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P-1—Stop Notice. In evidence on page 50. Printed as part of complaint on page ... 18
P-2—Contract for erection of building. In evidence on page 73. Printed as part of Complaint on page 5
D-1—For Identification on page 55. Notice to Henry M. Post of suit to be instituted by Albert Frederici.
D-2—Twenty certificates from architect. In evidence on page 150, but marked D-1. Printed on page 241
D-5—Sheet showing credits and balances. In evidence on page 154. Printed on ... 254

D-6—Stop notice from Albert Frederici. In evidence on page 191. Printed on page 258
D-7—Geldziler's notice to John J. Ritchie & Sons of Frederici's stop notice. In evidence on page 191. Printed on page 259
D-8—Stop notice from Paterson Bridge Co. In evidence on page 191. Printed on 260
D-9—Service of preceding exhibit. In evidence on page 192. Printed on page 261
D-10—Stop notice of Henry M. Post. In evidence on page 192. Printed on page 263
D-11—Receipt from Paterson Bridge Company. In evidence on page 198. Printed on page 265
D-14—Notice to Henry M. Post from Samuel Geldziler of suit instituted by Paterson Bridge Company. In evidence on page 204. Printed on page 265
D-15—Notice to Post from Samuel Geldziler of the suit brought by Albert Frederici. In evidence on page 266. Printed on page 266
D-16—Bond from John J. Ritchie & Sons and Henry M. Post to Samuel Geldziler. In evidence on page 239. Printed on page 267

SUMMONS

(Filed January 11, 1926.)

Passaic County, ss.
The State of New Jersey

To Samuel Geldziler and John J. Ritchie and John J. Ritchie, Jr., partners trading as John J. Ritchie & Sons.

You are summoned to answer the annexed Complaint of Henry M. Post in an action at law in the Circuit Court of said County, and take notice that unless you file your answer of said complaint with the Clerk of the Passaic County Circuit Court, at Paterson, within Twenty days after the service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit, and judgment may be entered against you. (And see notice endorsed hereon.)

Witness, Clifford L. Newman, Esq., Judge of the Passaic County Circuit Court at Paterson, this thirty-first day of December, 1925.

John McCutcheon, Clerk.

Hudson & Joelson, Attorneys.

Complaint

(Filed January 11, 1926.)

PASSAIC COUNTY CIRCUIT COURT

Henry M. Post, Plaintiff, vs. Samuel Geldziler and John J. Ritchie and John J. Ritchie, Jr., partners trading as John Ritchie & Sons, Defendants.	Action at Law

COMPLAINT

Plaintiff, of the City of Paterson, in the County of Passaic and State of New Jersey, says that:

1. At the times hereinafter stated, defendant, Samuel Geldziler, was the owner of a piot of land upon which he was then constructing a certain building situate on Clay Street, in the City of Paterson, and known and designated as lots Nos. 368-370 Clay Street in said City.

2. On or about March 15th, 1920, the defendants, Samuel Geldziler, and John J. Ritchie and John J. Ritchie, Jr., partners trading as John J. Ritchie & Sons, contractors, executed a contract in writing for the construction of said building on said land, a copy of which is hereunto annexed, Marked "A" and made part hereof.

3. That on or about May 24th, 1920, said contract, together with the specifications therein referred to were duly filed in the office of the Clerk of said County of Passaic before any of the work

was done or materials furnished for said building hereinafter referred to.

4. Plaintiff furnished materials for the erection and construction of said building on the premises owned by the defendant, Samuel Geldziler, as shown by the statement hereto annexed and made a part hereof and marked Schedule "B" and which materials were of the value of $11172.61.

5. John J. Ritchie and John J. Ritchie, Jr., partners trading as John J. Ritchie & Sons, have paid to plaintiff in part payment of said sum of $11,-172.61, the sum of $6375.80 as shown on the statement hereto annexed and made a part hereof and marked Schedule "B", but said John J. Ritchie and John J. Ritchie, Jr., partners trading as John J. Ritchie & Sons, have failed and refused to pay to the plaintiff the balance of said sum of $11,172.61, to wit, the sum of Four Thousand Seven Hundred Ninety-six Dollars and Eighty-one Cents.

6. Prior to the second day of March, 1921, there was due to the plaintiff from the said John J. Ritchie and John J. Ritchie, Jr., partners trading as John J. Ritchie & Sons the said sum of $4796.81 as aforesaid for materials furnished and used in the erection of said building.

Prior to the second day of March, 1921, plaintiff demanded of said John J. Ritchie and John J. Ritchie, Jr., partners trading as John J. Ritchie & Sons, the said sum of $4796.81 and the said John J. Ritchie & Sons refused to pay said sum of $4796.81 or any part thereof and have ever since refused to pay or settle the same or any part thereof and the whole sum of $4796.81 with interest thereon remains wholly due and unpaid.

7. On March 2nd, 1921, plaintiff gave to the defendant, Samuel Geldziler, notice in writing of said demand and refusal and of the amount aforesaid due to the plaintiff, a copy of which notice is hereto annexed and made part hereof and is marked Schedule "C".

8. Defendant, Samuel Geldziler, who ever since making said contract has been and is now the owner of said building was at the said time of the giving of said notice to him and ever since has been satisfied of the correctness of the said demand of the plaintiff.

9. Prior to the said time when the plaintiff gave said notice to the defendant, Samuel Geldziler, as aforesaid, the defendant, Samuel Geldziler, paid to the defendants, John J. Ritchie & Sons, a sum of money, to wit, $7500. in advance of the terms of said contract executed by said defendants, Samuel Geldziler and John J. Ritchie & Sons, which said sum of $7500.00 when so paid as aforesaid was not then due or payable according to the terms and provisions of said last named contract.

10. Plaintiff avers that the plaintiff is entitled to have judgment for said sum of $4796.81 and interest from the 2nd day of March, 1921, and costs against said defendants, Samuel Geldziler and John J. Ritchie and John J. Ritchie, Jr., partners trading as John J. Ritchie & Sons, or in the alternative in case the defendant Samuel Geldziler should not be liable therefor, against the defendants, John J. Ritchie and John J. Ritchie, Jr., partners trading as John J. Ritchie & Sons. Plaintiff demands against the defendants, Samuel Geldziler and John J. Ritchie and John J. Ritchie, Jr., partners trading as John

J. Ritchie & Sons, or in the alternative as aforesaid against the defendants, John J. Ritchie and John J. Ritchie, Jr., partners trading as John J. Ritchie & Sons, said sum of $4796.81 and interest from March 2nd, 1921 and costs of suit.

Hudson & Joelson,
Attorneys of Plaintiff.

SCHEDULE "A"

This agreement made the fifteenth day of March in the year one thousand nine hundred and twenty by and between John J. Ritchie, Sr., and John J. Ritchie, Jr., copartnership doing business under the name of John J. Ritchie & Sons, of the City of Paterson, County of Passaic and State of New Jersey, party of the first part (hereinafter designated the Contractor) and Samuel Geldziler of the City of Paterson, County of Passaic and the State of New Jersey, party of the second part (hereinafter designated the Owner)

Witnesseth that the Contractor, in consideration of the agreements herein made by the Owner agree with the said Owner as follows:

Article I. The Contractor shall and will provide all the materials and perform all the work for the erection and completion of a Motion Picture Theatre Building situated at No. 368 and 370 Clay Street in the City of Paterson, County of Passaic and the State of New Jersey and covered by Specification pages 1 to 17 inclusive and attached Addenda Items 1 to 29 inclusive and as shown on the drawings and described in the specifications prepared by Edmund Shore and checked and revised by Fred W. Went-

worth, Architect, which drawings and specifications are identified by the signatures of the parties hereto, and become hereby a part of this contract.

Article II. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said Architect, and that his decision as to the true construction and meaning of the drawings and specifications shall be final. It is also understood and agreed by and between the parties hereto that such additional drawings and explanations as may be necessary to detail and illustrate the work to be done are to be furnished by said Architect, and they agree to conform to and abide by the same so far as they may be consistent with the purpose and intent of the original drawings and specifications referred to in Art. I.

It is further understood and agreed by the parties hereto that any and all drawings and specifications prepared for the purposes of this contract by the said Architect are and remain his property, and that all charges for the use of the same and for the services of said Architect are to be paid by the said Owner.

Article III. No Alterations shall be made in the work except upon written order of the Architect; the amount to be paid by the Owner or allowed by the Contractor by virtue of such alterations to be stated in said order. Should the Owner and Contractor not agree as to amount to be paid or allowed, the work shall go on under the order required above, and in case of failure to agree, the determination of said amount shall be referred to arbitration, as provided for in Art. XII of this contract.

Complaint

Article IV. The Contractor shall provide sufficient safe and proper facilities at all times for the inspection of the work by the Architect or his authorized representatives; shall, within twenty-four hours after receiving written notice from the Architect to that effect proceed to remove from the grounds or buildings all materials condemned by him, whether worked or unworked, and to take down all portions of the work which the Architect shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications and shall make good all work damaged or destroyed thereby.

Article V. Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architect, the Owner shall be at liberty, after three days written notice to the Contractor to provide any such labor or materials and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the Architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner shall also be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work and to provide the materials there-

for; and in case of such discontinuance of the employment of the Contractor they shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work, such excess shall be paid by the Owner to the Contractor; but if such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expense incurred by the Owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Architect, whose certificate thereof shall be conclusive upon the parties.

Article VI. The Contractor shall complete the several portions, and the whole of the work comprehended in this Agreement by and at the time or times hereinafter stated, to wit: On or before August 1st, 1920.

Article VII. Should the Contractor be delayed in the prosecution or completion of the work by the act, neglect or default of the Owner, of the Architect, or of any other contractor employed by the Owner upon the work, or by any damage caused by fire or other casualty for which the Contractor is not responsible, or by combined action of workmen in no wise caused by or resulting from default or collusion on the part of the Contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid, which extended period shall be determined

and fixed by the Architect; but no such allowance shall be made unless a claim therefor is presented in writing to the Architect within forty-eight hours of the occurrence of such delay.

Article VIII. The owner agrees to provide all labor and materials essential to the conduct of this work not included in this contract in such manner as not to delay its progress, and in the event of failure so to do, thereby causing loss to the Contractor, agree that he will reimburse the Contractor for such loss; and the Contractor agrees that if they shall delay the progress of the work so as to cause loss for which the owner shall become liable then they shall reimburse the Owner for such loss. Should the owner and Contractor fail to agree as to the amount of loss comprehended in this Article, the determination of the amount shall be referred to arbitration as provided in Art. XII of this contract.

Article IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Contractor for said work and materials shal be forty-nine thousand and thirty-one ($49,-031.00) Dollars it being understood that this price includes all work mentioned in Specification and Addenda Items 1 to 29 inclusive subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the Owner to the Contractor in current funds, and only upon certificates of the Architect, as follows:

Payments to be made from time to time as the work progresses in amounts to be certified to by a written certificate of the Architect. No payments to be made for more than eighty-five (85%) per cent of the work completed, materials furnished and actual-

ly installed in the building. The eighty-five (85%) per cent valuation and the certificate of the Architect, in all cases, to be final, binding and conclusive between owner, Contractor and all parties concerned, and no work to be considered finally accepted until the issuance of the final certificate.

The final payment shall be made within thirty days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued.

If at any time there shall be evidence of any lien or claim for which, if established, the Owner of the said premises might become liable, and which is chargeable to the Contractor the owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify himself against such lien or claim. Should there prove to be any such claim after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the Contractor default.

Article X. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

Article XI. The Owner shall during the progress of the work maintain insurance on the same against loss or damage by fire, the policies to cover all work

incorporated in the building and all materials for the same in or about the premises, and to be made payable to the parties hereto, as their interest may appear.

Article XII. In case the Owner and Contractor fail to agree in relation to matters of payment, allowance of loss referred to in Arts. III or VIII of this contract, or should either of them dissent from the decision of the Architect referred to in Art. VII of this contract, which dissent shall have been filed in writing with the Architect within ten days of the announcement of such decision, then the matter shall be referred to a Board of Arbitration to consist of one person selected by the Owner, and one person selected by the Contractor, these two to select a third. The decision of any two of this Board shall be final and binding on both parties hereto. Each party hereto shall pay one-half of the expense of such reference.

Article XIII. The contractor shall maintain during the progress of the work, employees' liability and compensation insurance, in conformity with the laws of the State of New Jersey; also insurance to fully protect the owner against damages or injury, death or otherwise, to workmen, or other persons, damages to properties of all classes and description including protection against any suit for damages and neglecting to do so nullifies this contract.

The said parties for themselves, their heirs, successors, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

In witness whereof the parties to these presents

have hereunto set their hands and seals the day and year first above written.

John J. Ritchie (Seal)
John J. Ritchie, Jr. (Seal)
Samuel Geldziler (Seal)

In presence of Fred W. Wentworth

SCHEDULE "B"

	1919		Clay St.		
	Nov.	27	12,000 Hard Brick 20.00M		240.00
	Dec.	10	50 Bags Cement	.75	37.50
		11	50 Bags Cement		37.50
		16	3000 Hard Brick 20.00M		60.00
		17	3000 " "		60.00
		18	3000 " "		60.00
		22	3000 " "		60.00
		23	3000 " "		60.00
20		24	3000 " "		60.00
		27	6000 " "		120.00
	1920				
	Mar.	3	2 Bbls F. Lime	4.25	8.50
			30 Bags Cement	.75	22.50
		31	20 " "		15.00
			2 Bbls Lime	4.25	8.50
	May	15	50 Bags Cement	1.10	55.00
			50 " "		55.00
		19	50 " "		55.00
30			50 " "		55.00
			50 " "		55.00
		20	50 " "		55.00
			6 Bbls Lime	5.25	31.50
			25 Bags Cement	1.10	27.50
		26	8 Bbls Lime	5.25	42.00

	7	Bags Cement	1.10		7.70
	50	" "			55.00
	27	60 " "			66.00
June	1	60 " "			66.00
		7 Bbls Lime	5.50		38.50
May	27	3000 Hard Brick	20.00M		60.00
	28	3000 " "			60.00
	29	3000 " "			60.00
	31	6000 " "			120.00
June	8	10 Ft. 12x16 Flue L. ..	1.05		10.50
		130 6x12x12 Block	.35		45.50
	14	51 Bags Cement	1.10		56.10
		50 " "			55.00
	15	50 " "			55.00
	18	40 " "			44.00
	19	50 " "			55.00
	24	25 Bags Majestic	.65		16.25
		50 " "			32.50
	26	30 " "			19.50
	28	60 Bags Cement	1.20		72.00
	30	Car Hollow Brick			
		23,000 Hollow Brick ..	40.00M		920.00
		50 Bags Cement	1.20		60.00
	1	9000 Hard Brick			
	3	6000 " "			
	4	9000 " '			
	12	3000 " "			
	14	3000 " "			
	21	6000 " "			
	22	6000 " "			
	24	6000 " "			
	25	6000 " "			
	28	12000 " "			
		66000 " "	20.00M		1,320.00

10

20

30

July	7	60 Bags Cement	1.20		72.00
	7	10 Bbls Lime	5.50		55.00
		40 Bags Cement	1.20		48.00
	8	Car No. 1386			
		12,000 Front Brick ..	50.00M		600.00
		35 Bags Cement	1.20		42.00
	15	50 " "			60.00
	20	50 " "	1.25		62.50
		8000 Front Brick	50.00M		400.00
	21	50 Bags Cement	1.25		62.50
	22	50 " "			62.50
	28	10,060 Hollow Brick ..	40.00M		400.00
	30	60 Bags Cement	1.25		75.00
June	1	3000 Hard Brick	20.00M		60.00
July	2	21000 " "			420.00
	3	9000 " "			180.00
	6	6000 " "			120.00
Aug.	13	25 Bags Cement	1.25		31.25
		10 Ft. 12x12 Flue L. ..	.80½		8.05
	18	25 Bags Cement	1.25		31.25
		3 Bbls Lime	5.75		17.25
	21	25 Bags Cement	1.25		31.25
	23	20 Ft. 12x12 Flue L. ..	.80½		16.10
		50 Bags Cement	1.25		62.50
	26	3 Bbls. Lime	5.75		17.25
		25 Bags Cement	1.25		31.25
	3	3000 Hard Brick	20.00M		60.00
	5	3000 " "			60.00
	20	3000 " "			60.00
Sept.	7	60 Bags Cement	1.25		75.00
		25 Bags Majestic	.65		16.25
		25 Bags Cement	1.25		31.25
	15	25 " "	1.35		33.75
		15 Bags Majestic	.75		11.25

17	6 Ft. 12x12 Flue L. ..	.92	5.52		
21	1 Bbl Pl Paris		6.50		
	5 Bbls Lime	6.00	30.00		
23	50 Bags Cement	1.35	67.50		
14	3000 Hard Brick		60.00		
20	3000 " "		60.00		
23	3000 " "		60.00		
Oct. 1	3 Bbls Lime	6.00	18.00		
	20 Bags Cement	1.35	27.00		
7	50 Bags Cement		67.50	10	
11	3 Bbls Lime	6.00	18.00		
	80 Ft. 8 in. Coping ..	.32	25.60		
	2 8-in. Stops 4 Ft. ..	.32	1.28		
	2 8-in. Corners	.96	1.92		
16	50 Bags Cement	1.35	67.50		
18	50 " "		67.50		
19	70 Bags O. K. Plaster .	1.15	80.50		
20	70 " " " .		80.50		
	50 Bags Cement	1.35	67.50	20	
25	70 Bags Adamant Pl. .	1.15	80.50		
	4050 lb. Granolite	5.00T	10.13		
26	60 Bags Cement	1.35	81.00		
Nov. 8	7 " "		9.45		
9	60 " "		81.00		
11	50 " "	1.25	62.50		
	5 Bbls Lime	6.00	30.00		
13	60 " "	1.25	75.00		
15	50 " "		62.50		
17	60 " Adamant Pl. ..	1.10	66.00	30	
19	40 " Cement	1.25	50.00		
	40 " Adamant Pl. .	1.10	44.00		
22	25 " " " ..		27.50		
24	6 " " " ..		6.60		
	25 " " " ..		27.50		

	26	30	" " " ..		33.00
	29	50	" Cement	1.25	62.50
Dec.	1	100	8x12x12 Blocks ..	.46	46.00
		25	Pl Boards	.35	8.75
	3	15	" "		5.25
		25	Bags Cement	1.25	31.25
		100	4x12x12 Blocks ..	.26	26.00
	6	25	Bags Cement	1.25	31.25
		25	" Adamant Pl. .	1.10	27.50
		1	Bbl. Pl. Paris ----		6.00
	7	25	Bags Cement	1.25	31.25
		25	" Adamant Pl. .	1.10	27.50
		75	4x12x12 Blocks	.26	19.50
	8	10	Bags Adamant Pl.	1.10	11.00
		50	" Cement	1.25	62.50
		6300	Lb. Granolite	5.00T	15.75
		500	4x12x12 Blocks ..	.26	130.00
	9	25	Bags Cement	1.25	31.25
		25	" Adamant Pl. .	1.10	27.50
		50	" Cement	1.25	62.50
	11	50	" " ----	.50	62.50
		10	" Adamant Pl. .	1.10	11.00
	15	25	Bags Cement	1.25	31.25
		25	" Adamant Pl. ..	1.10	27.50
	16	50	" Cement	1.25	62.50
	17	50	" "		62.50
	18	50	" "		62.50
	20	4000	Lb. Granolite ..	5.00T	10.00
		50	Bags Cement	1.25	62.50
	22	50	" Adamant Pl. ..	1.10	55.00
	24	50	" Cement	1.25	62.50
		200	Hard Brick 29.00M		5.80
	27	1	10-in. Tee		3.36
		10	Ft. 10-in. Pipe	.84	8.40

28	50	Bags	Neat Pl.	1.40	70.00
	50	"	Cement	1.25	62.50
29	60	"	"		75.00
31	25	"	"		31.25
	12	"	Majestic ..	.75	9.00
	100	4x12x12	Blocks ..	.26	26.00
	200	Hard	Brick 29.00M		5.80
1921					
Jan. 5	25	Bags	Neat Pl.	1.40	35.00
	5	"	Majestic	.75	3.75
	1	Bbl Pl	Paris		6.00
	200	Hard	Brick 29.00M		5.80
8	12	Bags	Majestic	.75	9.00
11	5	"	"		3.75
	1	Bbl Pl	Paris		6.00
12	2	Bbls Pl	Paris	6.00	12.00
	10	Bags	Cement	1.25	12.50
	2	"	Majestic	.75	1.50
21	10	"	Cement	1.25	12.50
	10	"	Majestic	.75	7.50
22	25	"	Cement	1.25	31.25
27	10	"	"		12.50
Feb. 4	1	Bbl Pl	Paris		5.50
18	1	"	" "		5.50
Mar. 1	1	"	" "		5.50
	5	Bags	Cement	1.15	5.75
	5	"	Majestic	.70	3.50
	2	"	Red Color	4.00	8.00
					$11,172.61

1920			
Jan. 8	By	Check	$ 660.00
June 12		.....	1,000.00

July 31	.....	1,000.00	
Aug. 23	.....	2,000.00	
Oct. 9	.....	1,000.00	
			5,660.00
			$ 5,512.61
3,579 Mt Bags Retd. . .		.20	715.80
			$ 4,796.81

SCHEDULE "C"

To Samuel Geldziler:

You are hereby notified, that John J. Ritchie & Sons, Contractors, are justly indebted to me, in the sum of Four Thousand Seven Hundred and Ninety-six Dollars and eighty-one cents ($4,796.81) for materials furnished, by me to them, and used in the erection of the new theatre erected or being erected on the land owned by you, and situated at 368 and 370 Clay Street, in the City of Paterson, Passaic County, New Jersey, pursuant to the written contract, made between you and them, on file in the Passaic County Clerk's Office; and you are further notified, that I have demanded payment from the said John J. Ritchie & Sons of the said sum of money, so due and owing to me as aforesaid, and that they have refused to pay the same or any part thereof; and you are, therefore, required to retain the amount so due and claimed by me, out of the amount owing by you on said contract, or that may hereafter become due and owing from you on said contract, and

on being satisfied of the correctness of my demand, to pay the same to me.

Henry M. Post.

Dated March 2nd, 1921.

Notice to the Within Named Defendants:

In case the within Summons and Complaint are served upon you personally, then take notice that if you intend to make a defense to this action, you must file an affidavit of merits within Ten Days from date of service hereof upon you, and must file your answer within Twenty Days from the date of such service, and in default of the filing of such affidavit and answer, judgement will be entered against you.

Hudson & Joelson,
Atorneys of Plaintiff.

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Affidavit of Merits of Defendant

(Filed January 15, 1926.)

PASSAIC COUNTY CIRCUIT COURT

Henry M. Post, Plaintiff, vs. Samuel Geldziler and John J. Ritchie and John J. Ritchie, Jr., partners trading as John Ritchie & Sons, Defendants.	Action at Law

AFFIDAVIT OF MERITS OF DEFENDANT, SAMUEL GELDZILER

State of New Jersey
County of Passaic } ss.

Samuel Geldziler, of full age, being duly sworn according to law on his oath deposes and says:

That he is one of the defendants above named and that he believes that he had a just and legal defense to the above entitled action on the merits of the case.

Samuel Geldziler

Subscribed and sworn to before me this 15th day of January, 1926.

Elsie Horridge, Notary Public of N. J.

(Seal)

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Answer of the Defendant

(Filed January 23, 1926.)

PASSAIC COUNTY CIRCUIT COURT

Henry M. Post, Plaintiff, vs. Samuel Geldziler and John J. Ritchie and John J. Ritchie, Jr., partners trading as John Ritchie & Sons, Defendants.	Action at Law

ANSWER OF THE DEFENDANT, SAMUEL GELDZILER

The defendant, Samuel Geldziler, of the City of Paterson, in the County of Passaic and State of New Jersey, answering the said plaintiff says:

1. He admits paragraph No. 1 of the complaint.

2. He admits paragraph No. 2 of the complaint.

3. He admits paragraph No. 3 of the complaint.

4. He has no knowledge of the matters and things set forth in paragraph No. 4 of the complaint.

5. He has no knowledge of the matters and things set forth in paragraph No. 5 of the complaint.

6. He has no knowledge of the matters and things set forth in paragraph No. 6 of the complaint.

7. He denies paragraph No. 7 of the complaint.

8. He denies paragraph No. 8 of the complaint, excepting that he is now the owner of said building.

9. He denies paragraph No. 9 of the complaint.

10. He denies paragraph No. 10 of the complaint in so far as the same alleges that the plaintiff is entitled to have judgment for the sum of $4798.81 and interest from the 2nd day of March, 1921 and costs against this defendant, Samuel Geldziler, and as to the rest of said paragraph he has no knowledge.

11. If at any time this defendant paid any money to John J. Ritchie & Sons in advance of the terms of the contract executed between this defendant and the said John J. Ritchie & Sons, such payment or payments became due and payable under the terms of said contract before the 2nd day of March, 1921, the date when the alleged notice is alleged to have been served by the plaintiff upon this defendant, as set forth in the seventh paragraph of the complaint.

F. W. Van Blarcom,
Attorney of Defendant,
Samuel Geldziler.

Answer

(Filed July 8, 1926.)

PASSAIC COUNTY CIRCUIT COURT

Henry M. Post,
Plaintiff,
vs.
Samuel Geldziler and John J. Ritchie and John J. Ritchie, Jr., partners trading as John Ritchie & Sons,
Defendants.
} Action at Law

ANSWER

Defendants John J. Ritchie and John J. Ritchie, Jr., partners trading as John J. Ritchie & Sons, in the City of Paterson, in the County of Passaic and State of New Jersey, say that:

1. They admit the first and second paragraphs.
2. As to the statements in the third paragraph, defendants have not any knowledge or information thereof, sufficient to form a belief.
3. They admit the fourth and fifth paragraphs.
4. They deny the sixth paragraph.
5. They admit the seventh paragraph.
6. As to the statements in the eighth paragraph, defendants have not any knowledge or information thereof, sufficient to form a belief.
7. Defendants admit the ninth paragraph.
8. They deny the tenth paragraph.

Robert Boyle,
Attorney of Defendants John J. Ritchie and John J. Ritchie, Jr., partners trading as John J. Ritchie & Sons.

Reply to Answer of Defendant

(Filed February 5, 1926.)

PASSAIC COUNTY CIRCUIT COURT

Henry M. Post, Plaintiff, vs. Samuel Geldziler and John J. Ritchie and John J. Ritchie, Jr., partners trading as John Ritchie & Sons, Defendants.	Action at Law

REPLY TO ANSWER OF DEFENDANT, SAMUEL GELDZILER

Plaintiff denies every allegation contained in the Answer of Defendant, Samuel Geldziler.

Hudson & Joelson,
Attorneys of Plaintiff.

Amended Answer of Defendant

(Filed September 14, 1926.)

PASSAIC COUNTY CIRCUIT COURT

Henry M. Post,
Plaintiff,
vs.
Samuel Geldziler and John J. Ritchie and John J. Ritchie, Jr., partners trading as John Ritchie & Sons,
Defendants.
} Action at Law

AMENDED ANSWER OF THE DEFENDANT, SAMUEL GELDZILER

The defendant, Samuel Geldziler, of the City of Paterson, in the County of Passaic and State of New Jersey, answering the said plaintiff says:

First Defense.

1. He admits paragraph No. 1 of the complaint.
2. He admits paragraph No. 2 of the complaint.
3. He admits paragraph No. 3 of the complaint.
4. He has no knowledge of the matters and things set forth in paragraph No. 4 of the complaint.
5. He has no knowledge of the matters and things set forth in paragraph No. 5 of the complaint.
6. He has no knowledge of the matters and things set forth in paragraph No. 6 of the complaint.
7. He denies paragraph No. 7 of the complaint.
8. He denies paragraph No. 8 of the complaint, excepting that he is now the owner of said building.
9. He denies paragraph No. 9 of the complaint.
10. He denies paragraph No. 10 of the com-

plaint in so far as the same alleges that the plaintiff is entitled to have judgment for the sum of $4,-798.81 and interest from the 2nd day of March, 1921 and costs against this defendant, Samuel Geldziler, and as to the rest of said paragraph he has no knowledge.

11. If at any time this defendant paid any money to John J. Ritchie & Sons in advance of the terms of the contract executed between this defendant and the said John J. Ritchie & Sons, such payment or payments became due and payable under the terms of said contract before the 2nd day of March, 1921, the date when the alleged notice is alleged to have been served by the plaintiff upon this defendant, as set forth in the seventh paragraph of the complaint.

Second Defense.

1. On or about the time of the execution of the said contract between the defendant Samuel Geldziler and the defendants John J. Ritchie, Sr., and John J. Ritchie, Jr., partners trading as John J. Ritchie and Sons, for the construction of said building as set forth in paragraph 2 of the plaintiff's complaint, and as part of said contract, the said John J. Ritchie, Sr., and John J. Ritchie, Jr., partners as aforesaid, trading as John J. Ritchie & Sons, entered into a bond or obligation to this defendant with the plaintiff, Henry M. Post and the defendant John J. Ritchie, Sr., as sureties in the penal sum of $49,031.00 conditioned for the faithful performance of said contract by the said defendants John J. Ritchie & Sons which bond bears date the 21st day of May, 1920, and is on file in the office of the clerk of the County of Passaic and a copy of which is hereunto annexed.

2. That afterwards the said defendants, John J. Ritchie, Sr., and John J. Ritchie, Jr., partners as aforesaid trading as John J. Ritchie & Sons defaulted in their said contract with this defendant to the loss and damage of this defendant of many thousands of dollars, the exact amount of which has not yet been determined.

3. That by reason of the said contract and the said bond, and the failure of the said defendants, John J. Ritchie, Sr., and John J. Ritchie, Jr., partners as aforesaid trading as John J. Ritchie & Sons to carry out and perform the terms of said contract, to wit, to complete said building on or before the first day of August, 1920, to pay all legal claims of contractors, material men and laborers for labor performed and materials furnished in the carrying forward, performing or completing of said contract and to indemnify and save harmless this defendant from any and all claims, demands, damages and costs in the premises, the plaintiff Henry M. Post became and is indebted to this defendant in a large sum of money, the exact amount of which has not yet been determined.

4. That the indebtedness of the said John J. Ritchie, Sr., and John J. Ritchie, Jr., partners as aforesaid trading as John J. Ritchie and Sons and of the defendant John J. Ritchie, Sr., individually and of the said plaintiff Henry M. Post to this defendant by reason of the said contract and the said bond will include any amount which the said plaintiff, Henry M. Post might recover against this defendant in this suit.

5. That under the terms of the said bond the said defendants John J. Ritchie, Sr., and John J.

Ritchie Jr., partners as aforesaid trading as John J. Ritchie and Sons and John J. Ritchie, Sr., individually, and the said plaintiff Henry M. Post are obligated to pay to this defendant any sum that may be recovered against this defendant in this suit.

6. That under the terms of the said bond the said plaintiff Henry M. Post is obligated to pay to this defendant any sum that may be recovered against this defendant in this suit.

7. By reason whereof this defendant is not indebted to the plaintiff Henry M. Post nor to the said John J. Ritchie, Sr., and John J. Ritchie, Jr., partners as aforesaid trading as John J. Ritchie and Sons in any sum whatsoever.

F. W. Van Blarcom,
Attorney of Defendant, Samuel Geldziler.

Know all men by these presents, That We, the undersigned John J. Ritchie, Sr., John J. Ritchie, Jr., partners trading and doing business under the firm name and style of John J. Ritchie & Sons, as principal and Henry M. Post and John J. Ritchie, Sr. as sureties are hereby held and firmly bound unto Samuel Geldziler, of the City of Paterson, County of Passaic, and State of New Jersey, in the penal sum of forty-nine thousand and thirty-one dollars, for the payment of which well and truly to be made, we hereby jointly and severally bind ourselves, our heirs, executors, administrators, successors and assigns.

Signed this 21st day of May, 1920.

The condition of the above obligation is such that whereas, the above named principal did on the 15th day of March, 1920, enter into a contract with the said Samuel Geldziler, which said contract with the specifications and addenda upon which it is based is on file in the office of the Clerk of the County of Passaic and is made a part of this the bond the same as though set forth herein;

Now, if the said John J. Ritchie, Sr., John J. Ritchie, Jr., partners trading and doing business under the firm name and style of John J. Ritchie & Sons, shall well and faithfully do and perform the things agreed by them to be done and performed according to the terms of said contract within the time therein specified, to wit: on or before the first day of August, A. D. 1920, and shall pay all lawful claims of sub-contractors, material men and laborers, for labor performed and materials furnished in the carrying forward, performing or completing of said contract, and shall indemnify and save harmless the said Samuel Geldziler from any and all suits, claims, demands, damages, and costs in the premises, then this obligation shall be void, otherwise the same shall remain in full force and effect, it being expressly understood and agreed that the liability of the surety for any and all claims hereunder shall in no event exceed the penal amount of this obligation as herein stated.

The said surety hereby stipulates and agrees that no modifications, omissions or additions in or to the terms of the said contract or in or to the plans and

specifications therefor shall in any wise affect the obligation of said surety on its bond.

Sealed and delivered in the presence of
James J. Murner

John J. Ritchie, (L. S.)
John J. Ritchie, Jr. (L. S.)
Partners trading and doing business under the name of John J. Ritchie & Sons.
Henry M. Post, (L. S.)
John J. Ritchie, (L. S.)

JUSTIFICATION OF SURETY

State of Jersey
County of Passaic. } ss.

On this 21st day of May A. D. 1920, before me, a Notary Public in and for the County and State aforesaid, personally appeared Henry M. Post who, being duly sworn on his oath declares that he is a resident of the County of Passaic in the State of New Jersey; that he is a freeholder in said County, and that he owns real estate in said County in his own right, to the amount of Twenty-five thousand dollars over and above all his indebtedness and after all his debts are paid and over any contingent liability by reason of being bail, surety, endorsor or guarantor.

Subscribed and sworn to before me the day and year aforesaid. I hereby certify that the contents of the above have been carefully made known to affiant before execution.
James J. Murner,
Notary Public of New Jersey.

Henry M. Post

Amended Answer of Defendant

JUSTIFICATION OF SURETY

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

On this 21st day of May A. D. 1920, before me a Notary Public in and for the County and State aforesaid, personally appeared John J. Ritchie, Sr. who, being duly sworn on his oath declares that he is a resident of the County of Passaic in the State of New Jersey; that he is a freeholder in said County and that he owns real estate in said County on his own right, to the amount of Twenty-five Thousand dollars over and above all his indebtedness and after all his debts are paid and over any contingent liability by reason of being bail, surety, endorsor or guarantor.

Subscribed and sworn to before me, the day and year aforesaid. I hereby certify that the contents of the above have been carefully made known to affiant before execution.
Changed and rechanged to Twenty-five thousand dollars before execution.

John J. Ritchie

James J. Murner,
Notary Public of New Jersey.

Reply to Amended Answer of Defendant

(Filed Sept. 22, 1926.)

PASSAIC COUNTY CIRCUIT COURT

Henry M. Post,
Plaintiff,
vs.
Samuel Geldziler and John J. Ritchie and John J. Ritchie, Jr., partners trading as John Ritchie & Sons,
Defendants.

REPLY TO AMENDED ANSWER OF SAMUEL GELDILER

The plaintiff replying to the amended Answer of Samuel Geldziler, says:

1. He denies Paragraph eleven of the said amended Answer.

2. He denies Paragraph one of the Second Defense and says that he did not execute the bond as pleaded in the answer and that the same is not his bond.

3. He has no knowledge of the facts alleged in Paragraphs 2, 3, 4, 5, 6, and 7 of the Second Defense.

4. He denies that he is indebted to said Samuel Geldziler on said alleged bond.

John O. Totten, Jr.,
Substituted Attorney for Plaintiff.

Notice of Motion Addressed to Answer of Defendant

(Filed Sept. 22, 1926.)

PASSAIC CIRCUIT COURT

Henry M. Post,
Plaintiff,
vs.
Samuel Geldziler and John J. Ritchie and John J. Ritchie, Jr., partners trading as John Ritchie & Sons,
Defendants.

NOTICE OF MOTION ADDRESSED TO ANSWER OF SAMUEL GELDZILER

To: Samuel Geldziler, defendant:

Take notice that the plaintiff will move at the trial of the above cause to strike out Paragraphs one to seven inclusive of the Second Defense as alleged in the Amended Answer of the defendant, Samuel Geldziler for the following reasons:

1. That said second defense as pleaded does not set out a legal defense to the cause of action as set forth in the Complaint as filed by the plaintiff.

2. Said second defense does not deny any of the allegations of the Complaint but sets up a new cause of action on a bond which should be pleaded as a Counterclaim.

3. Said second defense is a mis-joinder of causes of action as the plantiff's action is based on a special statutory right and the second defense alleges a cause of action on a contract under seal wherein

until the plaintiff succeeds in his said action no breach of the condition of the bond has occurred.

4. Said defense is sham and frivolous and interposed to delay a fair trial of the issue.

John O. Totten, Jr.,
Substituted Attorney for Plaintiff.

Notice to Produce

PASSAIC COUNTY CIRCUIT COURT

Henry M. Post,
Plaintiff,
vs.
Samuel Geldziler and John J. Ritchie and John J. Ritchie, Jr., partners trading as John Ritchie & Sons,
Defendants.

NOTICE TO PRODUCE

To: Mr. Frederick Van Blarcom, Attorney for Samuel Geldziler and or Samuel Geldziler.

Please take notice that the plaintiff requires that you produce at the trial of the above stated action the stop-notice served upon the defendant Samuel Geldziler on March 2, 1921, a copy of which stop-notice is annexed to the Summons and Complaint and marked Schedule C.

Unless you produce same at the trial of the above stated action the plaintiff will introduce secondary evidence to prove same.

John O. Totten, Jr.,
Substituted Attorney for Plaintiff.

PASSAIC COUNTY CIRCUIT COURT.

Henry M. Post, Plaintiff, vs. Samuel Geldziler, et al., Defendants.	Action at Law

Paterson, N. J., Sept. 22, 1927.
10:00 A. M.

On Trial Before: Hon. Newton H. Porter, Judge.

Appearances:

Messrs. Hudson & Joelson (By Mr. Totten), for the Plaintiff;

Fredk. W. Van Blarcom, Esq., for the Defendants.

Mr. Totten—If Your Honor please, you will recall that there is a stipulation on the record, that this case be tried before Your Honor, sitting both as the court and jury. At the last time, at the commencement of the trial in this case, counsel injected a defense on the bond given by the plaintiff to indemnify one of the defendants against any loss that might occur to the contractor, or by him failing to fulfill the terms of the contract, and the plaintiff's attorney has filed a reply to the amended answer, which, I believe, Your Honor has on his bench.

The Court—I ought to, but I haven't it—Mr. Sommers.

Mr. Totten—I have also noticed a motion addressed to the amended answer of Samuel Geldziler.

The Court—Now, let me see, you started to try this and something developed in the trial, and we put it off until an amendment could be made, and you alleged surprise, or somebody did, and I put it off until an amended answer could be filed, and now that has been done. I have forgoten just what point was that came up.

Mr. Totten—Possibly I can refresh Your Honor's recollection on that point. The original answer, as filed by the defendant Geldziler, made no mention as a defense of a bond made by the plaintiff Post as surety. The other two defendants, Ritchie and Son, were the principals and Post, the plaintiff, was the surety, so it is alleged. We do not admit that. And that was not pleaded in the answer, but in counsel's opening and in his cross-examination of the first witness, it was brought out that that was one of the defenses that they desired to present to this court, and as it was not pleaded, sir, I immediately stated to the court that I was surprised, so that Your Honor allowed an amended answer to be filed, which I have replied to; but I have also served notice of motion, returnable at the trial this morning to strike out the amended answer as filed. That should also be on Your Honor's desk.

The Court—I have it.

Mr. Totten—(Continuing) And I allege as my reasons for striking out the second de-

fense, which is that part of the amended answer that deals with the bond, first, that the second defense does not set out a legal defense to the cause of action of the plaintiff. And I maintain, sir, on my first point,—I will present my points in my argument as I proceed, on each point. I maintain that this bond—or alleged bond—as pleaded by the Defendant Geldziler, if he has a cause of action against Post on the bond, that cause of action does not come into existence until Post, as a material man and not a surety on a bond,—not act- in a dual capacity—but Post as a material man, has recovered a judgment against him, Geldziler. The complaint sets out specifically that a breach has occurred because Ritchie did not complete his contract within the specified time as set forth, but it's too late to plead that, sir, because what Geldziler did, was he paid the entire purchase price—entire contract price, and he is now estopped from contending that the contract, insofar as that is concerned, was broken. He has paid this man every dollar, so he says—and on this motion we have to take his pleadings as so, sir. He has paid this $40,000.00, so that if he had any claim against Ritchie and Ritchie's surety, Post, it should have been—he should have withheld his payments under the contract, but, instead of that, he has made all of the payments under the contract.

The Court—The defendant discharged the bond and broke it, according to your argument?

Mr. Totten—Yes, sir; that is my first point.

Now, my next point is this, that said second defense sets up purely a new cause of action, that the plaintiff's case is based upon the statute,— the Mechanic's Lien act. This defense is an action on an instrument under seal, and if it is pleaded at all, sir, it is pleaded by way of counterclaim, and should be so pleaded, rather than as a defense, which would then place this defendant in a position where the affirmative proof would rest upon him to prove the contention on this bond, under bond in the case.

My third point is the same as my second, as far as the argument is concerned; and my fourth point is that the bond is introduced in order to delay a fair trial of the issue. I wanted to note before, Your Honor, the $2000.00 bond point in this case, there has been a breach of the bond at the present time, sir, and there would not be, under the best possible theory, a cause of action on the Defendant Geldziler's part, until Post succeeds in getting a judgment against this defendant, Geldziler; and I would ask that your honor—

The Court—I will hear Mr. Van Blarcom in reply.

Mr. Van Blarcom—In the first place, I understand under the new Practice act, that is a perfectly good defense, in what is now known as the defense, in that it sets up the bond, only insofar as it is necessary to defeat the action. It is not a recoupment; it is not a set off. It is a plea of a new matter to defeat this action, it is a matter of a situation being

that as long as Post gets a judgment against Geldziler, if he succeeds in maintaining his action, that he should not recover as against Geldziler, because he is liable under his bond for the amount of any judgment or recovery so that the plaintiff should not recover in this suit because a recovery in this suit means that the defendant, Geldziler, of this present suit being a statutory suit, it is a suit on a contract. It is not a statutory suit, but we are suing under this contract.

The Court—I do not see myself how it can be a counter-claim, because you deny any liability, as in the counter-claim you say, "Perhaps I owe him something, but he has not paid my bill, and I ask that the amount he owes me may be set up against what I owe him." You say, first, "We owe him nothing, because we have not incurred this debt, or because we have paid it, or what-not," and then you say, "But if it should be found that he would be entitled to anything because we haven't paid the money, or because we have incurred the obligation then we are not liable anyway, because he indemnified us." That is your position.

Mr. Van Blarcom—Yes, he promised to pay whatever he recovered under this suit.

The Court—Of course, I would have to read the pleadings over carefully—I have not gone into them yet with any degree of care—and my judgment, my thought, is that it is a proper pleading, a proper thing to set up as an affirmative defense, and that is my view;

but inasmuch as we are trying this without a jury I will reserve the decision on it, and we will go on with the trial, on the assumption that it is proper. Then, if I find upon mature consideration, that it is not, I will rule accordingly on it then. I think it unwise to postpone the trial until I can give some thought to it, because this is tried before me, without a jury, and I think we ought to get as much of it out of the way as we can.

Mr. Totten—In the event that Your Honor holds he has a cause of action under the bond, sir, Your Honor will permit me, of course, an exception.

The Court—Certainly.

Mr. Van Blarcom—And I want an exception if Your Honor rules the other way; but I think it is a little premature to make that motion.

Mr. Totten—This is the time to make that motion.

The Court—It is understood that whichever one suffers by the ruling of the court may have an exception.

Now I am going to have to ask you to open again. There have been so many cases that have been tried since that I am frank to say that I have forgotten. I haven't such a mind that I can remember all these details. In a general way, I know that there was a building built and the plaintiff was not paid and he now wants his money, but that is not enough for me to intelligently listen to the evidence. Just briefly give me the high spots.

Mr. Totten—The plaintiff in this case, Hen-

ry M. Post, is suing Samuel Geldziler as the owner and John J. Ritchie, Jr., and John J. Ritchie, trading as John J. Ritchie & Sons, the latter two being general contractors. It seems that in 1920 the Ritchies entered into a contract with Geldziler to build a building on Clay street, in the City of Paterson,—a theatre building. Geldziler was the owner of the ground upon which the building was erected, and that is admitted in the answer. The Ritchies proceeded to build the building and the plaintiff Post furnished material to the extent of $11,000.00 to build this building. He has been paid over $6,000.00 on account of the price of the materials furnished, and there is a balance due him of $4,696.8, so plaintiff says, with interest from the time of the incurring of the debt, in 1921. Attached to the complaint, sir, is a list of the materials furnished by the plaintiff Post, showing the dates.

Post served a stop notice in accordance with Section 5—Section 3 and Section 5—of the Mechanics's Lien act, on Mar. 2, 1921, by delivering it personally to the owner, Geldziler, claiming, as stated in that stop notice, the amount of money which is the basis of this suit. He has not been paid by either Ritchie or Geldziler. The contract entered in to between the Ritchies and Geldziler was placed upon file and that contract is here in court, and that contract calls for payments by the owner, Geldziler, to the general contractor,

Ritchie, upon architects' certificates. It is somewhat different than the ordinary building contract which provides, as Your Honor is familiar, with a certain payment when the cellar is dug, a certain payment when the house is enclosed, and as the work progresses certain payments are to be made; but, in this contract, the only payments that can be made are upon the certificate of the architect, as he, in his judgment, sees fit to issue certificates.

The plaintiff contends that there were payments made by Geldziler to Ritchie, without architects' certificates, which, under the decisions in this state, allows this plaintiff to look to the owner, by reason of the fact, that the contract has been broken, that the lien which the material man has on the contract price in the hands of the owner, has been broken. That is the theory of this case, sir. I will let my opponent explain to Your Honor his theory. I am not going into that now, as I want to hurry it along; and all I say in order to hurry it along is that the bond that the defendant sets up in this case, and attaches to his amended answer, is not the bond that was signed by this plaintiff.

The Court—All right.

Mr. Van Blarcom—The position of the defendant Geldziler is this: That in March, 1920, he entered into a contract with Ritchie & Sons for the erection of the Capitol Theatre, and the contract was filed, and there

were specifications filed with the Clerk of the Court and after about a month or so Ritchie & Sons gave a bond to Mr. Geldziler with Mr. Post, the plaintiff here, as one surety and the elder Ritchie, one of the defendants, the other surety, that they would faithfully complete this contract in accordance with its terms, and the bond was filed with the contract in the office of the Clerk. The building was to have been completed the 1st of August, 1920 and it was not completed until the 1st of April, 1921—

The Court—And the bondsmen made themselves jointly and severally liable?

Mr. Van Blarcom—And the bondsmen made themselves jointly and severally liable.

The Court—And the condition of the bond is that the work be completed on that day?

