what to answer you. The reason I did keep track of this

extra work is when I got this order here for all the extras the price should be made up after the job is completed. Mr. Brown tells me that I should keep a record of all the extras and he will see that I get the money and ten per cent on top of that. He, himself, told me to keep track of all the extra work.

Mr. Cole: I ask your Honor to strike that as not being responsive to any question.

10

The Court: It may be stricken.

Q. Did you say in answer to your counsel's question that these prices were to be adjusted by Mr. Brown? Now, did you say that?

A. Here is the paper says that; it should be adjusted by the parties.

Q. Did you say in answer to your counsel's question that these prices were to be adjusted by Brown?

20 Now, did you say that?

A. I can't remember if I did say that or not.

Q. Well, if you did say that, was it so?

A. I couldn't remember if I said it.

Q. Well, have these prices ever been adjusted by Mr. Brown?

A. No.

(Recess to Wednesday morning, at ten o'clock.)

30

November 4, 1926.

HARRY KOLMETZKY, recalled.

Cross-examination. (resumed.)

By Mr. Cole:

Q. How much money did you receive from Mr. Pellicoff on account of this work? 10

A. I received about a little over thirteen thousand, which some money he did pay to the sub-contractors without me knowing it.

Q. I want to know how much money you received?

A. Over a thousand dollars.

Q. What?

A. A little more than thirteen thousand dollars.

Q. Have you any record of the payments you received? 20

A. Well, I said that that book was lost in Mr. Bloom's office.

Q. I am asking you have you any record that a jury can see of all the money you received?

A. I didn't lose that book. It was in Bloom's office.

Q. Then you haven't anything to show to the jury?

A. No.

Q. Now, isn't it a fact that you received over fifteen thousand dollars? 30

A. Well, I said that Mr. Pellicoff paid some—

Q. I say isn't it a fact that you received over fifteen thousand dollars from Mr. Pellicoff?

A. Well, I can't say that.

Q. Then you are not certain, are you, of how much money you did receive?

A. Well, I said over thirteen thousand dollars; little over thirteen thousand.

Q. How much over thirteen thousand dollars?

A. I think it is thirteen thousand four hundred or between four and five hundred.

Q. Now, do you remember making an affidavit to the lien claim that you filed in this case?

A. Yes.

Q. Did you read it?

10 A. I did but I can't remember if it was six or seven months ago or eight months ago.

Q. Well, was it true what you said in there?

A. Yes.

Q. Well, the lien claim says that the labor you performed and the materials you furnished were between the fifth day of November, 1924, and the fifth day of November, 1925, and to that you swore. Now, you testified the other day here that you finished that work in May. Why did you make an affidavit that

20 you didn't finish this until November, 1925?

A. Now, Judge Shinn sent a list to Mr. Bloom, little things that was not completed on the job and I went over with the different mechanics and completed that day, that month, and that means that I did complete in that month or that day. Now, he sent a list that a door was not locked good, or the window, a spigot for the plumbing and different things in the house which I went to complete at that time.

30 Q. I am asking you why you testified the other day that you completed this in May?

A. So he moved in in May.

Q. What?

A. That is the time he moved in; he moved in the house.

Q. Why did you testify the other day that you completed it in May?

A. I did testify it was completed in May?

Q. You did so on Monday. Now, was that true?

A. Yes, it was.

Q. Then you did complete it in May?

A. Yes, but then I had a list from Judge Shinn that it was not completed.

Q. Will you please answer my questions? Did you complete it in May?

A. I completed as far as I can see; but it was a list sent to me that it was not completed, which I 10 completed afterwards.

Q. Then you thought you completed it in May?

A. I didn't thought it. It was.

Q. It was completed?

A. Then I had the list sent by Judge Shinn to Mr. Bloom that was completed little things, which I went to complete, and I called that completion then.

Q. Now, when did you begin to charge for extra labor?

A. The day it was started the extras I did. 20

Q. When was that?

A. I cannot remember.

Q. When did you start on the work?

A. I think about three or four days after I got the contract signed, or a week.

Q. The contract was signed November 4, wasn't it?

A. November 5, I think.

Q. November 5. All right. And you started to work right away? 30

A. Well, a couple of days; three or four or five days.

Q. When did you begin to charge for extra labor?

A. I don't think I had the roof done—I mean I tore the roof.

Q. I am asking you if you know?

A. I couldn't tell you that. It is impossible for me.

Q. Well, why didn't you say so?

A. Well, I couldn't tell you that.

Q. Now, from whom did you get the money with which to pay for labor?

A. Pellicoff.

Q. All the money that you used in paying labor you got from him, didn't you?

10 A. From him, from Pellicoff, yes.

Q. And you gave him a statement each week of the amount of labor?

A. No, it was given me by Brown, the architect, in order for—

Q. Didn't you make up a payroll each week?

A. No. I told you that I had an order from Mr. Brown, the architect, for my payroll.

Q. Well, who made up the payroll?

A. Mr. Brown—I mean I went to Mr. Brown for
20 an order. See? And he did give me an order as much as was the amount at that time.

Q. Who made up the amount?

A. I did give the amount to Brown.

Q. Then you made up the payroll, didn't you?

A. Yes, I did.

Q. Well, that was a question I asked you five minutes ago. Did you make up the payroll?

A. Yes, I did give the figures, yes.

Q. Then you went with the payroll to Mr. Brown?

30 A. Yes.

Q. And Mr. Brown gave an order to Mr. Pellicoff?

A. Yes.

Q. And who gave you the money?

A. Mr. Pellicoff did give me the money, yes.

Q. For each week's payroll that you made up?

A. Yes.

Q. Did that include the entire payroll?

A. Yes.

Q. Not for the extras alone, but the whole thing?

A. The whole thing.

Q. The contract required that you should be paid the payroll each week, didn't it?

A. Yes.

Q. And that Mr. Pellicoff did, didn't he?

A. Well, sure he did.

Q. Now, you spoke of certain bills, I think, and 10 certain contracts that you had for extras. Have you any of those bills or those contracts that you **can let** the jury see?

A. Well, no, I haven't got it, no.

Q. Now, do you remember being asked to furnish a bill of particulars?

A. I think Mr. Bloom told me. It was not asked direct to me.

Q. Did you make up a bill of particulars?

A. Yes.

Q. I show you what purports to be a bill of particulars and ask you if that is the bill of particulars you made up and served in compliance with the request.

A. You mean for the extras?

Q. For this suit, yes.

A. For the extra work, yes. This is the specification.

Q. On this bill of particulars you served you gave the amounts, didn't you, of the particular items of 30 extra work?

A. Well, the first —

Q. Well, did you or didn't you?

The Court: Won't you please answer the question "yes" or "no?"

A. That bill of particulars was two or three times. That is the reason I want to bring out.

Q. You just said this was the bill of particulars you served?

A. Yes, but the price was added afterward. That is all I want to bring out. They were asking me for a specification what the extra work was, and I did do this.

Q. Well —

10 A. Later on Judge Shinn said he wants to have an itemized price, each item separate, which they added on the prices afterward.

Q. Did you provide the figures?

A. Not the first time. The figures was the full amount, then he asked itemized bill.

Q. Did you provide the figures? Will you please look at that bill of particulars and say whether there are figures at the right of each item? Now, are they there or not?

20 A. The figures is in here, yes.

Q. Are they your figures?

A. Yes; they are my figures.

Q. Then you did provide them, didn't you?

A. Yes.

Q. Now, you say "fireproof steps to basement under main stairs."

A. Yes.

Q. You charged for that. Now, how much was that extra?

30 A. I couldn't remember now.

Q. Well, can you tell the jury how much it was?

A. It is on the list there. There is fifty items.

Q. I know. But I want to know whether you can tell the jury outside of this where you got the figure?

A. There is fifty or sixty items. I positively wouldn't be able to answer that.

Q. Fifty or sixty?

A. As many as is on the specification there.

Q. You mean as many as are on here you cannot give the figures for?

A. I couldn't exactly give you the figures on that, but it is there.

Q. Where did you get the information from to put on this paper?

A. I did figure myself.

Q. Figured it out?

10

A. I did figure so much lumber was, and the labor and material.

Q. How did you figure it?

A. Well, didn't I have in the book the labor and material, and I know what was for each job.

Q. But you cannot tell the jury now how you make these figures up; is that right?

A. Well, the figures is there.

Q. I see they are here. You say they are here. But I want to know whether you can tell the jury 20 how you arrived at them?

A. I had the itemized figures from my labor and material.

Mr. Cole: Mark that for identification.

(The paper referred to is marked for identification for the defendant D1.)

Q. I show you a letter under date of April 2, 30 1925, and ask you whether that is your letter? Suppose you look at the signature. Maybe we will get along a little faster. Is that your signature?

A. April 2—yes, that is my signature; sure; positively.

Mr. Cole: Mark that for identification.

(The paper referred to is marked for identification for the defendant, D2.)

Q. How much extra labor and extra material did you have in dollars and cents after you wrote this letter on April 2, 1925?

A. I couldn't remember. It was—the letter was
10 printed in —

Q. I am asking you if you can tell the jury how much?

A. I did tell them to Mr. Brown. It was printed in his office.

Q. Can you tell the jury now?

A. I couldn't say that. That was—that letter was asked by Pellicoff, that he should know where he stands with me about the extra work, which I did give him a statement that time, up to April 2nd.

20 Q. Well, in this letter you say: "This is to inform you that the extras on job at 172 States Avenue cannot be figured out correctly at the present time."

A. Yes.

Q. "—as same has not been completed as yet."

A. Yes.

30 Q. "However, I may state roughly that the amount may be about five thousand dollars. This is not definite because I have not received prices from roofer, painter, plumber, heater," etc.

A. That was on April 2.

Q. That was on April 2?

A. Yes.

Q. Now, how much extra labor did you have after April 2?

A. I couldn't tell you that.

Q. Have you no idea? Have you no idea?

A. I couldn't tell you.

Q. Where did you get the figures of five thousand dollars from?

A. Now, the figures was in Brown's office. Brown dictated for me the letter and it was his typewriter who done it. He says to show Pellicoff what is going on with the extra work.

Q. Now, will you please look at this book that you said you could help us by, and have your recollection refreshed, and tell me if you can how much in dollars and cents —

A. I have to get my son for that.

Q. You can't do it?

A. No.

Q. How many tons of pebble did you use on that building?

A. I couldn't tell you. It is on the slips, on the bills there. I couldn't tell you.

Q. You haven't any idea?

20

A. No.

Q. Did you use fifty tons?

A. I couldn't tell you.

Q. Do you think you used fifty tons?

A. I couldn't tell you that.

Q. Did you use more than one ton?

A. Yes.

Q. How many more than one ton?

A. I couldn't tell you that.

Q. Well, you are asking this jury to give you
30 thirteen thousand dollars or more from Mr. Pellicoff. Don't you think you ought to be able to tell them something? Do you want them to guess how much you ought to have?

Mr. Hanstein: I object to that. I do not think that is proper.

Q. Well, you were on this work all the time, weren't you?

A. I was.

Q. Did you buy the pebbles?

A. Sure I did.

Q. How many tons did you buy?

10 A. I couldn't tell you that now.

Q. Do you know the names of the carpenters that work for you?

A. One carpenter is Bill Nugent. He was from the first day to the job was finished.

Q. I want to know the name.

A. Bill Nugent.

Q. Who else?

A. About six or seven more. I couldn't give you the name now.

20 Q. Is that the only one you can recall?

A. Yes, because he was from the first day there until the job was completed.

Q. You can only recall the name of one carpenter?

A. Well, there was Hyman Markman—I couldn't remember exactly.

30 Q. Do you recall being asked by Mr. Pellicoff and his daughter to furnish him with a bill of extras and you told them that you couldn't tell how much it was until you found out how much money you had been paid on account of your main contract, or conversation to that effect?

A. No.

Q. Did you ever furnish him with a bill of extras?

A. Bill of extras? I went over —

Q. Did you ever furnish Mr. Pellicoff with a bill of extras?

A. I told Mr. Brown to look over all the extras in Pellicoff's house when he was leaving their door, and there is a statement from Mr. Brown himself what the extras was.

Q. Did you do the work under the plans on that easel?

A. Yes.

Q. Did you make any other plans?

A. No; they were the only plans.

Q. Now, I show you three sheets and ask you to look at them and say whether you ever saw them or any of them before today? 10

A. This is all right. That is the one I worked under, yes. (Referring to D4.) I never saw this one. (Referring to D5.) Let me have that last one again one moment. No, that was a different day and month was made, and that was a different day, two different days. There is a date on here when this was made. 20

Mr. Hanstein: Just sit down. That is all right.

The Witness: These two were made in one day. That other one was made on a different day.

Q. Let us have an understanding. This sketch, or whatever it may be called, which is marked D5—you say that you never saw that before?

A. I didn't see this here but —

Q. Did you ever see that before? 30

A. No, I didn't.

Q. First time this morning?

A. Yes.

Q. Never saw it before?

A. No.

Q. The other two, one marked D3 and the other D4, you did see before?

A. Yes, that was the plans same as over there.

Q. You say these are the same as those on the easel?

A. Yes.

Q. Are they dated, those plans on the easel? If so, tell us the date on those plans.

A. This is 10-17-24; 10-17-24.

Q. Now, you spoke about there being a change, didn't you, on account of the state department?

10 A. Not this plans. It was a change made after six or eight weeks later by Mr. Brown which I didn't see the change because the State inspector came around on the job and said: "Kolmetzky, you must have a copy from Trenton on the job," which I went to Brown and asked for it and never received it and never saw those plans that was filed in Trenton.

Q. In other words, you changed the work but you maintained or retained the same plans?

20 A. On the same plans only by the order through Mr. Pellicoff; and the same plans only by the order to suit Mr. Pellicoff.

Q. You never had any other plans except those?

A. Except these two.

Q. But, as a matter of fact, you did do the work?

A. Yes.

Q. After the State department made some objection?

30 A. No; that was about seventy per cent the job done when they made the changes in Trenton.

Q. Exactly; but they were made at same time, weren't they, in Trenton?

A. Not what I know. It was changed—Mr. Brown changed that according to law in Trenton.

Q. But was the work changed? Was the work changed?

A. The work was changed every day.

Q. No, but was not some of the work changed by reason of orders from Trenton or the State department?

A. No, no, no.

Q. You don't know anything about that?

A. The only thing is he told me to make that fire escape extra. That is according to Trenton law. And I went along, different things, but it was not changing windows and partitions on account of 10 their law.

Q. Now, if you received the money from Pellicoff each week with which to pay the payroll for both the original contract and the extras —

A. When I received the payroll —

Q. I have not finished my question.

A. All right.

Q. You testified that you were paid by Mr. Pellicoff each week as you submitted your payroll, didn't you? 20

A. Yes.

Q. And you paid the payroll to the men?

A. Yes.

Q. Well, if that is so how can you get seven thousand dollars against him for extra labor?

A. It is not against him seven thousand, against him labor. This is the statement only what the extra labor was. It is not against. It is a statement. He asked me for a statement for the extra work which I produced. 30

Q. Did you keep any account in a book of the labor that you have on contracts?

A. No, on a slip of paper. When the job is done it is done; but during job on anything I mark down.

Q. You don't keep any record of your contract?

A. No.

Q. You don't know whether you are making money or losing it?

A. I know when it is done.

Q. What?

A. When I am done with the job I know whether I made or lose.

Q. How do you know if you don't know what you are paying out?

10 A. I kept a small record on a piece of paper, on a card or anything I get hold of and keep that in my pocket.

Q. What did you do with the piece of paper?

A. When the job is done it is destroyed.

Q. But you do know whether you are making money or not on each contract?

A. I know it.

Q. When you testified the other day you carried it all in your head.

20 A. Even in my head don't I know whether I lose or make?

Q. Now, Mr. Kolmetzky, I am going to show you a number of receipts purporting to be signed by you. I wish you would look at them and tell me whether you received the money represented by them and if, in any case, you did not receive the money just say which one and put that aside, won't you, so we can look it up later. (Hands slips to the witness who examines them.)

30 A. Where is the rest of the checks? Only three checks? I had about fifty or sixty checks. Always checks. Every Friday used to give me a check.

Q. Now, Mr. Kolmetzky, I am going to show you a number of receipts purporting to be signed by you. I wish you would look at them and tell me whether you received the money represented by

them, and if, in any case, you did not receive the money just say which one and put that aside, won't you, so we can look it up later?

A. Well, there should be a check for each of that order and I don't see them.

Mr. Hanstein: Just answer the question, Mr. Kolmetzky.

(The witness examines each slip and sets some 10 of them aside.)

Q. Well, now that one you just put down is dated first month seventeenth, twenty-five and on the back of it is one receipt for February seventh. Is that also yours?

A. Yes.

Q. All right.

A. This ninety-five is on that bill, so you have to figure that. And I didn't receive that. (Handing 20 check to Mr. Cole.) And this here receipt covers that check. (Handing the receipt to Mr. Cole.)

Q. And receipt dated May 22, 1925, covers the check of the same date to Hyman?

A. Yes; which I don't know anything about it.

Q. All right.

A. That is no bill. (Handing a letter to Mr. Cole.)

Q. Now, are these that you have laid upon the table—you got the money for? 30

A. Yes.

Mr. Cole: Mark these for identification.

(The slips referred to and examined by the witness are marked as one exhibit for identification for the defendant, D6.)

Q. Now, you put aside three checks. I show you one check dated November 7, B. Pellicoff to your order for \$200 and endorsed "Harry Kolmetzky." Did you get the money on that check?

A. Well —

Q. Did you get the money on that check?

A. That was changing checks. I show a check against that in my house to Pellicoff. That was not on this job at all. It had nothing to do with this
10 job.

Mr. Cole: Mark that for identification.

(The paper referred to is marked for identification for the defendant, D7.)

Q. What was that check given for?

A. This check I asked Mr. Pellicoff—he changed checks with me for a week, which I did give him
20 my check and he did give me his, and if I had known it I would bring my check.

Q. In other words, he lent you \$200?

A. Yes.

Q. And you gave him your check?

A. I paid him for it, too.

Q. Check of November 18th to your order by Mr. Pellicoff for \$200. Is the same thing true with respect to that?

A. If you don't mind give me that bill which is
30 marked in the back there. That covers the \$200 here. That is the \$200 for this check here.

Q. Point out which receipt that is, won't you, please?

A. That is the receipt for that \$200 check.

Q. February 7th?

A. Yes.

Q. Well, the check is dated November 18th.

A. Then I will show you a check which I couldn't pay him by my check and he took a receipt for it on the job for \$200 on account of this check.

Q. Well, you notice the check you say you didn't get the money on —

A. Well, this check here is not on this job.

Q. Wait a moment, please. You say, do you, that the check dated November 18th, for \$200, he has already been given credit for by the receipt
10 dated February 7th?

A. Because he loaned —

Q. Is that so or not?

A. Judge Cole, he loaned me that \$200 and I couldn't give him it back, which he got a receipt for it. That is paid. Now, he will have to show me a certificate or an order for \$200 if it went on that job. This is a different proposition altogether. It had nothing to do with this job.

Q. I again call your attention to the check dated
20 November 18th to your order for \$200 —

A. Not for that job. It has nothing to do with that job.

Q. Did you get the money on that check?

A. And I gave him a receipt for it.

Q. Where is the receipt?

A. That receipt right in the book.

Q. Dated February 7th?

A. Yes, and he loaned me money and I couldn't pay him back that time and he said: "Give me a
30 receipt," and it is for \$200. Every receipt that is here he ordered—now —

Mr. Hanstein: Now, there is no question.

Q. Look at the check May 22, 1925, to M. Hyman,

\$200. You said awhile ago you didn't know anything about that check?

A. No. There is no signature of mine here, and Hyman is the painter of the job.

Q. Who employed him?

A. I did.

Q. Well, isn't that a check to Hyman for \$200 on account of this work?

A. Can I explain how the check was given to him?

10 Q. That is all I want you to do.

A. Hyman came over to me. I think it was on a Friday. And he said: "Kolmetzky, I want \$200." I said: "All right. I will ask Pellicoff and I will get \$200 for you," which he did give me before some money for the painter. Now, I asked Pellicoff and Pellicoff said no, he hasn't see much done yet—and what his answer was I can't remember—and he said: "No, I would not give him. If he has this week the money he will come next week." Well,

20 Hyman came the next day and I told him what Pellicoff told me. "Now," he said to me, "Kolmetzky, wouldn't you mind if I go to Pellicoff and ask him if he will give me the \$200?" I said: "Why not?" It is all the same thing. I was trying to get \$200 for you. If you think you can get the \$200 go ahead and get the \$200 and you will give me a credit on the contract job." So he went there and I didn't hear from Hyman for about a week. I saw him next Monday on the job.

30 Q. Did Hyman get the money?

A. That is what I want to explain you, what was done. I didn't know it until a week later if he has got the \$200.

Q. All right. Did he get that \$200?

A. He did but I didn't know it until a week after he gave him the check.

Q. That was paid on account of your contract?

A. Yes, yes, certainly.

Q. Have you given Mr. Pellicoff credit for it?

A. Yes, positively.

Q. Where?

A. I mean the painter. You know the painter's job was a thousand dollars and the amount that I paid him —

Q. But, Mr. Kolmetzky you —

A. Oh, you mean to Pellicoff? No, I didn't give 10 him no credit because I didn't know it.

Q. Why didn't you?

A. Because he didn't give the check direct to me.

Q. Are you willing to give him credit for it now?

A. Yes.

Q. \$200 more than you have given him?

A. Yes. I think there is some more money that he paid out that I didn't know it.

Q. Oh, you do? You think he is still entitled to some more credit, do you? 20

A. Yes. Whatever he is entitled to he will get it, whatever bill is paid to me the receipt he has got; it is all right; I will O. K. that.

Q. Now, we will mark this check of November 18, 1924, for identification.

(The paper is marked as an exhibit for the defendant for identification, D8.)

Q. Now, without explaining anything I want to 30 know whether you actually got the money on this check of November 7?

A. Not for this check. I got the money but not for this job.

Q. Did you get the money on this check?

A. Yes, I did, but not on this job here. It is a different proposition.

Q. Did you get the money —

A. And I paid for it.

Q. Did you get the money on the check of November 18th?

A. Which one was that? That was November 7th. I got a check to show that was paid by my check. On November 18th that receipt covers that check.

