

INDEX.

	PAGE.
Appeal, Notice of.....	1
Appeal, Grounds of.....	13-14
Answer	8-10
Charge	79-80
Complaint	3-6
Judgment	12
Motion for Direction of Verdict.....	77
Motion for Non-Suit.....	61
Reply	11
Service	7
Summons	2

PLAINTIFF'S WITNESSES.

Kilgor, James A.

direct examination	16-27, 59
cross "	28-34, 60, 61
re-direct "	34-38

Young, John

direct examination	38-43
cross "	43-52
re-direct "	52-54
re-cross "	54-59

DEFENDANTS' WITNESSES.

Bishop, Clifford H.

direct examination	77-79
--------------------------	-------

McCance, William

direct examination	64-70
cross "	70-76

Senior, Wiliam H.	PAGE.
direct examination	62-64

EXHIBITS.

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 8, 9, 10..	80
Plaintiff's Exhibit No. 6.....	81-82
Plaintiff's Exhibit No. 7.....	83
Plaintiff's Exhibit No. 11.....	83-84
Plaintiff's Exhibit No. 12.....	84-85
Plaintiff's Exhibit No. 13.....	86-87
Defendants' Exhibit No. 1.....	87-88
Defendants' Exhibit No. 2.....	89
Defendants' Exhibit No. 3.....	90
Defendants' Exhibit No. 4.....	80

Notice of Appeal

Filed May 15, 1917.

Essex County Circuit Court

JOHN YOUNG,

Plaintiff,

vs.

THE SOCIETY OF THE FIRST CON-
GREGATIONAL CHURCH OF VER-
ONA, N. J.,

Defendant.

*Action at
Law.*

*Notice of
Appeal.*

10

To William Hauser, Attorney of Plaintiff.

TAKE NOTICE, that the defendant appeals to the
Court of Errors and Appeals from the whole of a
judgment entered in this cause, dated March 16th,
1916.

JONES & GLEESON,

Attorneys of Appellant.

30

40

Summons

Filed August 12, 1916.

ESSEX COUNTY CIRCUIT COURT.

JOHN YOUNG,

*Plaintiff,**against*

10 THE SOCIETY OF THE FIRST
 CONGREGATIONAL CHURCH OF
 VERONA, NEW JERSEY, AND
 WILLIAM McCANCE, PAUL A.
 MUNGER, CHARLES A. TUERS,
 HUGH LYNN AND EDWARD
 WOLFF, AS THE BUILDING COM-
 MITTEE OF THE SAID FIRST CON-
 GREGATIONAL CHURCH OF VER-
 ONA, NEW JERSEY,

20

Defendants.

STATE OF NEW JERSEY:

To the above-named defendants.

YOU ARE SUMMONED to answer the
 annexed complaint of John Young, in
 (L. S.) an action at law in the Essex County
 Circuit Court, and take notice that
 unless you filed your answer to said
 30 complaint with the clerk of the Essex County Cir-
 cuit Court, at Newark, within twenty days after
 service upon you of this writ and the annexed com-
 plaint, the plaintiff may proceed in the suit and
 judgment may be entered against you.

Witness: Frederic Adams, Judge of the Essex
 County Circuit Court, at Newark, the 8th day of
 August, 1916.

JOSEPH McDONOUGH,

Clerk.

40 WILLIAM HAUSER,

Plaintiff's Attorney.

Complaint

Filed August 12, 1916.

ESSEX COUNTY CIRCUIT COURT.

JOHN YOUNG,

Plaintiff,

against

THE SOCIETY OF THE FIRST
CONGREGATIONAL CHURCH OF
VERONA, NEW JERSEY, AND
WILLIAM McCANCE, PAUL A.
MUNGER, CHARLES A. TUERS,
HUGH LYNN AND EDWARD
WOLFF, AS THE BUILDING COM-
MITTEE OF THE SAID FIRST CON-
GREGATIONAL CHURCH OF VER-
ONA, NEW JERSEY,

Defendants.

10

20

The plaintiff above named, residing at Bloomfield, New Jersey, says that:

1. At all the times hereinafter stated, the defendant, The Society of the First Congregational Church of Verona, New Jersey, was and still is the owner of certain land and buildings situate on the easterly side of Claremont Place, about two hundred (200) feet north of Bloomfield avenue, in the Borough of Verona, County of Essex and State of New Jersey.

30

II. On December 26, 1914, the defendants McCance, Munger, Tuers and Lynn, constituting a majority of the Building Committee of The First Congregational Church of Verona, New Jersey, for the Society of the First Congregational Church of Verona, New Jersey, hereinafter referred to as the Contractors, executed a contract in writing with

40

Complaint.

this plaintiff, for the alteration of, and an addition to, The First Congregational Church above referred to, in accordance with the terms on the drawings and described in the specifications prepared by architects employed by the defendant contractors.

10 III. That in and by said contract, it was provided that the said Contractor should pay to the plaintiff herein the sum of one thousand and thirty-three (\$1,033) dollars in stipulated instalments as in said contract provided.

IV. That thereafter and on or about the day of 191 , the said contract, together with the specifications therein referred to, were duly filed in the office of the clerk of the County of Essex.

20 V. That thereafter and between the 21st day of January, 1915, and about the 16th day of April, 1915, the plaintiff duly performed the work, and provided the materials specified in, and by him required to be furnished by the said contract, and in all details completed the work called for by the said contract. The defendants have paid, and been credited, with, on account of said contract and work done thereunder, the sum of one thousand and eight (\$1,008) dollars, leaving a balance of twenty-five (\$25) dollars due and owing thereunder.

30 VI. That on April 3, 1915, the defendants McCance, Wolff, Lynn, Tuers and Munger, constituting the Building Committee of The First Congregational Church of Verona, New Jersey, or the Society of The First Congregational Church of Verona, New Jersey, made and executed a contract in writing with this plaintiff, for the erection and completion of the alteration and addition to The First Congregational Church at Verona, New Jersey, in accordance with the terms of said contract
40 and as shown on the drawings and described in the

Complaint.

specifications prepared by the architect of the defendants.

VII. On or about the day of 1915, the said contract, together with the specifications therein referred to, were duly filed in the office of the clerk of the County of Essex.

VIII. That thereafter and between the day of April, 1915, and the 13th day of March, 1916, this plaintiff furnished the materials and performed the work called for by said contract, in the construction and completion of the alteration and addition to the said First Congregational Church, as in and by said contract required. 10

IX. That the agreed price for the furnishing of said materials and the performance of such work, as stated in said contract, was the sum of four thousand, five hundred and fifty-two and 10/100 (\$4,552.10) dollars, to be paid in instalments, pursuant to the terms of said contract, to which reference is hereby made, and which respective contracts will be produced upon the trial of this cause. 20

X. That the plaintiff herein duly performed all the terms and conditions, and supplied all the labor and materials and completed the work specified in said contract.