Mr. Van Blarcom—The obligation of the bond is--it mentions the contract--that if Ritchie & Sons will faithfully do and perform the things agreed by them to be done and performed according to the terms and said contract within the time therein specified, to-wit: on or before the 1st of Aug. 1920, and shall pay all lawful claims of subcontractors, material men and laborers, for labor performed and materials furnished in the carrying forward, performing or completing of said contract, and shall indemnify and save harmless the said Samuel Geldziler from any and all suits, claims, demands, damages and costs in the premises, then this obligation shall be void, otherwise the same shall remain in full

force and effect, it being expressly understood and agreed that the liability of the surety for any and all claims hereunder shall in no event exceed the penal amount of this obligation as herein stated.

The Court—Which is how much?

Mr. Van Blarcom—$49,000.00.

The Court—The bond is for the amount of the contract price.

Mr. Van Blarcom—The bond is for the amount of the contract price. And the said surety hereby stipulates and agrees that no modifications, omissions or additions in or to the terms of the said contract or in or to the plans and specifications therefor shall in any wise affect the obligation of said surety on its bond.

The Court—In other words, before Mr. Geldziler gave the contract, he asked them to guarantee the faithful performance of their contract and to bring in some satisfactory signer as surety.

Mr. Van Blarcom—He did.

The Court—And that is the bond that you have pleaded, and you say that under the bond there can be no recovery, because the plaintiff in this suit is one of the sureties and signers of that bond.

Mr. Van Blarcom—In the bond, and on that point, the other defendant, Ritchie, did not carry out the terms of the contract. In the first place, instead of finishing the building on the 1st of Aug. 1920, it was not finished until the 1st of Feb. 1921, and after it was finished the final payment or the concluding

certificate of the architect was given, and the balance of money due under the contract that was then in the hands of Mr. Geldziler, under this contract, was $2,015.00 and a few cents. And then one Frederici, a subcontractor of some kind, filed a stop notice with Mr. Geldziler for over $3,000.00, I think, on the 11th of February, and on the 22nd or 23rd of February, the Paterson Bridge Company filed another stop notice against this money for approximately $3,000.00, and then on the 2nd day of March, 1921, the plaintiff filed his stop notice for the $4,000.00 or over. Mr. Geldziler tried to satisfy these people, or to make some adjustment, and was unable to do so, and finally he was sued by Frederici and notice of the suit was given to Post, the surety under this bond, and he paid nothing, and the suit was satisfied by payment from Geldziler to Frederici of $2,256.00 being the $2,015.00 and some cents which Mr. Geldziler had on hand and a little more to satisfy the suit. The one Dawson brought suit against Geldziler for some $300.00, as I recall it, in the District Court, and notice was given to the surety, Post, and he paid nothing, and that suit was satisfied by Mr. Geldziler. And the Paterson Bridge Company brought suit against Mr. Geldziler for $10,000.00 and notice was given to the surety and he did nothing, and the suit was settled by Mr. Geldziler, not as a recognition of liability but in order to avoid litigation. So he paid $400.00 to get rid of the Paterson Bridge Company

suit. Then various other claims come along. Here is one of the ———— Lumber Company for $839.00.

Mr. Totten—Just a minute, sir; none of this is pleaded. I do not know anything about any of this the counsel is talking about.

The Court—Well, it doesn't hurt to recite it, if he cannot prove it.

Mr. Van Blarcom—He knows about the three suits.

The Court—It gives a history of the transaction.

Mr. Van Blarcom—He knows about the three suits.

The Court—Well, this is the only one now open, is it?

Mr. Van Blarcom—Well, they are all known to them. It is over 6 years ago, and this is the last one, and as I suggested to Your Honor, the condition of the fact is this, that both the Ritchies, father and son, are defendants here, and they have blandly abandoned their defense and joined with the plaintiff for the purpose of getting $4,000.00 from the defendant Geldziler. All I would say now is that the facts are as I presented them to you before, at the last time before, Your Honor, and Post knew about these suits and he did not do anything with them. Certainiy, we have not demanded and we do not demand anything now, because of those suits, but we do claim that if there is anything due Post under this contract, that we have paid it, and

that anything he could recover he would have to pay himself as one of the sureties in this bond, because of the damages that were suffered by the denfendant Geldziler.

The Court—What about the contract with respect to any penalty for not completing the building within the time mentioned?

Mr. Van Blarcom—I do not believe that there is any specified penalty; it is simply the damages that were naturally accrued.

The Court—So that the only liability under the bond would be the amount of moneys unpaid for the buildings and such damages as may be shown to have been suffered by reason of the building not being completed as the contract provided.

Mr. Van Blarcom—That is an important factor, that instead of his concluding his performance of the contract in August, the building was not finished until about the first of February, the year after.

Mr Totten—I want to say,Your Honor, before we call our witnesses, that there is, according to the defendant's contention, a period of two months that elapsed between the time of the making of this contract in March, on March 15th, and May 21st, the date of the execution of this bond, so that Geldziler was not induced to make this contract because of this bond. We deny their contention there, as there is a period of two months in there.

The Court—What difference does that make?

Mr. Totten—Only this, that your Honor made a statement that—I think I get your Honor's thought — Your Honor made the statement before the contract was made Geldziler asked to be indemnified. Now that does not appear and I do not believe it will appear in this case.

The Court—It amounts to the same thing.

Mr. Totten—But if he did, he was indemnified two months afterwards and after work was commenced on the building. There is this further point, Your Honor will recall, that counsel in his opening stated that when the final payment was made there was $2,015.00 in Geldziler's hand. We will show that according to his contract, it should have been 15% of $49,000.00 in his hands at the time when the final certificate was given, showing the breach thereby of this contract.

The Court—All right.

HENRY M. POST. sworn.

Direct Examination by Mr. Totten:

Q. Mr. Post, you are the Henry M. Post, the plaintiff in this case? A. Yes, sir.

Q. What was your business during the years 1920 and 1921? A. Coal and Mason materials.

Q. Did you furnish any material in the erection of the theatre on Clay street— A. Yes, sir.

Q. Property owned by Mr. Geldziler? A. Yes, sir.

Q. Does this statement attached to the com-

plaint show the true amount of the balance due you? A. Yes, sir.

Q. How much is the balance due you, Mr. Post? A. $4,796.81.

The Court—What is that for?

The Witness—Mason material.

Q. Did you serve a stop notice upon Samuel Geldziler the defendant in this case? A. Yes, sir.

Q. Is this the paper that you served upon Mr. Geldziler (handing paper to witness)? A. Yes, sir.

Q. Do you know when you served that paper? A. Yes, sir.

Q. When? A. At 9:30 P. M., March 2, 1921.

Q. Did you deliver it to him personally? A. Yes, sir.

Mr. Totten—I offer this in evidence. It was offered before, sir. Any objections?

Mr. Van Blarcom—No, that is all right.

(Marked P-1 in evidence)

Q. Have you been paid any part of the sum of $4,796.81? A. No, sir.

Q. That is the amount still due you? A. Yes, sir.

The Court—These materials were delivered where?

The Witness—Delivered on Clay street, at Mr. Geldziler's theatre.

The Court—And, as far as you know, were

used in the construction of that building?

The Witness—Yes, sir; they were.

The Court—Anything more?

Mr. Totten—I have the original delivery slips.

The Court—Is there any dispute about that?

Mr. Van Blarcom—Oh, I cannot dispute that.

The Court—All right.

Mr. Totten—That is all.

Cross-examination by Mr. Van Blarcom:

Q. To whom did you sell this material? A. John J. Ritchie.

Q. He was the contractor? A. Yes, sir.

Q. And the owner was Mr. Geldziler? A. Yes, sir.

Q. When the contract between Mr. Geldziler and Mr. Ritchie was entered into, or shortly after, you gave a bond to Mr. Geldziler, didn't you,—you as surety with the elder Ritchie? A. Why, they entered into this contract before I signed that bond.

Q. Well, afterwards, you did sign a bond, didn't you? A. I did, after, yes.

Q. This is your signature on this bond, isn't it?

Mr. Totten—Your Honor please—

A. Yes, sir.

Mr. Totten—This is not proper cross-examination.

Mr. Van Blarcom—I think that is all.

The Court—Just a moment.

Mr. Totten—If Mr. Van Blarcom intends to make this witness his witness, I haven't any objection, but, of course, I expect to have the bond—

The Court—Well, it perhaps strictly is not proper cross-examination, and yet, why isn't he entitled to go into the circumstances surrounding the transaction, on cross-examination? What difference does it make? There is no jury here.

Mr. Totten—Well, only this, sir, that I mean, in his examination on that he should not be allowed that same latitude which is ordinarily allowed on cross-examination; and if he is his witness now, if he goes into his case now, under his theory of the case, that branch of the case is, Your Honor, as I stated before, his affirmative defense, and I should be allowed to cross-examine on that.

The Court—Yes, I see your point, and, as I say, strictly speaking, it is not proper cross-examination to go into the bond. Do you want to make him your witness now, or reserve him until later?

Mr. Van Blarcom—Your Honor, it would seem to me that I could do that. This is his witness and he is plaintiff in this case.

Q. When you sold this material to Ritchie, you knew you were on Ritchie's bond, didn't you? A. Not at the beginning.

Q. Well, after May you did, didn't you? A. After March I did.

Q. After March? A. Yes.

Q. You knew that you were Ritchie's surety on a bond? A. I knew that I was on the bond.

Q. And this is the bond you were surety on? A. Yes, sir.

Q. That was your signature on this bond? A. Yes, sir.

Q. That is your signature on the justification? A. Yes, sir.

Q. You knew all of that when you sold Ritchie this material, didn't you? A. I knew I was on the bond.

Q. You knew that if Mr. Ritchie didn't pay you or pay the others, you would lose, didn't you? A. What is that?

Q. You knew that if Mr. Ritchie didn't pay you for these materials, that you would lose the money, didn't you? A. I did not know that I would.

Q. Well, you were taking chances on that, weren't you? A. (No answer.)

Q. And you knew that if Ritchie did not finish his contract and pay the material men and it cost Mr. Geldziler more than $49,000.00, that you would have to pay the difference, didn't you? A. Not if he altered the contract.

Q. You did not read this bond when you signed it? A. Yes.

Q. You didn't know that? A. I scanned over it carefully——or, I scanned it, but not very carefully, when I signed it, but that didn't make any difference.

Q. That did not make any difference? A. (No answer.)

The Court—Anything more?

Q. Mr. Geldziler served notices on you, on this bond, didn't he, after the——A. Not that I know of, not after that.

Q. Do you know Mr. Barnes, a process server in the Sheriff's office? A. I know Mr. Barnes.

Q. He served you with a notice, didn't he? A. He may have probably served me, but, as I say, it is out of my mind now, whether he did or not. He may have served me with such a notice.

Q. I read you this notice: Henry M. Post, 45 Ellison street, Paterson, New Jersey,——is that your address? A. Yes, it was.

Q. Or was it? A. It was.

Q. (Continuing) Sir: Take notice that I, Samuel Geldziler, have been served with summons and complaint at the suit of Albert Frederici, a copy of which summons and complaint with the of a copy of the agreement which is attached to the original, and is hereto annexed, "which is signed by Samuel Geldziler by F. W. Van Blarcom, as his attorney, dated June 3, 1921,—— did Brown serve that notice on you? A. Yes, I think he did.

Q. You think he did? A. Yes, I think he did.

Q. What did you do about that suit? A. I did not do anything.

Mr. Van Blarcom—I offer that notice.

Mr. Totten—If Your Honor please, I feel that is entirely immaterial, and I object to it on the ground of immateriality, sir.

The Court—What is the materiality of it?

Mr. Van Blarcom—Simply to show that he knew this suit had been instituted, and that he had been served with notice of it.

The Court.—All right. I do not know that it has any great materiality, but it may have some materiality. I will allow it.

Mr. Totten—I ask an exception.

The Court—You may have it. Mark it now for identification.

(Marked D-1 for Identification)

Q. Mr. Post, I read you this notice: To Mr. Henry M. Post, 45 Ellison street or 171 East Seventh street—is that your house or business address?

A. Business address.

Q. (Continuing)——Paterson, New Jersey, (continuing reading), dated July 5, 1921. Do you remember Mr. Brown's serving that notice on you?

Mr. Totten—I would like to have my objection noted to this entire line right through, sir. I presume Your Honor will rule the same.

The Court—Yes, let it be noted and exception allowed.

A. I do not remember that; he may have served me, but I do not remember that, but I do remember that there was one, the first one.

Q. But you do not remember this one? A. No, I do not remember that one. I don't say he did not serve me.

Q. I will read you another notice: Mr. Henry M. Post, Paterson, N. J. Take notice that I, Samuel Geldziler, have been served with summons and complaint in the Paterson Bridge Company, which suit started in the Passaic County Circuit Court, and is

against John J. Ritchie, etc., the said summons is returnable twenty days from the 9th day of July, 1921. Dated July, 12, 1921. Do you remember that being served on you? A. No, sir; I do not.

Q. You do not? No, sir.

Q. After this debt that you are sueing for now was incurred, when did you first make any demand on Mr. Geldziler for the money? A. That stop notice.

Q. The stop notice was the first demand that you made on Mr. Geldziler? A. (No answer.)

Q. This present suit, this is the first action you have taken against Mr. Geldziler for collecting this suit—or this money? A. Yes, sir.

The Court—Don't shake your head.
Mr. Van Blarcom—That is all.
The Court—"Yes"?
The Witness—Yes, sir.

Redirect Examination by Mr. Totten:

Q. Mr. Post, is this the bond that you signed? A. Yes, sir.

Q. Were there these changes in it at the time that you signed it? A. No, sir; there were not.

Q. Was this man's,—Jacob Connor's—name stricken out and John J. Ritchie written above it? A. No, sir; it was not.

Q. Do you remember the date that you signed the bond? A. Yes, on March—I have got the date, —on March 15th.

Q. Was this marking here, "21st of May" in there when you signed that bond? A. No, sir; it was not.

Q. Were those initials, "J. J. M." on the side? A. No, sir; the face of it was not marred in any way.

Q. Do you now James J. Murner? A. I do not.

Q. When did you first see him? A. Last Tuesady, a week ago, here in court, that is the first I knew anything about him.

The Court—Never heard of him before?

The Witness—No, sir; not to my knowledge. I had no connection with him whatever.

Mr. Totten—Mr. Post is not a oolitician.

Mr. Van Blarcom—I do not think he is alive, if he had not heard of Mr. Murner.

The Witness.—I am not connected with the courts very much.

Q. Did you sign this bond in his presence? A. No, sir; I did not.

Q. This affidavit of justification attached to it, did you sign this on the 21st day of May? A. No, sir.

Q. Did you sign this in the presence of James J. Murner? A. No, sir.

Q. Did you personally appear before him? A. No, sir.

Q. (Continuing) And swear that you were worth twenty-five thousand dollars? A. No, sir.

Q. Where did you sign the bond? A. I signed it in the back of Mr. Geldziler's liquor store on the corner of Madison avenue and Clay street.

Q. Who was present when you signed it? A. Mr. John J. Ritchie, Sr.

Q. Anyone else? A. No, sir.

Q. Mr. Geldziler, was he there? A. Yes, Mr. Geldziler.

Q. Anyone but Mr. Geldziler? A. No one but Mr. Geldziler, and Mr. John J. Ritchie, Sr.

Mr. Totten—Mr. Ritchie is in court, sir.

The Court—You swore to it before no one?

The Witness—No, sir; I never took an affidavit to that paper.

The Court—Well, to any paper?

The Witness—No, not in connection with this.

The Court—You say that is not the paper, don't you?

The Witness—This is the paper but not marred up in that condition.

The Court—I see.

Q. I believe you said that Mr. Jacob Connor's name was in the face of the instrument? A. Sure, it was in and I understood he was to be on that bond.

Q. That is the reason you signed that bond? A. Yes, sir.

Q. You knew Mr. Connor? A. Oh, very well.

The Court—Was his signature on it?

Q. Answer the court's question. Was his signature on it? A. Not at that time, but his name was written in there.

Q. Were you told that his signature was going to be on? A. Yes, siri; it was understood that Mr. Connor was going on that bond with me.

Q. And was that the reason you signed that

bond? A. Yes, sir; I was willing to go on with Mr. Connor.

Q. Would you have been willing to go on that bond with Mr. Ritchie, Sr.? A. If Mr. Connor had not gone on it, I would not have touched it at all.

Q. You would not have gone on it? A. No, sir.

Q. Then, Mr. Post, that paper, in its present condition, is not the bond that you signed? A. No, sir; not in that condition.

Mr. Totten—That is all.

By the Court:

Q. When did you first notice Mr. Connor had not signed the bond, Mr. Post? A. Well, I really was not made aware of that now—of that fact.

Q. Today is the first time you have found it out? A. Well, after they talked about it, then it was said that Mr. Connor had not signed it.

Q. Is this the first you have seen it from the time you signed it? A. A week ago last Tuesday in the court, was the first time I ever saw that bond.

Q. Did you ever make any inquiry as to whether Mr. Connor signed it? A. No.

Q. Did you ever talk with Mr. Connor? A. Oh, yes; I talked with Mr. Connor.

Q. Talk with him about the bond? A. That I do not know.

Q. Didn't you find out that Mr. Connor hadn't signed it when you signed it, didn't you acquaint yourself with the fact that he hadn't signed it? A. No, sir; I did not.

The Court—All right, anything more?

Recross Examination by Mr. Van Blarcom:

Q. You have got a copy of this bond? Didn't you—? A. I don't know that I did.

Q. Well, you have got one, haven't you? A. No, I haven't any copy.

Q. You were given a copy of the bond at the time you signed this instrument—? A. No, sir.

Q. —just the same as this? A. No, I have no copy of that thing.

Q. You were handed one, weren't you? A. Not that I know of.

Q. What did you do with it? A. I don't know that I had one, I don't know what became of it; I never remember having any.

Q. At the time you signed this bond, you were handed a copy of it, weren't you? A. No, sir.

Q. You knew then that Connor wasn't on the bond, didn't you? A. No, I did not; I knew his name wasn't there, but I understood he was to sign it.

Q. And you signed that bond without Connor's name on it, didn't you? A. That Connor's is written in there, first name that is written in there.

Q. And scratched out? A. It was not scratched out at that time.

Q. (Continuing) And Murner's initials put opposite the scratch? A. No, sir.

Q. And you got a copy of it? A. No, sir; I have not.

Q. (Continuing) And you have got a copy of it now? A. No, sir.

Q. When did you destroy it? A. I never de-

stroyed it; I never had one, to my knowledge.

Q. How many times did you sign this bond? A. Well, my signature is twice there.

Q. Yes, and it is scratched out once, isn't it? A. Not to my knowledge.

Q. You signed twice on the face of the bond, didn't you? A. Where?

Q. That is your signature, isn't it? A. Yes, that is, sure.

Q. And it is scratched out, isn't it? A. It seems to be.

Q. It was scratched out before you put this bottom signature on, wasn't it? A. Not to my knowledge.

Q. You know that it was, don't you? A. I do not.

Q. And that Murner's initials were here to erase your signature? A. No, sir; I do not know about that.

Q. It was on the copy that you got? A. I never had a copy, to my knowledge.

Q. You know that you did not sign this bond back of the liquor store with Geldziler— A. I certainly did.

Q. —and you signed it in the shed? A. I did not.

Q. —and that Mr. Ritchie was there? A. Mr. Ritchie was there with me in the saloon.

Q. In the shed? A. In the saloon.

Q. All right, in the saloon. A. No, in the saloon.

Q. Murner was there? A. No, sir; he was not there.

Q. Geldziler was there? A. Sam Geldziler was there.

Q. And Mr. Geldziler's wife was there, wasn't she? A. No, sir; she was not.

Q. And saw you sign it? A. No, sir; she was not there.

Q. You are sure about that? A. I am positive.

Q. You are positive that nobody was there, excepting you and Mr. Geldziler? A. Mr. Geldziler and Mr. John J. Ritchie, Sr.

Q. Are you sure that the time you are talking about is the time that you signed this bond? A. Yes.

Q. How do you know— A. Do you want me to tell you what led them to go there to sign it?

Q. No. A. No, you had better not hear that. I can tell you something that led right up to the signing of that bond there.

Q. But you signed it there, didn't you? A. In that saloon, in the back room of the saloon, that is where—

Q. Yes. A. (Continuing) —I signed that bond.

Q. And this is the bond you signed? A. I suppose so.

Q. As it is? As it is? Isn't it?

The Court—Do you understand the question?

The Witness—No, I do not understand that.

The Court—That is the bond you signed, as it is?

The Witness—As it is without all of that crossing off.

The Court—Then your answer is no, isn't it?

The Witness—No, I didn't never sign it as it is, no.

The Court—All right.

Q. You are sure it was in March you signed this bond? A. Yes, sir.

Q. What date in March? A. 21st, I think.

The Court—No, the 15th, you said before.

The Witness—Yes, the 15th, that is right. 21st, I got the date marked when I served the stop notice.

The Court—Where did you get that date, March 15th, that you have got written on the back of that card?

The Witness—Why, we took it off of our data that we have here.

The Court—What data?

The Witness—In regards to the case. Well, the bond, that was when that bond was first signed.

The Court—Well, what data have you that shows you when you first signed the bond?

The Witness—Nothing more than the bond itself.

The Court—On the bond; you never saw that until two weeks ago?

The Witness—Well, that is since that time I signed, I asked Mr.— my lawyer here, the attorney, what the date that was on March when we signed it, and he had the copy of it, the data—

The Court—What copy?

The Witness—concerning it. I never had no copy of it.

The Court—You just said, "copy of it"?

The Witness—I mean, from what my lawyer has there; that is where I got my information.

The Court—So that you do not know it was the 15th of March that you signed it, excepting as your lawyer told you; is that right?

The Witness—No, it is the dates I seen in connection with it.

The Court—What date does the bond bear?

Mr. Van Blarcom—Are you asking me?

The Court—I am asking somebody.

Mr. Totten—The bond bears the 15th of March crossed off with the 21st of May.

Mr. Van Blarcom—21st of May and filed on the 24th of May.

The Court—All right. So that you have no record from which you took that 15th of March and wrote it on the back of the card?

The Witness—No, nothing more than after this came into the argument.

The Court—You do not remember when you signed it? Your own recollection as to the date is not clear, is it?

The Witness—Yes, because it was cold weather, and the circumstances that took us there to sign that, and we got cold in that place, as it was cold, and there was no fire in there, and I said, "We do not want to stay here long, because it is too cold in here; they ought to have a fire."

The Court—Well, he had something there to warm you, didn't he?

Henry M. Post—recross

The Witness—Yes, he brought out something after we had signed it.

Q. Now, was there anybody's else name on this bond that was crossed off besides Connor's? A. I do not know.

Q. Why don't you know? A. I do not know.

Q. You read the bond, didn't you? A. I read it there; I scanned it, yes, sir.

Q. Very carefully, didn't you? A. Well, no, I cannot say that I did very carefully; I scanned it over.

Q. You saw all of these erasures on it, didn't you? A. What is that?

Q. You saw all of these erasures on it, didn't you? A. Not at that time, no.

Q. Not at that time? A. No, sir.

Q. You read this bond over very carefully, didn't you? A. How is that?

Q. You read this bond over very carefully, didn't you? A. No, I cannot say that I had read it over very carefully. I read it over.

Q. Didn't you care what you signed? A. Oh, yes, sure; I didn't want to sign my head away.

Q. Well, didn't you look to see what you were signing? A. Yes, I looked the bond over.

Q. Read it very carefully, didn't you? A. No, I did not.

Q. Why not? A. I don't know why I did not; but there is a clause you read in I do not remember seeing at the time.

Q. Then, if you did not read it so carefully, how do you know that those changes were not there?

A. Oh, I know they were not there. I could see the face of the whole thing in my sight.

Q. Yes; this is the paper, is it not? A. Yes, that is the paper, but all of them ink initials and signatures on there wasn't there when I signed it.

Q. Whose card is that you have got in your hands? A. My own.

Q. Let me see it, please. (Witness hands card to counsel.) When did you make these dates? A. The other day.

Q. What other day? A. Well—

Mr. Totten—Now, if Your Honor please, Mr. Van Blarcom has made Mr. Post his own witness.

Mr. Van Blarcom—Not I.

The Court—No, I have ruled that he was cross-examining him.

Mr. Totten—I did not understand that your Honor had made then any ruling, sir.

The Court—I do not recall that I made any ————; I said that it did not make any difference, but strictly speaking, it was improper cross-examination, and that perhaps it was out of order to examine him on this bond at this time, but I did not see that it makes a particle of difference whether he cross-examines him and brings this out on cross-examination, or whether he brings it out by making this man his witness, not the slightest.

Mr. Totten—The only difference is this: I he makes this man his witness, he is bound by the witness' testimony: if he gets it out on cross-examination, he is not.

Henry M. Post—recross

Mr. Van Blarcom—He is a hostile witness, and I am not bound by it.

Mr. Totten—No, he is not hostile.

Mr. Van Blarcom—He is, touching my claim. It would make me hostile.

The Court—You may proceed.

Mr. Totten—Your Honor, I would like to note my objection.

The Court—You may have it.

Mr. Totten—I object to the last question on the ground that it is not proper cross-examination, and I object to the entire line, if Your Honor has ruled that it is proper cross-examination.

The Court—I rule that it is proper cross-examination.

Mr. Totten—I ask an exception.

The Court—You may have an exception.

Q. When did you make these notations? A. Why, after we met here the first day, a week ago last Tuesday, I got those dates.

Q. Didn't you know them then? A. What is that?

Q. Didn't you know them then? A. No, it is so long ago that they had got out of my mind.

Q. You testified you had served the stop notice on March 2nd, didn't you? A. Because I saw the date.

Q. You didn't have to make any notation about that? A. Well, I didn't want to forget it.

Q. You testified that you signed the bond on May 21st, didn't you? A. No, I did not.

Mr. Totten—No, there was no such testimony here.

A. No, sir; I did not. I will have the card, please.

Q. You may have it. A. Thank you.

Q. Now, as a point of fact, you had seen this bond before Tuesday, hadn't you? You had been waiting six years from the time——— A. Not until the day I seen it that this case came up, did I ever see that bond.

Q. What do you mean, when you say "this case came up"? A. A week ago last Tuesday.

Q. You mean for trial? A. All of that time until Tuesday.

Q. Was that the first time you have seen it, since the 21st of May, 1921? A. Yes, sir; to my knowledge, it is.

Q. You did not know what it contained all of those six or seven years; is that right? A. I knew I had signed that bond.

Q. Is that right? A. I knew I had signed that bond, whatever was in it.

Q. You did not know what it contained for seven years; is that right? A. For five or six years I didn't remember what was in it.

Q. For seven years you didn't even know what was in this bond? A. Six or seven.

Mr.Totten—It isn't seven; it is only six.

The Court—He says so.

Mr. Van Blarcom—I don't know, May 21, 1920, to September, 1927, isn't that seven years?

The Court—Well, don't waste any time on that.

Q. You brought this suit against Geldziler without finding out what was in this bond, did you? A. Yes, because we understood that the bond—he had broken the contract, and under those conditions we had a right to bring suit.

Q. And you did not look at the bond? A. No, not to my knowledge.

Redirect Examination by Mr. Totten.

Q. Now, Mr. Post, when you refer to your lawyer, meaning myself, making mention of March 15th, by papers in my possession, did you mean the contract between Geldziler and Ritchie? A. No, I meant that——

Q. This complaint here? That is a complaint. A. Yes, that bond.

Q. This is not a bond; this is a complaint. A. All right, the complaint.

Q. What was the condition of the weather at the time you signed this bond? A. It was cold.

Q. Are you sure that it was in March that you signed this bond? A. Yes, sir; because I know I wore my overcoat when I went over there, and I would not be wearing that in May.

Q. Heavy winter overcoat? A. Yes, sir; and we went in that back room it was cold over there; it would not have to be winter, because he had no fire.

Q. Did you keep your overcoats on in there? A. We sure did.

Q. Did you sign this alleged bond with a fountain pen or with an ordinary steel pen? A. No, sir; Mr. Geldziler went and got a bottle of ink and an old fashioned pen; it was no fountain pen; he went out in the other part of the house and brought it in there.

Q. Whom did you say was present when this bond was signed?

The Court—Don't let's repeat all of that.

Mr. Totten—I will withdraw that; we have been all over that. I will withdraw that. That is all.

JOHN J. RITCHIE, Sr., sworn.

Direct Examination by Mr. Totten.

Q. Mr. Ritchie, you are the John J. Ritchie named as a defendant in this action? A. Yes, sir .

Q. Do you, as a member of the firm of John J. Ritchie & Sons, owe Mr. Post any money for materials——A. Yes.

Q. ———furnished on the Geldziler job? A. Yes.

Q. Do you owe Mr. Post the sum of $4,796.81? A. To the best of my knowledge, yes.

Q. You were the contractor named? A. Yes.

Q. And you bought materials from Post for this work? A. Yes.

Q. Do you know the total amount of your bill, Mr. Ritchie? A. No, I do not off-hand.

Q. I show you slips and ask you if you have ever seen these slips before.

The Court—As I understand it, Mr. Van Blarcom is not disputing that these materials were delivered there.

Mr. Van Blarcom—I am not admitting it, but I am not disputing it.

Mr. Totten—I only take his answer. If he will admit the amount of the charge, we can save a lot of time.

The Court—He is not disputing it, but he is not admitting it either.

Mr. Totten—Well, that places me in the position where perhaps I should prove each one of these items.

The Court—Haven't you proved it by Mr. Post? Mr. Post has testified that that material was all sold by him and went into the erection and delivered at the theatre building.

Mr. Totten—And then Mr. Ritchie has testified that the amount of the indebtedness on this job was $4,796.81, the balance.

The Court—Yes, to the best of his knowledge.

Mr. Totten—Then we can save time on that line, sir.

The Court—Yes.

Mr. Totten—As long as Your Honor is clear on that point. I did not want to leave any question there.

Q. Now, Mr. Ritchie, did you know Mr. Post in March of 1921? A. Yes, sir.

Q. Did you know him in March of 1920? A. Yes.

The Witness—Your Honor, if you will permit me?

The Court—No, I won't permit anything. You have got good counsel, and he will ask all that you need to say. If there is any-

thing that you forgot, you can recall it when you leave the stand, and he will bring you back.

The Witness—All right, sir.

The Court—I am not the lawyer in the case.

Q. Did you sign this contract in the case? Is that your signature? A. That is mine, the top one.

Q. Did you see this one signed, John J. Ritchie Jr., was that in your presence? A. Well, now, to be honest about that, I say, yes, I think we both signed together.

Q. And did Geldziler sign it at the same time? A. Yes.

Mr. Totten—I will offer the contract in evidence, but not this other paper which is attached.

The Court—You had better separate it. I do not know what that paper is that is attached.

Mr. Totten—The paper that is attached to it is the paper signed the 21st of May.

The Court—That is the bond?

Mr. Totten—That is the so-called bond. I am not going to offer that in evidence.

The Court—Well it will be offered before we get through, so do not tear them apart. I assume you will offer it, Mr. Van Blarcom.

Mr. Van Blarcom—The defendant will offer it.

Mr. Totten—Well, if that is the case, I am simply offering the contract.

The Court—Very well, let the contract be marked as your exhibit.

(Marked P-2, in evidence.)

Q. Now under that contract, Mr. Ritchie, did you do the work that is called for in the contract? A. What do you mean by doing the work?

Q. Well, did you build the building? A. I built the building according to what contract?

The Court—The contract just shown to you.

Q. The contract that I have just shown to you? A. I have built the building, yes.

The Court—You have answered it.

Q. Now, in what way did the construction of the building built by you differ from the contract as just offered in evidence and filed in the County Clerk's office? A. If you want to get at this thing in this way, I agreed with Geldziler, Your Honor, to put up a certain building according to a certain contract and certain plans and specifications.

Q. Now, right there, may I interrupt? Is that the contract? A. That is the originl contract.

Q. Yes, then what happened? Go on and tell us. A. The building contract was to be for the amount $49,000 and some odd dollars, according to a certain plans and specifications, payments to be made under certain conditions. The job was

started under the present contract here in the front of me, at the price, $49,000 and some odd dollars. The job had proceeded to a certain point when Mr. Geldziler decided to change the entire interior of the building. Now, is that what you want me to get at?

Q. Yes.

The Court—So you entered into a new contract, then, did you?

The Witness—Not in writing, Your Honor.

The Court—Well, by word of mouth?

The Witness—By word of mouth.

A. (Continuing) We took out the interior of the building and put something else in there. There was a new——

The Court—(Interrupting) At what additional or reduced cost?

The Witness—No mention of that, sir.

The Court—That is you amended the contract without mentioning the cost?

The Witness—Yes, sir; the contract was that we went on, Your Honor, took the material on the interior of the building, abandon that, and used another material entirely, that cost more money.

The Court—Did you tell him it was going to cost more money?

The Witness—No, to be honest about that, Your Honor, I do not think we ever mentioned money, neither one of us.

The Court—I see.

Q. Wasn't it agreed that Mr. Geldziler was to pay anything in addition for the necessary materials over what was called for in the contract?

Mr. Van Blarcom—I object to this agreement, if any, that changes this written agreement, unless it is in writing.

The Court—The question is also objectionable because it is leading.

Mr. Van Blarcom—It is rather leading, but I was thinking of the other feature first.

The Court—Yes.

Mr. Totten—Well, it is in line with Your Honor's questions, sir.

The Court—Yes, but you did not object to mine.

Mr. Totten—Why should I?

The Court—I do not know. Why shouldn't you?

Mr. Totten—Why should I? It is all water in my mill.

The Court—I will allow him to answer.

Mr. Van Blarcom—I ask an exception.

A. The answer is that there was no money mentioned.

Q. Now, how much were you paid for your materials supplied and work done on this theatre, if you know? A. How much was I paid?

Q. How much; yes. A. Why, as I understand my son, we have been paid about 49,000.00.

Q. Were you paid anything more than $49,000.00 for your work on that building? A. Not to the best of my knowledge.

The Court—What was the contract?
The Witness—$49,000.00, I think it was.
The Court—And forty dollars?
The Witness—And forty dollars.
The Court—You did not get the forty?
The Witness—Not to my knowledge, Your Honor.
The Court—All right.
The Witness—I do not think so; I am not positive about it.

Q. Was there any extra work done on this job? A. Was there any extra—

Q. Was there any extra work done on this job that was not called for in the contract, done on this job? A. Yes, sir; plenty of it.

Q. Were you paid for that? A. Not yet.

Q. Then, when I asked you how much was due —withdraw that. How much did you say that you have been paid for your work and material on this job?

The Court—$49,000.00.

A. That is the contract price.

Q. Is there any money still due you for work done by you on this job? A. To the best of my recollection, yes.

Q. Do you know how much that is? A. One bill has been presented for $4,000.00, I believe, and been acknowledged by the owner.

The Court—But not paid?
The Witness—But not paid, to my knowledge.

The Court—You would know, if it was paid, wouldn't you?

The Witness—Yes, sir.

Q. Was there any change in the specifications after you commenced the work? A. In these specifications?

Q. Yes, sir. A. Not in writing, there was not.

Q. Was there any change in the specifications other than mentioned in that contract, Mr. Ritchie? A. Not in writing, I said.

Q. Well, was there any, in writing or not in writing? A. Yes, the building, entire interior—

Mr. Van Blarcom—Wait a minute; the answer is yes.

Q. Did you supply other material than called for in these specifications? A. Yes, sir.

Q. Who ordered you to supply that material? A. I had to supply that—Mr. Geldziler.

Q. Why did you have to supply the materials? A. Why, to do the work the way he wanted it done.

Q. Do you know when this job was finished? A. Do I recollect when it was finished?

Q. Yes, sir. A. No, I do not.

Q. Was it finished, do you know, on March 2, 1921? A. I do not know.

Q. Do you know whether or not Post, as the material man, furnished any material on this job on March 1, 1921? A. March 1, 1921?

Q. 1921. A. As far as I know, all of the mason material that was furnished on that job was

furnished by Henry M. Post. About the dates, I am not familiar.

Q. I show you Exhibit D-1, of the complaint, to refresh your recollection, and ask you whether these materials under date of March 1, 1921, were furnished? A. That is seven years ago, and I cannot remember, but I cover that by making the statement that all materials furnished on that building was furnished by Post.

Q. Now, I ask you, do you know when Mr. Post served that stop notice? A. Yes, sir.

Q. Was the job finished when he served the stop notice? A. No.

Q. Can you say now how long after the service of the stop notice the job was finished? A Well, I cannot just recall that, how long after, but I could recall the stop notice, very very plainly.

Q. And the work was not finished then? A. No, sir; not to the best of my knowledge.

Q. You would know, wouldn't you? You were in charge of the job at that time? A. The work was not finished at the time the stop notice was served.

Q. Is the job all finished yet? A. No.

Q. Were you present when this—

(Discussion between Mr. Totten and the witness.)

Mr. Van Blarcom—I cannot hear you, Mr. Ritchie.

The Witness—I am asking my counsel why he does not confine himself to the contract a little while.

Mr. Totten—Will Your Honor permit me a moment?

(Discussion between counsel and witness continued.)

Q. You say that the specifications on this job were changed? A. It calls for a certain kind of material.

Q. Was the new material called for by Mr. Geldziler more expensive or less expensive? A. More expensive.

Mr. Van Blarcom—I object to this. It is going over the same grounds we had before. I have heard all of that once.

Mr. Totten—Why, we haven't had that.

The Court—Oh, yes, you had. You had that he paid him 49,000.00, but that was not all that he owed him, and that the job cost more than the contract provided, because it was more expensive changing the whole interior.

Mr. Totten—Yes.

The Court—That is as I understood his testimony.

The Witness—That is right, Your Honor.

Q. Now, were you present when Mr. Post signed a bond? A. Was I present when Mr. Post signed a bond?

Q. That is it; that is the question. A. To the best of my knowledge, I was.

Q. Did you see the paper that he signed? A. Yes, I saw the paper that he signed.

Q. I ask you if this paper I am now showing you, in the condition that it now is, is the paper that Post signed, with the changes contained on

the first page, second page, and the third page, of that document? A. You are asking me if that is the paper that Post signed—

The Court—If it was in the same condition when it was signed as it is in now.

A. Well, Your Honor, those things that are all in front of me, they are seven years old. To the best of my knowledge, I do not see any change in this paper.

The Court—Were those erasures and interlineations there when you signed it?

The Witness—If you will allow me just a minute, Your Honor.

The Court—All right.

The Witness—(Examining paper) I do not see any difference in the paper today and the day that they were signed.

Q. I asked you when Mr. Post signed, not when you signed. You say you were present when Mr. Post signed this paper? A. Yes.

Q. Was John J. Ritchie, Sr., written in, and Jacob Connor crossed out, when Post signed?

Mr. Van Blarcom—I object to that.

A. There was something here—

Mr. Totten—Now, if Your Honor please, this is a very close point, and this particular witness, at this point, is not what would be termed a friendly witness. I do not want

to go into it, but I am forced to by the defense, as it now stands.

The Court—I will allow him to answer the question.

Mr. Totten—He is trying to recollect. It is not the case of a friendly witness. It is simply as he recollected.

The Court—He is your witness.

Q. Was John J. Ritchie written in there and Jacob Connor crossed out, when you signed this —this bond? A. Yes, Connor's name was erased and my name was written in.

Q. At the time that Post signed this bond? A. Oh, I do not remember nothing about that; I do not remember that.

Q. You do not know whether it was or it was not? A. No, I do not.

Q. Do you know whether the change from the 15th day of March to the 21st day of May was in there when Post signed? A. No, I do not; I do not remember that.

Q. Do you remember when Post signed this bond? A. Well, the only incident I can remember about Post signing this bond, is that we were together with Geldziler, myself and Post in his saloon, we were in the back of the saloon, in Mr. Geldziler's back room, and he signed the bond; that is what I remember, as far as—

Q. Well, when was that? A. I do not know.

Q. Was it in March or May? A. It was cold weather; that is all I can remember.

Q. Well, would you say it was March 15th? A. I would not say what month it was, because I do

not remember the month; I know the theatre was going on, the building was going on.

Q. Was James J. Murner there when you saw Post sign that paper?

The Witness—Now, Your Honor, that is something that I cannot remember.

The Court—All right, that is your answer.

10 The Witness—That is something that I cannot remember. James J. Murner was there when I signed the bond.

Q. Did you sign the bond when Post signed the bond? A. No.

Q. How many days later did you sign the bond? A. Oh, I think I signed the bond first. Oh, no. I am talking about the contract, and you are talking about the bond.

20 Q. I am talking about the bond now, Mr. Ritchie.

The Court—Was Mr. Murner there when you signed the bond?

The Witness—Was Mr. Murner there when I signed the bond?

Mr. Totten—Was who—

The Witness—Yes.

The Court—Was Mr. Murner there when you say Mr. Post signed the bond?

30 The Witness—Not to my recollection.

The Court—Did Mr. Post sign it the time

—

The Witness—(Interrupting) No, sir.

The Court—Wait a minute. Did Mr. Post

sign it at the time that you speak of going to the back room of Mr. Geldziler_s saloon?

The Witness—To the best of my recollection, yes.

The Court—You saw him sign it?

The Witness—I saw him sign that bond.

The Court—Mr. Murner was not there?

The Witness—If Mr. Murner was not there when Mr. Post signed the bond?

The Court—Was he?

The Witness—Mr. Murner was not in Geldziler's saloon with Mr. Post and I and Geldziler.

The Court—Well, it was signed there, wasn't it?

The Witness—That is where Post signed it.

The Court—Then, if Mr. Murner was not there, he was not there, was he?

The Witness—Now, Your Honor, I am just a little bit mixed up on that thing.

The Witness—I want to be honest about this thing.

The Court—I want you to be.

Q. You are certain that when the bond was to the back room of Mr. Geldziler's saloon?
A. I am quite sure about that.

Q. There is no doubt about that in your mind, is there? A. That Post signed the bond in Geldziler's side room, not in the saloon.

Q. In the side room. Do you recollect whether Post had his overcoat on, or not? A. Yes, it was cold enough for an overcoat.

Q. Did you have an overcoat on? A. No, I had a pair of overalls on.

Q. Whom did you say was present when Post signed the bond? A. To the best of my recollection, Geldziler, Ritchie and Post.

Q. Now, do you remember taking an affidavit when you signed the bond? A. Yes.

Q. Do you know whether you signed this bond after Post or before it? A. Before, to the best of my recollection.

Q. Sure about that? A. Yes, as near as I can remember, I signed that bond—before or after—before or after—I cannot say.

Q. You do not know? A. No.

Q. Is that your signature, Mr. Ritchie? A. Yes, that is my signature.

Q. When you signed this affidavit, was it cold weather? A. Was it cold weather?

Q. Yes, sir. A. Yes.

Q. Would you say that it was the 21st of May or the 15th of March? A. I am inclined to think it was March, because that I signed this paper in my office in front of the building.

Q. Then was this change made in it on the 15th day of March to the 21st day of May? A. I do not know.

Q. (Continuing) When you signed it? A. I do not know.

Q. But you think it was March that you signed it? A. Yes.

Q. Now, at the time that you signed this affidavit, did you swear that you were worth $25,000.00 above all of your debts, before James J. Murner, a Notary Public of New Jersey? A. I think I did, or it would not be there.

Q. I will ask you the question again. Did you swear that you were worth $25,000.00 over and above all your debts before James J. Murner on the 21st day of May, 1920? A. My answer to that is, yes.

Q. Now, I want to get you correct on this. Then you were in error when you said the 15th of March was the day you signed it? A. Now, get me right. I am not saying on what date it was. You asked me if I took an affidavit that I was worth $25,000.00.

Q. Yes. A. No, the date, I do not know.

Q. You do not know when it was? A. No.

Q. Did you take that affidavit before Mr. Murner? A. Yes.

Q. Now, did Mr. Post take an affidavit before Mr. Murner that he was worth any money? A. I am just trying to say that I do not remember Mr. Murner being there when Mr. Post took the affidavit or when he signed the bond.

Mr. Totten—That is all.

Cross-examination by Mr. Van Blarcom:

Q. Who had this bond, getting the signatures on it? A. Huh?

Q. Who had tsih bond, getting the signatures on it? A. When I saw it first?

Q. No, who took it around and got signatures on it? A. Why, Mr. Murner had it when I saw it.

Q. Did he have it all of the time? A. All of the time, as far as I know, except the time that is now talked about, of Post signing the bond.

Q. Who had it there? A. Who had it there?

Q. Yes. A. When Post signed the bond?

Q. Yes. A. God, I cannot remember, to be honest about it.

Q. Who gave it to Post to sign? A. The only ones, as I said before, Mr. Van Blarcom, I remember, Mr. Geldziler and Post.

Q. I do not care who was there. Who handed it to Post and asked him to sign it?

The Witness—Your Honor, I cannot answer that question; I do not remember.

Q. How did the bond get there? A. I cannot answer that question either.

The Court—You did not take it, did you?

The Witness—No.

The Court—Mr. Post did not take it as far as you know.

The Witness—No.

The Court—Then Mr. Geldziler must have, he being the only other man there.

Q. Did Geldziler have that bond? A. I do not remember who had the bond.

Q. Murner had it, didn't he? A. When I signed it, yes.

The Court—No, he is talking about the time in the side room.

The Witness—I never remember Murner being in the side room.

Q. Don't you remember when you were in the side room you were told that the bond was not signed at all, but it was signed afterwards in the

shanty? Don't you remember that? A. No, I signed that bond alone in the shanty.

Q. Who was with you? A. I guess probably my son might have been with me and Murner.

Q. Post was there? A. No, not to my knowledge.

Q. Didn't Post come there and sign that bond at the same time that you signed it? A. Not to my knowledge, Mr. Van Blarcom.

Q. Didn't he sign it then before Murner? A. I am a little bit mixed up about the signing. I know how I signed it, and I recollect all about Murner having this paper in his possession when I signed it.

Q. Who gave that bond to you in the first place? A. Who gave it to me?

Q. Yes. A. James J. Murner—nobody gave it to me; they brought it to me to sign.

Q. Who brought it? A. James J. Murner.

Q. You knew about the bond before; didn't you? A. What do you mean, before?

Q. You knew you were going to give a bond on this job, didn't you? A. Yes, he knew who the two bondsmen were.

Q. Who drew the bond up? A. I understand that James J. Murner drew it up, but I always thought that you drew it up. It is two weeks ago, or ten days ago, that I found out that James J. Murner drew it up.

Q. Didn't Wentworth draw it up? A. I don't know; I understand James J. Murner did.

Q. Wentworth was the architect? A. Yes.

Q. He drew the plans and specifications? A. No, sir.

Q. The contract was drawn by him? A. I believe it was.

Q. Did you sign the contract the same day you signed the bond? A. Well, if I did, I signed them both in Wentworth's office then.

Q. Didn't you do that? A. I signed the contract, yes, in Wentworth's office.

Q. Didn't you sign the bond in Wentworth's office? A. No, sir; to my best recollection, I signed the bond in my own office, at the front of the building.

Q. Wentworth had a man at that building all of the time, didn't he? A. Pretty much.

Q. And he was superintending the work? A. Yes.

Q. He made the estimate of the material and the work that went in it? A. Yes.

Q. And he made an estimate on the new cost of the changed work on the interior of the building, didn't he? A. I guess so.