Q. But still I want to know whether you actually got the money from the bank on these checks?

10 A. Sure, and he has got mine, too, and the receipt there covers it.

Q. From whom did you buy the pebbles?

A. Hudson Supply.

Q. Have you got its bill?

A. I got plenty of bills for that job, not exactly only for pebbles.

Q. I am talking about the bill for pebbles and you say you changed from white to colored.

A. Yes.

20 Q. Have you got the bill for those pebbles?

A. I had.

Q. You are charging him ten dollars a ton extra, aren't you?

A. For the color, yes.

Q. And you said it amounted to about one hundred dollars extra?

A. Ninety-five to one hundred dollars, I think.

Q. So that you must have had about ten tons of pebbles?

30 A. Yes; I think so.

Q. Did you use ten tons of pebbles on there?

A. I couldn't tell you that now.

Q. What do you think about it? Did you use ten tons of pebbles, do you think?

A. I couldn't tell you just now.

Q. On your bill of particulars you charge \$115. Do you know that?

A. I couldn't remember it. If it is there it is \$115.

Mr. Cole: I think that is all, Mr. Kolmetzky.

Re-direct examination.

By Mr. Hanstein:

Q. Judge Cole asked you if you had any bills for 10 extras on this work.

A. He asked me if I had any contracts, not bills. I had the bills, not the contract.

Q. Do you know what those bills relate to?

A. That is for the extra.

Q. Are both those bills for extras?

A. Yes.

Q. Do you have any other bills for extras here?

A. No, I haven't got it here.

Q. Do you know where they are?

20

A. I don't think that I will be able to get them. I tell you I did left all my papers with Mr. Bloom and when I got it back he didn't give me the papers and I couldn't remember which I did give him or what I did give him at that time.

Mr. Hanstein: I offer that.

Mr. Cole: I object to the offer of somebody else's bill.

30

Mr. Hanstein: Well, I think it is entirely proper now. Judge Cole has questioned him about bills for extras.

Mr. Cole: I cross-examined him. He says I didn't. He says I asked him for contracts.

Mr. Hanstein: After all, the record is going to speak for itself.

Mr. Cole: The objection is that you cannot prove the bills by merely producing them. They ought to be proved by the people who furnished the material, or —

The Witness: They are here.

10

The Court: I will permit them on the theory that they are produced in response to counsel's question if he had any. He says he did not have any but here are the two that can be produced.

Mr. Cole: Allow me an exception.

(The papers offered are received in evidence and marked as exhibits for the plaintiff, P8 and P9.)

20

Q. Did you have any conversation with Mr. Pellicoff about the extras?

A. Yes.

Q. Was Mr. Brown, the architect, there?

A. Yes.

Q. Is Mr. Brown the architect, the gentleman sitting next to Judge Shinn?

A. Yes.

30 Q. Did he make up a list with you of the extras that you had done?

A. Yes, right in Pellicoff's house, 172 States Avenue.

Q. Is that the list of extras that was made up by Mr. Pellicoff's architect?

A. Yes. That is his handwriting. That is, Mr. Brown himself put down all the extras which we went through.

Q. Did I understand you to say that the letter that Judge Cole has read to the jury was dictated in Mr. Brown's office?

A. Yes, sir.

Q. Who dictated that?

A. Mr. Brown.

Q. What did you know about the cost of the extras at that time?

A. I didn't know anything only except what Mr. Brown told me to show the paper to Mr. Pellicoff 10 that he should not get scared for more extras.

Q. Who suggested this figure of five thousand dollars that was inserted in that letter?

A. Mr. Brown himself. I myself said I better put in seven or eight because I know it run more and at that time he said "Make it five and make him feel better."

Q. How soon did you start doing extra work after you started doing the work under the contract?

A. Well, I couldn't tell you exactly. When I told 20

The Court: He testified to that four or five times; that he started on the extra work two or three days or four days after the contract, after he signed it.

Q. Judge Cole has shown you a bill of particulars. Did you make up the list of items on that bill of particulars? 30

A. Yes, I did.

Q. Whom did you give that to?

A. I give it to Mr. Bloom.

Q. Your lawyer?

A. Yes.

Q. At whose suggestion did you put those figures on there?

A. Well, the specification was produced —

Mr. Cole: Will you please answer that question? Who suggested putting the figures on it?

A. Who suggested? Lawyer Bloom told me Judge Shinn wants to have the figures itemized, each item separate.

10 Mr. Cole: Still he has not answered the question. At whose suggestion did you put the figures there?

Mr. Hanstein: Well, I think he has answered it all right—that Judge Shinn wanted them put on.

Q. Now, you stated that you went back and did certain repairs to this building, fixed the doors and locks and so on after you had felt that it was completed. When was it that you went back and made
20 these repairs?

A. I think in November, 1925.

Q. You think that was November that you went back and did that work?

A. Yes.

Q. Has Mr. Pellicoff paid you the money due for the extra labor?

A. Well, he—he—paid me the money that is due on the extra labor?

Q. Yes, has he paid for the extra labor?

30 A. I don't know because it was never mentioned any extra labor for contract labor. It was never mentioned.

Q. I am talking about the labor that was required in the doing of the extra work. Did he ever pay for that?

A. Well, I used to get my payroll every week as

I am going along on the job, but I didn't exactly know if it was on the extra. It was not spoke about anything if the money goes on the extra and not extra. I got my payroll.

Q. There was nothing said about what was to be done with —

Mr. Cole: Ask him. I object to it as quite leading. 10

The Court: I sustain the objection.

Mr. Hanstein: May I see these receipts you showed him, Judge?

(Referring to slips marked Exhibit D6 for identification as one exhibit.)

The Court: I wish you would clear up something for my benefit. You say in this suit that one item which you claim he owes you is some seven
20 thousand dollars for labor.

The Witness: Yes.

The Court: And yet you say in answer to a question by Judge Cole that you got the money from him and used the money from him in the payment of your labor both for extras and contract work that was performed on that job. Now, if that is
30 a fact, how can you now claim against him seven thousand dollars for labor?

The Witness: Now, my claim is not the seven thousand dollars for labor. That was Judge Shinn wants to have an itemized bill, which I showed that the labor for extras amounted to that much.

The Court: Let us see in your schedule of recitals what claim you made. (Referring to the schedule.) All right. You don't specify any claim for labor or any amount in your complaint.

The Witness: No; it was only a statement. He wanted an itemized statement a hundred times.

10 Mr. Hanstein: I would like to offer this bill of particulars in evidence, marked "D1 for identification.

Mr. Cole: I object to it going in evidence.

The Court: It seems to me where it is admitted as a fact that the defendant and the defendant's counsel requested to be supplied with a bill of particulars and were to be supplied with it, and the plaintiff having been cross-examined on it, it ought
20 to be admissible in evidence. I will permit it.

Mr. Cole: Allow me an exception.

(The paper offered, heretofore marked D1 for identification, is received in evidence and marked as an exhibit for the plaintiff, P10.)

Mr. Hanstein: That is all.

30 Re-cross examination.

By Mr. Cole:

Q. When was the last work you did before you went back in November?

A. I couldn't remember; I couldn't tell you.

Q. What day in November did you go back?

A. I couldn't tell you that.

Q. How long were you there?

A. I couldn't tell you that.

Q. What did you do?

A. I had one or two mechanics there and told them what to do.

Q. What did you do?

A. According to Judge Shinn's request.

Q. I didn't ask you that. What did you do in
November when you went back? 10

A. Fixed up or completed the job.

Q. What did you do?

A. Fixed the doors, spigots.

Q. What doors did you fix?

A. It is impossible for me to tell you.

Q. Were you there when it was done?

A. I was there and showed my carpenters what
to do.

Q. You were there when it was done? 20

A. After it was done I was there.

Q. Were you there when it was done?

A. When the carpenter came back on that job and told me it is done I went over and saw it is done.

Q. How long were they there?

A. I think it was a day and a half.

Q. Did you charge for that?

A. I couldn't tell you that. I couldn't tell you
that.

Q. How much was it? 30

A. I couldn't tell you just now.

Q. Is it in the little book?

A. I couldn't tell you that.

Q. Suppose you look at it and see if it is in the
little book?

A. You will have to ask my son. I couldn't tell
you that.

Q. And the last day you did any work before you went back in November was in May, wasn't it?

A. I couldn't tell you that now.

Q. Now, when was it that Mr. Brown gave you that list of extras?

A. I couldn't tell you when it was, but I know Pellicoff lived in the house already there, because Pellicoff was —

10 Q. Was it after Pellicoff took possession and after you had finished all work he gave you this list?

A. Yes.

Q. As indicating to you what you had done by way of extras?

A. Yes.

Q. That was his version of it?

A. Well, Mr. —

20 Q. Was that Mr. Brown's version of what extra work you had done?

A. Looked over all the extra work, yes.

Q. And after the job was completed?

A. After Pellicoff was in the house already.

Mr. Cole: That is all.

(Witness excused.)

AFTER RECESS.

30

HARRY KOLMETZKY, recalled.

Direct examination.

By Mr. Hanstein:

Q. Mr. Kolmetzky, after you had completed your extras did you go to see Mr. Brown?

A. Yes, sir.

Q. Did you have a conversation with him?

A. Yes.

Q. What did you have a conversation with him about?

A. Well, I asked him to give me a price on all the extras, which he told me that he will make up the price, and he told me that he will have to go over again and I shall have to see him a couple of 10 days later.

Q. And did you go to see him again later?

A. Yes.

Q. What did he say to you then?

A. He told me he is not ready yet.

Q. Had you told him what your charge was for the extras?

A. I did told him that it will amount to about twelve thousand or over twelve thousand. Well, he answered me he will have to go over that. 20

Mr. Cole: Mr. Brown can't bind us except by the certificate under the contract.

The Court: I think that is correct.

Mr. Hanstein: Judge Cole contended at the time he made his motion that even assuming that the situation was as we contend—that this was a new and independent contract—we have not complied with the terms because we had not gotten an ad- 30 justment from Mr. Brown.

Mr. Cole: There is nothing in this case to show there was any authority on Mr. Brown's part to do anything of this sort to bind this defendant.

The Court: The purpose of your examination now is to relate some conversation between the architect Brown and this plaintiff to bind the defendant.

Q. (Repeated by the stenographer): Had you told him that you charged for the extras?

Mr. Cole: I object on the ground it is irrelevant and immaterial and cannot possibly bind the defendant. 10

Mr. Hanstein: All I want to establish is this— if they will concede this to be the fact there won't be any need of further testimony: that we undertook to get an adjustment from Mr. Brown.

The Court: You may ask the witness if he asked Brown to make the adjustment. 20

Q. Did you ask Brown to adjust these prices?

A. Yes, sir.

Q. Did he do it?

A. No.

Q. Now, subsequently, or, at any other time did you go to see Judge Shinn about an arbitration?

A. Yes.

Q. Was Judge Shinn representing Mr. Pellicoff at that time?

A. Yes. 30

Q. And what did you say to him?

Mr. Cole: I object to any testimony between this witness and Judge Shinn as to an arbitration. The contract speaks. An attorney-at-law has no authority to bind a client in a matter of this sort.

Mr. Hanstein: I want to prove that we went to Judge Shinn in an effort to get an arbitration and didn't get it.

Mr. Cole: The contract provides for the way they can have the arbitration. The contract is specific as to how it is to be done.

The Court: I sustain the objection.

Q. Did you make a request upon Mr. Pellicoff or his attorney for an arbitration? 10

A. Yes.

Mr. Cole: That is objected to. He includes the attorney again. Now, what took place between him and —

Mr. Hanstein: He is the attorney of record. We certainly have the right to show that we went to the attorney of the defendant and said we wanted an arbitration. 20

The Court: I will permit it to stand.

Mr. Cole: Exception.

Q. Upon whom did you make that request?

A. Upon Pellicoff and upon Judge Shinn both.

Q. Did you make a request upon Pellicoff for an arbitration? 30

A. First on Judge Shinn. Later I saw Pellicoff.

Q. What did you say to Pellicoff?

A. I said to Pellicoff: "Why don't we get an arbitration and have that settled?" He said to me: "It is already in my lawyer's hands and it is paid

for. It has to go to court.” That is what Mr. Pellicoff answered me in front of his hotel on Virginia Avenue. He went out of the hotel and I just passed by. I didn’t go exactly to see Mr. Pellicoff, but it was just coming when I walked up and he came off the steps and I told him that and that was his answer.

Q. Did you go to see Judge Shinn?

A. Judge Shinn I saw before I saw Pellicoff. I think it was a couple of weeks or three or four weeks.

Q. And what did you ask him?

A. I asked him for an arbitration.

Q. What did he say?

A. He didn’t want to talk to me. He made me with his hand. That means that I should leave the office.

Mr. Hanstein: I think that is all.

20

Cross-examination.

By Mr. Cole:

Q. When was it?

A. Oh, about six or seven months ago. I don’t know exactly but it is a long time.

Q. Well, was it six or seven months ago?

A. What?

30 Q. Was it six or seven months ago?

A. I couldn’t answer you on that.

Q. Was it after you brought this suit?

A. I couldn’t answer you on that. I cannot remember whether it was brought or not already.

Q. Do you know when this suit was brought?

A. I couldn’t tell you that.

Q. You don’t fix the time?

A. I couldn’t tell you anything about that.

Q. Was it ten years ago?

A. I cannot say it is ten years ago.

Q. Was it ten weeks ago?

A. Oh, more than ten weeks.

Q. Was it six months ago?

A. I couldn’t tell you that.

Q. Was it as much as six months ago?

A. I couldn’t answer that.

Q. How long a time between seeing Mr. Pellicoff and seeing Judge Shinn?

A. I don’t remember that either. I couldn’t give you an answer on that, but I know I saw Judge Shinn first.

Q. You don’t know whether it was before or after you brought this suit?

A. I couldn’t tell you.

Q. Well, do you know when you brought this suit?

A. I couldn’t answer that.

Q. Well, you brought this suit on the fourth day of March, 1926.

A. I couldn’t tell you.

Mr. Cole: That is all.

(Witness excused.)

HARRY KOLMETZKY, recalled in rebuttal.

30

Direct examination.

By Mr. Hanstein:

Q. Mr. Kolmetzky, did you ever see these plans that the defendant has introduced in evidence?

Mr. Cole: I object on the ground that on cross-examination he expressed denial of ever having any plans except those on the board. I asked the question specifically because we intended to show there were other plans.

Mr. Hanstein: All right, so long as that is in.

Q. Did you ever see this basement plan?

10

Mr. Cole: He said he did not. I asked him that and he said he never saw that.

Mr. Hanstein: All right.

Q. Did you ever agree with Mr. Pellicoff that you would build his house for \$12,500?

A. No, sir.

Q. Did you ever have any conversation with Mr. Pellicoff about giving him a credit of two thousand dollars if you eliminated the work on the basement?

20

Mr. Cole: He denied that. I asked him that question expressly. He said it never occurred.

Q. Mr. Kolmetzky, what work did you do on the third floor that caused you to say that you are entitled to charge for extra work in respect to it?

Mr. Cole: Objected to. It is a part of his case and gone into and it is not rebuttal.

30

The Court: I sustain the objection.

Mr. Hanstein: I ask an exception.

Q. Did you receive this \$200 by check of November 7th which Mr. Pellicoff claims he gave you on account of the contract price?

Mr. Cole: I object. He says he didn't.

Mr. Hanstein: All right, so long as it is in.

(Witness excused.)

10

PLAINTIFF RESTS.

APPEARANCES:

MESSRS. THOMPSON & HANSTEIN, for plaintiff.

C. C. SHINN, Esq., for defendant.

CLARENCE COLE, Esq., of counsel for defendant.

20

(The above entitled case was tried November 1, 1926, before Hon. William H. Smathers, Judge, and a jury.)

BENJAMIN BROWN, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows:

30

Direct examination.

By Mr. Hanstein:

Q. Mr. Brown, you were the architect on this job?

A. I was.

Q. Did Mr. Kolmetzky come to see you after he had completed his work there?

A. He comes in right along. He is a frequent visitor to my place.

Q. Did he ever come to see you and ask you for an adjustment of the prices on these extras?

A. I think he asked me for an arbitration. As for an adjustment I don't recollect it.

10 Q. Aren't you certain as to whether or not he asked you for —

A. An arbitration.

Q. —for an adjustment?

A. We tried to adjust ourselves after the job was completed, and then I never saw him for a good long while until after he saw you, I think.

Q. Didn't you tell me during the noon recess that Mr. Kolmetzky had been to see you about an adjustment of the prices of these extras?

20 A. As to adjustment, yes, he came; but as to a final real meeting for adjustments that was—we never met for that.

Q. Well, what did he say to you about adjusting prices?

A. Adjusting prices? At first he would not give any information about the real cost of these extras until he would know definitely how much Mr. Pell-coff paid him. See? And I couldn't get anything out of him until—yes, before he brought suit. He told me it was around \$5,000, and I told him that

30 was too much.

Q. Well, did he talk to you about an adjustment of the price for extras? That is all I want to know.

A. He talked about it, yes.

Q. Did he ever ask you for it? Did he ever ask that the price of his extras be adjusted?

A. He never—well, he asked me for an adjustment, yes; but he never showed up again in order to come to a regular meeting in order to adjust things.

Q. All right. Did you ever make any statement to him that you were ready to adjust the prices?

A. I think I did.

Q. Did you ever tell him at what price you were willing to adjust these extras?

A. I told him it was around "\$2,000," nothing 10 definite.

Q. Did he ever agree to that?

A. Oh, he said his debts were more than that.

Q. So that you people never adjusted these extras, did you?

A. No, sir.

Mr. Hanstein: That is all.

Cross-examination. 20

By Mr. Cole:

Q. Did he ever furnish you with an itemized statement of the extra materials and extra labor?

A. Never.

Q. Did you ask him for it?

A. I did. I told him I must have it.

Q. And you say that he mentioned the figure \$5,000? 30

A. Yes.

Q. And you told him that was too much?

A. Yes.

Q. Your idea was that he was not entitled to have more than two thousand dollars?

A. My idea was that he was not entitled to have more than two thousand dollars.

Q. Did he say—what did he say to that? That it was not enough?

A. Not enough to pay his bills.

Q. And he never did furnish you with data from which you could make up the figures?

A. Never.

Q. And concequently you could not adjust it?

A. No.

10 Q. You don't know anything about what he spent or claimed except his general statement, do you?

A. I just knew generally what he did up there, of course.

Q. And he never gave you anything at all upon which you could base an adjustment?

A. No.

Mr. Cole: That is all.

20 Re-direct examination.

By Mr. Hanstein:

Q. You were on this job every day or practically so?

A. About three times a week.

Q. You knew of these extras and the variations from the plans?

A. Surely.

Q. You are an experienced architect?

30 A. I hope so.

Q. You were able, were you not, to figure for yourself what these extras were worth?

A. Well, not as good as a contractor.

Q. Not so good? Did any contractor ever give you the figure on this when you were talking to Kolmetzky?

A. Mr. Pellicoff took all the bids in.

Mr. Hanstein: That is all.

Mr. Cole: That is all.

(Witness excused.)

DEFENDANT'S CASE.

10

BERNARD PELLICOFF, the defendant, called as a witness in his own behalf, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Cole:

20 Q. I show you check to the order of Mr. Kolmetzky for \$200 dated November 18, 1924, and it is marked Exhibit D8 for identification. I ask you what was that check for?

A. For labor, to pay for labor.

Q. On this job?

A. Yes, sir.

Mr. Cole: I offer that in evidence.

(The paper offered, heretofore marked D8 for identification, is received in evidence.)

30

Q. I show you check to the order of Mr. Kolmetzky, November 7, 1925, marked D7 for identification. What is that for?

A. For labor.

Q. On this job?

A. On this job; yes, sir.

Mr. Cole: I offer that in evidence.

(The paper offered, heretofore marked D7 for identification, is received in evidence.)

10 Q. Mr. Kolmetzky stated that one of these checks was a mere exchange; that he gave you his check for \$200 and you got the money on that and you gave him your check; is that true?

A. No, sir.

Q. Did he ever give you his check in exchange for one of these checks?

A. No, sir.

Mr. Cole: I offer the check of June 1, 1925, Pellicoff to "Kaplan" for \$168.

(The paper offered, heretofore marked an as exhibit for identification, D9, is received in evidence.)

Mr. Cole: I offer the receipts and check which were marked for identification.

(The offer heretofore marked D6 for identification for the defendant, is received in evidence.)

30 Cross-examination.

By Mr. Hanstein:

Q. Did you say that you never exchanged checks with Mr. Kolmetzky?

A. No, sir.

Q. Did he ever give you a check for \$200 around November of that year?

A. No, sir.

Mr. Hanstein: All right.

(Witness excused.)

BENJAMIN BROWN, recalled as a witness on behalf of the defendant, having been previously sworn, was examined and testified as follows:

Direct examination.

By Mr. Cole:

Q. The investigation here has brought out that there was some question about work to be done in the basement of this house. Was that a part of the original plan?

A. Yes, sir.

Q. Does that appear on any plan?

A. I made a plan for it.

Q. Is it among the papers here?

A. That is the plan.

Q. It is Exhibit D5?

A. Yes, sir; that is it.

Mr. Cole: I offer it in evidence.

(The offer, heretofore marked as an exhibit for the defendant for identification D5 is received in evidence.)

Q. What was to be done in the basement by this plan?

A. We built these four rooms.

Q. Just tell it to the jury.

A. There is one, two, three—four bedrooms. See that? And one, two, three—three pair of twin windows, new ones, and these—that says pine floor, hall electricity; and this other back part was supposed to remain, and there is supposed to be a storage room, also calls for new steps in there but we changed our mind from that; and it also says in
10 here, make floor level with the basement in the front of the porch. There are windows marked, new windows in there. See that?

Q. All right. Now, you may take your seat again. Did Mr. Kolmetzky have a copy of this?

A. Why, he worked on it with me in the basement with Mr. Pellicoff.

Mr. Hanstein: What is that?

20 The Witness: Mr. Kolmetzky was in the basement with Mr. Pellicoff and I. We all doped out what was the best thing to do with that.

Q. After the contract had been made to do the work for \$14,500, was there any talk with Mr. Kolmetzky about omitting the things provided for in that basement?

A. We thought of saving two thousand dollars.

30 Mr. Hanstein: I object to what you thought.

The Witness: Well, Mr. Pellicoff wanted to save two thousand dollars.