XI. That the defendants have paid to this plaintiff and been credited with on account of said second contract, the total amount of four thousand three hundred and forty-three and 68/100 (\$4,343.68) dollars, leaving a balance of two hundred and eight and 42/100 (\$208.42) dollars still due and unpaid. 30

XII. That in addition to the specified work called for in said contracts, the plaintiff, at the special instance and request of the said Building Committee of The First Congregational Church of 40

Complaint.

Verona, New Jersey, performed additional and extra work upon said building and furnished certain materials, which said work and materials were reasonably worth and for which the defendants promised and agreed to pay the further sum of one hundred and ninety-seven and $35/100$ (\$197.35) dollars.

10 XIII. That there is now due and owing to the plaintiff the total amount of four hundred and thirty and $77/100$ (\$430.77) dollars, with interest thereon from April 18, 1916, no part of which has been paid, although duly demanded.

XIV. The said debt is a lien upon said building and land by virtue of the provisions of an act entitled, "An Act to secure to mechanics and others, payment for their labor and materials in erecting any building."

20 XV. That prior to the beginning of this action and on or about the 31st day of May, 1916, the plaintiff caused to be filed in the office of the clerk of the County of Essex, a notice of his lien against the above named defendants, to the amount hereinbefore set forth, and thereafter duly notified said respective defendants of the filing of said lien, by serving the said church and the chairman of said building committee with a copy thereof.

30 Plaintiff demands as damages, the sum of four hundred and thirty and $77/100$ (\$430.77) dollars, with interest from April 18, 1916, besides costs.

WILLIAM HAUSER,
Attorney for Plaintiff.

Service.

Service

I hereby appoint and depute Daniel Demarest to serve the within writ.

Witness my hand and seal this ninth day of August, 1916.

RALPH B. SCHMIDT,

(L.S.)

Sheriff.

10

By HARVEY W. KEOUGH,

Under Sheriff.

Served the within summons and complaint August 9, 1916, personally upon Rev. John R. Pratt, Pastor of First Congregational Church of Verona, N. J., at his usual place of abode, 12 Malvern place, Verona, N. J.

Served the within summons and complaint August 9, 1916, personally upon William McCance within named defendant, at his usual place of abode, 110 Claremount avenue, Verona, N. J.

20

RALPH B. SCHMIDT,

Sheriff.

By D. DEMAREST,

Special Deputy.

30

40

Answer

Filed August 28, 1916.

ESSEX COUNTY CIRCUIT COURT.

JOHN YOUNG,

Plaintiff,

vs.

10

THE SOCIETY OF THE FIRST
CONGREGATIONAL CHURCH OF
VERONA, NEW JERSEY, AND
WILLIAM McCANCE, PAUL A.
MUNGER, CHARLES A. TUERS,
HUGH LYNN AND EDWARD
WOLFF, AS THE BUILDING COM-
MITTEE OF THE SAID FIRST CON-
GREGATIONAL CHURCH OF VER-
ONA, NEW JERSEY,

20

Defendants.

Lien Claim.

*Action at
Law.*

Answer.

FIRST DEFENSE.

The defendants above named, residing at Verona, in the County of Essex and State of New Jersey, say:

1. They admit paragraph one of the plaintiff's complaint.
- 30 2. They admit paragraph two.
3. They admit paragraph three.
4. They have not sufficient knowledge of paragraph four and leave plaintiff to his proof.
5. They deny paragraph five.
6. They admit paragraph six.
7. They have no knowledge of paragraph seven and leave plaintiff to his proof.
8. They deny paragraph eight.
9. They admit paragraph nine.
- 40 10. They deny paragraph ten.

Answer.

11. They admit paragraph eleven with the exception of the statement that a balance of two hundred and eight dollars and forty-two (\$208.42) cents is still due and unpaid.

12. They deny paragraph twelve.

13. They deny paragraph thirteen.

14. They deny paragraph fourteen.

15. They deny paragraph fifteen.

10

SECOND DEFENSE.

16. That prior to September 25th, 1915, plaintiff and defendants entered into a written stipulation, a copy of which is hereto attached, by the terms of which the matters in dispute in this cause were submitted to the Board of Arbitration as therein provided. That subsequent to said agreement, the contentions of each of the parties were presented and considered by the Board of Arbitration, and on September 25th, 1915, and subsequently on October 7th, 1915, said Board of Arbitration filed its report, and defendants have at all times been ready and are still ready to abide by the findings of said Board of Arbitration.

20

THIRD DEFENSE.

17. Defendants will contend as a matter of law, that the said debt is not a lien upon the building and land described in the lien claim, because a summons was not issued within four months after the last item of work was done by the plaintiff, and the issuing of the summons was not endorsed upon the lien claim within said four months.

30

JONES & GLEESON,
Attorneys of Defendants.

Agreement between John Young and The Building Committee of the First Congregational Society of Verona, New Jersey.

40

Answer.

We, the undersigned, contractor and members of the Building Committee of the First Congregational Society of Verona, agree to submit to arbitration on the matters regarding the foundation of the First Congregational Church of Verona.

10 The matters in dispute shall be presented to a Board of Arbitration consisting of three members composed as follows: The contractor shall select one member who shall be approved by the Building Committee of the First Congregational Society of Verona, the Building Committee of the First Congregational Society of Verona shall select one member who shall be approved by the contractor, and these two members of the Arbitration Board to select a third member. The decision of any two of this board shall be final and binding on both the contractor and the Building Committee of the First
20 Congregational Society of Verona. The contractor and the Building Committee of the First Congregational Society of Verona each agree to pay one-half of the expense of such referencee.

It is further agreed that the Building Committee of the First Congregational Society of Verona shall employ men to do the required excavating and that the responsibility for the cost of same shall be determined by the above mentioned Arbitration Board.

30 It is further agreed that when the work of excavation, shall be completed to the satisfaction of the architect, the contractor shall at once proceed to the erection of the foundation.

JOHN YOUNG,
Contractor.

*Building Committee of the First Congregational
Church of Verona.*

40 WM. McCANCE, HUGH LYNN,
A. TUERS, PAUL A. MUN-
GER, E. A. WOLFF.

Reply

Filed September 16, 1916.

ESSEX COUNTY CIRCUIT COURT.

JOHN YOUNG,

Plaintiff,

vs.

THE SOCIETY OF THE FIRST
CONGREGATIONAL CHURCH OF
VERONA, NEW JERSEY, AND
WILLIAM McCANCE, *et al,*

Defendants.

Lien Claim. 10

*Action at
Law.*

Reply.

