

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM I. LUCKENBACH,

Plaintiff in Error,

vs.

HENRY M. SCIPLE, BUILDER,

AND TRENTON AND NEW

BRUNSWICK RAILROAD CO.,

OWNER,

Defendants in Error.

ON WRIT OF

ERROR.

ARGUMENT FOR PLAINTIFF IN ERROR.

The writ of error in this cause brings up a judgment of non-suit entered by the Mercer County Circuit Court, in a suit on mechanics lien.

The suit was brought to collect a claim of \$2,317.79 against the Trenton and New Brunswick Railroad Company, owner, for materials and labor supplied in the erection of its power house, at or near Princeton Junction.

The judgment of non-suit resulted from the action of the Trial Judge, in ruling out a question and answer put to the plaintiff near the close of his testimony.

Error is assigned on the ruling complained of under the first assignment (page 48).

The ruling of the Judge claimed to be erroneous came up in the following situation:

Counsel for the plaintiff, on re-direct examination (pages 42-43) asked the witness this question:

"Ques. I call your attention to the fact that there is appended to the lien claim filed in this case an affidavit, which says, 'W. C. Gochenor, being duly sworn, on his oath says, that he is the agent of Wilson I. Luckenbach, in this behalf, the claimant named in the foregoing claim and bill of particulars,' and so on. Now, having that affidavit before you, what have you to say as to whether or not Mr. Gochenor was your agent?"

To which the witness replied:

"Yes; for the purpose of making that affidavit."

Then the Court interposed:

"That is very easy."

Mr. Walker: "The statement of the witness that Gochenor was not an employee of his is corrected by this statement that he now makes."

Then counsel for defendant, after that colloquy, interposes:

Mr. Lanning: "I object to the question and answer."

Whereupon the Court replied: That he thought he would strike out the question and answer.

Counsel for plaintiff then objected.

Mr. Walker: "I object to the striking out of the question and answer after the question has been asked and answered without objection."

The Court: "I strike it out because it seems to me that it was put in such a way as to suggest an answer to the witness," etc.

To which ruling exception was taken and allowed (page 43).

This action of the Court, in striking out the question and answer, was error.

The question and answer having been stricken out, it then appeared that Gochenor, who had made the affidavit to the lien claim, asserting that he was the agent of the plaintiff for that purpose, had no authority therefor and was not the plaintiff's agent. Defendant's motion for a non-suit on this ground was then allowed, and a non-suit granted.

The result was that the ruling out of the question and answer on which error is assigned resulted in the non-suit.

In *Clark vs. State*, 47 N. J. L., 558, the Court of Errors, speaking through Judge Reed, said:

"In the first place, the testimony of Carter, so far as the record informs us, was all in before the objection to it was taken. It does not appear that there was not an opportunity afforded to the counsel for the defendant to have made his objection earlier. The rule is established that counsel cannot take the chance of testimony making in his favor, and if it happens to be adverse, then interpose his objection."

There is nothing to show that the defendant here was not apprised of the point of which the witness was about to speak.

Even if the question itself was illegal the Court should not rule it out on objection made after answer was given.

In *Ryan vs. State*, 60 N. J. L., 554, the Court of Errors, speaking through Judge Collins, remarked:

"The Supreme Court refused to consider exceptions to testimony declared in that Court to be 'responsible.' The reason given for such refusal was that the inference to be drawn from the several bills of exceptions must be that the defendant's objections were made to the questions and answers, i. e., to answers that were responsive to illegal questions, to which no objection was made at the time of asking. If such must be the inference, the conclusion of the Court was correct."

This language was affirming the rule of law as expressed by Justice Garrison, in *Ryan vs. State*, 60 N. J. L., 34, to the effect that when a responsive answer to an illegal question is the subject of

an objection upon which an exception is allowed, the objection is too late.

Fath vs. Thompson, 58 N. J. L., 187.

Cunningham vs. State, 61 N. J. L., 70.

In the case at bar, the previous examination indicates the knowledge in the mind of counsel for defendant on the point to which the question ruled out was addressed. He could not claim surprise; he did not even make his objection immediately upon the question being answered; he waited until the Court made a comment, and counsel for plaintiff had replied to the comment; then counsel for the defendant, doubtless thinking the Court would favor his view of the possible illegality of the question, made his motion to strike out not only the question but the answer as well, coming exactly within the vice criticized in *Clark vs. State*, that the objection was not to the question, but to the answer.

No ground of objection whatever was stated when the objection was made.

II.

But even if the objection had been made in time and a reason stated, the question was not illegal or improper.

The Court ruled out the question and answer on the expressed theory that the witness's recollection could not be refreshed by showing him an affidavit made by a third party; but that was not

the purpose of the question, nor did it contain any language indicative thereof. The purpose of the question was to bring again to the witness's attention the fact that Gochenor had made an affidavit as his agent. The witness had already stated, in general terms, that Gochenor was not in his employ, and that he had no relations with him; evidently speaking to business transactions. He had never been asked, nor had he stated, that Gochenor was not his agent for the particular purpose of making that affidavit. He had disclosed that Gochenor was familiar with all the details of items appearing in the lien claim, Gochenor being the bookkeeper of Sciple, who was the principal contractor on the ground.

Neither did the question suggest an answer, as the Judge seems to have opined (page 43).

The question commences by calling the attention of the witness to a fact.

The question concludes by the interrogatory, "What have you to say as to whether or not Gochenor was your agent?"

I cannot conceive a fairer question, nor one less leading. The answer was responsive.

III.

It may be argued that the striking out of the question and answer, on which error was assigned, was not a reversible error. The non-suit was allowed on the express ground that the lien claim filed by the plaintiff below had not been properly

verified, because the plaintiff had sworn that Gochenor was not his agent generally.

Manifestly, if the testimony of the plaintiff that Gochenor was his agent for the express purpose of swearing to the lien claim had been allowed to remain in the case, there could have been no non-suit.

It would have been for the jury to determine whether the plaintiff told the truth or not when he swore that Gochenor was not his agent or in his employ, and that he had no business relations with him; but that he was his agent for the express purpose of making the affidavit.

As already said, it appears in the case that Gochenor was the bookkeeper for the main contractor on the ground, and, therefore, was in the direct line of having full knowledge of the items delivered by the plaintiff. He, therefore, was qualified to be the agent of the plaintiff and was qualified to make the affidavit to the lien claim.

When the question and answer were stricken out of the case, all evidence as to the authority of Gochenor to make the affidavit to the lien claim was eliminated and the non-suit resulted therefrom (page 47).

The Court says, in allowing the non-suit (page 47):

"I think the facts show that Mr. Gochenor filed this lien claim, not representing the plaintiff, but perhaps for the plaintiff's benefit."

When he ruled out the question and answer he took from the jury all the evidence there was in the case that Gochenor was the plaintiff's agent.

NORMAN GREY,
Attorney for Plaintiff in Error.

New Jersey Court of Errors and Appeals.

WILSON I. LUCKENBACH, <i>Plaintiff in Error,</i> <i>vs.</i> TRENTON AND NEW BRUNSWICK RAILROAD COMPANY, <i>Defendant in Error.</i>	}	<i>In Error to Mercer Circuit Court.</i>
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BRIEF FOR RESPONDENT.

The case contains only two assignments of error.
(p. 48).

The first assignment challenges the action of the court in striking out the following question addressed to the plaintiff and the plaintiff's answer thereto:

"Q. I call your attention to the fact that there is appended to the lien claim filed in this case an affidavit, which says: 'W .C. Gochenor, being duly sworn, on his oath says, that he is the agent of William I. Luckenbach, in this behalf, the claimant named in the foregoing claim and bill of particulars,' and so on; now, having that affidavit before you, what have you to say as to whether or not Mr. Gochenor was your agent?"

"A. Yes; for the purpose of making that affidavit."

Counsel for the plaintiff objected to the striking out of the question and answer on the ground that the

question had been asked and answered without objection.

The reasons given by the court for its action are as follows:

"*The Court.* I strike it out because it seems to me that it was put in such a way as to suggest the answer to the witness on a crucial point, and because I do not see how it can be proper to show the witness an affidavit of a third party with a view to refresh his recollection. Take your exception."

Clearly this matter was within the discretion of the court and is not, therefore, reviewable on error.

Greenleaf on Evidence, Vol. 1, p. 539, (16th Ed.)

Wigmore on Evidence, Vol. 1, Sec. 770.

Taylor on Evidence, Vol. 2, Sec. 1263.

Chambers v. Hunt, 2 Zab., 522.

Trenton Passenger Ry. Co. v. Cooper, 31 Vr., 219.

Nor was the discretion abused. Plaintiff had testified on cross examination that the person who swore to his lien claim was not his agent; that he had never represented him in any capacity whatever, and that he had had no relations with him at all (case, p. 41, ll. 22-36).

The attempt on re-direct examination to lead the plaintiff into a contradictory statement was manifestly one calling for immediate and firm action by the court.