Mr. Hanstein: I object to that.

Q. I want to know whether after this contract was made in which you say the basement was provided for and the work was to be done for \$14,500—was there any talk either by you or Mr. Pellicoff with Kolmetzky touching the omitting the doing of the work in that basement?

A. Mr. Kolmetzky told me they are going to omit the basement and I spoke to Mr. Pellicoff about it. I said: "What is the idea of removing the basement? There is more rooms you can rent out." 10 He said: "I want to make a cheaper job."

Q. Now, was any figure agreed upon between Mr. Pellicoff and Mr. Kolmetzky as to the credit for omitting those things?

A. Before the agreement was made we figured two thousand dollars for the basement.

Q. Yes.

A. And \$12,500 for the upstairs; and before—then Mr. Pellicoff—then we decided this way — 20

Mr. Hanstein: I object.

Q. Was it agreed that those things should be left out?

A. Yes.

Q. And were they left out?

A. They were left out.

Q. And before the contract was made two thousand dollars was figured for doing that part of the work to make up the \$14,500? 30

A. Yes, sir.

Q. There have been marked for identification the two white sheets?

A. Yes, sir.

Q. Were they a part of the plans for this building?

A. Yes.

Q. Were they made before or after the blue-prints on the board?

A. After those.

Q. Will you explain to the jury —

Mr. Cole: I will offer those in evidence.

10 (The papers offered, heretofore marked D3 and D4 for identification for the defendant are received in evidence.)

Q. Explain to the jury how those two sheets came to be made after the original blue-prints.

A. At first I made this set of plans.

Q. Those on the board?

20 A. On the board. And we found out it was hard to rent the large apartment, see? It is hard to get a big bidder. So I suggested making two smaller apartments on that second floor. That means if it is a three-family house we had to get a permit from Newark. So I made this here set of plans and got it O. K'd.—sent it to Newark. It usually takes about two or three weeks to get a report from Newark. Kolmetzky says that in order to have time we will take a permit out now and he can tear it down. Now, nobody is going to bother him tearing it down so long as he has a permit. He took a permit out on this.

30 Q. On the blue-print on the board?

A. For a two-family house. Now, I didn't get my report—these here plans back from Newark. In the meantime the inspector was here and put a stop notice on the job. He saw they were working on a three-family house. And about a day or so later I got my report from Newark and the stop notice

was taken off, after he saw this here plan was on the job.

Q. Now, which plan did he work by?

A. This is the plan—the job was completed according to this.

Q. You mean now the white sheets?

A. The white sheets, sure.

Q. Now, in what respect, can you tell us in a general way, do the plans on the blue-print on the board differ from the white sheets? 10

A. This has only two kitchens on that second floor—this has only one kitchen on the second floor and this has two kitchens on that second floor. I can show you it on here.

Q. Tell us all the differences between the blue-print plan and the white sheet plan?

20 A. Why, this here stairs is taken out. We put a kitchenette in here, a little hallway and vestibule. There is a doorway in here. This is a dining room now. See? This here is a kitchenette which runs all the way across to here. See? With an alcove in here—that is a kitchenette.

Q. Does that appear on the white sheet plans and not on the blue?

A. Not on the blue; not on these here blues, no.

Q. But on the white?

A. On the white.

Q. Now, will you show that to the jurors, please, where the thing you just explained appears on that sheet and does not appear on the blue sheet? 30

A. You see that there marked "Kitchen." There is another kitchen there. There is two kitchens on each floor, and this only has one.

Q. Now, what else is there that is different?

A. What wall? There is a division in here making two rooms, in this here part back of this here front

kitchen. Those white marks go with these white marks, these here old partitions same as this here. Those red marks are really new things on the plan, those red marks. This is new and this is new.

Q. Now, wait a moment. What I want you to make clear to the jury is the difference between the blue-print plan and the white sheet first.

A. Oh, I see. Well, that is all.

10 Q. All right. Now, let us make this clear. Did Mr. Kolmetzky have the copy of the white sheets?

A. Oh, he has to have them.

Q. Did he have?

A. Yes.

Q. Did you have any blue-prints made of the white sheet plans?

A. Yes, sir.

Q. Did you have any of the blue-prints?

A. Oh, yes.

20 Q. Are there any blue-prints outstanding now that you know of—for the white sheet plans I am talking about now?

A. There would be a set of that up at Newark.

Q. Well, do you know of any blue-print plans that are here in Atlantic City? Do you have any in your office?

A. No, sir.

Q. Has anybody got a copy so far as you know?

A. That I don't know.

30 Q. Now, Mr. Brown, there is in evidence here a basic sheet with a lot of writing on it —

Mr. Hanstein: I offer it.

(The paper offered is received in evidence and marked as an exhibit for the plaintiff, P11.)

Q. Mr. Kolmetzky says you handed him this basic sheet which is now marked P11 after the work was all completed. Now, first I want to know is that so?

A. No, sir.

Q. Is that your writing?

A. My writing.

Q. When was it handed to him?

A. We had a meeting one night at Mr. Pellicoff's house on States Avenue and he claimed these here extras and I wrote them down and told him I would 10 look them over.

Q. Who claimed them?

A. He did.

Q. Well, who, Kolmetzky?

A. Kolmetzky did.

Q. In other words, you put down on that paper what Kolmetzky was claiming?

A. Yes.

Q. Not what you said was being done?

A. No.

Q. Now, can you look at that sheet and tell now whether there are any items on there that he was claiming other than were in fact extras, that were not in fact extras?

A. Oh, there are a lot of things on here extras, that is right.

Q. I ask you whether you can look at that and say whether there are any items there that are not extras?

A. That are not extras?

Q. Yes. Now, if you discover on there any items that are not extras you tell what those items are.

A. Tile in rear of vestibule.

Q. Well, explain that. He claimed that he tiled that vestibule from the front to the rear, whereas he was only required to tile it in the front. Now, what is your explanation of that?

A. The plans call for tiled vestibule.

Q. The entire length?

A. Where are the specifications?

Q. I have never seen specifications. We have been talking about them but they have not been offered in evidence, have they? Suppose you look at the contract P2 and tell us whether he was required to tile the full length?

A. Tile front entrance vestibule; front entrance
10 vestibule.

Q. Is that what it says?

A. Yes.

Q. Well, do you interpret that to mean that he had to tile the whole length?

A. That is all the vestibule.

Q. And was that all he tiled, the vestibule?

A. Well, outside of bathrooms.

Q. I am talking about this particular one.

A. Tile the whole vestibule.

20 Q. Now, what is the next one? What is the next item?

A. Third floor half building—half of the third floor—he says floors—he wanted extra for that. I claim that is not an extra.

Q. Why do you say that is not an extra?

A. Because these rooms—I would not design a building without any floors in it.

Q. Well, is that all he did, put floors in it?

30 A. He is claiming for half of the third floor flooring. I don't think he ought to be paid for half of the flooring.

Q. You heard what he said about it. What was the objection to it?

A. I don't know what his objections are at all. He simply claimed it; that is all.

Q. Well, wasn't it an extra?

A. No, sir.

Q. All right. What is the next?

A. He claims here four partitions and one closet on the second floor. I can only see two.

Q. You mean there are only two there in fact now?

A. I give him credit for three.

Q. And he claims how many?

A. Four.

Q. And does he claim one too many? 10

A. One too many.

Q. Now, the next.

A. They have two closets to the kitchen of the first floor. I just claim one closet.

Q. Well, do you mean he only put in one or was he required to put in one or put in two?

A. Required to put in one.

Q. And he put in two?

A. And put in two.

Q. Do your plans call for one closet? 20

A. I don't know how—I don't remember how many there are here.

Q. You don't remember how many there are there in fact at this time?

A. At this time.

Q. Well, how many are provided for on your plan?

A. None.

Q. Well, any number of closets he put in there he is entitled to have; is that the idea? 30

A. Yes, sure.

Q. And he is claiming two?

A. Yes, two.

Q. And you don't recall how many there are?

A. No.

Q. What is the next item you think may be wrong?

A. Wash-boards; for the stucco—that is in the plans, anyway.

Q. You think he is claiming for that and he is not entitled to it?

A. Yes.

Q. What next?

A. He has moving boiler. The specification calls for re-arrange the present heating system, re-arrange present system it says in here.

10 Q. So that all he did was to re-arrange it?

A. That is what he did.

Q. And he was required to do that by the contract?

A. Yes.

Q. In what way was the re-arrangement required?

A. Moving from one place to another, whatever was necessary. We didn't know what was going to happen down there on account of this here basement.

20 Q. And that is what was in fact done—simply move from one place to another?

A. Simply moved around, yes.

Q. What next?

A. He has here water pipes. The specification calls for install water supply system to all fixtures.

Q. Is that all he did?

A. Well, he put in water, that is what he did—he put in water, yes, except he left a fixture out on the top floor, which I think he charged us for some-
30 where. He didn't put it in yet.

Q. So far as those water pipes are concerned, did he do anything more than the contract or specifications called for?

A. No.

Q. Any other item?

A. That is all.

Q. Now, did he omit to do anything that the contract and specifications required him to do?

A. Why, the plan calls for fire escape from the third floor down on my plan here and he didn't put it in.

Q. Entirely omitted?

A. Entirely omitted.

Q. Will you show that to the jury on your plan?

A. It says fire escape and this is the third floor. You see, there is fire escape and a ladder to the
10 roof.

Q. And it is not there?

A. It is not there.

Q. Anything else?

A. Why, you can see this here plan—well, it is pretty low down. Mine is the same—that the front porches require turned baluster, that is fancy baluster. He just put in straight ones, one and a quarter square; that is straight bars like. Of course, he omitted the basement, but we came after that.
20

Q. You told about that. Is there any difference between the length of the balusters —

A. The back balcony is two feet short. The plan calls for an eight-foot back porch and he put in six. There is an arcade between the dining room and a living room. He didn't put that in at all. He omitted small beveled glass windows in the living room. He put in plain glass; and in the dining room instead of putting in two windows he put in small casements.
30

Q. Anything else omitted?

A. Two thirty-gallon tanks with gas meters were omitted.

Q. Were they called for in the specifications?

A. They were called for on the specifications.

Q. Well, he has given credit of forty dollars for

that. How about the metal medicine cabinet? Did he give you credit for that?

A. There are some transoms missing on the top floor. I think there were five the last time I looked at them. The specifications calls for transoms over all doors and they are not there.

Q. And they are not there?

A. Not there. And when he left the job the painting wasn't completed yet.

Q. Has it been completed since?

10 A. I think Mr. Pellicoff hired some men to complete it.

Q. In what respect wasn't it completed?

A. It was raw and you could see the grains of wood through the paint; in very poor state.

Q. That was done by the gentleman who was on the stand this morning?

A. Yes. He claimed those extras, too.

Q. What extra painting did he in fact do?

20 A. Why, there was those two rooms on the side which he built. Of course, he painted there.

Q. Is that all?

A. And those extra partitions here and there which were put in. He painted those, of course. That is all I can think of.

Q. Well, is there any difference between the roof as contracted for and as it exists?

A. Well, the plan calls for a hip roof—well, according to specifications it was changed to a flat roof.

30 Q. The building was originally what kind of roof?

A. Hip. And they changed to flat. There is a communication between the two of them, how they changed it, somehow or other. Mr. Pellicoff wanted a flat roof—maybe he wanted to have a flat roof for his convenience. I don't know.

Q. What I want to know is whether he put on the kind of roof called for by the plans and specifications in question?

A. There is two ways of taking that, because the plan calls for a hip roof. The specification has asbestos shingles and scratch.

Q. What kind of roof did he in fact put on?

A. Flat.

Q. And was that in accordance with the plan?

A. That was not in accordance with the plan, no. 10

Q. Is it in accordance with the specification?

A. Well, if you take out what you call the scratch part which calls for asbestos which would go on a hip roof—you see, they both don't agree when you have the plan of the hip roof, and somebody changed this in here to flat. They don't agree. I don't know who did that.

Q. Who made the change?

A. That I don't know.

Q. Did you make it?

20

A. I don't think I did.

Q. Let me put it like this: is there a difference between the plans and the specifications touching the roof?

A. Yes, there is.

Q. And were they the same when they left your hands or have they been changed since?

A. When they left my hands they were supposed to be hip roof and asbestos shingles. Now, somebody just turned this here specification around. 30

Q. Would there be any difference in the cost?

A. Oh, yes.

Q. Which is the most expensive?

A. Hip roof.

Q. The one provided for by the plans and specifications when they left your hands?

- A. Oh, yes.
- Q. What would be the difference in price?
- A. I guess about a thousand dollars easily.
- Q. Well, now, concerning these omissions, did you ever speak to Mr. Kolmetsky about them?
- A. Omissions?
- Q. Yes, or the fact that he had omitted to do some of the things he was required to do?
- A. You couldn't get him to complete those things.
- 10 Q. The question is whether you spoke to him about any of these omissions?
- A. Yes.
- Q. Tell us what he said, if anything, when you spoke to him about them?
- A. When I spoke about the hip roof he said Mr. Pellicoff wanted a flat roof, or Mrs. Pellicoff. I don't remember which.
- Q. Did he speak about any other omission?
- A. Balusters.
- 20 Q. What did he say about those?
- A. I think he said that he is putting those square ones in the back. He thought there was a railing required there and Mr. Pellicoff wanted a wood rail there with square balusters. He said he was putting these in the back.
- Q. Do you recall any other, any talk that you had with him about omissions?
- A. Hardwood floors weren't completed and the painting wasn't completed.
- 30 Q. You mean the work wasn't completed at all by him?
- A. I didn't hear.
- Q. Weren't they completed at all by him?
- A. No, the hardwood floors aren't completed yet.
- Q. What part of the house do you have hardwood floors?

A. Why, downstairs I am referring to because that is in his contract verbally. Then there is a living room and dining room, I think.

The Court: What do the specifications call for?

The Witness: This doesn't call for any.

The Court: Why do you say he omitted the hardwood floors? 10

The Witness: He promised Mrs. Pellicoff three hardwood floors.

Q. You mean after the written contract was made?

A. I think it was before the written contract was made and Mr. Pellicoff didn't remember to put it in.

Mr. Hanstein: I ask that that be stricken entirely. 20

Mr. Cole: Yes. We are relying on the contract, of course. You cannot change that.

Q. Now, do you know what extra work was actually done on that building?

A. Yes, sure.

Q. That is all that occurs to me now.

Mr. Cole: Cross-examine. 30

Cross-examination.

By Mr. Hanstein:

Q. Mr. Brown, how many sets of original drawings did you prepare?

- A. Sets of original drawings?
 Q. Yes.
 A. One—well, that is not proper. This is what I call the original drawings, in our terms.
 Q. That is what I call an original drawing, too.
 A. This here drawing was made —
 Q. How many sets of original drawings—we both understand the term—how many sets of original drawings did you prepare?
 10 A. (No audible answer.)
 Q. Now, the stenographer cannot get that. Well, how many? The number.
 A. How many?
 Q. Yes.
 A. I will have to answer in this way —
 Q. Can't you say one, two, six, or whatever it may be?
 A. One and the revised one. You might say that.
 Q. Was the revised one a completely new one?
 20 A. No.
 Q. Didn't you have to re-draw the whole thing in order to make the revised one?
 A. No, just rubbed out a few lines.
 Q. Is that all this is?
 A. That is all this is.
 Q. So that this plan that you have here now is just like that one of which you have a blue-print, except that you have rubbed out some lines?
 A. Yes, and added to comply with the state laws.
 30 Q. And you changed this plan?
 A. Yes, surely.
 Q. So—was that change made before the contract was signed?
 A. Yes.
 Q. Was that change made before the contract was invited—or before the bids were invited on this contract?

- A. I didn't take bids. Mr. Pellicoff took bids. I don't know.
 Q. You prepared the plans under which the bids were taken, didn't you?
 A. Yes.
 Q. Now, were the bids taken before those changes were made?
 A. I cannot answer for bids. I didn't take any bids.
 Q. Well, when did you first give the set of plans 10 to Mr. Pellicoff?
 A. Oh, about October 17th or 18th, 1924, something like that.
 Q. You gave him a set of plans around that date?
 A. Yes, sir.
 Q. And did you give him the originals or the blue-prints?
 A. Blue-print.
 Q. You gave him a blue-print. Where did you get 20 your blue-print made?
 A. That I can't say because I used to go to Philadelphia almost every day, either made them there or in Atlantic City, I don't know.
 Q. You don't know where you got those blue-prints made?
 A. No.
 Q. Now, do you know whether or not these changes were made in these plans before the bids were taken?
 A. That I don't know. 30
 Q. Didn't you draw the contract?
 A. No, sir.
 Q. You didn't draw the contract?
 A. No.
 Q. Did you draw the specifications?
 A. Yes.

- Q. Prepared the plans?
 A. Yes.
 Q. Were you aware when the contract was entered into?
 A. I was a witness there.
 Q. You were a witness to the contract?
 A. Yes, sure, but I don't know if I signed my name to it, but I was there.
 Q. You were there? So there is no doubt in your mind when this contract was signed?
 10 A. Yes.
 Q. Now, I want to know from you whether these changes in these plans were made before that contract was signed?
 A. Yes.
 Q. They were?
 A. Yes.
 Q. Were bids ever taken on the plans without the changing?
 20 A. I don't know about the bids.
 Q. How soon after you prepared the original drawings did you make changes in them?
 A. Oh, about a week.
 Q. About a week?
 A. Yes.
 Q. And what did you do with the original drawings?
 A. There they are.
 Q. I mean the first original drawings?
 A. Just rubbed out and made changes to require
 30 what they wanted. There they are.
 Q. You have the first original drawings here?
 A. There they are. (Indicating P6.)
 Q. At whose suggestion were those changes made?
 A. Kolmetzky was there —
 Q. Who made the suggestions?

- A. We all worked together, Kolmetzky, I and Mr. Pellicoff at the Majestic Hotel.
 Q. Whereabouts, Atlantic City?
 A. Atlantic City, yes.
 Q. Was Kolmetzky there at the time you say changes were made?
 A. Yes, he helped us dope that stuff out.
 Q. Now, you don't know anything about offering these plans to various contractors for bidding?
 A. No, I had nothing to do with that. 10
 Q. When did you first know that Kolmetzky was to be the contractor?
 A. When? Oh, I don't know, that I cannot say.
 Q. Do you know or did you know the day the contract was signed?
 A. Well, naturally.
 Q. You did know it that day?
 A. Yes.
 Q. Did you know it before that?
 A. Before that? No. 20
 Q. You didn't know it until the day the contract was signed?
 A. Well, I might say a few days before I think he told us it was going to be his job.
 Q. So that a few days before the contract was signed you knew Kolmetzky was going to be the contractor?
 A. Yes.
 Q. Now, had the contract been signed when these changes were made? 30
 A. Surely.
 Q. How did Kolmetzky get a set of plans without that change being shown on them?
 A. These were the first set of plans I made before I made these changes. See the point?
 Q. I understand that.

A. That is how he got these. Does that answer your question?

Q. Did you make the application to the tenement house board?

A. Yes, sir.

Q. When did you make it?

A. Around—I cannot tell you off hand. I could easily find out for you.

Q. Well, was it before the contract was signed?

10 A. I don't remember—well, most likely.

Q. What is that?

A. Most likely.

Q. You knew the tenement house requirements as to three-family apartments?

A. Yes, sir, sure.

Q. Is the difference between these plans here, those white plans sufficient to bring it within the tenement house law?

20 A. You couldn't build according to these plans if there is a tenement house law.

Q. That is what I am asking you. These do comply with the tenement house law?

A. Yes.

Q. These do not?

A. These do not.

Mr. Cole: Of course "these" and "these'" do not mean anything unless you show what he is talking about.

30 Q. Did you have blue-prints made of the plans that were offered in evidence?

A. You must have two blue-prints for Newark, one to them and one to return to you.

Q. Did you see the plans that were on this job?

A. Surely.

Q. What plans were they?

A. These here.

Mr. Cole: The white ones.

The Witness: Those white ones.

Q. Were the white sheets themselves the blue-prints?

A. Blue-prints of the white sheets.

Q. Who drew this contract?

A. H. H. Finkelstein, on Virginia Avenue.

Q. Is he a lawyer?

10 A. Notary public, I think. I don't know what he is, real estate man or notary public.

Q. How did Mr. Kolmetzky get this set of plans—the set of blue-prints that he has offered in evidence?

A. When I first made my first original drawing I made blue-prints of that and that is how he got these blue-prints.

Q. Did you see to it that the building permit was issued for this job?

20 A. I explained that before. He took these—he took a permit out on these blue-prints in order to save time. He can tear down the building as much as he can but when it comes to the construction of a tenement house he must have a permit.

Q. Now, this filing of the blue-print plans that we have here—did the filing of the blue-print plans that we have here now save him any time?

A. Oh, yes.

Q. Did he make application for a permit before 30 the contract was signed?

A. You can see that in back of the sheet.

Q. I am asking you.

A. That I don't know. You can see that on the back of the sheet.

Mr. Cole: Well, take it off and look at it.

The Witness: There you are, eleventh month 5-24.

Q. All right. So that these plans were filed with the building department, the plans of which we have a blue-print, on the very day the contract was signed?

10 A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. And you and Kolmetzky had a discussion about filing these plans in preference to the revised plan because it would save time?

A. Yes.

Q. And yet you say at the time the contract was signed you had there a blue-print of this revised plan?

20 A. Yes. What of it?

Q. All right. If you had a copy of the revised plan —

A. Yes.

Q. —there on the fifth of November —

A. Yes.

Q. —will you explain to me why you saved any time in filing the plan that you did file in city hall instead of the true plan which you say was there.

A. You see why? I didn't have a stamped plan
30 from Newark. You cannot take a permit without having a stamped plan from Newark, approved plan from Newark. See the point?

Q. You explain this.

A. If I didn't have a true plan from Newark I couldn't get a permit out to put an apartment house up, or he couldn't. Therefore, in order to save time

the laborers could tear down required parts and he took out a permit on this without being an apartment house, in order to take a permit out, and then you can file your amended plans with the building department which I think he did. I am not sure about that.