Plaintiff having replication to the second defense set up in the defendant's answer says that:

20

1. He admits that a written stipulation, a copy of which is attached to the defendant's answer was entered into between the parties thereto, but that all the matters in dispute, so far as the same relate, to the contracts made between the plaintiff and the defendants and the work done by plaintiff thereunder, were adjusted and allowed, and that the amount heretofore claimed by the plaintiff of the defendants, remained justly due and owing to him, after the making of such adjustments and allow-
ances aforesaid.

30

Plaintiff demands judgment as heretofore.

WILLIAM HAUSER,

Attorney for Plaintiff.

40

Judgment

ESSEX COUNTY CIRCUIT COURT.

27255

10	<p>JOHN YOUNG, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>THE SOCIETY OF THE FIRST CONGREGATIONAL CHURCH OF VERONA, NEW JERSEY, AND WILLIAM McCANCE, PAUL A. MUNGER, CHARLES A. TUERS, HUGH LYNN, EDWARD WOLFF, BUILDING COMMITTEE, <i>Defendants.</i></p>	<p><i>Action at Law After Verdict.</i></p>
----	--	--

20 Judgment entered March 16th, A. D., 1917.

Damages	\$427.45
Costs	64.83
Total	\$492.28

William Hauser, Attorney of Plaintiff.

30 Judgment after verdict in the above entitled action at law as rendered on the sixteenth day of March, A. D., nineteen hundred and seventeen in favor of the said plaintiff John Young and against the said defendant The Society of the First Congregational Church of Verona, N. J., for the sum of four hundred twenty-seven dollars and forty-five cents damages and the sum of sixty-four dollars and eighty-three cents cost of suit.

Judgment entered and signed March 16th, A. D., 1917.

WM. S. GUMMERE,
Judge.

Grounds of Appeal

New Jersey Court of Errors and Appeals

Filed May, 1917.

<p>JOHN YOUNG, <i>Plaintiff-Appellee,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>THE SOCIETY OF THE FIRST CONGREGATIONAL CHURCH OF VERONA, N. J., <i>Defendant-Appellant.</i></p>	}	<p><i>Grounds of Appeal.</i></p>	10
---	---	----------------------------------	----

To William Hauser, Esq., Attorney for Plaintiff-Appellee:

Sir: Please take notice, that the following are the grounds set forth by the defendant-appellant, as the grounds of appeal in the above entitled cause: 20

1. Because the Circuit Court refused to grant a non-suit at the close of the plaintiff's case, because he should have sued on the award of the arbitration board, rather than the items of his claim.

2. Because the Circuit Court refused defendant's request for a direction of verdict against the defendant for one hundred and ninety-three dollars and forty-two (\$193.42) cents only. 30

3. Because the Circuit Court directed a verdict for plaintiff for four hundred and twenty-seven dollars and forty-five (\$427.45) cents, although it was error, so to do.

4. Because the Circuit Court, over defendant's objection, excluded evidence to show that the matters in dispute were prior to the parties entering into an agreement to arbitrate.

40

Grounds of Appeal.

5. Because the Circuit Court over defendant's objection refused to allow William H. Senior, the umpire, to testify as to what matters were considered by the arbitrators prior to, and in making up their award.

10 6. Because the Circuit Court refused the offer of defendant to show by William H. Senior and the other arbitrators, that the removal of the debris, and the rebonding of the walls was considered by them, and was intended to be included in the language of the award.

7. Because the Circuit Court over defendant's objection refused to allow testimony to show who removed the debris from the cellar after the wall had fallen, and the cost of such removal.

20 8. Because the Circuit Court over defendant's objection, refused defendant's offer to prove by an architect produced, that the falling of the east wall was the fault of the contractor.

Dated May 9th, 1917.

JONES & GLEESON,
*Attorneys for and of Counsel
with Defendant-Appellant.*

30

40

Opening.

ESSEX CIRCUIT COURT.

JOHN YOUNG,

vs.

SOCIETY OF THE FIRST CONGREGATIONAL CHURCH OF VERONA,
et als.

10

Transcript of shorthand notes of testimony, and so forth, taken in the above stated cause, upon the trial thereof, at the Court House, Newark, N. J., March 15, 1917.

Before Hon. Nelson Y. Dungan, Judge, and a Jury.

William Hauser for plaintiff.

Jones & Gleeson for defendants.

Mr. Hauser opened for plaintiff.

20

Mr. Jones opened for defendants.

Mr. Hauser. I offer in evidence, under the admissions in the answer, the contract dated December 26, 1914, between John Young as general contractor, and the building committee of the First Congregational Church of Verona for the Society of the First Congregational Church.

(Said contract marked Ex. P1.)

Mr. Hauser. I also offer in evidence the second contract dated April 3, 1915, between the same parties.

30

(Same marked Ex. P2.)

Mr. Hauser. And the specifications which were prepared by the architects of the defendants.

(Same marked Ex. P3.)

The Court. They accompany which contract?

Mr. Hauser. The second contract, the contract of April 3, 1915.

40

James A. Kilgor, direct.

I also offer a blueprint of the plans of the premises covered by these contracts.

(Same marked Ex. P4.)

Mr. Hauser. I also offer the original lien claim filed in the office of the clerk of the County of Essex on June 2, 1916, covering these contracts and the work done thereunder.

10 (Same marked Ex. P5.)

JAMES A. KILGOR, sworn for the plaintiff.

Direct examination by Mr. Hauser.

Q Mr. Kilgor, what is your business?

A Architect.

Q And where is your place of business?

A 1182 Broadway, New York.

Q Do you know Mr. John Young?

20 A I do.

Q And are you acquainted with the First Congregational Church of Verona, and the building committee of that church?

A I am.

Q I show you Exhibits P1 and P2, and ask you if you know by whom they were prepared?

A They were prepared by myself.

Q And at whose request?

30 A At the request of the First Congregational Church of Verona, New Jersey.

Q And were you employed by them about the time these contracts were prepared?

A Yes, sir.

Q And what connection, if any, did you have with the work that was to be done under those contracts?

A Somewhat in a general way, I had charge of it in a general way.

40 Q You mean you had the general charge of the entire work?

James A. Kilgor, direct.

A I did in some respects; what the church thought they could handle themselves, they did.

Q But with respect to passing upon any work which was done by Mr. Young, Mr. Kilgor, did you have anything to do with that?

A Yes, sir.

Q And, among other things, what were your duties with respect to the issuing of certificates, if any? 10

Mr. Jones. I object; that is set forth by the contract.

Q Mr. Kilgor, by the provisions of these contracts payments were to be made upon your certificates?

A Yes, sir.

Q Did you from time to time issue certificates to Mr. Young for work done by him?

A I did. 20

Q And to whom did you send those certificates?

A Customary to send them to the church.

Q No, it is not a question of custom; to whom did you send them?