Q. Made out certificates? A. When?

Q. Made our certificates as the work went on for you to get your money? A. Who did?

Q. Wentworth? A. I generally got my money without a certificate.

Q. Then you got a certificate? A. After the money was paid.

Q. How did you go and get the money first? A. I went to Mr. Geldziler and asked for it.

Q. What did you do that for? A. To make my payments.

Q. To make your payments for what? A. To make my payment on the payroll.

Q. Why didn't you wait until the certificate was issued? A. Why, it did not seem to be necessary; I went to Mr. Geldziler and told him I wanted so much money for my payroll, and he did it.

Mr. Totten—Of course, again I say that that is not proper cross-examination, but I can say, if Mr. Van Blarcom is making this witness his witness, I do not object what he says.

The Court—I will allow it.

Mr. Van Blarcom—I do not understand that at all.

The Court—I think it is proper cross-examination.

Mr. Totten—Your Honor thinks it is proper cross-examination?

The Court—Certainly. You went into the whole building operation yourself, and he is cross-examining on the same feature.

Mr. Totten—He is cross-examining on the method of payment.

The Court—You brought it out, the fact that he was paid $49,000.00. That opens the door to tell him that.

Mr. Totten—As to how the payments were made?

The Court—Yes.

Mr. Totten—I will withdraw my objection.

Q. After you got the money from time to time from Geldziler, and after you got your certificate? A. Afterwards, yes.

Q. Why didn't you wait until you got your certificate before you asked Geldziler for the money?

Mr. Totten—I object to that as immaterial.

The Court—He has already answered it, that he needed the money to pay his men.

The Witness—That is right.
Mr. Totten—I did not hear that answer.
The Witness—I needed the money.

Q. That is the reason why you asked Geldziler for the money and Geldziler gave you the money? A. Yes.

Q. Then afterwards Wentworth issued the certificate? A. Yes.

Q. Now, you did not have so much to come on the 21st of February, 1921, under these certificates, did you? A. Why, that I cannot recall, Mr. Van Blarcom. February, 1921?

Q. Yes. A. No, there would not be a whole lot to come then.

Q. You had all of your money then? A. February, 1921?

Q. Yes. A. Yes, as near as I can recollect, we had all of that money by that time.

Q. Besides that, there was some reduction to be made because the staging was left out? A. No, no reduction to be made.

Q. Do you know how much was put on for that extra work? A. How much was put on?

Q. Yes. A. For what extra work?

Q. What you are talking about. A. I just said that I presented a bill for $4,000, if I recollect right.

Q. But that $4,000.00 was added to the $49,000.00 under the contract? A. No, we sent that bill in as an extra bill for extra work.

Q. And it was added in under the contract, added to the contract price, wasn't it? A. Added to it?

Q. Yes. A. I guess, it would be added to it.

Q. You were issued certificates on that extra work? A. No.

Q. You are sure about that? A. Yes.

Q. Sure these certificates still call for that $4,000? A. Well, they may cal for it, but it was not paid on them.

Q. When you got your certificates on the 1st of February, 1921, you had more than that to come under the contract, and you had a part payment on that $4,000.00 beside, didn't you? A. In February, 1921?

Q. Yes; didn't you? A. I cannot recall, February, 1921, as far as the payments was concerned.

Q. That $4,000.00 was added to the amount of your contract price, away back in December? A. It was?

Q. Wasnt it? A. Not to my knowledge.

Q. Every certificate that was issued to you after that showed the addition of the $4,000.00? A. Showed the addition of $4,000.00?

Q. To your contract price, didn't it? A. There is no such a thing, Mr. Van Blarcom, as a $4,000.00 contract.

Q. Extra work? Extra work? A. There is a bill rendered for $4,000.00 as part payment of extra work.

Q. That was added to your contract price on every certificate you received from the architect after December 3, 1920—A. No.

Q. Wasn't it? A. No, no.

Q. You got certificates from the architect? A. I haven't got them; someone else has got them.

Q. I mean, you did get them? A. From time to time I got certificates, yes; nothing mentioned about extra work.

Q. You received some of them yourself, didn't you? A. I would like to see them first, then I

will answer your question, if it is in order, Your Honor.

Q. They were received by either you or your son? A. Well, if they were receipted by either one, that is good enough for me.

Q. Here are the certificates themselves. I do not like to take up the time, on the record. I show you this certificate under date of December 3, 1920, for the 19th payment. A. 19th payment?

Q. Look at that and see the calculation on the left hand side—lower left hand side of this certificate. A. Yes, just show me anything extra there, will you, Fred? I cannot see it.

Q. The amount of contract, $49,031.00; that is right, isn't it? A. I think it was $49,031.

Q. Extra work,————, $4,000.00. A. Yes.

Q. Is that right? A. Yes.

Q. Total, $53,031.00; that is there, isn't it? A. Yes, that is there.

Q. Previous payment, $30,568.72—A. That is right.

Q. Balance, $22,462.28? A. Yes.

Q. That is there, isn't it? A. Yes, sir.

Q. That is receipted, isn't it? A. Yes.

Q. By whom? A. By John, Jr.

Q. That is his signature? A. Yes.

Q. That is all right? A. Yes.

Q. That is the nineteenth payment. I show you one for the twentieth payment, December 11, 1920; that is receipted by your son? A. Yes.

Q. Shows the same figures approximately? A. Yes.

Q. I show you the twenty-third certificate, December 18, 1920, receipted by your son? A. Yes.

Q. Twenty-fourth certificate, December 18, 1920, receipted by your son? A. Yes, that there is all his.

Q. Twenty--fifth payment, December 20, 1920; was that receipted by your son? A. Yes.

Q. Same sort of calculation down in the corner on all of these, isn't there? A. We are not disputing any of them.

Q. Twenty-sixth payment, of December 22, 1920 —A. Yes.

Q.—receipted by your son? A. Yes.

Q. Twenty-seventh payment—A. Yes, them is all his receipts, O. K.

Q. Twenty-eighth payment; this is the twenty-ninth payment, January 6th, that was receipted by you, wasn't it? A. Yes, that is mine.

Q. In addition to that, $4,000.00, you receipted for the extra work, $4076.00? A. Yes, it is added there, all right.

Q. You receipted that? You signed that? A. Yes, I signed it; I know I signed it; that is my receipt.

Q. I show you the thirtieth payment, that is receipted by your son? A. Yes. Thirtieth payment?

Q. And the 31st, receipted by your son? A. Yes.

Q. And the thirty-second, receipted by your son? A. Yes.

Q. And the thirty-third is receipted by your son, is it? A. Yes.

Q. And the thirty-fourth? A. Yes, we are not disputing any of these, Mr. VanBlarcom.

Q. I am just reading off these numbers. That thirty-fifth is receipted by your son? A. Yes—let's see that one; that is right.

Q. And the thirty-sixth, receipted by your son? A. Yes.

Q. Thirty-seventh, receipted by your son? A. They all look like his signature.

Q. Thirty-eighth, receipted by your son? A. Yes.

Q. Thirty-ninth, was receipted by your son? A. Yes.

Q. And the fortieth? A. The last of all, is that?

Mr. Totten—Your Honor please, we do not want to take the time to go over receipts receipted by the son, with the son in court here.

Mr. Van Blarcom—We are through now.

Mr. Totten—Really?

Mr. Van Blarcom—On these.

Mr. Totten—I did not know how many more you had; you have got quite a handful there.

Q. Was that receipted by your son? A. Yes.

Q. And this is dated February 1, 1921? A. February 1, 1921?

Q. Isn't it? A. Yes.

Q. And calls for the contract price plus $4,000.00, plus $76.00? A. Yes.

Q. And payments that you had gotten before this one was $49,523.39? That says that there? A. That is what it says.

Q. And the balance is $3,583.61? A. That is what it says.

Q. Then you took off this $148.00 that this certificate calls for; is that so? A. As far as I can see it.

Mr. Van Blarcom—I offer these in a bulk.

The Court—All right.

Mr. Totten—I object to them now, at this stage.

The Court—On what grounds?

Mr. Totten—On the grounds that practically all of these certificates issued there were, in the first place, made out by a man named Wentworth, receipted by someone else other than this witness, and it is not the proper procedure of proving them, who did not receipt for them at all.

The Court—He has identified the signature of his son. They may be marked for identification.

(Marked D-2, for Identification.)

Q. The son that signed these, that receipted these, is one of your partners, isn't he? A. Yes, sir.

Q. You did not pay Post all of his money that he had coming, did you? A. No.

Q. And you did not pay Frederici? A. No.

Q. And you did not pay the Paterson Bridge Company? A. No.

Mr. Totten—Now, if your Honor please, as to any of these others' debts, as far as they are concerned, I cannot see the relevancy in this action.

The Court—If there is no relevancy, it won't hurt; I do not think it does much harm.

Mr. Totten—Well, then, I will withdraw my objection, as long as there is no jury here.

The Court—It won't influence me.

Mr. Totten—That is all I am interested in.

Q. You were served with a notice by Mr. Geldziler that Frederici had served a stop notice on February 11th? A. Yes, sir.

Q. You remember that? A. Yes, sir.

Q. For $3,067.00? A. Yes, sir; I do not remember the amount, but I remember the stop notice.

Q. It was about that? A. I think so.

Q. What did you do about that claim? A. Not a thing; I just left it up to Mr. Geldziler.

Q. You were served by Mr. Geldziler with a notice that the Paterson Bridge Company had served a stop notice for $3,272.00 on February 23rd. A. Yes, sir; and I just left that to Mr. Geldziler.

Q. You were served with a notice that Mr. Geldziler had been served with a stop notice for this Post bill of $4700.00? A. Yes.

Q. Did Mr. Gelziler serve you with notice of the Eastern Marble Mosaic Company—A. Yes, sir.

Q. How much was that? A. Something around—I forget the amount of it.

Q. $1,408.00? A. Something like.

Q. Something like that? A. Yes, sir.

Q. Did he serve you with a notice of a stop notice of Benjamin Bolleman? A. Bolleman?

Q. Yes, of $112.00? A. What did he do?

Q. Well, I do not know, if you do not. A. I do not know, not that name.

Q. Well, you were served with a notice by Geldziler, weren't you? A. I don't remember that name.

Q. Didn't Barnes bring a notice up to you on June 4th about this Bolleman? A. Bolleman; I would like to get the name right.

Q. Painting work? A. Painting?

Q. Painting? A. I don't remember that stop notice; I don't remember that stop notice.

Q. I show you that stop notice. You never saw that before? A. No.

Q. But did you see this or a notice like that? A. I might have been served, Mr. Van Blarcom; I might be mixed up with the name.

Q. You were served with a notice by Mr. Geldziler of a stop notice by the Bauer Contsruction Company of $339.00? A. Electrician?

Q. Yes. A. I believe so.

Q. This is wiring—

Mr. Totten—This is all over my objection, Your Honor please, as irrelevant.

The Court—I understand it.

Q. Did you get a notice from Mr. Geldziler about a stop notice of James T. Reimer? A. Yes, sir.

Q. For $1,333.00? A. Yes, sir.

Q. What did you do about that? A. Nothing.

Q. Did you get a notice from Mr. Geldziler about a stop notice of Counselman Brothers of $934.48? A. Yes, sir.

Q. What did you do about that? A. Referred it to Mr. Geldziler.

Q. Did you know that Frederici at the end sued Mr. Geldziler on his stop notice? A. Yes, sir.

Q. Did you know that Dawson had sued Geldziler on his stop notice? A. Who?

Q. Dawson? A. The painter? I do not know that.

Q. And the Bauer Construction Company? A. I believe I did know that he sued him, yes.

Q. Did you know the Paterson Bridge Company sued Mr. Geldziler on their stop notice? A. Yes, I knew it very well.

Q. And you also know that this suit is being tried? A. Yes.

Q. What did you do about any of the suits? A. Why, I do not know that I did anything about any of them, that I can recollect.

Q. Go back now to the signing of this bond. How many times did you see Mr. Post sign it? A. Once, to my memory.

Q. In one place? A. To my memory. Wait a minute. I think it was signed in the wrong place first, and that was stricken out and signed over again.

Q. Who struck it out?

Mr. Totten—Now, just a minute. Now, I object to that, sir. Mr. Murner sits here, and says, "I did," indicates to the witness.

The Court—Is that true?

Mr. Totten—I heard it, sitting right here.

The Court—Did you hear anything from Mr. Murner?

The Witness—No, I am not looking, Your Honor, in the front here; I am trying to answer the lawyer.

Mr. Totten—He said it so I heard it.

The Court—The witness did not and I did not, Mr. Totten. You may answer the question.

The Witness—Your Honor, I am trying to answer these questions to the best of my ability.

The Court—Who crossed that out?

A. I cannot recall who crossed that out.

The Court—All right.

Q. Was it crossed out there in the saloon? A. That I cannot recall.

The Court—You only saw him in the saloon?

The Witness—That is the only place. Oh, I saw him several times, Your Honor, but on this bond question, my recollection is just what I said about it.

The Court—It was crossed out.

The Witness—It was crossed out, yes, sir, but by whom, I do not know.

The Court—The only time you saw the bond was at the saloon?

The Witness—No, I saw that when I signed it; when I signed the bond, I saw it.

The Court—All right, so that it may have been crossed out at that time?

The Witness—It may have been, yes.

The Court—All right.

Q. Crossed out when you signed it. Was it crossed out when you three were in the— A. Now, Mr. VanBlarcom, I signed this bond personally myself without anybody but Mr. Murner, to my knowledge, with me.

Q. But when Post signed it— A. I do not remember Mr. Murner being there.

Q. Do you remember Post scratching it out at the same time you signed it? A. No, I do not.

Q. Or at the time when you were at Geldziler's place? A. I do not.

Q. Did Post sign his name and scratch it out and then sign it over again? A. That I do not remember.

Q. Do you remember that? A. No.

The Court—This was in the back room of the saloon?

The Witness—To the best of my knowledge, that is when.

The Court—Was there any shed at the saloon?

The Witness—No, we had the shed at the front of the building.

The Court—I understand that, but I think Mr. Post said he signed it, not in the back room but in the shed.

The Witness—No, he did not say that.

The Court—I thought he meant a shed at the saloon.

The Witness—No.

Mr. Totten—I think Your Honor is in error, as far as a shed at the saloon is concerned.

The Court—I thought that is what Mr. Post said, that he signed it in the shed.

Mr. Totten—No, he said the—

The Witness—(Interrupting) Side room.

The Court—Mr. Post said he wasn't in the saloon, but he signed it in the shed, and it was cold, and he had his overcoat on. I took it to mean it was a shed at the saloon, because it entered my mind to ask whether there was a shed at the saloon. You will find that in the testimony, but don't let's waste any time about that.

Q. What corner was Geldziler's—what do you call it?—saloon? A. Corner of Madison avenue and Clay street.

Q. Which corner? A. Well, it would be the upper corner; it would be the northwest corner, wouldn't it?

Q. Northwest, toward Main street? A. Yes.

Q. And toward Market street? A. Toward us.

Q. Toward Market? A. No, the other way; Geldziler's corner is on the same corner as his theatre is on.

Q. Toward the southwest? A. Yes, toward the southwest.

Q. What kind of an inside did this saloon have? A. Sam's saloon?

Q. Yes. A. Why, it had a bar, nice big bar—

Q. I do not mean that. Did it have upon the sides a bottle or two— A. I do not care to talk about bottles now, unless I have them.

Q. Well, don't; you do not have to. Was Sam's saloon open then? A. Sam's saloon was open then; there was one room, a side room, and the other side was an old bowling room.

Q. Bowling room; was there a side room there to Sam's place? A. Yes, certainly was, as far as I can remember.

Q. Furnished? A. Furnished with a few chairs and table for people to sit down.

Q. How big was it? A. About 20x20.

Q. Great big hall room? A. Yes, a great big room.

Q. And the other side, you say, was a bowling room? A. To the right.

Q. Yes; that is all.

Mr. Totten—Just one question more.

Redirect Examination by Mr. Totten:

Q. Did you know that Geldziler paid you without certificates? A. Oh, yes, yes; yes, I have admitted that.

Q. You yourself do not know how much Mr.

Geldziler paid you without certificates, do you? A. To answer that question quick, no. There was no question of certificates of myself at any time; just when I went to Mr. Geldziler for money, that was the least thing to be thought of, about; the certificate came forward after.

Q. Do you know how many times you went to him for payments without certificates? A. Oh, I have no idea of how many times; quite often.

Q. Quite often? A. Yes, pretty nearly every week.

Q. To meet your payroll, I suppose? A. Yes, that is what we had to do, so as to meet the payroll.

Q. Then when these payments were made or advanced, was there any record kept by you as to how much was paid? A. The record was kept by my son, who was the bookkeeper.

Q. I see; that is all.

Recross Examination by Mr. Van Blarcom:

Q. You did not get any money after this fortieth payment on February 1st from Geldziler? A. Not that I remember, Mr. Van Blarcom.

Q. And you did not do any work up there after that? A. February 1, 1921?

Q. Yes. A. Your Honor, I cannot answer that question, too long ago.

The Court—You know that you are a defendant in this suit, that you are being sued?

The Witness—Yes, Your Honor.

The Court—You have no counsel here?

The Witness—No.

The Court—If there is a judgment against you, you may have to pay it.

The Witness—I understand that. I wanted to come here and confess judgment.

The Court—All right.

JOHN J. RITCHIE, JR., sworn.

Direct Examination by Mr. Totten:

Q. Mr. Ritchie, you are the John J. Ritchie, Jr., named in the complaint as one of the defendants? A. Yes, sir.

Q. You recall building a building for Mr. Geldziler under a contract on Clay street in Paterson, you and your father? A. Yes, sir.

Q. What part of the contract and the work in connection with the building did you have charge of, Mr. Ritchie? A. Bookkeeping.

Q. The bookkeeping. Did you keep the books as to payments, records as to payments made under the contract, by Geldziler to you? A. Yes, sir.

Q. Have you got the book here? A. I have a copy of the record of the book.

Q. Where is the book? A. I have not been able to locate them. We have made two or three moves since the job was completed.

Q. I show you a writing and ask you if that is in your handwriting? A. It is.

Q. And the record on that sheet of paper was taken from—was it taken from any books of entry? A. Our books of entry.

Q. From your books of entry. In whose handwriting was the book of entry? A. My own.

Q. Did you copy that statement on that sheet

of paper, from the original books of entry, in your hand writing? A. I did.

Q. Can you tell the court when or about when? A. About a month or so after the job was supposed to be completed.

Q. Well, referring to the years, could you tell us what year? A. 1921.

Q. 1921.

Mr. Totten—Now, I am going to offer this in evidence, sir. (Exhibiting to counsel.)

Mr. Van Blarcom—I object to that. That is not authentic, irrelevant, immaterial, not taken—

The Court—The books from which this calculation was made are lost, you say?

The Witness—Yes, sir.

The Court—In view of the objection, I do not see how he can use that, Mr. Totten.

Mr. Totten—Why, if your Honor please, this paper was made out by the witness, who has testified that he kept the books originally.

The Court—I understand that he said he did, but nevertheless it does not make it competent, just because he said it was a copy that he has made from the original.

Mr. Totten—Well, the original instrument is lost, sir.

The Court—There is no way on which Mr. VanBlarcom can cross-examine, and there is no way that the court can cross-examine on these payments. What does that show?

The Witness—Just the credits.

The Court—Is there any dispute about them anywhere?

Mr. Van Blarcom—I do not know, but I would not put them in that way; I would not let him make a copy of what he says is the book.

The Court—I do not see how he can use that.

Mr. Totten—Maybe the book is not right.

The Court—There is no way of checking that up.

The Witness—Check it with the certificates.

The Court—Checking it with the certificates, all right.

Mr. Van Blarcom—If they checked with the certificates, he would not have it here.

The Court—He says it does.

The Witness—It is a list of payments that we received from Mr. Geldziler on that job.

Mr. Van Blarcom—Does every one of these figures check with the figures shown on the certificates?

The Witness—They should.

Mr. Van Blarcom—Do they?

The Witness—Well, I do not know; they should.

The Court—Is there any objection to his having them checked with the certificates, each slip, during the recess?

Mr. Van Blarcom—I will have my young man go over them, but I want to have an opportunity of doing that, before I can admit anything like this.

The Court—If that is the only purpose of it, I think you can get together on that.

Mr. Totten—This paper is either in evi-

dence. If it is not in evidence, I do not want Mr. Van Blarcom to use it to help his case.

The Court—I am trying to help you, not Mr. Van Blarcom. You are offering something that is patently not evidence and is not admissible. I am trying to have you get in what you want by consent, after according Mr. Van Blarcom opportunity to check it. I do not get the materiality of the amounts that are paid anyway. The question in this case is whether Mr. Post is entitled to recover $4,796.00 against Mr. Geldziler, and this witness. Now, is this witness trying to show by these receipts, as a party defendant to this suit, that he does not owe that much?

Mr. Totten—No, sir.

The Court—Or, is he trying to show that Mr. Post is not entitled to it? What has Mr. Post to do, in this case, with the amount of moneys that have been paid by Mr. Geldziler to Mr. Ritchie?

Mr. Totten—This case is predicated upon the thought and the idea that Mr. Geldziler has paid money to the general contractor without architects' certificates, and if we are able to show that, sir, under the decisions in this state, we are entitled to recover.

The Court—I guess there is no dispute about that. There is no dispute that he was paid. The testimony up to this point is that they were paid in advance of architects' certificates.

Mr. Totten—That is all the purpose that this has, sir; that is all.

The Court—Is there any doubt about that?

Mr. Van Blarcom—I do not think there is any doubt about that.

The Court—Then there is no purpose in that at all.

Mr. Totten—That was my whole purpose.

The Court—I do not understand that there is any dispute about that, that Mr. Ritchie is correct; that when he wanted money he went to Mr. Geldziler and got it, anticipating the architects' certificates, whether that is either true or false. Now, if the only purpose of putting this in is to corroborate that, to show that that was true, I do not see that you have any difficulty with it. As to the legal effect of the payments in that manner, that is another story.

Mr. Totten—I am prepared to argue that.

The Court—Oh, let's get the facts, and we will argue after the facts are in.

Mr. Totten—I am just as willing as the court is to get this over.

The Court—I have no special desire to get it over; when I am doing this, I am doing nothing else.

Q. Now, Mr. Ritchie, you knew of the contract marked Exhibit P-1, did you not? You knew there was a contract in this case? A. I did.

Q. That is your signature, isn't it? A. It is.

Q. Do you know the terms of the contract, as to the amount of money to be paid? A. I do.

The Court—Talk a little louder, Mr. Ritchie; I cannot hear you.

A. I do.

Q. Now, do you know whether, under the terms of the contract, the plans and specifications annexed, were a part of the contract? A. I do.

Q. Isn't that a fact? A. I do.

Q. Do you know whether or not the building—the theatre was built according to the plans and specifications which is a part of that contract? A. It was not.

Q. In what way was it not built according to the plans and specifications? A. Numerous changes made by Mr. Geldziler on the interior of the building.

Q. Do you know whether or not Mr. Post was advised that the plans and specifications and contract was changed? A. To my knowledge, he was never advised.

Q. How long have you been in the building business, Mr. Ritchie? Or, how long had you been a builder just prior to March, 1920 to March, 1921? A. About ten years.

Q. During the course of that period, have you built—did you build any other theatres?

Mr. Van Blarcom—I object to that.

Mr. Totten—I am just qualifying him as an expert.

A. We did.

Q. How many? A. One.

Q. Did you do any other work, mason and material work, during that period of ten years? A. Plenty.

Q. How many buildings did you build? A. About eighteen or twenty.

Q. Now, are you able to say whether or not,

from your experience, the theatre built for Mr. Geldziler could be built for the contract price with the changes in the plans and specifications as made by Mr. Geldziler?

Mr. Van Blarcom—I object to that.

The Court—(After argument) No necessity of going into that.

Q. Could the building be built for the contract price according to the original plans and specifications?

Mr. Van Blarcom—I object to that.

The Court—Objection sustained; it makes no difference. He has made a contract to build it acocrding to certain plans and specifications for a certain price. We are not concerned with whether the builder was able to make ten thousand dollars profit or lost forty thousand on it; that is not the subject in this suit.

Q. Do you know the date that this contract was signed? A. I do not remember the date.

Q. Were you present when your father signed the alleged bond in this case? A. Yes.

Q. Do you know when it was he signed it? A. It was in the early part of 1921—1920.

The Court—Early part; what do you mean by that?

The Witness—Well, about March or April.

The Court—Or May?

The Witness—Well, I would not say that; I know it was cool weather.

The Court—Cool weather. It is cool in May sometimes, isn't it?

The Witness—I believe it is.

The Court—Keep your furnace fires going sometimes, don't you?

The Witness—Yes.

The Court—All right.

Q. Did you have your fire going until the 21st of May this last year? A. I don't remember.

Q. When you say "cool weather," did you have in mind May as cool weather? A. I would not say so.

Q. Would you say that this paper was signed by you in May of 1921? A. I would not say yes or no.

Q. Would you say it was signed before May, 1921? A. It might have been.

Q. Well, now, can you say whether it was or not? A. No.

Q. Did you sign this after your father did, or at the same time, or before your father did? A. He and I signed it together.

Q. Did you sign at the same time Post signed? A. No, it was signed after, already signed.

Q. Signed by whom when you signed? A. Post.

Q. Post signed before you did? A. It was already signed by him when they gave it to me to sign.

Q. Were you present when Post signed? A. No.

Q. Whom else was present when you signed besides your father? A. Mr. Murner.

Q. Was there any changes made in the contract or the affidavit of justification attached to it? A. I did not see the affidavit.

Q. You did not see it? Did you see your father sign the affidavit of justification? A. I saw him sign ahead of me, on the sheet here, where we both signed together.

Q. Yes; then did you see him sign this justification— A. No.

Q. —on Page 3? A. No.

Q. Did you see Mr. Murner change the figure "10" to "25"? A. I did not see any of that.

Q. Do you know when this building was completed? A. Around the end of February, 1921.

Q. Do you know when the last material was furnished by the plaintiff, Post, for this contract job? A. Oh, well, the end of February or the beginning of March.

Q. Of what year? A. 1921.

Q. It is shown in this Exhibit B of the plaintiff's complaint that material was delivered on March 1—five bags of cement—on March 1st, five bags of majestic, March 1st, 1921, two bags of red color. Are you able to say whether that was necessary for the contract job? A. It was.

Q. To complete the contract? A. To finish up in the lavatories.

The Court—Was that the last goods delivered?

Mr. Totten—That was the last goods delivered.

The Court—All right.

Q. Then, what would you say the contract was completed, Mr. Ritchie? A. It is not completed yet.

Q. It is not completed yet? A. No.

The Court—You said awhile ago it was completed in February of 1921.

The Witness—Well, that was when they decided that the building was finished, but not according to the terms and conditions of the contract.

Q. What was that last answer?

The Court—That was when they decided it was finished, but not as it was according to the terms and conditions of the contract.

Q. What was the agreement at that time? Just tell us what the agreement was at that time, in February, when they decided—

Mr. Van Blarcom—I object to that.

The Court—What is the purpose of it?

Mr. Totten—I think it was at that time that Mr. Ritchie, Jr., and Mr. Ritchie, Sr., went ahead to finish this work for Geldziler outside of the contract, sir.

Mr. Van Blarcom—I object to this information to the witness.

Mr. Totten—This is not to the witness.

Mr. Van Blarcom—Better let him tell.

Q. Mr. Ritchie will you step down.

Mr. Totten—The court asked me a question, and I was trying to answer it.

(Witness leaves stand.)

Mr. Totten—(Continuing) The purpose of

that—the purpose of my answering the question, I believe that Mr. Ritchie, Jr., the witness on the stand, and Mr. Ritchie, Sr., at about that time, entered into a contract whereby—or an agreement whereby Ritchie, Sr., was to get a hundred a week and Junior was to get $75.00 a week, outside of the contract, to finish the job.

The Court—What would that have to do with this issue?

Mr. Totten—This: We are trying to show as many breaches as possible in this contract, because if Post was not notified of the changes, and the bond—depending upon this contract—and Geldziler and the Ritchies got together and changed the contract, certainly it is hard to see how Post can be held on a bond to indemnify Geldziler if Geldziler deliberately changes the contract.

The Court—All right; I think it might be of some materiality.

Mr. Totten—All right.

(The witness resumes the stand.)

Q. Mr. Ritchie, were you present at any time with Mr. Geldziler and your father when the question of changing the method of payment for doing this work was agreed upon? A. Yes, sir.

Mr. Van Blarcom—I object to the question. There is no such testimony that there was any such agreement.

Mr. Totten—The answer is in.

The Court—Well, I will allow it to stand. It is a leading question.

Q. What was that agreement?

Mr. Van Blarcom—I object to that, because it is immaterial, irrelevant, and is not in writing.

The Court—I will allow it.

Q. What was the agreement? A. About October, of 1920, when Mr. Post discovered that we were getting money without certificates, he decided then that he was off the bond, on account of the way the payments were being made, so we were going to quit the job, and Mr. Post went away, and Mr. Geldziler and my father and I talked it over, and decided to go ahead and complete the job, and when the job was finished Mr. Geldziler would pay the bills.

Q. Was that all of the agreement? A. And we were put on at a salary, my father and I—

Q. Do you remember how much— A. —and every week—

Q. Go ahead. A. —we went to Geldziler with a list of the employees that were working there and received a check from him, and the material men, and we strung along until the job was finished.

The Court—Then you strung them some more, didn't you?

The Witness—Mr. Geldziler did.

The Court—All right.

Q. Then the agreement was that you and your father were to get a salary and Geldziler was to pay the material men? A. We were to supervise

the job, and he was to pay the material when the job was completed.

Q. Post was out of it? A. Post was out of it.

The Court—You still kept getting materials from Post?

The Witness—We still kept getting materials from Mr. Post, and he was to be paid when the job was completed; that was understood with him.

Q. Do you know whether or not Post knew of this change of agreement between you, your father, and Mr. Geldziler? A. He did; we told him of it.

Q. About when did you tell him? State to the court. A. Two or three days after we had made the arrangement.

Q. Was Mr. Geldziler present when you told him? A. No.

Mr. Van Blarcom—I ask that these answers be stricken out.

The Court—How can they be binding on Mr. Geldziler?

Mr. Totten—I do not think they can, sir.

The Court—Strike that out.

Mr. Totten—That is all.

The Court—Cross-examine.

Cross Examination by Mr. Van Blarcom:

Q. Was this last contract in writing between you and Geldziler?

The Court—What is the answer?

A. No.

Q. Was there any contract, excepting that one, in writing, between you and Mr. Geldziler? A. No.

Q. The agreement to change the inside of the building and the material to be used, was that in writing, that contract? A. No.

Q. And the agreement to alter the method of payment, was that in writing? A. No.

Q. And the agreement that Mr. Geldziler was to pay for all material used after November, was that in writing? A. No.

Q. In fact, that was not done at all, was it? A. It was done.

Q. And Post knew it? A. Post knew of it.

Q. Then—? A. After we had made the arrangement with Mr. Geldziler.

Q. What lawyer did you have when you made up this agreement? A. We did not have any lawyer.

Q. What lawyer did Geldziler have when you made up this last agreement? A. No lawyers entered into it.

Q. What arrangement was made with the architect about the changing of the certificates when you made this agreement? A. I don't know of any arrangements being made with the architect.

Q. Was there any arrangement to be made at that time? A. Only that we were to give each week to Mr. Geldziler that list of the employees and the amount of money that we were to pay out, and he would give me the check.

Q. And the rest of the money Mr. Geldziler was to keep, is that so? A. He had to pay the bills when the job was completed.

Q. As a matter of fact, that was not done at all, was it? A. Not the paying of the bills.

Q. Or the giving to you of the money in that way, that was not done either? A. Every week.

Q. As a matter of fact, you got the money the same as you were to under the contract, and as you did, under the contract, didn't you? A. The contract was void.

Q. When was that agreement of the change of payments made? A. About October or November, 1920.

Q. The latter part of October or the latter part of October or when? A. I don't know, latter part of October or the beginning of November.

Q. What date was it? A. What date?

Q. Yes. A. I do not remember the date.

Q. I show you this Certificate 19, receipted by you— A. Yes, sir.

Q. —for $753.45— A. Yes, sir.

Q. What was that for? A. That was payment on account of the theatre.

Q. For labor? A. I do not know.

Q. Only labor? A. It might have been for some small material bill, or it might have been—all been labor.

Q. Is that your receipt? A. Yes, sir.

Q. I show you this twentieth certificate, December 11, for $716.00; was that receipted by you? A. Yes, sir.

Q. What was that for? A. I think, for labor.

Q. Only labor? A. Yes.

Q. I show you this one, this is the twenty-third certificate, of December 18th, for $704.00; what was that for? A. Labor.

Q. Was that all labor? A. I am quite sure.

Q. Is it receipted by you? A. Yes, sir.

Q. I show you this twenty-fourth certificate, of

December 18th, for $307.00, receipted by you. A. Yes, sir.

Q. What was that for? A. I think, labor.

Q. How is it you did not get your labor certificates all on one that day? A. That I cannot remember.

Q. Did you get two certificates on the same day, one for seven hundred, one for three hundred, for labor? A. The small one might have been for small material bill, somebody squaking for money, and we had to give it to them.

The Court—Somebody what?
The Witness—Squaking for their money.
The Court—Squaking for their money?
The Witness—Yes.

Q. Why didn't you send them to Geldziler? A. We did send them to Geldziler and he would not make out the check, and we got the architect to make out a certificate.

Q. You receipted it? A. For that amount of money, yes.

Q. What right did you receipt it if you did not have it coming to you? A. He made the checks out to us and we endorsed them over to where they would go to.

Q. What right did you have to receipt the certificate if Mr. Geldziler paid the material men? A. Oh, he insisted on making them out that way.

Q. I show you certificate of December 20th, for a thousand dollars; what is that for? A. I do not remember.

Q. Did you have all of that labor in two days?

A. It might have been for payment on account of material.

Q. Whose material? A. I do not remember.

Q. Why didn't Geldziler make the payment, if that was the agreement you are talking about? A. He was to make all of the checks payable to us, and we were to give them over to whoever was to receive it.

Q. Oh, then, it was the same as under this contract, wasn't it? A. No.

Q. What was there different? A. He had that agreement with us that we would go ahead and complete the job, and he would pay as we went along.

Q. All of these certificates I show you now are in the same class, this, the twenty-sixth, for $56.00; was that signed by you, receipted by you? A. Yes, sir.

Q. Twenty-seventh for $657.60; was that receited by you? A. Signed by me.

Q. This certificate twenty-eight, December 31st, for $663.87—was that— A. And signed by me.

Q. The twenty-ninth certificate, January 6, 1921, $391.05; who is that signed by? A. Signed by John J. Ritchie.

Q. Your father? A. I think it is. When we signed for these certificates, we signed for those amounts of moneys; it had nothing to do with these items over here.

Q. Did you see those items on the lower left hand corner there when you signed for it? A. I did not pay any attention to that part; I signed for the amount of money I received.

Q. Here is the thirtieth certificate for $633.85; is that your signature? A. Signed by me.

Mr. Totten—If the court please, I do not think it is necessary to go all over these. We know that certain payments were made by certificates; but we say that there were some payments made without certificates, and Your Honor will recall it is agreed and admitted by the defendant that there were payments made.

The Court—Yes, but now this witness says that from a certain time he got a check from Mr. Geldziler every week for his salary for himself and father and for the payment of their payroll, and yet he continued to sign architects' certificates after that time, and now, he says, as I understand it, that the checks were made directly to material men or whoever was coming to get money.

The Witness—They were made payable to us.

The Court—Or, they were made payable to them, and they endorsed them over to them. I think that is important to show us just how the payments were made by Mr. Geldziler from the time he says this contract was made, this verbal contract in October. I do not know that that is the purpose that Mr. Van Blarcom is offering them for, but it is material for that point anyway.

Mr. Totten—And supposing that is so, what difference does it make if there were payments made outside of the terms of the contract?

The Court—Only I understand Mr. Geldziler is going to show that that is not true,

that there was no such a contract made, and that they did not do what this witness said they did; that is all. I cannot anticipate, but sometimes I do.

Q. The thirty-first certificate, January 10th, $300.00, that is signed by you, receipted by you? A. Yes, sir.

Q. The thirty-second certificate, January 13th, for $600.00? A. And signed by me.

Q. The thirty-third certificate, January 15th, for $480.85; was that receipted by you?

Mr. Totten—What year is that, Mr. Van Blarcom?

Mr. Van Blarcom—1921.

A. Yes.

Mr. Totten—January, 1921?

The Witness—Yes.

Q. The thirty-fourth certificate, January 19, 1921, for $259.20; was that receipted by you? A. Yes.

Q. The thirty-fifth certificate, January 14th, for $200.00; was that receipted by you? A. Yes, sir.

Q. The thirty-sixth payment or certificate, January 18, 1921, for $500.00; was that receipted by you? A. Yes, sir.

Q. The thirty-seventh certificate, January 21, 1921, for $25.00; was that receipted by you? A. Yes.

Q. The thirty-eighth certificate, January 22, 1921, $216.40; was that receipted by you? A. Yes, sir.

Q. When did your father sign the top signature to this bond?

Mr. Totten—If you know.

A. I think on the same day that I signed this, in the presence of Mr. Murner.

Q. In the presence of Mr. Murner? A. Yes, sir.

Q. You and your father were together when this was signed by you and him in— A. We were together.

Q. When, if you know, did he sign the second time on this bond?

Mr. Totten—What do you mean by "he", Mr. Van Blarcom?

Q. Below there, in black ink? A. I couldn't say whether or not he signed in both places on the same day, but when the bond was given to me, I know I signed there, and he was there also.

Q. And was your father's signature on there before when you signed? A. I do not remember.

Q. Was Mr. Post's name there when you signed? A. Yes, sir.

Q. Was that erasure on it when you signed, Mr. Post having written his name, and it was scratched out; was that there when you signed? A. I do not remember.

Q. You do not remember that? These two affidavits on the page following, signed one by Henry M. Post and the other by John J. Ritchie, were they filled out and signed when you signed the bond? A. I did not see that paper.

Q. You did not see that paper. Was Mr. Post there when you signed? A. Yes, sir.

Q. Who was present when you signed this bond? A. My father and Mr. Murner.

Q. Where was it signed? A. In the office in front of the theatre.

Q. Near the work? A. In the shed.

The Court—Talk a little louder.
The Witness—In the shed.

Q. In the shed in front of the theatre? A. In the shed in front of the theatre.

Q. And you do not recollect the date? A. I do not.

Q. Do you? A. I do not.

Q. It may have been the 21st of May, 1920? A. I couldn't say.

Mr. Van Blarcom—That is all.

Mr. Totten—I just want to call Mr. Post for one question.

The Court—All right.

HENRY M. POST, recalled.

Direct Examination by Mr. Totten:

Q. Mr. Post, where was it that you signed this alleged bond? A. In the side room of Mr. Geldziler's saloon.

The Court—I understood you to say, Mr. Post, that it was in a shed at the saloon.

The Witness—No; I beg your pardon.

The Court—All right; that is what I understood you to say, in a shed.

The Witness—No.

The Court—Not in the saloon but in a shed by the saloon, at least, I understood it was at the saloon.

The Witness—They asked me if I signed it in the shed—

The Court—And you said, no?

The Witness—I said no.

Mr. Totten—That is all.

Cross Examination by Mr. Van Blarcom:

Q. Were you ever in the shed in front of the building? A. Yes.

Q. What kind of a shed was it? A. Oh, it was a sort of a tool shed, one of them they move around from place to place, to put tools in. That is all, it was no office.

Q. Was there a desk in it? A. No, there was a board nailed up in the side of the building or the shed—tool shed—where he had his plans for the building laid out.

Q. Where you could write on it, if you wanted to? A. Oh, yes, you could write on it.

Mr. Van Blarcom—That is all.

Mr. Totten—I have the witnesses here, the men who————on the job, but under the condition that the proof is in—

The Court—Save it for rebuttal.

Mr. Totten—I do not think that—

The Court—It is cumulative, you mean.

Mr. Totten—That is all it is. With the case as it now stands, the plaintiff rests.

The Court—All right.

(Plaintiff rests)

Mr. Van Blarcom—I ask for a non-suit on the ground that the plaintiff has not made a case out against this defendant Geldziler. There isn't anything here on which Mr. Geldziler can be held. He was the owner defendant. As to the builder defendant, I have nothing to say about, but as to this defendant, Geldziler, there is nothing in this case which shows that he is liable at all to the plaintiff.

(Motion taken under advisement by the court, after extended discussion, and a recess taken.)

(Second Day)

Trial of the above entitled cause continued before Hon. Newton H. Porter, pursuant to adjournment Sept. 22, 1927.

Counsel present as before.

Wm. W. Watson, Esq., also appearing as associate counsel for the Plaintiff.

The Court—As I recall the situation, the plaintiff had rested and a motion made for non-suit, which I held in abeyance, and suggested that we go on with it, and I am still holding the motion in abeyance for a non-suit on the plaintiff's case. In other words, at the end of the case, I may decide that either one way or the other, after hearing the defense. There were questions of law pre-

sented by Mr. Van Blarcom, as I recall it. I am a little rusty on it.

Mr. Watson—Here is the part of the case that has been tried. I ask Your Honor's and counsel's indulgence to be admitted as one of the counsel for the plaintiff, as I have associated with Mr. Totten since that time. Here is a copy of the testimony so far. May I suggest, at this time, Your Honor, that this replication or reply be amended in the second paragraph, by the adding of the words, "and that the same is not his bond"? The second paragraph denies Paragraph One of the defendant, and says that he did not execute the bond as pleaded in the answer. That is practically a substantial statement of the plaintiff's contention, as to the bond, but as I understand the effect here, to plead denial to the bond, which plaintiff contends and maintains is not his bond, that the same is not his bond. That cannot cause any surprise, and I would like, at this time, that the answer be amended.

The Court—Any objection?

Mr. Van Blarcom—No, sir; I want to try this question.

The Court—I understood that, throughout the presentation of the plaintiff's case, from the cross-examination, that there was a denial that the bond was the bond of the plaintiff.

Mr. Watson—In fact, in the opening, as I read it, Mr. Totten maintained the same, that it is not his bond, and I wish to have

that recorded as pleaded.

The Court—Very well, let it be amended accordingly.

Mr. Watson—I ask the indulgence of the court by putting in some testimony that might be submitted by reopening the plaintiff's case. However, there is a bare possibility that I may not want to put it in now, because I might possibly get it in by way of rebuttal, after the defendant's case is in, and it has been my intention to wait until the defendant's case is in, and then if I felt that the plaintiff's case would be benefitted by the addition of affirmative evidence, I was going to ask the indulgence of the court at that time. I may not have to ask the indulgence, however.

The Court—Well, we do not want it if we do not need it. I suppose it would be all right to bring it in in rebuttal, even though it is not proper rebuttal.

Mr. Watson—At this time, it is not my desire to take—to apparently take my opponent by surprise,—to make the suggestion at this time, to offer some further testimony.

The Court—What is the nature of the testimony?

Mr. Watson—Oh, I wish to further examine Mr. Ritchie as concerns this agreement which he had with Mr. Geldziler, about October 20th, regarding the Ritchies, that they were to receive weekly wages and Mr. Geldziler was to pay for the materials pur-

chased or secured after that time, and then furthermore—

The Court—That would hardly be rebuttal.

Mr. Watson—Well, I think, Your Honor, I am of the impression that when Mr. Geldziler goes on the stand, he will be examined possibly to that effect, and we can clear it up.

The Court—Well, suppose we call it rebuttal, that won't affect us. There is no jury here.

Mr. Watson—That is the answer.

The Court—All right.

Mr. Van Blarcom—In such a situation, if it goes beyond this court, I want to be in such situation that my client will be protected. I do not know, of course, what the judgment of the court is going to be, and I want to be in a position—I can see now, as I face the attorneys on the other side, Your Honor, I surmise perhaps that if the plaintiff or the defendants lost here, that he is going to go further, and I would like to have the case in such shape when he goes further, that it is not going to be mixed up.

The Court—Well, if that be so, I think perhaps we had better reopen the plaintiff's case now, and let it go in in an orderly, regular way.

Mr. Van Blarcom—I will ask an exception to the reopening, Your Honor please.

The Court—I will grant you an exception. I will let you reopen your case.

Mr. Watson—I will call Mr. Ritchie, Sr.

(Plaintiff's case reopened.)

JOHN J. RITCHIE, Sr., recalled.

Direct Examination by Mr. Watson:

Q. Mr. Ritchie, you are the senior member of the firm that builded this theatre? A. Yes, sir.

Q. I understand that, from your previous testimony, that after this job had been commenced, there was some alteration or some change made in theatre after the completion of it; is that correct?

Mr. Van Blarcom—I—

A. Yes, sir.

Mr. Van Blarcom—object to the question. If it was so, it ought not to be repeated. Counsel has a copy of the testimony, and the question and answer should be repeated, rather than covering the same ground.

The Court—Page 95, you say?

Mr. Watson—Yes, it runs from there on.

The Court—Don't repeat anything. I will sustain the objection.

Mr. Van Blarcom—I ask that the answer be stricken out.

The Court—Strike it out.

Mr. Watson—Well, if I understand, Your Honor, that you have reopened the case—

The Court—I have reopened the case, but I do not feel that we ought to cover the same grounds. He has already testified to

that, as I understand the record, as to that; we ought not to go into the same things that he has already testified to. Here is the record that has been transcribed to date, and he has already testified to that, as I understand it.

Mr. Watson—Your Honor, if the plaintiff's case is still open, I presume that we would be permitted to produce testimony which would sustain the plaintiff's contention.

The Court—That is true, but my only objection is that it is covering the same ground that has already been covered, and he has already testified to that same thing.

Mr. Watson—I have no intention to cover the same thing. I am merely calling attention, and I think, if the stenographer will repeat the question, I merely referred to the fact that he had testified. I said, "You testified the contract had been changed?" and the answer is "yes, sir" or "no, sir."

The Court—I will allow that to stand.

Mr. Van Blarcom—I would like to have reference to where the testimony is.

The Court—Page 95.

Mr. Watson—95, 96 and 97.

Mr. Van Blarcom—Now, as a point of fact, and it goes to my objection to this question, the testimony at Page 95 is not a transcript of this witness' testimony at all. The question is leading, and I object to the question, and ask that the answer be stricken out.

The Court—Oh, I will let it stand; grant you an exception.

Q. Well, you did testify, didn't you, that this contract had been changed and the manner of payment, when you were on the stand before? A. To my recollection, yes.

Q. That was after this work had been started? A. Yes, sir.

Q. How long had this work been in operation at the time that this change was had? A. About two months.

Q. And about when was it that you and Mr. Geldziler conversed concerning the change? A. About July.

Q. July? A. Yes, in the month of July, between the 1st and the 10th.

Q. That would be 1920? A. Yes, sir.

Q. You testified to the fact that the entire interior of this theatre was changed? A. Parts of the interior.

Q. Well, just explain what the alterations were, and changes. A. Alterations were?

Q. Yes. A. Alterations were—why, to begin with, the concrete floors and the concrete balconies were to be at first of ash concrete—

Q. Under the contract, or as changed? A. Under the contract.

Q. Under the contract. A. And was changed to blue stone concrete.

Q. What else? A. The side walls of the theatre were to be of hollow tile, brick and plaster; they were changed at the same time to be tapestry brick.