The second assignment of error is that the court refused to withdraw a juror as requested by the plaintiff below.

This matter was also within the discretion of the court.

Besides no exception was sealed to the refusal of the court to make the order requested.

That error cannot be assigned in the absence of an exception, is of course well settled. The proceedings at a trial constitute no part of the record and can only be brought into the record by a bill of exceptions sealed in pursuance of the statute.

Associates, etc. v. Davison, 5 Dutch., 415.

Driscoll v. Carlin, 21 Vr., 28.

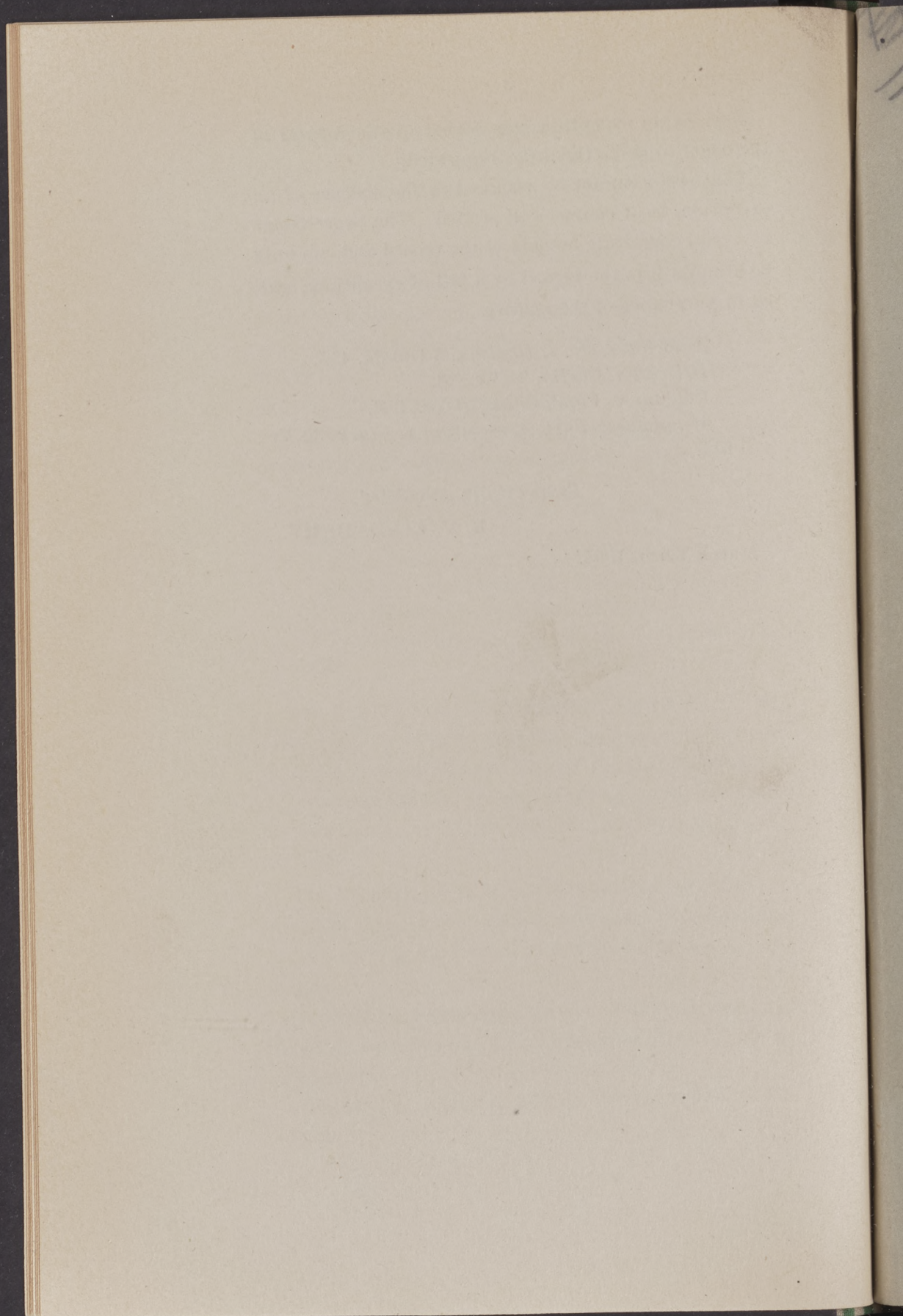
Robbins v. Vanderbeck, 26 Vr., 364.

Wanamassa Park Association v. Clark, 32 Vr., 611.

Respectfully submitted,

R. V. LINDABURY.

March Term, 1905.



N.J. Court of Errors and Appeals

WILSON I. LUCKENBACH,

Plaintiff in Error (Plaintiff below),

vs.

TRENTON AND NEW BRUNSWICK RAILROAD COMPANY,

Defendant in Error (Defendant below).

IN ERROR.

PRINTED CASE.

NORMAN GREY,

For Plaintiff in Error.

LINDABURY, DE PUE & FAULKS,

For Defendant in Error.

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NEW JERSEY COURT OF ERRORS AND APPEALS.

NEW JERSEY, TO WIT:

State of New Jersey to our Judge of our
[L. s.] Circuit Court, at Trenton, in and for the 10
county of Mercer, Greeting:

Because in the proceedings and also in a plaint which
was in our Circuit Court holden at Trenton, in and for
the said county of Mercer, between Wilson I. Lucken-
bach, plaintiff, and Henry M. Sciple, builder, and Tren-
ton and New Brunswick Railroad Company, owner, de-
fendants, in an action upon contract, manifest error hath
intervened to the great damage of said plaintiff, as by
his complaint we are informed, we being willing that
justice should be done to the parties aforesaid in this 20
behalf, do command you distinctly and openly to send,
under your seal, the records and proceedings aforesaid,
with all things touching and concerning the same, to
our Court of Errors and Appeals, to the Judges thereof,
on the twentieth day of April, nineteen hundred and
four, and this writ, that the record and proceedings
aforesaid being inspected, we may cause to be further
done thereupon what of right and according to law
ought to be done.

Witness, WILLIAM J. MAGIE, our Chancellor and Presi- 30
dent Judge of our Court of Errors and Appeals, at Tren-
ton, aforesaid, this eighth day of April, nineteen hun-
dred and four.

S. D. DICKINSON,
Clerk.

NORMAN GREY,
Attorney.

MERCER COUNTY CIRCUIT COURT,

Of the thirtieth day of January, in the year of our Lord, one thousand nine hundred and three.

MERCER COUNTY, SS.

- Henry M. Sciple, builder, and Trenton and New Brunswick Railroad Company, owner, the defendants in
 10 this suit, were summoned to answer unto Wilson I. Luckenbach, the plaintiff herein, in an action upon contract, appearance having been entered for Henry M. Sciple, builder, and the summons having been served on Trenton and New Brunswick Railroad Company; whereupon the said Wilson I. Luckenbach, by Norman Grey, his attorney, complains for that whereas the said defendant, Henry M. Sciple, heretofore, to wit, on the twentieth day of January, nineteen hundred and three, at "Elwood Nutt Farm," near Princeton Junction, New
 20 Jersey, in the township of West Winsor, was indebted to the plaintiff in the sum of six thousand dollars (\$6,000.00) for work and labor, care and diligence of the said plaintiff, by the plaintiff before that time done, performed and bestowed for the said defendant, and at his special instance and request, and also for divers materials and other necessary things by the said plaintiff before that time found, provided, used and applied in and about that work and labor for the said defendant, and at his special instance and request; and in the further sum of
 30 six thousand dollars (\$6,000.00) for goods, wares and merchandise, sold and delivered by the said plaintiff to the said defendant, Henry M. Sciple, at his special instance and request; and in the like sum of money for money lent by the plaintiff to the said defendant, Henry M. Sciple, at his special instance and request; and in the like sum of money for interest due from the said defendant, Henry M. Sciple, to the plaintiff, for moneys before

lent by the plaintiff to the said defendant at his special instance and request, and at the like instance and request, forborne by the plaintiff for a long time then elapsed; and in the like sum of money, for money found to be due from the said defendant, Henry M. Sciple, to the plaintiff, on an account then and there stated between them; and in a like sum of money for goods, wares and merchandise, sold and delivered to the said defendant, Henry M. Sciple, and work and labor done and performed for the said defendant, Henry M. Sciple, by the said plaintiff, at the special instance and request of the said defendant, and at an agreed price of six thousand dollars; and being so indebted, he, the said defendant, Henry M. Sciple, in consideration thereof, at "Elwood Nutt Farm," near Princeton Junction, New Jersey, in the township of West Windsor, undertook and promised to pay the said several sums of money to the plaintiff on request, yet the said defendant, Henry M. Sciple, has disregarded his promise and has not paid any of the said moneys, or any part thereof, to the plaintiff's damage six thousand dollars (\$6,000.00). And therefore he brings his suit, etc.