A Sent them to the church.

Q Do you know whether those certificates were honored up to the time of the matter in dispute? Whether the payments were made?

A I believe they were honored; that is far as I know; I don't know positively that they were. 30

Q With respect to these plans and specifications, were those also made under your direction?

A They were.

Q And you were familiar with them before they were submitted and acted upon?

A Yes, sir.

Q And they were in existence at the time this later contract of April 3d, was prepared?

A They were.

Q Do you know anything about the condition 40

James A. Kilgor, direct.

of the ground out there at the time Mr. Young took charge of it?

A I do.

Q What was its condition?

A It was a hard clay ground.

Q I didn't mean in that respect, I meant was the ground in its natural condition, or had it been excavated?

10 A The ground was in its natural condition when we started the work.

Q Who was to do the excavating?

A The church.

Q And no provision for that was included in the specification which you prepared for Mr. Young to follow?

A No.

Q Something happened with respect to a wall put up there, did it not?

20 A Yes, sir.

Q Can you fix the time when that took place?

A I don't know that I can tell exactly, I think it was some time in October, I would not be positive.

By the Court.

Q What year?

A 1915.

30 *By Mr. Hauser.*

Q It was earlier than that, wasn't it, Mr. Kilgor?

A Really, I could not say. I have my notes here.

Q Can you refresh your mind by looking at your notes?

A I have—

40 *Mr. Jones.* We agree it was some time in August.

James A. Kilgor, direct.

Q What happened to that wall, Mr. Kilgor?

A It fell in.

Q And as a result of the wall having fallen in do you know what transpired between Mr. Young and the church?

A Why, after it had fallen in they endeavored to come to a conclusion as to who and how it should be built, or rebuilt.

Q Was there a conference held between the parties? 10

A There were.

Q Were you present?

A At some.

Q There was a board of arbitration agreed upon, was there not, between the parties?

A Yes.

Q Respecting fixing the responsibility for the damage? 20

A Yes, sir.

Q And were you present at a meeting of this board on October 9, 1915?

A As I recall—

Q October 5th, I should say.

A I was present on the date of the arbitration meeting, which has been stated October 5th.

Q I show you a duplicate letter of that date and ask you whether that will refresh your mind as to that meeting? 30

Mr. Jones. Objected to.

Mr. Hauser. He may answer that yes or no.

The Court. What is your objection, Mr. Jones?

Mr. Jones. Well, the objection is not proper at this time. He may answer that question.

Q Does that refresh your mind as to the meeting, Mr. Kilgor?

The Court. Unless it is shown to be a proper memorandum he cannot use it. 40

James A. Kilgor, direct.

By Mr. Jones.

Q That is not in your handwriting?

A This is not, it is typewriting; but the notes that were on here was in my handwriting.

The Court. The objection is sustained.

10 *Mr. Hauser.* I ask the defendant to produce the letter under my notice which was sent to the First Congregational Church, dated October 9, 1915.

Mr. Jones. That is the original letter (producing paper.)

Mr. Hauser. I don't think so.

By Mr. Hauser.

Q Mr. Kilgor, do you remember to whom you mailed a letter dated October 9, 1915, respecting—

20 A There was one mailed to the church to Mr. McCance, chairman of the building committee, and one mailed to Mr. John Young, the contractor.

Mr. Hauser. I ask you to produce the letter to Mr. McCance.

Mr. Jones. No such letter was ever received.

Q Mr. Kilgor, is this the letter which you sent to Mr. Young?

A It is.

30 *Mr. Jones.* Before it is offered in evidence I would like to question him about it.

By Mr. Jones.

Q That is the original letter, isn't it?

A It is not.

Q Don't you carbon your letters?

A We do.

Q Did you have a talk with Mr. McCance yesterday?

40 A No, sir.

James A. Kilgor, direct.

Q And in reference to that show him a carbon copy?

A No, sir.

Q You had a talk with him about it yesterday?

A I did not.

By Mr. Hauser.

Q Is that a duplicate of the letter which you say you sent to Mr. McCance? 10

A There was a duplicate made of this one. There were four made, two ribbons and two copies; the two copies I believe I have myself, and the two ribbons went out.

Q And how were they mailed?

A In the usual manner, addressed to the individuals.

Q And in what kind of envelope?

A In the firm envelope.

Q With the return notice on the outside of the envelope? 20

A Yes, sir.

Q And where were they mailed from?

A New York.

Q Do you know what amount of postage was on the envelope?

A I could not say; two cents we usually put on them; I don't recall.

Q Was the letter addressed to Mr. McCance that he had not received a letter of that kind? 30

A Never.

Q And have you ever heard from Mr. McCance that he had not received a letter of that kind?

A I have not.

Q Who mailed the letter?

A The stenographer, I presume.

By Mr. Jones.

Q You did not?

A I did not. 40

James A. Kilgor, direct.

By Mr. Hauser.

Q Was it mailed at the same time this was mailed?

A I believe they were mailed at the same time.

Q What is the practice in your office with respect to sending out mail? How is it kept, and when is it mailed?

10 *Mr. Jones.* Objected to.

The Court. Objection overruled.

A What is the question, please?

RECESS.

(Previous question read.)

The Court. The question may be answered.

A Usually when a letter is dictated to the stenographer it is written, and in turn filed in our letter files, and subsequently it is mailed, usually
20 that same day that it is written.

Q The question is directed as to the custom of mailing your letters. Are they mailed separately or kept for a definite time, and all deposited at once?

A Usually mailed at night.

Q Where from?

A From the office, there is a mail chute on the same floor we are on.

30 *By the Court.*

Q What building is it?

A Centurian building.

Q Is there any particular place where the mail is kept while it accumulates during the day?

A Usually on the stenographer's desk, in a basket.

By Mr. Hauser.

40 Q And before leaving, the letters in that mail basket are mailed in the chute on your floor?

James A. Kilgor, direct.

A Yes, sir.

Q Can you say whether that course was pursued in this letter?

A I presume it was inasmuch as it is the custom in our office to do that.

Q You personally did not see it mailed?

A I do not as a rule.

By the Court.

10

Q Did you do more than dictate?

A That is about all I do.

By Mr. Hauser.

Q Who signs the letters?

A I usually sign the ones I dictate.

Q And do you know whether you signed the one sent to Mr. McCance in this instance?

A Sometimes our mail consists of notes that are not signed—

20

The Court. That entire answer will be stricken out.

Q Do you know whether you signed the letter which you sent to Mr. McCance, the original of the copy which you sent to Mr. Young?

A I do not recall.

Q Is it your custom to use a rubber stamp on originals, or on copies of letters you send out?

A Copies are stamped.

30

Q How about originals?

A Originals are usually signed.

Q This letter I show you bears a stamp signature, does it not?