Q. And what else? A. The stage, to some extent, was changed—the excavation of the stage to put an organ in underneath the floor, or down below, a pit dug, and, of course, an entire change in the contract, in that respect.

Q. Well, those changes then, of necessity, contemplated new material, didn't they? A. Yes, sir.

Q. And abandonment of the old material? A. Yes, sir.

Q. When you started this job, you gave your supply man a list of the materials included— A. Yes, sir.

Q. —or needed? A. Yes, sir.

Q. Of course, it did not include the changed material, as subsequently fixed upon? A. No, sir.

Q. Did that require a new list of materials to be secured? A. Certainly; yes, sir.

Q. Did it require any other work on your part? A. Yes, considerable.

Q. What else did you do concerning the obtaining of new material, or the securing of it? A. The labor feature was considerable more money.

Q. Well, did you go anywheres? Did you inspect any material? Did you do anything? A. We went to New York with Mr. Geldziler to inspect the interior of another theatre which Mr. Geldziler—

Q. At whose request? A. At Mr. Geldziler's request. It was at the Bronx, in New York.

Q. This all delayed the completion of this job, or not? A. Well, to a certain—materials did, yes.

Q. What understanding, if any, did you have with Mr. Geldziler as to the completion date of this other work? A. Mr. Geldziler understood, and so did I, that it would take longer to complete the job.

Q. Did he agree to that? A. Yes, sir.

Mr. Van Blarcom—I object to the question and ask that the answer be stricken out.

The Court—That is a conclusion; strike it out.

Q. What did you and Mr. Geldziler say concerning the completion of this building, subject to those changes? A. Whatever the extra expense would be, Mr. Geldziler would pay.

Q. What did he say as to it? A. Well, we understood between us that the changes—

Mr. Van Blarcom—I object to that.

The Court—No, objection sustained. What was said?

The Witness—What was said?

The Court—Yes.

A. "Go ahead with the building and get it done as quick as you can."

Q. That was Mr. Geldziler's statement? A. Yes, sir.

Q. Now, you and your son and Mr. Geldziler had some conversation along about October of that year,— A. Yes, sir.

Q. —concerning another arrangement for the completion of this building?

Mr. Van Blarcom—I object,—

A. Yes, sir.

Mr. Van Blarcom—to that; immaterial, irrelevant.

The Court—I do not know whether it is or not.

Mr. Watson—Well, then, I will ask the court to permit it, subject to being stricken out, if it is not relevant.

The Court—All right.

Q. When and where was this conversation had? A. In the theatre.

Q. Who was present? A. Mr. Geldziler, my son and myself.

Q. Was Mr. Post there? A. No, not to my knowledge.

Q. Had he been there? A. Had he been there?

Q. Yes; at that time and date? A. No, sir.

Q. What was the conversation had at that time concerning Mr. Geldziler, with Mr. Geldziler, and your son and yourself?

Mr. Van Blarcom—I object to the question, irrelevant and immaterial.

The Court—Well, I do not know. I will allow it, subject to being stricken out, if I find it is.

A. Relation was—

The Court—Conversation, he asked.

A. The conversation between Mr. Geldziler, my son and myself was, how are we going to complete the building? in what way will we proceed? Go ahead and proceed and complete the building, I will pay you a salary, your son a salary, pay for the material that will be furnished from now on.

Q. Who made that statement? A. Mr. Geldziler.

The Court—When was that?
The Witness—Sometime in October.

Q. Of what year? A. 1920.
Q. Well, did you go ahead then? A. I sure did.
Q. Under that arrangement? A. Yes, sir.
Q. Did Mr. Post deliver materials subsequent—
A. Yes, sir.
Q. —to that arrangement that you had with Mr. Geldziler? A. Previous to that?

The Court—No, after that.

Q. No, after that. A. After that; yes, sir.

The Court—Did he every pay for anything after that?
The Witness—Mr. Geldziler? Yes.
The Court—Yes.
The Witness—Yes, he paid me.
The Court—Did he pay Mr. Post anything after that?
The Witness—I do not just remember whether he did, or not.
Mr. Watson—I think he did not, Your Honor.
The Court—All right.

Q. Mr. Geldziler was to pay you and your son what? A. Wages.
Q. Wages. And he was also to pay for the

what? A. For the material that would be furnished after.

Q. Subsequent to that agreement? A. Yes, sir.

Q. You agreed to that? A. Yes, sir.

Q. That was Mr. Geldziler's own suggestion? A. Yes, sir.

Mr. Van Blarcom—I object to that question; that is leading, absolutely leading.

The Court—Well, he has already said it was.

Mr. Walson—Already said so, that is what he said, Mr. Geldziler said.

The Court—That was in October, you say.

The Witness—To the best of my knowledge, judge.

Mr. Watson—At this time, we will ask, Your Honor, to amend the complaint by the addition of a count to the effect that the defendant entered into a contract with Ritchie & Son, two of the defendants, for the benefit of Post, with the third defendant, to pay a reasonable price for goods sold and delivered to the defendant, Geldziler.

Mr. Van Blarcom—I object to any such amendment.

Mr. Watson—(continuing) And that the amount of such goods sold and delivered is in the sum of $1278.40.

Mr. Van Blarcom—That will make an entirely different case out of this, and I object, of course, to the amendment. Here is

a thing that has been hanging for six years, and they are finding out at this late date, and it places this defendant in the position of being compelled to defend an entirely different action.

The Court—I do not see how I can allow you to do that at this late date, Judge Watson. It is an entirely new count, based on an entirely different theory from the theory of the original suit, and I do not think you can properly come in now and do this at this late date, when the facts were all in the possession of the plaintiff's attorney during all of these years, and right in the midst of the trial, to inject something entirely foreign to the original suit. It is hardly fair. I suppose you are out by limitation anyway.

Mr. Watson—I think not, that we are within the original suit,—

The Court—No, the original suit was started in time. That stopped the statute of limitations.

(Extended discussion.)

I will deny the motion and grant you an exception.

Mr. Watson—I pray an exception. That is all.

Cross Examination by Mr. Van Blarcom:

Q. When was it that you had this alleged conversation with Geldziler about changing the material in the walls and floors and balcony of the theatre? A. October.

Q. October when? A. 1920.

The Witness—Your Honor, I have already explained that.

The Court—You did not explain it. You said it was July.

The Witness—July? Oh, July, yes.

The Court—Now, which was it?

The Witness—July.

The Court—All right.

Q. You are sure it was July? A. Yes.

Q. What year? A. 1920.

Q. How long had you been working on the building? A. Why, about March 1st.

Q. Under whose direction had you been working? A. Under Geldziler.

Q. What did the architect have to do with it? A. What did he?

Q. What did the architect have to do with it, yes? A. He was the supervisor.

Q. It was under his direction that you were working? A. More under Geldziler than the architect.

Q. Did you ever read your contract? A. Yes.

Q. You knew the building was being constructed under the supervision of— A. It was to be.

Q. You knew that under the contract the building was being constructed under the supervision of the architect, didn't you? A. It was to be, I said.

Q. It was, wasn't it? A. To a certain extent.

Q. The architect's representative was on the building at all times? A. Sometimes.

Q. There enough to know what was going on, wasn't he? A. Yes, but Mr. Geldziler was the man we worked under.

Q. Did you consult the architect about the changes that were arranged for in July? A. No, sir.

Q. Did you get written instructions to make the changes from the architect? A. No, sir.

Q. Did you get written instructions to make the changes from Mr. Geldziler? A. No, sir; just word of mouth.

Q. Was there any written contract between you and Geldziler to make the changes in the floor— A. No, sir.

Q. —as you have testified were made? A. No, sir.

Q. And the walls that you talked about in July? A. No, sir; all verbal.

Q. You did not put it in writing? A. No, sir.

Q. Neither one of you? A. No, sir.

Q. Which cost the most? what was originally intended or what you were supposed to do afterwards? A. Why, what I done afterward.

Q. How much? A. Oh, 25%.

Q. Well, how much was that? A. In the neighborhood of $10,000 altogether.

Q. Did you give Geldziler a bill for it? A. Not yet.

Q. Not yet? A. Partly, part of it.

Q. Not yet? A. Part of it, I gave him a bill for.

Q. In October, you had another conversation with him, did you? A. Yes.

Q. With Geldziler? A. Yes.

Q. What was that about? A. How was we, how we should proceed to complete the building.

Q. Why did you have to talk with Geldziler

about how you were to proceed to complete the building? A. Well, who else would I talk to?

Q. Why did you have to talk to anybody about it? A. Because there was no money left to complete the building.

Q. You were broke, were you? A. I wasn't broke, but the building was broke.

Q. Why did you have to talk with anybody about completing the building? A. Because I wanted to know where the money was coming from to build it.

Q. Didn't you think Geldziler had the money? A. Well, I thought he did, and I think so yet.

Q. You had enough money coming under the contract in October, didn't you? A. Oh, no.

Q. You did not? A. Oh, no.

Q. In October, 1920, how much was due you yet under the contract? A. Not enough to complete the building.

Q. How much? A. I have no idea at this time.

Q. Did you know then? A. Yes, I did then.

Q. Well, how much do you think it was?

Mr. Watson—Your Honor please, I think I will object to this line of testimony as not being rebuttal—

The Court—Cross-examination.

Mr. Van Blarcom—It is cross-examination.

Mr. Watson—I grant you that upon cross-examination, it is on the credibility of the witness that counsel may be permitted to cross-examine, concerning matters which

are incidental to the direct examination, but I think it is perhaps a stretching of it to ask these questions. I address my objection to the discretion of the court.

The Court—I think that we ought to find out the reason for the conversation in October, with respect to whether it is likely to have taken place at all; and if it should be shown that there was no apparent reason for it, I think that that goes to the credibility of the witness' testimony that there was such a conversation.

Mr. Watson—Your Honor has ruled on my application to file an amendment to the—

The Court—I know, but we are not talking about that. We are talking about the conversation with respect to the changes in the materials.

Mr. Watson—That was in June—

The Court—That was July.

Mr. Watson—July.

The Court—That is what he is cross-examining him on.

Mr. Van Blarcom—October, now.

Mr. Watson—He is cross-examining as to occurrences in October.

The Court—Well, I do not think we ought to go into that. We have ruled out that conversation because the only thing testified to about the conversation in October was with respect to the obligation that was there agreed on.

Mr. Watson—As to the third party to the contract.

The Court—Yes. We are not concerned with that, excepting as it might have a bearing on the change in materials. If there was anything testified to with respect to the October conversation, in that regard, I think you can go into that, but not otherwise.

Mr. Watson—May I ask to have such testimony as concerns what the various payments, pertaining to the happening in October, be stricken out.

The Court—Insofar as it pertains to the contract that was entered into, it will be stricken out, yes.

Mr. Van Blarcom—My understanding is that the testimony of this witness regarding that supposed change in the terms of the payment—I understood that the motion to amend was stricken out, but not the testimony, but if this cross-examination is to be stricken out, then the original testimony in regard to that should be stricken out.

The Court—As I recall it, the only thing he testified to about October, Judge Watson, was the fact that there was a new arrangement made at that time.

Mr. Watson—Yes, sir; that was the object of it.

The Court—That was the object of it then, and I have stricken all of that out.

Mr. Van Blarcom—Then—

The Court—Testimony out, all out about October.

Mr. Van Blarcom—About October.

The Court—Now, we go back to July, and

he says that they made arrangements in July, that the materials were to be changed and the work was to be changed, and that by reason of those changes that there was to be added 25% to the cost of the building, which amounted to ten thousand dollars.

Mr. Van Blarcom—He does not say it was to be added. He said that is what it cost, but he also said he never sent any bills for it.

The Court—What did you mean by $10,000.00, just the material?

The Witness—No, the whole thing.

The Court—Materials and labor?

The Witness—And labor, Your Honor.

The Court—All right.

The Witness—No, I would like to recall that where I said that I did not send any bill. I sent Mr. Geldziler one bill for $4,000.00, with the extra work, which you and he have both recognized.

Q. Yes. A. That was one bill.

Q. That was the $4,000.00 that is on all of these certificates that you got from the architect; isn't it? A. I can't say anything about that. I don't remember anything about that being on the certificate.

Q. You say you never got a written order from the architect to make these changes? A. No, sir; I did not.

Q. And you never had any written agreement with Mr. Geldziler to make these changes? A. No, sir; I did not.

Q. Did you ever have a written agreement with Mr. Geldziler at any time during the progress of this work, or while you were connected with it, about changing the contract? A. No, it was all word of mouth.

Q. All right; that is all. A. He was my boss.

Mr. Van Blarcom—That is all.

The Court—And at that time at which you changed whatever that was in the building which you spoke of, or substituted, he asked you how much more that would cost or how much less that would cost, did he?

The Witness—Your Honor, as far as I know, I said it would cost a whole lot more money, and he said, "Go ahead with the building".

The Court—Didn't he try to find out how much?

The Witness—No, sir; he did not.

The Court—Didn't you make any estimates at that time?

The Witness—No, sir; I did not. "Go ahead with the building and get it done."

The Court—Irrespective of cost?

The Witness—Yes, that was the arrangement.

Q. Did you ever present an estimate of that increased cost to the architect? A. No, sir.

Q. Did you ever tell him about it? A. I never had nothing to do with the architect.

Q. Why not? A. Because Geldziler was my boss.

Mr. Van Blarcom—All right; that is all.

Redirect Examination by Mr. Watson:

Q. In other words, Mr. Geldziler assumed supervision over you; is that right? A. Yes, sir; all of the time, from the time the building began until the time it wound up.

Q. Did this architect ever come to you with any instructions? A. Never, that I remember. If he did, I did not take them. I took them off Geldziler.

Q. Did he? A. Not to my memory.

Q. So that you got all of these instructions from Mr. Geldziler? A. Entirely from Mr. Geldziler.

Q. All right. You did have different arrangement concerning materials in October— A. Certainly, I did, or I never would have went on.

Q. —and a changed method of payment, didn't you? A. That is the idea, exactly.

Mr. Watson—That is all.

Mr. Van Blarcom—I ask that all of the testimony of this witness be stricken out, regarding the changes in the contract and specifications complained of, for the reason that they are not in writing.

The Court—Oh, I will let it stand.

Mr. Van Blarcom—I ask an exception.

The Court—You may have it.

Mr. Van Blarcom—That is all; I am through.

The Court—Is that the plaintiff's case?

Mr. Totten—That is the plaintiff's case.

(Plaintiff Rests.)

Thereupon, to further maintain the issues in his behalf, the Defendant Geldziler introduced the following evidenec, to-wit:

LOUISE M. BECKER, sworn.

Direct Examination by Mr. Van Blarcom:

Q. Miss Becker, where are you employed? A. Fred M. Wentworth's office.

Q. What is his business? A. Architect.

Q. How long have you been employed with Mr. Wentworth? A. About seven years.

Q. Were you employed with him when the contract between Mr. Geldziler and Mr. Ritchie for the erection of the Capitol Theatre was made? A. Shortly afterwards, I believe.

Q. Shortly afterwards? A. Yes, sir.

Q. In your employment with Mr. Wentworth, what are your duties, relative to buildings? A. Drawing of certificates, mostly.

Q. Do you have anything to do— A. And bookkeeping.

Q. —with the books? A. Yes, sir.

Q. Keeping of the books and drawing of the certificates? A. Yes, sir.

Mr. Van Blarcom—As a technical matter, Your Honor, I suppose I ought to renew my motion for a non-suit, now that the plaintiff has reopend his case and reclosed it.

The Court—The motion is held in reserve.

Q. I show you a certificate, dated December 3, 1920, indicated as the 19th certificate, and ask you if that was issued through your office? A. Yes, sir; it was.

Q. And in whose handwriting is it, Miss Becker? A. My handwriting.

Q. And whose signature does it bear? A. Mr. Wentworth's, by Mr. Stansbury.

Q. Who was Mr. Stansbury? A. He was the superintendent on the job.

Q. Of the Capitol Theatre job? A. Yes, sir.

Mr. Watson—I presume, Your Honor, that we will be permitted to cross-examine as to this defendant.

The Court—He has not offered them yet; you may, before he offers them in evidence.

Mr. Watson—Well, we certainly should not allow them in evidence, if they are competent, until we have opportunity to test them.

The Court—There is no evidence yet in as to their contents; they are simply having them identified.

Mr. Watson—Do you propose to introduce them, Mr. Van Blarcom?

Mr. Van Blarcom—Yes, they were identified before.

Mr. Watson—If you have no objection at all, I would like to look at them.

The Court—Let's save time, if we can. Let Judge Watson see them.

Mr. Van Blarcom—This is new to you but not to your associate.

The Court—They were all marked for identification before. I know what they show. They show the amounts of payments that were made and receipted for by the builder, on each certificate, shows the balance that was then due on the contract price, as I recall it.

Mr. Totten—It is all in the testimony, sir.

The Court—Yes.

Mr. Watson—I have no objections.

The Court—All right, let them all be received and marked in evidence.

Q. I will give you the certificate number: 19, 20, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40. All of these certificates were made out by you? A. Yes, sir.

Q. From instructions by Mr. Stansbury? A. That is right.

Q. How were they signed? by Mr. Stansbury, were they? all of them? A. Most of them; some by Mr. Wentworth, I believe.

Mr. Van Blarcom—I offer all of these in evidence.

The Court—Let them be received.

Architects' Certificates, previously marked D-2, Id., offered and received in evidence. and marked Defendant's Exhibit D-1.

Q. Outside of the issuing of these certificates, did you keep any other record for Mr. Wentworth. as to the payments on the Geldziler job, or the certificates issued? A. Yes, sir; book entry.

Q. A book entry. Is this the book that has those entries? A. Yes, sir.

Q. Will you turn to the page relative to this job? A. (Witness does as directed.)

Q. There is—

Mr. Watson—Just one moment, now,—I would like to examine this.

The Court—Look at the book.

By Mr. Watson:

Q. Is this book in your handwriting? A. This is in my handwriting.

Q. This is the memorandum of the account in your office? A. When I draw a certificate, I enter it in this book, as a permanent record.

Q. So that this book contains nothing other than these amounts of these certificates; is that correct? A. This page, nothing else but the certificates.

Mr. Watson—I ask that be stricken out upon the ground this is not original evidence,—it is unnecessary—that the entire evidence contained in the book is contained in the certificates which have been offered in evidence.

Mr. Van Blarcom—Well, it does contain something more, sir.

By Mr. Van Blarcom:

Q. At the time of the issuing of the fortieth certificate, what was the balance due from Mr. Geldziler to Ritchie on this job? A. $3,435.61, after the issuance of the fortieth certificate.

Q. Now, was there any credit to be allowed to Mr. Geldziler on account of this job at the time the fortieth certificate was issued?

Mr. Watson—I object.

The Court—I do not know that she can show that.

Q. (Continued) As shown by the record?

The Court—I think that is proper.

A. Yes, sir; there has been a credit for mason work, $1,402.25.

The Court—That was a credit due Mr. Ritchie?

The Witness—Credit due Mr. Geldziler.

Mr. Watson—Now, don't you see, Your Honor, I object to this testimony? I object to the admission of this book for that purpose. Here is a young woman who has testified as to what a credit is from a certain book which she made an entry in. She is limited by those enries which are appertaining to the certificates, and we have admitted that; but she is not to make evidence—

The Court—No, that does not prove that it is due; it would simply prove that the record shows it.

Mr. Watson—She is making evidence and it is going on the record, and I think it ought to be—

The Court—Well, there is no jury here.
Mr. Watson—All right.
The Court—I will allow that.

Q. After that deduction is made then, what does your book,—your record,—show as to the amount due from Geldziler to Post under this contract? A. I did not figure up the—there was also a credit of $37.00.
Q. $37.00? A. Yes.

Mr. Watson—Same objection.
The Court—Same objection; same ruling.

Q. Then, what does that leave as the amount due from Geldziler to Ritchie under the contract?
A. $1,964.11.
Q. Now, was there any additional—

Mr. Watson—Same objection.
The Court—Same ruling.

Q. —to be made to that?

The Court—I will take it that you have a continuing objection to all of this line of testimony.

A. Then, there was extra work for some small mason work for $15.15, bringing the total amount, as shown by my books, due Mr. Ritchie, $2015.26.
Q. Where did you get the information to make these entries in the book?

Mr. Watson—Objected to, as hearsay.
The Court—I will allow it.

Q. From where did you get the information to make these entries in the book? A. Well, I would guess from our superintendent on the job.

The Court—Don't guess, please.

A. Well, I don't know from whom else I would have gotten it elsewhere.

The Court—Then you did get it from your superintendent.

The Witness—I would say so, yes.

The Court—All right, who was he?

The Witness—Mr. Stansbury.

The Court—You made these entries under his instructions?

The Witness—Yes, sir; to the best of my knowledge.

The Court—All right.

Mr. Van Blarcom—I offer this page 5 or Sheet No. 5, of this book, in evidence.

Mr. Watson—I object, Your Honor.

The Court—I will allow it for what it may be worth. Grant you an exception.

Ledger Sheet offered and received in evidence, and marked Defendant's Exhibit D-5.

Cross Examination by Mr. Watson:

Q. So that these statements that are entered in that book, in your handwriting, were made according to the best of your knowledge, belief and

understanding, from statements made to you by your superintendent? A. Yes, sir.

Q. Now, what did you mean when you said to the best of your knowledge and belief? A. Well, I do not recall exactly, but that is the usual procedure, unless it is under Mr. Wentworth's personal direction.

Q. In other words, you are not positive who gave you these directions, are you? A. No, I would not say so.

Q. And this memorandum which contains the payments set forth in the certificates was made from the certificates; is that right? A. I do not quite understand you. The entries in my book?

Q. Yes. A. They are made when the certificate is drawn; the entry is made in the book as a permanent record.

Q. You draw the certificates? A. Yes, sir.

Q. Under whose instructions are those drawn? A. Under the direction of Mr. Stansbury, the superintendent.

Q. You are positive that he directed you as to these? A. Yes, sir.

Q. No question about that? A. No, sir.

Mr. Watson—I ask to have these entries, other than those set forth on the certificates, be stricken out, on the ground that they are not identified by the source from which they come.

The Court—I will allow them to stand.

Q. After these certificates were issued, whom did you deliver them to, after you drew them? A.

Well, I cannot say in each instance just where they went, but the contractor usually got them.

Q. From you? A. Yes, sir; from the office, came in and got them.

Q. Do you see the man here that got these certificates from you? A. Well, I cannot say just which ones received them, but young Mr. Ritchie came in and got quite a number of them, I am positive.

Q. Quite a number? A. Yes, sir.

Q. Not all? A. I do not just recall whether it was all or not; sometimes they might have been credited—

Q. To whom? A. —to Mr. Ritchie.

Q. Which Mr. Ritchie?

Mr. Van Blarcom—I object to this testimony, because it is not cross-examination. I did not show anything about who got them or who did not get them.

Mr. Watson—I will save the record, Your Honor; I will withdraw the question, because we have admitted the certificates anyhow.

Mr. Van Blarcom—Wait a moment. I want to recall Miss Becker.

LOUISE M. BECKER, recalled.

Redirect Examination by Mr. Van Blarcom:

Q. I show you letter dated April 13, 1922; who wrote that letter? A. Well, I probably type-

wrote it. It is signed by Mr. Wentworth; I was in his employ at that time.

Q. This is Mr. Wentworth's signature on that letter? A. Yes, sir; it is.

Mr. Van Blarcom—I offer that letter in evidence.

Mr. Watson—We object to it.

The Court—You do object? Let me see it.

Mr. Watson—Self-serving declaration.

Mr. Van Blarcom—Wentworth did not own the Capitol Theatre.

Mr. Watson—Why should we be bound by what somebody writes for Mr. Wentworth?

Mr. Van Blarcom—Well, the contract will bind you.

The Court—Well, I think that this could all be testified to anyway.

Mr. Van Blarcom—Your Honor, it has been testified to, but I want to show that it was written and delivered.

The Court—I think it is objectionable as a self-serving declaration; it is not evidential.

Mr. Van Blarcom—That is all.

Recross Examination by Mr. Watson:

Q. These entries that you have entered in this book, they are not entries of payments made under the certificates? All you know about those is what was told you; is that correct? A. Yes, sir.

Q. By somebody else? A. By one of the men in charge of our office.

Q. You do not know who the man was? A.

Well, it must have been either Mr. Stansbury or Mr. Wentworth personally.

Q. You are not positive? A. I cannot say, in each instance.

Q. In other words, you made these entries under directions given you by somebody? A. Yes, sir

Mr. Watson—Well, I have asked to have these entries stricken out.

The Court—She is doing the same that every bookkeeper does, apparently, putting down what she is told to put down, that is all. That is all.

Mr. Totten—Of course, we do not want to be bound by that credit.

The Court—I understand. I understand your point exactly. I think you will find before we get thru, they will all be tied up.

Mr. Totten—Maybe.

The Court—If they are not, they won't have much weight with the court.

CHARLES E. STANSBURY, sworn.

Direct Examination by Mr. Van Blarcom:

Q. What is your position, Mr. Stansbury? A. Superintendent.

Q. Of what? A. Construction.

Q. For whom do you work? A. Mr. Wentworth.

Q. How long have you been employed by Mr. Wentworth? A. About fifteen years.

Q. Did you have anything to do with the build-

ing of the Capitol Theatre under the contract between Geldziler and Ritchie? A. I did.

Q. What did you have to do with it? A. I supervised the work.

Q. Did you have anything to do with the issuing of certificates? A. Yes.

Q. I show you certificates, Exhibit D-2, and ask you if they were issued by Mr. Wentworth through your instructions? A. All of these.

Q. Look them all over and then answer. If you should find that they are not all issued under your instructions—. I will read them over for you. Nineteenth certificate; was that issued under you instructions? A. It was.

Q. And signed by you? A. Yes.

Q. Twentieth; was that issued under your instructions and signed by you? A. Yes.

Q. Twenty-third; was that issued under your instructions? A. Yes, sir.

Q. And signed by you? A. Yes.

Q. Twenty-fourth; was that issued under your instructions? A. Yes, sir.

Q. And signed by you? A. Yes.

Q. Twenty-fifth; was that issued under your instructions, and signed by you? A. Yes, sir.

Q. Does this same thing apply to the twenty-sixth? A. Yes.

Q. Twenty-seventh? A. Yes.

Q. To the twenty-eighth? A. Right.

Q. Twenty-ninth? A. Yes.

Q. Thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, thirty-seventh, thirty-eighth, thirty-ninth, and fortieth? A. Yes.

The Court—Aren't any of them signed by Mr. Wentworth?

The Witness—Not those.

Q. The notation on the lower left hand corner of Certificate 40 shows how much balance was due from Mr. Geldziler to Ritchie under this contract? A. $3583.61.

Q. Was that calculation before or after that certificate was issued? A. This is after.

Q. After the amount of that certificate is taken off, or before? A. No, this is,—that is the balance.

Q. Balance at the time that certificate was issued? A. Yes.

Q. So that, after the certificate had been paid, the balance would be $148.00 less, will it not?

Mr. Totten—Just a moment, I object to the leading form of this question.

The Court—Oh, the certificate speaks for itself, I guess, in that respect, doesn't it?

Mr. Van Blarcom—It does; it is only a question on the record.

The Court—It does. I will allow it, although it speaks for itself.

A. (No audible response).

Q. At the time that certificate was issued, was Mr. Geldziler entitled to any credit on this job? Do you know?

Mr. Totten—I object to that, unless he knows.

Mr. Van Blarcom—If he doesn't know, he won't answer it.

The Court—I hope not. He did not answer the previous question, though.

Mr. Totten—The certificate speaks for itself.

The Court—Excepting, of course, as the certificate speaks of itself. The question was whether there was a hundred dollars represented by that certificate to be taken—

Q. $148.00—

The Court—from the $3,583.61.

Q. Is this balance of $3,583.61 the balancee at the time that certificate was issued? A. Was issued.

Q. From that balance the amount of $148.00 is to be deducted to show the balance after that certificate has been paid? That is right? A. Yes.

The Court—How much is it? $148.00; is that right?

The Witness—Yes, sir.

Q. At the time this fortieth certificate was issued, was Mr. Geldziler entitled to any credit on this job?

Mr. Totten—I object to that, sir, as a conclusion; the certificate speaks for itself.

The Court—Well, of course, it may be a conclusion; but it is a conclusion based on his own personal knowledge. If he knows; I will allow it, if you know.

Mr. Totten—Your Honor permits an exception to all of this.

The Court—You may have it.

A. He was allowed a credit, but I do not know just where it came in. Miss Becker's books will tell that.

Q. Are you familiar with these books? A. Yes.

Q. I show you Exhibit D-5, which shows a credit for mason work, of $1,402.25, and ask you what that is for.

Mr. Totten—Just a moment, Your Honor; I object.

Mr. Van Blarcom—If you will, please, let me examine this witness.

The Court—He says he is familiar with the book; he says there were credits due as shown by the books.

Mr. Totten—Does Your Honor understand that the credits, under the circumstances, in which this book is in evidence, that he would be permitted to use it to refresh his memory? That is all—

The Court—This book was made under your direction, was it?

The Witness—Yes, sir.

The Court—Who made the record in the book?

The Witness—Miss Becker.

The Court—How did she get the items that she has put there??

The Witness—From me.

The Court—Where did you get them?

The Witness—I got them off the job.

The Court—What do you mean? off the job.

The Witness—Well, I calculated the work that was donee, and made some allowance there for the tile and the stage.

The Court—And what else, without looking at it?

The Witness—I do not know that I can tell you the other now,—seven years ago.

Mr. Watson—Now, Your Honor, the young lady testified that thesee entries were given to her by somebody; she was not sure whether it was Mr. Wentworth or whether it was this gentleman.

The Witness—It was me.

Mr. Watson—She was the one who made this book.

The Court—Yes.

Mr. Watson—And she is the person that knows it.

The Court—Here is the man that gave her the instructions, he says, and corresponds to what she says, too.

Mr. Watson—She said, sir, several people gave her instructions.

The Court—Not several people,—two—Mr. Wentworth and Mr. Stansbury. Mr. Stansbury said he gave it to her. That clears that up, I think.

Mr. Watson—I think it contradicts her testimony.

The Court—I do not think it—

Mr. Watson—(continuing) I do not mean to say—I am not questioning his honesty, but I mean, it is not in accordance with her statement, because her statement was that these entries, as far as she knew, came from several people.

The Court—Two.

Mr. Watson—Now, he says he is the man. I do not know whether—even his source of knowledge is of such indefinite nature, that I do not think that he should use this statement for the purpose of refreshing his memory, it does seem to me, and being an extremely self--serving declaration, which is brought into court for the purpose of testifying as to what happened.

The Court—All right; let me examine him a little further, please.

By the Court:

Q. Did you have full charge of this job? A. Yes, sir.

Q. Did anyone else have anything to do with it? A. No, sir; not from our office.

Q. What did Mr. Wentworth do in connection with it? A. Why, I was under Mr. Wentworth; I was employed by Mr. Wentworth to take care of the building.

Q. What did Mr. Wentworth have to do about the calculation of any credits that might be due? A. Why, that is usually taken up with him, and he makes the calculation.

Q. Well, did you examine it, or did he? A. I did not make any—

Q. He made them; how is it that you came to tell Miss Becker about the amounts? A. Well, I went by my certificate that I gave, and I would see to it what the credit was.

Q. I understand that, but then, in addition to the certificate, that you say that you gave to Miss Becker certain instructions with respect to certain

items; that under your instructions she put it in the records. A. Yes.

Q. Now, where did you get those figures that you gave her, whatever they may have been? A. Why, I got them at the building.

Q. From Mr. Wentworth? That is correct, isn't it? A. Yes.

Q. Then you translated whatever Mr. Wentworth told you to Miss Becker? A. Yes, sir.

Q. And also made out the certificates under his supervision? A. Yes, sir.

Q. That is correct, isn't it? A. Yes, sir.

Q. Now, you do not know what the credits are? A. I cannot tell you off-hand.

Q. What were they, besides tiling? How much was—don't look at the book; just a moment;—how much was the tile credit about, if you know? A. I cannot tell you off-hand.

Q. Well, was it a large amount, small amount, or what? Have you any recollection of it? A. No.

Q. What other items were there, if any? A. It was—I cannot tell you off-hand.

Q. Well, were there any other? A. Yes.

Q. For what? A. Well, there is this allowance on—I don't know as I can tell you just now.

Q. You haven't looked at that record in some time, have you? A. No, not for seven years.

Q. Seven years; all right.

Th Court—I do not think he should be permitted to recall those from someone else's writing in that record.

By Mr. Van Blarcom:

Q. Well, you did look at this record about the

time it was made, did you? A. Why, yes, certainly, I would, naturally, whenever I was making other certificates.

Q. And the amount that that record shows to be due from Geldziler to Post is correct? A. Absolutely.

Q. Unless it has been changed in the last seven years? A. Yes, sir.

Mr. Totten—I ask that be stricken out.

The Court—Oh, I will allow that. Anything more?

Q. You were familiar with the contract between Geldziler and Post? A. Yes.

Q. And these certificates were issued, were they not, in accordance with the terms of that contract? A. They were, when the work was completed.

Q. Now, who estimated the work completed? A. Why, I did.

Q. You do? A. Yes.

Q. And the materials furnished, who estimated that? A. Well, I merely took it as a—

Q. That is, who estimated the amount of it? A. Yes.

Q. Who did? A. I did.

Q. You or Mr. Wentworth? A. I did.

Q. And from your own calculation, did you give Miss Becker the information to issue these certificates? A. It was.

Q. Or was it from Mr. Wentworth's calculation? A. No, it was from me.

Q. From your own calculation? A. Yes.

Q. You have been in the building business how long? A. About fifteen years.

Mr. Van Blarcom—That is all.

Cross-examination by Mr. Totten:

Q. Mr. Stansbury, are you an architect? A. No, sir.

Q. The certificates that you have identified, did you sign Mr. Wentworth's name to those certificates? A. I signed all of those.

Q. You are sure about that, every one of them? A. Yes.

Q. Do you know whether those certificates contain the reduction for the fifteen percent as provided for in the contract?

Mr. Van Blarcom—I object to that.
The Court—Oh, I will allow it.

Q. Do you know? A. Well, usually, yes.
Q. They do? A. (No answer.)

The Court—What is the answer? That they do include the fifteen?

Mr. Van Blarcom—They do not that it is allowed, however.

Q. Therefore when these certificates were issued, right down to the fortieth certificate, there was fifteen percent still in the hands of the architect; is that right?

Mr. Van Blarcom—I object to that. That is misleading. The contract does not say that, and the question is misleading, and I object to it.

The Court—The contract says what?

Mr. Totten—I have the contract before me, the original, which has been offered in evidence. (Reading) "Payments to be made from time to time as the work progresses, in the amounts to be certified to by such certificate of the architect, no payment to be made for more than eighty-five percent of the work completed, materials furnished and actually installed in the building; certificate of the architect in all cases to be final, binding and conclusive between owner, architect and all parties concerned."

The Court—I do not see any objection to that.

Mr. Van Blarcom—That is not the correct statement; the contract does not say so.

The Court—It practically does.

Mr. Van Blarcom—No, it does not.

The Court—It says that there shall be retained, that there shall only be paid out eighty-five percent of the amount of work and material.

Mr. Van Blarcom—Yes, but he is not asking, Your Honor, if fifteen percent of the contract price was retained; that is a different thing entirely.

The Court—What is the difference?

Mr. Van Blarcom—The difference is this—Suppose this man lost money on the job, and the certificates call for the retention of fifteen percent—or, not retention, but issuance of only eighty-five percent of the labor and material. Now, that theatre may have cost us $75,000.00 instead of $50,000.00, and the certificates, under that, would have been

much more than the contract price, if it was eighty-five percent.

The Court—That is true.

Mr. Van Blarcom—And it does not say to retain fifteen percent.

Q. Mr. Stansbury, I ask you this: When you issued certificates from 29 to 40, inclusive, whether or not the certificates represented more than eighty-five percent of the work completed and materials furnished and actually installed in the building? A. They did not.

Q. Now, I ask you, when the fortieth certificate was issued, it represented,—

Mr. Totten—I will withdraw that.

Q. When the fortieth certificate was issued, did it represent eighty-five percent of the work completed and materials furnished and actually installed in the building?

Mr. Van Blarcom—I object to that.

The Court—Oh, I will allow it.

A. Well, I think, at that time, when I gave that last certificate, I went according to the work completed and the material on the job.

The Court—Well, of what? What percentage was it of the entire cost?

The Witness—Well, it would run more than the cost.

Mr. Totten—No, I do not ask that, sir, if Your Honor please.

The Court—All right; I thought it was the same thing.

Mr. Totten—Now, at this point, sir, I am going to ask every one of these certificates that have been offered in evidence here, purporting to be issued under the signature of Fred W. Wentworth as the architect on the job, as they are not the certificate of Fred W. Wentworth, and they are not the certificate of an architect, and not in accordance with the contract itself under which this building was built, sir,—I am going to ask that every one of them be thrown out or stricken out. My point is, I wanted to get the record clear.

The Court—Motion denied.

Mr. Van Blarcom—That will end the case.

Mr. Totten—We only want what we are entitled to.

The Court—Motion denied. I do not take the contract to mean that Mr. Wentworth himself cannot send somebody else to do it. This man is the agent of the architect.

Mr. Totten—Your Honor, permit me one moment on that point?

The Court—No, I won't waste any time on that.

Mr. Totten—The contract is very specific as to how these certificates shall be issued.

The Court—By the architect.

Mr. Totten—By the architect.

The Court—Yes. I do not think that that means that the architect personally himself must do it, but could delegate that job to somebody else.

Mr. Watson—But it does seem to me that he cannot prove the agency. No agent can establish his own agency.

The Court—Well, that may be, but I will allow it to stand for the present.

Q. Now, do you know any clause in the contract under which this theatre was erected by which credits could be allowed to Mr. Geldziler?

Mr. Van Blarcom—I object to that. The contract speaks for itself.

The Court—Oh, well, he may tell, if he knows anything about it.

Mr. Totten—Let him answer.

Mr. Van Blarcom—What he doesn't know about that contract doesn't take it out of the contract.

The Court—No, not at all, but if he wants to ask it, I haven't any objection. Do you know of any clause in the contract under which this theatre was erected by which credits could be allowed to Mr. Geldziler, Mr. Stansbury?

A. No, I do not.

The Court—All right; he does not.

Q. Do you know what these allowances of $1400.00 and $148.00 are for? A. Well, I think it combines two or three togeether.

Q. What do you know? We do not want what you think, Mr. Stansbury. A. I cannot tell you off-hand.

Q. Well, have you any record that you yourself made on the job that would clear this situation up? A. No, I have not.

Q. On the face of them, you issued these certificates, setting forth these credits, in the face of the fact that you did not know what they are for?

The Court—He does not say that. He knew at the time. He does not recall now, and he has already said that one of the items was for the tile work, but he does not recall the amount. Then, there are some other items that he does not now recall. If you have no objection to his looking at the record, I suppose he could tell us, but I thought your objection was sound, so I sustained it, so don't waste much time on it.

Q. While you were superintending this job, were you superintending any other job? A. I was not.

Q. That was the only job in the office at the time? A. At that time?

Q. At what time? A. Well, in the course of construction—

Q. At what time?

The Court—Do you mean the date?
Mr. Totten—No.

Q. I mean covering what period—how long a period? A. It is 1920—1921, I think.

Q. Period of 1920 and 1921 Mr. Wentworth, the architect, had no other job that you were supervising for him; is that right? A. Not at that time. He may have had other jobs, but I was not superintending them.

Q. Is there any other superintendent of con-

struction in Mr. Wentworth's employ? A. Three or four.

Q. Did they do any figuring on this job? A. What do you mean by figuring?

Q. Did they in any way superintend this building, the Capitol Theatre? A. No, they did not.

Q. Did they make any of these figures which you used in these certificates? A. No, sir.

Q. Sure as to that? A. Yes.

Q. Did they figure out any of the allowances allowed on these certificates?

Mr. Van Blarcom—There aren't any allowances allowed on the certificates.

Mr. Totten—Aren't any?

Mr. Van Blarcom—No.

Q. Did they figure any of these credits?

Mr. Van Blarcom—No credits allowed on the certificates.

Mr. Totten—There has been testimony that there were credits. If there are no credits,—I understood that there was one credit of $1400.00.

The Court—This witness has not said so. The question is: Did any of these other persons have anything to do with the fixing of the amount of these credits that were allowed on this job?

The Witness—Well, only by the bookkeeper.

The Court—The bookkeeper only did what you told her to do.

The Witness—Certainly.

The Court—The question is: Did any of these other persons have anything to do with the supervision of this work, or anything to do with the work?

The Witness—No.

The Court—You alone, with Mr. Wentworth; is that right?

The Witness—Yes, sir.

The Court—(Continuing) Had to do with this job?

The Witness—Yes, sir.

The Court—All right.

Q. Mr. Wentworth didn't have anything to do with this job, did he? A. I was working under his directions and supervision.

Q. Did Mr. Wentworth supervise the job, or did you supervise the job? A. I supervised it, for Mr. Wentworth.

Q. Why is it then, that if Mr. Wentworth supervised the job, and you worked under him, that Mr. Wentworth did not sign the certificates of the architect?

Mr. Van Blarcom—I object to that.

The Court—He did not say that. He said he supervised it under Mr. Wentworth's directions. That is a different thing from saying that Mr. Wentworth supervised it.

Q. Why is it then, that if this job was being done under the direction of Mr. Wentworth, and your supervision—A. Yes.

Q.—that Mr. Wentworth didn't make out the figures?

Mr. Totten—I will withdraw that.

Q. Did Mr. Wentworth give you the same figures that you used in these certificates? A. Why, those were taken from the previous certificates, and whatever the allowances made, I would see at the time the job or work proceeded; that is the way we usually do these things.

Q. What did you do in this case? That is what we are interested in. A. That is what I am telling you.

Q. Well, were the figures given to you by Mr. Wentworth—A. No.

Q. —that you used in them? A. No, sir.

Q. —in these certificates? A. No.

Q. Didn't you just say on direct examination that these figures used in these certificates were given to you by Mr. Wentworth? A. No.

Q. Sure about that now? A. Yes.

Q. Are they your figures? A. Those are my figures.

Q. They weren't put there under the direction of Mr. Wentworth? A. The bookkeeper, and myself.

Q. Answer my question. Were they put there under the direction of Mr. Wentworth? A. No.

Q. Then, if you made the statement on direct examination that they were made under the direction of Mr. Wentworth, you were then in error, and you wish to correct that statement; is that right?

Mr. Van Blarcom—I object to that.

A. I did not say that.

Mr. Van Blarcom—He never said that.
Mr. Totten—The record speaks for itself.

Q. Do you know whether you ever submitted a one of these certificates to Mr. Wentworth before you signed it? A. No, I did not.

Mr. Totten—That is all.

FRED W. WENTWORTH, sworn.

Direct Examination by Mr. Van Blarcom:

Q. What are you in the City of Paterson in a business way, Mr. Wentworth? A. Architect.

Mr. Watson—We will admit his qualifications.

The Court—All right.

Q. How long have you been an architect?

Mr. Watson—That is not necessary.

A. Thirty-five years.

Mr. Van Blarcom—Well, the more the merrier. I could have had four questions answered by this time.

The Court—Go ahead.

Q. Did you have anything to do with the contract between Mr. Geldziler and Mr. Ritchie for the erection of the Capitol Theatre? A. Yes, sir.

Q. Was the contract, plans and specifications prepared in your office? A. A portion of them were. The original arrangement was with Mr. Geldziler and Short.

Q. And Short? A. And Short came to me and asked me to work with him on the job, which I did, and I had charge of the construction of the work.

The Court—Who is Mr. Short?
The Witness—He was another architect.

Q. You had the supervision of the construction of this theatre? A. We had the construction of the whole work.

Q. Who did the actual inspection and supervision? A. My outside superintendent, Mr. Stansbury.

Q. How long has he been with you? A. So long that I cannot remember when he came with me; it must be nearly fifteen years.

Q. And been with you continuously? A. That is all.

Q. Who is your bookkeeper? A. Miss Becker.

Q. Are you familiar with your own books of your office? A. To a certain extent.

Q. I show you Exhibit D-5, and ask you if this record of the Geldziler job, certificates, payments and the amount due, is correct?

Mr. Watson—Objected to.
The Court—I will allow it.
Mr. Watson—I ask an exception.

A. I consider it so.

The Court—You may have it.

Q. Did Mr. Stansbury have authority to authorize and sign these certificates? A. He did.

Q. I show you Certificate No. 4, extra work, approximately $4,000.00, and extra work, $76.00, and in the book, D-5, there is an item of extra work, $51.00; did you ever authorize any other additions to the amount due under this contract, in writing or otherwise? A. Not to my knowledge.

Mr. Van Blarcom—That is all.

Cross Examination by Mr. Watson:

Q. How many supervisors have you, Mr. Wentworth? A. I have five at the present time. I did not have as many then, two probably then.

Q. Two at that time. You did not personally supervise this job, did you? A. Occasionally.

Q. So that you left the supervision of this job, in the estimation of quantities, etc., in the hands of the man that had charge of it; is that right? A. The man that has charge of the job always does that detail work.

Q. Did you either make or supervise the figures set forth in these certificates? A. No, sir.

Q. At the time—so that you had nothing to do with them? You do not know whether they were—

A. Mr. Stansbury undoubtedly consulted with me on points that he wanted to take up, asked my advice, which I gave him, but I do not do the detail of it at all.

Q. You do not know of your own knowledge as to whether these certificates were issued in strict

accordance with the terms of this contract? A. That was my instructions, that they should be.

Q. I say, you do not know of your own knowledge? A. I am not positive of it, no.

Q. All you know is what your supervisor did, isn't that correct? A. Yes, sir.

Q. I suppose, in many instances, you never saw these certificates, did you? A. Probably not.

Q. In most instances? A. Probably not.

Q. You knew this building was being altered, that is, the original plans and specifications had been changed, to some extent? A. Oh, yes.

Q. You had been in the building after that? A. I was in the building a great many times during its construction, but only to go there and go over the thing with my superintendent.

Q. You were there subsequent to August 1, 1920? A. I couldn't tell you dates now, because I do not keep a record.

Q. Well, you would know whether you were there subsequent to August 1, 1920, for a period of four or five months, wouldn't you? A. I doubt it.

Q. Is that your vacation period? A. (No answer.)

Q. Well, this job stretched over six or seven months? A. Yes.

Q. (Continuing) Beyond the expiration, is that right? the original expiration date? A. It was slow, I know, at the time of the—

Q. You issued certificates, or you knew your man issued partial certificates, in payment of this work at periods subsequent to the original expiration date, do you not? A. That is customary.

Q. Yes. These alterations consisted of a complete change in material, did they not? A. Not a complete change, no.

Q. Well, a mighty large change? A. There were numerous changes; I do not remember the detail of the changes now.

The Court—Do you remember the change from ash concrete to bluestone concrete?

The Witness—I couldn't say, no.

The Court—All right.

Q. When was the job finally finished? Do you know? A. No.

Q. It is substantially completed now? A. As far as I know.

Q. It is occupied? A. It has been occupied for a long time.

Q. Accepted by the owner? A. (No answer.)

Q. This contract calls for the retention of fifteen percent of the materials that was furnished and the work and labor done?