And the said plaintiff avers, and in fact says, that the said debt is, by virtue of an act of the Legislature, entitled "An Act to secure to mechanics and others payment for their labor and materials in erecting any building," approved June 14, 1898, and the supplements thereto, a lien on a certain building and curtilage described as follows:

"The said building is a one story power house, ninety-six feet eleven inches long by fifty-one feet eight inches wide, outside of walls, by sixteen feet clear height to the under side of lower cord of truss, measuring from the level of the boiler room floor. It is built of brick and mortar. The roof is of slate, supported by iron trusses, and the whole building rests upon stone foundation; at the boiler end of the building, on the outside of the line

of the walls above indicated, there is an iron stack supported upon stone and brick foundations, which is connected with the boiler located within the walls above described, by a sheet iron smoke drum.

10 "Said building is located on a lot or curtilage, situated in the county of Mercer, State of New Jersey, and on the land of the 'Trenton and New Brunswick Railroad Company, known as 'Elwood Nutt Farm,' near Princeton Junction, New Jersey, in the township of West Windsor, being between the Millstone river and the road leading to Grover's Mills, adjoining land of William Wiley on the west and Brazilla Grover on the east, and described as follows:

20 "Beginning at a stone planted in the aforesaid road eleven links north twenty-one degrees west from another stone corner to Brazilla Grover's land; thence (1) north two degrees and three-quarters west, thirteen chains and thirty-five links along the said Wiley's land to the middle of said river; thence (2) beginning again at the first mentioned stone, north eighty-two and one-quarter degrees east along the middle of said road twenty-three chains and eighty links to a stone; thence (3) north four and three-quarters degrees east eight chains and thirteen links more or less to the middle of the river; thence (4) down the middle of said river, the several courses thereof, to the end of the first mentioned line."

Norman Ery
Attorney for the Plaintiff.

The following is a bill of particulars of the work and labor performed and materials furnished for the said defendant, Henry M. Sciple, by the said plaintiff, and for which this action is brought:

Henry M. Sciple to Wilson I. Luckenbach, Dr.

To furnishing labor and materials necessary to complete the entire piping system inside of said building above described; said labor and materials were furnished from the month of June, 1902, to December 31, 1902, at the agreed price of.....	\$1,976 00	10
To extra work on six valves and piping.....	210 44	
To labor performed on blow-off cocks.....	35 35	
To extra labor.....	180 00	
Balance due claimant.....	\$2,401 75	

All the last items of labor were performed from September, 1902, to December 31, 1902. 20

Interest from December 31, 1902, to date.

All the above labor was performed and materials furnished from June, 1902, to December, 1902.

Said defendants are not entitled to any credits whatever.

NORMAN GREY,
Attorney for Plaintiff.

MERCER COUNTY CIRCUIT COURT.

WILSON I. LUCKENBACH,

Plaintiff,

vs.

10 HENRY M. SCIPLE, BUILDER, AND
TRENTON AND NEW BRUNSWICK RAILROAD COMPANY,
OWNER,

Defendants.

ON MECHANIC'S

LIEN.

PLEAS.

20

And the said defendant, the Trenton and New Brunswick Railroad Company, by William M. Lanning, its attorney, comes and defends the wrong and injury, when, etc., and says that the said Henry M. Sciple, builder, did not undertake nor promise, in manner and form as the said plaintiff hath above thereof complained against him, and of this it puts itself upon the country.

30

And for a further plea in this behalf, by leave of the Court here for that purpose first had and obtained, according to the form of the statute in such case made and provided, the said defendant says that the said plaintiff ought not further to have or maintain his aforesaid action thereof against it and against said building and lands in the declaration above mentioned and described, because it says that said building and lands are not liable to the said supposed debt in manner and form as the plaintiff

hath above thereof complained against it, and of this it puts itself upon the country.

WILLIAM M. LANNING,
Attorney of Defendant, the Trenton and
New Brunswick Railroad Company.

STATE OF NEW JERSEY, ss.
COUNTY OF MERCER,

10

WILLIAM M. LANNING, of full age, being duly sworn according to law, on his oath says, that the president, vice president, secretary and treasurer, being the officers of the Trenton and New Brunswick Railroad Company, which company is one of the defendants in the above named action, are absent from the State of New Jersey, and that this deponent is the attorney of the said company in said action; that the foregoing pleas are not intended for the purpose of delay, and that this deponent verily believes that the said Trenton and New Brunswick Railroad Company has a just and legal defense to said action on the merits of the case.

20

W. M. LANNING.

Sworn to and subscribed before me this 1st day of May, A. D. 1903.

SCOTT SCAMMELL,
M. C. C. of N. J.

30

MERCER COUNTY CIRCUIT COURT.

WILSON I. LUCKENBACH,

Plaintiff,

vs.

ON MECHANIC'S

10

HENRY M. SCIPLE, BUILDER, AND

LIEN.

TRENTON AND NEW BRUNS-

SPECIFICATION OF

WICK RAILROAD COMPANY,

DEFENCES.

OWNER,

Defendants.

20

To Wilson I. Luckenbach, Plaintiff, and Norman Grey, Esq., Attorney of said Plaintiff:

Please take notice, that the following is a specification of defences intended to be made by the Trenton and New Brunswick Railroad Company, one of the defendants in the above stated action, under the plea of general issue by it filed in said action:

30

I. That the defendant, Henry M. Sciple, was not, on the twentieth day of January, nineteen hundred and three, indebted to the plaintiff in the sum of six thousand dollars for work and labor, care and diligence of the said plaintiff by the said plaintiff before that time done, performed and bestowed for said defendant, and for divers materials and other necessary things by said plaintiff before that time found, provided, used and applied in and about said work and labor for said defendant, Henry M. Sciple, as in the plaintiff's declaration mentioned.

2. That said defendant, Henry M. Sciple, was not indebted in the sum of six thousand dollars for goods, wares and merchandise sold and delivered by said plaintiff to said defendant, Henry M. Sciple, at his special instance and request, as in said declaration alleged.

3. That said defendant, Henry M. Sciple, was not indebted to the said plaintiff in the like sum of money for money lent by the said plaintiff to said defendant, Henry M. Sciple, as in said declaration alleged.

4. That said defendant, Henry M. Sciple, was not indebted to said plaintiff in the like sum of money for interest due from said defendant, Henry M. Sciple, to said plaintiff, for moneys lent by said plaintiff to said defendant, as in said declaration alleged. 10

5. That said defendant, Henry M. Sciple, was not indebted to said plaintiff in the like sum of money for money forborne by the plaintiff, as in said declaration alleged.

6. That said defendant, Henry M. Sciple, was not indebted to the said plaintiff in the like sum of money for money found to be due by said defendant, Henry M. Sciple, to said plaintiff on an account stated, as in said declaration alleged. 20

7. That said defendant, Henry M. Sciple, was not indebted to the said plaintiff in the like sum of money for goods, wares and merchandise sold and delivered to the said defendant, Henry M. Sciple, and work and labor done and performed for said defendant, Henry M. Sciple, by said plaintiff, at an agreed price of six thousand dollars, as in said declaration alleged.

8. That said defendant, Henry M. Sciple, did not undertake and promise to pay the said several moneys, or any of them, to the said plaintiff, as in said declaration alleged. 30

9. That the materials furnished and labor performed, described in the bill of particulars annexed to said declaration, and in the lien claim filed in the office of the

Clerk of the county of Mercer, or some portions thereof, were not furnished to, or performed for, said defendant, Henry M. Sciple, within four months next preceding the time when said lien claim was filed or this action was commenced.

10 10. That in and by a certain agreement in writing, bearing date the fifth day of February, in the year nineteen hundred and two, and made by and between the Railroad Construction Company, party of the first part, and said Henry M. Sciple, party of the second part, the said Henry M. Sciple being one of the defendants in this action, did agree to furnish the materials and perform the work and labor described in the bill of particulars annexed to the plaintiff's declaration, and in and by said agreement did further agree to file no liens for any labor performed or materials furnished under said contract, of which agreement to waive liens the said plaintiff had notice before furnishing any of the materials or performing any of the labor described in the bill of particulars annexed to his declaration.

20 11. That the piping system and other materials, described in the bill of particulars annexed to the plaintiff's declaration, are not such fixed machinery, or gearing, or other fixtures for manufacturing purposes, as entitles the plaintiff to any lien under our Mechanics' Lien Act.

Dated May first, A. D. nineteen hundred and three.

W. M. LANNING,

Attorney of Defendant, The Trenton and
New Brunswick Railroad Company.