A Yes, sir.

Q Is there any question in your mind whether that is an original or a duplicate?

A It seems to me to be a duplicate inasmuch as it is stamped.

40

James A. Kilgor, direct.

Q I want your positive statement whether it is or is not an original?

A It is an original of the two sets, one of the originals of the two sets, and this being a copy, in other words, of the original, is stamped.

Mr. Hauser. I offer this in evidence.

(Same marked Ex. P. 6 and read.)

10 Q Subsequent to the sending of this letter were you at any time at the church?

A I was.

Q And tell us whether the work which is called for in this plaintiff's Exhibit 6 to be done by Mr. Young was done by him?

A It was done by Mr. Young.

Q Did you thereafter at any time issue certificates for the amount due Mr. Young?

20 I did.

Q Can you recall the date?

A I do not.

Mr. Hauser. Is it admitted that Mr. Kilgor was the authorized representative of the church in the matter of the construction of this building?

Mr. Jones. No, he is the architect under the contract.

30 *Mr. Hauser.* And under the contract he was to pass on all these things, and issue certificates, and payments to be made on his certificates.

The Court. The contract speaks for itself.

By the Court.

Q Did you issue final certificates?

A I did.

By Mr. Hauser.

40 Q I show you a letter dated January 19, 1916,

James A. Kilgor, direct.

and ask you if you can remember the issuance of certificates to Mr. Young?

A I do recall it.

Q And to whom did you send those certificates?

A They were sent to McCance, chairman of the committee.

Q With a letter accompanying them?

A I do not recall that.

10

Mr. Hauser. Mr. Jones, will you produce the certificate sent to Mr. McCance on January 19, 1916, and the letter accompanying same, if there was one?

Mr. Jones. We will admit that certificates were received and returned, because they were improper.

Mr. Hauser. I am willing to accept a stipulation that the certificates were received, but cannot consent that they were returned.

20

The Court. Why should you make that condition of your admission, if that is the fact?

Mr. Hauser. It was received and returned.

The Court. The admission will be noted on the record that the certificates were received, if you are willing to admit also that they were returned.

Mr. Hauser. I cannot, because I have no knowledge.

The Court. The first part of the admission will be received.

30

Mr. Jones. I except to that.

The Court. The exception will be noted.

An exception to this ruling is noted by the defendant as grounds of appeal.

Q Did you at the same time write to Mr. Young, on or about the same date the certificates were issued?

40

James A. Kilgor, direct.

A I cannot recall whether I did; sometimes I did.

Q Will you refer to the letter and tell me whether you wrote to Mr. Young regarding the issuance of the certificates?

A I did write him.

Q What date?

10 A January 19, 1916.

The Court. Mr. Jones, I would like to have your view as to the effect in law, so far as the plaintiff is concerned, of the return of the certificates.

Mr. Jones. You mean from the defendant's standpoint?

The Court. Yes.

20 *Mr. Jones.* Where work is apparently on the face of it not finished the certificate of the architect cannot bind anybody. Suppose he sent a final certificate where the roof was not on, is that going to bind us?

The Court. It binds you just as much if you return it as if you did not return it, doesn't it? My question relates to what the effect of the return of it would be upon the plaintiff, if you actually received the certificate.

30 *Mr. Jones.* I think the receiving and retaining of the certificate would show that we acquiesced in his decision.

The Court. You could just as well show it was a fraudulent issuance of certificates if they were retained, as if they were returned; my view being that the return of the certificates to the architect really made no difference so far as the plaintiff in this case was concerned. It is just the same whether you retain them or return them, because if they were fraudulently issued you could show that
40 in one case as well as the other.

James A. Kilgor, direct.

Mr. Hauser. Is there any objection to that going in evidence?

(Showing Mr. Jones a letter.)

Mr. Jones. Why, yes.

Mr. Hauser. I simply ask to have this marked for identification at the present time.

(Said letter marked P7 for identification.)

Mr. Hauser. Kindly let me have the letter written to Mr. McCance on January 19, 1916, by Mr. Young. 10

(Letter produced by defendants' counsel.)

Mr. Hauser. I offer in evidence letter dated January 19, 1916, addressed to Mr. McCance, chairman of the building committee of the Verona Church, written by the plaintiff in his own handwriting.

(Same marked Ex. P8 and read.)

Mr. Hauser. Now, I offer the letter written by the architect to Mr. Young of the same date advising him of the forwarding of the certificates. 20

(The letter heretofore marked P7 for identification is marked Ex. P7 and read.)

Q Were you out there on the premises at any time after that, after the issuing of your final certificate?

A I was.

Q Can you fix any date? 30

A I cannot; I was out a number of times after the certificate had been issued.

Q Were you present at any time in February, 1916, when a payment was made to Mr. Young?

A I was not present.

Q Were you present at any time when any additional work was called for to be done by Mr. Young, subsequent, I mean, to your letter of January 19, 1916?

A I know of none. 40

James A. Kilgor, cross.

Cross examination by Mr. Jones.

Q When you sent the final certificate you wrote a letter, didn't you?

A Yes.

Q And you received a reply, didn't you?

A Received a reply from whom?

Q What does it matter who you received a reply
10 from?

A Received a reply to the certificates?

Q To your letter enclosing the certificates?

A Yes.

Q Is that a copy of the reply (showing witness
paper)?

A I don't recall receiving this letter.

Mr. Jones. Will you produce the original
of that letter?

Q Can you tell by referring to it?

20 A What date was that?

Q January 28, 1916, is the date of the carbon?

A I haven't got the original.

Q Do you recall when you received it?

A I don't recall receiving that.

Q Do you recall receiving the certificate back
again?

A I do.

Q And there was a letter with it, wasn't there?

30 A I don't recall whether there was; there may
have been a letter.

Q Did not Mr. Pratt write you a letter?

A He has written me a number of letters.

Q I mean returning the certificate, and explain-
ing why he returned them?

A I think there probably was one with the re-
turn.

Q Have you the date when you sent the certifi-
cate?

40 A Yes. May I refer to my certificate book?

James A. Kilgor, cross.

Q This letter of January 19th, to Mr. Young, in which you say you sent it, you say in that letter to Mr. Young you have sent certificates?

A Yes, this is the date I sent the certificate.

Q And this is January 28th, following?

A Yes, sir.

Q Would that correspond about right when you received the certificates back?

A I should imagine it would, yes. 10

Q But you do not know whether you received this letter?

A I don't recall it.

Q Now, after you received the certificates back what did you do with them?

A Filed them away with the other certificates which had been returned paid.

Q Paid?

A The other certificates. 20

Q Did you look at the building again to see whether the objections they raised, whether there was any merit to them?

A I did.

Q Did you make any corrections?

A I did not.