Q. You have not found out about that?

A. No.

Q. Now, why—where have these plans been all the time since you had blue-prints made of them? 10

A. In my office.

Q. They have been in your office all the time?

A. Yes.

Q. And this plan, as you say, is now revised?

A. Yes. It will check up.

Q. Checked up, you say, with this plan?

A. Surely.

Q. Now, were the additions that Kolmetzky pointed out made—these additions to the blue-print plan that he has marked in red, those same addi- 20
tions would appear on this plan, isn't that true?

A. If I make a blue-print of this, you mean?

Q. Yes.

A. And make all those red marks?

Q. Yes.

A. Not all; not all.

Q. Which change that Kolmetzky had pointed out would you say would not be there?

A. This one here and —

Q. All right. You point to two partitions that 30
you say would not have been extra work if Kolmetzky had been working from this white plan, is that correct?

A. I don't say that. All in all it has about four partitions in the whole place. I just took up two. If that is the case I don't know how many he has altogether.

Q. Now, how much prior to the execution of that contract did you furnish Kolmetsky with a copy of these plans?

A. Which plans?

Q. Of these revised plans that you say you prepared?

A. How much prior to the execution of the contract?

Q. Yes.

10 A. It must have been a few days, I guess.

Q. Do you know what day November 5 fell on?

A. No, sir.

Q. You don't know that?

A. It was a week day I know.

Q. Did you ever give a copy of this basement plan to Kolmetzky?

A. Sure.

Q. When did you give it to him? I say when did you give it to him.

20 A. When? It must have been about maybe the twenty-fourth or twenty-fifth or something around that time, of October.

Q. The twenty-fifth or twenty-fourth?

A. Around that time, about that time.

Q. You are sure about that?

A. Yes.

Q. Is that it?

A. Yes, to the best of my knowledge.

Q. Now, did you give him a copy of the other two floor plans at the same time?

30 A. That I don't remember.

Q. Well, did you give him the basement floor plans first?

A. That I don't know, I don't remember that positively.

Q. Did you give it to him altogether?

A. I cannot say that. I don't know.

Q. You don't remember?

A. No.

Q. But you do remember you gave him this first floor plan around the twenty-fourth or twenty-fifth?

A. You mean the basement plan?

Q. I mean the basement plan, yes.

A. Yes.

Q. Now, Mr. Brown, what does this date on Exhibit D1 mean? You have up in the corner 10-17-24. 10 What does that mean?

A. That is when I completed the original drawings.

Q. That is when you completed the original drawing. Will you tell us what the date 10-30-31 means on that?

A. That must have been after the twenty-fourth.

Q. So that those plans were drawn after the 24th?

A. That is right.

Q. And you say it was on the 24th that you gave 20 him that plan?

A. Well, I don't say positively. Thereabouts I told you—thereabouts. It may be a few days before that. I don't know.

Q. One thing is certain in your mind and that is that this basement floor was not drawn at the same time as the other plans?

A. That is right.

Q. That much is true?

The Court: Was that drawn on the day that the 30 contract was executed?

The Witness: Whenever I finish a plan I mark the date on it.

The Court: Do you know the date the contract was executed?

The Witness: November 5. This is the 30th of October.

The Court: And the contract was executed November 5?

The Witness: Yes. That means we had to work on this before the 30th. We spoke about this here basement plan way before the 30th of October.

10 Q. You mean Kolmetzky gave you a price on the basement way before he knew what your plan was?

A. Sure.

Q. He did, eh?

A. Yes. He was there to work with me. He knew just where the partitions were going.

Q. Now, then, Judge Cole examined you about this pink slip.

A. Yes, sir.

20 Q. Where was this pink slip made up?

A. In Mr. Pellicoff's house.

Q. And at that time Kolmetzky was there with you discussing these extras, was he not?

A. Yes; yes, sir.

Q. You were entirely familiar with this job, were you not?

A. Fairly well, yes.

Q. Well, no "fairly well" about it. You were entirely familiar, weren't you?

A. Yes.

30 Q. You were the superintending architect, were you?

A. Supervising architect.

Q. Yes, supervising architect. Now, where does it say on here about tile in the rear of the vestibule? Right there, does it not?

A. Yes, sir.

Q. Well, if you know now and are able to testify that Kolmetzky was supposed to put the tile in the rear of the vestibule as a part of his contract —

A. Yes, sir.

Q. —why is it you made a note of it?

A. Kolmetzky claimed these here extras. See? And I wrote them down what he was claiming. That is all I did. These are only the things he claimed; that is all. It is not what I say is an extra. It is what he claims to be an extra. 10

Q. Didn't you know right offhand that it was an extra?

A. Don't think it is only one job I handle a day. I can't remember every job or every specification.

Q. Well, you are remembering this one very well. Didn't you remember it better at the time this list was made up than you remember it now?

A. No.

Q. You remember it just as well now as you did 20 at the time you discussed it?

A. I studied the job over and got my bearings.

Q. You had been around there?

A. Yes, but that was an evening. I was tired. I just jotted down to see what I would do after and get my mind settled.

Q. You gave this memorandum to Kolmetzky?

A. Yes, sir, that is the stuff he would have to show me. Then we would go over it together. That was the whole thing. I never saw that again. It is the first time I have seen it. 30

Q. You seem to remember the circumstances of making it very well?

A. Yes, I do. There were only a few meetings we had. I never saw him after that.

Q. Isn't it a fact that Kolmetzky had to change the floor on the third floor, or half of it?

A. Not that I know of.

Q. You don't know that?

A. No, sir.

Q. Now, you said that Kolmetzky claimed four partitions and one closet on the second floor and you say that there should only be three; that it might arise that he was talking about the one plan and you were talking about another, is that true?

A. Most likely—I won't say anything about that,
10 about what you think or what he thinks.

Q. No. If he was working from this blue-print there would be one more partition, wouldn't there? Than what you would say was done as an extra under the white plan?

A. Yes.

Q. You don't remember whether there were two kitchens and the closet or not, do you?

A. I don't remember.

Q. Do you know how many times he moved that
20 boiler in the basement at the time?

A. Times?

Q. Yes.

A. Well, it must have been once. That is all I can think of.

The Court: Let me ask you a question: was this plan ever on the job?

The Witness: The blue-print of that, yes, sir.

30 The Court: The blue-print of it?

The Witness: Yes, sir.

The Court: Were there any blue-prints made from this?

The Witness: Oh, yes. You must have blue-prints made of it in order to get a permit from Newark. They have a copy of that there.

The Court: I understood that was the plan that was on the job.

The Witness: No, that was the plan they took out a permit on in Atlantic City in order to save time.
10

Q. Also the plan Kolmetzky said was on the job. That is also the plan that Kolmetzky said was on the job?

A. Yes, the job couldn't go on unless you had a blue-print of this.

Q. What?

A. The job couldn't go on unless you had a blue-print of this. There was a stop notice placed on the job when he didn't have a blue-print of it. See?
20 From Newark, because I didn't get my own returned yet. You see the point?

Mr. Cole: We are going to produce the blue-prints. They are in the hands of somebody else now. They will be here tomorrow.

Q. Now, you said the water pipes that he claimed were extra were required by the contract? Well, didn't he put an extra bathroom in?

A. Well—he means extra water pipe. I don't
30 know what he recalls of it.

Q. Well, didn't he put an extra bathroom in?

A. Extra bathroom? You mean a toilet on the first floor?

Q. I don't know where. I am asking you if he didn't put an extra bathroom in?

A. I don't remember that.

Q. You don't know whether he put an extra bathroom in or not?

A. I am just a little bit filled up now. I don't remember.

Q. Well, you straighten yourself out.

A. I don't recall that at all. I don't remember the plan or the building.

Q. Did you see an extra toilet?

10 A. An extra toilet?

Q. Now, if he put an extra toilet in he would have to run extra water pipe?

A. A man would never —

Q. Now, wouldn't he?

A. Yes, but that is no claim.

Q. If that was put in as an extra the pipes of it would be extra, wouldn't they?

A. But a man never figures that way, Mr. Hanstein.

20 Q. I am not asking you about how anybody else figures. What I want to know is when a man puts in an extra toilet he would not need to run extra water pipe?

A. Yes, sure.

Q. Now, you say he omitted from his contract a fire escape?

A. Yes, sir, third floor.

Q. Third floor. It does not appear on the blue-print plan that we have at all, does it?

30 A. No.

Q. How far down was that fire escape to go, all the way to the ground floor or all the way to the ground?

A. Yes.

Q. All the way to the ground?

A. Of course.

Q. What is that?

A. It must go or what is it good for?

Q. It is not there now, is it?

A. No, sir.

Q. Did you ever make any objection to Mr. Kolmetzky that he was omitting it? Yes or no?

A. Yes, I did.

Q. You did. Now, if that fire escape had been put on the third floor it would have come right down on this porch; that is on the side of the second floor? 10

A. That is right.

Q. It would have come right on that wooden porch?

A. That is right.

Q. And how were you to get from the wooden porch down to the ground according to your version of it?

A. There is another platform leads from that that goes all the way down. See the steps there?

Q. This phrase "iron fire escape" was written 20 when?

A. When the plans were made.

Q. Well, the plans were made on the 17th of October.

A. Oh, I will tell you if it was rubbed out or not.

Q. Oh, it was not rubbed out. It was written on.

A. It always did have a fire escape on there originally.

Q. What is that?

A. Even the original plans had a fire escape. 30

Q. Original plans. Now, that is a blue-print of your original plan. Will you show us the fire escape?

A. Right there.

Q. That is the fire escape?

A. Yes, sir.

Q. Is there anything to show that was to be a fire escape?

A. There is a door which leads to that.

Q. Well, what was it to be made of according to the original plan?

Mr. Cole: Now, which do you call original?

Mr. Hanstein: This.

10

The Witness: Or that? I call this my original.

Q. Well, we will call this the original for a minute and you say it was always on the original. Now, I ask you what it was to be made of according to that plan?

A. It does say iron. It does not say wood or iron.

Q. It does not say it was to be made of iron and
20 it does not say it was to be a fire escape?

A. It acts as a fire escape.

Q. I say it does not say it is a fire escape?

A. Well, it is an outside stairway. That is all I can say.

Q. Is there anything in your specifications about an iron fire escape?

A. No, sir.

Q. What is that?

A. I don't think so.

30 Q. Well, now, will you verify that for us?

A. (Examining the specifications.) It does not call for any.

Q. Does not call for any fire escape?

A. No.

Q. Now, referring to this white plan and the same feature of it, I will ask you if you can read the words that has been attempted to be erased?

A. It says "down to yard."

Q. What does it say before "down to yard?"

A. What did you say?

Q. What else does it say?

A. That is all. You see? You can see through. "Down to yard."

Q. "Down to yard;" nothing about what it is made of?

A. No.

Q. You never heard of a wooden fire escape, did
you? 10

A. Oh, yes.

Q. Did you?

A. Yes.

Q. Now, among the items that you say Mr. Kolmetzky should allow a credit for, was a back porch that was two foot narrow. Will you look at the credits allowed on that bill of particulars and see —

A. Yes, \$35.00.

Q. He allowed a credit for two feet on the back
porch, didn't he? 20

A. Yes.

Q. Did he allow a credit for the glass in the living room?

A. Yes, \$12.00.

Q. Did he allow a credit for the two thirty-gallon tanks?

A. \$40.

Q. He allowed credit for these items?

A. Yes, he was very nice about that.

Q. Where is there a reference in these specifications to the roof? 30

A. There.

Q. The plans you say call for what kind of a roof?

A. Asbestos shingles.

Q. Plans call for asbestos shingles. Now, will

you read me—read so the jury gets this—what is typewritten there about the roof under the specifications?

A. That is not fair.

Q. You read me what is typewritten and I will let you read when you get through what is written in ink.

A. "Cover entire surface of roof with four-ply roofing felt and gutters five-ply; all to be Barrett
10 felt and crushed slag and laid in accordance with the Barrett specifications and guaranteed for period of ten years against leakage, and approved ten-year guarantee acceptable to the owner furnished at completion."

Q. Now, that much of it would relate to a flat roof and not a pitched roof?

A. Yes, sir.

Q. And you say that is the only work or roof you would use —

A. Such a specification.
20

Q. —such a specification on. Now, there is written after that in ink something about shingles?

A. Yes, sir.

Q. Read what is written in ink.

A. Roofing to be asbestos shingles.

Q. And who wrote that?

A. I did, and at the same time I put a parenthesis around this here roofing which I just read, meaning to omit what I just read. That is the felt and slag on the roof, and put in the asbestos
30 shingles. See the point?

Q. Is that what is meant?

A. Yes.

Q. Did anybody else besides you know what it meant?

A. I suppose Kolmetzky knew it.

Q. You suppose he did?

A. Yes.

Q. You saw this slag roof going on there?

A. I did. I asked him what was the matter. He said Pellicoff wanted something else.

Q. This plan calls for a hip roof?

A. Yes.

Q. When did you cross out this part that you wrote in?

A. I didn't cross that out. 10

Q. Well, do you mean to say that you turned to a contractor a specification that provided for both a shingle roof and a slag roof?

A. No. I said I crossed out this here typewritten part, which meant slag roof, before the contract was made, and put in asbestos shingles.

Q. You crossed that out before the contract was made?

A. Yes, sir.

Q. Now, let the jury see how that is crossed out. 20

A. The parenthesis around the typewritten part.

Q. This line around the typewritten part means—

A. Means omit.

Q. Means to omit? And who struck out —

A. I didn't strike that out.

Q. Who struck out asbestos shingles?

A. I wrote it.

Q. And you don't know who struck it out?

A. No.

Q. Do you mean that you put this line around the
30 typewritten part?

A. I put that line in there.

Q. You put that line in there but you didn't strike out this "to be asbestos shingles?"

A. No, sir.

Q. And it is your version that this was to be asbestos and shingles?

A. Yes.

Q. Did you ever keep the—did you ever get a copy of this specification, you yourself?

A. I gave them all to Judge Shinn.

Q. Suppose you get your copy of those specifications.

A. (Mr. Shinn hands paper to Mr. Hanstein.)

Q. Is this your copy of the specifications?

A. Now, —

10 Q. I just asked you if that is your copy of the specifications?

A. Yes—that is not the specification for this job now, because it is not complete until I put those changes on there. See the point?

Q. You were the superintending architect or maybe you call it a little different than that.

A. Call it whatever you want.

20 Q. You were the architect who was to see that Mr. Pellicoff got all that was coming to him, were you?

A. Yes, sir.

Q. And in order to do that you had a set of the specifications that related to this contract, didn't you? You certainly had to know what they were.

A. Not necessarily. His specification on the job would be good enough for me.

Q. You mean to say that you did not have a copy of these specifications in your office?

A. Not up to date.

30 Q. What do you mean by "up to date?"

A. With all the required changes which go into the contract. For instance, I will make a specification of a job which goes out. I will have a specification as a job goes out. In comes some changes. Every job has some changes before it is completed. Now, when the changes come in before the contract

is signed I change those several specifications after the signing of the contract to comply with the agreement. See that?

Q. Yes.

A. Therefore, these here I found were in the bottom of my drawer, not even put together, just clips. You see the point? And we had to get some specifications going and I got those, that is all; but they are not up to date to comply with the regular agreement specifications, because the agreement specifications has the marks required according to the agreement. 10

Q. So that you are perfectly willing to mark things in specifications and let Kolmetzky have it without keeping a copy of it yourself?

A. Yes, sure.

Q. That is right. When did you write in here referring to asbestos shingles?

A. That is not my writing.

Q. Who did write it? 20

A. Don't know.

Q. Well, was it written in there when you gave it to Judge Shinn?

A. I don't know. That is not my writing, that one thing. I don't write like that.

Q. Then if I understand you correctly the only copy of these specifications that you had —

A. Yes —

Q. —around your office when you were superintending this job was a copy that just had this type-writing in Kolmetzky's and didn't have anything at all about asbestos shingles, is that right? 30

A. The only specification I go by is the specification on the job, that is all. Most likely Mr. Pellicoff had a set, too.

Q. Then if I understand you your set of specifi-

cations that you produced in your office and gave to Judge Shinn when this case came to an end didn't have written in it "Roofing to be asbestos shingles?"

A. That I don't know.

Q. Well, you say you didn't write it?

A. I didn't write it.

Mr. Shinn: I wrote that off the other specification.
10

Mr. Hanstein: Judge Shinn says he wrote "Roofing to be asbestos shingles."

Q. Was the specification that you have in here just above the typewritten matter the thing that we have referred to?

A. That is right.

Q. And according to your theory of it if this building was to have a roof of asbestos shingles on it and Kolmetzky didn't put it on, he did the work a thousand dollars cheaper than the thing originally contemplated?
20

A. What is that, thousand dollars cheaper? Nobody got credit for it so far.

Q. I understand that, but he saved a thousand dollars on the job, didn't he?

A. Most likely he did.

Q. If this was to be a shingle roof and he got away putting on a slag roof he saved a thousand dollars?
30

A. Yes.

(Witness withdrawn for the present.)

BERNARD PELLICOFF, recalled.

Re-examination.

By Mr. Cole:

Q. Are you hard of hearing?

A. Little hard of hearing, yes.

Q. What have you got to say to the jury about any work that Mr. Kolmetzky was to do in the basement under your contract for \$14,500?
10

A. In the basement the contract was—the agreement was for him for the building on the top in the house—\$12,500, but after we went —

Mr. Hanstein: I think I must object to it because apparently he is relating something that preceded this contract.
20

Mr. Cole: No, it will be an explanation of why the work in the basement was not done under the plans that we contended for.

The Court: Proceed.

Q. Now, speak slow so the jury can understand you.

A. We made the arrangement with him for \$12,500 to remodel the house. Then we went downstairs before we went to make the agreement. We went and me and Mr. Brown and Kolmetzky—we went downstairs in the basement. We started to look around and Mr. Kolmetzky, or I don't remember if Mr. Brown, said: "Why don't you make an apartment in here?" Of course, I told them I didn't have
30

no money. I said: "How much will you charge me for making an apartment in here, so many rooms?" They looked it up and measured it up and he and Mr. Brown, both of them, and he said, "It will cost you two thousand dollars." Then we went to Mr. Finkelstein and made the agreement \$14,500, and the agreement I think is put in what extras he will have, I should pay him, and what will be our —

Q. Never mind about that. Now, you put that in
10 \$14,500?

A. Yes.

Q. Did you ever see a plan for the doing of the basement work?

A. Yes, sir.

Q. Did you see a blue-print?

A. A blue-print, yes.

Q. Now, here is what seems to be a blue-print of the plan for the basement work. Will you look at that and say whether that shows what you and
20 Kolmetzky agreed might be done in that basement?

A. Yes. That is the plan which he agreed to do.

Mr. Cole: I offer that in evidence.

(The paper offered is received in evidence and marked as an exhibit for the defendant D10.)

Q. Now, nothing was done in the basement, was there?

30 A. Nothing done.

Q. Now, did you have any talk with Kolmetzky about changing the roof, the roof of the building?

A. Yes. Mr. Kolmetzky told me, "Why, you should make a flat roof. It will cost you much cheaper."

Q. Cost you much cheaper?

A. Yes. I said: "All right, let it be a flat roof, if it will cost me less, let it be a flat roof."

Q. Well, did you agree to change it?

A. Yes, sir.

Q. Did you have any understanding with him about what allowance was to be made to you for the change?

A. No, sir.

Q. Was there any talk about it at all?

A. He told me he don't know exactly, he will
10 figure out how much it will cost me cheaper.

Q. What kind of a roof were you to get according to the plans and specifications?

Mr. Hanstein: I think they speak for themselves.

Mr. Cole: I suppose that is so.

Q. What was the stage of the work—how far had you gone when you and Kolmetzky discussed or
20 talked about changing the roof from asbestos to what you have got?

A. What do you mean? I don't understand.

Q. How far had the work of making these alterations gone along or progressed when you and Kolmetzky talked about changing the character of the roof?

A. I can't remember exactly but I think somewhere in the middle of the work.

Q. In the middle of the work?

A. Yes.

30

November 4, 1926.

(Trial resumed pursuant to adjournment.)

BERNARD PELLICOFF, recalled.

Cross-examination (resumed).

10

By Mr. Hanstein:

Q. Mr. Pellicoff, I show you check to the order of Mr. Kolmetzky in the sum of \$200, dated November 7, 1924, which has been marked D7, and I want you to tell me if you denied when you were on the stand that that check had been given by you in exchange for a check that Kolmetzky gave you?

A. I don't remember I should give him change
20 for a check—change a check for him.

Q. Do you remember that you ever exchanged checks with him?

A. I don't remember such a thing.

Q. You never changed checks with him?

A. I don't remember I should change checks with him.

Q. Did you ever owe him money for which you would make—did he ever owe you money for which he would have given you a check?

30 A. Not in that time.

Q. Did he ever owe you money before that time?

A. Yes. He owed me \$200 in that time.

Q. What?

A. \$200 was coming to me from that time.

Q. When was \$200 coming to you from that time?

A. From that time when he took the agreement,

when he took the job, \$200 coming to me from him before.

Q. He owed you \$200 before that?

A. Yes.

Q. What for?

A. I loaned it to him.

Q. You loaned him \$200?

A. Yes.

Q. Well, did this check have anything to do with that \$200? 10

A. I don't think so, no.

Q. Do you say that this check here was on account of the contract price?

A. That check what I give to him, I loaned him \$200 because before—not on the 7th, it was before he took the contract, about two or three weeks before.

Q. But this check here you say was in payment of the contract price?

A. This check was in payment of the contract
20 price, yes.

Q. Well, what is that check for?

A. Well, this was November 12th.

Q. All right. This check that I just show you is dated in November 12th, to the order of B. Pellicoff, for the sum of \$200 and signed by Harry Kolmetzky, and endorsed "B. Pellicoff." Is that your signature?

A. Yes, sir.

Mr. Hanstein: Mark it for identification. 30

(Paper referred to is marked as an exhibit for identification for the plaintiff P12.)

Q. Do you still say that this check was not given

to Mr. Kolmetzky in exchange for this check of the 12th?

A. (No answer.)

Q. Didn't you two men exchange these two checks?

A. I never exchanged checks with him.

Q. All right. Why did he owe you that \$200 on November 12th?

A. Because I loaned him the money before.

10 Q. You had loaned him money before?

A. Yes.

Q. Hadn't he paid you that back?

A. That must be the check that he paid me.

Q. You are not sure about it?

A. I don't remember.

Q. Now, you loaned him \$200 before that. I show you a check dated May 14th, 1924, to the order of B. Pellicoff for \$100, signed Harry Kolmetzky, and I show you a check dated May 30th, 1924, to the order of Pellicoff for \$100 signed Harry Kolmetzky —

20

A. Well?

Q. I will ask you if those two checks are endorsed by you?

A. Yes, sir.

Mr. Hanstein: Let us have those marked for identification.