Mr. Van Blarcom—I object to that; it does not call for that.

The Court—No, that is the point we argued before. It provides that no payments are to be made beyond eighty percent of the cost of material and labor,—

Mr. Watson—On the job at the time of the payment.

The Court— —does it not?

The Witness—That is the usual custom.

Q. What do you understand that to mean? What is the custom of the trade? A. What?

Q. What is the custom of the trade? What does it mean? A. What the eighty-five percent clause means?

Q. Yes, what does that clause mean, according to custom? A. It means that we should retain at least fifteen percent of the cost of the work.

The Court—Cost of the work or the contract price?

A. Cost of the work as it progresses. In other words, if a thousand dollars worth of work is completed on a job, we pay the man $850.00.

The Court—Suppose you had a contract that calls for a building to be erected at a cost of $80,000. and during the course of the work it came about that it cost $100,000, how much would you retain, before the final payment was made?

The Witness—$15,000.00.

The Court—15% of the hundred and not eighty?

The Witness—15% of the cost of the work.

The Court—All right.

Q. That is, if the contract were changed; but if the contract—

The Court—In any event, he says.

A. In any event.

The Court—Cost of the work is what governs, not the contract price.

The Witness—The changes in the cost become a part of the contract.

The Court—Yes.

Q. Would that be true, Mr. Wentworth, if the additional cost were included under extras, which were being done, and performed, at a per diem price and according to the reasonable value of the materials used, or would that, as a lump sum price? A. That would be a question of special agreement between the owner and the contractor.

Q. And without agreement? A. Then, I should think they would follow the terms of the contract.

Q. You do not know positively whether that is customary, or not, that would be the— A. That would be the way I would do it—

Q. But it might be otherwise? A. I think that is the general custom.

Q. Who instructed your superintendent to follow the terms of this contract?

Mr. Van Blarcom—Oh, I object to that. Common sense ought to do that.

The Court—I will allow it.

Mr. Watson—I am not here, Fred, to ascertain what the common sense opinion is. Maybe, if there had been a little common sense used, we would not be here at all.

Mr. Van Blarcom—No, you would not have brought this suit.

Mr. Watson—We would never have had to.

Q. So you instructed the superintendent to follow the terms of this contract? A. Always, I put my superintendent in charge of the job, and I hold him to handle the job.

The Court—According to the terms of the contract?

The Witness—According to the terms of the contract and the agreement.

The Court—If he did not, what would you do to him?

The Witness—Well, I think he—

The Court—Fire him?

The Witness—wouldn't do it again, I know.

Q. He knew the terms of this contract?

Mr. Van Blarcom—I object to that. How does Mr. Wentworth know whether he knew the terms of this contract?

The Court—Oh, I wil allow it.

A. Well, in a general way, yes. In a detail way, no.

The Court—The question is: Was Mr. Stansbury acquainted with the contract?

A. Certainly, he had all of the specifications, all of the plans and the contract.

The Court—He had the contract.

A. In his hands.

The Court—You assumed from that that he knew what the contract was?

The Witness—Yes.

The Court—If he can read.

The Witness—Yes.

The Court—All right.

Q. You saw them in his possession? A. I couldn't say that I saw them in his possession.

Q. You gave them to him? A. I would presume that I took the plans and handed them to him.

Mr. Van Blarcom—Did you get a receipt from him for them?

The Witness—That is part of the office detail.

The Court—Do you know anything about the payments on this job, Mr. Wentworth?

The Witness—No.

The Court—Do you know whether the certificates were given before payments were made, or after?

The Witnes—I am not sure on that.

The Court—Were you ever importuned to give certificates, and were you told when the certificates were pleaded for, that the money had already been paid to the contractor?

The Witness—I think that occurred.

The Court—It did occur?

The Witness—I think so; I am not sure.

Q. Was Mr. Geldziler a client of your office, Mr. Wentworth? A. Mr. Geldziler was my client.

Q. You do not know whether he assumed a certain management in the control of the construction, do you? A. Why, he was on the job, and he worked with Mr. Stansbury, and we take instructions from our clients, and if they want to make changes, we try to make changes to please them, and Mr. Stansbury handled all of that detail with Mr. Geldziler, and once or twice I was called to the job to pass my judgment as to whether I thought it was advisable to do it, or not, which I did do; but as far as the detail of the work—construction work—was concerned, or as far as the issuing of certificates was concerned, that was in charge of my superintendent, whom I hold on the job, because I cannot go there and handle every little detail.

Q. You do not know whether if Geldziler assumed the prerogative of your superintendent in instructing this contractor as to what to do and what not to do? A. I do not know anything about that.

Q. And you do not know whether, when these certificates were issued, whether the payments which they called for had previously been paid, do you? A. No.

Q. All you know is that they were issued at a time—? A. All I know is what my records show.

Wr. Watson—That is all.

SAMUEL GELDILER, Sworn.

Direct Examination by Mr. Van Blarcom:

Q. You are the defendant in this suit? A. Yes, sir.

Q. On February 11th, were you served with that notice? A. Yes, sir.

The Court—February 11th, of what year?

Mr. Van Blarcom—1921.

The Court—All right.

Mr. Van Blarcom—I offer this in evidence.

Mr. Watson—Has this been set forth in your answer?

Mr. Van Blarcom—This is a natural defense.

Mr. Watson—Well, have you set it up? (Examining pleadings) I do not think it is admissible. I think, Your Honor, that we should be apprised, in this class of cases, in every instance of every payment that he has been forced to make by prior stop notices.

The Court—What does the answer say in that respect?

Mr. Watson—If this stop notice, assuming that there was a foundation, and that he is entitled to bring it in, and this stop notice is entitled to priority, I think we are entitled to know as to what priority he is entitled to receive the benefit in that connection.

The Court—What does his answer say in respect to the priority of an other stop notice?

Mr. Watson—It does not make mention any other particular priorities.

The Court—It does say that out of the fund that was in his hands, he was obliged to pay out to other people.

(Mr. Totten reads from pleadings.)

Mr. Van Blarcom—That is not it.

Mr. Totten—Where is it?

Mr. Watson—This is the defense alleged under the bond.

Mr. Van Blarcom—He denies Paragraph 10 of the complaint in so far as the same alleges that the plaintiff is entitled to have judgment for the sum of $4,798.00 with interest, against this defendant. General denial.

The Court—General denial?

Mr. Van Blarcom—It is a denial of the allegations.

The Court—Judge Watson's contention is that you should have in a separate count set up affirmatively, as a matter of defense, that you did, as a matter of fact, pay to each one who served stop notices certain sums of money. That is your point.

Mr. Van Blarcom—Yes.

Mr. Watson—But you see, Your Honor, this is a statutory action, and he is pleading a statutory defense.

Mr. Van Blarcom—No, I am not.

Mr. Watson—He has. It is a statutory defense, the statutory defense being that, even assuming there be a fund in our hands, we must pay, according to the statute, we must pay this fund out according to the priority of notices, that your notice is No. 4; consequently, we paid 1, 2, and 3, and that leaves no balance from which you may recover. Now, if that be true, then I say,—and it is true,—we are entitled to know who 1, 2 and 3 are. How can we investigate who

he may set up as prior stop notices? How can we ascertain whether or not there is a fund there to which we are entitled to a specific judgment. We cannot recover a general judgment against this defendant Geldziler, x x x so that I maintain, Your Honor, that it is a specific proceedings, and we are entitled to know these facts, and that he cannot come into court and set up prior claimants without first giving us notice, giving us an opportunity. Why, he could set up, under these circumstances,—he could set up twenty, thirty or forty payments.

The Court—What do you say to that, Mr. Van Blarcom?

Mr. Van Blarcom—I submit that the judge is a little bit in error, and is putting on the defendant what is in reality, is the plaintiff's business to prove. In other words, if it is a statutory action, then the plaintiff, under the statute, is only entitled to the money that is in Geldziler's hands, and he, in order to recover, has got to show what is in Geldziler's hands, whether it has been taken out by payments to the contractor or by stop notices. In fact, if I relied strictly on the statute, I could have stopped and not put any defense in at all, and simply state that he has not shown that there is any fund in the hands of Geldziler out of which this judgment could be met. I do not have to plead these stop notices, because the statute gives me the right to come in here and say that there is no money.

Mr. Watson—That is it, exactly, and the burden of proof is upon him to show that.

Mr. Van Blarcom—I do not have to tell him why there is no money. He has got to tell me. He has got to tell Geldziler that Geldziler has got the money.

Mr. Watson—We sustain our burden of proof when we establish that he had the money, and his defense is to prove that it has been used in other directions, which he is entitled to pay.

The Court—Your point is that he should have set this up in the pleadings, these different stop notices that he claims he has paid.

Mr. Watson—Yes, sir.

Mr. Van Blarcom—I claim we do not have to, but that he has got to prove that Geldziler has got money in his hands.

Mr. Watson—We establish the burden of our case when we established that there was money or should have been money. He must come forward and prove that the money has been used in accordance with the statute.

The Court—The only question in my mind is whether there was any necessity, under the rules of pleading and under this statute, if he has specifically set up in his answer, a general denial, that there was no moneys due.

Mr. Watson—Don't you see, Your Honor? How can we rebut his defense, unless we know what it is? Now, then, if Mr. Van Blarcom's contention is correct, we have no opportunity of knowing what he is going

to set up as against that fund until the moment of trial, and then we must meet the issue as best we can to prove it, and I contend that, under those circumstances, when he fails to specify what they are, he is estopped from offering evidence of their existence at all.

The Court—I am not sure that you are—frank about it—I am frank to say I do not know,—but I will allow the testimony, and then if it be necessary for you to have time to rebut it, I will give you such opportunity. You will be in the same position.

Mr. Watson—In other words, this means that you are allowing him to amend his pleadings.

The Court—No, I am not sure that he needs to amend.

Mr. Watson—It would amount to an amendment.

The Court—Oh, I do not think so. He has made a denial in his answer that this money is due. Now, you find out, for the first time, we will assume, or you are discovering, that the reason he is not responsible is because he has paid to divers people prior claims on this fund. The only point about it is that you are not in position to rebut that, whereas you would have been in a position to rebut it, if he had set it forth specifically in his reply, and I say, I will obviate that difficulty, in that regard, by giving you additional opportunity, whatever you may need, to rebut it. I am holding that the answer does raise an issue and that under that issue he is entitled to prove it. I will allow it.

Mr. Watson—May I have an exception?

The Court—You may have an exception.

Mr. Van Blarcom—I will offer that notice.

The Court—Let it be received and marked.

Stop Notice offered and received in evidence, and marked Defendant's Exhibit D-6.

Q. On February 16, 1921, did you sign that notice? A. Yes, sir.

Mr. Van Blarcom—I offer that in evidence.

The Court—Let it be received and marked.

Stop Notice offered and received in evidence, and marked Defendant's Exhibit D-7.

Q. On February 23, 1921, did you receive that notice? A. Yes, sir.

Mr. Van Blarcom—I offer that.

Stop Notice offered and received in evidence, and marked Defendant's Exhibit D-8.

Mr. Watson—What was that? another notice?

Mr. Van Blarcom—That is the Bridge Company's notice.

Mr. Watson—Same objection to that.

The Court—I understand your objection is to all of this line; it will be a continuing one, and the ruling will be the same.

Mr. Watson—Yes, sir.

Q. February 25, 1921, did you sign that notice?
A. Yes, sir.

Stop Notice offered and received in evidence, and marked Defendant's Exhibit D-9.

Q. On March 2, 1921, did you receive this notice, P-1? A. Yes, sir.

Q. On March 3, 1921, did you sign that notice? A. Yes, sir.

Stop Notice offered and received in evidence, and marked Defendant's Exhibit D-10.

Q. Were you served with any other stop notices after that? A. I guess I was.

Q. Were you?

Mr. Watson—After the Post notice?

Q. After the Post notice? A. Sure.

Q. Sure. Now, the stop notice served by Frederici, on you, were you sued? A. Yes, sir.

Q. And who was Frederici's attorney? A. Walter Hudson, if I ain't mistaken.

Q. What did you do about that suit? A. I went to the counsellor at the time and he said, "You will have to settle the case."

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

Q. How did you settle it?

Mr. Watson—Just a moment.

A. (Interrupting) I gave, if I ain't mistaken, five hundred dollars in cash.

Mr. Watson—(Continuing) I object to that. Are we bound, Your Honor, to the fact that this man settled a case?

The Court—He might have improperly settled it, or he might have voluntarily paid something that he did not owe.

Mr. Watson—That is the point.

Mr. Van Blarcom—Under the statute, he has a right to.

Mr. Watson—We are bound legally to pay what we should pay, but are we bound to pay for this man's voluntary payments out of court?

The Court—I question very much, if you are.

Mr. Van Blarcom—We can pay these without any suit at all.

The Court—You could pay them, but supposing you have paid them improperly; suppose there is nothing due. I will hear—

Mr. Van Blarcom—Let them show that

The Court—I will hear what he said, but on the point—

Mr. Watson—I think that the testimony is improper; I do not think that we are bound by his settlements.

Mr. Van Blarcom—This is the first time I have ever heard of that.

The Court—You may be and you may not be, if the claim was a proper one and it was for two thousand dollars and by reason of his giving cash immediately rather than contesting it got rid of it for a thousand dollars; that is to your benefit.

Mr. Watson—Oh, yes, but then, on the other hand, there is no positive proof that the claim had any merit at all, if he settles it for anything less. If the court says to settle, and if he had to pay so much money, we are bound.

The Court—Yes, of course.

Mr. Watson—But if he takes the responsibility, whether he settles for half or more, we are not bound.

The Court—You mean to say, if he investigates it and finds that there was no question but that the moneys were due, that he would not be permitted to settle it, but would have to go to the expense of a court action?

Mr. Watson—He is the fiduciary of this fund. After he received the notice, he is the fiduciary of the money in his hand, and he is bound to hold that money in the capacity of a trustee for the benefit of those who have served him with notices. That is practically his situation. Now, what happens? If he settles it for half the amount of the stop notice, that is a fair presumption that there was something wrong with it, and I think it is a just and fair presumption that there was something wrong, and if there is something wrong, it may have been worthless. So that I maintain that when he takes that responsibility, this amount, whatever he may state, is too speculative for the court to consider at all. In order to protect himself, he should have a court of competent jurisdiction enter upon a judgment.

Now, he has not done so, and I say that the court should reject it for that reason.

The Court—I will hear it.

Mr. Watson—I might suggest, Your Honor, that there is another phase of this thing, that part of this defense is that we are on a bond.

The Court—No, we have not forgotten that.

Mr. Watson—We are on a bond, and if we are sureties, do you realize what that is? Why, simply, that means, Your Honor, that they have practically taken away from us our rights under that bond, which makes our bond worthless.

The Court—I will hear the testimony, subject to being disregarded or stricken out, after I examine it, on that point. I think there may be some merit in what you say.

Mr. Van Blarcom—There may be. It sounds good, but it is not according to the Mechanics' Lien law. The Mechanics' Lien law says that when a notice is served when served on a contractor, and if he believes a certain amount is due, and the contractor does not dispute the bill, then it is payable, whether it is good or not,—

Mr. Watson—But this a surety on a bond.

The Court—That may change the situation.

Mr. Van Blarcom—It certainly would.

The Court—I will hear the testimony. You have got your witnesses here now, and there is no prejudice, because there is no jury.

I will hear it, subject to your objection, and then I will consider the question from the legal standpoint, and if you are right, of course, it won't cause you any prejudice. Now, the question presented to Mr. Geldziler, is what he settled for.

Mr. Van Blarcom—Yes, that is the question.

Q. What did you settle for? A. I think for twenty-five hundred dollars.

Mr. Watson—How much?
The Court—$2500.00.

A. Something like that.

The Court—You paid it?
The Witness—I paid it; yes, sir.
The Court—What was the man's name?
The Witness—Frederici.

Q. Did Ritchie tell you at any time that he disputed Frederici's bill? A. No, sir.
Q. Or this judgment? A. No, sir.
Q. Or this statement, I mean. A. No, sir.

The Court—Is that the first stop notice?
The Witness—Yes, sir.
Mr. Van Blarcom—This is the first stop notice.

Q. Were you afterwards served with a summons in the suit of the Paterson Bridge Company? A. Yes, sir.

Q. Did you settle that? A. I settled that.
Q. For how much? A. $400.00.

The Court—Is that the second stop notice?

The Witness—Yes, sir; Your Honor.

Q. Did Mr. Ritchie ever tell you—either one of the Ritchies ever tell you that the Paterson Bridge Company case was—amount was not right? incorrect? A. No, they never did. With the exception, if I ain't mistaken, $4500.00 was the bill, but they never disputed the bill.

Q. Eh? A. They never did.

Q. They never did. You settled it, you said, for $400.00? A. $400.00.

Q. Without prejudice? A. Without anything, so that I didn't have to go to court.

Q. I show you this receipt; is this the receipt you got from the Paterson Bridge Company? A. Yes, sir.

Q. When you settled? A. Yes, sir; when I settled.

Mr. Van Blarcom—I offer that in evidence.

Mr. Totten—That does not bind us?

Mr. Van Blarcom—Oh, it does not?

The Court—It is evidence of the payment, however; he has said he paid $400.00 and he has the receipt.

Mr. Totten—And that is the receipt.

The Court—Yes, this is the receipt to corroborate the defendant's evidence.

Mr. Totten—Only as to one payment.
The Court—That is all.

Paper offered and received in evidence, and marked Defendant's Exhibit D-11.

Cross Examination by Mr. Totten:

Q. Mr. Geldziler, do you know how much the Paterson Bridge Co.'s claim was? A. If I ain't mistaken, it was $4400.00, if I ain't mistaken,—something like that.

Q. Have you got it here? A. $4400.00—

Q. You say the Paterson Bridge Company was about forty-four hundred? A. I can't really say. I didn't really argue that point, as long as Mr. Ritchie had never said it was wrong. Mr. Cook came up on the job looking for money and he has not got any money—

Q. Yes. A.—so when they started to sue, I went down to ask Mr. Van Blarcom, "Will you please settle that case?" and he did. They asked Mr. Van Blarcom $400.00 and I gave a check.

Q. Who was there besides Mr. Van Blarcom when you settled this for $400.00? A. Lawyer from the other side.

Q. Who was the lawyer from the other side? A. Filbert Rosenstein, if I ain't mistaken.

Q. Do you know now that the claim was for $3272.00? A. I don't know now, don't know nothing today.

Q. You don't know nothing today? A. No.

Q. Well, you got that letter, didn't you? A. Well, I took it down to the counsellor.

Q. Didn't you read the letter? A. No, that was to Mr. Van Blarcom to take care of it.

Q. You did not even read this letter, then? You didn't know how much the Paterson Bridge Company claimed? A. No, I did not.

Mr. Van Blarcom—What difference does that make?

Q. How did you arrive at a figure of $400.00 in settlement? A. I don't know; that is all they asked me.

Q. Were you sure that you owed them any money? A. Well, I had to go to court about it.

Q. What court? A. Paterson.

Q. What court? A. They started suit, Mr. Van Blarcom claimed.

Q. What court did you have to go? A. I didn't have to go to any, but we had to go—

Q. What court were you subpoenaed to come to? A. I don't remember, but I guess it was the Circuit Court.

Q. Now, is it not a fact that you settled this claim for $400.00 simply to save you personally the trouble of coming to court? A. Yes.

Mh. Van Blarcom—Your Honor, the receipt says that. The receipt says that was understood.

Mr. Totten—Now, I am asking why he settled for $400.00, not what the receipt contains.

The Witness—I haven't even been there when they settled. I left it to counsel. I said, if you call me up, if you settle this case, I will mail you a check. That is all I did. That is all I know about it.

Q. You never personally talked to any representative of the Paterson Bridge Company as to the settlement of the case? A. No, I did not.

Q. You did not know whether they had a good claim, or not, did you? A. Well, now—

Q. Did you know whether their claim was good or whether it was not good? A. I had no doubt their claim was good.

Q. Did you know it was good? A. It must have been good.

Q. Do you know whether it was good? A. I don't know.

Q. Now, this claim of Frederici; do you know how much Frederici claimed coming to him from this job? A. I do not know exactly.

Q. Do you know how much Frederici claimed? A. I do not know.

Mr. Van Blarcom—$——.00.

Mr. Totten—Will you let me conduct this examination, please?

Q. Did you ever receive this notice?

Mr. Van Blarcom—He swore that he did.

Mr. Totten—Will you permit me to conduct this examination?

A. Yes, sir.

Q. Did you read it? A. I did not.

Q. You did not read it? A. No, sir.

Q. Then, you didn't know how much Frederici claimed? A. No, I didn't; I trusted to my counsellor, to be truthful.

Q. Do you know how much you paid Frederici? A. If I ain't mistaken, I have in mind at that time, we were short in cash, and I gave him five hundred in cash and I gave him $2,000.00 in a note of the Paterson National Bank, for thirty days, that I met it, met the note.

Q. That is your recollection? A. Yes.

Q. Altogether you gave Frederici $2500.00 on a $3,067 claim; that is right, isn't it? A. Yes.

Q. You never talked to Frederici about his claim, did you? A. Oh, yes, I did; he met me three or four times down on the street, and he demanded his money—

Q. Yes? A. And that his—just a minute—I said, "I wish you would take it up with Ritchie," and he will straighten it out. He said, "Mr. Ritchie will do nothing." I said, "All right, I will go to the counsel, to Mr. Van Blarcom," and I said, "I wish you would take care of it, and try to get together and let's straighten this claim out," and so he did; that is all I can tell you.

Q. Did he offer to take less than $2500.00, if you gave him all cash? A. That I do not know.

Q. Did you ask him? A. No, I didn't; I left it to Mr. Van Blarcom, to settle the case.

Q. Didn't you talk money to him at all? A. No, sir.

Q. Didn't you make him an offer of $500.00 cash and a note for thirty days for $2,000.00? A. To the counsellor.

Q. Didn't you? A. To the counsellor.

Q. Did you make that offer to Mr. Frederici? A. To my counsellor.

Q. Then you, yourself, never talked to Mr. Frederici about this claim, did you? A. He met

me three or four times on Market street; he said he would go down and tear out the tiles.

Q. Did you make him an offer yourself? A. No, I made no offer whatever, I never did.

Q. Did you ask him how much he had coming to him? A. I didn't ask him. I said, "Mr. Van Blarcom will take care of you," I said, "if you see my lawyer, and you will get together all right," I said. That is all that was said.

Mr. Totten—That is all.

Redirect Examination by Mr. Van Blarcom:

Q. Are you sure it was $2500.00 or $2250.00 that you paid Frederici? A. That I couldn't tell you.

The Court—That is all.

Q. All right. A. I do not remember.

Mr. Van Blarcom—All right.

FREDERICK BARNES, sworn.

Direct Examination by Mr. Van Blarcom:

Q. What do you do, Mr. Barnes? A. Deputy Sheriff.

Q. Process server, also? A. Yes.

Q. Serve stop notices and papers? A. Yes.

Q. I show you a notice signed by Samuel Geldziler, to John J. Ritchie, and ask you if you served that notice on anybody? It is exhibit D-7. A. Yes, I signed that affidavit; I remember serving it.

Q. On whom did you serve it? A. I think I served it on John J. Ritchie.

Q. Does the affidavit show? A. Yes. John J. Ritchie, himself, personally.

Q. I show you this notice, D-7, and ask you if you served that on anybody? A. Yes; John J. Ritchie.

Q. Senior or Junior? A. John J. Ritchie, Sr., the father.

Mr. Totten—We do not deny the receipt of these notices that were served on Mr. Ritchie.

The Court—No necessity of putting that in.

Q. I show you notice signed, Samuel Geldziler, and directed to Post, and ask you if you served that notice?

The Court—Is that true?

A. Yes.

Mr. Totten—Yourself?

A. I served that on Post down in the coalyard.

Mr. Van Blarcom—Your Honor, I will ask that to be marked.

The Court—Isn't that in evidence?

Mr. Van Blarcom—It is not in evidence.

The Court—Have you seen that?

Mr. Totten—I thought it was marked as an exhibit.

The Court—Notice served on Mr. Post.

Mr. Watson—Your Honor, we object to it on the same theory that we object to all of the others.

Mr. Totten—And the further ground, sir, that this notice does not properly apprise Post, the surety, of the facts sufficient to let him know what this suit is to be.

The Court—I will admit it for what it may be worth, for whatever it does show.

Mr. Watson—And objection to all of these notices, as stop notices, as to form.

The Court—Yes, I understand that, that they have not been properly pleaded.

Mr. Watson—And we object to the form, as not complying with the statute.

The Court—Very well.

Papers offered and received in evidence, and marked Defendant's Exhibits D-13 and D-14.

Q. I show you this notice and ask you if you served that notice on Mr. Post, on the date as shown in this affidavit? A. Yes, sir.

Mr. Van Blarcom—I offer these two notices in evidence.

The Court—Let them be marked,

Mr. Totten—Objected to and exception.

The Court—Your exception will be noted.

(Papers previously marked D-13 and D-14.)

Mr. Van Blarcom—That is all, Mr. Barnes.

The Court—Cross-examine.

(No Cross-examination)

JAMES J. MURNER, sworn for Defendant.

Direct Examination by Mr. Van Blarcom:

Q. Are you a lawyer? A. I am.

Mr. Van Blarcom—Is this all marked the same thing?

The Court—It is all one exhibit, I think. It is.

Mr. Watson—I think the evidence previously shows the plaintiff offered the contract, Your Honor, and excepted the bond.

The Court—I think that is right. I remember now.

Mr. Van Blarcom—I just wanted to know.

Q. I show you this bond and ask you if that was certified in your presence?

Mr. Watson—I object—

A. (Interrupting) It positively was.

The Court—Object on what ground?

Mr. Watson—I object to the question on the ground that it is too general. Was it certified in your presence? It doesn't say by whom, and it is very general. By reference to the answer, Your Honor—

Mr. Van Blarcom—Withdraw the question, to save time.

The Court—The question is withdrawn.

Q. Did John J. Ritchie sign that in your presence? did he? A. Yes; three times.

Q. Did John J. Ritchie, Jr., sign it in your presence? A. Yes; once.

Q. Did they sign it as partners, trading and doing business under the name of John J. Ritchie & Sons, or individually? A. John J. Ritchie, Jr., and John J. Ritchie, Sr., signed it as partners, trading and doing business under the name of John J. Ritchie & Sons.

Q. Did Henry M. Post sign it in your presence? A. Three times.

Q. Did John J. Ritchie, Sr., sign that again in your presence? A. He did, as surety.

Q. Is this your signature as a witness? A. It is.

Q. Are these justifications, were they signed in your presence? A. They were.

Q. Were they sworn to before you? A. They were.

Q. By the parties who have signed? A. They were.

Q. Henry M. Post? A. Yes, sir.

Q. —and the John J. Ritchies? A. Yes, sir.

Q. When this bond was signed by John J. Ritchie, Sr., and John J. Ritchie, Jr., partners, trading and doing business under the name of John J. Ritchie & Sons, and Henry M. Post and John J. Ritchie, was this bond as it now is?

Mr. Watson—Objected to, as too general.

A. It was.

The Court—I will allow it.

Q. Was this bond altered by you? A. It was, and I initialed those alterations prior to the execution by the parties to it.

Q. Was there any alterations made after Post signed it? A. Not by me.

Q. Or after anybody else signed it? A. Not by me.

Q. These erasures or the erasures and interlineations were all made prior to the signing by anybody?

Mr. Totten—Just a minute. I object to that question. He does not testify to that. At least, he has not, so far, as his answers so far seem to indicate if there have been changes made, they were made after the signing.

The Witness—That is not true.

Mr. Totten—And I only drew that conclusion from the answer. I may be wrong.

The Court—I will allow it.

The Witness—That is not true; I did not state that.

The Court—Answer the question.

A. I cannot make it too positive that I remember all of those changes were made prior to the execution.

The Court—You see, when you said, "Not by me," that raised a question in the mind of counsel whether or not you hadn't a mental reservation, in that some changes might have been made by somebody else. That is what counsel had in mind.

Mr. Totten—That is what I had in mind.

The Witness—The only changes I observed were those that were initialed by me; I do not see any others there.

The Court—All right.

Q. How was this one, George Ritchie, scratched out, not initialed; was that made by you? A. That was.

Q. It is not initialed? A. Yes.

Q. All of these others are initialed by you? A. Yes.

Q. By you on the first page? A. That is right.

Q. And second page? A. That is true.

Q. This Henry M. Post signature was scratched out and initialed by you? A. Because he had signed it in the wrong place, and I had him scratch it out and sign it over again.

Q. This bond is the same as it was after it had left your possession? A. Yes.

Q. As it was when it was in your possession? A. Yes.

Mr. Van Blarcom—I offer that in evidence.

Mr. Totten—I object.

The Court—Why do you object to it?

Mr. Totten—It is objectionable for this reason, Your Honor, that under the decisions in this state where an instrument has been altered subsequent to its execution, it is not even evidential. Now, of course, that presupposes that Your Honor will take into consideration the testimony of Ritchie and Post.

The Court—Yes.

Mr. Totten—As to the fact, I will grant you that so far, at this particular time, that Mr. Murner's statement may raise a question

of fact, because he contradicts that. But, on the other hand, these two gentlemen both testified to the fact that this instrument was altered or must have been altered subsequent to its execution. Now, I would suggest, that, if I may, that under this circumstance, that at least the admission of this instrument into evidence be deferred until I could cross-examine this gentleman.

The Court—All right, have it marked for identification at this time. We will now take a recess to two o'clock.

(Paper not handed to stenographer for marking.)

(Noon Recess)

————————, 1927; 2:00 P. M.

Witness resumes stand for further examination.

Mr. Van Blarcom—Cross-examine.

Cross-examination by Mr. Watson:

Q. Mr. Murner, you are an attorney-at-law? A. Yes, sir.

Q. You were admitted when? A. This year.

Q. This year? January or February? A. I think it was in February.

Q. So that at the time that this bond was executed, you were not a member of the bar? A. No, I took that as a notary public.

Q. Did you draw this bond? A. I did not.

Q. You what? A. I did not.

Q. Do you know who did? A. I do not.

Q. When did you become a notary public? A. I do not remember.

Q. When did your commission expire? A. I am still one.

Q. On your original application? A. No, sir.

Q. Five years? A. No, sir.

Q. On a renewed application? A. (No answer.)

Q. When did you first see this bond? A. The first time I saw it was the time it was executed on Clay St.

Q. That is the first time that you saw the bond. In whose possession was it? A. Mr. Geldziler's.

Q. Mr. Geldziler's possession? A. Yes, sir.

Q. Whereabouts on Clay street was this? A. Right in front of where the Capitol Theatre now stands.

Q. On the street? A. In the shed, in the tool shed.

Q. Who handed it to you? A. Mr. Geldziler.

Q. You had been at Mr. Geldziler's place of business, hadn't you? A. Have I been?

Q. You have been there? You have been in his place of business? A. Where do you mean?

Q. Well, he has, in that vicinity there, hasn't he, a saloon or a cafe? A. No, he has not.

Q. Well, he had at the time that this building was being erected? A. Yes, he did.

Q. And you have been in it? A. Several times.

The Court—Pleasant memories.

The Witness—Yes, indeed.

Q. There is a back room to it, isn't there? A. As I recall, there were two.

Q. You and Geldziler are very friendly, aren't you? A. Very, very much so.

Q. Politically associated? A. And socially, both.

Q. You have been instrumental in procuring Mr. Geldziler political honors, haven't you?

Mr. Van Blarcom—I don't know that this is exactly cross-examination.

Mr. Watson—Merely to show the relationship, Your Honor.

The Court—Oh, I will allow it, unless the witness is too modest to answer.

Q. Isn't that true? A. I don't understand your question.

The Court—The question is, if you were instrumental in procuring political honors for Mr. Geldziler.

The Witness—I do not know that he has them.

The Court—Well, a political position?

The Witness—He received no position from me.

The Court—Well, I do not know that he asked you that. He asked whether you were instrumental in obtaining for him a position.

The Witness—I will answer, yes, putting it that way.

The Court—All right. Only question in your mind is whether it is an honor or not.

Q. Your influence had considerable to do with his procuring such position? A. I do not know that I had any.

Q. Well, you do, don't you? A. I do not know.

Q. You were the leader of one of the great political parties at one time, weren't you? and now, too, you are a man of great political importance in this community, aren't you? A. Not that I know of.

Q. Well, I have always given you credit for it. A. (No answer.)

Q. Now, who was present when this instrument was executed, Mr. Murner? A. There was John J. Ritchie, John J. Ritchie, Jr., Mr. Post, Mrs. Geldziler, and Mr. Geldziler.

Q. When was this instrument signed? A. When? The date will show on there, on the instrument.

Q. Well, I am asking you. A. I think the instrument speaks for itself.

Q. Well, I am still asking you when, if you know. A. If you will show me the instrument, I will tell you the date.

Q. I am asking you. The instrument in not in evidence. When was this instrument signed, Mr. Murner? A. I cannot give you the date, unless you will let me see the instrument; that will show when it was signed.

Q. What was the occasion of its being signed? Was there anything particular about the execution of it at that time which was peculiarly noted by you? A. Yes, sir.

Q. What kind of weather was it, stormy? A. No, it was not stormy.

Q. Cold? A. I wouldn't say it was cold, because I remember Mrs. Geldziler coming along in a brown dress.

Q. How were you dressed? A. How?

Q. How were you dressed? Did you have an overcoat? A. No, I did not.

Q. So that it was warm? Is that right? A. I did not say that. I do not know.

Q. You cannot state when it was signed, without inspection— A. The date?

Q. —without inspection of this instrument? A. I remember particularly the circumstances surrounding the execution of it, because I very vividly— 10

Q. I asked you if you cannot remember the date without inspection of this instrument? A. The date it was executed?

Q. Yes. A. No, I would not attempt to.

The Court—The month?

Mr. Watson—He would not attempt to.

The Witness—I would not attempt to say.

The Court—All right. 20

The Witness—Because I had to change the date, Your Honor; I remember that.

The Court—All right.

Q. You did change the date, did you? A. Yes, sir.

Q. You remember that? A. Yes, sir.

Q. Do you remember any other changes you made? A. Yes, sir.

Q. What were they? A. I remember when I 30 first read it that the name of O'Connors, I think it was, who was in the clothing business, was in there, and I asked, was he present, and I was informed by Mr. Ritchie and Mr. Geldziler that Mr. O'Connor had refused to go on the bond, Mr. Ritchie A. (No answer).

said, because he was about to build a building or do some work for Mr. O'Connor, and for that reason Mr. O'Connor didn't want to go on it. I remember saying to Mr. Ritchie, "Why is the name of George Ritchie in here?" Mr. Ritchie is my uncle and George Ritchie is my cousin. I remember saying, "Why is Mr. George Ritchie in here? He is not a member of the firm of Ritchie & Sons, is he?" He said, "No." I remember I had to take that out. I remember when it came to the question of Mr. Ritchie, Sr., how much property he owned, he ——— the affidavit, and it read that he had owned $25,000.00 worth of property. I said to him at that time, "I do not think you own that much property. Are you going to take this affidavit?" He said, "Yes, sir; I do." I said, "Where is it?" He says, "Well, I have property on 20th street and East 19th street." I recall very well having said, "Why, you sold that property on East 19th street." He said, "No, I bought a new place," he said. Then his son stated to him, "How about the sand pit in Totowa Borough?" He said, "That is right, I can swear that I own $25,000.00 worth of property." And I think after I had crossed out the $25,000.00 and put $10,000.00 in, he then, when he spoke of the Totowa Borough property, agreed to take the affidavit that he was worth $25,000.00 I recall that change.

Q. What change? A. That change in the affidavit to make it from twenty-five to ten and then to twenty-five again.

Q. Then what? A. Then back to twenty-five.

Q. All of those changes were in your handwriting, were they not? A. All of which changes?

Q. All of those changes which you spoke of. A. Yes, sir.

Q. From twenty-five to ten, to twenty-five? A. Yes, sir.

Q. Yes? A. And I initialed the change.

Q. And the substitution of the name of John J. Ritchie, Sr., for Jacob O'Connor? A. That is right.

Q. Both in the instrument itself and in the affidavit? A. Let me see it; I am quite sure it is.

Q. Oh, no.

Mr. Van Blarcom—The witness is entitled to see the instrument.

The Court—He does not have to show it, if he does not wish to. He can do it either way or both ways, or he can testify from his own recollection.

Mr. Watson—If I understood the ruling that you made, your Honor said you would not allow it in evidence at this time.

The Court—Yes, this is not in evidence, as far as that is concerned. This is testing his recollection of it.

Q. What time of day was it that you were at the— A. It was after dinner.

Q. Afternoon. Whom did you go to this place with, where this signing was? A. I went alone.

Q. When you got there, who was present? A. Mr. Geldziler, John J. Ritchie, Jr., and John J. Ritchie, when I got there.

Q. When you got there. Was the instrument signed then when you got there? A. After I got there?

Q. Well, immediately after? A. No, sir.

Q. Who came in next? A. Mrs. Geldziler.

Q. Anyone else? A. Then comes Mr. Post.

Q. How long after you got there did Post arrive? A. Oh, I should say, about half an hour.

Q. How long after you arrived there did Geldziler hand you this bond? A. Oh, about five minutes.

Q. When was this conversation had concerning the taking off of O'Connor's name, off the bond, and substituting Mr. Ritchie? A. While Mr. Post was there, with Mr. Geldziler, Mrs. Geldziler, with John J. Ritchie, Sr., and John J. Ritchie, Jr.

Q. What were you talking about during the half hour before Post arrived? A. Oh, what we were talking about—

Q. Yes? A. —I do not remember.

Q. You went there for the purpose of having this bond executed, I presume? A. I didn't know it until I got there.

Q. Why did you go? A. Mr. Geldziler asked me to come over to the theatre.

Q. What reason did he assign? A. Didn't assign any.

Q. You went without reason? A. I always went whenever he asked me to come over there.

Q. Without reason? A. There was reason; it was in response to his request.

Q. There was reason, then? A. In response to his request was my reason for going.

Q. Because he requested you to go, you went? A. Yes, sir.

Q. Without knowing why you went? A. Yes, sir.

Q. But as soon as you arrived, or within five minutes thereafter, you were handed this bond? A. Yes, sir.

Q. What did he say to you when he handed you the bond? A. He told me that he was going to have Ritchie and Post and O'Connor's enter into a bond, and that he and Ritchie had gone to O'Connor's, and that O'Connor would not go on the bond, so I said to him, "All right, let me read it." We talked, I don't know what we talked about. We were in this shed, which was in this shed he used it as an office also there. We were around there, I should judge, in the neighborhood of half an hour, when Post came in, and—

Q. That is enough, so far. Then, as a matter of fact, you did discuss this bond before Mr. Post arrived? A. With Geldziler.

Q. Yes? A. Positively.

Q. — A. Positively.

Q. Yes? A. Yes.

Q. So that when you stated the matter concerning the erasure of Mr. O'Connor's name and the substitution of Mr. Ritchie's, took place after Mr. Post arrived, you made an error? That is correct? A. No, I did not; it occurred at two different times.

Q. But you did discuss it with Mr. Ritchie, Jr., and Mr. Ritchie, Sr., before Post arrived? A. Mr. Ritchie and Mr. Ritchie's son.

Q. Yes, Mr. John J. Ritchie and John J. Ritchie, Jr., is that right? A. Yes, and I discussed it after he got there, too.

Q. You are sure about that? A. Positive.

Q. Why are you so positive? A. Because I

remember advising Mr. Geldziler that I did not think he was doing what was right to take Ritchie's surety in place of Connor's.

Q. But you did that? You did that? A. And I also recall his wife coming along and hollering—

Q. Just one moment. A. —about his signing.

Mr. Watson—I ask to have the latter part of the answer stricken out.

The Court—Oh, I will let it stand.

Mr. Watson—All right.

Q. But you did that? You did discuss that with Mr. Geldziler? A. Discussed what?

Q. The advisability of Mr. O'Connors staying on the bond when Mr. Geldziler first showed you the bond, and told you that Mr. O'Connor would not go on it. A. That is right.

Q. So that that is when you discussed the question concerning the inadvisability of Mr. O'Connor's name being taken off this bond? A. We talked about it, at that time.

Q. How long was Post at this place where this bond was signed? A. Oh, I cannot say that.

Q. Who signed the bond first, Post or Ritchie? A. Ritchie.

Q. Who signed it next? A. The other Ritchie.

Q. And Post signed it last? A. Yes, he signed it the wrong place, and I had to scratch it out, and I had him sign over again.

Q. You are sure he signed it in the wrong place? A. Yes, sir.

Q. Where did he sign it that was improperly signed? A. As I recall, he signed it over the

name of John J. Ritchie & Sons, partners, doing business as John J. Ritchie & Sons.

Q. When he signed it under the heading of partners trading and doing business as John J. Ritchie & Sons, you crossed the name out, did you? A. About it, I believe, not below it.

Q. How long was Post there? A. I said, I do not remember.

Q. Well, you know whether he just came and went out? A. Oh, I know he was there while we talked over this bond, and I know he was there long enough to hear me read it, word by word, before I permitted him to sign it, in my presence.

Q. That is not your recollection? That you are positive about? Isn't that right? A. Yes, because I never took an affidavit in my life unless I read the contents of the instrument.

Q. Is that the reason you are positive, because you never took an affidavit in your life—? A. That is one of them.

Q. Is that the reason why you are positive? A. That is not the only reason.

Q. What are the other reasons? A. The other is that I remember distinctly reading it to him and Ritchie and Geldziler, to all of them, as they stood there, word for word, each and every word in it.

Q. And yet, in the face of all these positive assertions, you are not positive as to when it was signed? A. I did say when it was signed.

Q. Well, when? A. You mean, as to the date?

Q. Yes, the date? A. I am not positive as to the date, no, but I know in what order it was signed.

Q. What kind of a pen was it that this was signed with? A. The two Ritchies signed with a

fountain pen, and as I recall, Post signed with a pen that Geldziler went and got, an old pen. Ritchie signed first; he signed with the fountain pen that his son had, and then he signed with the pen that Geldziler bought—Ritchie, Sr.

Q. What kind of ink? A. I think it was green ink, but whether the ink was black ink or green ink, I do not know, for sure.

Q. So Geldziler went out to get a pen, is that right? or some ink? A. He went out and got pen and ink, before I changed the instrument. I changed the instrument with the pen and ink he went out to get, because I didn't have a pen.

Q. Why didn't they continue signing with the fountain pen? A. I don't know why they did not do a certain thing.

Q. Why didn't you use the fountain pen? A. I didn't have one.

Q. But there was a fountain pen there. A. There wasn't when we first wanted to change the instrument; there wasn't one there until Ritchie's son had come in; John J. Ritchie, Jr., had the pen.

Q. But Ritchie, Sr., was the first to sign. A. That is right.

Q. So the fountain pen was there after the initialing? A. No, that was there after we had made these changes.

Q. Was this instrument signed and then changed after and re-signed? A. No, sir; the instrument was changed first, and then signed.

Q. If Ritchie signed it first and signed it with the fountain pen, why wasn't the fountain pen there when the changes were made? A. I don't know; maybe it was.

Q. What was the necessity of Geldziler going out and getting another pen? A. Because these changes were made out before they signed.

Q. That was the only reason you say he went out and got a pen? A. That is the best in the world I know of; that is the reason he went out and got the pen.

Q. You couldn't make the changes with the fountain pen, of course. A. Certainly, I could have.

Q. How long was Geldziler gone? A. How long was he gone?

Q. Yes. A. Oh, I should judge, a couple of minutes; the store was right next to the tool shed.

Q. He bought a bottle of ink? A. He brought one back, together with a pen, out of this store.

Q. His store? A. No, this store that was next to the shed.

Q. After he brought this pen back, what was signed then? or, who did the signing then? A. When he brought the pen back, I first made the changes in their presence—in the presence of all of them; and after the changes were completed, Ritchie was asked to sign, and his son went to sign it, and he handed his father the pen. He said, "Here, father, sign first," as I recall it, and he handed his father his fountain pen. Then the father signed, then the son signed. Then John J. Ritchie went out, back into the building, with his pen, because when Ritchie signed the affidavit, he signed with the pen that I was using.

Q. Is that an afterthought, or is that a fact? A. That is a fact.

Q. Why didn't you mention that before, the first time? A. I think I did.

Q. I understand that Ritchie signed this instrument— A. That is true.

Q. Senior, first? A. That is true.

Q. And Ritchie, Jr., signed it next? A. That is true.

Q. Now, Ritchie, Jr., had a fountain pen? A. That is true.

Q. And Ritchie, Jr., signed it with his pen? A. With his own pen?

10 Q. Yes. A. That is true.

Q. And his father signed with the pen that Ritchie, Jr., handed him? A. Yes, before Ritchie, Jr., signed it; and then he handed it back to Ritchie, Jr., to sign it.

Q. So that after Ritchie, Jr., and Ritchie, Sr., signed it with Ritchie, Jr., fountain pen— A. That is right; that is the way I recall it.

Q. —then the necessity arose for Geldziler's

20 going out and getting a pen? A. I don't say that. I told you before three times that Geldziler went out and got the pen and ink before any of the changes were made, before any signing was done.

Q. Where was this pen when Ritchie, Sr., and Ritchie, Jr., sign it—the one that Geldziler got? A. I suppose I had it in my hand.

Q. You are not sure about that? A. No, I am not.

30 Q. So that is another—? A. Another what?

Q. —item of which you are not so positive about, as to where this pen was? A. I suppose I had it in my hand; I am not positive.

Q. I say, you are not positive about that. A. No; I might have laid it on the table, there, on the bench.

Q. You are not positive? A. On the bench.
Q. You are not positive—

Mr. Van Blarcom—He said he was not.

A. I said I was not positive, twice.

Q. Who suggested to Geldziler that he go out and get a pen? A. Who suggested it?

Q. Yes. A. I do not recall that; I suppose it was me.

Q. Why did you suggest it? A. Because it was necessary to make some changes in the instrument.

Q. Are you sure that you suggested it to him? A. I am quite positive that I did, because I couldn't change it with my fingers; it was me that was going to change it.

Q. More positive about that than you are as to where the other pen was, by whom used, or the date on which it was executed? A. Yes, sir.

Q. So that at your suggestion Geldziler got the pen? A. That is my impression of it.

Q. What did you say to Geldziler that caused him to go out and get a pen? A. I asked him, if he had a pen. He said, No. I said, "Well you had better get one," so he went in this store and got a bottle of ink and a pen.

Q. Now, when you made that statement to Geldziler—you had better go and get a pen, who was there? A. John J. Ritchie, Sr., John J. Ritchie, Jr., Mrs. Geldziler, Mr. Geldziler, and Mr. Post.

Q. Didn't any of those persons present say, "Here, I have got a fountain pen"? A. No, sir;

not that I recall. I would have used it, I think, had they said that.

Q. Well, this place where you say this instrument was executed, was small enough for you to hear everybody's voice? A. That is right.

Q. And yet, when the instrument came to be signed, Ritchie, Jr., who was present, when you suggested the securing of a pen, and he said nothing, but took out a fountain pen and handed it to his father and used it himself? A. He was present; he was outside of the door when we were talking about that. This was a shed. Ritchie, Jr., was on the sidewalk, and we were in the shed.