Q So that the matter stands just as it did at the time you issued the certificates?

A Yes, sir.

Q Subsequent to your issuing those certificates the east wall fell down, didn't it? 30

A Yes.

By Mr. Hauser.

Q Subsequent to issuing the last certificate?

A Not to the issuing of the last certificate.

By Mr. Jones.

Q Not subsequent to it?

A Subsequent to issuing the last certificate?

Q It was subsequent. 40

James A. Kilgor, cross.

A That is to say it was issued in September and the wall fell in August.

By the Court.

Q What was issued in September?

A The letter that he had reference to, the letter he is speaking of now was in September, and the wall had fallen in August.

10 Q That was not the question, the question was whether the wall fell after you issued those final certificates which went with your letter of January 19, 1916?

Mr. Jones. I will withdraw that.

By Mr. Jones.

Q Previous to issuing this final certificate, and about August 4, 1916, something happened to the east wall, didn't it?

20 A Yes.

Q It fell down?

A Yes.

Q And the west wall was weakened, wasn't it?

A Not by the falling in of the east wall.

Q I didn't ask what by, I asked if it was not weakened?

A It had weakened, yes.

Q Now, as a result of that you were called upon to explain the matter, weren't you?

30 A I was.

Q And as a further result the church entered into a separate arbitration agreement separate to these contracts it entered into, didn't it?

A Yes.

Q And appointed three men arbitrators, didn't they?

A Yes, they did.

40 Q And did you ever see the arbitration agreement?

James A. Kilgor, cross.

A I did.

Q (Showing witness a paper.) This paper which I show you, signed by both parties, is the agreement entered into subsequent to the contract, to arbitrate this particular dispute, wasn't it?

A Yes.

Mr. Jones. Will you admit this at this time? It is the arbitration agreement. 10

Mr. Hauser. I assume that is the one that was signed; it has no date on it.

The Court. You agree it shall be received in your case?

Mr. Hauser. Yes, sir.

The Court. It will be received.

(Said paper marked Ex. D1.)

Q After that had been entered into, and to your knowledge, the arbitrators made a report, did they not? 20

A They did; not a final report.

Q Well, they made two reports, didn't they?

A Yes.

Q Did you see those?

A I have not seen them.

Q You would not recognize them if you saw them?

A I have seen one report; there were several reports rendered which I have not seen.

Q Whatever that report was subsequently they went ahead according to that report, the one that you saw? 30

Mr. Hauser. Objected to as calling for a conclusion on the part of the witness.

The Court. I will sustain the objection.

Q Subsequently, after these various reports were made by the arbitrators, work progressed on the church, did it not?

A Yes. 40

James A. Kilgor, cross.

Q That is in jacking it up, excavating the debris out of the cellar, and raising the superstructure to its original position?

A It did.

Q And reinstating the west wall?

A That is right.

Q And do you recall how that expense was divided between the two of them?

10

Mr. Hauser. I object to that, it seems to me the report should be offered in evidence.

The Court. That would not amount to anything unless you asked him what the report provided, so I might as well sustain the objection to this question as to the next one. Well, the answer to this question would be harmless, it amounts to nothing, standing alone.

Q Did you ever pass on the work on the east wall after it had been completed?

20

A That is prior to the falling down?

Q Prior, or subsequent?

A Prior to it I never did.

Q Subsequent, did you?

A No, I did not.

Q Then, at no time did you ever pass on the work on the east wall?

A Never did.

Q Isn't that part of your contract?

30

Mr. Hauser. I object to that on the ground that is a matter between the defendant and architect and has no bearing on the rights of the plaintiff of this suit.

The Court. Except this; if the architect gave a certificate that the work had been done according to plans and specifications it might bear upon whether the certificate was *bona fidedly* given. The question may be answered.

40

A It was a part of my contract on the first wall, prior to it falling down.

James A. Kilgor, cross.

Q And subsequently whose contract did it cover?

(Objected to as a question of law.)

Q Subsequently—what is there about this east wall, that is, the second wall that you built, what part of it was not part of your original contract?

A All of that which fell down was not a part of my original contract; that is to say, when it was rebuilt it was not part of my original contract. 10

Q The rebuilding of that you do not consider came under your contract with the church?

A Not under my old contract.

Q So when you say you did not give a certificate on the east wall you meant the rebuilding of it?

A I issued a certificate on the rebuilding of the new wall.

Q You did issue? 20

A I did.

By the Court.

Q How did you do that without passing on the work?

A I had never written to the committee, and I do not in other cases.

Q How can you give a certificate upon work which is done without passing upon it?

A I find my own judgment is right, I can issue the certificate. 30

Q Without passing upon the work?

A To pass on the work without notifying the owner that you have passed upon it. It is customary to supervise the work, and if you find it is all right in accordance with any agreement that is arrived at, we feel entitled to issue the certificate without notifying the owner or owners that the work has been approved, the certificate has been approved by the architect. 40

James A. Kilgor, re-direct.

By Mr. Jones.

Q Did you approve this particular wall after it had been built?

A I did in my own mind, yes.

By the Court.

Q But without seeing it?

10 A Without seeing it, yes.

Re-direct examination.

Q Mr. Jones asked you about some knowledge of the report of the board of arbitration; I show you a letter dated September 28, 1915, and ask you if you sent that to Mr. Young following the report of the board and following the instructions given to you by the church?

Mr. Jones. I object to that. What is it?

20 *Mr. Hauser.* I will let you see it; I haven't offered it in evidence yet. (Handing paper to counsel.)

Mr. Jones. I object to that.

The Court. The question is whether it was sent by instructions from the church.

Mr. Jones. He does not represent the church.

The Court. The question was whether it was sent by instructions from the church.

30 Q Can you answer that question?

A This information was given me by the church.

Q By whom representing the church?

A Mr. Pratt.

Mr. Hauser. Any objection to the letter, Mr. Jones?

Mr. Jones. Yes.

40 Q When and where did you have any talk with Mr. Pratt about the letter following the report of the board?

James A. Kilgor, re-direct.

A At Mr. Pratt's house.

Q Can you fix the time? Would this letter refresh your memory any, Mr. Kilgor?

A As near as I can find it was September 18, 1915.

Q Was that before or after the arbitration board had made a report?

A It was after the arbitration board had made a report. 10

Q Are not you mistaken about the date?

A I may be mistaken; I have several dates here; I think it was around that time.

Q Can you tell us without refreshing your memory what the conversation was with Mr. Pratt respecting the work to be done following the report of the board?

A I cannot recall what was said at that time.

Q Have you any notes or memorandums from which you can refresh your memory? 20

A No, I haven't got any of that.

Q Would it refresh your memory any by looking at the letter which is signed by you?

A Probably would.