(The papers referred to are marked as exhibits for identification for the plaintiff P13 and P14.)

30 Q. You said that you had loaned him \$200 before you entered into this contract?

A. I loaned him many times, every week or every two weeks. He used to come to me to loan him money, a hundred dollars, one hundred dollars.

Q. Weren't these two checks that we have just

offered in evidence and marked rather for identification—weren't they in payment of the \$200 he owed you?

A. On them \$200 separate \$200.

Q. They were in payment of the \$200?

A. Not —

Q. Now, what was this check given to you for?

A. That is for the same thing. He loaned \$200 of me.

Q. How many times did you lend him \$200? 10

A. I loaned about fifteen or twenty times or more; two years straight. He used to come every two weeks or every week to loan money from me.

Q. Let us boil it down to this: do you still insist that this check of November 7th for \$200 which Mr. Kolmetzky said was merely an exchange of checks—do you still insist that that check of \$200 is in payment of your contract?

A. Positive.

Q. And you don't say that it was in payment of 20 this check?

A. No, sir.

Q. All right. Now, Mr. Pellicoff, did you get an order from the architect for the payment of that \$200?

A. I don't remember.

Q. You don't remember whether you had an order or not. Do you know if this order here which you have offered in evidence, which is dated November 7th, and is, of course, two days later than the contract—do you know if that is the first payment you made to Kolmetzky under that contract? 30

A. Well, that is the first payment.

Q. That is the first payment you made under the contract?

A. Yes, sir.

Q. And that is for \$86.50, isn't it?

A. Yes, sir.

Q. Now, at the time you asked Mr. Kolmetzky to bid on this contract, did you show him a copy of the plans and specifications?

A. Yes, sir.

Q. And what plans did you show him?

A. The blue-print.

Q. Are these the blue-prints that you showed him?

10 A. I don't remember. I cannot tell the difference.

Q. You don't know the difference between them?

A. I am not experienced on plans.

Q. How many sets of different kinds of blue-prints did you ever see for this job?

A. I don't know. I don't remember how many kinds.

Q. Well, you remember—you were around this work all the time, weren't you?

20 A. I was every day there.

Q. And you knew the kind of building you wanted, didn't you?

A. I knew according to the architect made the plans.

Q. Well, he made the plans under your direction, didn't he?

A. Yes.

Q. Are these the plans that the architect prepared for you?

30 A. I don't know if this is it or not. I cannot tell the difference.

Q. You don't know the difference between this set of plans and the set of plans that Mr. Brown now says the work was done under?

A. I am not much experienced on the plans.

Q. You don't know anything about that?

A. No.

Q. Did you have any other contractors to bid on this work?

A. Yes, sir.

Q. Did you give them plans from which they could bid?

A. Yes.

Q. Do you know which set of plans you gave these other contractors to bid on?

A. Then what I had from the architect I give 10 to them.

Q. Didn't you know that your architect changed the plans that he first drew? Didn't you know that your architect changed the plans after he first drew them?

A. I don't know.

Q. Didn't you know that he did it?

A. I don't know nothing about that.

Q. Do you mean to say that you are going into this building operation not knowing whether the 20 plans were for a building as you wanted it or not?

A. I am not experienced in the plans. I told you I told the architect.

Q. You don't have to be experienced in plans to know whether the plans suited you.

A. I told the architect I wanted him to make plans. I don't know how he did it.

Q. Do you know if the plans showed two apartments on the second floor or one?

A. Two.

Q. Showed two?

A. Two.

Q. And did the plans that you gave these other contractors to bid on show two?

A. Same thing, two apartments.

Q. Two apartments?

- A. Yes.
- Q. Did you ever see the plans on the job?
- A. The builder had the plans but I didn't take care of them. I didn't look on the plans.
- Q. You never saw the plans?
- A. I never looked at the plans.
- Q. Did you give Mr. Kolmetzky copy of the specifications when you gave him the plans?
- A. Yes, sir.
- 10 Q. How many pieces were there to the plans when you gave them to him?
- A. What?
- Q. How many sheets were there to the plans when you gave them to Kolmetzky to bid on?
- A. I don't remember.
- Q. You don't remember whether there were two sheets or three sheets?
- A. I don't remember that.
- Q. You don't remember that. Did you make any
- 20 objection to Mr. Kolmetzky as the work progressed that he was not building according to the plans? You never objected that he was not building the building according to the plans?
- A. I never told him anything.
- Q. Well, you told him to put on some extra work, didn't you?
- A. I told him to make them two rooms to build upstairs, then two rooms I told him, and I asked him how much it will cost. He told me \$200 or \$250.
- 30 Q. Well, did you tell him to do some other extra work besides that?
- A. To build the closet in the front room downstairs.
- Q. They are the only extras you ordered?
- A. That is all I ordered.
- Q. Didn't you know that he made a great many more extras than that?

- A. I didn't order that. I used to come in there and many times I heard that the manager here—that carpenter—had an argument with him. The carpenter said to him: "Mr. Kolmetzky, that will be wrong. That won't suit," when they started to work, and he started an argument with him and they tore it down and made it over. But I didn't know what to do or what they were doing.
- Q. Now, the only extras you say you recall were the two rooms and a closet? 10
- A. Yes, sir.
- Q. They are the only two rooms you know about?
- A. That I ordered them, yes, sir.
- Q. You are sure about that?
- A. That is what I remember, I told you. Maybe I don't remember.
- Q. Now, there were, in fact, many other extras, weren't there?
- A. If they made themselves I don't know, the car- 20
penter —
- Q. Weren't you there every day?
- A. Yes.
- Q. And you saw these changes being made from the plans, didn't you?
- A. Not—I don't know from the plan or not, but I know what I told them to do. Then another extra I know it—he moved a partition in one room and I come in and said that that room will be too small and I told him to move the partition.
- Q. They are the only extras you remember? 30
- A. Yes, sir.
- Q. Don't you know that that whole re-arrangement of the staircase was an extra?
- A. The what?
- Q. The re-arrangement of the staircase was an extra, didn't you order that done?

- A. No, sir. I didn't order that.
- Q. Did you know it was done?
- A. I know the steps were made, of course, when it is done.
- Q. Didn't you know that the steps were made different from the plans?
- A. I didn't know that.
- Q. You didn't know that?
- A. I don't know that. What was on the plan —
- 10 Q. Is there a staircase in the center of the building, or over on the side?
- A. On the side.
- Q. Well, do you know where the plans called for the staircase to be? Do you know where the plans called for the staircase to be?
- A. I didn't notice. I don't know.
- Q. You don't know?
- A. I heard him say something but I didn't see on the plans.
- 20 Q. Well, could you tell if you looked at the plans now?
- A. I don't know. Maybe if you show me.
- Q. Well, there they are. These are the plans. See where the plans call for the staircase to be?
- A. Search me! I don't know where the steps are. I don't know what is in here. I cannot tell anything.
- Q. You don't know anything about this plan?
- A. No, sir.
- 30 Q. Did you know that the staircase was built right here once and was taken down by your order?
- A. It was built?
- Q. The staircase was built from the first floor to the second floor and was right in this point in your building and that it was taken down afterward and put over on the side? Did you know that?

- A. The steps were built where?
- Q. Where I pointed on this plan that is in evidence.
- A. Where is it? Where?
- Q. This, right here where I am pointing.
- A. Whether it was in the middle of the room—I don't know what it is.
- Q. You don't know that the staircase was ever built in the middle of the building, do you? 10
- A. Never was built in the middle.
- Q. Never was. You were there every day?
- A. Never was built in the middle of the steps.
- Mr. Hanstein: I think that is all, Mr. Pellicoff.
- Re-direct examination.
- By Mr. Cole:
- Q. Can you read architect's plans and understand 20 them?
- A. I can read but I don't understand from the plans.
- Q. Did Mr. Kolmetzky talk to you about arbitrating this case?
- A. About what?
- Q. Did Mr. Kolmetzky talk to you about having an arbitration of this matter?
- A. He did, but when?
- Q. When was it? 30
- A. It was about four weeks from now. I passed by on Virginia Avenue and he was in Finkelstein's office and he came out from there. It was about four—not more than four weeks.
- Q. Was that the first time he talked to you?
- A. Yes, sir.

Q. That was after this suit was brought?

A. Well, it is four weeks only.

Q. Now, had Kolmetzky ever done any work for you before he did work under this contract of November, 1924?

A. If he did work for me before this?

Q. Yes.

A. Yes.

10 Q. Where did he do work for you?

A. At the Majestic Hotel.

Q. Then you had business relations with him before November, 1924?

A. It was 1923 or 1922; I don't remember. A year before or two years before.

Q. Now, these two checks for \$100 each that have been shown to you, they were before this present contract, weren't they?

A. That was before, long before.

20 Q. That is what I said, long before.

A. I can prove I got checks against what I gave to him. I got those checks in my office.

Q. Now, who paid for the Ruud heaters in this house?

A. I did.

Q. And whom was it you paid?

A. To whom?

Q. Yes.

A. To the Ruud.

30 Q. For the Ruud heaters whom did you pay?

A. On the boardwalk, to the Ruud heater.

Q. Do you remember the name?

A. To the Ruud heater.

Q. How much did you pay for the Ruud heaters?

A. Between five and six hundred dollars. I don't remember exactly. Five hundred. I got the bill somewhere.

Q. Here is a check dated June 1, 1925, to the order of L. "Caspian" for \$168, and your check. What was that given for?

A. That was for the plumbing in the front room there and in that toilet.

Q. Was that for the Ruud heaters?

A. No, sir.

Q. Now, you said that he made some changes in the rooms and agreed to do it for \$200. Just explain that to the jury? What was it he was to do for \$200?

A. I ask him what he will charge me, I want two rooms to build up three walls only to the house, to build up three walls—I don't remember exactly; 8 by about 12 by 14. I don't remember exactly the size. And I asked him how much he will charge me before we started to build. He said "It will cost you about \$200. \$200 it will cost you a room." I said: "All right; go ahead." Then when he started to build he had to tear off—he say "It will cost \$500." I said: "You told me \$400," on account he had to tear up one room, the one room where it is built before, it is covered already and he had to tear up that roof. Then he said it would cost me \$500, those two rooms.

Q. Well, did you agree to pay the \$500 for the two rooms?

A. Yes.

Q. Now, do you know how much he is charging you for that?

A. I don't know. He didn't give me a bill.

Q. He never gave you any bill, did he?

A. No, sir. I told him to give me a bill for the extra work. I called Mr. Brown and called Mr. Kolmetzky in the house and I say: "Mr. Kolmetzky, give me a bill for the extra work and I will pay you."

He said he can't give me a bill. I say: "Why you can't give me a bill?" He says: "I can't give you a bill," he say, "You go pay off all the bills for the material and we will call it square." I said: "How I pay off for the material if I have no bill how much I owe you? If I have to pay for the material I will pay it, if I owe you so much," and he refused to give me a bill. About two or three times Mr. Brown was in my house and I called his
10 attention to give me a bill.

Mr. Hanstein: There is no question pending.

Q. Now, on this bill of particulars that Mr. Kolmetzky furnished he has this item: two rooms at side front complete with radiator, heat and basin with hot and cold water, with a four-ply tar roof on it, \$1,780. Now, are they the two rooms you are talking about?

20 A. They are the two rooms; but no heat in one room and no water in the other room and no closet in one room.

Q. Then that item is not true; they haven't got what he is charging you for—you haven't got what he is charging you for?

A. No; I have not.

Q. What is it you have not got that he is charging for?

A. He says with heat.

30 Q. Yes.

A. And no radiator in one room and no water in one room and no closet in one room.

Q. Is there any water in either room?

A. No; one is water; yes.

Q. There is water in one?

A. Yes, one.

Q. And only heat in one?

A. No heat in one and no closet in one.

Mr. Cole: That is all.

(Witness excused.)

BENJAMIN BROWN, recalled.

Cross-examination.

10

By Mr. Hanstein: (Resumed.)

Q. Mr. Brown, you were around this job every day or practically so?

A. About three times a week.

Q. Do you know what plans there were on this job from which the contractor was working?

A. Yes; I do.

Q. I show you some sets of plans and ask you if these are the plans that you saw on the job?

A. Not these.

Q. Never saw that one on the job?

A. I have seen it lying around there, but it is not the plans for the job.

Q. I am asking you if you saw this on the job?

A. Well, I cannot say that.

Q. All right. Didn't see any of those plans on the job?

A. No. It may have been lying around there; I don't know. I cannot say positively these were the plans.

Q. Did you ever see on this job any plans such as this revised plan that you produced here, the white paper?

20

30

A. Oh, yes.

Q. You have seen that plan there?

A. Oh, yes.

Q. When did you ever see—whom did you ever see have it?

A. I saw them lying around there. That was one place. I cannot recollect, in fact, where; but they must have been there and that is all there is to it.

10 Q. No, no. Did you ever see anybody on that job with a copy of these plans which you produced on white paper?

A. I cannot recollect that at all.

Q. Did you ever see a copy of the plans on the job? Any plans on the job?

A. Yes.

Q. You saw plans on the job?

A. Yes.

Q. And when you saw them who had the plans?

20 A. I think Kolmetzky and I were discussing it one time.

Q. And do you mean to say it was a copy of this, copy of this white plan?

A. Yes.

Q. It was?

A. Yes.

Q. Did you ever see this foreman who was here yesterday with any plans?

30 A. I think—I don't remember. Maybe he had and maybe he had not. I cannot recollect. I know I was talking one time with Kolmetzky on the plans, as to what was to be done, and I think I instructed the man who was working—that is this Nugent—what to do.

Q. And you say that you used a copy of these plans for your discussion?

A. That is the only thing you could go by.

Q. No, no. You say you did?

A. Yes.

Q. Do you know if any of the sub-contractors ever saw a copy of these plans?

A. I don't make up with those fellows. Of course, I go on the job; but what they are figuring on is none of my business.

Q. Well, you had to approve what they figured; didn't you?

A. No, no. I didn't take any bids at all. 10

Q. Did you ever see any of the sub-contractors working from these plans?

A. I didn't—I told you I don't mingle. It is none of my business.

Q. I didn't ask you that. Did you ever see any of them with them?

A. No.

Q. Will you show me on this plan where the chimney is supposed to be?

A. Supposed to be? 20

Q. Yes.

A. Nothing is supposed to be.

Q. Now, what is it to be according to the plans?

A. Not a new chimney.

Q. Where was the old chimney supposed to be according to those plans?

A. The old chimney was here.

Q. The old chimney was there?

A. Yes.

Q. Have you got anything on that plan showing 30 that that chimney is supposed to be changed?

A. No, sir.

Q. Have you got anything on those plans showing that the chimney is to be changed?

A. No, sir.

Q. Nothing on either set of plans that shows that that chimney needed to be changed, is there?

Q. Did it ever occur to you to say to him: "You don't need to move the heating plant?"

A. You are trying to go around what I am trying to tell you. I never mix into heating systems. That is not my line. We usually get an expert for that and leave it to the steam-fitting man if he is reliable.

Q. So you left the advisability of moving this heating plant to the steam-heating man?

10 A. Yes, sure.

Q. And if he thought it was all right to do it, that was all right with you?

A. Yes, sure.

Q. And if he thought that since the chimney was moved he had to move the heating plant, you are ready to say that was all right to do?

A. If he is a reliable man and I thought the man was reliable, why, I would give in to what he would say, yes.

20 Q. So you thought it was all right for him to move the heating plant; is that right?

A. If he would say so, yes.

Q. Now, will you say that the moving of that heating plant over to this chimney as newly relocated was a part of the original contract or extra work?

A. The specification calls for to re-arrange the present system as required.

Q. As required by what?

A. You see, when you have —

30 Q. No, as required by what?

A. Now, as I recollect there was a talk about moving the heater itself and that is the reason I put that in there.

Q. Where was this talk?

A. This talk was in Mr.—I think in that real estate office over there, Finkelstein's.

Q. When was this talk?

A. When the agreement was signed.

Q. What was said when the agreement was signed? What was said?

A. We were going to move the boiler over.

Q. Who said that?

A. Kolmetzky said so.

Q. Kolmetzky said he was going to move the boiler?

A. Yes.

10

Q. Did you ask why?

A. I think it was—why? They were going to make the lockers on one end. Where the boilers were they were going to make some lockers at that end. See? And showers; and that is the reason they were going to move that boiler over.

Q. And did you call it to his attention that there was no chimney over at the point where he expected to move this heating plant?

A. That has nothing to do with it.

20

Q. The chimney has nothing to do with this?

A. Because it is so near that you can easily tie to that old chimney.

Q. I thought you were not an expert on that and didn't claim any knowledge of that?

A. I know enough of that —

Q. You did know that?

A. I know that much, anyway.

Q. Did you know that the heating plant could stay where it was and still operate from the chimney as you re-located it? Did you know that?

30

A. You were supposed to move the boiler.

Q. Well, did you know that the heating plant would have worked all right from the location where it was originally?

A. Yes.

Q. You knew it would work all right; and when you saw them moving the heating plant you never told them that they were doing unnecessary work, did you?

A. Moving it?

Q. When you saw them moving the heating plant over to the new chimney you never told them they were doing any unnecessary work?

A. I didn't see them moving it.

10 Q. You didn't see them move it?

A. No.

Q. Did you know that they did?

A. Yes.

Q. How soon did you know it after the work was done?

A. That I don't know.

Q. You don't remember that, and you say you were over there two and three times a week?

A. Yes.

20 Q. You never saw them moving this heating plant?

A. No.

Q. You saw them building a chimney, didn't you?

A. Yes.

Q. Did you ask them how they were going to operate that heating plant from that chimney?

A. No.

Q. Didn't make any inquiry at all?

A. No.

30 Q. Mr. Brown, how far—how many feet is there between the old location of this chimney, the old location of the heating system and the new chimney as now located?

A. I don't remember that.

Q. Can you tell from the plans?

A. No, I could not.

Q. You cannot tell?

A. No.

Q. Can't you measure?

A. No; I cannot tell exactly where it is.

Q. Can't you measure from where the heating plant was to the chimney as it now is?

A. Oh, where it was? Yes, I can tell you that.

Q. Well, that is what I am asking you to do.

A. I can tell you on the basement plan. The heater is over here somewheres and the chimney is there, and if they moved the heater from here to there 10 they can easily attach to the same chimney, it is only a few feet.

Q. Then they didn't need any new chimney?

A. No.

Q. Why did they build a new chimney?

A. In order to make more room in that bedroom there.

Q. Who instructed that?

A. I told you before one of the Pellicoffs.

Q. Now, the chimney as it was previously located 20—the boiler as previously located was how far away from the chimney as they rebuilt it?

A. Maybe about five or six feet.

Q. Now, just show us on the plan where the boiler was.

A. The boiler was over here somewhere.

Q. All right. The boiler was over there and the new chimney was built where?

A. The new chimney was over here.

Q. And you say that is only about five or six feet 30 from the old heater to the new chimney?

A. Yes.

Q. I am talking about the new chimney.

A. The new chimney is there.

Q. Now, tell us how many feet it is from where the old boiler was to the new chimney?

A. I am going to retract what I said there. I don't know exactly where that was.

Q. You don't know exactly where that was?

A. No.

Q. Do you know approximately where it was?

A. Around the old chimney, of course, somewhere; but I cannot say exactly.

Q. Can you tell from looking at the basement plan?

10 A. It is not on there.

Q. Not on the basement plan?

A. No.

Q. Was it half the width of the house away from this new chimney?

A. I cannot say.

Q. You don't know. All right. Now, tell me this: when you sat down to draw up this contract you wrote in some changes in the specifications, didn't you?

20 A. I didn't draw the contract.

Q. You were present when it was drawn, weren't you?

A. Yes.

Q. You wrote some changes in the specifications, didn't you?

A. Yes, sir; but at Mr. Kolmetzky's request.

Q. That was all at his request?

A. Yes, because he agreed with Mr. Pellicoff to put certain things in which were not mentioned in the specification.

30 Q. And you put those in —

A. At his request.

Q. Because Mr. Pellicoff wanted them in?

A. He and Mr. Pellicoff agreed to put certain things in which were never told to be put in before, and then I inserted them at the signing of the contract.

Q. Did you insert anything here about moving the heating system?

A. Yes, sir.

Q. Where is it in these specifications?

A. I showed it to you yesterday, I think. It says here "Heating; no heat on third floor. Re-arrange present system."

Q. Does that mean move the present system?

A. Re-arranging means moving

Q. Why didn't you say "moving?" That is your 10 handwriting in there, isn't it?

A. Yes.

Q. You didn't say a word about moving it, did you?

A. No.

Q. Just said "re-arrange it?"

A. Re-arrange it.

Q. All right. Now, here is something else I want to ask you, Mr. Brown: yesterday in testifying in 20 regarding to the roofing who did you say struck out the words "to be asbestos shingles?"

A. I don't know.

Q. You don't know. Do you recognize this set of specifications?

A. Yes, sir; that is my writing, too.

Q. That is your writing?

A. Exactly the same as this.

Q. And whoever struck it out struck it out of the other; wouldn't you say that?

A. That I won't say. 30

Q. You won't say that? Do you know that this other set of specifications is the set that was on file with the building department?

A. Yes.

Q. That is right. These were on file with the building department; all right. Then suppose we

just hand them both to the jury. (Hands the papers referred to to the jury.)

Mr. Hanstein: That is all.

Re-direct examination.

By Mr. Cole:

10 Q. Did you file those specifications with the building department?

A. No, sir.

Q. Did you have anything to do with that?

A. No, sir.

Q. And were those words about the asbestos stricken out when you turned them over to Mr. Kolmetzky?

A. That I don't know.

20 Q. Well, did you strike them out?

A. No, sir.

Q. Did you have anything to do with striking them out?

A. No, sir.

Q. Did you understand that they were not to be asbestos roof?

A. When the contract was signed it was supposed to be an asbestos roof.

Q. And if any change was made you didn't know anything about it?

30 A. No, sir.

Q. Now I show you two blue-prints and ask you whether or not they are blue-prints from the two white sheets of plans offered yesterday?