Q. Then he wasn't in this shed all of this time, was he? A. Junior?

Q. Yes. A. No; we were all scattered around the door; the shed was not very large.

Q. Now, was Ritchie, Jr., outside of the shed just before the signing, and then did he go off somewheres else, just after; is that correct? A. He came back after.

Q. Yes? A. And then he signed, and then he went in the building after.

Q. Well, after the instrument was signed, then the instrument was complete? A. That is true.

Q. Was Post in and out, the same as Ritchie, Jr.? A. No, Post was with us in the shed.

Q. You are positive of that? A. Yes, sir.

Q. Now, that statement is not to the best of your knowledge, as the others were, concerning the pen? You are sure of that? A. I am positive of it.

Q. You know he did not leave the shed at any time? A. Not after he got there, until he had signed the instrument.

Q. Why did you keep such a watch on Post?
A. Why did I keep such a watch on Post?

Q. Why did you let Junior go out? He was one of the signers, wasn't he? A. I didn't hold anybody in.

Q. So that they all was in the shed? A. No.

Q. Geldziler's saloon was open and operating at the time that this instrument was signed, wasn't it? A. Geldziler's saloon?

Q. Huh-huh. A. I know, he was operating as a wholesale liquor dealer then.

Q. He still ran a store? A. Ran a wholesale liquor house.

Q. That was right in the vicinity of this shed, was it not? A. Yes, that is up on the corner—corner of Madison avenue and Clay street.

Q. How far away from this shed?

Mr. Van Blarcom—I object to this testimony. What has the location of his store got to do with this matter?

The Court—I do not know; it may have some materiality. I will allow it.

A. Just up on the corner.

Mr. Van Blarcom—A hundred feet away?

A. I should say, within a hundred feet.

Q. Did you say there was a fire in the shed that day? A. There was not.

Q. Was there a fire in Geldziler's saloon that day? A. I wasn't in Geldziler's saloon that day, that I recall.

Q. You are not sure that you were? A. Well, if I was in there, I would know it, I think.

Q. That is another indefinite position or inconsistency? A. I will say, I was not in Geldziler's saloon on that date, or in his store, or in his liquor house.

Q. Do you say that positively, or do you say that—? A. Yes, positively, because I met him at the shed, and I left him there at the shed.

Q. Did Mr. Post have an overcoat on this day? A. He did not.

Q. He did not have an overcoat on? A. No, sir.

Q. Who had the overcoat on? A. I did not say anybody did; I didn't see anybody with any on.

Q. Then nobody had an overcoat on? A. Not that I noticed.

Q. Well, if they had it, you would have noticed it? A. I think so.

Q. So that you are positive that nobody had an overcoat on? A. I will say that.

Q. You do not know when, in the afternoon, it was that you went up to this place? A. It was shortly after dinner.

Q. Why was Mrs. Geldziler present? Do you know? A. Why?

Q. Yes. A. I recall that she came there, and she was talking to her husband. I remember her distinctly having said that he was crazy for building a moving picture house. She stood there, I well recall it; and she had brown slippers on, white dress, with blue stripes.

Q. I am not asking you that. Why was she there? Do you know? A. It would be very difficult for me to say why she did anything.

Q. Did anybody send for her? A. Why, not that I know of.

Q. Did you send for her? A. No, sir.

Q. But she came there how shortly after you arrived? A. She was there when I got there; she stood there, looking at where they was just constructing this theatre.

Q. Your first statement was that when you got there, Post, the two Ritchies, and Geldziler was there, and that she came in later. A. Yes, she was outside, and she came in; she came right in the door.

Q. Right about as you went in? A. No, after she came in; she didn't come in right away.

Q. Well, how long after you got there, did she come in? A. Only a couple of minutes.

Q. What? A. Only a couple of minutes.

Q. Only a couple of minutes; she stayed there until this instrument was signed? A. Yes, sir; she was watching us all of the time.

Q. How long were you there? The better part of an hour? A. I should say, we were there the better part of an hour; yes.

Q. During that hour did you find out what her purpose was for coming? A. No, sir; I was not concerned with her purpose.

Q. She apparently was there without a purpose. and stayed an hour; is that right? A. That is right, watching what was going on; I suppose, she was very much interested.

Q. Did she disclose her purpose for coming over there, in your presence? A. No, sir.

Q. But when you arrived, she was standing outside? A. That is right.

Q. And she came in and stood there for the better part of an hour, until this instrument was signed? A. Listening to what was going on, and watching what was going on, very closely.

Q. Sitting or standing? A. Standing; everyone was standing.

Q. Dressed with just a dress? A. And brown stripes.

Q. Brown dress? A. White dress with blue stripes.

Q. No other outside wearing apparel? A. Just a brown—

Q. This shed was just an ordinary box shed, built on the ground floor? A. Built right near the store, it was.

Q. Dirt floor? A. No, wooden floor.

Q. No heat in it? A. No, sir.

Q. And this lady stood there for the better part of three quarters of an hour to an hour? A. Yes, sir.

Q. And, as far as you know, came over there for no other purpose than merely that of an observer? A. To watch what was going on.

Q. Did she express any opinion as to what was being done? A. Yes, she did.

Q. She did. How big was this shed anyway? A. I should judge it was about 15x8, and about seven foot high.

Q. Built out in the street? A. Yes, sir; right at the curb.

Q. The fifteen feet ran parallel with the street, or— A. With Clay street.

Q. Huh? A. Parallel with the street.

Q. So that the shed stuck out eight or nine feet in the public road? A. I should say so.

Q. How wide was the public road? A. I think it must be sixty feet.

Q. Sixty feet? A. I suppose it is; it is quite wide. There is two trolley tracks there.

Q. Sixty feet between curbs? A. I should think so.

Q. Is all of your other testimony the evidential value of that statement?

Mr. Van Blarcom—I object to that.

The Court—Objection sustained.

Q. Now, as a matter of fact, you know that there is not sixty feet between those two curbs? A. You mean, between the curbs?

Q. Yes. A. The street is sixty feet wide.

Q. There isn't sixty feet between those two curbs? A. You said, how wide the street was. I said, sixty feet. I guess there is about twenty feet off for the sidefalk, if that is what you are driving at—ten on each side.

Q. It is not sixty feet between those two curbs, is it? A. Which two curbs?

Q. The curbs of that public street upon which that shed was? A. Which curbs do you mean?

Q. The curbs of the street, Clay street, or whatever the street was. A. There is a lot of curbs on Clay street.

Q. How many curbs? A. There is curbs in every block.

Q. How many curbs are there on Clay street at that point? A. There is one in the front of the building.

Q. Yes; how many more? A. One on the other side.

Q. All right; then there are two, aren't there? A. Right in front, and the other—

Q. Yes? A. One in front, one on the other side of the street.

Q. It wasn't sixty feet between those two curbs?

Mr. Van Blarcom—I do not know that this is very material or not. However, I will allow it.

Mr. Watson—My contention, Your Honor—

The Court—I understand—

Mr. Watson—is that it is a fair inference that this shed is not as large, and I want to demonstrate it by showing the width of the street.

The Court—I will allow it.

Mr. Watson—I assume that the court will take judicial notice of the fact that no contractor would be permitted to have a shed of that size in the street, blocking it.

The Witness—If you were traveling around there, you wouldn't take any such inference at all.

Mr. Watson—Then, politics are more potent here than I thought they were.

Q. Tell me; there wasn't sixty feet between those two curbs, was there, Mr. Murner? A. I wouldn't say there was sixty feet between those two curbs.

Q. There wasn't thirty? A. Yes, there is.

Q. Do you know of any street outside of Market street and Hamilton avenue that has much over thirty feet between curbs, in the City of Paterson? A. Yes.

Q. Some new street? A. No, old ones. Main street, Market street, Park avenue. I can sit here all day, telling them to you.

The Court—Now, was this shed built over the sidewalk, or over the street?

The Witness—Part on both.

The Court—How far did it extend over the curb into the street?

The Witness—I should say, at least six feet.

The Court—All right.

Q. And this shed was built over this curb? A. Yes, sir.

Q. Was there a jog then in the floor of the shed? A. Was there what?

The Court—A jog.

Q. Jog in the floor of the shed. A. The shed was built, as I recall it; they had some logs or something out in the roadway to even it up with the curb line, where it rested on the curb.

Q. I see. Everybody was inside, in this little shed? A. Everybody?

Q. Yes, that you mentioned? A. Not at one time; everybody wasn't there all of the time.

Q. The two Ritchies, Mr. Post, Mrs. Geldziler, yourself, Ritchie, Jr.,; that is right? A. That is right.

Q. All of the— A. Not at all times; but there was a time—

Q. Not all of the time? A. —young Ritchie was outside once when we were in there.

Q. Who else was out while you were in there? A. Mrs. Geldziler was outside, when she first came there; when I first got there, she came in.

Q. But she came in a few minutes after you got there? A. That is right; she stood there.

Q. She stayed; she was very much interested? A. Very much so.

Q. So that she did not leave after she was once in there? A. Not until we were finished.

Q. Who else beside Young Ritchie went out? A. Geldziler, to get the pen and ink.

Q. Who else? A. That is all that I remember.

Q. What else was in this shed? What furniture or fixtures, did they have in this shed? A. I remember there was a shelf that was by a window, or a shelf that faced Madison avenue, that was looking towards Madison avenue. We were writing on that shelf; and there were some tools in there, and there was a blue print lying on this shelf.

The Court—Any chairs?
The Witness—No, sir.
The Court—Or tables?
The Witness—Just this shelf.
The Court—All right.

Q. How far did this shelf stick out from the side of the wall? A. I should say, about—about as wide as this shelf here (indicating).

Q. Indicating two foot and a half? A. Easily.

Mr. Van Blarcom—Oh, that is not two foot and a half, Your Honor.

The Witness—It was quite a large shelf.

The Court—That is about two foot and a half—thirty inches. Prestty close to it, isn't it?

Mr. Van Blarcom—All right.

Q. What were the tools in this place? A. Tools?

Q. Yes. A. I remember seeing a level there.

Q. That is a surveyor's instrument, on three legs? A. Not that I know.

Q. Isn't it? What kind of an instrument is it? A. Level that is used by workmen.

Q. What else was there? A. I remember seeing a saw and hammer.

Q. Kegs of nails? A. There were a couple of little kegs there; I don't know what was in them.

Q. Building paper? A. Building paper? I don't know what you mean by building paper.

Q. Laths? A. No, sir.

Q. Wooden posts? A. What do you mean by wooden posts?

Q. Frames of any kind? A. No, sir; there were a few sticks in there.

Q. What? A. A few sticks.

Q. Where were they? On the floor? A. Yes, sir.

Q. Sticks? They occupied some space? A. And there was some cord on the shelf—a ball of cord by the blue prints.

Q. But those tools were on the floor? A. Yes, sir.

Q. They occupied some space? A. Yes, sir.

Q. How crowded were you when you were all in this place? A. We filled it up pretty well.

Q. Was the window open? A. The door was open.

Q. Not the window? A. (No answer.)

Q. This desk or this shelf that you speak of, was that on the side of the shed that was nearest the center of the road, or was it on the side of the shed that was towards the curb? A. Facing Madison avenue; it was not facing either of the directions that you have mentioned; it was facing Madison avenue.

Q. It was on the end of it? A. That is right.

Q. Where was this window in this shed? A. Right in front of the shelf.

Q. How many windows were there in this shed? A. That one is all I remember.

Q. So that the shelf was at one end of the shed? A. Of the shed, facing Madison avenue.

Q. There was some blue prints on this? A. Yes, sir.

Q. How many? A. I saw a roll of blue prints; I don't know how many was there.

Q. This instrument was changed or altered on the— A. On that shelf.

Q. Where was it signed by these men? A. On that shelf.

Q. Could they all get up to the shelf by the window all right? A. No, I don't think so.

Q. They came up? A. Well, we all stood around in a group there.

Q. But Ritchie and his son were there together when they signed? A. And so was Post there when they signed.

Q. How wide was this shelf? A. About thirty inches.

Q. You mean to say that four people stood in front of this thirty inch shelf? A. You mean the length or the width?

Q. I mean the length. A. You said the width.

Q. I said, I think, I asked you how wide it was. A. I said, thirty inches wide.

Q. All right; how long was it? A. I should judge about eight foot, the width of the shed.

Q. Was it attached to both sides of the shed? A. As I recall it, they had two sticks of wood built from the shed out like, and it was resting on those two sticks.

Mr. Watson—That is all.

The Court—Wait a minute. Had you been to that shed before?

The Witness—Yes, sir.

The Court—Did you say you had been in the back room of Mr. Geldziler's store?

The Witness—Yes, sir.

The Court—Did you ever attend at the back room of that store, or the store, at any time, and swear any parties to this affidavit?

The Witness—Never.

The Court—Never. Did you ever meet Mr. Ritchie or Mr. Post in Mr. Geldziler's back room?

The Witness—No, sir; first time I ever met Mr. Post was that time at the building, where they were building the theatre.

The Court—Never had met him before?

The Witness—No, sir.

The Court—Did you ever witness his signature or take his acknowledgement other than that one time?

The Witness—No, sir.

The Court—All right.

Q. Are you sure it was Mr. Post? A. Sure, I know him; I remember his voice too.

Q. When did you hear him talk after that day? A. In the court here.

Q. When? Today? A. No, when this case was on before, and there was another case on, too.

Q. Then you did see him since that date more than once? A. I didn't say that I did not.

Q. I understood you to say that was the first time you saw him. A. First time I saw him was at the shed—

Q. And this was the second time? A. —when he signed this instrument. When was the second time.

Q. When you saw him here today; is that right? A. No, no, no.

Q. How many times have you seen him since he was at the shed? A. I saw him at the theatre.

Q. How many times? A. I saw him at the theatre, I should judge, four or five times after that.

Q. At the theatre? A. Yes, sir.

Q. What were you doing at the theatre? A. I was over there almost every day.

Q. You hadn't any financial interest in this theatre, had you? A. I wish I had; I do not.

Q. I am asking you, if you had; have you? A. No, sir.

Q. Had you at that time? A. No, sir.

Q. Still, you went there every day? A. That is right, I was with Mr. Geldziler almost every day.

Q. Is that because of your great personal interest in him? A. Yes, sir.

Q. That you have expressed? A. Yes, sir; I did much work for him.

Q. So that about the time that this instrument was executed, you were constantly in Mr. Geldziler's company; is that right? A. Yes, sir.

Q. And you were constantly seeing Geldziler, and you saw Ritchie, Jr., and Ritchie, Sr., and Mrs. Geldziler? A. At that time and since that time, I have been constantly in his company, and Ritchie's too; he is related to me.

Q. Still, you are of the opinion that you saw those people at that time, and it is not possible that you got one of those several times confused up with this particular time? A. I am not of the opinion; I know I saw them there.

Q. So you said; you are positive about that? A. Absolutely.

Q. But not positive about the date when or where the pen was, not exactly— A. I am not positive where the pen was at the time the Ritchies were signing the instrument, but the pen was in my hand when I was changing it; it was in the hands of Post when he signed it, and it was in the hands of John J. Ritchie, Jr., when he was signing.

Q. So you have stated.

The Court—That is all.

Mr. Watson—Just a moment.

Q. This instrument that was eventually signed, as you have said, had a great many changes, which

you made in it; is that correct? A. Yes, sir.

Q. And you made those and penciled— A. Penciled? I initialed them.

Q. Wel, initialed them? A. In ink.

Q. In other words, this instrument was considerably mutilated by the time it was ready for signature; that is correct? A. It was changed considerably as to the name and as to the amount where Ritchie was taking an affidavit to the amount of property he was worth.

Q. Yes, there was erasures of names, and there was erasures of dates? A. Yes, and I think there was a word misspelled in it.

Q. And there was erasures of the amount of Ritchies' surety? A. That is right.

Q. So that the instrument was a much mutilated instrument when it came to be signed? A. I would not say it was much mutilated.

Q. Well, it was mutilated? A. I wouldn't say it was mutilated.

Q. What would you say it was? A. It was changed.

Q. What would you call a mutilated instrument? A. I think, one that was destroyed.

Q. Oh, got to be entirely destroyed to be mutilated? A. I should think so.

Q. In your opinion; well, it was not very nice looking, was it, with all these alterations on it? A. Not in my opinion.

Q. We agree on that. A. (No response.)

Q. You were a law student, weren't you? A. Not at that time, no.

Q. Well, you were contemplating the study of law? A. Yes, sir.

Q. And you were a notary public? A. Yes, sir.

Q. Why didn't you suggest a redrafting of this instrument so that it would be clear and legible and not open to suspicion and doubt?

Mr. Van Blarcom—I object.

A. (Interrupting) I thought it was legible all right, and I still think it is legible.

Q. That is your reasoning, is it? A. Yes, sir.

Mr. Watson—That is all.

Mr. Van Blarcom—I offer this bond in evidence.

Mr. Watson—I object to it.

The Court—I will admit it.

Bond offered and received in evidence, and marked Defendant's Exhibit D-16.

(Followed by extended argument.)

Mr. Van Blarcom—I am through; my case is in.

(Defendant Rests.)

The Court—Any rebuttal?

Mr. Totten—Yes, Mr. Post.

(Plaintiff's rebuttal.)

HENRY M. POST, recalled in rebuttal.

Direct Examination by Mr. Totten:

Q. Mr. Post, you heard Mr. Murner testify that at the shed, in the presence of Mr. Ritchie, Mr. Ritchie, Jr., Mrs. Geldziler, Mr. Geldziler, and himself, after Mr. Ritchie had made alterations to this

bond, or that you did, Ritchie, Sr., and Ritchie, Jr., signed this bond as surety, and that you attached your signature after; is that a fact? A. That is not.

Mr. Watson—That is all.
The Court—Cross examine.
Mr. Van Blarcom—That is all.

Q. Were you present at any—

Mr. Van Blarcom—Wait a minute; now, I thought this was all finished.
The Court—Well, I will let him open it up.

Q. Were you present at any inside gathering when all of those people were present? A. No, sir; I was not.

Mr. Watson—That is all.
The Court—Cross examine.
Mr. Van Blarcom—That is all.
(Followed by extended argument.)
(Testimony closed; both sides rest.)

Exhibit D-1

EXHIBIT D-1

This Certificate is given only as an expression of opinion and is not to form a legal obligation on the part of Architect.

Certificate No. 4360

$753.45 Dec. 3, 1920.

To Samuel Geldziler.

John J. Ritchie, Contractor for General work, entitled to the 19th payment amounting to Seven Hundred Fifty-three and 45/100 Dollars, as per contract .....

Am't of Contract,	$49031.00
Extra Work, approx.	4000.00
Total,	$53031.00
Previously Paid	30568.72
Balance	$22462.28

Fred W. Wentworth (C. S.)

This payment does not accept the work done until after final payment is made.

12/4/20

Received the above,

John J. Ritchie, Jr.

This Certificate is given only as an expression of opinion and is not to form a legal obligation on the part of Architect.

Certificate No. 4360

$716.15 Dec. 11, 1920

To Samuel Geldziler.

John J. Ritchie, Contractor for General work, entitled to the 20th payment amounting to Seven Hundred Sixteen and 15/100 Dollars as per contract

Exhibit D-1

Am't of Contract,	$49031.00
Extra Work, approx.	4000.00
Total,	$53031.00
Previously Paid,	31322.17
Balance	$21708.83

Fred W. Wentworth (C. S.)

This payment does not accept the work done until after final payment is made.

12/11/20

Received the above,

John J. Ritchie, Jr.

This Certificate is given only as an expression of opinion and is not to form a legal obligation on the part of Architect.

Certificate No. 4367

$704.88 Dec. 18, 1920

To Samuel Geldziler.

John J. Ritchie, Contractor for General work, entitled to the 23rd payment amounting to Seven Hundred Four and 88/100 Dollars, as per contract

Am't of Contract,	$49031.00
Extra Work, approx.	4000.00
Total,	$53031.00
Previously Paid	42273.84
Balance	$10757.16

Fred W. Wentworth (C. S.)

This payment does not accept the work done until after final payment is made.

12/18/20

Received the above,

John J. Ritchie, Jr.

Exhibit D-1

This Certificate is given only as an expression of opinion and is not to form a legal obligation on the part of Architect.

Certificate No. 4368

$307.10 Dec. 18, 1920

To Samuel Geldziler.

John J. Ritchie, Contractor for General work, entitled to the 24th payment amounting to Three Hundred Seven and 10/100 Dollars, as per contract

Am't of Contract,	$49031.00
Extra Work, approx.	4000.00
Total,	$53031.00
Previously Paid	42978.72
Balance,	$10,052.28

Fred W. Wentworth (C. S.)

This payment does not accept the work done until after final payment is made.

12/18/20

Received the above,

John J. Ritchie, Jr.

This Certificate is given only as an expression of opinion and is not to form a legal obligation on the part of Architect.

Certificate No. 4371

$1,000.00 Dec. 20, 1920

To Samuel Geldziler.

John J. Ritchie, Contractor for General work, entitled to the 25th payment amounting to One Thousand Dollars, as per contract.....

Exhibit D-1

Am't of Contract,	$49031.00
Extra Work, approx.	4000.00
Total,	$53031.00
Previously Paid	43285.82
Balance,	$ 9745.18

Fred W. Wentworth (C. S.)

This payment does not accept the work done until after final payment is made.

12/27/20

Received the above,

John J. Ritchie, Jr.

This Certificate is given only as an expression of opinion and is not to form a legal obligation on the part of Architect.

Certificate No. 4372

$56.00 Dec. 22, 1920

To Samuel Geldziler.

John J. Ritchie, Contractor for General work, entitled to the 26th payment amounting to Fifty-six Dollars, as per contract .....

Am't of Contract,	$49031.00
Extra Work, approx.	4000.00
	76.00
Total	$53107.00
Previously Paid,	44285.82
Balance,	$ 8821.18

Fred W. Wentworth (C. S.)

This payment does not accept the work done until after final payment is made.

12/22/20

Received the above,

John J. Ritchie, Jr.

Exhibit D-1

This Certificate is given only as an expression of opinion and is not to form a legal obligation on the part of Architect.

Certificate No. 4374

$657.60 Dec. 24, 1920

To Samuel Geldziler.

John J. Ritchie, Contractor for General work, entitled to the 27th payment amounting to Six Hundred Fifty-seven and 60/100 Dollars, as per contract .....

Am't of Contract,	$49031.00
Extra Work, approx.	4000.00
	76.00
Total	$53107.00
Previously Paid,	44341.82
Balance	$ 8765.18

Fred W. Wentworth (C. S.)

This payment does not accept the work done until after final payment is made.

12/24/20

Received the above,

John J. Ritchie, Jr.

This Certificate is given only as an expression of opinion and is not to form a legal obligation on the part of Architect.

Certificate No. 4381

$663.87 Dec. 31, 1920

To Samuel Geldziler.

John J. Ritchie, Contractor for General work, entitled to the 28th payment amounting to Six Hundred Sixty-three and 87/100 Dollars, as per contract .....

Exhibit D-1

Am't of Contract,	$49031.00
Extra Work, approx.	4000.00
	76.00
Total	$53107.00
Previously Paid,	44999.42
Balance,	$ 8107.58

Fred W. Wentworth (C. S.)

This payment does not accept the work done until after final payment is made.

12/31/20

Received the above,

John J. Ritchie, Jr.

This Certificate is given only as an expression of opinion and is not to form a legal obligation on the part of Architect.

Certificate No. 4382

$391.05 Jan 6, 1921

To Samuel Geldziler.

John J. Ritchie, Contractor for General work, entitled to the 29th payment amounting to Three Hundred Ninety-one and 05/100 Dollars, as per contract .....

Am't of Contract,	$49031.00
Extra Work, approx.	4000.00
	76.00
Total	$53107.00
Previously Paid,	45663.29
Balance	$ 7443.71

Fred W. Wentworth (C. S.)

This payment does not accept the work done until after final payment is made.

Received the above,

John J. Ritchie.

Exhibit D-1

This Certificate is given only as an expression of opinion and is not to form a legal obligation on the part of Architect.

Certificate No. 4385

$633.85 Jan. 8, 1921

To Samuel Geldziler.

John J. Ritchie, Contractor for General work, entitled to the 30th payment amounting to Six Hundred Thirty-three and 85/100 Dollars, as per contract .....

Am't of Contract,	$49031.00
Extra Work, approx.	4000.00
	76.00
Total	$53107.00
Previously Paid,	46054.34
Balance,	$ 7052.66

Fred W. Wentworth (C. S.)

This payment does not accept the work done until after final payment is made.

1/8/21

Received the above,

John J. Ritchie, Jr.

This Certificate is given only as an expression of opinion and is not to form a legal obligation on the part of Architect.

Certificate No. 4386

$300.00 Jan. 10, 1921

To Samuel Geldziler.

John J. Ritchie, Contractor for General work, entitled to the 31st payment amounting to Three Hundred Dollars, as per contract .....

Exhibit D-1

Am't of Contract,	$49031.00
Extra Work, approx.	4000.00
	76.00
Total	$53107.00
Previously Paid,	46688.19
Balance	$ 6418.81

Fred W. Wentworth (C. S.)

This payment does not accept the work done until after final payment is made.

1/10/21

Received the above,

John J. Ritchie, Jr.

This Certificate is given only as an expression of opinion and is not to form a legal obligation on the part of Architect.

Certificate No. 4390

$600.00 Jan. 13, 1921

To Samuel Geldziler.

John J. Ritchie, Contractor for General work, entitled to the 32nd payment amounting to Six Hundred Dollars, as per contract .....

Am't of Contract,	$49031.00
Extra Work, approx.	4000.00
	76.00
Total	$53107.00
Previously Paid,	46988.19
Balance	$ 6118.81

Fred W. Wentworth (C. S.)

This payment does not accept the work done until after final payment is made.

1/13/21

Received the above,

John J. Ritchie, Jr.

Exhibit D-1

This Certificate is given only as an expression of opinion and is not to form a legal obligation on the part of Architect.

Certificate No. 4391

$480.85 Jan. 15, 1921

To Samuel Geldziler.

John J. Ritchie, Contractor for General work, entitled to the 33rd payment amounting to Four Hundred Eighty and 85/100 Dollars, as per contract

Am't of Contract,	$49031.00
Extra Work, approx.	4000.00
	76.00
Total	$53107.00
Previously Paid,	47588.19
Balance	$ 5518.81

Fred W. Wentworth (C. S.)

This payment does not accept the work done until after final payment is made.

1/15/21

Received the above,

John J. Ritchie, Jr.

This Certificate is given only as an expression of opinion and is not to form a legal obligation on the part of Architect.

Certificate No. 4392

$259.20 Jan. 15, 1920

To Samuel Geldziler.

John J. Ritchie, Contractor for General work, entitled to the 34th payment amounting to Two Hundred Fifty-Nine and 20/100 Dollars, as per contract .....

Exhibit D-1

Am't of Contract,	$49031.00
Extra Work, approx.	4000.00
	76.00
Total	$53107.00
Previously Paid,	48069.04
Balance,	$ 5037.96

Fred W. Wentworth (C. S.)

This payment does not accept the work done until after final payment is made.

2/1/21

Received the above,

John J. Ritchie, Jr.

This Certificate is given only as an expression of opinion and is not to form a legal obligation on the part of Architect.

Certificate No. 4393

$200.00 Jan. 15, 1921

To Samuel Geldziler.

John J. Ritchie, Contractor for General work, entitled to the 35th payment amounting to Two Hundred Dollars, as per contract .....

Am't of Contract,	$49031.00
Extra Work, approx.	4000.00
	76.00
Total	$53107.00
Previously Paid,	48328.24
Balance	$ 4778.76

Fred W. Wentworth (C. S.)

This payment does not accept the work done until after final payment is made.

1/15/21

Received the above,

John J. Ritchie, Jr.

Exhibit D-1

This Certificate is given only as an expression of opinion and is not to form a legal obligation on the part of Architect.

Certificate No. 4394

$500.00 Jan. 18, 1921

To Samuel Geldziler.

John J. Ritchie, Contractor for General work, entitled to the 36th payment amounting to Five Hundred Dollars, as per contract .....

Am't of Contract,	$49031.00
Extra Work, approx.	4000.00
	76.00
Total	$53107.00
Previously Paid,	48528.24
Balance,	$ 4578.76

Fred W. Wentworth (C. S.)

This payment does not accept the work done until after final payment is made.

1/20/21

Received the above,

John J. Ritchie, Jr.

This Certificate is given only as an expression of opinion and is not to form a legal obligation on the part of Architect.

Certificate No. 4395

$25.00 Jan. 21, 1921

To Samuel Geldziler.

John J. Ritchie, Contractor for General work, entitled to the 37th payment amounting to Twenty-five Dollars, as per contract .....

Exhibit D-1

Am't of Contract,	$49031.00
Extra Work, approx.	4000.00
	76.00
Total	$53107.00
Previously Paid,	49028.24
Balance	$ 4078.76

Fred W. Wentworth (C. S.)

This payment does not accept the work done until after final payment is made.

Received the above, 2/1/21

John J. Ritchie, Jr.

This Certificate is given only as an expression of opinion and is not to form a legal obligation on the part of Architect.

Certificate No. 4397

$216.40 Jan. 22, 1921

To Samuel Geldziler.

John J. Ritchie, Contractor for General work, entitled to the 38th payment amounting to Two Hundred Sixteen and 40/100 Dollars, as per contract .....

Am't of Contract,	$49031.00
Extra Work, approx.	4000.00
	76.00
Total	$53107.00
Previously Paid,	49053.24
Balance	$ 4053.76

Fred W. Wentworth (C. S.)

This payment does not accept the work done until after final payment is made.

1/22/21

Received the above,

John J. Ritchie, Jr.

Exhibit D-1

This Certificate is given only as an expression of opinion and is not to form a legal obligation on the part of Architect.

Certificate No. 4399

$253.75 Jan. 29, 1921

To Samuel Geldziler.

John J. Ritchie, Contractor for General work, entitled to the 39th payment amounting to Two Hundred Fifty-three and 75/100 Dollars, as per contract .....

Am't of Contract,	$49031.00
Extra Work, approx.	4000.00
	76.00
Total	$53107.00
Previously Paid,	49267.64
Balance	$ 3839.36

Fred W. Wentworth (C. S.)

This payment does not accept the work done until after final payment is made.

1/29/21

Received the above,

John J. Ritchie, Jr.

This Certificate is given only as an expression of opinion and is not to form a legal obligation on the part of Architect.

Certificate No. 4401

$148.00 Feb. 1, 1921.

To Samuel Geldziler.

John J. Ritchie, Contractor for General work, entitled to the 40th payment amounting to One Hundred Forty-eight Dollars, as per contract.

Exhibit D-5

Am't of Contract,	$49031.00
Extra Work, approx.	4000.00
	76.00
Total	$53107.00
Previously Paid,	49523.39
Balance,	$ 3583.61

Fred W. Wentworth (C. S.)

This payment does not accept the work done until after final payment is made.

2/1/21

Received the above,

John J. Ritchie, Jr.

EXHIBIT D-5

Sheet No. 5 Name—Samuel Geldziler

Date	Items	Debits	Credits	Balance
1920	John J. Ritchie & Son			
Mar. 5	Contract—$49,031.00			
May 22	Cert. No. 1		2,861.95	46.169.05
June 4	" No. 2		3,049.15	43,119.90
" 11	" No. 3		1,550.82	41,569.08
" 19	" No. 4		1,000.00	40,569.08
July 21	" No. 5		1,736.95	38,832.13
" 21	" No. 6		3.263.34	35,568.79
" 21	" No. 7		3,803.00	31,765.79
Sept. 3	" No. 8		4,713.09	27,052.70
" 16	" No. 9	949.97		26,102.73
Oct. 5	" No. 10	500.00		25,602.73
" 9	" No. 11 Kouzelman Bros.	800.00		24,802.73
Nov. 16	Cert. No. 12 Kouzelman Bros.	500.00		24,302.73
" 16	Cert. No. 13 (Power Const. Co.)	100.00		23,702.73
" 16	Cert. No. 14 (J. T. Ri-			

Exhibit D-5

		ker)	100.00	23,102.73	
"	16	Cert. No. 15 (Pat. Bridge)	2,000.00	21,102.73	
"	23	Cert. No. 16 (J. Mairheimer)	350.00	20,752.73	
Dec.	3	Cert. No. 17 (Ham. Lumber)	2,000.00	18,752.73	
"	3	Cert. No. 18 (M. Lynch)	290.45	18,462.28	10
"	3	Cert. No. 19	753.45	17,708.83	
"	10	" No. 20	716.15	16,992.68	
"	10	Extra mason work Approximate 4,000.00		20,992.68	
"	14	Cert. No. 21	4,000.00	16,992.68	
"	14	" No. 22	6,235.52	10,757.16	
"	18	" No. 23	704.88	10,052.28	
"	18	" No. 24	307.10	9,745.18	
"	20	" No. 25 (Kouzelman Bros.)	1,000.00	8,745.18	20
"	22	Extra (J. T. Riker)	76.00	8,821.18	
"	22	" No. 26	56.00	8,765.18	
"	24	" No. 27	657.60	8,107.58	
"	31	" No. 28	663.87	7,443.71	
Jan.	6	" No. 29	391.05	7,052.66	
"	7	" No. 30	633.85	6,418.81	
"	10	" No. 31 (B. Pelman)	300.00	6,118.81	
"	13	" No. 32 (Power Const.)	600.00	5,518.81	30
"	15	" No. 33	480.85	5,037.96	
"	15	" No. 34 (Ramsey)	259.20	4,778.76	
"	15	" No. 35 (B. Pelman)	200.00	4,578.76	
"	18	" No. 36 (E. Marble M. Co.)	500.00	4,078.76	
"	21	" No. 37 (Ramsey)	25.00	4,053.76	

"	22	"	No. 38	216.40	3,837.36
"	29	"	No. 39	253.75	3,583.61
Feb.	1	"	No. 40	148.00	3,435.61
Jan.	28	"	No. 41 (J. Westerveld)	32.25	3,403.36
			Credit for mason work ..	1,402.25	2,001.11
			Eastern Marble Mosaic Co.	37.00	1,964.11
			Extra cost of Masonry	51.15	2,015.26

U. T. Hungerford B. & C. Co.

1921

		Debits	Credits
Jan. 20	Contract	373.00	
Mar. 29	Certificate		373.00
Mar. 29	Extra work	60.00	
Mar. 29	Certificate		60.00

P. J. Martin

		Debits	Credits	Bal.
Nov. 30	Contract 1,140.00			
Dec. 1	1st. cert.		300.00	840.00
Feb. 4	2nd. cert. final		840.00	

Black & Boyd Mfg. Co.

Contract $1,000.00

		Debits	Credits
Feb. 4	Cert. in full		1,000.00
Mar. 18	Extra work	41.40	
Mar. 18	Cert. in full		41.40

Konzerlman Bros.

		Debits	Credits
Feb. 11	Metal ceiling under marquise 180.00		

Exhibit D-5

Feb. 11	Certificate		180.00
May 14	Extra 112.59		
May 14	Certificate		112.59

Architect's Fees

1920

		Debits	Credits	
May 22	1st Check acc't.		500.00	
May 24	Filing contract spec. & bond (Ritchie)	.30		10
Nov. 15	2nd Check acc't.		500.00	
1922				
Mar. 4	3rd Check acc't.		350.00	
1923				
Feb. 9	4th Check acc't.		200.00	
Oct. 9	5th Check final		200.00	

Power Const. Company

		Debits	Credits	Bal.	
Oct. 22	Changing service from single to two phase, also wiring for generator 326.00				20
Nov. 5	Installation of two phase reserve source of supply from cellar to operator's booth ...269.83			595.83	
Jan. 2	Cert. in full		595.83		
Feb. 11	Extras billed 667.63				30
Feb. 11	Cert. No. 2		367.00	300.63	
Feb. 15	Cert. No. 3		200.00	100.63	
Feb. 15	Additional extras .220.25				

Exhibit D-6

EXHIBIT D-6

To Samuel Geldziler, Owner:

You are hereby notified that John J. Ritchie & Sons the General Contractor is justly indebted to me, in the sum of $3067.00, for materials furnished by me and labor done and performed by me for them, and used in the erection of the theatre at No. 368-370 Clay Street, Paterson, New Jersey, erected or being erected on the land owned by you, pursuant to a written contract, made between you and them and on file in the Passaic County Clerk's Office; and you are further notified that I have demanded payment from the said John J. Ritchie & Sons of the said money, so due and owing to me as aforesaid, and that they have refused to pay the same or any part thereof; and you are, therefore, required to retain the amount, so due and claimed by me, out of the amount owing by you on said contract, or that may hereafter become due and owing from you on said contract, and on being satisfied of the correctness of my demand, to pay the same to me. Attached hereto is a statement of account due me.

Dated: February 11, 1921.

Albert Federici.

Albert Federici
Building Contractor
Office 152 Market St.,
Paterson, N. J.

Contract		$3,567.00
By Cash Aug. 1920	$400	
Allowance for work not done according to first plan as agreed by architect and myself	$100	
Credits		500.00
Balance of money due me		$3,067.00

EXHIBIT D-7

To John J. Ritchie & Sons
77 E. 20th St.,
Paterson, N. J.

Take Notice, That on or about the Eleventh day of February, nineteen hundred and twenty-one, I was served with a stop notice by Albert Federici, a copy of which is hereto annexed.

Dated: February 16th, 1921.

Sam Geldziler

To Samuel Geldziler, Owner:

You are hereby notified that John J. Ritchie & Sons the General Contractor is justly indebted to me, in the sum of $3067.00 for materials furnished by me and labor done and performed by me for them, and used in the erection of the theatre at No. 368-370 Clay Street, Paterson, New Jersey, erected or being erected on the land owned by you, pursuant to a written contract, made between you and them and on file in the Passaic County Clerk's office; and you are further notified that I have demanded payment from the said John J. Ritchie & Sons of the said money, so due and owing to me as aforesaid, and that they have refused to pay the same or any part thereof; and you are therefore, required to retain the amount, so due and claimed by me, out of the amount owing by you on said contract, or that may hereafter become due and owing from you on said contract, and on being satisfied of the correctness of my demand, to pay the same to me.

Attached hereto is a statement of account due me.

Dated: February 11, 1921.

Albert Federici.

Exhibit D-8

Albert Federici
Building Contractor
Office 152 Market St.,
Paterson, N. J.

Contract $3,567.00
By cash Aug. 1920 .....$400
Allowance for work not done according to first plan as agreed by architect and myself $100
Credits 500.00
Balance of money due me $3,067.00

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

Frederic C. Barnes, of full age, being duly sworn according to law on his oath deposes and says that he served a notice, a true copy of which is herein contained, upon John J. Ritchie, personally, at the Capitol Theatre, No. 368 Clay St., Paterson, N. J., on Saturday evening, February 19th, 1921.

Frederic C. Barnes

Subscribed and sworn to before me this 28th day of February, 1921.

Ruth Tilton,
Notary Public of N. J.

EXHIBIT D-8

Paterson Bridge Company
Formerly Passaic Rolling Mill Company
General Offices and Works
Paterson, N. J.
New York Office: 149 Broadway

Feb. 23rd, 1921

Exhibit D-9

Mr. Samuel Geldziler,
1008 Madison Avenue,
Paterson, N. J.

Dear Sir:—

You are hereby notified to stop forthwith all payments due or to become due, from you to John J. Ritchie and Sons, on account of the structural steel furnished by us to him for the theatre belonging to you and situated at 368 to 370 Clay Street, Paterson, N. J., and all payments for any work, labor or materials of any kind furnished by the said John J. Ritchie and Sons to you on account of said theatre, and in the event of your failure to comply with this notice we will look to you for the full amount due us as per our contract, as follows:—

Amount of contract	$5,245.00
Extra bill	27.00
Total charges	$5,272.00
Less payment of Nov. 17, 1920	2,000.00
Balance due us	$3,272.00

Very truly yours,
Walter E. Cooke,
Vice-President.

EXHIBIT D-9

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

Federic C. Barnes, of full age, being duly sworn according to law on his oath deposes and says that he served a notice, a true copy of which is hereto annexed, on John J. Ritchie on the evening of Feb-

ruary 28th, 1921, at No. 368-370 Clay Street, Paterson, N. J., and that said notice was served personally.

Frederic C. Barnes

Subscribed and sworn to before me this 3rd day of March, A. D., 1921.

Ruth Tilton,
Notary Public of N. J.

To: John J. Ritchie & Sons,
77 E. 20th St.,
Paterson, N. J.

Take notice, That on or about the Twenty-third day of February, nineteen hundred and twenty-one I was served with a stop notice by Walter E. Cooke, a copy of which is hereto annexed.

Dated February 25th, 1921.

Samuel Geldziler.

Paterson Bridge Company
Formerly Passaic Rolling Mill Company
General Offices and Works
New York Office: 149 Broadway

Paterson, N. J., Feb. 23rd, 1921.

Mr. Samuel Geldziler,
1008 Madison Avenue,
Paterson, N. J.

Dear Sir:—

You are hereby notified to stop forthwith payments due or to become due, from you to John J. Ritchie and Sons, on account of the structural steel furnished by us to him for the theatre belonging to you and situated at 368 to 370 Clay Street, Paterson, N. J., and all payments for any work, labor or materials of any kind furnished by the said John J. Ritchie and Sons to you on account of said theatre, and in the event of your failure

to comply with this notice we will look to you for the full amount due us as per our contract, as follows:—

Amount of Contract	$5,245.00
Extra bill	27.00
Total charges	$5,272.00
Less payment of Nov. 17, 1920	2,000.00
Balance due us	$3,272.00

Very truly yours,
Walter E. Cooke,
Vice-President.

EXHIBIT D-10

To: John J. Ritchie & Sons,
77 E. 20th St.,
Paterson, N. J.

Take Notice, That on or about the 2nd day of March, 1921 I was served with a stop notice by Mr. H. M. Post, a copy of which is hereto annexed, and with the said stop notice, but not attached thereto, was an itemized bill of materials mentioned in said stop notice, showing that you had purchased from the said H. M. Post, materials amounting to $11,172.61 on account of which you had paid $5,660.00, leaving a balance of $5,512.61, against which is credited 3,579 empty bags at .20 amounting to $715.80, leaving a balance of $4,796.81.

Dated March 3rd, 1921.

Samuel Geldziler

To Samuel Geldziler,

You are hereby notified, that John J. Ritchie & Sons, Contractors, are justly indebted to me, in the sum of Four Thousand Seven Hundred and Ninety six Dollars and eight-one cents ($4,796.81) for

materials furnished, by me to them, and used in the erection of the new theatre erected or being erected on the land owned by you, and situated at 368 and 370 Clay Street, in the City of Paterson, Passaic County, New Jersey, pursuant to the written contract, made between you and them, on file in the Passaic County Clerk's Office, and you are further notified, that I have demanded payment from the said John J. Ritchie & Sons of the said sum of money, so due and owing to me as aforesaid, and that they have refused to pay the same or any part thereof; and you are, therefore, required to retain the amount, so due and claimed by me, out of the amount owing by you on said contract, or that may hereafter become due and owing from you on said contract, and on being satisfied of the correctness of my demand, to pay the same to me.

.....

Dated March 2nd, 1921.

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

Frederic C. Barnes, of full age, being duly sworn according to law on his oath deposes and says that he served a copy of the within notice on John J. Ritchie, personally, at his residence 77 East Twentieth Street, Paterson, N. J., at Seven O'clock P. M. March 3rd, 1921.

Frederick C. Barnes.

Subscribed and sworn to before me this 4th day of March, A. D., 1921.

Ruth Tilton,
Notary Public of N. J.

EXHIBIT D-11

Received of Samuel Geldziler the sum of Four Hundred Dollars ($400), in full settlement of any claim against the said Samuel Geldziler by reason of materials delivered to or work done upon the building of the said Samuel Geldziler at 368-370 Clay Street, Paterson, New Jersey. It is understood that the said payment is made by the said Samuel Geldziler not in recognition of any liability on his part, but in order to amicably settle the litigation now pending between the said parties.

Paterson Bridge Co.,
J. B. Cooke, Pres.

EXHIBIT D-14

To: Mr. H. M. Post,
445 Ellison St.,
Paterson, N. J.
Sir:

Take Notice, That I, Samuel Geldziler, have been served with a summons and complaint in the suit of Paterson Bridge Company which suit started in the Passaic County Circuit Court and is against John J. Ritchie and John J. Ritchie, Jr., partners, trading as John J. Ritchie and Sons and myself as defendants. The said summons is returnable twenty days from the Ninth day of July, 1921.

Samuel Geldziler,.

Dated Paterson, N. J., July 12th, 1921.

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

Frederic C. Barnes, of full age, being duly sworn according to law on his oath deposes and says that he served a copy of the within notice on H. M. Post, personally, on the 18th day of July, 1921.

Frederic C. Barnes.

Exhibit D-15

Sworn to and subscribed before me this 18th day of July, A. D., 1921.

Ruth Tilton,
Notary Public of N. J.

EXHIBIT D-15

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

Frederic C. Barnes, of full age, being duly sworn according to law on his oath deposes and says that he served a notice, a true copy of which is hereto annexed, on H. M. Post, personally, on June 6th, 1921, at Paterson, N. J.

Frederic C. Barnes.

Subscribed and sworn to before me this 9th day of June, A. D., 1921.

Ruth Tilton,
Notary Public of N. J.

Mr. Henry M. Post,
445 Ellison St.,
Paterson, N. J.

Sir:

Take Notice, That I, Samuel Geldziler, have been served with a summons and complaint at the suit of Albert Federici, a copy of which summons and complaint, with the exception of a copy of the agreement which is attached to the original, is hereto annexed.

Yours etc.
Samuel Geldziler.

Dated June 3rd, 1921.

By Fred W. Van Blarcom,
His Attorney.

Exhibit D-16

COPY OF EXHIBIT D-16

Know All Men By These Presents, That
J.J.M. We, the undersigned John J. Ritchie, Sr., John J. Ritchie, Jr., partners trading and doing business under the firm name and style of John J Ritchie & Sons, as principal
J.J.M. and Henry M. Post and John J. Ritchie,
J.J.M. Sr., as sureties are hereby held and firmly bound unto Samuel Geldziler, of the City of Paterson, County of Passaic, and State of New Jersey, in the penal sum of forty-nine thousand and thirty-one dollars, for the payment of which well and truly to be made, we hereby jointly and severally bind ourselves, our heirs, executors, administrators, successors and assigns.

J.J.M. Signed this 21st day of May, 1920.

The condition of the above obligation is such that whereas, the above named principal did on the 15th day of March, 1920
J.J.M. enter into a contract with the said Samuel Geldziler, which said contract with the specifications and addenda upon which it is based is on file in the office of the Clerk of the County of Passaic and is made a part of this the bond the same as though set forth herein.

Now, if the said John J. Ritchie, Sr., John J. Ritchie, Jr., partners trading and doing business under the firm name and style of John J. Ritchie & Sons, shall well and faithfully do and perform the things agreed by them to be done and performed according to the terms of said contract within the time therein specified, to wit; on or before the first day of August, A. D.

1920, and shall pay all lawful claims of sub-contractors, material men and laborers, for labor performed and materials furnished in the carrying forward, performing or completing of said contract, and shall indemnify and save harmless the said
J.J.M. Samuel Geldziler from any and all suits, claims, demands, damages, and costs in the premises, then this obligation shall be
10 void, otherwise the same shall remain in full force and effect, it being expressly understood and agreed that the liability of the surety for any and all claims hereunder shall in no event exceed the penal amount of this obligation as herein stated.