Mr. Jones. I object to that; he is attempting to recall a conversation which he says he had with Mr. Pratt; in order to refresh it a letter is produced by him written at a subsequent date to Mr. Young in typewriting. 30

The Court. The information which he says he received from Mr. Pratt.

Mr. Jones. I think that is objectionable unless he made the memorandum at the time, and refreshes his recollection by that.

By the Court.

Q How long after your conversation with Mr. Pratt was that letter written?

A I think, if I remember rightly, the conver- 40

James A. Kilgor, re-direct.

sation was usually held on Saturday, and on the following Monday or Tuesday I usually made these notes.

By Mr. Hauser.

Q How long after the conversation was the letter usually sent?

10 A The letter was usually sent two or three days after, at the most, after any committee meeting.

Q Mr. Kilgor, following this conversation with Mr. Pratt you did write Mr. Young concerning some work to be done pursuant to the recommendations of the board, did you not?

A I did.

Q And did that have anything to do with the matter of the erection of the easterly wall?

20 A It did.

Q What was the thickness of the original wall, the one which fell down?

A It was supposed to have been a 10 inch wall, reinforced with four inch piers.

Q Can you tell us what size wall was to be put up in place of the one that fell down?

A Sixteen inch wall.

Q Following the letter which you sent to Mr. Young pursuant to the conversation with Mr. Pratt, did you see the wall which was put up?

30 A I did.

Q What size wall was it, I mean as to thickness?

A Sixteen inch wall.

Q Was there anything said in the conversation with Mr. Pratt respecting the anchoring of steel beams in that new wall, the 16 inch wall?

A There was.

40 Q And was that also communicated to Mr. Young by you?

James A. Kilgor, re-direct.

A It was.

Q Did you see the premises after that letter?

A I did.

Q Do you know whether those steel beams were put in?

A Do you mean the steel beams in the wall?

Q Yes, the anchoring?

A The anchoring, yes, sir.

Q Were they anchored in accordance with the instructions you had forwarded to Mr. Young? 10

A Not in accordance with my first instruction.

Q But they were anchored?

A They were anchored.

Q And were they anchored according to your specifications?

A They were.

Q Was there anything said about additional pipe piers reinforcing? 20

A There was.

Q And was that also part of the matter which you communicated to Mr. Young?

A I did.

Q Can you tell us whether that was done or not by Mr. Young.

A That was done.

Q And you inspected the work after it had been finished?

A After it was finished. 30

By the Court.

Q What is pipe pier?

A That was pipe pier inside of solid piers.

By Mr. Hauser.

Q Following the sending of that letter to Mr. Young you received a letter from Mr. Young regarding it, didn't you?

A I did.

Q Have you that letter? 40

A I have not.

John Young, direct.

Q Do you know what has become of it?

A Why—the letter to me?

Q Yes.

A It is either in my office or my attorney.

Q Do you recall anything of that letter to you?
Could you state you had it at your office?

A Yes.

Q And when did you see it last?

10 A I don't recall having seen the letter from
Mr. Young for some time.

Q Is it, or is it not, a fact that in answer to
his letter you sent him plaintiff's Exhibit 6, the
letter of October 9th, which contained the list of
the work to be done?

A That is right.

Q And that provided with respect to the pay-
ment for the work to be done?

20 A For the payments on that work.

Re-cross examination.

Q When you say you sent this to Mr. Young,
Exhibit P6, you were aware that there was an
arbitration agreement, didn't you?

Mr. Hauser. Objected to on the ground that
Exhibit 6 refers to that fact.

The Court. The objection will be overruled.

30 Q You were aware that there was an arbitra-
tion agreement in respect to the four walls of the
church, weren't you?

A Yes.

JOHN YOUNG, sworn for the plaintiff.

Direct examination by Mr. Hauser.

Q Mr. Young, where do you live?

A 21 Elmira street, Bloomfield.

Q What is your business?

A Carpenter and builder.

40 Q Did you on the 26th day of December, 1914,
enter into a contract with the building committee

John Young, direct.

of the First Congregational Church of Verona?

A Yes, sir.

Q And entered into a second contract on the 3d day of April, 1915?

A Yes, sir.

Q I show you Exhibits P1 and P2, and ask you if those are your signatures?

A Yes, sir.

Q Did you receive any plans and specifications, Mr. Young? 10

A Yes, sir.

Q And did you sign a copy of the specifications?

A Yes, sir.

Q I show you a duplicate copy and ask you if you signed those specifications?

A Yes, sir.

Q Mr. Young, did anybody supervise the work done by you on that building up there? 20

A Yes, sir.

Q Who?

A Mr. Kilgor, the architect.

Q And were you paid—by whom were you paid when you got any payment?

A The Montclair Trust Company.

Q And did your receive certificates?

A Yes.

Q From whom? 30

A The certificates, except this one case, was all sent to the church.

Q And who delivered them to you?

A Why, I got them from Mr. McCance, or Mr. Pratt.

Q Mr. Young, what did you have to do with the preparation of the ground up there for the erection of the building covered by your contract?

A Nothing at all?

Q At any time? 40

John Young, direct.

A No.

Q In what condition were the premises delivered to you?

A The foundation was dug.

Q And what part of the year did you begin work on that? I mean, was it spring, summer, autumn or winter?

10 A In the wintertime.

Q Can you recall the particular month?

A Must have been in January, I guess.

Q What year?

A 1915.

Q Now, then, Mr. Young, what work did you do on that building in pursuance of these contracts?

A Under the first contract?

Q Under both.

20 A Under the first contract we erected the foundation; provided the lumber for the forms of cribbing, and furnished the steel.

Q How much was paid to you on account of that contract?

A I would have to refer to my books to give the exact amount.

The Court. It is agreed by the pleadings.

30 *Mr. Jones.* We will admit that all except \$25 was paid on the first contract, and all except \$208.42 on the second.

Q Now, then, Mr. Young, I call your attention to plaintiff's Exhibit 6, dated October 9, 1915, and ask you if you did all the work set out in the notification to you?

A Yes, sir.

Q And do you recall writing a letter to Mr. McCance on January 19, 1916, plaintiff's Exhibit 8?

40 A Yes, sir.

John Young, direct.

Q Do you remember getting any answer to that letter?

A No, sir.

Q I show you a letter dated January 28, 1916, and ask you if you remember getting that letter?

A Yes, sir.

Mr. Hauser. Is this consented to, Mr. Jones? 10

Mr. Jones. Yes, we wrote that.

(Said letter offered in evidence and marked Ex. P9, being dated January 28, 1916, written by Mr. John R. Pratt to Mr. John Young.)

(Letter read.)

Q I show you another letter dated January 13, 1916, and ask you if you received that letter?

A Yes, sir.