A. There is the kitchen and there is the kitchen. See?

Mr. Hanstein: I am not asking you anything.

The Witness: They are alike.

Mr. Cole: I offer those in evidence.

(The papers offered are received in evidence and marked as exhibits for the defendant, D11 and D12.)

10

Q. Now, Mr. Brown, there has been offered in evidence here what we have referred to as a bill of particulars furnished by Mr. Kolmetzky. Have you seen that or a copy of it?

A. Yes, sir. Judge Shinn showed it to me.

Q. Have you a copy of the bill of particulars?

A. Yes, sir.

Q. Now, I am going to take up this bill of particulars by items: The first item is fireproof steps to basement under main stairs. Are they there? 20

A. Yes, sir.

Q. Was that a part of the contract or one of the extras?

A. That is an extra.

Q. Do you know what it should have cost to put those steps in?

A. Oh, yes. One hundred dollars.

Q. The next item is a complete water closet first floor and wash basin with hot and cold water; new stack three stories high; tile floor, and window and door and a medicine cabinet. What have you to say as to whether that is or is not an extra? 30

A. It is an extra.

Q. The entire thing?

A. Yes, sir.

Q. What have you to say as to what that should cost?

A. The whole thing complete is worth about \$175.

Q. Build out a bedroom on the first floor complete with radiator, heat and a four-ply roof over it. Is that an extra?

A. Not altogether. He only made an extension of that room. You see, the other room has a bay-window there and he extended that room about six or eight feet more. It was not a whole room.

10 Q. In other words, he extended it as far as the bay-window was concerned?

A. He extended the bay-window to meet the other bay.

Q. What should that have cost?

A. I don't know; about —

Q. If you know?

A. It is worth about \$500, say.

20 Q. Removed partition in dining-room of first floor and put in an iron girder to support the upper floors. Then build a new plaster partition two feet away, also a new casement window complete. Is that an extra?

A. That is right.

Q. What should that have cost?

A. Now, when you ask me costs, Judge, I am only giving you just my idea of it; that is all.

Mr. Hanstein: Wait a minute. Let us have an understanding on it.

30 The Witness: I don't want to put a price on contract work. I am an architect.

Q. Then you don't claim to be able to testify?

A. Not in that line.

Mr. Hanstein: Then I ask that that other testimony be stricken out.

Mr. Cole: I agree.

Q. Now, remove old chimney and build a new one the height of the building. Is that an extra?

A. That is extra.

Q. Clothes chest with cedar lining in breakfast room.

A. That is extra.

Q. First floor; straighten the bay-window to a square corner. 10

A. That is an extra.

Q. First floor; move casement window in bedroom toward Maryland Avenue?

A. That was an old one. It is not a new window. It is an old place in there, re-located—he built a window there but it is an old frame.

Q. Tore out and put in a wooden rough floor and finished off the tile floor in rear of vestibule.

A. That is on the plan.

Q. Well, which plan is it on? 20

A. Both.

Q. Top and bottom railing and balusters for the rear porches and side platforms, also painting.

A. That is an arbitrary one, Judge —

Q. Explain that.

A. Because sometimes a man makes a rear stairway which is more of a service stairway and he puts two rails for a railing, two single rails. Understand me?

Q. Yes. 30

A. And in this case Mr. Pellicoff—but I didn't specify what kind of railing. Now, Mrs. Pellicoff wanted those small balusters or those thin balusters in the railing.

Q. Now, there is a front plan or elevation called for turned balusters.

A. So I told him when he put in the same kind of railing in the front, I said, "You are supposed to put in the turned balusters." "Well," he said, "it will have to do and I won't charge for the back."

Q. That is what occurred in that case?

A. Yes.

Q. Next, built out porch on front of third floor covered with canvas and finish with railing.

A. That is extra.

10 Q. Stairs from second to third floor with an enclosed room.

A. It is on the plans.

Q. It is on the plans?

A. Yes, sir.

Q. It is not an extra?

A. No, sir.

20 Mr. Hanstein: Let us find out if it is on the other plan while you are at it.

Q. It is on this one, too—just a minute.

A. From the first to the second floor.

Q. Second to third floor; stairs from second to third floor with an enclosed room.

A. It is on the plan—oh! From second to the third?

Q. Yes.

A. That is extra.

30 Q. A bay-window in front with two French doors and windows.

A. What floor is that?

Q. It does not say. It says "bay window in front with two French doors and windows —"

A. Third floor. That is extra.

Q. Two rooms at side front complete with radiator, heat —

A. Pardon me, Judge. In regard to that bay-window in front with two French doors, he built that roughly at first, tore it out and then put in exactly what was supposed to be. Therefore, I would not call that exactly a real extra; because we want a credit for opening up and making openings there, and the plan calls for windows instead of that stuff. We want credit for those things.

Q. Have you got credit for them?

A. Not yet.

Q. Two rooms at side front, complete with radiator, heat and basin, with hot and cold water, with a four-ply tar roof on it.

A. There is no basin and there is no heat in there, and all the rest is O.K.

Q. You are sure there is no basin and no heat?

A. Positively.

Q. How about water?

A. There is no basin in there because there is no water. That is on the top floor. I don't remember the second floor.

Q. Toilet on third floor complete.

A. I don't remember that. I don't think it is in.

Q. You mean it is actually put in?

A. I don't think so.

Q. Well, if it is in is it an extra?

A. I think there is a talk of switching a toilet from one room to another—I think that is what he did but I cannot say exactly.

Q. Does your plan or specification call for a toilet entire on the third floor—anywhere on the third floor?

A. Oh, yes; it calls for two baths, one for ladies and one for men.

Q. First floor two partitions and door and two windows?

A. That is extra.

Q. New floors on the third floor, three-quarters of the building?

A. That is not extra.

Q. Second floor four partitions and one closet complete?

A. I think yesterday I spoke on there; there were only three partitions and the one closet.

Q. You say there are three rather than four?

10 A. Yes, sir.

Q. Would the three be extra?

A. The three would be extra.

Q. Second floor rear one window. Are there any extra windows in the rear?

A. That I don't remember, that second floor.

Q. Second floor ventilated skylight in bathroom.

A. That is extra, although it is shown on the plan.

Q. What?

20 A. It is shown on the plan but I kind of think that was an extra.

Q. Well, if it is shown on the plan which plan do you mean?

A. That was supposed to be a vent. I don't know if it was a skylight or not. I think it is only a vent. A vent is supposed to be on the plans, but not a skylight. I don't recall if it is a skylight or not.

Q. Is there a skylight there?

30 A. The plan calls for—it is an air duct to the roof only, a vent.

Q. Well, is it there?

A. He put in a skylight.

Q. Is the air duct through the skylight?

A. Yes.

Q. In other words, the skylight acts as an air duct?

A. Yes.

Q. Well, is the air duct itself independent of the skylight?

A. It is a ventilating skylight; you might call it that.

Q. So that the skylight acts for the air duct that you say is there?

A. Yes.

Q. Vestibule on second floor?

A. That is extra.

Q. First floor, build out a cold storage closet through the new wall, with a roof on it, and stuccoed over, and a closet for brooms and carpet sweeper.

A. That is extra.

Q. Made imitation stone blocks in the two front corners of the house out of stucco the height of the building.

A. That is extra.

Q. Wash-boards out of stucco on all the porches?

A. No extra.

Q. Change doors from five panels to two panels.

A. Extra.

Q. Moving of boiler and enlarging the main. Is that what we had this testimony about this morning?

A. Yes, sir. That is no extra.

Q. Made nine rooms out of eight rooms, with a basin, hot and cold water?

A. The basin, hot and cold water—I didn't see that in that ninth room.

Q. Well, were nine rooms made out of eight?

A. Yes, sir.

Q. Gas outlet in each room on third floor?

A. That is extra.

Q. Glass knobs in place of plain knobs?

A. No extra—just a minute—that is no extra.

- Q. Twenty-four extra electric outlets.
 A. That is extra.
 Q. Three hardwood floors on first floor.
 A. According to the plans and specifications that is an extra.
 Q. It is an extra?
 A. Yes, sir.
 Q. One brick pier to support side of building?
 A. That is taken care of when he built that extension to that bay.
 10 Q. Scraping wall paper in all rooms throughout the house.
 A. I never—he had to do that in order to see where the cracks showed in the plastering.
 Q. In other words, he had to do that to make a good job?
 A. Sure.
 Q. Plaster up all cracks and holes when paper was removed from ceiling and walls.
 20 A. That is according to specifications.
 Q. What?
 A. That is according to specifications.
 Q. He was required to do that?
 A. Yes.
 Q. So it is not an extra?
 A. No, sir.
 Q. First floor put metal lath on two ceilings and plastered over them.
 A. That is required by law.
 30 Q. Required by your specifications?
 A. That is extra.
 Q. Tile blocks inserted in stucco in front of house?
 A. Extra.
 Q. Plaster boiler room and put in a new window.

- A. I don't know that part.
 Q. Changing from white pebbles to colored pebbles—that we know about. Difference of price of three gas ranges. Do you know anything about that?
 A. Well, it is not for me to say anything on that, is it?
 Q. Were the gas ranges that were put in different from those specified?
 A. I never specify a gas range. 10
 Q. Well, you didn't have anything to do with that at all—I mean your specification; is that it?
 A. I think that is in the contract.
 Q. You think that is in the contract?
 A. I don't know. I don't know anything about that.
 Mr. Hanstein: Well, is your answer "I don't know?"
 20
 The Witness: I don't know.
 Q. Difference of price of electric fixtures.
 A. That I don't know either. I have nothing to do with it. I never work on that.
 Q. And four double electric bracket fixtures as extras.
 A. That is extra.
 Q. Now, re-location of windows, doors and partitions in closing up old openings of same. Do you 30 know what that means?
 A. That is in the general work, when he made those over.
 Q. Then it is not extra?
 A. I don't know what he refers to.

Mr. Hanstein: I didn't get that answer.

The Witness: I don't know what he refers to.

Q. In other words, you don't know what the item means.

A. I don't know what it means, no.

Q. Now, water pipes throughout the building and a twenty-two inch main?

10 A. That is in the specifications.

Q. Read that. What does it say about the water pipes?

A. Install water supply system to all fixtures, Wilcox boilers as required furnished; make connection to supply pipes and all like that.

Mr. Cole: Cross-examine.

Cross-examination.

20

By Mr. Hanstein:

Q. There was no new main provided for in your specifications, was there—new water main?

A. Install water supply system to all fixtures.

Q. Does that call for a new main?

A. Just a minute. I am not through yet. It says install the water supply system. Where would you think the water supply system would come from?

30

Mr. Cole: Well, do not argue with the lawyer. Just testify.

Q. Well, if he had run a pipe to each fixture that was put in that would be installing a water supply system, wouldn't it?

A. Not according to what I mean nor what was required. You want a certain flow, from a faucet. You don't want to have a trickle from the faucet. If you need a new main you will put that in.

Q. Well, if you need a new main isn't that a different thing from running a supply to each fixture?

A. No, sir.

Q. You think he ought to have done that?

A. Because there are so darn many fixtures put in there. You see, the top floor, every room had a basin and you couldn't rely on, say, a four-basin supply and then put in about a fifteen-basin supply. You couldn't draw from the same pipe.

Q. But you were the man who drew the specification?

A. Yes, sir.

Q. You didn't specify a new main there?

A. It says install a water supply system. That is what I am after.

Q. That is your interpretation of what you said? 20

A. Yes.

Q. But you didn't say "new main?"

A. New main—I didn't mention that exactly, "new main."

Q. Now, this "build two rooms at side front, complete with radiator, heat and basin with hot and cold water, four-ply tar roof on it," you say that work was done as an extra? But there is no heat in one of the rooms?

A. No heat and no water. 30

Q. And which one of the rooms is it that has no heat?

A. The one I saw was the third floor.

Q. Third floor room that he built as an extra has no heat?

A. No heat and no water.

Q. Now, don't your specifications provide there is not to be any heat in the third floor?

A. That is right.

Q. So he did all that he was supposed to do when he did the extra and lived up to your specification?

A. Except the basin.

Q. He didn't put the basin in there?

A. He charged for heat, you see.

Q. Well, no, no.

10 A. That is what his extra calls for. He says the third floor. What leaf is that on there? Where are you reading from, what part?

Q. Well, let me read: "Build two rooms at side front complete with radiator, heat, and basin with hot and cold water, with four-ply tar roof on it."

A. Now, you see, in one room I have put heat.

Q. He did in fact?

A. He did; but the third floor had no heat.

20 Q. All right. But when you complained here a minute ago that it had no heat—your specification says there is not to be any heat, doesn't it?

A. That is right.

Q. Aren't you a little uncertain about whether there is water up there or not?

A. I am sure of that. I saw that the other day.

Q. Now, will you show me where on this plan it calls for a vent in that bathroom that you referred to?

A. Not on there.

30 Q. Not on that at all, any vent?

A. No.

Q. No skylight, is there?

A. No, sir.

Q. Now, on this —

A. On there it is. (Referring to the paper drawings.)

Q. On this plan you say that there is a vent, air duct?

A. Yes.

Q. But that is not a skylight, is it?

A. No, sir.

Q. Are these the blue-prints of those?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. Mr. Brown, this plan that you say is the plan 10 according to which the building was built, and referring to this blue-print of it that you say is a copy—will you show me where there is a stairway on here from the second floor to the third floor?

A. You see this here? It says "up." This here says "down." Usually the way it is built is one over the other. There it is.

Q. Is that what that is? One is "up" —

A. That is enclosed. See there? 20

Mr. Hanstein: That is all.

(Witness excused.)

MOTION TO NON-SUIT.

Mr. Cole: My motion is to non-suit upon the assumption that the completion of the testimony counsel says he has to produce would in no wise affect 30 the points anyhow. Now, in making this motion, I do it upon the case as made by the pleadings. I call attention to the contract—"You shall well and efficiently perform all work and furnish all materials for the alterations, additions at 172 States

Avenue, Atlantic City, New Jersey, agreeable to the drawings and specifications made by Benjamin Brown, Architect," etc. And again: "All payments to be made by an order issued and signed by Benjamin Brown, Architect." "The entire balance of the contract price is to be paid by the party of the first part to the party of the second part within fifteen days of the entire completion of the building upon proper certificate of the architect and upon the delivery of a complete release of liens therein." And the further provision: "Should any dispute arise respecting the true consideration or meaning of the drawings and specifications, the same shall be decided by Brown, Architect, and his decisions shall be final. But should any dispute arise respecting the true value of the extra work or of the work omitted, the same shall be valued by two competent persons, one employed by the owner, the other by the contractor, and those two shall have power to name an umpire whose decision shall be binding on all the parties."

Then I call your Honor's attention to the testimony of Mr. Kolmetzky in which he said that when these extras were ordered and he began to perform, the price was to be fixed after completion and adjusted by Brown, Architect.

Now, my legal proposition is that all those were conditions precedent to the right to bring this suit. There is nothing in the complaint which touches the question of the order or certificate by the architect. There is nothing in the complaint that the price is to be fixed after completion and adjusted by Brown. There is a reference in the complaint to this provision to arbitrate. I am assuming there will be no proof to establish that we refused to arbitrate. (Citing 84 Law, 176; 45 Law, 213; 40 Equity, 106.)

In addition to that you have the testimony of the plaintiff himself that the amount of money he was to receive, the price he was to have, was to be settled after completion by the architect, and that has not been done. The architect has not even been asked to fix it.

The Court: I will hold the motion until the conclusion of the plaintiff's case. (Counsel for the plaintiff having stated that he had other testimony to produce.)

(At the conclusion of the plaintiff's whole case, Judge Cole renewed his motion for non-suit as follows:)

Mr. Cole: Now, it may please your Honor, I renew the motion I made, and I want to call your Honor's attention to the fact that this agreement provides as follows:

On Friday of each week before twelve o'clock noon of the said day the party of the first part agrees to furnish to the party of the second part the weekly payroll. This payroll is to be furnished by the party of the first part to the party of the second part weekly for the purpose of paying the weekly payroll, provided, however, that the payroll shall not exceed" so much. I call attention to the fact that that is exactly the way the money was paid as is shown in the case, to Kolmetzky, both for the original contract and for the extras, showing a recognition of this contract. (Reading Section 2 of the contract and Section 3, and citing 64 Law, 269.)

Now, with respect to the question of arbitration, I call attention to the fact that the only evidence

here is some suggestion about an attempt to arbitrate, and no evidence of when that occurred. The evidence must show that that effort was made before suit was brought. It is too late to make that attempt after suit is brought, and that I submit is a condition precedent to the right of recovery here.

10 So that upon any of these grounds it seems to me that the plaintiff has not shown his right to maintain this suit, and your Honor will recall Mr. Brown's testimony to the effect that in this attempt to have him adjust—that has not been contradicted—there was not any protest; there was not a thing produced at all by this plaintiff upon which he could make any adjustment. He asked for it and never got it, and, according to his statement, his figures at that time were not in existence.

20 The Court: I will deny your motion and let the jury pass upon the question as to whether or not there was a new contract made for these additions.

Mr. Cole: Exception.

DEFENDANT'S MOTION FOR DIRECTION
OF VERDICT.

30 Mr. Cole: I want to make a motion for direction on the following grounds: I take it they were required to produce a release of liens before he had a right to sue. It was not produced. He was required to arbitrate any difference or dispute as to the amount due. There is no evidence to justify a finding that he made any effort to arbitrate at all, and certainly none before suit was brought.

Third, plaintiff was required to produce an architect's certificate. There is no evidence that he produced such.

Fourth, by the plaintiff's own testimony, the extras that he was entitled to have were to be adjusted by the architect. The architect never adjusted them because before the suit was brought he never had anything produced to him to enable him to adjust. 10

Now, I suppose we all want to get right legally on this thing, because while we cannot control the jury we ought to be able to control the law. I went over this case yesterday with your Honor on the subject of the earmarks of the contract and extras, I pointed out, first, that the order which we gave and which, by the way, they thought they had to have, and which, by the terms of the contract, they had to have before they were entitled to sue for extras expressly says this order is given for extras pursuant to the agreement. That is number one. 20

Secondly, the bill of particulars in this case mingles the contract and the extras as one thing and credits as one thing—a clear recognition that the extras were being done under the contract.

Third, all the payments that were made from week to week were made by virtue of a payroll made up both under the contract and for extras and were paid by us; so that we paid for all of the labor both for the contract and the extras. How can this jury unmix or unscramble that? Now, the averment of the declaration of paragraph number 2, is that there was a contract entered into and by virtue of that contract these extras were done. Now, the effort here is to get from under a solemn written contract which provides among other things: "It is under- 30

stood that the owner shall have the right to make any alterations, additions or omissions of the work or materials herein specified or shown on the drawings during the progress of the building that in the opinion of the architect may be found necessary and the same shall be acceded to by the contractor and carried effect without in any way violating or vitiating the contract, and if any such changes are made
10 the value of the same to be decided by the architect, who will make equitable allowances therefor, and will add the amount to the cost of the work," etc.

The Court: I am going to let it go to the jury with the instruction that there be no recovery of any balance under the contract; but the issue will be confined to whether or not there was an independent contract for extras.

20 Mr. Cole: I want to include a request that the Court direct the jury in any event that there can be no verdict to sustain the lien, upon the ground that under the proof the lien was filed too late, and I ask an exception to the Court's refusal to direct a verdict for the defendant.

Mr. Hanstein: I ask for a direction of verdict on the counter-claim.

30 The Court: I will direct that.

Mr. Hanstein: If you decide there is something due us on the original contract, we waive it here and now.

COURT'S CHARGE TO THE JURY.

SMATHERS, J.:

Members of the jury: The plaintiff in this case seeks to recover from the defendant a balance due upon a contract that has been offered in evidence, and also for work done and materials furnished in the pursuance of extra alterations and repairs on
10 this job as requested by the defendant.

The Court charges the jury as a matter of law that there can be no recovery by the plaintiff for any balance due the plaintiff under the alleged contract. Therefore, your consideration in this case is directed to the question of whether or not there was an independent agreement entered into between the plaintiff and the defendant whereby the defendant requested the plaintiff to do certain extra work and to perform alterations not contemplated by the
20 agreement.

If you find as a fact in this case that all the work done was contemplated by the agreement and performed by the plaintiff in pursuance to the agreement, then, of course, your verdict would be a verdict of no cause for action.

On the other hand, if the plaintiff has satisfied you by a fair preponderance of the evidence that there was an independent agreement entered into between the plaintiff and the defendant whereby the plaintiff was requested to perform certain extra
30 work and alterations, and that as the result of performing such extra work and alterations not contemplated by the agreement, the defendant owes to the plaintiff the sum that the plaintiff claims as a fair compensation for the extra work done by the

plaintiff, then you go to the question of whether or not the plaintiff has also satisfied you by a fair preponderance of the evidence that he requested the architect to adjust the amount due to him and the architect refused, and that he sought and demanded arbitration and that arbitration was refused. If the plaintiff has satisfied you by a fair preponderance of the evidence of all of those questions, then the plaintiff in this case is entitled to recover at
 10 your hands a verdict which would compensate him for the amount of work performed by him as extras; in other words, if the plaintiff's contention that this work was ordered as extras and was performed by him in response to the request has been satisfied to you by a fair preponderance of the evidence, then, of course, the law says he is entitled to be paid what the services rendered by him as extras are reasonably worth.

The plaintiff claims that he is entitled to recover
 20 \$12,526.32, representing the fair value of the extra work performed by him for the defendant. It has been testified to in this case that the defendant is entitled to a credit of some \$2,000 by reason of the fact that the basement work contemplated by this contract and figured in the contract of \$14,500 was eliminated, and that as the result of the elimination of the basement work the plaintiff and the defendant agreed that there should be a credit of \$2,000 on the contract price. The Court charges you, as a
 30 matter of law, that if you are satisfied that this agreement was entered into whereby a credit of \$2,000 should be allowed the defendant, that credit and any other credits which the testimony offered in this case would support, should be considered and allowed the defendant and deducted from whatever amount you find, if any, is due the plaintiff as a

reasonable compensation for the extra work performed by him not contemplated by this contract.

The suit is brought against the defendant under the Mechanics' Lien Law as well as against him in his general capacity. The Court charges you, as a matter of law, that under the evidence adduced in this trial there can be no special lien verdict rendered against the defendant in this action, and if any verdict is rendered against the defendant in this action, it must be a general verdict and no
 10 special lien verdict.