Therefore, let a jury come before the Court aforesaid, at Trenton aforesaid, on the third Tuesday of January next ensuing, by whom, etc., who neither, etc., to recognize, etc., comes as well, etc., and the same day is given to the parties aforesaid, at the same time and place. At which day, before the Court aforesaid, at Trenton aforesaid, come the parties by their respective attorneys aforesaid, and the jurors of the jury whereof mention is made, are respited between them from day to day until Wednesday, January then next ensuing, at which last mentioned day, before the court aforesaid, come the said parties aforesaid, by their respective attorneys aforesaid, and the jurors of the jury, being summoned, also come, who to speak the truth of the matters within contained, being chosen, tried and sworn, after evidence being given to them thereupon, for certain causes to the said Justice appearing, the jurors of the jury are altogether discharged from giving any verdict of and upon the premises within mentioned, etc. 10

Therefore, it is considered that the said Wilson I. Luckenbach take nothing by his said writ, but that he and his pledges to prosecute be in mercy, etc., and that the said Trenton and New Brunswick Railroad Company go thereby without day, etc., and it is further considered by the Court here that the said Trenton and New Brunswick Railroad Company do recover against the said Wilson I. Luckenbach, its cost and charges by it laid out and expended about its defence, in their behalf to be taxed, and that the said Trenton and New Brunswick Railroad Company have execution therefor, etc. 20 30

FRANCIS J. SWAYZE,
Judge.

STATE OF NEW JERSEY, }
COUNTY OF MERCER, } ss.

I, CHARLES H. BAKER, Clerk of said county and also Clerk of the County Courts thereof, do hereby certify that the foregoing is a correct copy of the judgment entered in the above cause, as the same remains of record in my office.

10 In testimony whereof, I have hereunto set my hand and the seal of said Courts and county this eighteenth day of April, 1904.

CHARLES H. BAKER, [L. s.]
Clerk.

20 The answer of Francis J. Swayze, Judge of the Circuit Court of the county of Mercer, within named. The record and proceedings mentioned in the within writ of error, wherein Wilson I. Luckenbach was plaintiff and the Trenton and New Brunswick Railroad Company was defendant, with all things touching and concerning the same, to the Court of Errors and Appeals in the last resort in all cases, is certified in a certain schedule hereunto annexed, as within commanded.

FRANCIS J. SWAYZE,
Judge.

MERCER COUNTY CIRCUIT COURT.

WILSON I. LUCKENBACH,	}		
VS.			
HENRY M. SCIPLE, BUILDER, AND		ON CONTRACT.	
TRENTON AND NEW BRUNSWICK RAILROAD COMPANY.		MECHANIC'S LIEN.	10

Stenographer's transcript of testimony taken on the trial of the above stated cause, January 27th, 1904, at Trenton, before his Honor, Francis J. Swayze, and a jury.

20

Appearances:

For the Plaintiff, MR. WOLCOTT and MR. WALKER.

For the Defendant, The Trenton and New Brunswick Railroad Company, HON. WILLIAM M. LANNING.

Counsel for the plaintiff offers in evidence the following documents: 20

(1) Deed from Elwood Nutt and wife to the Railroad Construction Company, dated February 22, 1902, recorded in Mercer County Clerk's office in Book 251 of Deeds, page 263.

Marked P1.

(2) Deed from the Railroad Construction Company to the Trenton and New Brunswick Railroad Company, dated July 28, 1902, and recorded in the Mercer County Clerk's office, Book 258 of Deeds, page 95.
Marked Exhibit P2.

(3) Contract between Henry M. Sciple, contractor, and the Railroad Construction Company, dated February 5, 1902, signed by the Railroad Construction Company, W. H. Stern, president, and H. M. Sciple.
10 Marked Exhibit P3.

(4) The lien claim and the order amending the lien claim.
Marked Exhibit P4.

(5) The summons in the case, which shows that it was issued on the twenty-second day of January, 1902.
Marked P5.

20

PLAINTIFF'S CASE.

WILSON I. LUCKENBACH, the plaintiff, sworn as a witness in his own behalf, testifies as follows:

Direct examination:

30 By Mr. Wolcott:

Ques. Are you the plaintiff in this case?

Ans. Yes, sir.

Ques. Where do you live?

Ans. Allentown, Pa.

Ques. What is your business?

Ans. Contracting engineer.

Ques. Have you had any dealings with Mr. Henry M. Sciple, one of the defendants in this case, with reference to work at Princeton Junction, New Jersey?

Ans. Yes, sir.

Ques. How was this business done—under contract?

Ans. We had a contract for erecting the pipe work in this plant, and there was a separate line of extras which were not in the contract.

Ques. Was this contract in writing?

Ans. Yes, sir.

Ques. Of what did that contract consist?

10

(Objected to.)

The Court: You will have to produce the contract.

Ques. (Showing witness papers.) I show you a paper marked "Copy," and ask you what that is?

Ans. That is a copy of the last two pages of that contract there.

Ques. What are they?

20

(Objected to.)

The Court: They show for themselves.

Ans. They are the last two pages of the contract.

(Papers are offered in evidence.)

(Objected to.)

30

The Court: They are only a copy.

By Mr. Walker:

Ques. Were you given any paper by Mr. Sciple by which to make your estimate as to what you were to do the piping work for?

Ans. Yes, sir.

Ques. I show you a paper, and ask you if that is the paper handed you by Mr. Sciple?

Ans. This is not the original. That is the one general contract and this is a copy sent to me afterwards.

Ques. Were you shown any contract?

Ans. That is a contract applying to my work.

Ques. By whom were you shown that?

Ans. By Mr. Sciple.

10 Ques. What part of the contract were you shown?

Ans. Just the piping part—piping and connections.

Ques. I show you a paper purporting to be a contract between Mr. Sciple and the Railroad Construction Company, and ask you if that is the identical paper handed to you, the specifications of which concerning the piping were shown you?

(Objected to as leading.)

20 The Court: I will allow it.

Ans. That is the paper as near as I can tell.

Ques. How much of that paper did you see and read?

Ans. All of it—that is, this part—the piping, pumps and heaters.

Ques. Any of the other parts?

Ans. No, sir; I didn't bother with any other part outside of my part.

Ques. After seeing that, did you or did you not ever get any other paper?

30 Ans. Afterward I asked for a copy of that so as to guide myself in doing the work.

Ques. I hand you a paper and ask you what it is?

Ans. That is the copy.

Ques. Have you had it in your possession ever since?

Ans. Yes; I had it and gave it to my foreman to work by.

Ques. Where did you get it afterwards?

Ans. I got it from the foreman.

Ques. That is the one?

Ans. Yes, sir.

Ques. I show you a copy signed W. Luckenbach, and ask you if it is in your handwriting?

Ans. That is my handwriting which I gave Mr. Sciple when I placed a figure on that work.

Ques. How did you come into possession of it afterwards?

Ans. I asked him for it.

10

Ques. When?

Ans. After this work was done and the lien claims started to come in.

(Paper is offered in evidence.)

(Objected to upon the ground that it does not appear to be relevant.)

Mr. Walker: I offer this in evidence, and propose to ask him what resulted from this proposal.

20

The Court: I think I will allow it.

Mr. Lanning: If I am not in error, the witness stated that he had a written contract.

The Court: I think he did say so, but Mr. Walker now says that is not the case. I think I will allow him to make further proof.

30

Mr. Walker: It is partly in writing and partly oral.

Mr. Lanning: As the case now stands, the witness has said that he and Sciple had a written contract. If they had, that written contract should be here.

Ques. Did you and Sciple have a written contract?

Ans. No, sir; that (indicating paper) is the only contract we had.

(Paper is offered in evidence, received, and marked P6.)

Ques. After you handed that to Mr. Sciple, what did he say about the work to you?

Ans. He told me to proceed at once.

10

(Plaintiff offers in evidence two pages of the specifications, which is a copy of the specifications for piping, pumps and heaters in the contract between the Construction Company and Sciple.)

(Objected to.)

20 The Court: I understand that Mr. Sciple furnished them to Mr. Luckenbach, and that they are the original specifications, so to speak, from which Mr. Luckenbach worked. It so happens that they are a copy of something else, but as between Luckenbach and Sciple they are the original paper.

(Paper received in evidence and marked P7.)

Ques. Was there or not any change made by Mr. Sciple in these specifications, either before or after you commenced to do the work?

30 Ans. Yes, sir; there were some changes made—not in the specifications, but by verbal agreement.

Ques. When and where was that change made?

Ans. At the time I placed my figure on them.

Ques. That was between you and Sciple?

Ans. Yes.

Ques. State what that agreement was, stating what you said and what Sciple said?

(Objected to on the ground that the specifications constituting the original contract were placed in his hands, and he was bound by the terms of them.)

Mr. Walker: He testified that he examined no part of the contract whatever, except that part of the specifications that he was asked to bid upon.

Mr. Lanning: My point is that he was bound to examine it and was bound by its provisions.

10

The Court: I will permit this testimony. Judge Lanning may have his exception.

Ans. There is a part of the specifications which called for two main set valves on the boiler, and it was decided then only to use one, and on that I based the figure of \$1967 in making the estimate.

Ques. What, if anything, was said about the necessity for one or more valves?