The said surety hereby stipulates and agreed that no modifications, omissions or additions in or to the terms of the said contract or in or to the plans and specifica-
20 J.J.M. tions therefor shall in any wise affect the obligation of said surety on its bond.

Sealed and delivered in the presence of James J. Murner.

John J. Ritchie (L. S.)
John J. Ritchie, Jr. (L. S.)
Partners trading and doing business under the name of
John J. Ritchie & Sons
Henry M. Post (L. S.)
30 John J. Ritchie (L. S.)

Justification of Surety

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

J.J.M. On this 21st day of May A. D. 1920, before me, a Notary Public in and for the

County and State aforesaid, personally appeared Henry M. Post who, being duly sworn on his oath declares that he is a resident of the County of Passaic in the State of New Jersey; that he is a freeholder in said County, and that he owns real estate in said County in his own right, to the amount of twenty-five thousand dollars over and above all his indebtedness and after all his debts are paid and over any contingent liability by reason of being bail, surety, endorser or guarantor.

Henry M. Post.

Subscribed and sworn to before me the day and year aforesaid. I hereby certify that the contents of the above have been carefully made known to affiant before execution.

James J. Murner,
Notary Public of New Jersey

Justification of Surety

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

J.J.M. On this 21st day of May A. D. 1920, before me, a Notary Public in and for the County and State aforesaid, personally ap-
J.J.M peared John J. Ritchie, Sr., who, being duly sworn on his oath declares that he is a resident of the County of Passaic in the State of New Jersey; that he is a freeholder in said County, and that he owns real estate in said County on his own
J.J.M. right, to the amount of twenty-five thousand dollars over and above all his indeb-

tedness and after all his debts are paid and over any contingent liability by reason of being bail, surety, endorsor or guarantor.

John J. Ritchie.

Subscribed and sworn to before me the day and year aforesaid. I hereby certify that the contents of the above have been carefully made known to affiant before execution.

Changed and rechanged to twenty-five thousand dollars before execution.

James J. Murner,
Notary Public of New Jersey

PASSAIC COUNTY CIRCUIT COURT

Henry M. Post, Plaintiff, vs. Samuel Geldziler and John J. Ritchie and John J. Ritchie, Jr., partners, trading as John J. Ritchie & Sons, Defendants.	Action at Law

For Plaintiff: John O. Totten, Esq., and Frederick V. Watson, Esq.

For Defendants: Frederick W. VanBlarcom, Esq., for Defendant Samuel Geldziler. No appearance for Defendants Ritchies.

Porter, J.

This is a suit brought by a material man against the contractors and owner of a theatre building under the Mechanics Lien statute. The case was tried by the Court sitting without a jury.

The facts are that a building contract was entered into between Samuel Geldziler, the defendant, and John J. Ritchie and John J. Ritchie, Jr., trading and doing business as John J. Ritchie & Sons, under date of March 15, 1920, for the erection of a theatre building, to cost $49,031.00. A bond conditioned for the faithful performance of the contract was entered into between the contractors and the owner for the amount of the contract, and signed by the plaintiff, H. M. Post, as surety, which bond bears date May 21, 1920. The contractor built the building but did not complete work, and purchased the materials from the plaintiff. On March 2, 1921, there was due and owing to the plaintiff for materials so furnished the sum of $4,796.81.

Demand for payment of this amount had previously been made by the plaintiff to the contractor and refused. The last materials furnished by the plaintiff and delivered at the building was on February 18,1921. On March 2, 1921, a written notice, signed by the plaintiff, was served on the owner, Geldziler, stating that materials had been furnished to the contractor for said building and payment therefor refused, and that the above amount was due, and requesting that the same be retained by the owner from the amount due on the contract and to pay the same to the plaintiff. Under the terms of the contract payments were to be made only when certified to by the architect.

The first question to be considered is as to the amount due on the contract on March 2, 1921, the date of the notice given by the plaintiff to the owner.

In Reeve v. Elmendorf, 38 N. J. L., at Page 130, Chief Justice Beasley said: "The owner cannot be compelled to pay to the workman or material man any moneys which, by force of his contract, he was not compellable to pay to the contractor. Upon notice given, the workman or material man, to the extent of his demand, takes the place of the contractor, so that, if the owner, as against the latter, can withhold the payment of the moneys earned, he can do so, in like manner, against the demands of the former. The test is, whether a suit for the money in question will lie by the contractor against the owner. If it will not, the owner is not liable to a suit by the workman or material man."

This language seems pertinent to the case at bar. According to the Architect's Certificate No. 40, dated February 1, 1921, which was the last one

issued prior to March 2, 1921, it showed the contract price to be $49,031.00, Extra Work, $76.00 and "approximately $4,000.00," a total of 53,107.00. It also showed previously paid $49,523.39, leaving due $3,583.61. That certificate was for a payment of $148.00, which was paid, and receipted for by the contractor, and then left a balance due as of that date of $3,435.61.

According to the book of account of the architect, there was an additional Architect's Certificate No. 41, for $32.25, dated June 28, 1921, and certain credits, viz., Mason, $1402.25 and $37.00, reducing the amount due from the owner to $1964.11, to which is to be added a charge of $51.15 for extra work, making the net balance due at that time of $2,015.26. While this Certificate No. 41 was issued after the date of the plaintiff's notice and the credits referred to were entered in the Architect's records as of June 28th, also after the date of the plaintiff's notice, still, as the work had been stopped, it is clear that the credits were for work done prior to March 2, 1921, and shows the amount due as of that date. The largest credit is for mason work, $1,402.25. This refers to the extra mason work, which is a charge on the Architect's book, as of December 10, 1920, as "approximately $4,000.00."

Some twenty architects' certificates were introduced in evidence, and were all signed by either one or the other of the Ritchies. The Ritchies contend that there was a material change in the contract, that the entire interior work was changed and different materials used than those specified, that those changes were made by verbal instructions from the owner to the contractor in October, 1920. It was agreed then, say the Ritchies,

that the owner would pay all material bills and labor bills from then to the completion of the building, and, in addition thereto, a certain sum weekly to each of the Ritchies for their services in supervising the work. This is denied by Geldziler. Nor does the architect's certificate bear out the Ritchies' contention. All of the certificates produced at the trial, dated from December 3, 1920, to February 1, 1921, twenty in all, as appears from their faces, are for work "as per contract." Moreover, many of them are for odd amounts. The Ritchies say that from October they were paid each Saturday by the owner, and always in cash, in sums necessary to meet the payrolls and for their own wages, and that no architect's certificates were furnished for those payments, nor receipts given; that during that period the owner paid the material bills also.

No evidence other than that given by the Ritchies was offered. The books of account of the Ritchies were not produced, it being said that the same were lost.

The contract provides, in Article 9, that "payments to be made from time to time, as the work progresses, in amounts to be certified to by a written certificate of the architect. No payments to be made for more than 85% of the work completed, materials furnished and actually installed in the building. The 85% valuation and the certificate of the architect in all cases to be final, binding and conclusive between owner, contractor and all parties concerned, and no work to be considered finally accepted until the issuance of the final certificate." There has been no completion of the work, according to the testimony of the witnesses for the plaintiff, nor has there been any final certificate issued by the architect.

The defendants, Ritchies, admit that they owe the plaintiff the amount due. They put in no defense. On the contrary, they both testified on behalf of the plaintiff. There being no denial of the claim by the defendants, Ritchie, the plaintiff is entitled to judgment against them for the amount claimed, with interest.

The only remaining question is as to whether the judgment should also be rendered against the owner. It is claimed by the plaintiff that he is entitled to recover from the owner under Section 5 of the Mechanics' Lien act. This section reads as follows:

> "5. Payments to contractor to defeat lien claims. If the owner or owners of any building or other property which, by this act, is made the subject of liens for or toward the construction, altering, repair or improvement of which labor or services have been performed or materials furnished by contract, duly filed, shall, for the purpose of avoiding the provisions of this act, or in advance of the terms of such contract, pay any money or other valuable thing on such contract, and the amount still due to the contractor, after such payment has been made, shall be insufficient to satisfy the notices served in conformity with the provisions of this act, such owner or owners shall be liable in the same manner as if no such payment had been made. (P. L. 1898, p. 539.)."

The contention being that the owner had paid prior to March 2, 1921, the date of the service of the notice by the plaintiff, of moneys in advance of the terms of the contract, in which case, under the pro-

visions of this section, the owner shall be liable in the same manner as if no such payments had been made.

The notice referred to in Section 5 must appear to have been served before the contract had been completed or before the liability of the owner under the contract matured, and notice served after said time derives no aid from this section of the statute.

Pearson v. Herring, 63 N. J. L. 599.

Slingerland v. Binns, 56 N. J. Eq. 413.

On March 2, 1921, the work under the contract, had not yet been completed. In fact, the contractors had abandonend it. No work was being done; no materials were being furnished. The contract price had been paid and a substantial amount also paid on account of extras. The entire amount as certified by the architect had been paid, the last payment having been made on Certificate No. 40, on February 1, 1921. Only one payment was made on architect's certificate after the serving of the notice, according to the architect's record, which was on Certificate No. 41, on June 28, 1921, for $32.25.

While it is true that the Ritchies claimed that there was more money due them for extra work, they testified that the changes in the construction, ordered by the owner, increased the cost by about $10,000.00. They also testified that they had not so advised the owner at any time and had never, even to the date of trial, submitted any bill or made any demand for the same. The architect had certified the amount of the extra work on his certificates as approximately $4,000.00. These certificates were all signed by either one or the other of the Ritchies, and, presumably, no objection was

made by them to the amounts set forth on the certificates. From the proofs in this case, it seems clear that the amounts shown on the certificates were the correct amounts due the contractors. Therefore, at the time of the service of the notice, there was due the contractors the sum of $2015.00.

It appears that the plaintiff is not the only material man whom the contractor did not pay. Before March 2, 1921, other notices were served on the owner; viz., on February 11, 1921, notice was served by Albert Federici, a sub-contractor, demanding $3,067.00, and on February 16, 1921, the owner notified in writing the contractor of this claim, and sent him a copy of it; on February 23, 1921, notice was served on the owner by Paterson Bridge Company, sub-contractors, demanding $3,272.00, and on February 25, 1921, the owner notified in writing the contractor of this claim, and sent him a copy of it. The owner afterwards paid the Paterson Bridge Company $400.00 in full settlement. Federici brought suit on his claim, and the owner settled that claim for $2,250.00, making $2,650.00 paid by him, thus wiping out the balance in his hands.

It is contended by the plaintiff that the owner acted as a fiduciary with respect to the balance in his hands and that he had no legal right to compromise these claims, and that the plaintiff in this suit is not bound by his action in so doing. Inasmuch as these claims have priority over the claim of the plaintiff, both notices having been served before the notice served by the plaintiff, the owner was obliged to consider them and, if satisfied that they were valid claims, did have the right to dispose of them by way of compromise or otherwise.

Opinion

It is claimed by the defendant that a bond was signed in the penal sum of the contract price by the contractors and the owner, conditioned for the faithful performance of the contract, which bond was also signed by the plaintiff as surety. The plaintiff admits signing such a bond, but places the date of such execution at an earlier time than the date appearing on the bond, and claims that he did not sign it in the presence of the person whose name appears thereon as the subscribing witness, and that he did not take an affidavit in the presence of such subscribing witness. A bond was produced at the trial, which bears date of May 21, 1920, and which admittedly contains the signature of the Ritchies and of Post, both on the bond and the justifications. Certain erasures appear on the bond. The plaintiff claims that they were not there when he signed it and says the bond he signed is not the bond produced. James J. Murner, now a member of the bar, but who was not such on May 21, 1920, testified that the bond was executed in his presence by all of the parties on May 21, 1920, and that both Ritchie and Post swore to it before him on that date, all being present together in the shed adjacent to the theatre building. Moreover, he testified that all erasures to the bond were made before execution.

Neither the Ritchies nor Mr. Post satisfied me, by their testimony, as to their recollection of the circumstances of the execution of the bond, that the same was not executed in Mr. Murner's presence, at the time, place and under the circumstances so clearly and unequivocably testified to by him.

The defense contends that even though there be money due from the owner to the plaintiff, the bond will bar its recovery. On the other hand, the

plaintiff's contention is that the bond was not valid because of changes made in it as above mentioned, and also, because the contract was not carried out by the parties thereto, there having been an abandonment of it and a new contract entered into verbally in lieu thereof and inconsistent therewith as to work to be done and materials to be furnished.

The plaintiff admits signing a bond as surety. He furnished the materials, or the bulk thereof, which were used in the erection of this building. He knew of the contract and of its terms. He was in touch with the Ritchies from time to time as he supplied them with material. If there had been such a change in contract as Ritchies claim, requiring entirely different materials for the work, then certainly the plaintiff would have had knowledge of such changes. He apparently made no inquiries of the owner or the architect or of anyone else concerning those changes, and so he brings the suit on the theory that there has been no new contract and that the original one is still effective, and that, as a material man under that contract, he is entitled to a lien and to be paid by the owner. He seeks to prove by the Ritchies that a new contract was entered into. If that be so, he is clearly not entitled to recovery.

But I am not satisfied that there was a new contract and an abandonment and recission of the original one. It may be that some changes were made in the work and some extra work done, which is not rare in building contracts. That there was extra work is evidenced by the architect's certificates and books of accounts. That evidence seems most reliable to me and shows that the changes or extras were of minor character and importance, and not as testified to by the Ritchies.

I must conclude from the testimony before me that there was a substantial compliance with the terms of the contract by both parties to it up to the time that the work stopped, which, as stated, was before the work was entirely completed. So that if the plaintiff is entitled to recover, he can only do so, if at the time of the service of his notice, there was an unexpended balance of the amount due the contractor, under the contract, in the owner's hands.

There was in the owner's hands and due the contractor on that date, $2,015.26, as above set forth, and the plaintiff could look to that fund for his unpaid bill.

The testimony, however, is that prior claims had been made on the owner by other material men for more than that sum. Notices of such claims were given by the owner to the contractors prior to the receipt of the plaintiff's claim on March 2, 1921. Those claims were valid, and the owner paid them a total of $2,650.00, being $534.74 in excess of the amount then due the contractor.

These claims took priority over the claim of the plaintiff. Lien claims are payable in the order of their priority and not pro rated.

Smith v. Dodge & Bliss Co., 59 N. J. Eq. 484.

The plaintiff also claims that but 85% of the work complete was to be paid for as the work progressed, and that by reason of a larger percentage having been paid, the owner is liable to the material man because of such overpayment. It is true that the contract provided that but 85% of the work shall be paid for until final certificate is issued, but certainly where the work is abandoned the owner cannot withhold payment indefinitely, especially

where, as in this case, architect's certificates were issued and receipted for by the contractor. Those last certificates were not actually final certificates, but inasmuch as the contractor was through with the work when they were issued, they were in effect final certificates. In any event, the contract makes issuance of the architect's certificates the test of the amount due, and provides that the same shall be "final, binding and conclusive between owner, contractor and all parties concerned."

At the outset of the trial, counsel for the plaintiff moved to strike out the defense setting up the bond in the answer, on the ground that it did not constitute a legal defense but, rather, a counterclaim, that it constituted a misjoinder of causes of action, and was sham and frivolous. Decision was reserved on this motion. Proofs were allowed, subject to being stricken out if the motion prevailed. It seems to me that the defense was a proper one. The motion therefore, to strike out is denied.

For the reasons stated, the verdict will be no cause of action as against the owner.

Newton H. Porter,
Judge.

Rule for Judgment

PASSAIC COUNTY CIRCUIT COURT

Henry M. Post,
Plaintiff,
vs.
Samuel Geldziler, and John J. Ritchie and John J. Ritchie, Jr., partners, trading as John J. Ritchie & Son,
Defendants.

Rule for Judgment

This action having been tried before Judge Newton H. Porter without a jury in the presence of counsel of the respective parties on September 22, 1927, November 21 and 22nd, 1927, and the Court having returned a verdict in favor of defendant Samuel Geldziler:

It is ordered that Judgment final be entered against the plaintiff and in favor of the defendant Samuel Geldziler for the cost of the suit to be taxed. On motion of

Frederick W. Van Blarcom,
Attorney for Defendants

Entered March 5, 1928.

PASSAIC COUNTY CIRCUIT COURT

Henry M. Post, Plaintiff, vs. Samuel Geldziler, John J. Ritchie, John J. Ritchie, Jr., trading and doing business as John J. Ritchie & Son, Defendants.	Action at Law

NOTICE OF APPEAL

To Frederick Van Blarcom, Attorney of Defendant Samuel Geldziler, Sir:

Please take notice that the plaintiff in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this case.

Respectfully yours,
John O. Totten, Jr.,
Attorney of Plaintiff.

Service acknowledged April 27th, 1928. F. W. Van Blarcom, Atty. of Deft., Sam'l. Geldziler.

NEW JERSEY COURT OF ERRORS
AND APPEALS

Henry M. Post, Plaintiff-Appellant, vs. Samuel Geldziler and John J. Ritchie and John J. Ritchie, Jr., partners, trading as John J. Ritchie & Sons, Defendants-Appellees.	Action at Law

GROUNDS OF APPEAL

To Frederick W. Van Blarcom, Attorney for plaintiff:

Please take notice that the reasons assigned by the plaintiff under the appeal by him made to the Court of Errors and Appeals in the last resort in all causes in New Jersey, in this cause served and filed in manner prescribed by law, are as follows:

1. Because the Trial Court erred in that its decision was contrary to the evidence adduced at the trial.

2. Because the Trial Court erred in that its decision was contrary to the law of this state.

3. Because the Trial Court erred in that it failed to find for the plaintiff and against the defendant.

4. Because the Trial Court erred in that it found a verdict of no cause of action as against the owner, Samuel Geldziler.

5. Because the Trial Court erred in that although it found as a fact that the contract for

building was not completed March 2, 1921, the time of the service and filing of the plaintiff's stop notice upon the defendant and owner, Geldziler, and further that while the contract provided "that payments to be made from time to time as the work progresses in amounts to be certified to by a written certificate by the architect. No payment to be made for more than eighty-five per cent of the work completed, materials furnished and actually installed in the building. The eighty-five per cent valuation and the certificate of the architect in no case to be final, binding and conclusive between the owner, contractor and all parties concerned, and no work to be considered finally accepted until the issuance of the final certificate." Nevertheless the Court did find as a conclusion of law, that it was not necessary for the defendant and owner, Geldziler, to have in his hands at the date above mentioned, fifteen per cent of the costs of the construction of the said building for the purpose of satisfying stop notice claims already filed, including the stop notice claim of the plaintiff.

6. Because the Trial Court erred in finding that the defendant and owner, Geldziler, was only obligated to have as the unexpended balance due the contractor at the time of the serving and filing of plaintiff's stop notice, the sum of $2,015.26 to which the plaintiff could look for as a fund for his unpaid bill.

7. Because the Trial Court erred in finding as a conclusion of law that the contract had been substantially completed at the time of the serving and filing of the plaintiff's stop notice and in the same decision found as a question of fact that "no work

to be considered finally accepted until the issuance of the final certificate", and in addition thereto found the fact to be that architect's certificate No. 41 was issued June 28, 1921.

8. Because the Trial Court erred in finding as a conclusion of law as against the plaintiff's right and lien to moneys in the hands of the defendant and owner, Geldziler, that the contract was substantially completed at the time of the plaintiff's serving and filing of the stop notice.

9. Because the Trial Court erred in finding as a conclusion of law that there can be a substantial completion of the contract as against the plaintiff's right and lien to moneys in the hands of the defendant and owner, or to moneys that should have been in the hands of the defendant and owner at the time that the plaintiff served and filed his stop notice.

10. Because the Trial Court erred in not finding as a conclusion of law that the defendant and owner, Geldziler, should have had in his hands at the time of the serving and filing of plaintiff's stop notice, the sum of fifteen per cent of $53,107 the amount found by the Court as the total of the contract plus extras.

11. Because the Trial Court erred in finding as a conclusion of law that the defendant and owner's liability under the contract matured before the date of the serving and filing of the plaintiff's stop notice, although it found as a fact that the moneys due it for materials furnished accrued prior thereto, the last item of which accrued on February 18, 1921.

12. Because the Trial Court erred in finding as a conclusion of law that the owner may make pay-

ment of the moneys under the contract in his hands after stop notice has been served upon him where the contractor has abandoned the contract.

13. Because the Trial Court erred in admitting the testimony of Louise M. Becker, as to the contents of a book kept by her concerning the payments and allowances to the contractor other than expressed by the architect's certificate, over the objection of the counsel for the plaintiff.

14. Because the Trial Court erred in allowing page 5, sheet 5, of book of Louise M. Becker to be offered in evidence over objection of the counsel for the plaintiff, said sheet being marked Defendant's Exhibit D-5.

15. Because the Trial Court erred in refusing to strike out the record of the book kept by Miss Becker on motion made by counsel for the plaintiff.

16. Because the Trial Court erred in allowing the defendant and owner, Geldziler, to testify to the receipt of and payment under previous stop notices, although not specifically pleaded by the defendant, Geldziler, over the objection of counsel for the plaintiff, Post.

Respectfully yours,

JOHN O. TOTTEN, JR.

Attorney for Plaintiff-Appellant.

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JUDGMENT IN FAVOR OF PLAINTIFF AGAINST DEFENDANTS, RICHIE, CONTRACTORS.

This action was tried before Judge Newton H. Porter without a jury, at the Passaic County Circuit Court on September 22, and 23 and November 21 and 22, 1927.

The cause having been heard by the Court sitting without a jury and the findings of the Court are as follows:

A general verdict against the defendants, John J. Ritchie and John J. Ritchie, Jr., partners, trading as John J. Ritchie & Son, in favor of the plaintiff in the sum of four thousand seven hundred ninety-six dollars and eighty-one cents ($4,796.81).

Whereupon it is adjudged that the plaintiff recover of the defendants, John J. Ritchie and John J. Ritchie, Jr., partners, trading and doing business as John J. Ritchie and Son, in the sum of four thousand seven hundred ninety-six dollars and eighty-one cents ($4,796.81) and his costs which are taxed at the sum of $47.75, making a total of $4,844.56.

NEWTON H. PORTER,
Judge.

Judgment entered March 5, 1928.

JUDGMENT IN FAVOR OF GELDZILER, OWNER.

This action was tried before Judge Newton H. Porter, without a jury, in the presence of the counsel of the respective parties, at the Passaic County Circuit Court on September 22nd and November 18th, A. D. 1927.

The cause having been heard the Court found in favor of the defendant, Samuel Geldziler.

Whereupon, it is adjudged that the complaint of the plaintiff be dismissed as to the defendant, Samuel Geldziler and that the defendant, Samuel Geldziler recover of the plaintiff, Henry M. Post, his costs, which are taxed at the sum of forty-seven dollars and seventy-five cents ($47.75). Judgment entered and filed March 5th, A. D. 1928, at 3:50 P. M. Action No. 10220. Docket J, page 471.

NEWTON H. PORTER.
Judge.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

HENRY M. POST,
Plaintiff-Appellant,

vs.

SAMUEL GELDZILER, *et als.*,
Defendants-Appellees.

Action at Law.

REPLY BRIEF OF PLAINTIFF-APPELLANT.

Defendant Geldziler argues that by virtue of payments made to other claimants who had served prior stop-notices on prior claims the balance in the hands of the owner was exhausted, and in support of this argument he submits certain figures as to the amount of the contract price, extra work, etc. These figures are correct as far as they go but the argument overlooks entirely the provision of the contract which permits payments to be made from time to time only in the amounts certified to by the architect—with the further provision, "No payments to be made for more than eighty-five (85%) per cent. of the work completed, materials furnished and actually installed in the building" (State of Case, p. 9, l. 30, to p. 10, l. 1).

Let us take the owner's figures as follows:

Amount of Contract.....	$49,031.00
Extra work, about	4,076.00
Total.....	$53,107.00

(Page 3 of brief.)

If we apply fifteen (15%) per cent. to this total it will be seen that the amount which should have been reserved for the final payment (which was

to be made within thirty days after completion of the work) (p. 10, l. 10) is $7,966.05.

These facts are not disputed, and hence if we admit that the owner properly paid to other claimants a total of $2,650 (p. 5 of brief) there was still a balance due under the contract of $5,316.05, which amount under the terms of the contract should have been in the hands of the owner at the time the plaintiff herein served his stop-notice.

While it may be true that (as found by the Trial Court) there was in the hands of the owner at the time the plaintiff's stop-notice was served the sum of only $2,015.26, it is not correct to say that the plaintiff "could look to that fund for his unpaid bill" (p. 280, State of Case, ll. 10-15). This conclusion of the Trial Court overlooks the point that the plaintiff had the right to look not only to this balance of $2,015.26 but also to the total fund of $7,966.05, of which there *should* have been still remaining in the hands of the owner the sum of $5,316.05 even after all other claims had been paid provided the owner had complied with the contract.

Counsel argues that the owner is excused from liability by reason of the fact that he made payments in accordance with the architect's certificates. But this overlooks two facts, first, that certain payments were made *without* certificates, and secondly, that the plaintiff had a right to rely upon the terms of the filed contract (concerning which there was no dispute), which provided that payments should be made from time to time on certificates as the work progressed, that the payments should not exceed eighty-five (85%) per cent. of the work completed, etc., and that the eighty-five (85%) per cent. valuation and the

certificate should be "conclusive" between owner, contractor and all parties concerned and no work to be considered finally accepted until the issuance of the final certificate (p. 9, l. 30, to p. 10, l. 10).

Counsel in his brief practically concedes that as to the certificates that were given there were various irregularities but claims these were cured by the certificate for the fortieth payment (page 6 of brief).

We submit that this argument is a *non sequitur* because it leaves out the two facts above set forth, to wit, the making of certain payments without certificates and the express terms of the contract.

Moreover, the case of *Slingerland* v. *Binns* (page 9 of our brief) construes the statute to prohibit *any* payments by the owner except payments that are made "according to the terms of the contract."

Respectfully submitted,

JOHN O. TOTTEN, JR.,
Attorney for Plaintiff-Appellant.

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New Jersey Court of Errors and Appeals

Henry M. Post, Plaintiff-Appellant, vs. Samuel Geldziler, et als., Defendants-Appellees.	Action at Law

BRIEF OF SAMUEL GELDZILER, DEFENDANT-APPELLEE

This is an action brought by the appellant, a materialman, for the price and value of goods, wares and merchandise furnished to the defendants John J. Ritchie, Sr. and John J. Ritchie, Jr., partners trading as John J. Ritchie & Sons, as contractors, and used by the contractors in the erection and construction of a theatre building, on Clay Street, in the City of Paterson, County of Passaic and State of New Jersey, owned by the appellee. The suit against this appellee, as owner, and the contractors, as builders, was based on a stop notice served upon the appellee by the appellant by virtue of the provisions of the Mechanics' Lien Act, and resulted in a judgment in favor of this appellee and against the contractors.

On the 15th day of March, 1920, this appellee entered into a contract, in writing, with the defendants, John J. Ritchie, Sr. and John J. Ritchie, Jr., a copartnership doing business under the name of John J. Ritchie & Sons, for the erection of a motion picture theatre building, at No. 368-370 Clay Street, in the City of Paterson, N. J., the contract was duly filed in the office of the Clerk of Passaic County and is marked Schedule

"A" attached to the appellant's complaint (State of Case, pp. 5-12). On the 21st day of May, 1920, the defendants John J. Ritchie & Sons, John J. Ritchie, Sr., and the appellant entered into a bond or obligation to this appellee for the faithful performance of said contract on the part of the defendants John J. Ritchie & Sons; the payment of all lawful claims of subcontractors, materialmen and laborers, for labor performed and materials furnished in the carrying forward of said contract, and to save harmless this appellee from any and all suits, claims, demands, damages and costs in the premises. (Exhibit D-16, State of Case, pp. 267 to 270.)

Under the terms of the contract and the provisions of the bond, the building was to be completed on the 1st day of August, 1920 (State of Case, pp. 8 & 267), but the building was not completed at that time. The defendant, Ritchie, Sr., testified the building was not finished March 1, 1921; in fact, he testified that the job is not all finished yet (State of Case, p. 78, ls. 18-25). However that may be, the work progressed and from time to time the architect issued certificates in accordance with the terms of the contract, and there were offered in evidence certificates for the 19th to 40th payments inclusive (with one or two exceptions), as Exhibit D-1 (State of Case, pp. 241 to 254). Each of these certificates show the contract price, $49,031.00, the approximate amount of extra work $4,000.00, the amount previously paid, the balance at the time of issuing the certificate and the amount of the certificate itself; certificates for the 26th to 40th payments, inclusive, also show approximate extra work

amounting to $76.00. All of these certificates are receipted by either of the defendants, Ritchie Sr. or Ritchie, Jr. (State of Case, p. 92, l. 3, et seq.); and the certificate for the 40th payment (State of Case, p. 253, l. 26 to p. 254, l. 16), dated February 1, 1921, receipted by the defendant Ritchie, Jr., shows:

Am't. of contract	$49,031.00
Extra Work, approx.	4,000.00
	76.00
Total	$53,107.00
Previously Paid	49,523.39
Balance	$ 3,583.61

This certificate was for $148.00, which being deducted from said balance, left in the hands of this appellee at that time $3,435.61.

There is no evidence that the contractors did any work under the contract after receiving this payment; Ritchie, Sr., says he does not remember (State of Case, p. 102, ls. 21 to 30).

On the 11th day of February, 1921, this appellee was served with a stop notice on behalf of one Albert Federici, who claimed a balance due him of $3067.00 (Exhibit D-6, State of Case, p. 258), notice of which was given to the defendants John J. Ritchie & Sons on the 19th day of February, 1921 (Exhibit D-7, State of Case, pp. 259-260).

On the 23rd day of February, 1921, this appellee was served with a stop notice on behalf of Paterson Bridge Company, who claimed a balance due it of $3272.00 (Exhibit D-8, State of Case, pp. 260-261), notice of which was given to the defendants John J. Ritchie & Sons on the 28th

day of February, 1921 (Exhibit D-9, State of Case, pp. 261-262).

On the 2nd day of March, 1921, this appellee was served with a stop notice by the appellant, who claimed a balance due of $4796.81, notice of which was served on the defendants John J. Ritchie & Sons on March 3, 1921 (Exhibit D-10, pp. 263-264).

Other stop notices were served upon this appellee by various materialmen and subcontractors, as will appear from the State of the Case (S. C., p. 95, l. 35; p. 96; p. 97 to l. 20).

On or about June 3, 1921, suit was brought against this appellee by Albert Federici on his stop notice, notice of which suit was served on the appellant on June 6, 1921 (Exhibit D-15, State of Case, p. 266), and on or about the 9th day of July, 1921, suit was brought against this appellee by Paterson Bridge Company on its stop notice, notice of which was served on the appellant on July 18, 1921 (Exhibit D-14, State of Case, p. 265).

At the time of the suit of Albert Federici, there was in this appellee's hands to be applied on account of said contract, the sum of $2015.26, as follows:

Balance February 1, 1921		$3,435.61
June 28, 1921, certificate 41, issued to J. Westerveld	$ 32.25	
Credit for mason work	1402.25	
Eastern Marble Mosaic Co.	37.00	
		1,471.50
		$1,964.11
Plus extra cost of masonry		51.15
Balance		$2,015.26

(Exhibit D-5, State of Case, p. 256, ls. 3-10 and pp. 151, 152, 153.)

In settlement of the suit of Albert Federici, this appellee paid to him $2,250.00 (State of Case, p. 201 & 202), which exhausted all the money in his hands under the contract and $234.74 in addition. In settlement of the suit of the Paterson Bridge Company, without recognizing any liability on his part, this appellee paid to it the sum of $400.00 (Exhibit D-11, State of Case, p. 265 and p. 197). This made the amount paid by this appellee, in excess of the money in hand under the contract, $634.74 and left remaining due to Federici the sum of $817.00 and to Paterson Bridge Company the sum of $2872.00, a total of $3689.00; payment of which would be due before any payment should be made on the stop notice of the appellant.

Summons in the instant suit was not issued until December 31, 1925 (State of Case, p. 1) and although the Ritchies filed an answer (State of Case, p. 23) they not only put in no defense at the trial (State of Case, pp. 102-103), but were appellant's principal witnesses (State of Case, pp. 70, 103, 131); in consequence of which the trial of this cause resolved itself practically into a suit between the appellant and the two Ritchies against this appellee.

The appellant in his brief sets up fourteen (14) points upon which he relies for a judgment from this court reversing the judgment in favor of this appellee in the court below, to which this appellee will make answer herein as they occur in appellant's brief.

ANSWER TO POINT I.

"The trial court erred in that its decision was contrary to the evidence adduced at the trial."

First: The argument of this point by the appellant goes to the claim that from time to time payments were made by this appellee to the contractor without architect's certificates, which was at the trial admitted by this appellee.

This appellee's answer to this point, however, is that before the appellant served his stop notice, which is the basis of this suit, the architect had issued to the appellee many certificates (Exhibit D-1, State of Case, pp. 241 to 254, incl.), which had been received and receipted for by the contractor, the last of which was the certificate for the 40th payment, on February 1, 1921, showing a balance then in this appellee's hands of $3435.61, as above recited.

The giving of these certificates, and particularly the certificate for the 40th payment, cured any irregularity that may have preceded it in the matter of payments made without certificates, that certificate having been issued before the stop notice was served.

This appellee contends that the stop notice of the appellant not having been served until after the architect's certificate for the 40th payment had been issued, any irregularity because of anticipatory payments was cured and the inchoate lien of appellant expired as to everything except the balance of $3435.61, which was first liable for the completion of the building and for the payment of prior stop notices.

"This enactment, we think, affords a reasonably clear indication of a legislative purpose to give to persons entitled to serve the statutory notice an inchoate lien upon the liability of the owner under the contract, ***until that liability matures according to the terms of the contract, such lien to become perfect on service of the notice before the liability matures, but to expire on such maturity if no notice has been given, for a notice served after maturity derives no aid from this provision.***"

Slingerland vs. Binns, et al., 56 N. J. Eq. 415.

"In Slingerland v. Binns, 56 N. J. Eq. 413, 39 Atl. 712, this court construed the new section to give to workmen and material men, as against the contractor and his assigns, an inchoate lien ab initio upon the liability of the owner to the contractor of a building for which they furnished labor or material; ***but distinctly declared that such lien becomes perfect only on service, before that liability matures, of the statutory notice,*** based on demand and refusal of payment, ***and expires on such maturity if no notice be given.***"

Bayonne Building Asso. No. 2 vs. Williams, et al., 59 N. J. Eq. 617.

"The essential principle of this decision is its declaration that the effect of the supplement is to secure 'to persons entitled to serve the statutory notice and inchoate lien

upon the liability of the owner under the contract; ***such lien to become perfect on service of the notice before the liability matures, but to expire on such maturity if no notice has been given; for a notice served after maturity derives no aid from this provision'.***"

Donnelly v. Johnes et al., 58 N. J. Eq. 442.

"This ruling makes it necessary to determine in each case, when a contest arises as to the applicability of installments coming due under the contract, what is the exact time when the liability of the owner to the contractor matures. ***Before that time the inchoate lien may be perfectd by service of notice in conformity to the statute.***"

Flaherty v. Atlantic Lumber Co., 58 N. J. Eq., 467.

In the case of Smith et al v. Dodge & Bliss Co. 59 N. J. Equity 585, Mr. Justice Van Syckel, commenting on the effect of Sec. 5 of the Mechanics' Lien Act quotes Slingerland v. Binns and Association v. Williams and the Court of Errors and Appeals follows these cases in its decision in this case.

In the case of Person v. Herring et al., 63 N. J. Law 599, Mr. Justice Lippincott, speaking for the Court of Errors and Appeals, cites Slingerland v. Binns and the decision of the court is based thereon.

In the case of Booth et al. v. Kiefer, 60 N. J. Equity 57, Vice Chancellor Pitney cites and follows Slingerland v. Binns and Association v. Williams.

"Upon the whole, it seems well settled that while a claimant who serves his stop notice after the owner's liability to the contractor has matured still has the benefit of his notice, so far as it entitles him to stand in the shoes of the contractor and recover from the owner any moneys then due from the owner to the contractor, to the extent of the claimant's demand, yet such a belated stop notice has no retroactive effect, and does not entitle the claimant to any benefit of the provisions of section 5 of the act. ***His rights are subject to all payments previously made by the owner to the contractor, all stop notices previously served, and other prior assignments,*** without regard to the time when, or the order in which, such prior payments or assignments were made, or stop notices were served."

Taylor v. Reed, 68 N. J. Law 178.

"It is impossible to distinguish this case from Bayonne Building Association v. Williams, Supra, except that ***Horner served his stop notice one day after the maturity of the owner's liability to pay to the contractor,*** and in the Bayonne Building case some months had elapsed between the maturity of the owner's liability and the ser-

vice of the notice. In my opinion, this can make no difference. If the stop notice can be served one day after the contractor is entitled to his payment, it may be served six months after, and ***this the Court of Appeals has declared to be ineffective.***"

Edge v. McClay et al., 72 N. J. Equity 216.

"A stop notice served subsequent to the time the last installment became due is operative only against such part of the last installment as remains unpaid or unappropriated at the time such subsequent stop notice is served. Taylor v. Reed, 68 N. J. Law 178, 52 Atl. 579."

Keupler et al., v. Eisele et al., 79 N. J. Eq. 651.

"It has been repeatedly held that the inchoate lien which the provisions of section 5 of the Mechanic's Lien Act imparts to stop-notices under that act ***extends only to the time the liability of the owner matures according to the terms of the contract.*** Slingerland v. Binns, 56 N. J. 413, 415, 39 Atl. 712; Donnelly v. Johnes, 58 N. J. Eq. 442, 445, 44 Atl. 180; Flaherty v. Atlantic Lumber Co., 58 N. J. Eq. 467, 469, 44 Atl. 186; Smith v. Dodge & Bliss Co., 59 N. J. Eq. 584, 585, 44 Atl. 639; Person v. Herring, 63 N. J. Law, 599, 603, 44 Atl. 753; Taylor v. Reed, 68 N. J. Law, 178, 52 Atl. 579; Edge v. McClay, 72 N. J. Eq. 216, 64 Atl. 969; Keupler v. Eiselle 83 Atl. 999."

Board of Education of Riverton Boro v. Tait et al, 80 N. J. Eq. 94.

"The principle laid down in that case is the same whether by the terms of the filed contract a certificate is to be procured before the final payment, or before the first payment, or before any payment. And so where, as here, a building contract, duly filed in the county clerk's office, provided that all payments should be made upon the certificate of the architect named therein, the owner is liable to a party furnishing labor or materials, ***who served notice prior to the issuance of any such certificate,*** to the full amount of his claim, not exceeding the full amount of such advance payments."

Somers Lumber Co. v. Kaufman et al., 102 N. J. Law 601.

Second: Many of these certificates the appellant alleges were issued to persons other than the contractor and as to that point the appellant refers to Exhibit D-5, the books of the architect (the admission of which in the latter part of his brief he assigns as another point of error), wherein, after the record of said certificates, there is a memorandum in parenthesis which seems to this appellee to indicate for what part of the work the certificate was issued.

This appellee's answer to this point is the record of Exhibit D-1 (State of Case, pp. 241 to 254), the various certificates for payments from the 19th to the 40th inclusive, from which it

will appear that these certificates themselves were all issued to the appellee for the benefit of the contractor, regardless of the parenthetical memorandum or notation in the architect's books.

Third: The argument of this point by the appellant goes to the issuing, or rather the failure to issue, the final certificate.

This appellee is rather at a loss to apply the point raised in this subdivision of Point I, but his answer to it is that the issuance of the final certificate is a question solely between the contractor and this appellee and in no wise affects the right of the appellant to recover. The appellant's claim is against a fund and if there be no fund from which he can recover, it is immaterial to him whether or not the final certificate has been issued, or whether or not the building has been accepted by the owner. The fund above referred to is the balance of the contract price remaining in the hands of the owner unappropriated by the issued architect's certificates, or by the provisions of the Mechanics' Lien Act (i.e. prior stop notices).

> ***"The inchoate lien is not a lien on the building, but on the contract price remaining in the hands of the owner,*** and which the law holds there according to the terms of the contract."
>
> Smith et al. v. Dodge & Bliss Co. et al., 59 N. J. Equity 585.

> ***"The right of the material man to recover from the owner after the service of***

the stop notice depends, as will be seen from the words of the statute, upon whether he has in his hands, at the time of such service or afterwards, money owing by him to the contractor for labor or material used in the erection of the building. * * * By the service of their stop notice the plaintiffs took the place of the contractor to the extent of their claim. They acquired no higher or other rights to the fund in question than the latter had. ***'The test is,'*** as was said by this court in Reeve v. Elmendorf, 38 N. J. law 130, ***'whether a suit will lie by the contractor against the owner.*** If it will not, the owner is not liable to a suit by the materialman'."

Blauvelt et al. vs. Fuller et al, 66 N. J. Law 46.

ANSWER TO POINT II.

> "The trial court erred in that its decision was contrary to the law of this state."

In his argument of this point the appellant contends that there should have been in the hands of the owner at the time of the service of his stop notice 15% of the contract price, $49,031.00, and the approximate bill for extras $4,000.00 ($53,-031.00).

This appellee's answer to this contenion is that the appellant has evidently misunderstood the wording of the contract, which he misquotes in his brief. The contract reads:

"Payments to be made from time to time as the work progresses in amounts to be certified to by a written certificate of the architect. No payments to be made for more than eighty-five (85%) per cent of the work completed, materials furnished and actually installed in the building. The eighty-five (85%) per cent valuation and the certificate of the architect, in all cases, to be final, binding and conclusive between owner, contractor and all parties concerned, * * *."

State of Case, p. 9, l. 30 to p. 10, l. 4.

This provision of the contract does not provide for the detention of 15% of the contract price and the approximate bill for extras, as alleged by the appellant. What it does do is to limit the payment of 85% "of the work completed, materials furnished and actually installed in the building." Nowhere in the case does the appellant even seek to show the value of these items. The testimony of the architect is to the effect that he instructed his superintendent to follow the terms of the contract (State of Case, p. 183, l. 1 et seq.), having previously testified as to the custom of the trade in regard to the payment of 85% as set forth in the contract (State of Case, pp. 181-182). The superintendent of the architect testified that when certificates for the 29th to the 40th payments, inclusive, were issued, the certificates did not represent "more than eighty-five per cent of the work completed and materials furnished and actually installed in the building" and that when the certificate for the 40th payment was issued, it was issued in the same way (State of Case, p. 169, ls. 5-30).

In the absence of direct proof as to the value of the work completed, materials furnished and actually installed in the building and in view of the express provision in the contract that "the certificate of the architect in all cases to be final, binding and conclusive between owner, contractor and all parties concerned," the court below was entirely right when it found that there was no fund in the hands of this appellee out of which the appellant could recover a judgment. This fact was further emphasized by proof adduced at the trial in this cause. Ritchie, Sr. testified that in February, 1921, they had all of their money (State of Case, p. 90, l. 10 to 20); he also testified that he did not pay the appellant all of the money that was coming to him, nor did he pay Albert Federici, nor the Paterson Bridge Company (State of Case, p. 95, ls. 12 to 22) and further testified that the following bills had not been paid:

Albert Federici	$ 3,067.00
Paterson Bridge Company	3,272.00
Henry M. Post	4,796.81
Eastern Marble Mosaic Co.	1,408.00
Benjamin Bolleman	112.00
Bauer Construction Co.	339.00
James T. Reimer	1,333.00
Counselman Brothers	934.48
Making a total of unpaid bills amounting to	$15,262.29

(State of Case, p. 95, l. 35; p. 96; p. 97 to l. 20.)

It is to be observed that the contractors, Ritchie, Sr. and Ritchie, Jr. were the principal witnesses of the appellant and in that connection the

observation of both Ritchie, Sr. and Ritchie, Jr. acknowledged having received from this appellee $49,523.39, plus $148.00, the amount of the certificate itself (certificate for the 40th payment, part of Exhibit D-1, State of Case, p. 253, l. 25 to p. 254, l. 15), and acknowledged that they had not paid bills amounting to $15,262.29, as above recited; if they are honest and honorable men, as we assume them to be, the labor and material that had gone into the building by February 1, 1921 amounted to $64,933.68:

Am't. previously paid (certificate for 40th payment)	$49,523.39	
Am't. of certificate for 40th payment	148.00	
		$49,671.39
Unpaid bills		15,262.29
Total labor, materials &c.		$64,933.68
85% of $64,933.68	$55,193.63	
Amount paid	49,671.39	
Required to make up the 85%		$ 5,522.24

It is evident that the architect and his superintendent were very conservative when they estimated $49,671.39 as being 85% of the work completed, materials furnished and actually installed in the building, and therefore it follows that as far as the 85% clause of the contract is concerned this appellee did not pay in advance of the terms of the contract.

ANSWER TO POINT III.

"The trial court erred in that it failed to find for the plaintiff and against the defendant."

AND POINT IV.

"The trial court erred in that it found a verdict of no cause of action as against the owner, Samuel Geldziler."

These two points are argued by the appellant under his points I and II above referred to and require no further answer by this appellee.

ANSWER TO POINT V.

"The trial court erred in that although it found as a fact that the contract for building was not completed March 2, 1921, the time of the service and filing of the plaintiff's stop notice upon the defendant and owner, Geldziler, and further that while the contract provided 'that payments to be made from time to time as the work progresses in amounts to be certified to by a written certificate by the architect. No payment to be made for more than eighty-five per cent of the work completed, materials furnished and actually installed in the building. The eighty-five per cent valuation and the certificate of the architect in no case to be final, binding and conclusive between the owner, contractor and all

parties concerned, and no work to be considered finally accepted until the issuance of the final certificate.' Nevertheless the court did find as a conclusion of law, that it was not necessary for the defendant and owner, Geldziler, to have in his hands at the date above mentioned, fifteen per cent of the costs of the construction of the said building for the purpose of satisfying stop notice claims already filed, including the stop notice claim of the plaintiff."

The portion of the contract referred to in this point is again misquoted by the use of the words underscored by this appellee.

The contract reads:

"the certificate of the architect, in all cases, to be final, binding &c."

(State of case, p. 9, l. 31 to p. 10, l. 6.)

Another error in this point is line 2, page 20 of appellant's brief, where he sets forth the amount paid as being $29,523.38 instead of $49,523.39, plus $148.00, the amount of the certificate for the 40th payment itself. (Part of Exhibit D-1, State of Case, p. 253, l. 25 to p. 254, l. 10.)

This contention has been fully answered above in replying to Point II.

ANSWER TO POINT VI.

"The trial court erred in finding that the defendant and owner, Geldziler, was only obliged to have as the unexpended

balance due the contractor at the time of the serving and filing of plaintiff's stop notice, the sum of $2015.26 to which the plaintiff could look for as a fund for his unpaid bill."

This appellee refers to his answer to Points I and II hereinabove.

ANSWER TO POINT VII.

> "The trial court erred in finding as a conclusion of law that the contract had been substantially completed at the time of the serving and filing of the plaintiff's stop notice and in the same decision found as a question of fact that 'no work to be considered finally accepted until the issuance of the final certificate,' and in addition thereto found the fact to be that architect's certificate No. 41 was issued June 28, 1921."