You may retire.

Mr. Cole: May I call attention to the admitted fact that \$738 and a fraction more paid to this plaintiff than he is giving credit for? The question is where should that credit go? Your Honor has not charged the jury about that.

The Court: Well, I told them that the credit
 20 of \$2,000 and any other credit —

Mr. Cole: That is admitted. I ask your Honor to charge that they must allow this \$738 and a fraction.

The Court: Well, there is some disputed fact about it, isn't there?

Mr. Cole: I ask your Honor to charge it speci-
 30 fically.

The Court: If they find as a fact that there is a credit of \$2,000, why, then, these receipts will enable them to find out how much was paid.

Mr. Cole: I except to the Court's refusal to specifically tell the jury that they must give credit for the payments that were undisputed and on account of the extra work if they find an independent contract.

I except to what the Court told the jury with reference to ignoring the original agreement on the ground that there is no justification for allowing them to do it.

10 Also in leaving the jury to find whether there was an independent contract, because under all the evidence there could be no independent contract.

Also in suggesting that they might find that the work as done was not contemplated by the agreement. There is no jury question.

Also to all that the Court said with respect to arbitration and release of liens and the adjustment by the architect, upon the ground that that made an inconsistent charge to the jury. It went both
20 ways.

Mr. Hanstein: I except to the charge of the Court where the Court said: "Then you go to the question of whether or not the plaintiff has satisfied you by a fair preponderance of the evidence that he requested the architect to adjust the amount due him and that the architect refused and that he sought and demanded arbitration and that arbitration was refused."
30

EXHIBIT P2.

ARTICLES OF AGREEMENT, made the fifth day of November, one thousand nine hundred and twenty-four, between BERNARD PELLICOFF, owner, of the City of Atlantic City, County of Atlantic, and State of New Jersey, of the first part, and HARRY KOLMETSKY, contractor, of the City
10 of Atlantic City, County of Atlantic and State of New Jersey, of the second part.

WITNESSETH, first—That the said party of the second part, does hereby, for himself, his heirs, executors and administrators, or assigns, covenant, promise and agree to and with the said party of the first part his executors, administrators or assigns, that he, the said party of the second part, his heirs executors, administrators or assigns, shall and will, for the consideration hereinafter mentioned, on or before
20 the third day of February, one thousand nine hundred and twenty-five, well and sufficiently perform all work and furnish all material for the alterations and additions, at 172 States Avenue, Atlantic City, New Jersey, agreeably to the drawings and specifications made by Benjamin Brown, architect, legend, proposed alterations and additions to dwelling at 172 States Avenue, Atlantic City, New Jersey, and signed by the said parties and hereunto annexed,
30 within the time aforesaid, in a good, workmanlike and substantial manner, under the direction of the said Benjamin Brown, architect, to be testified by a writing or certificate under the hand of the said Benjamin Brown, architect; and also shall and will find and provide such good, proper and sufficient materials of all kinds whatsoever as shall be proper

and sufficient for completing and finishing all the work which is to be done at 172 States Avenue, Atlantic City, New Jersey, and all other works of the said building mentioned in the plans and specifications, for the sum of FOURTEEN THOUSAND FIVE HUNDRED DOLLARS (\$14,500.)

And the said party of the first part, does hereby, for himself, his heirs, executors, administrators or assigns, covenant, promise and agree, to and with the
 10 said party of the second part, his heirs, executors, administrators or assigns, that he, the said party of the first part, his heirs, executors, administrators or assigns, shall and will, in consideration of covenants and agreements being strictly performed and kept by the said party of the second part, as specified, well
 and truly pay or cause to be paid unto the said party of the second part, his heirs, executors, administrators or assigns, the sum of FOURTEEN THOUSAND FIVE HUNDRED DOLLARS (\$14,500),
 20 lawful money of the United States of America, in the manner following:

1. On Friday of each week, and before twelve o'clock noon of said day, the party of the second part agrees to furnish to the party of the first part, the weekly payroll incurred in the operation aforesaid; this payroll is to be furnished by the party of the first part to the party of the second part weekly, for the purpose of paying the weekly payroll, provided, however, that the weekly payroll, in all, shall not
 30 exceed the sum of Seven Thousand Two Hundred and Fifty Dollars (\$7250).

2. All payments must be made by an order issued and signed by Benjamin Brown, architect.

3. The entire balance of the contract price is to be paid by the party of the first part to the second party within fifteen days of the entire completion of

the building, upon proper certificate of the architect; and upon the delivery of a complete release of liens therein.

4. The second party agrees to furnish to the first party all bills for materials purchased in and about the erection of the building aforesaid, at least once a month during the time of the construction thereof.

5. The party of the second part agrees, as part of the consideration aforesaid, to demolish and remove
 10 any parts of the building now erected upon the premises aforesaid, at his own expense, and without charge to the party of the first part; which demolition is to begin within three days after written notice is given by the party of the first part to the second party; and the party of the second part further agrees to proceed every working day with a full force of men; to proceed with all possible speed toward the completion of the proposed alterations and additions, according to the plans and specifications; provided, however, that this said building
 20 shall be fully finished and completed, on or before February 3, 1925.

6. The party of the second part does covenant and agree to carry full public liability and compensation covering the proposed building, at his own expense.

AND IT IS HEREBY FURTHER AGREED BY AND BETWEEN THE PARTIES:

7. The Specifications and the Drawings are intended to co-operate so that any works exhibited in the Drawings, and not mentioned in the Specifications, or vice versa, are to be executed the same as
 30 if they were mentioned in the Specifications and set forth in the Drawings to the true meaning and intentions of the said Drawings and Specifications, without any extra charge whatsoever.

8. The Contractor, at his own proper cost and

EXHIBIT P8.

Power and Lighting Electrical and Motor Repairs
Installations of All Descriptions

Marine 7893

GRUEN ELECTRICAL COMPANY

Registered

10

Electrical Engineers and Contractors

44 North Massachusetts Avenue

Atlantic City, N. J., September 10, 1925.

Mr. H. Kolmetzky

288 So. Congress Ave.

Atlantic City, N. J.

To wiring 11 extra outlets at 172 So. States
Avenue\$55.00

20

30

EXHIBIT P9.

Atlantic City, N. J., Jan. 26, 1925.

M. H. Kolmetsky

To I. KAPLAN, Dr.

REGISTERED PLUMBER

624 DREXEL AVENUE

Phone Marine 4635-W

10

Extra Contract Work 172 States Ave

To install on 1st floor: 1 toilet and

1 basin Complete

3rd floor: 1 Basin Complete

1 Toilet Complete

1-2 in New water main from meter to
inside of building

3rd floor: Gas Connections in each
room

Contract 675.00

20

Extra Heating: Removed boiler and
repaired

Installing 4 radiators

Changing & increasing mains

Complete 450.00

1125.00

30

OPINION.

(Filed Mar. 19, 1928.)

NEW JERSEY SUPREME COURT.

No. 35. Oct. Term, 1927.

10

 HARRY KOLMETSKY,)
 v.)
 BERNARD PELLICOFF.)

Appeal from Atlantic Circuit Court.

20

Argued before GUMMERE, Chief Justice, and JUSTICES BLACK and LLOYD.

 For the appellant, COLE & COLE.
 For the respondent, THOMPSON & HANSTEIN.

30

Per Curiam:

The plaintiff and defendant entered into a contract, by the terms of which the plaintiff was to make alterations in and additions to an apartment house of the defendant in Atlantic City, furnishing all the material and doing all the work required for

that purpose. This contract was in writing, and was made on the 4th of November, 1924, and specified the alterations and additions which were to be made and the price to be paid for the same. Subsequently certain changes and additions not provided in the original contract were ordered by the defendant and the work and materials required therefor were furnished by the plaintiff. This subsequent agreement was oral, and provided that the price to be paid by the defendant for its performance should be adjusted after the building was completed. The present suit was brought to recover the reasonable compensation to which the plaintiff was entitled for the work done and materials furnished under this verbal contract. The trial resulted in a verdict for the plaintiff, the jury awarding him \$9,000.

The first ground upon which it is contended that this judgment should be reversed is that it was error for the Court to submit the case to the jury upon the theory of a subsequent and independent contract, and that the plaintiff should have been nonsuited or a verdict directed against him for this reason. It is entirely settled by the decision of the Court of Errors and Appeals in *Headley v. Cavalier*, 82 N. J. L. 235, and subsequent cases, that, when it appears that subsequent to the execution of the original contract and during the progress of the work (as was the present situation) the owner and contractor made further agreements with relation to changes or alterations and expressly agreed that a reasonable price should be charged and paid therefor, the jury is entitled to base its action upon the subsequent and further agreements.

The next point is that the Court improperly allowed the following question, which was put to the plaintiff: "Now, where you do extra work and the price is to be adjusted after the contract is com-

pleted, what is the usual allowance or arrangement as to profit?" The argument is that this question was improper because the right of recovery was limited to the true value of the work done and materials furnished. But, in our opinion, true value necessarily includes a reasonable profit, and testimony as to what "the usual allowance as to profit" is becomes an element in determining what is the reasonable value of the work and labor done and materials furnished; that is, what is a reasonable compensation to be paid therefor.

10 It is next argued that the trial Court erroneously admitted in evidence bills for materials furnished to and work done for the plaintiff by third persons. They were objected to on the ground that they were incompetent unless proved by the people who furnished the materials or did the work. The bills in question were for work done and materials furnished by third persons employed by the plaintiff in the execution of the contract which was the basis of the suit; and, according to the testimony of the latter, had been paid by him. They were confirmatory of his testimony, and were admissible for that purpose, notwithstanding the fact that the persons who presented them to the plaintiff for payment, and who were, in fact, paid the amounts called for therein, were not produced by the plaintiff for the purpose of verifying their accuracy.

20 The last reason for reversal is that the Court erred in charging the jury that its verdict must be based upon the supplemental contract and not at all upon the original contract between the parties. The suit was based entirely upon the supplemental contract, and what has already been stated is dispositive of this contention.

30 The judgment under review will be affirmed.

ORDER OF AFFIRMANCE.

NEW JERSEY SUPREME COURT.

October Term, 1927.

HARRY KOLMETSKY, <i>Plaintiff-Respondent,</i> v. BERNARD PELLICOFF, <i>Defendant-Appellant.</i>	}	On Appeal. Order of Affirmance.	10
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This cause having been duly argued at the October term, 1927, of this Court by Messrs. Cole & Cole, of counsel for the appellant, and Thompson & Hanstein, of counsel for the respondent, and the Court having considered the same and finding no error in the record or proceedings in the Atlantic County Circuit Court: 20

It is thereupon, on this 21st day of March, 1928, ordered and adjudged that the judgment of the Atlantic County Circuit Court, removed by the appeal in this cause, be affirmed with costs, and the record be remitted to the Court below to be proceeded with according to law and the practice of said Court. 30

Entered March 21, 1928, on motion of
 THOMPSON & HANSTEIN,
Attorneys of Plaintiff-Respondent.

A true copy.

FRED. L. BLOODGOOD,
Clerk.

NOTICE AND GROUNDS OF APPEAL.

(Filed Mar. 27, 1928.)

NEW JERSEY SUPREME COURT.

10 HARRY KOLMETSKY,
Plaintiff, } Action at Law.
 v. } Notice and Grounds
 BERNARD PELLICOFF, } of Appeal.
Defendant. }

To the within named Plaintiff:

20 Notice that the defendant hereby appeals from
 the judgment of the Supreme Court affirming the
 judgment of the Circuit Court upon the following
 ground:

1. The Supreme Court affirmed the judgment
 under review when it should have reversed it.

COLE & COLE,
Attorneys of Defendant.

A true copy.

FRED. L. BLOODGOOD,
Clerk.

30

[ENDORSED.]

Due and legal service of the within
 notice acknowledged this 24th day of
 March, 1928.

Thompson & Hanstein,
Attorneys of plaintiff.

NEW JERSEY
 Court of Errors and Appeals.

HARRY KOLMETZKY,
Plaintiff-Respondent, }
 vs. } On Mechanic's Lien.
 BERNARD PELLICOFF, } On Appeal from
Defendant-Appellant. } Supreme Court.

APPELLANT'S BRIEF

Statement.

This is a mechanic's lien suit by respondent, contractor, against appellant as owner and builder. By the language of the complaint, the action is grounded upon a written contract and for extras in pursuance thereof. (See the complaint and bill of particulars.) The cause was tried within the issue made by the complaint and answer, but at the close of the trial counsel for respondent, as we perceive the situation, shifted his position and claimed that the basis of the action was for work done and materials furnished under an independent contract, not in writing, and the cause was submitted to the jury upon this theory. There was a verdict for a

sum much less than the amount claimed, and from the judgment entered thereon this appeal was taken. The Supreme Court affirmed and from the affirmance this appeal is taken.

ARGUMENT.

I.

It was Error to Submit the Case to the Jury Upon the Theory of an Independent Contract.

Ground of appeal number four is:

"Because the Court permitted the jury to find a verdict in favor of the plaintiff, if they found there was a new and independent agreement entered into between the plaintiff and the defendant, notwithstanding there was no evidence to support such independent agreement."

Ground number six is:

"Because the Court told the jury that they must ignore the original agreement on which the action was based, and to confine their consideration to an alleged independent agreement."

It was not within the province of the respondent or the Court to change the issue without the consent or waiver of appellant, neither of which appellant did. There is nothing in the case, until its close, to indicate that counsel for respondent was trying the case upon any theory other than that set up in the complaint.

Paragraph two of the complaint sets up a contract in writing and alleged performance. Paragraph five alleges the request of appellant to "make certain other and further alterations and additions to said premises."

Then follows:

"That plaintiff completed said extra alterations and additions and completed said building, but the defendant failed to adjust the prices therefore and failed and refused to refer to arbitration the value of said extra work and material, in accordance with the terms of the said contract above referred to."

The averments in paragraph five directly tie to the averments in paragraph two, concerning the existence of the written contract and which written contract, it will be seen, expressly and explicitly provides for extra work and material. The schedule attached to the complaint and made a part thereof is grounded upon the written contract and the extras referred to. The written agreement was introduced and marked *Exhibit P-2*.

At page 21 respondent is asked:

"How soon after you had started the work did he (appellant) speak to you about changing these plans and specifications?"

A. When I had the third floor—the third floor, half story, the roof off, &c."

At page 23 he is asked:

"Q. Now, did you have a talk with Mr. Pellicoff in regards to the price of these alterations?"

A. Well, I did say to Pellicoff, 'Mr. Pellicoff, our agreement calls that any extra work to be done, should be a price on it and an order—'

And at page 24 he continues:

"A. And I said, 'If it would be on extra work I could give you a price right now, but to tear out the work I done when I don't know what lumber would be waste, and what I could use, and the labor it was done already—and tear it out again and do it over again, it is impossible for me to give you a price, which it was agreed on it that the price should be made after the whole job was completed, extras and according to contract.'"

Throughout his testimony, constant reference is made to the written contract and changes thereunder and it is manifest that the witness was treating the written contract as the basis for his alleged extras.

There was a motion to non-suit for reasons stated, which motion was held, and at the close of the entire case there was a motion for a direction, which was refused, and to which an exception was taken.

"All payments must be made by an order issued and signed by Benjamin Brown, architect.

The entire balance of the contract price is to be paid by the party of the first part to the second party within fifteen days of the entire completion of the building, upon proper certificate of the architect; and upon the delivery of a complete release of liens therein."

The respondent did not comply with the provisions touching an order from the architect, a certificate of the architect and a complete release of liens. It is manifest that a shift of position by counsel of the issue made by the pleadings was to avoid the effect of these provisions.

The foregoing points were made in the motion for non-suit and for a direction.

In addition to the foregoing evidence that respondent's present contention was an afterthought, it appears by paragraph one of the contract, and the evidence which indubitably shows the recognition of the written contract and that the extra work was done in pursuance thereof, paragraph one reads:

"On Friday of each week, and before twelve o'clock noon of said day, the party of the second part agrees to furnish to the party of the first part, the weekly payroll incurred in the operation aforesaid; this payroll is to be furnished by the party of the first part to the party of the second part weekly, for the purpose of paying the weekly payroll, provided, however, that the weekly payroll, in all, shall not exceed the sum of \$7,250."

The following testimony of respondent, on cross-examination, relates to the foregoing provision:

"Q. Then you went with the payroll to Mr. Brown?

A. Yes.

Q. And Mr. Brown gave an order to Mr. Pellicoff?

A. Yes.

Q. And who gave you the money?

A. Mr. Pellicoff did give me the money, yes.

Q. For the week's payroll that you made up?

A. Yes.

Q. Did that include the entire payroll?

A. Yes.

Q. Not for the extras alone, but the whole thing?

A. The whole thing.

Q. The contract required that you should be paid the payroll each week, didn't it?

A. Yes.

Q. And that Mr. Pellicoff did, didn't he?

A. Well, sure he did."

From the foregoing, it will be seen that the respondent recovered a verdict upon the strength of the breach of his own written contract, and in disregard thereof.

That the respondent could have recovered only upon the strength of the issue made by the pleadings is settled law in *Jordan v. Reed*, 77 Law, page 590, and cases cited.

II.

It was Error to Refuse the Motion to Non-Suit and for a Direction.

What has been said in number one is applicable in number two. There was no evidence to show the production of a release of liens, the certificate of the architect or arbitration, all of which are required by the contract. This was not disputed by counsel, after statement of the grounds of the motion. These were conditions precedent to the right to recover.

The trial Court must have so recognized, because it will be observed that it instructed the jury that there could be no recovery under the written contract, and this was not so unless the respondent was not required to

perform what we say were conditions precedent. See *Turner v. Wells*, 35 Vroom, page 269; and *Titus v. Gunn*, 69 Law, page 410.

III.

The Court Improperly Allowed the Following Question to be Answered: "Now, Where You Do Extra Work, and the Price is to be Adjusted After the Contract is to be Completed, What is the Usual Allowance or Arrangement as to Profit?"

This question will be found at page 72, to which the witness was permitted to answer, "Ten per cent."

The amount to which the respondent was entitled to receive for the extra work, according to the terms of the contract (paragraph 11), was the true value thereof. In paragraph five of the complaint the "reasonable" value is claimed. The question propounded and admitted was not within either the terms of the contract or the averment of the complaint. Apparently the question was predicated upon the order given by the architect to the plaintiff, and which was *Exhibit P-7*. The language is:

"Prices to be adjusted after building is completed."

Obviously the architect had the terms of the contract in mind, and he follows the quoted language by saying:

"This notice is given in compliance with the contract made between you and Mr. B. Pell-coff, owner."

There is nothing in the complaint to suggest that a recovery was to be had upon the basis of a custom in the trade, and, in the absence of any other controlling factor, respondent was entitled to the reasonable value of his work, or the going price. To admit the witness to arbitrarily add ten per cent. to the amount of his alleged claim was without any basis in law, and the admission of the evidence was harmful error.

IV.

The Trial Court Erroneously Admitted in Evidence Bills of Third Parties.

The bills were marked *Exhibits P-8* and *P-9*, page 116. The objection was that the bills could not be proved as correct by merely producing them, and that they should have been proved by those furnishing the material. The Court's response was:

"I will permit them on the theory that they are produced in response to counsel's question, if he had any. He says he did not have any but here are the two that can be produced."

Without doubt, the purpose was to prove the correctness of the bills by producing them, and not calling the material men who furnished the material. We were afforded no opportunity to cross-examine as to the accuracy of the bills and whether the material was incorporated in appellant's building.

V.

The Following Charge was Erroneous: "Then You go to the Question of Whether or not the Plaintiff has Satisfied You by a Fair Preponderance of the Evidence that He Requested the Architect to Adjust the Amount Due Him and the Architect Refused, and that He Sought and Demanded Arbitration and that Arbitration was Refused."

Already it appears that the final contention of respondent was that his claim for extras (and this was the only question submitted to the jury), was grounded upon a contract wholly independent of the written contract, and whether that were so was the single question, which, at the outset, the trial Court submitted to the jury. He explicitly withdrew the written contract from consideration by the jury. Having done this, he then proceeded to charge the impugned language, which injected into the case the written contract and the order

for extra work thereunder. The question of arbitration came into the case only through the written contract and the order given by the architect to the respondent. The effect of the charge was to create an inconsistency and necessarily must have confused the jury. If, as he told the jury, they were concerned only with the question of whether there was an independent contract, then it was palpably wrong to thereafter inject some other contract into the case for their consideration.

The statement in the opinion of the Supreme Court that the agreement was oral is contrary to the fact. It was in writing and was the order of the architect (*Ex. P-7*), set out in the complaint.

The Court was in error in saying that, "the suit was based entirely upon the supplemental contract." See the complaint and bill of particulars. *Headley v. Cavileer*, cited by the Supreme Court is not applicable under the pleadings and proofs here.

For the reasons stated, the judgment should be reversed.

Respectfully submitted,

COLE & COLE,
Attorneys for and of Counsel
with Defendant-Appellant.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

HARRY KOLMETZKY,
Plaintiff-Respondent,

v.

BERNARD PELLICOFF,
Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT.

The appellant's brief sets forth that the case was submitted to the jury upon a different theory than that made by the pleadings, and upon which it was tried. It is, therefore, important to first analyze the issue made by the pleadings in the case.

The complaint sets up in paragraph 2, that the defendant, Pellicoff, made a contract in writing with the plaintiff for certain alterations and additions, and in paragraph 5 plaintiff alleged as follows:

"5. Between said dates the said defendant requested plaintiff to make certain other and further alterations and additions to said premises, a list of which are attached hereto and made a part hereof and marked Schedule A, and through his architect and agent agreed in writing that the prices for the doing of the said work would be adjusted after the building was completed, a copy of which notice is attached

hereto and made a part hereof and marked Schedule B. That plaintiff completed said extra alterations and additions and completed said building but the defendant failed to adjust the prices therefor and failed and refused to refer to arbitration the value of said extra work and material, in accordance with the terms of the said contract above referred to; that Schedule A sets forth the reasonable value of said extra work and material."