20

Ans. They said there was no need of it; that it was very seldom put in.

Ques. Who said that?

Ans. Mr. Jones and Mr. Sciple.

Ques. What was Mr. Jones' first name?

Ans. I think George—G. L.

Mr. Lanning: We object to any testimony as to what Mr. Jones said on the ground that it does not appear that he had any connection with this case.

30

The Court: You ought to prove Mr. Jones' connection with the matter.

Ques. Do you know what, if any, connection Mr. Jones had with Mr. Sciple?

Ans. No; I don't know any more than—(interrupted).

Ques. Only what you yourself know?

Ans. I don't know.

Ques. Did or did not Mr. Sciple ever say anything to you about any authority Mr. Jones had or had not?

Ans. Yes, sir.

Ques. When and where?

Ans. Right in his own office; everything was to follow Mr. Jones' instructions on the plans.

10 Mr. Lanning: I move to strike out the last part of the answer.

The Court: I will let it stand for the present.

Ques. What did Mr. Sciple then and there say to you about Mr. Jones?

(Objected to upon the ground that whatever Mr. Sciple may have said concerning Mr. Jones is not binding upon the defendant, The Trenton and New Brunswick Railroad Company.)

20

The Court: I will admit the testimony.

(Counsel for defendant thereupon prays an exception, which is allowed, and the same is sealed accordingly.)

Ans. I don't just remember anything mentioning Mr. Jones at the time.

Ques. Did Mr. Sciple ever say anything to you about any authority that Mr. Jones had?

30

Ans. Yes; I understood so right along.

Ques. When and where did he say anything to you about any authority that Mr. Jones had?

Ans. In his office.

Ques. What did he say about the authority that Mr. Jones had?

(Objected to upon the grounds before given.)

The Court: I will admit the testimony, and you have your exception.

Ans. Mr. Jones was in Mr. Sciple's employ, and, of course, he was the architect—(interrupted.)

By the Court:

Ques. Tell us what Mr. Sciple said.

Ans. He was the architect, and I was to follow his plans. He gave me his plans to follow by. Mr. Jones made the plans— 10

Mr. Lanning: I move to strike out the answer.

The Court: It seems to me that the witness is stating his conclusion. I will strike it out.

Ques. What we want is your recollection, as near as you can give it, of what Mr. Sciple said. 20

Ans. As I said before, of course, I had no reason to keep these things in memory—I was informed to go down to see Mr. Jones.

Ques. Did Mr. Sciple say anything to you?

Ans. When I went to ask Mr. Sciple, he knew nothing of the plans, and I was told by Mr. Sciple to go to see Mr. Jones and get the plans to work on.

Ques. Did you go to Jones and get the plans?

Ans. Certainly I did.

Ques. What, if anything, did Sciple say to you about anybody having authority to direct the work, if he said anything about that? 30

(Objected to. Objection overruled.)

(Counsel for the defendant prays an exception, which is allowed, and the same is sealed accordingly.)

Ans. No more than I understood Mr. Jones directed the work.

Ques. Understood it from whom?

(Objected to on the ground that he states that it is his understanding, and he is not pretending to state what Mr. Sciple said.)

The Court: I think I will allow it to stand.

10

(Counsel for the defendant prays an exception, which is allowed, and the same is sealed accordingly.)

Ques. What did Mr. Sciple say in that respect?

Ans. He sent me to see Jones.

(Motion to strike out answer. Motion denied.)

Ques. What did Mr. Jones say in that respect?

20

(Objected to upon the grounds stated before. Objection overruled. Exception prayed and allowed.)

Ans. Just as I stated before. I don't just remember in what way he said it, but I got the understanding that he was getting up the drawings, and Mr. Jones gave us the drawings to work on.

Ques. State as nearly as you can remember the language of Mr. Sciple; draw upon your memory and tell us what Sciple said to you that gave you the understanding that

30 you got?

(Objected to. Question allowed.)

(Counsel for the defendant prays an exception, which is allowed, and the same is sealed accordingly.)

Ans. For me to see Jones. Just how he said it—I just understood it that way.

Ques. I have asked you repeatedly to tell us as nearly as you can the language he used.

By the Court:

Ques. You said that you went to Mr. Jones for the drawings, did you not?

Ans. Yes, sir; by Mr. Sciple's instructions.

Ques. You say you went by Mr. Sciple's instructions; what did Mr. Sciple say to you?

10

Ans. When I went to Mr. Sciple for instructions, Mr. Sciple sent me to Mr. Jones—that he had the say of it.

Ques. Is that what he said—that he had the say of it?

Ans. Certainly; or else I would not have gone to Mr. Jones.

Mr. Lanning: That is what I have just taken exception to.

20

The Court: You have the benefit of an objection to each question that I asked, and I allow you an exception to my admitting it.

By Mr. Walker:

Ques. We were inquiring about any departure from the plans that might have been made; you stated that the work was to be changed so far as installation was concerned from two valves to one; is that right?

30

Ans. That is right.

Ques. What other, if any, changes were made, and if so, by whom?

(Objected to on the ground that the witness had placed in his hands the original contract, which contained these specifications, a copy of which was furnished

to him; that having knowledge of the existence of the original contract, he was not at liberty to make a contract with Sciple varying from those specifications.)

The Court: I will admit it.

(Counsel for the defendant prays an exception, which is allowed and sealed.)

- 10 Ans. There were no other changes.
 Ques. Were there any additions made?
 Ans. No, sir; that is, not until after October 18.
 Ques. After October 18, what was done in regard to it.
 Ans. There was additional work done on it; additional material and labor.
 Ques. How did that come to be done?
 Ans. By letters I received from Mr. Sciple telling me to go down and do certain amount of work—things that were asked for by the railroad company.
- 20 Ques. Did you do them?
 Ans. Yes, sir.
 Ques. From whom did you get these letters?
 Ans. From Mr. Sciple.
 Ques. Were you present at the power house, near Princeton Junction, at the installation of the work which your contract called for you to do and perform?
 Ans. Not all of the time.
 Ques. How much of the time?
 Ans. Once or twice a week, and sometimes three or
- 30 four days at a time.
 Ques. When did your work commence?
 Ans. About the twenty-sixth of August.
 Ques. What year?
 Ans. 1902.
 Ques. When was the work completed?
 Ans. October 18th.

Ques. When was the extra work done that you have spoken of?

Ans. From November 3d to December 24th, same year.

Ques. Was, or was not, work done that is called for in the specifications for the piping, pumps and heaters?

Ans. Yes; that was done.

Ques. All of it?

Ans. Yes, sir. Every piece of it.

Ques. There being one valve instead of two?

10

Ans. That's it.

Ques. What was the extra work that was called for?

(Objected to.)

Ques. I show you the paper which you say you obtained from Mr. Sciple; did that call for extra work?

Ans. Yes, sir.

(Paper offered in evidence; objected to.)

20

Ques. This paper that I have in my hand, which you say you got from Mr. Sciple, concerning extra work; is that the paper that you call a letter?

Ans. There was a letter accompanying that.

Ques. Where is that letter?

Ans. It is home; I didn't think of bringing it.

Ques. This paper was enclosed in the letter?

Ans. Yes, sir.

Ques. What does that paper call for?

30

(Objected to.)

The Court: The paper shows for itself.

Ques. Take that paper in your hand; I ask you whether or not anything in the way of work done and materials furnished, under that paper, were done and

bestowed upon the power house near Princeton Junction, and if so, what?

(Objected to upon the ground that it appears that this contract is in writing, and it is not here; that the letter is a very material part of the contract.)

The Court: It seems to me that the whole document ought to be produced.

10

Mr. Walker: The question is what work was done.

The Court: He must not state the contents of the letter, and I don't see how I can receive that letter in evidence unless the letter is produced. I don't mean to say that that disposes of the matter by any means, but if a document is offered, the whole of it ought to be offered.

20

Ques. Where is that letter?

Ans. Home.

Ques. Where do you live?

Ans. Allentown.

Ques. Pennsylvania?

Ans. Yes, sir.

Ques. Do you remember the contents of that letter?

Ans. No; I don't—any more than—(interrupted).

(Objected to.)

30

Mr. Walker: I submit the letter being out of the jurisdiction of this court; and not being obtainable, and not being withheld, we ought not to be prevented from proving its contents.

Mr. Lanning: This is a party in the case. He is bound to bring his materials with him. It appears from what the witness says that he undertook to do what he

says was extra work upon the authority of a letter received from Mr. Sciple; he does not pretend that there was any other authority except that letter. It was directed to him and he accepted. There is the contract and the whole of the contract, and it is in writing.