The answer of this appellee to this ground of error is that, if it is an error on the part of the trial court, which this appellee denies, it is a harmless error to the appellant for the reason given above, that whether or not the building was substantially completed, whether or not the work had been finally accepted, or whether or not the architect's certificate for the 41st payment of $32.25 (Exhibit D-5, State of Case, p. 256, ls. 4-5) had been subsequently issued is no present concern of this appellant, whose remedy is against a fund, which the trial court right-

fully found was nonexistent. As a matter of fact, the trial court did not find "that the contract had been substantially completed at the time of the serving and filing of the plaintiff's stop notice."

> "On March 2, 1921, the work under the contract had not yet been completed. In fact, the contractors had abandoned it."
>
> (Opinion of Trial Court, State of Case, p. 276, ls. 12-14.)

> "I must conclude from the testimony before me that there was a substantial compliance with the terms of the contract by both parties to it up to the time that the work stopped, which, as stated, was before the work was entirely completed."
>
> (Opinion of Trial Court, State of Case, p. 280, ls. 1-5.)

This appellee also refers to his awner to Point II in this brief for his reply to this point.

ANSWER TO POINT VIII.

> "The trial court erred in finding as a conclusion of law as against the plaintiff's right and lien to moneys in the hands of the defendant and owner, Geldziler, that the contract was substantially completed at the time of the plaintiff's serving and filing of the stop notice."

This is apparently the same alleged cause of error referred to in appellant's Point VII, and this appellee refers to his answer to Point VII.

ANSWER TO POINT IX.

"The trial court erred in finding as a conclusion of law that there can be a substantial completion of the contract as against the plaintiff's right and lien to moneys in the hands of the defendant and owner, or to money that should have been in the hands of the defendant and owner at the time that the plaintiff served and filed his stop notice."

This point seems to have been adequately answered above by this appellee.

ANSWER TO POINT X.

"The trial court erred in finding as a conclusion of law that the defendant and owner Geldziler, should have had in his hands at the time of the serving and filing of plaintiff's stop notice, the sum of fifteen percent of $53,107, the amount found by the court as the total of the contract plus extras."

This point is obviously mis-stated in the appellant's brief for the reason that the Court did not so find, and in the second place, if it had so found, it would have been wholly for the benefit of the appellant. This appellee assumes that the appellant intended to say that the court erred because it did not so find, and if that is so, the answer is fully and adequately made by this appellee hereinabove.

ANSWER TO POINT XI.

"The trial court erred in finding as a conclusion of law that the defendant and owner's liability under the contract matured before the date of the serving and filing of the plaintiff's stop notice, although it found as a fact that the moneys due it for materials furnished accrued prior thereto, the last item of which accrued on February 18, 1921."

This point has been adequately answered by this appellee hereinabove.

ANSWER TO POINT XII.

"The trial court erred in finding as a conclusion of law that the owner may make payment of money under the contract in his hands after stop notice has been served upon him where the contractor has abandoned the contract."

There seems to be no doubt about the trial court being right in its conclusion in this regard.

It is a well settled law in this State that the owner can complete his building and charge up the cost of the completion against the contract moneys in his hands.

"By the construction given by the court of appeals in Slingerland v. Binns, 56 N. J. Eq. 413, 39 Atl. 712, and Association v. Williams (June term, 1899; not yet officially reported), 43 Atl. 669, the fifth section

of the supplement of 1895 (2 Gen. St. p. 2074) was declared to give to the workmen and materialmen ***(subject to the expense of completing the contract work)*** an inchoate lien, ab initio, upon the liability of the owner to the contractor, which lien becomes perfect only on service of the statutory notice, based on demand and refusal of payment before that liability matures, and expires on such maturity if no notice has been given."

Flaherty v. Atlantic Lumber Co., 58 N. J. Equity 467.

The law is clear that prior stop notices served upon the owner and uncontested can be paid by by the owner out of the same fund before payment is made to a noticing claimant.

"As, before the supplement, an owner was liable in the order of service of notice, such is still the order of liability."

Bayonne Building Asso. v. Williams et al., 59 N. J. Equity, 617.

"On appeal, Association v. Williams was reversed (June Term, 1899; 43 Atl. 669), and the declaration in that case, and in Leary v. Lamont, that the stop notices should be paid pro rata, and not in full, according to order of service, was overruled. The court of appeals declared that, under the supplement of 1895, statutory stop notices still ***entitled the noticing party to be paid in full in the order in which the notices were presented to the owner,*** as

heretofore they had, and that the inchoate lien created by the operation of that supplement could be perfected only by serving the notice required by the provisions of the mechanic's lien act, * * *"

Donnelly v. Johnes et al., 58 N. J. Eq. 442.

"The rights of those who served stop orders are superior to the claim of the Barnes Company, ***and they must be paid in the order of priority in which they were served,*** and not pro rata."

Smith et al. v. Dodge & Bliss Co., et al., 59 N. J. Eq. 585.

ANSWER TO POINT XIII.

"The trial court erred in admitting the testimony of Louise M. Becker as to the contents of a book kept by her concerning the payments and allowances to the contractor other than expressed by the architect's certificate, over the objection of the counsel for the plaintiff; the trial court erred in allowing page five, sheet five of book of Louise M. Becker to be allowed in evidence over objection of the counsel for the plaintiff, said sheet being marked defendant's exhibit D-5; the trial court erred in refusing to strike out the record of the book kept by Miss Becker on motion made by counsel for the plaintiff."

A close perusal of the contract will disclose that the details of the construction of this build-

ing were in the hands of the architect, who calculated the amount of the work completed, materials furnished and actually installed in the building, who issued the certificates which were final, binding and conclusive between owner, contractor and all parties concerned, who calculated the value of extra work performed about the building, unless a fixed price was set therefor and who also calculated the allowance due to the owner for omissions from the contract or changes made in regard thereto.

There is nothing in the testimony to impeach either the ability or the honesty of the architect, nor his superintendent, nor his bookkeeper, whose books of account are now brought in question by the appellant.

Miss Becker, the bookkeeper, testified that she made out the certificates under the direction of the superintendent; that she made the entries in her books from information given to her either by the superintendent or the architect; that the entries were correctly made and the books correctly kept by her from such information. (State of Case. p. 150, l. 14 to end of Miss Becker's testimony, p. 158, l. 22.)

The superintendent testified that the certificates were made out under his supervision; that he signed the certificates issued.on this particular job; that he gave the information to Miss Becker, the bookkeeper, for her entries. (State of Case, p. 159, l. 7 to l. 36; p. 162, l. 4 to l. 34; p. 166, l. 4 to l. 10.)

The architect testified substantially to the same effect and testified that he considered the books to be correct. (State of Case, p. 177, l. 16 to p. 178, l. 4.)

The book, as is shown above, was an account book kept by the bookkeeper under the supervision of the architect from data furnished by his superintendent. All of the above parties identified sheet five of the book of the architect and testified to the accuracy of the entries therein, and therefore this appellee contends that sheet five is proper evidence and is equally as binding upon the appellant as an accurate account of certificates issued by the architect and of allowances to which the appellee is entitled under the contract, as it would be against the contractor. The effect of the evidence contained in the book in question is to show the balance ($2,015.26) due to the contractor after the issuance of the certificates and allowances set off by the architect.

The authority cited by appellant in support of his contention is not in point. In that case, the pass book was not the best evidence because the account books of the bank were accessible and subject to be subpoened for positive evidence. In the case at bar, this appellee submits that sheet five from the book of the architect under the contract, a disinterested party, is the best and only evidence available and under the elementary rules of evidence is admissible, where properly proven and identified.

> "Book Entries—In General.
>
> The mere fact that unofficial statements of third persons, or of a party in his own favor, are in the form of written entries will not render them admissible unless a foundation is laid for their admission under some recognized rule of law. As, however, such entries are frequently made at a time when there is no motive to misrepresent or to make false

entries, and under such circumstances as to be of a reliable character, and as they frequently form the only available evidence of the facts stated, the rule is subject to modification under which such entries are admitted in many cases."

Corpus Juris No. 22, p. 861, Par. 1033.

ANSWER TO POINT XIV.

"The trial court erred in allowing the defendant and owner, Geldziler, to testify to the receipt of and payment under previous stop notices, although not specifically pleaded by the defendant, Geldziler, over the objection of counsel for the plaintiff, Post."

As has been argued above, the recourse of the appellant is against a fund, which fund may be depleted by payments made under the provisions of the contract, or made under the provisions of the Mechanics' Lien Act.

At the time the appellant brought this suit whatever fund there had been ($2015.26) had not only been exhausted by payments on account of two prior stop notices but there still remained to be paid thereon $3689.00 before the appellant could hope to participate in the fund (see statement of facts above). This appellee had the authority of the law to make payments to the prior noticing claimants.

The Mechanics' Lien Act provides:

"Such owner or owners, on being satisfied of the correctness of said demand, (stop notice) shall pay the same, and the receipt

of such journeyman, laborer, materialman or sub-contractor for the same shall entitle such owner or owners to an allowance therefor in the settlement of accounts between him and such master workman or contractor, or his representatives or assigns, as so much paid on account."

P. L. 1917, p. 822.

The two prior noticing creditors had brought suit on their notices and this appellee had notified the appellant of each suit (Exhibit D-15, State of Case, p. 266 and Exhibit D-14, State of Case, p. 265). The appellant has no complaint to make because of lack of notice of the existence of these stop notices and he can certainly have no complaint as to the legal effect thereof upon his own stop notice served subsequently.

The question arising on this point, however, is that the previous stop notices should have been pleaded, in order to appraise the appellant of the status of the fund from which he seeks to recover. This appellee can find nothing in the law that puts the burden of proving the existence of this fund upon him. It is the duty or obligation of the appellant to show that there is a fund from which he can recover. In other words, a part of the appellant's case is to show, not only that he is entitled to recover the amount claimed, but that there is a fund out of which that recovery can be made.

"The privilege of preferential payment out of the contract price fund is purely statutory."

Donnelly v. Johnes et al. 58 N. J. Eq. 442.

"It must be borne in mind, however, that the statutory remedy must be ***strictly*** pursued."

Supt. v. Heath, 2 McCart, 26; 15 N. J. Eq. 26.

"The claimant must be able to show: *** 11. That there are moneys in the owner's hands due to the primary contractor under the contract."

Luce Mechanics' Lien Law (1928), Part II, pp. 151, 152 and cases cited above.

"The right of the material man to recover from the owner after the service of the stop notice depends, as will be seen from the words of the statute, upon whether he has in his hands, at the time of such service or afterwards, money owing by him to the contractor for labor or material used in the erection of the building. * * * ***By the service of their stop notice the plaintiffs took the place of the contractor to the extent of their claim. They acquired no higher or other rights to the fund in question than the latter had.*** 'The test is,' as was said by this court in Reeve v. Elmendorf, 38 N. J. Law, 130, 'whether a suit will lie by the contractor against the owner. If it will not, the owner is not liable to a suit by the materialman'."

Blauvelt et al., v. Fuller et al., 66 N. J. Law 46.

The appellant having failed to make out a case against this appellee by showing that there was a fund in existence from which he was entitled to receive his money, this appellee's motion for a nonsuit (State of Case, p. 127) should have prevailed.

ADDITIONAL POINT OF THIS APPELLEE

Upon the execution of the contract, the contractors, with John J. Ritchie, Sr., and the appellant as sureties, entered into a bond or obligation (Exhibit D-16, State of Case, pp. 267-270) in the penal sum of $49,031.00, with the following condition therein written:

> "Now, if the said John J. Ritchie, Sr., John J. Ritchie, Jr., partners trading and doing business under the firm name and style of John J. Ritchie & Sons, shall well and faithfully do and perform the things agreed by them to be done and performed according to the terms of said contract within the time therein specified, to wit; on or before the first day of August, A.D. 1920, and shall pay all lawful claims of sub-contractors, material men and laborers, for labor performed and materials furnished in the carrying forward, performing or completing of said contract, and shall indemnify and save harmless the said Samuel Geldziler from any and all suits, claims, demands, damages and costs in the premises, then this obligation shall be void, otherwise the same shall remain in full force and effect, it being expressly understood and agreed that the liability of the surety for any

and all claims hereunder shall in no event exceed the penal amount of this obligation as herein stated."

Exhibit D-16, State of Case, pp. 267-268.

This bond has been set up in the answer of this appellee as an affirmative defense in bar, on the theory that, even if the appellant could recover against this appellee, he having paid out all of the money under the contract, the building not being completed and many stop notices having been served upon him, the appellant by virtue of said bond or obligation would be in turn liable to this appellee for any amount so recovered. The whole liability under the bond not having yet accrued and the damages not having yet been liquidated, this appellee could not plead the bond as a set off or counterclaim, but only as an affirmative plea in bar.

"An affirmative defense, impliedly admitting the facts alleged in the complaint, sets up new facts which will avoid the legal effect of the plaintiff's allegations. The defendant undertakes to raise a new issue which does not flow out of the complaint. To constitute an effective defense, the facts presented by the defendant must present a protanto bar to the plaintiff's cause of action. 36. What will constitute a defense in a particular cause of action is a question of substantive law."

Note 36. "Delabello v. Central R. R. Co. of N. J., 124 A. 59; Lord v. Brookfield, 37 N. J. L. 552."

Pleadings and Practice in New Jersey by Harris, page 357, par. 358.

If it had been found that this appellee was indebted to the appellant in this suit, such indebtedness would have been nullified by the provisions of the bond and no judgment could be rendered in favor of the appellant against this appellee.

The trial Court passing upon the validity of the bond, which was disputed by the appellant in the suit, said:

> "Neither the Ritchies nor Mr. Post satisfied me, by their testimony, as to their recollection of the circumstances of the execution of the bond, that the same was not executed in Mr. Murner's presence, at the time, place and under the circumstances so clearly and unequivocably testified to by him."

(Opinion of Court, p. 278, ls. 28-34)

but it does not apply the liability of the appellant under the bond in this case for the reason, as this appellee presumes, that having found that there was no fund out of which the appellant could be paid there was no necessity to pass upon the effect of the execution of the bond by the appellant.

This appellee therefore respectfully submits that the said judgment so far as it affects him should be affirmed with costs.

Respectfully submitted,

FREDERICK W. VAN BLARCOM,
Of Counsel with the Appellee,
Samuel Geldziler.

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New Jersey Court of Errors and Appeals

Henry M. Post, Plaintiff-Appellant, vs. Samuel Geldziler, et al., Defendant-Appellee.	Action at Law

Brief of Plaintiff-Appellant

STATEMENT OF FACTS

This is an action by Henry M. Post as a material man against Samuel Geldziler, owner, and John J. Ritchie and John J. Ritchie, Jr., as contractors for the price of materials furnished by the Plaintiff to the Contractors for the erection and construction of a theater building on Clay Street, in the City of Paterson, Passaic County, New Jersey owned by the defendant Samuel Geldziler. The contract is marked in evidence (P-1) and was filed in accordance with the Mechanics' Lien Act in the office of the County Clerk of Passaic.

The Plaintiff served a stop notice on the owner defendant Samuel Geldziler on March 2, 1921 and this action is predicated upon the Fifth Section of the Mechanics' Lien Act on the theory that the defendant owner paid the defendant contractor in advance of the terms of the contract and in anticipation of architect's certificates (see admission of Court Page 106, Line 30, Page 107 Lines 8 to 18, State of the Case). These facts are also admitted by defendant appellee's counsel, (see Page 107, Lines 2 and 3, State of Case).

The Plaintiff appellant contends that the due date of the contract was extended to such time as the builder or contractor was able to complete the same by and with the consent of the owner defendant Samuel Geldziler (see the undisputed testimony of John J. Ritchie, Jr., Page 135, Line 20 as well as testimony of John J. Ritchie, Jr., Pages 133-134-135), and this conclusion is presumably reached by the Court when it found that there was a substantial compliance with the terms of the contract at the time the work was abandoned, (see Page 280 Lines 1-2-3). The Court found that the work stopped or was abandoned prior to March 2, 1921 but presumably subsequent to the issuing of the architect certificate No. 40, Feb. 1, 1921 (see Page 272, Lines 6-7, and Page 273, Lines 1 to 12).

The Trial Court also found as a fact that the Architect issued Architect certificate No. 41 on June 28, 1921, which was subsequent to the filing of Plaintiff appellant's stop notice, (see Lines 9-10-11, Opinion of Court, Page 273, State of Case).

The Court also found that the some twenty architect certificates introduced in evidence signed by either one or the other of the defendants Ritchie, (Line 28-29-30, Page 273, State of Case), raising the presumption thereby that the certificates set forth in exhibit D-5 (Page 254-255, State of Case), made out to Kouzelman Brothers, Paterson Bridge Company, J. Mairheimer, E. Marble M. Co., Power Const. Co., J. T. Riker, etc., were not included within the 20 certificates offered in evidence and referred to in the said Trial Court's opinion.

The said action was tried before the Passaic Circuit Court without a jury by an agreement of counsel with the consent of said Trial Court, (see Page 36, State of Case, Line 20).

POINT I.

THE TRIAL COURT ERRED IN THAT ITS DECISION WAS CONTRARY TO THE EVIDENCE ADDUCED AT THE TRIAL.

First: The admission of the Court and defendant appellee's counsel (Page 106 and 107) is as follows:

> The Court—Or, is he trying to show that Mr. Post is not entitled to it? What has Mr. Post to do, in this case, with the amount of moneys that have been paid by Mr. Geldziler to Mr. Ritchie?
>
> Mr. Totten—This case is predicated upon the thought and the idea that Mr. Geldziler has paid money to the general contractor without architects' certificates, and if we are able to show that, sir, under the decisions in this state, we are entitled to recover.
>
> The Court—I guess there is no dispute about that. There is no dispute that he was paid. The testimony up to this point is that they were paid in advance of architects' certificates.
>
> Mr. Totten—That is all the purpose that this has sir; that is all.
>
> The Court—Is there any doubt about that?
>
> Mr. Van Blarcom—I do not think there

is any doubt about that.

The Court—Then there is no purpose in that at all.

Mr. Totten—That was my whole purpose.

The Court—I do not understand that there is any dispute about that, that Mr. Ritchie is correct; that when he wanted money he went to Mr. Geldziler and got it, anticipating the architects' certificates whether that is either true or false. Now, if the only purpose of putting this in is to corroborate that, to show that that was true, I do not see that you have any difficulty with it. As to the legal effect of the payments in that manner, that is another story.

Secondly—That in accordance with Exhibit D-5 (page 254, 255, 256, 257, State of Case) introduced in evidence by Defendant-appellee and by which he is bound; that payments were made on Architect's certfiicates to others than the contractor in violation of the contract (see Lines 20 to 35, Page 9, Lines 1-24, Page 10, State of Case, which provides that the payment of the contract price $49,031 shall be made to the contractor) to wit, October 9, 1920, Certificate No. 11 Kouzelman Brothers, $800; November 16, 1920, Certificate No. 12, Kouzelman Brothers, $500; November 16, 1920, Certificate No. 13, Power Const. Co., $100; November 16, 1920, Certificate No. 14, J. T. Riker, $100; November 23, 1920, Certificate No. 15, Paterson Bridge Company, $2,000; November 23, 1920, Certificate No. 16, J. Mairheimer, $350; December 3, 1920, Certificate No. 17, Ham. Lumber Co., $2,000; December 3,

1920, Certificate No. 18, M. Lynch, $290.45; December 20, 1920, Certificate No. 25, Kouzelman Bros., $1,000; December 22, 1920, Extra to J. T. Riker, $76; January 10, 1921, Certificate No. 31, B. Pellman, $300; January 13, 1921, Certificate No. 32, Power Const. Co., $600; January 15, 1921, Certificate No. 34, Ramsey, $259.20; January 15, 1921, Certificate No. 35, B. Pellman, $200; January 18, 1921, Certificate 36, E. Marble M. Co., $500; January 21, 1921, Certificate No. 37, Ramsey, $25; January 28, 1921, Certificate No. 41, J. Westerveld, $32.25.

The Court in its opinion at Page 277 of the State of the Case, lines 2 to 5 finds as follows:

> "From the proofs in this case, it seems clear that the amount shown on the certificates were the correct amounts due the contractors. Therefore, at the time of the service of the notice, there was due the contractors the sum of $2,015.00."

Third: The Court found the evidence to be:

> "There has been no completion of the work accorcding to the testimony of the witnesses for the plaintiff nor has there been any final certificate issued by the architect." (Lines 35 to 39, Page 274, State of the Case).
>
> "On March 2, 1921, the work under the contract had not yet been completed. In fact, the contractors had abandoned it. No work was being done; no materials were being furnished. ***The contract price had been paid and a substantial amount also paid on account of extras.***" (Page 276, State of Case, Lines 12 to 17).

"Those last certificates were not actually final certificates."

This last finding of the Court in its Opinion should be read in conjunction with Article IX of the Contract as set forth on Pages 9 and 10 of the State of the Case, and particularly lines 2 and 3 of Page 10, as follows:

"* * * and no work to be considered finally accepted until the issuance of the final certificate."

From the extracts of the evidence herein given in conjunction with the findings of the Court it seems clear that the Court erred in finding no cause of action against this defendant and owner Samuel Geldziler.

POINT II.

THE TRIAL COURT ERRED IN THAT ITS DECISION WAS CONTRARY TO THE LAW OF THIS STATE.

The Revised Mechanic's Lien Law of this State, Section 5 (P. L. 1898 page 539) provides as follows:

"5. ***Payments to contractor to defeat lien claims.*** If the owner or owners of any building or other property which, by this act, is made the subject of liens for or toward the construction, altering, repair or improvement of which labor or services have been performed or materials furnished by contract, duly filed, shall, for the purpose of avoiding the provisions of this act, or in ad-

vance of the terms of such contract, pay any money or other valuable thing on such contract and the amount still due to the contractor, after such payment has been made, shall be insufficient to satisfy the notices served in conformity with the provisions of this act, such owner or owners shall be liable in the same manner as if no such payment had been made. (P. L. 1898, p. 539.)"

The contract filed by the defendant for the doing of the work being exhibit P-2 printed as a part of the Complaint on Page 5 of the State of the Case, Article Nine sets out the method of payment as follows:

"It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Contractor for said work and materials shall be Forty-nine thousand and thirty-one ($49,031.00) Dollars it being understood that this price includes all work mentioned in Specification and Addenda Items 1 to 29 inclusive subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the Owner to the Contractor in current funds, and only upon certificates of the Architect, as follows:

Payments to be made for more than eighty-five (85%) per cent of the work completed, materials furnished and actually installed in the building. The eighty-five (85%) per cent valuation and the certificate of the Architect, in all cases, to be final, binding and conclusive between Owner, Con-

tractor and all parties concerned, and no work to be considered finally accepted until the issuance of the final certificate.

The final payment shall be made within thirty days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued."

The Trial Court found as a fact that the Plaintiff on March 2, 1921 served a written notice on the owner defendant Geldziler, stating that materials had been furnished to the contractor for said building and payment refused, (see Opinion of Trial Court page 272 of State of Case, Lines 5 to 15).

This Stop-notice is plaintiff's exhibit P-1 and was offered in evidence on page 50 of State of Case and printed as a part of the Complaint on page 18.

The Trial Court found as a fact that, "On March 2, 1921 the work under the contract had not been completed. In fact the contractors had abandoned it. No work was being done; no materials were being furnished. The contract price had been paid and a substantial amount also paid on account of extras." (Page 276 of the Opinion, Lines 12 to 17).

Since the contract Article Nine as set forth above provides, "The final payment shall be made within thirty days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued;" the owner paid in advance of the terms of the contract in that the owner had paid the full contract price before the contract was completed.

The Trial Court found as a matter of law, "Where the work is abandoned the owner cannot withhold payment indefinately, especially where as this case achitect's certificates were issued and receipted for by the contractor." Bottom of page 280, top of page 281, State of Case.)

This rule of law the Plaintiff contends is contrary to the law of this State.

The leading case in this State on the rights of a material man under a stop notice to look to the owner is Slingerland vs. Binns, 56 N. J. Equity 415. In this case Mr. Justice Dixon in speaking for the majority of the Court of Errors and Appeals relative to the Fifth Section of the Mechanics' Lien Act says:

> "But plainly this section of the law changes the situation. ***It expressly forbids the owner to pay any money in advance of the terms of the contract,*** if the effect may be that the amount unpaid will prove insufficient to satisfy notices served in conformity with the statute. ***The prohibition is not cinfined to payments made to the contractor personally;*** it embraces payments made to anyone. ***In substance it directs that the owner shall not in any way discharge his liability to pay under the contract, until, according to the terms of the contract, the time to do so has arrived in order that until that time such liability may be preserved for the benefit of workmen and material men who serve the statutory notice.*** This enactment, we think, affords a reason-

ably clear indication of a legislative purpose to give to persons entitled to serve the statutory notice an inchoate lien upon the liability of the owner under the contract, until that liability matures, according to terms of the contract, such lien to become perfect on service of the notice before the liability matures, but to expire on such maturity if no notice has been given; for a notice served after maturity derived no aid from this provision. Of course, this inchoate lien does not impair the owner's right to protect himself against the consequences of any default upon the part of the contractor, but it does prevent the contractor from making any disposition of his rights, detrimental to the claims of those serving notice according to the act.

In the case of Smit vs. Dodge & Bliss Co., 59 N. J. Equity 584 Mr. Justice Van Syckel speaking for the majority of the Court of Errors and Appeals relative to the Fifth Section of the Mechanics' Lien Act, after referring to the case of Slingerland vs. Binns, supra, at page 585 says:

> "It expressly forbids the owner to pay any money in advance of the terms of the contract, if the effect may be that the amount unpaid will prove insufficient to satisfy notices served in conformity with the statute. In substance it directs his liability to pay under the contract until, ***according to the terms of the time to do so has arrived,*** in order that until that time such liability may be preserved for the bene-

fit of workmen and materialmen who serve the statutory notice. This enactment, we think, affords a reasonably clear indication of a legislative purpose to give to persons entitled to serve the statutory notice an inchoate lien upon the liability of the owner under the contract, until that liability matures ***according to the terms of the contract,*** such lien to become perfect on service of the notice before the liability matures, but to expire on such maturity if no notice has been given; for a notice served after maturity derives no aid from this provision."

At page 586 the Court states further:

"It is a vested right under the statute, and as such is secure as against the act of the owner. The Statute is an assurance to materialmen and workmen that they may rely upon the terms of the contract as filed, and that there shall be no advance payment, and no secret arrangement between the contractor and owner not authorized by the terms of the contract, by which any payment of money required thereby shall be withdrawn from the operation of a stop order before such payment matures."

At Page 588,

"The inchoate lien is not a lien on the building, but on the contract price remaining in the hands of the owner, and which the law holds there according to the terms of the contract."

In the case of Kreutz vs. Cramer, 64 Equity, 648. At Page 652 Vice-Chancellor Grey carefully goes into legislative intent as to the Mechanics' Lien Act and particularly Section Five of the Act as follows:

> "The legislative purpose in all the legislation on this subject is not in any way in doubt. The title of the original Mechanics' Lien statute defines it with precision. It is declared to be "An act to secure to mechanics and others payment for their labor and materials in erecting any building." All amendments or supplements to the original act should be construed with relation to this declared object of the original statute, and provisions which modify the act ought not to be held to take away the security which the legislation gives to workmen and furnishers of materials, unless that purpose is clearly within the legislative expression."

Bottom of Page 652:

> "In the conduct of the business, workmen and materialmen supplied work or materials to a building, relying upon their right to serve stop notices and thus have the contract price retained to secure the money due them. They were notified by the filed contract that the contract price would come to be due at certain periods in named installments. Naturally, they supposed a notice served before an installment came to be due would retain that installment.

But it came about that the contractor would give orders against the installments before they were due, and the owner would accept these and pay out the installments before the period when, by the contract, they would have come to be due.

Top of Page 653,

> "The result was a stop notice served on the owner failed to affect the part of the contract price which the owner had previously paid to the contractor before it was due or which the contractor might have assigned before the stop notice was served upon the owner.

The Trial Court in his opinion at the top of Page 281 states as follows: (State of Case)

> "Those last certificates were not actually final certificates, but inasmuch as the contractor was through with the work when they were issued, they were in effect final certificates. In any event the contract makes issuance of the architect's certificates the test of the amount due, and provides that the same shall be 'final, binding and conclusive between owner, contractor and all parties concerned.'"

In the case of Taylor vs. Reed, 68 N. J. Law, 178, the facts were that on September 28, 1898 the architect delivered a certificate that Krause Brothers had completed their work in accordance with the plans and specifications and were "entitled to the final payment of $1,500 as per contract, re-

serving, however, the sum of $500 to be retained for one month." Upon the strength of that certificate Reed paid to Krause Brothers $1,000 on September 28, 1898. The building was not, in fact, finished until October 17, 1898, on which day the architect delivered to Krause Brothers a certificate that they were entitled to the final payment of $500, as per contract.

Mr. Justice Pitney at the bottom of Page 180 speaking for the Supreme Court relative to the question states as follows:

> "As the contract called for the final payment to be made upon the completion of the building, it seems to result that laborers and materialmen are entitled to take it for granted that the final payment will not be made until the building is completed, notwithstanding an architect may prematurely certify it to be completed."

This decision seems to counsel to be very pertinent to the case at bar as the Trial Court in his decision made the deciding factor the architect's certificates rather than the terms of the contract on file. In this we say he was in error and cite the above case to sustain our contention.

In the case of Daley vs. Somers Lumber Company 70, N. J. Equity, 343 the same question was raised as in the present case. The facts in the Daley case were as follows: Daley was the owner of a lot of land in the City of Atlantic City and he contracted with Frank Muth to furnish the

labor and material for the erection and construction of a building described in a written contract and specifications. The contract contained a clause which provided that the owner was to make payment to the contractor when the contractor shall furnish a certificate from the architect. The owner paid to the contractor $4500 as the last payment on the work, the job being completed without any architect certificate. Some three months later the architect gave a certificate in an effort to cure the defect as the work was completed and the last payment made but before the architect gave his formal certificate that the work was completed as required to be done under the contract the Somers Lumber Company served a stop notice upon the owner. The owner claimed that as the contract called for the payment upon the completion of the work that accordingly he made payment. The Somers Lumber Company contended however that as the contract provided that no payment shall be made except upon the certificate of the architect that the payment was made in advance of the terms of the contract between the owner and general contractor and that under the rule of law laid down in the case of Slingerland vs. Binns cited above, they had the right to look to this last payment as a security for their work.

Vice Chancellor Gray in his opinion at the bottom of Page 347 and at the top of page 348 holds that the owner is bound by the expressed terms of his contract as follows:

"If the owner was of opinion that the requirement of the architect's certificate might subject him to trouble, he might readily have protected himself by so framing his contract that the last installment of the contract price should be payable when the building should be completed, without the provision for the architect's certificate. He did not do this. By the express terms of the filed contract, the last installment of the contract price $5,384, was to be paid on the architect's certificate. Under Section Five of the statute and the decision of Slingerland vs. Binns, ubi supra, the parties furnishing labor and materials had a right to presume that the last payment would be made only when the architect's certificate had been given, as prescribed by the filed contract."

This case was affirmed by the Court of Errors and Appeals in 71 N. J. Equity, page 307 for the reasons stated above and is the settled law in this State today.

The Court held in the Daley case the owner must stand by his contract, and that any materialman had the right to look to the provisions of this contract to be securety for his payment.

In the case of Somers Lumber Co. vs. Kaufman, 133 Atlantic, Page 200, Mr. Justice Trenchard speaking for the Court of Errors and Appeals cites the Daley Case in 70 N. J. Equity and continues as follows:

"The principle laid down in that case is the same whether by the terms of the filed contract a certificate is to be procured before the final payment, or before the first payment, or before any payment. And so where, as here, a building contract, duly filed in the county clerk's office, provided that all payments should be made upon the certificate of the architect named therein, the owner is liable to a party furnishing labor or materials, who served notice prior to the issuance of any such certificate, to the full amount of his claim, not exceeding the full amount of such advance payments."

From the decisions herein cited it is clearly the law of this State that a materialman has the right to look to the owner for a strict compliance by him of the terms of the contract on file and that the owner shall not in any way discharge his liability to pay under the contract until the terms of the contract call for payment.

If the trial Court should be right in his decision then the inchoate lien of the materialman to look to the terms of the contract for protection would disappear.

It seems clear that this rule of law as laid down by the Trial Court on page 280 wherein he states in his opinion, "But certainly where the work is abandoned the owner cannot withhold payment indefinately," is contrary to the settled law of this State.

POINT III

THE TRIAL COURT ERRED IN THAT IT FAILED TO FIND FOR THE PLAINTIFF AND AGAINST THE DEFENDANT.

The Plaintiff-Appellant as to this point assigns as his reasons the evidence, law and findings of the Court as set forth in Points One and Two.

POINT IV

THE TRIAL COURT ERRED IN THAT IT FOUND A VERDICT OF NO CAUSE OF ACTION AS AGAINST THE OWNER, SAMUEL GELDZILER.

The Plaintiff-Appellant assigns as his reason for this point the evidence, law and findings of the Court as set forth in Points One and Two.

POINT V.

THE TRIAL COURT ERRED IN THAT ALTHOUGH IT FOUND AS A FACT THAT THE CONTRACT FOR BUILDING WAS NOT COMPLETED MARCH 2, 1921, THE TIME OF THE SERVICE AND FILING OF THE PLAINTIFF'S STOP NOTICE UPON THE DEFENDANT AND OWNER, GELDZILER, AND FURTHER THAT WHILE THE CONTRACT PROVIDED "THAT PAYMENTS TO BE MADE FROM TIME TO TIME AS THE WORK PROGRESSES IN AMOUNTS TO BE CERTIFIED TO BY A WRITTEN

CERTIFICATE BY THE ARCHITECT. NO PAYMENT TO BE MADE FOR MORE THAN EIGHTY-FIVE PER CENT OF THE WORK COMPLETED, MATERIALS FURNISHED AND ACTUALLY INSTALLED IN THE BUILDING. THE EIGHTY-FIVE PER CENT VALUATION AND THE CERTIFICATE OF THE ARCHITECT IN NO CASE TO BE FINAL, BINDING AND CONCLUSIVE BETWEEN THE OWNER, CONTRACTOR AND ALL PARTLES CONCERNED, AND NO WORK TO BE CONSIDERED FINALLY ACCEPTED UNTIL THE ISSUANCE OF THE FINAL CERTIFICATE." NEVERTHELESS THE COURT DID FIND AS A CONCLUSION OF LAW, THAT IT WAS NOT NECESSARY FOR THE DEFENDANT AND OWNER, GELDZILER, TO HAVE IN HIS HANDS AT THE DATE ABOVE MENTIONED, FIFTEEN PER CENT OF THE COSTS OF THE CONSTRUCTION OF THE SAID BUILDING FOR THE PURPOSE OF SATISFYING STOP NOTICE CLAIMS ALREADY FILED, INCLUDING THE STOP NOTICE CLAIM OF THE PLAINTIFF.

The architect's certificates were the evidence of the defendant and he is bound thereby, (see Exhibit D-1 pages 249, 250-51-52-53, State of the Case). None of these certificates set forth that fifteen per cent of the total amount of the labor performed and materials supplied were retained. The Court did not find that any such deductions were made in the payments to the contractor John J. Ritchie & Sons, (see Opinion of Court, pages 271 to 280, State of Case). The only other alternative there-

fore, is, that, the fact established is that the moneys paid, to wit: $49,523.38 at the time of the filing of the plaintiff's stop notice, was paid in full for thework, labor and services rendered by the contractor John J. Ritchie & Sons, to that time, and represents the full value of the labor and material thereof, and this being in violation of the contract, the owner is bound under the Fifth Section of the Mechanics' Lien Act as herein cited for such moneys as he has paid to the contractor in violation of the terms, thereof, and as against the rights of stop notices and their inchoate lien on moneys due to the contractor which lien becomes choate upon the filing of the stop notices.

The Trial Court at page 272 of his opinion, lines 19 to 33 cites the case of Reeve vs. Ellendorf, 38 N. J. Law, page 130. Counsel for Appellant respectfully calls the Court's attention to the fact that the above case was decided long prior to the enactment of Section Five of the Mechanics' Lien Act which is the basis of the case at bar. The Reeve case in 38 Law was brought under the Third Section of the original Mechanics' Lien Act. The rule of law laid down in the Reeve case does not apply to the case at bar because of the enactment of the fifth section of the Mechanics' Lien Act. In the case of Slingerland vs. Binns cited under Point Two Mr. Justice Dixon clearly sets out the difference between the right under the Third Section and under the Fifth Section.

POINT VI.

THE TRIAL COURT ERRED IN FINDING THAT THE DEFENDANT AND OWNER, GELDZILER, WAS ONLY OBLIGATED TO HAVE AS THE UNEXPENDED BALANCE DUE THE CONTRACTOR AT THE TIME OF THE SERVING AND FILING OF PLAINTIFF'S STOP NOTICE, THE SUM OF $2,015.26 TO WHICH THE PLAINTIFF COULD LOOK FOR AS A FUND FOR HIS UNPAID BILL.

Plaintiff-Appellant respectfully refers to the reasons and authorities assigned in Points One and Two for the basis of his argument as to this point.

POINT VII.

THE TRIAL COURT ERRED IN FINDING AS A CONCLUSION OF LAW THAT THE CONTRACT HAD BEEN SUBSTANTIALLY COMPLETED AT THE TIME OF THE SERVING AND FILING OF THE PLAINTIFF'S STOP NOTICE AND IN THE SAME DECISION FOUND AS A QUESTION OF FACT THAT "NO WORK TO BE CONSIDERED FINALLY ACCEPTED UNTIL THE ISSUANCE OF THE FINAL CERTIFICATE," AND IN ADDITION THERETO FOUND THE FACT TO BE THAT ARCHITECT'S CERTIFICATE NO. 41 WAS ISSUED JUNE 28, 1921.

This ground of appeal speaks for itself and the Plaintiff-Appellant respectfully refers the Appellet Court to the Opinion of the Trial Court as follows:

"I must conclude from the testimony before me that there was a substantial compliance with the terms of the contract by both parties to it up to the time that the work stopped, which as stated, was before the work was entirely completed." (Page 280, State of Case, lines 1-2-3-4-5).

"Only one payment was made on architect's certificate after the serving of the notice according to the architect's record which was on Certificate No. 41 on June 28, 1921 for $32.73." (State of Case, page 276, lines 221-222-223).

The Plaintiff-Appellant respectfully refers to the decisions cited under Point Two as the basis for this point.

POINT VIII.

THE TRIAL COURT ERRED IN FINDING AS A CONCLUSION OF LAW AS AGAINST THE PLAINTIFF'S RIGHT AND LIEN TO MONEYS IN THE HANDS OF THE DEFENDANT AND OWNER, GELDZILER, THAT THE CONTRACT WAS SUBSTANTIALLY COMPLETED AT THE TIME OF THE PLAINTIFF'S SERVING AND FILING OF THE STOP NOTICE.

The Plaintiff-Appellant contends that as against his rights to moneys that should have been in the hands of the defendant Geldziler there can be no substantial completion of the contract and respectfully calls the Court's attention to the cases cited under Point Two particularly the recent case

of Somers Lumber Company vs. Kaufman 133 Atlantic, page 200 where the Court found "That all payments should be made upon the certificate of the architect named therein and the owner is liable to the party furnishing the labor or materials who served notice prior to the issuance of any such certificate, * * * "

POINT IX.

THE TRIAL COURT ERRED IN FINDING AS A CONCLUSION OF LAW THAT THERE CAN BE A SUBSTANTIAL COMPLETION OF THE CONTRACT AS AGAINST THE PLAINTIFF'S RIGHT AND LIEN TO MONEYS IN THE HANDS OF THE DEFENDANT AND OWNER, OR TO MONEY THAT SHOULD HAVE BEEN IN THE HANDS OF THE DEFENDANT AND OWNER AT THE TIME THAT THE PLAINTIFF SERVED AND FILED HIS STOP NOTICE.

The Plaintiff-Appellant assigns as his reasons under Point Nine the same reasons and authorities cited in Points One, Two and Eight herein.

POINT X.

THE TRIAL COURT ERRED IN NOT FINDING AS A CONCLUSION OF LAW THAT THE DEFENDANT AND OWNER, GELDZILER, SHOULD HAVE HAD IN HIS HANDS AT THE TIME OF THE SERVING AND FILING OF PLAINTIFF'S STOP NOTICE, THE SUM OF FIFTEEN PERCENT OF $53,107, THE AMOUNT FOUND BY THE COURT AS THE TOTAL OF THE CONTRACT PLUS EXTRAS.

The Plaintiff-Appellant assigns the same reasons and authorities to sustain this point as in Points One, Two, Five and Eight and respectfully refers the Appellet Court to the said points for the law and reasons to sustain this point.

The Plaintiff-Appellant maintains that under the Fifth Section of the Mechanics' Lien Act read in conjunction with the clause as to payments in the contract (see State of Case, page 10) he is entitled to have this defendant and owner Geldziler make such payments in strict compliance with the terms thereof. · That this defendant Geldziler should have made payments only to Richie & Sons the contractor on the architect's certificates which should have certified the amount of labor performed and materials furnished and should have deducted fifteen per cent thereof until the final certificate was given and the work completed. This was admittedly not done. The uncontradicted evidence is that the contractor received the money from the owner and sometimes afterwards would sign an architect's certificate at the owner's request. The owner had no right under the contract to pay anyone but the contractor and only on certificate of the architect. The evidence offered by the defendant owner Geldziler (Exhibit D-5, page 251 to 254, State of the Case) shows plainly that long before March 2, 1921, the date of the plaintiff's filing his stop notice the architect issued certificates and the owner paid others than the contractor.

POINT XI.

THE TRIAL COURT ERRED IN FINDING AS A CONCLUSION OF LAW THAT THE DEFENDANT AND OWNER'S LIABILITY UNDER THE CONTRACT MATURED BEFORE THE DATE OF THE SERVING AND FILING OF THE PLAINTIFF'S STOP NOTICE, ALTHOUGH IT FOUND AS A FACT THAT THE MONEYS DUE IT FOR MATERIALS FURNISHED ACCRUED PRIOR THERETO, THE LAST ITEM OF WHICH ACCRUED ON FEBRUARY 18, 1921.

The PlaintiffAppellant holds that the contract cannot mature or be substantially performed as against the plaintiff's lien as established by stop notice inchoately existing prior thereto when he has furnished materials that are unpaid for prior to the date of serving such stop notice and supports his contention by the reasons and authorities advanced under Points 1, 2, 5 and 8.

POINT XII.

THE TRIAL COURT ERRED IN FINDING AS A CONCLUSION OF LAW THAT THE OWNER MAY MAKE PAYMENT OF MONEY UNDER THE CONTRACT IN HIS HANDS AFTER STOP NOTICE HAS BEEN SERVED UPON HIM WHERE THE CONTRACTOR HAS ABANDONED THE CONTRACT.

The Plaintiff-Appellant assigns as his reasons for this Point the authorities cited under Points One, Two, Five, Eight and Ten.

POINT XIII.

THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF LOUISE M. BECKER AS TO THE CONTENTS OF A BOOK KEPT BY HER CONCERNING THE PAYMENTS AND ALLOWANCES TO THE CONTRACTOR OTHER THAN EXPRESSED BY THE ARCHITECT'S CERTIFICATE, OVER THE OBJECTION OF THE COUNSEL FOR THE PLAINTIFF; THE TRIAL COURT ERRED IN ALLOWING PAGE FIVE, SHEET FIVE OF BOOK OF LOUISE M. BECKER TO BE ALLOWED IN EVIDENCE OVER OBJECTION OF THE COUNSEL FOR THE PLAINTIFF, SAID SHEET BEING MARKED DEFENDANT'S EXHIBIT D-5; THE TRIAL COURT ERRED IN REFUSING TO STRIKE OUT THE RECORD OF THE BOOK KEPT BY MISS BECKER ON MOTION MADE BY COUNSEL FOR THE PLAINTIFF.

The plaintiff's attorney at the trial objected to the entry of evidence of the book kept by Louise M. Becker (See page 151, 152, 152 of State of Case). On Page 153 of State of the Case the Court allowed counsel for the plaintiff a continuing objection and on page 154, State of Case, the Court admitted the book and page five, sheet five, over the objection of counsel for the plaintiff below and did grant the plaintiff an objection to such rule.

Counsel for the plaintiff states that the book as offered in evidence, kept by Louise M. Becker, the bookkeeper in the office of the architect Fred W. Wentworth is not binding on this plaintiff and to

him it is a selfserving statement of facts. It purports to show dealings with others than either the owner or the contractor and with whom this plaintiff-appellant had no previty either of contract or under the bond. In sustaining his position Plaintiff-Appellant respectfully refers the Court to the case of Austrian vs. Laubheim, 78 N. J. Law, 178, Mr. Justice Parker at page 178 says:

> "The assignments of error relate exclusively to the inquiry on the trial into the fact of fraud. The first point is that the court excluded as evidence the bank-pass-book of defendant's firm, which was offered to show a deposit at a certain time. This book was clearly incompetent for that purpose."

The Plaintiff-Appellant contends therefore that the admission of the book and page five, sheet five, was clearly contrary to the rule of evidence and materially affected the plaintiff's rights and it was therefore error on the part of the trial Court to admit the same.

POINT XIV.

THE TRIAL COURT ERRED IN ALLOWING THE DEFENDANT AND OWNER, GELDZILER, TO TESTIFY TO THE RECEIPT OF AND PAYMENT UNDER PREVIOUS STOP NOTICES, ALTHOUGH NOT SPECIFICALLY PLEADED BY THE DEFENDANT, GELDZILER, OVER THE OBJECTION OF COUNSEL FOR THE PLAINTIFF, POST.

Plaintiff-Appellant refers the Court to the discussion had between counsel for Plaintiff-Appellant and the Defendant-Appellee Geldziler and the Trial Court as to the right of the defendant to offer affirmative testimony of payments made prior to the stop notice of the Plaintiff-Appellant when the pleadings of the defendant-appellee did not set up such payment, (see State of Case, pages186-87-88-89, 190-91). The Court allowed the attorney for the Plaintiff-Appellant the exception to the ruling whereby he did accept said testimony on the part of the defendant-appellee, (page 191, lines 1 and 2, State of Case) for reasons set up by the attorney of Plaintiff-Appellant in said discussion.

The Plaintiff-Appellant contends that a plea of payment is a plea of confession and avoidance and should be specially pleaded and unless so specially pleaded evidence of such payment to such prior stop notice should not be admitted.

The Supreme Court recognizes this and under Rule 58 relative to pleading payments sets forth the following:

> "The answer must specially deny such allegations of fact in the complaint as defendant intends to controvert, unless he intends in good faith to controvert all the allegations; in that case he may deny them generally. It must specially state any defense which is consistent with the truth of the material allegations of the complaint, and any defense which, if not stated, would be likely to cause surprise, or would raise is-

sues not arising out of the complaint. For instance, the statute of frauds, or of limitatations, release, ***payment,*** performance, or facts showing fraud, illegality, or contributory negligence."

Plaintiff-Appellant therefore contends that the Trial Court erred in allowing the defendant owner Geldziler to prove payment to prior stop-notices.

Respectfully submitted,
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FREDERICK V. WATSON,
Of Counsel.