By way of answer the defendant admitted paragraph 2, and as to paragraph 5, he pleaded as follows:

"5. He admits requesting plaintiff to make certain alterations and additions not comprehended by said contract, as evidenced by the notice attached to the complaint and marked Schedule B, but denies Schedule A, attached to the complaint, sets forth a list of said extra alterations and additions, and also denies, that the price of extra alterations, and additions was not adjusted; the price and value of said extra alterations and additions having been fully paid by defendant to plaintiff. He further denies that Schedule A sets forth the reasonable value of said extra work and material."

By way of separate defenses the defendant set up the following:

"1. Plaintiff at the request of this defendant, did certain extra work on the building mentioned and described in the complaint, the fair price and value of which is \$2840 upon which defendant is entitled to a credit of \$250 for the following items stipulated to be furnished by

plaintiff and defendant: 2-30 gallon boilers and 2 gas heaters \$100; 12 French beveled plate glass for living room windows \$50; allowance for labor and material by reason of lessening width of back porches, 2 feet, \$100; making the price and value of said extra work, \$2590.

3. The fair price and value of said extra work, after the allowance to defendant the sum of \$250 the value of said labor and materials omitted by consent of plaintiff and defendant is \$2590."

Clearly, it is admitted that the notice given by the architect and marked Schedule B was given. The answer denies the plaintiff's allegation that the defendant failed to adjust the prices, and says that the price of the extra was paid, and further denies that schedule A set forth the reasonable value of the extra work and labor.

The answer in the third defense sets up specifically the defendant's idea of the fair price and value of the extra work, and alleges payment. So clearly the issue was "what was the fair value of the extra work and did the defendant pay the fair value, and did the defendant adjust said prices?" The case was tried upon that issue.

Counsel for the appellant has set forth a number of grounds of appeal, but we will not attempt to answer any except those briefed. "Grounds of appeal not briefed will be considered abandoned." *Kopko v. New York Live Poultry Trucking Company*, 28 Atlantic Reporter, 870.

ARGUMENT.

I.

The first point argued is that it was error to submit the case to the jury upon the theory of an independent contract, and is referred to by appellant's brief, as being based upon grounds of appeal 4 and 6.

The written agreement between the plaintiff and defendant provided for the doing by the plaintiff of certain alterations and repairs for the defendant for a consideration of \$14,500, to be paid as provided in the contract. As to extra work, Section 9 of the contract provided as follows:

"Should the owner at any time during the progress of said building request any alterations, deviations, additions or omissions, from the said contract, he shall be at liberty to do so, and the same shall in no way affect or make void the contract, but will be added to or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation."

In *South End Improvement Company v. Harden*, 52 Atlantic Reporter, 1127, the contract provided:

"The parties hereto may agree to alterations in said buildings at any time during their construction, upon terms to be agreed on, without in any way altering or invalidating this agreement; the same to be settled for in final payment."

And the question was whether certain work was

done in pursuance of the original contract, or aside from it.

It was held that:

"By the contract the builder was not entitled to demand, or the contractor bound to make alterations or additions."

And the extra work was done aside from the contract.

It is, therefore, submitted that as a matter of the legal construction the Court would have been justified in ruling that the extra work done was done outside of the written contract, and, therefore, it was, in fact, the plaintiff who was harmed when that question was submitted to the jury.

It is obvious from the reading of section 9, that the contractor was not bound to make alterations or additions. In *South End Improvement Company v. Harden*, a similar contractual proposition was considered, and it was held as to extras, as above set forth, that the work was not done under the original contract, but under a separate one.

The contract contains three separate and inconsistent provisions as to the price of extras. The first is that set forth in section 9 above. The next is in section 11 and provides:

" * * * But should any dispute arise respecting the true value of the extra work or of the work omitted, the same shall be valued by two competent persons—one employed by the owner, and the other by the contractor—and those two shall have power to name an umpire, whose decision shall be binding on all parties."

And the third is in section 13, which provides as follows:

^{NO} "Alterations or extra work shall be done without a written order from the party of the first part and the architect, and an express agreement in writing as to the cost."

According to the testimony of the plaintiff the old building which was to be altered, was a 2½ story frame building, with a brick basement, and a pitched roof. The plans for the alterations would have converted it into a two-family house (S. C. 21, l. 11). The building as completed, after the variations from the plans had been carried out, was a tenement house, under our act. When a considerable part of the work had been done, under the plans as originally drawn, the defendant requested considerable alterations to be made (S. C. p. 21, l. 30—p. 22, l. 20).

The plaintiff, when the alterations were requested, said that in view of the fact that the changes would require that he tear out a large part of the work already done and, in view of the fact that he would not know how much of the lumber would be wasted and how much could be used again, it was impossible to give a price. His testimony in respect to that was:

"Q. Now, did you have a talk with Mr. Pellicoff in regards to the price of these alterations?"

A. Well, I did say to Pellicoff, 'Mr. Pellicoff, our agreement calls that any extra work to be done should be a price on it and an order —'

A. (Continuing.) And I said, 'If it would be on extra work I could give you a price right now, but to tear out the work I done when I don't know what lumber would be waste, and what I could use, and the labor it was done already—and tear it out again and do it over again, it is impossible for me to give you a price; which it was agreed on it that the price should be made

after the whole job was completed, extras and according to contract.

Q. Who made the agreement that the price would be fixed after the job was completed?

A. Mr. Brown, the architect, and Mr. Pellicoff was there.

Q. What did he say about paying you the price of these extras?

A. Well, he said that when the whole job was completed it should be adjusted by Mr. Brown, reasonable price, and he will pay when the job is all done.

Q. Well, what did he say he would pay you?

A. Well, he didn't say any amount, but he said a reasonable price.

Q. He said he would pay you the reasonable price?

A. Reasonable price, what it is worth." (S. C. p. 23, l. 32 to p. 24, l. 32.)

The extra work done, in accordance with that agreement is set out approximately between pages 25 and 58, of the state of the case. The order from the architect, which is marked schedule B, of the complaint, and admitted by the answer, was offered in evidence. There was no denial that the defendant agreed to pay the reasonable price of the extra work upon its completion.

Certainly it was not error to submit the case to the jury the question of whether or not the extra work was done under the original contract or under an independent contract.

Upon the plaintiff's testimony a showing was made that subsequent to the making of the written contract the parties agreed between themselves that the plaintiff should do certain additional work for which he was to be paid the reasonable price. The

order of the architect confirms the agreement. In confirmation of this, it should be pointed out that there was no provision in the contract under which the plaintiff was bound to do extras and have the price therefor fixed afterwards.

Reference is made in the appellant's brief to certain excerpts from the charge of the Court, and the appellant objects to the fact that the Court charged the jury that there could be no recovery by the plaintiff under the original contract, and submitted to the jury the question of whether or not the plaintiff did certain extra work under an independent agreement, and the Court further charged that if it was found that the work was performed by the plaintiff under the written contract, then the plaintiff is not entitled to recover.

It is difficult to see how the defendant can complain because the Court charged the jury that there could be no recovery under the written contract. By that feature of the charge the defendant escaped a possible liability. We concede, of course, that we are not claiming any money under the written contract, and specifically waived any money due under the written contract, so that feature of the charge was absolutely correct.

Submitting to the jury the question of whether or not there was an independent agreement for the doing of extra work not contemplated by the agreement, is nothing about which the appellant can complain. It was admitted by the defendant's answer; it was testified to by the plaintiff as above set forth, and it was never denied by the defendant. If anybody could complain about that feature of the charge it should be the plaintiff; he was entitled, strictly speaking, to have the Court direct the jury that the extra work was done pursuant to an agreement made subsequent to the written contract.

The appellant argues, under this same section, that the Court erred in refusing to non-suit; that we believe, has been answered by what has been heretofore written.

II.

As to defendant's motion for a direction, the first and second points were that the plaintiff was required to produce a release of lien, and that the plaintiff was required to arbitrate any difference or dispute as to the amount due. That would be true, if we were relying on the written contract, but was not true as to the plaintiff's independent contract, and the architect's order, upon which the suit was based. The third point was that the plaintiff was required to produce an architect's certificate. This, of course, has no application in view of the fact that we were suing upon an independent oral contract.

The fourth point was that the price of extras that plaintiff was entitled to have were to be adjusted by the architect, and that the architect never adjusted them. As to that, the complaint sets up that the defendant failed to adjust the prices. The answer denies that "the price of extra alterations and additions was not adjusted" and then continues "the price and value of said extra alterations and additions having been fully paid by defendant to plaintiff."

Obviously, in the answer the defendant took the position that there was nothing to adjust, since all the extras had been paid for.

As to the testimony on the question of adjustments, reference is made to the testimony in the case.

“Q. Mr. Kolmetzky, after you had completed your extras, did you go to see Mr. Brown?

(Brown being the architect.)

A. Yes, sir.

Q. Did you have a conversation with him?

A. Yes.

Q. What did you have a conversation with him about?

A. Well, I asked him to give me a price on all the extras, which he told me that he will make up the price, and he told me that he will have to go over again, and I shall have to see him a couple of days later.

Q. And did you go to see him again later?

A. Yes.

Q. What did he say to you then?

A. He told me he is not ready yet.

Q. Had you told him what your charge was for the extras?

A. I did told him that it will amount to about twelve thousand or over twelve thousand. Well, he answered me he will have to go over that.

Mr. Cole: Mr. Brown can't bind us except by the certificate under the contract.

The Court: I think that is correct.

Mr. Hanstein: Judge Cole contended at the time he made his motion that even assuming that the situation was as we contend—that this was a new and independent contract—we have not complied with the terms because we had not gotten an adjustment from Mr. Brown.

Mr. Cole: There is nothing in this case to show there was any authority on Mr. Brown's part to do anything of this sort to bind this defendant.

The Court: The purpose of your examina-

tion now is to relate some conversation between the architect, Brown, and this plaintiff to bind the defendant.

Q. (Repeated by the stenographer): Had you told him that you charged for the extras?

Mr. Cole: I object on the ground it is irrelevant and immaterial and cannot possibly bind the defendant.

Mr. Hanstein: All I want to establish is this—if they will concede this to be the fact there won't be any need of further testimony: that we undertook to get an adjustment from Mr. Brown.

The Court: You may ask the witness if he asked Brown to make the adjustment.

Q. Did you ask Brown to adjust these prices?

A. Yes, sir.

Q. Did he do it?

A. No.

Q. Now, subsequently, or, at any other time did you go to see Judge Shinn about an arbitration?

A. Yes.

Q. Was Judge Shinn representing Mr. Pell-coff at that time?

A. Yes.

Q. And what did you say to him?

Mr. Cole: I object to any testimony between this witness and Judge Shinn as to an arbitration. The contract speaks. An attorney-at-law has no authority to bind a client in a matter of this sort.

Mr. Hanstein: I want to prove that we went to Judge Shinn in an effort to get an arbitration and didn't get it.

Mr. Cole: The contract provides for the way

they can have the arbitration. The contract is specific as to how it is to be done.

The Court: I sustain the objection.

Q. Did you make a request upon Mr. Pellicoff or his attorney for an arbitration?

A. Yes.

Mr. Cole: That is objected to. He includes the attorney again. Now, what took place between him and —

Mr. Hanstein: He is the attorney of record. We certainly have the right to show that we went to the attorney of the defendant and said we wanted an arbitration.

The Court: I will permit it to stand.

Mr. Cole: Exception.

Q. Upon whom did you make that request?

A. Upon Pellicoff and upon Judge Shinn both.

Q. Did you make a request upon Pellicoff for an arbitration?

A. First on Judge Shinn. Later, I saw Pellicoff.

Q. What did you say to Pellicoff?

A. I said to Pellicoff, 'Why don't we get an arbitration and have that settled?' He said to me: 'It is already in my lawyer's hands and it is paid for. It has to go to court.' That is what Mr. Pellicoff answered me in front of his hotel on Virginia Avenue. He went out of the hotel and I just passed by. I didn't exactly go to see Mr. Pellicoff, but it was just coming when I walked up and he came off the steps and I told him that and that was his answer.

Q. Did you go to see Judge Shinn?

A. Judge Shinn I saw before I saw Pellicoff. I think it was a couple of weeks or three or four weeks.

Q. And what did you ask him?

A. I asked him for an arbitration.

Q. What did he say?

A. He didn't want to talk to me. He made me with his hand. That means that I should leave the office.

Mr. Hanstein: I think that is all." (S. C. p. 122, p. 126.)

The architect, Brown, testified as follows:

"Q. Did Mr. Kolmetzky come to see you after he had completed his work there?

A. He comes in right along. He is a frequent visitor to my place.

Q. Did he ever come to see you and ask you for an adjustment of the prices on these extras?

A. I think he asked me for an arbitration. As for an adjustment I don't recollect it.

Q. Aren't you certain as to whether or not he asked you for —

A. An arbitration.

Q. —for an adjustment?

A. We tried to adjust ourselves after the job was completed, and then I never saw him for a good long while until after he saw you, I think.

Q. Didn't you tell me during the noon recess that Mr. Kolmetzky had been to see you about an adjustment of the prices of these extras?

A. As to adjustment, yes, he came; but as to a final real meeting for adjustments that was—we never met for that.

Q. Well, what did he say to you about adjusting prices?

A. Adjusting prices? At first he would not give any information about the real cost of these

extras until he would know definitely how much Mr. Pellicoff paid him. See? And I couldn't get anything out of him until—yes, before he brought suit. He told me it was around \$5,000 and I told him that was too much.

Q. Well, did he talk to you about an adjustment of the price for extras? That is all I want to know.

A. He talked about it, yes.

Q. Did he ever ask you for it? Did he ever ask that the price of his extras be adjusted?

A. He never—well, he asked me for an adjustment, yes; but he never showed up again in order to come to a regular meeting in order to adjust things.

Q. All right. Did you ever make any statement to him that you were ready to adjust the prices?

A. I think I did.

Q. Did you ever tell him at what price you were willing to adjust these extras?

A. I told him it was around "\$2,000" nothing definite.

Q. Did he ever agree to that?

A. Oh, he said his debts were more than that.

Q. So that you people never adjusted these extras, did you?

A. No, sir." (S. C. p. 130 to p. 131, l. 15.)

From that testimony it is obvious that the plaintiff did make an effort to adjust prices. Certainly, the defendant was not entitled to a direction in the face of that testimony, and further than that, according to the testimony above referred to between the plaintiff and defendant, the defendant agreed to pay a reasonable price, after the job was completed, and the conversation which amounted to a contract, did

not require the plaintiff to do anything more than demand the fair price, and failing to get it, to bring suit for it.

It should be further pointed out that the architect was the defendant's agent, not the plaintiff's. His notice did not say who should seek the adjustment. It was the duty of the defendant, as a debtor, to pay his debts, not the duty of the plaintiff, as a creditor to seek out the defendant. It is submitted that our action lays, even though the plaintiff never took a step to procure an adjustment. The duty was on the defendant to seek the adjustment.

In the motion for a direction reference is made to the fact that the bill of particulars in the case mingles the contract, the extras and the credits, as one thing, and that payments were made by the defendant for all of the labor on the contract and the extras. The facts in regard to the situation should be pointed out.

Schedule C, of the complaint, sets out the contract price as \$14,500, extras \$12,526.32, shows a total charge of \$27,026.32, and shows a credit of \$13,469, leaving a balance due to the plaintiff of \$13,557.32.

The answer denies the amount allowed as credit, and sets up that the amount of the credit should be \$15,333.52. The plaintiff testified that he had engaged other counsel prior to the institution of suit, and that all of his papers had been given to that lawyer and some had not been returned, and he was, therefore, uncertain as to the exact amount of the credit. He also testified (on page 113, of the state of the case) that the defendant had paid some of plaintiff's bills, of which the plaintiff had no exact knowledge, and that whatever payments had been made in that respect, and for whatever money paid to the plaintiff for which the defendant had a receipt, the plaintiff was willing the defendant should be credited.

The defendant had paid the plaintiff each week the amount of his payroll. The written contract provided that the defendant should pay to the plaintiff the amount of his weekly payroll, provided the same did not exceed \$7,250. The written contract provided that the balance of the contract price was to be paid 15 days after the completion. Throughout the doing of the extra work, the plaintiff secured the amount of his weekly payroll from the defendant.

“Q. Has Mr. Pellicoff paid you the money due for the extra labor?”

A. Well, he—he—paid me the money that is due on the extra labor.

Q. Yes, has he paid for the extra labor?

A. I don't know, because it was never mentioned, any extra labor for contract labor. It was never mentioned.

Q. I am talking about the labor that was required in the doing of the extra work. Did he ever pay for that?

A. Well, I used to get my payroll every week as I am going along on the job, but I didn't exactly know if it was on the extra. It was not spoke about anything if the money goes on the extra and not extra. I got my payroll.” (S. C. p. 118 and 119.)

The payroll on the extra work amounted to over \$7,000. It was obvious to the parties that the plaintiff could not finance that. The defendant advanced that money weekly. We submit, not under the terms of the contract, but merely as the only practical means for the plaintiff to go on with his work. When it came time to resolve these facts into their true legal situation, it was entirely proper to take the sum total of the moneys paid by the defendant, and

credit them on the oldest account, to wit: the contract. No final payment, as provided in the contract, was ever made. Although the plaintiff received money weekly it was but money on account of the debt, not in payment of part of the extras.

Sufficient credits were shown by the defendant at the trial to show that the contract price had been fully paid, and, therefore, the plaintiff's attorney stated in open court that all claim on the contract was waived, and, we, therefore, relied entirely on extras as alleged in the complaint.

III.

Under point three of appellant's brief it is argued that the following question is improper:

“Q. Now, where you do extra work and the price is to be adjusted after the contract is completed, what is the usual allowance or arrangement in regard to profit?”

Mr. Cole: Objected to.

A. Ten per cent.

Mr. Cole: I ask that that be stricken until I get the benefit of my objection.

The Court: It may be stricken.

Mr. Cole: I object to it on the ground that the plaintiff must rely on the case made by his complaint, and he has not suggested any such a right as to add ten per cent to anything in this complaint.

The Court: I will permit it.

Mr. Cole: Exception.

Q. (Repeated by the stenographer): Now, where you do extra work and the price is to be adjusted after the contract is completed, what is the usual allowance or arrangement in regard to profit?

A. Ten per cent." (S. C. p. 72, l. 35 to p. 73, l. 23.)

The complaint, as has already been noted, claims for the reasonable value of the extra work and material. Reasonable value, of course, means what the item is worth. The testimony up to the point where that question was asked showed how much the plaintiff had paid out for actual cost of material and how much for labor. None of that went into his pocket in any way. The reasonable value of the work that a contractor does may be very properly shown by showing how much it cost him to do the work, together with reasonable compensation to himself. What is reasonable compensation should certainly be the usual allowance. It would certainly seem in this case that it was entirely proper that the plaintiff should recover, in addition to his actual costs, the usual compensation for profit; hence it is our opinion that the allowance of the question was entirely proper.

IV.

The fourth point of appellant's complaint is that the Court admitted in evidence Exhibits P8 and P9. As said under the previous heading, by way of proving reasonable value the plaintiff showed the exact cost of the extra work. On cross-examination appellant's counsel asked the plaintiff:

"Now, you spoke of certain bills, I think, and certain contracts that you had for extras. Have you any of these bills, or these contracts, that you can let the jury see?" (S. C. p. 99, l. 10.)

And on further cross-examination of the plaintiff the following took place:

"Q. From whom did you buy the pebbles?

A. Hudson Supply.

Q. Have you got its bill?

A. I got plenty of bills for that job, not exactly only for pebbles.

Q. I am talking about the bill for pebbles and you say you changed from white to colored.

A. Yes.

Q. Have you got the bill for those pebbles?

A. I had." (S. C. p. 114, ll. 12 to 21.)

Immediately upon the close of that cross-examination, on re-direct examination, the plaintiff was asked as follows:

"Q. Judge Cole asked you if you had any bills for extras on his work.

A. He asked me if I had any contracts, not bills, I had the bills, not the contract.

Q. Do you know what those bills relate to?

A. That is for the extra.

Q. Are both those bills for extras?

A. Yes.

Q. Do you have any other bills for extras here?

A. No, I haven't got it here.

Q. Do you know where they are?

A. I don't think that I will be able to get them. I tell you I did left all my papers with Mr. Bloom and when I got it back he didn't give me the papers, and I couldn't remember which I did give him or what I did give him at that time.

Mr. Hanstein: I offer that.

Mr. Cole: I object to the offer of somebody else's bill.

Mr. Hanstein: Well, I think it is entirely proper now. Judge Cole has questioned him about bills for extras.

Mr. Cole: I cross-examined him. He says I didn't. He says I asked him for contracts.

Mr. Hanstein: After all, the record is going to speak for itself.

Mr. Cole: The objection is that you cannot prove the bills by merely producing them. They ought to be proved by the people who furnished the material, or —

The Witness: They are here.

The Court: I will permit them on the theory that they are produced in response to counsel's question if he had any. He says he did not have any but here are the two that can be produced.

Mr. Cole: Allow me an exception.

(The papers offered are received in evidence and marked as exhibits for the plaintiff, P8 and P9)." (S. C. p. 115, l. 10 to p. 116, l. 19.)

On the strength of the fact that appellant's own counsel had asked if the plaintiff had any bills that he could let the jury see, it seems to us that it was entirely proper that these bills should be admitted in evidence, and they are further evidential as proof of what the plaintiff was obliged to lay out, or contract for, in the doing of the work for which he brought his suit.

Further than that it is difficult to see how the defendant was harmed, inasmuch as there was already oral testimony introduced as to the amount the plaintiff was obliged to pay for the very two items represented by the bills.

V.

The fifth point, which is the next point argued, relates to a part of the charge of the Court. The Court had already charged the jury that the written contract must be ignored, and that there could only be a recovery in the event that it was established that there was a new contract between the parties. Under the new contract alleged and proved by the plaintiff, there was, of course, no necessity for arbitration. The Court charged that the burden was upon the plaintiff to establish that arbitration had been demanded and refused.

The Court, thus, put a burden upon the plaintiff that was not proper so far as the plaintiff was concerned, but it is difficult to see how the defendant was harmed by it.

It is, therefore, submitted, that the issue in this case was clearly framed by the pleadings, and the case was tried upon that theory. The jury rendered its verdict in favor of the plaintiff; the defendant took a rule to show cause, which was dismissed. It is submitted that there was no error in the trial, and nothing done that was in any way prejudicial to the defendant.

Respectfully submitted,
THOMPSON & HANSTEIN,
Attorneys of Plaintiff-Respondent.