The Court: It seems to me that it is permissible to ask this witness whether, in consequence of a letter received from Sciple, he did certain work. I think it is also permissible to show what work he did in consequence of that letter. I think further, that in order to show what work he did, in consequence of that letter, he may use this paper, at any rate, as a memorandum to refresh his recollection. If it appears that there was a contract embraced in that letter, then, of course, they must be bound by that contract. I don't think that yet appears. The paper itself is not now offered. I adhere to my view that the paper itself cannot be admitted unless the letter is produced. Having been used, as I think it may be, as a memorandum to refresh the witness's recollection, it is open to inspection by the other side, and in that way, it may become a matter of evidence in itself.

Mr. Lanning: I pray an exception.

The Court: You may have your exception.

Ques. In pursuance of a letter received from Mr. Sciple, did you do and perform any other work upon the power house than called for in the specifications concerning the piping, heaters and pumps?

Ans. Yes, sir.

Ques. And have you here in court any memorandum in writing or print or typewriting, which contains the items of that work?

Ans. Nothing but this. (Indicating.)

Ques. The paper that you have in your hand?

Ans. Yes, sir.

Mr. Walker: I offer the paper in evidence as being a memorandum of the items and articles of the extra work done in pursuance of the request of Mr. Sciple, who employed the plaintiff.

Mr. Lanning: The admission of the paper is objected to upon the ground that the witness has said that what he did was in pursuance of a certain letter which he received from Sciple, and which letter is not yet produced.

10 The Court: I will exclude the paper as the case now stands.

Mr. Walker: I pray an exception.

(Exception allowed and sealed.)

Ques. Have you any other memorandum and account of the work which you did upon the power house, which is in addition to that called for in the specifications?

20 Ans. Nowhere but in my book of original entries.

Ques. I show you a book, and ask you what that is?

Ans. That is my book.

Ques. In whose handwriting is that book?

Ans. That is my handwriting.

Ques. When were the entries made in that book?

Ans. This (indicating) was made October 18th, and the rest after November 3, as they appear in the dates.

Ques. With reference to the dates they bear, when did you actually enter them?

30 Ans. About every week, as a rule.

Ques. Do these entries contain true accounts of what they purport to state?

(Objected to upon the ground that counsel is examining the witness with respect to work done, seeking to prove work done upon a book account; whereas, it appears in

evidence that the work was done pursuant to a letter received and to certain instructions in writing, and not on any *quantum valebant* or *quantum meruit*.

Mr. Walker: The offer of the book account is only a chain in the link of evidence, and is not offered as any conclusive evidence of what it contains.

Mr. Lanning: I pray an exception.

10

(Exception allowed and sealed.)

Mr. Walker: The book is offered in evidence.

Mr. Lanning: The book is objected to, on the ground that it appears in evidence that the work was done pursuant to a letter and written instructions, and that that letter has not been produced.

The Court: If that is the only objection, I will admit the book, and you may have an exception. Does it really appear that this is a book of original entry? 20

Mr. Lanning: I object to the introduction of the book on the ground further that it has not been properly proved as a book of original entry.

The Court: Is this the only book that you have?

Mr. Walker: Yes, sir.

30

The Court: I will admit the book.

Ques. I ask you to state, without referring to the book if you can, but using the book if necessary, what articles were incorporated into the plant by you, and what work was done in addition to that called for in the original specifications?

Ans. October 18th the contract was finished. November 3 I sent two men who staid there from November 3 to December 24th; there were a few intermissions in between when there was nothing done. There was material furnished during that time—five six-inch valves, heaters and a number of small fittings, and so on. The little items I cannot remember. The labor and material amounted to three hundred and fifty dollars and seventy-nine cents outside of the contract price.

10 Ques. Did you ever present a bill to Sciple?

Ans. Yes, sir.

Ques. For what?

Ans. For the contract and this extra work after it was all done.

Ques. And when you presented the bill to Sciple, what did he say?

Ans. He said that he could not get any money; that he had not received his yet, and that as soon as he got his, I should have mine.

20 Ques. Have you been paid your bill?

Ans. No, sir.

Ques. By Sciple?

Ans. No, sir.

Ques. Or by anybody else?

Ans. No, sir.

Ques. You say that there are some small items of this extra work that you could not remember?

Ans. Yes; elbows and tees—only small things—that amounted to a few cents a piece.

Ques. Are they all in this bill?

30 Ans. They are all in there.

Ques. Did you have more than one conversation with Sciple about the bill?

Ans. Yes, sir; I talked to him on several occasions, and I received letters from him stating that he was unable to pay up, and that he was awaiting settlement himself, and I should wait for him; and so I am waiting still.

Ques. I ask you whether or not this paper which I hold in my hand contains the items of what you call the extra work, and which appear in your book?

Mr. Lanning: Objected to on the ground that the defendant is entitled to have the letter which accompanied this paper in evidence to ascertain what it contains.

The Court: There may be matters in the letter which affect that paper. It seems to me that to make that paper admissible, we ought to have the letter which accompanied it. I will reject the paper; it is hardly worth while to inquire about it except in the line I have already indicated. 10

Mr. Walker: I pray an exception.

(Exception allowed and sealed.)

Ques. Do you know a man by the name of Stanton? 20

Ans. Yes, sir.

Ques. What was his first name.

Ans. I think he signed it "C. E."—I think "Charles."

Ques. Where did you see him?

Ans. On the plant of the power house.

Ques. At Princeton Junction?

Ans. Princeton Junction; yes, sir.

Ques. What was he doing there?

Ans. He was the general engineer of the plant.

Ques. Whose general engineer was he? 30

Ans. The railroad company's—The Trenton and New Brunswick Railroad Company.

Ques. When did you first see him there?

Ans. He was there at the time we started our work.

Ques. Was he there when you stopped your work?

Ans. Yes, sir.

Ques. What was your work—describe it generally.

Ans. Making all pipe connections between the boiler and engine and pumps—the pipe work in general.

Ques. After the work was done on your main contract, do you know as a matter of fact, or not, whether the engine and boilers were operated?

Ans. Yes, sir; they were all going.

Ques. Did you see them yourself?

Ans. Yes, sir.

10 Ques. Were they connected on your pipes?

Ans. Yes.

Ques. Who was there operating the engine?

Ans. Mr. Stanton and his engineers.

Ques. How many were there?

Ans. He had some fireman, and he had a man in the day time to oil the engine, called the running engineer; Stanton was the general engineer.

Ques. After the extra work was done, were you at the plant?

Ans. Yes, sir.

20 Ques. Were or were not the engines and boilers in operation?

Ans. Yes, sir.

Ques. And were or were not the extra materials that you bestowed there, in use and operation?

Ans. Yes, sir; they were all in use.

Ques. What, if anything, did Stanton say to you about your work and materials?

30 Mr. Lanning: Objected to upon the ground that it does not appear that Stanton was an agent with any authority to bind the Railroad Construction Company.

The Court: I will admit the testimony.

Mr. Lanning: I pray an exception.

(Exception allowed and sealed.)

Ans. On the eighteenth, when we arrived there, I went to see Mr. Stanton; I could not find him on the floor, and I went to his house—

Ques. (Interrupting.) Eighteenth of what?

Ans. Eighteenth of October. Our contract was done, and I went to Mr. Stanton, and I said: "We are ready to go. If there is anything undone, let us know before we go away. He said: "There is nothing that I know of." On the strength of that, we packed up our tools and went. 10

Ques. Did you have any conversation with him after the extra work had been done and materials furnished?

Ans. Yes; after we got back again on the extra work.

Ques. What then was the conversation?

Mr. Lanning: That is objected to on the ground that it does not appear that Stanton was an agent having any authority to speak for Sciple or for the Railroad Construction Company, or for the Trenton and New Brunswick Railroad Company. 20

The Court: I overrule the objection.

(Exception prayed and allowed.)

Ans. After that he said he was perfectly satisfied; everything was satisfactory to him.

Ques. That is after the extra work was done?

Ans. Yes, sir; that is December 24th. 30

Cross-examination.

By Mr. Lanning:

Ques. I show you a paper marked P6, being your proposal to do the main work, and ask you when you wrote that?

Ans. That was about—it bears no date; it was about the beginning of August; the first or second week in August.

Ques. When were the specifications which are attached to this proposal delivered to you?

Ans. They were sent to me about a week later.

Ques. By whom?

Ans. By Mr. Sciple. I asked him for a copy so as to work by.

10 Ques. Did you work by these specifications?

Ans. Yes; that is the only thing I had to go by.

Ques. Did you have these specifications—this copy of the specifications which are here attached to your proposal—delivered to you previous to the time when you wrote that proposal?

Ans. No; this came afterwards. I arrived at this figure from the other contract which Sciple had in his office; that is where I got the figures from.

20 Ques. I understand then that you had in your possession before you wrote the proposal to do the work for \$1,967, what now constitutes the last page of the specifications in the original contract between the Railroad Construction Company and Sciple?

Ans. Yes, sir.

Ques. And which has been offered in evidence in this case?

Ans. I think that is exactly like that; it is supposed to be. That is really supposed to be a copy of this.

30 Ques. Assuming that the copy annexed to your proposal is a true copy of the specifications that I have just shown you, then they are the specifications which you worked by?

Ans. Yes, sir.

Ques. In preparing this proposal to do the work for \$1,967, did you base your figures on anything else than what is found in these specifications?

Ans. Just as I said before—the two valves. There was one valve instead of two which the specifications called for.

Ques. Where did you see the specifications before you prepared your proposal?

Ans. Right in Mr. Sciple's office.

Ques. How long were you engaged in your work of examining the specifications and determining what you could do the work for?

Ans. Two days.

Ques. During those two days, did you have the specifications before you?

Ans. Yes, sir; but not all the time.

Ques. Did you spend the two days in Mr. Sciple's office?

10

Ans. No; I took the measurements from the specifications and made pencil sketches, and from these sketches I made my estimate.

Ques. How long did you have the contract annexed to the specifications in your possession?

Ans. Just during the day I was in Mr. Sciple's office.

Ques. How long were you there?

Ans. The whole day.

Ques. The whole day?

20

Ans. Yes, sir.

Ques. You spent that day in his office examining these specifications which were attached to the contract and figuring on your work?

Ans. Yes; and I went home to the hotel and figured that night and reported to him the next day the amount.

Ques. Did you have a table in Mr. Sciple's office to work at?

Ans. A desk.

Ques. Who spoke to you about putting in one valve instead of two valves?

30

Ans. Well, it was decided that one valve—

Ques. (Interrupting.) Who spoke to you about putting in one valve instead of two, as the specifications require?

Ans. Mr. Sciple and Mr. Jones.

Ques. Where was Jones—in Mr. Sciple's office?

Ans. No.

Ques. Where did you see Mr. Jones?

Ans. Why, down to Mr. Baker's office, on Third street.

Ques. Did Mr. Jones speak to you about substituting one valve instead of two down at Baker's office?

Ans. Yes.

Ques. Where did Mr. Sciple speak to you about it?

Ans. At his office.

Ques. Who spoke to you about it first?

Ans. Mr. Sciple.

10 Ques. Did you afterwards mention to Mr. Jones that Mr. Sciple had mentioned to you that there should be one valve instead of two?

Ans. Yes, sir.

Ques. You introduced the subject to Mr. Jones?

Ans. Yes, sir.

Ques. And you and Mr. Jones had a talk about it?

Ans. Yes, sir.

Ques. What did you say to Mr. Sciple about changing the specifications and putting in one valve instead of two?

Ans. The way that came about was this—

20 Ques. (Interrupting.) What did you say?

Ans. He said it.

Ques. What did you say to Mr. Sciple about putting in one valve instead of two?

Ans. I asked him whether it was necessary to have the two in.

Ques. You did; you asked him?

Ans. Yes, sir.

Ques. What was the first thing that was said about putting in one valve instead of two; was the first thing that was said about putting in one valve instead of two, said by you?

30 Ans. No, sir.

Ques. You have just stated that you asked Mr. Sciple if it was necessary to put in two; is that correct?

Ans. That is, after—

Ques. (Interrupting.) What was the first thing said, if you recollect?

Ans. He asked me to reduce my figures. My figure was twenty-three hundred and a few dollars, I think; and he asked me to reduce it. I said: "I cannot reduce it unless you make a change in the specifications." They agreed and said it was not necessary to have two valves.

Ques. Who agreed?

Ans. Mr. Sciple and Mr. Jones also agreed.

Ques. You didn't see Mr. Sciple and Mr. Jones together?

Ans. Not together; no, sir.

10

Ques. How did you come to talk with Mr. Jones about it; did you know that Mr. Jones was mentioned as the architect in the contract?

Ans. Yes, sir; he got the drawings.

Ques. Did you see by the contract that Mr. Jones was the architect?

Ans. Yes.

Ques. You read the contract and discovered for yourself that Mr. Jones was the architect?

Ans. I didn't discover it. Mr. Jones came over and talked to me about it, and told me he—

20

Ques. (Interrupting.) Didn't you see by the contract that he was the architect?

Ans. I didn't look all the way through to see his signature.

Ques. You know that this contract was really the original contract for doing the work?

Ans. Yes, sir.

Ques. Didn't you ask Mr. Sciple whether he had any authority to change these specifications?

30

(Objected to.)

The Court: I think counsel may inquire into the whole conversation. The bearing of it upon the case is another question. I don't pass on that.

Ans. No, sir.

Ques. When did you put steam into the boilers and pipes first?

Ans. About the eighth or ninth of October.

Ques. Your work was not then completed?

Ans. No, sir; we just tested the lines.

Ques. When did you first turn the wheels of the engine?

Ans. Well, about a few days later; it might have been between the eighth and twelfth, as near as I can recollect.

10 Ques. When were the engines first started running in complete condition?

Ans. Around the twelfth; in that neighborhood,—a few days one way or the other.

Ques. Were the cars running on the railroad before the eighteenth of October?

Ans. Yes, sir.

Ques. So that the steam had been turned on and electric power generated and cars were running before what you call your main contract was completed?

20 Ans. Yes, sir. They were not running for passenger service, but they were running a car for testing.

Ques. Did any of the pipes break?

Ans. Yes, sir; some broke; the flange broke.

Ques. What do you mean by the flange?

Ans. A flange is a pipe screwed in to make connection from one pipe to another.

Ques. What caused the flange to break?

Ans. Well, I suppose the expansion by turning on the steam.

30 Ques. How many flanges broke?

Ans. One; in making the connection between the engine room and the boiler room—the one that goes between the partitions.

Ques. How many broke?

Ans. That is the only one I remember.

Ques. How many flanges were there?

Ans. One. There is a pair; one half of the pair was broke and I replaced that.

Ques. When did you replace that?

Ans. I think it was about the eighth or ninth of October.

Ques. Were any pipes on your work broke other than what you have mentioned?

Ans. Nothing that I know of.

Ques. Did you look?

Ans. There were some leaks which were fixed up, certainly. 10

Ques. What pressure did you carry?

Ans. Up to as high as one hundred and twenty-five pounds.

Ques. Was there anything in the specifications as to the pressure?

Ans. Yes; we were supposed to put it under one hundred and twenty-five pounds of steam.

Ques. Do you mean to say that there was a provision to that effect?

Ans. I think there was a clause in like that. 20

Ques. Was there any objection made to the character of your work that you did, which you say you completed on October 18th, on the ground that it was too light?

(Objected to on the ground that it does not appear from whom the objection came.)

Ques. By Mr. Sciple?

(Objection withdrawn.) 30

Ques. Was there any objection made by Mr. Sciple that your work, which you say you completed on October 18th, was too light?

Ans. No, sir.

Ques. Was there any objection made by the Railroad Construction Company, or some of its representatives, to that effect?

(Objected to on the ground that the contract is between the plaintiff and Sciple.)

The Court: I think that Judge Lanning has the right on cross-examination to know whether any objection has been made.

Mr. Walker: I pray an exception.

10 (Exception allowed and sealed.)

Ans. None to me. There was no complaint made to me.

Ques. Do you know to whom any such complaint was made?

Ans. I don't know; no.

Ques. When did you make the entry that appears on page 46 of this book of accounts of yours, that reads as follows: "To contract pipe work, \$1,976"?

20 Ans. That was made on the eighteenth. Whether it was on the same day of the eighteenth I could not say. On the eighteenth we were finished, and then we made the entry. Before that I had no charges to make.

Ques. Who made it; in whose handwriting is it?

Ans. Myself; my own.

Ques. Where did you get these figures from?

Ans. The \$1,967 or \$1,976—from the contract price which I had offered Mr. Sciple.

Ques. Is that the only source?

Ans. Yes, sir.

30 Ques. Are those figures correct?

Ans. No; there was a little difference. Instead of \$1,976 it is \$1,967. It is credited here "By error, \$9.00."

Ques. How did you come to write \$1,976 instead of \$1,967?

Ans. I left this paper in Mr. Sciple's office and forgot the price fixed by the time I got home.

Ques. When did you credit this \$9.00 that is on the bottom of the page?

Ans. After I got the paper and saw the mistake.

Ques. Didn't you credit it after this suit was begun?

Ans. Not after this suit was begun; just when we were preparing the papers to begin the suit.

Ques. Are you sure you didn't credit it until after this suit was begun?

Ans. Yes, sir.

Ques. Didn't you file a lien claim in this case for \$1,976? 10

Ans. That may be; I don't know.

Ques. I show you the original lien claim, which has been offered in evidence, and call your attention to the fact that the first item is for the contract price, \$1,976; how is that?

Ans. I don't know how they could have done that.

Ques. It is sworn to by William E. Gochenor; who is he?

Ans. That is Mr. Sciple's bookkeeper. 20

Ques. It is not sworn to by yourself?

Ans. No.

Ques. Or any representative of yours?

Ans. No, sir.

Ques. Gochenor was not in your employ?

Ans. No, sir. He took that amount from the bill I sent to Sciple, I suppose.

Ques. Do you know Gochenor?

Ans. Yes.

Ques. Where was he?

Ans. In Sciple's office; he is his bookkeeper. 30

Ques. Never in your employ?

Ans. No, sir.

Ques. He never represented you in any capacity?

Ans. No; none whatever.

Ques. No relations with him at all?

Ans. None at all.

The Court: Is that the lien claim that you just showed the witness?

Mr. Lanning: That is the original lien claim.

Ques. Having called your attention to the fact that you filed a lien claim for \$1,976, I ask you now whether this nine dollars credit was not made after you filed your lien claim and after you commenced your suit?

Ans. This was in Sciple's hands, and—

10 Ques. (Interrupting.) You didn't know?

Ans. I didn't know.

Ques. In whose handwriting is the credit of nine dollars?

Ans. My own.

Ques. You don't know when you made that credit?

Ans. No, sir; not until I got the paper back from Sciple, and then I discovered the difference in amount, and made it right.

20 Further direct examination.

By Mr. Walker:

Ques. I call your attention to the fact that there is appended to the lien claim filed in this case an affidavit, which says: "W. C. Gochenor, being duly sworn, on his oath says, that he is the agent of William I. Luckenbach, in this behalf, the claimant named in the foregoing claim and bill of particulars," and so on; now, having that affidavit before you, what have you to say as to whether or

30 not Mr. Gochenor was your agent?

Ans. Yes; for the purpose of making that affidavit.

The Court: That is very easy.

Mr. Walker: The statement of the witness that Gochenor was not an employee of his, is corrected by this statement that he now makes.

Mr. Lanning: I object to the question and answer.

The Court: I don't think you can show the witness an affidavit made by a third party and then ask him whether his recollection is not refreshed so that that he can testify to what is set forth in the affidavit. I don't see how Mr. Gochenor's affidavit could in any way change Mr. Luckenbach's recollection of the facts. I think I will strike out that question and answer. You may inquire into any facts you think it is important to inquire into, but not in that way. 10

Mr. Walker: I object to striking out the question and answer after the question has been asked and answered without objection.

The Court: I strike it out because it seems to me that it was put in such a way as to suggest the answer to the witness on a crucial point, and because I do not see how it can be proper to show the witness an affidavit of a third party with a view to refresh his recollection. Take 20 your exception.

Mr. Walker: I pray my exception on the ground stated.

(Exception allowed.)

F. J. Luyke
Judge.

Ques. Who was this Mr. Gochenor?

Ans. Mr. Sciple's bookkeeper.

Ques. Whose?

30

Ans. H. M. Sciple's bookkeeper.

Ques. What, if any, conversation did you personally have with Gochenor concerning the filing of a lien claim in this case?

Ans. It was done mostly through mail, I think, if I remember right.

Ques. Did you write him any letters?

Ans. Yes; we wrote together on several different occasions about it.

Ques. Did he send any letters to you?

Ans. Yes, sir.

Ques. Have you got them here?

Ans. No, sir.

Ques. Is Mr. Gochenor here?

Ans. No, sir.

10 Ques. Did you ever have a personal face to face conversation with him about filing a lien claim in this case?
Ans. Yes, sir; after the thing was started we often spoke about it.

Ques. After what thing?

Ans. After the lien claim we spoke about it. Of course, I conversed with him about it. He was acquainted with all my bills for the work.

Ques. What do you mean?

Ans. In making preparations for the lien claim we had to get the bills together and get the different papers together, and so he—

20 Ques. (Interrupting.) Did you have a conversation with him before the lien claim suit was actually commenced?

Ans. Not to my recollection.

Ques. Before it was filed?

Ans. I don't know when it was filed; that was prosecuted here; I don't know when it was filed.

Ques. What was that conversation?

(Objected to.)

30 Mr. Walker: I submit it is admissible. The witness cannot state whether it was before or after.

Ans. (Handing Mr. Walker a letter.) This is almost the first I knew of it.

The Court: What is the date of that?

Mr. Walker: January 22.

The Court: Who wrote it?

Mr. Walker: This is from Norman Grey.

By the Court:

Ques. The first you knew of it was upon the receipt of this letter which you just handed Mr. Walker.

Ans. Yes.

Ques. The first you knew of what?

10

Ans. Of course I got word from Norman Grey, who was attending to this matter of Mr. Sciple, stating the facts of the lien claim, and for me to get my papers ready.

By Mr. Walker:

Ques. Prior to the receipt of this letter had you received anything from Mr. Grey?

Ans. Nothing whatever, but there might have been a few little things before that. 20

Ques. You said you had some conversation with Gochenor?

Ans. Not before that.

By the Court:

Ques. Not before you got that letter from Mr. Grey?

Ans. I don't remember just before that letter.

By Mr. Walker:

30

Ques. You don't know whether or not?

Ans. Not positively; I cannot recollect of anything occurring in that time.

Ques. And these letters from Mr. Gochenor you haven't here?

Ans. No.

Ques. And he is not here?

Ans. He isn't here.

Mr. Lanning: As the case has been proved, at this point I will move for a non-suit upon the ground that it appears that the lien claim has not been verified as required by the statute.

10 Mr. Walker: It is a matter of doubt whether this claim has not been properly verified, and I would ask that a juror be withdrawn so as to give the plaintiff a chance to come better prepared before the Court.

20 The Court: It seems to me that it now appears that Mr. Gochenor was not the agent of this plaintiff at the time the lien claim was filed. As I understand the plaintiff, he says that the first he knew of it was on receipt of a letter from his present attorney, which bears date January 22, which, as I understand it, is the date the lien claim was filed. It seems also that this lien claim was
 20 filed not by the agent of the plaintiff but by the agent of Mr. Sciple for objects which are well known to all of us; and I do not think that under these circumstances I ought to allow the plaintiff to withdraw a juror. The plaintiff has been very frank and straightforward in his statements. If the lien claim was not filed in the proper way pointed out by the statute, I think the defendant owner has the right to insist upon the protection which the statute gives him. It is hardship for him to be obliged to pay somebody else's debt. He ought not be obliged to
 20 pay this debt unless the requirements of the statute are observed. As I understand it, there has been a default by Mr. Sciple. With that I have nothing to do. So, the only question before me is as to the rights of the plaintiff against the railroad company. I think the plaintiff, on his own showing, has no right against the railroad company, and the result must be a non-suit.

Mr. Walker: The plaintiff has said that Gochenor was his agent for the purpose of filing this lien claim.

The Court: He said it, but you know whether a man is another's agent is not purely a question of fact as to which the witness may testify. It involves facts and conclusions from those facts. I think the facts—we have knowledge of the facts as testified to by the witness—show that Mr. Gochenor filed this lien claim, not as representing the plaintiff, but perhaps for the plaintiff's benefit. That, however, is not enough. 10

Mr. Walker: I submit that there is a ratification.

The Court: I don't see how any ratification can bring the affidavit within the statute. I think the owner is entitled to have the lien claim verified by a person having actual knowledge. A claimant is presumed to have actual knowledge. His agent for that purpose may be presumed to have some actual knowledge. Whereas, in this case Goshenor could have no knowledge; he was not in the employ of the plaintiff. 20

Mr. Walker: As the case now stands, there would be no hardship on the defendant, if your Honor would permit a juror to be withdrawn.

The Court: I cannot permit that; there must be a non-suit in this case.

Mr. Walker: I respectfully pray an exception to the refusal of your Honor to withdraw a juror. 30

The Court: I decline to seal a bill of exceptions to my refusal to permit a juror to be withdrawn. I think that is certainly a matter in my discretion. Let it appear upon the notes that you ask me to seal a bill of exception to my refusal to permit the withdrawal of a juror, and that I decline to seal any bill of exceptions on that subject.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

WILSON I. LUCKENBACH,

Plaintiff in Error,

vs.

10 HENRY M. SCIPLE, BUILDER, AND

TRENTON AND NEW BRUNS-

WICK RAILROAD COMPANY,

OWNER,

Defendants in Error.

ON WRIT OF ERROR.

ASSIGNMENTS OF
ERROR.

20 And now at this day the plaintiff in error assigns the following errors:

First. The Court below, after the question had been asked and answered without objection, struck out the following question and answer:

30 Ques. I call your attention to the fact that there is appended to the lien claim filed in this case an affidavit, which says, "W. C. Gochenor, being duly sworn, on his oath says, that he is the agent of Wilson I. Luckenbach in this behalf, the claimant named in the foregoing claim and bill of particulars," and so on. Now, having that affidavit before you, what have you to say as to whether or not Mr. Gochenor was your agent?

Ans. Yes; for the purpose of making that affidavit.

Second. Because the Court below refused to withdraw a juror as requested by the plaintiff below.

NORMAN GREY,

Attorney for Plaintiff in Error.

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FROM THE FIRST SETTLEMENT TO THE PRESENT TIME

BY

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