(Same offered in evidence and marked Ex. P10, being a letter dated January 13, 1916, signed by William McCance, and addressed to John Young.) 20

(Letter read.)

Q Now, Mr. Young, on or about February 10, 1916, were you up at the church premises?

A Yes, sir.

Q And who did you see on that day?

A I can't recall who was all there.

Q Do you recall, a payment of \$500 being made to you on that day? 30

A Yes, sir.

Q Can you remember now who was present; whom you saw?

A Mr. Pratt—

Mr. Jones. We will admit that.

Mr. Hauser. Will you let me have the receipt signed by Mr. Young.

(Paper produced by Mr. Jones.)

John Young, direct.

Q Is that a receipt you signed on that occasion, Mr. Young? That is your signature, isn't it?

A Yes, sir.

Mr. Hauser. Any objection to this being offered?

Mr. Jones. No.

10 (Receipt dated Verona, N. J., February 10, 1916, signed by Mr. Young, offered and marked as Ex. P11, and read.)

Q Mr. Young, will you tell us whether all those items which I just read, and included in this receipt, were completed by you?

A Yes, sir.

Q And was thereafter any complaint made to you about any of them not having been done?

A No, sir.

20 Q Following the notification to you by Mr. Kilgor, and the issuance of the final certificate as contained in plaintiff's Exhibit P7, January 19, 1916, did you ever get possession of the certificates?

A No, sir.

Q Was any further payment made to you, Mr. Young? After the payment of February 10, \$500, did you get any further money?

A No, no further money, no, sir.

30 *Mr. Hauser.* Plaintiff offers in evidence a statement dated April 18, 1916, addressed to Mr. McCance, chairman building committee Verona Church, signed by Mr. John Young.

(Same marked Ex. P12.)

The Court. This is admittedly the plaintiff's statement of the claim, and is it admitted that these items of labor and material were performed and furnished by him on that statement?

40 *Mr. Jones.* Certain ones; certain ones were not.

John Young, cross.

The Court. All but three, I understand.

Mr. Jones. All but three.

Mr. Hauser. Two of the three are not in here, because they were for shoring and excavating.

The Court. As it is read you may state what ones are not admitted.

Mr. Hauser. (Reading.) "Item of iron rods and setting \$24.06, full amount to be allowed Mr. Young." 10

Mr. Jones. That is not admitted.

Mr. Hauser. (Reading continued.) "Extra stucco on front of old building \$8." Denied. "Mason work on closet of old building \$9.20." Denied. "Resetting cellar frame of old building, \$2." Denied. "Shelving in closets in old building 60 cents." Denied. "Labor on finishing inside closet four hours, \$2.80." Denied. "Extra flooring and framing in study \$3." 20
Denied.

Cross examination by Mr. Jones.

Q You receive some reply to that, Mr. Young, did you?

A That last letter there?

Q The paper which his Honor now has in his hands, P12.

A I don't recall and answer.

Q I may be wrong in my time. That P12 which his Honor has in his hand, was in reply to a statement that he had previously sent to you, wasn't it? 30

Q Yes, that is right.

Mr. Jones. Have you that statement?

Mr. Hauser. Yes (producing paper).

Q This is the statement to which it is a reply, isn't it?

A This is the statement that that is the reply to. 40

John Young, cross.

Q This came first, and then you sent that back?

A Yes.

Q There are two items there, the seventh and eighth items, what are they, which are not on this?

A Shoring and excavating.

Q And those are really the items that are in dispute, aren't they?

10 A Yes, some of them; there are some others there.

Q Shoring \$35. Just read that.

A Shoring \$35, excavating \$202.

Q How are those divided?

A According to your division \$8.75 and \$50.50.

Q In other words, you were asked to pay seventy-five per cent., and the other man was asked to pay twenty-five per cent. isn't it, according to that division?

20 A As near as I can see there.

Mr. Hauser. You may offer that in evidence, if you wish.

The Court. There will be no objection to it, if you want to put it in on your side, and you may do it now.

(Same markel Ex. D2.)

30 Q You were present at a conference after the wall of the building fell down, subsequent to August 4, 1915, were you not?

A There were several conferences, two or three of them.

Q Conferences immediately following the fall of the wall?

A I guess so, yes.

Q You were?

A Yes.

40 Q And subsequent to that conference you entered into this agreement marked Exhibit D1, didn't you?

John Young, cross.

A Yes, sir.

Mr. Jones. Any objection to reading that to the jury at this time?

Mr. Hauser. Not the slightest.

(Same read.)

Q After that was signed you appeared before this arbitration board, didn't you?

A After it was signed?

10

Q Yes.

A Yes.

Q And you presented your side of the case, didn't you?

Mr. Hauser. I will consent that the hearing was had, and report was made by the board. If Mr. Jones will show me the report it may go in evidence.

The Court. That is all you want, I suppose?

20

Q Is that a copy of the report (showing witness paper)?

The Court. Show it to Mr. Hauser.

Mr. Hauser. This is the one presented to Mr. Young?

Mr. Jones. Yes.

Mr. Hauser. The report which was sent to us I will consent shall be offered and read.

(Same offered in evidence and marked Ex. D3.)

30

The Court. Now, what is it you are offering?

Mr. Jones. Offering the report of arbitrators dated October 7, 1915, a copy of which was sent to the plaintiff.

Q Now, that report which is dated October 7, 1915, was submitted after the easterly wall had been rebuilt, was it not?

40

John Young, cross.

A Before it had been rebuilt, to the best of my recollection.

Q You were building on it at the time, were you?

A Yes, I believe I was.

Q Now, when the easterly wall, which was the wall that fell down, when it did fall down what happened to the excavation?

10

A The excavation fell in along with it.

Q Did this easterly wall fall in the excavation, the debris resulting from it?

A Fall in the cellar?

Q Yes.

A Yes.

Q And on the day that the easterly wall buckled and fell in what was done to prevent further damage?

20

A The steel beams were shored up.

Q Did you provide the shoring?

A No, sir.

Q You saw the shoring there, didn't you?

A Yes, sir.

Q Consisted of jacks, planks, beams, and various things?

A Yes, sir.

Q Do you recall where it come from?

30

Mr. Hauser. I object on the ground that these questions have nothing to do with the report on which they are based. In other words, the report of the arbitration shows how the cost of rebuilding the wall shall be borne; not a word about re-shoring, or re-excavating. The place was delivered to Mr. Young excavated, he had nothing to do with it at all, and it is an attempt to go behind the report.

40

The Court. Let me see that report (paper handed to the Court). I imagine that is a

John Young, cross.

matter which the Court would be compelled to decide as a matter of law, taking into consideration the statement in the arbitration agreement, and the finding of the board; so I suppose we might as well hear what is to be said about this right now.

(Argued.)

The Court. I think the Court will have to construe this arbitration agreement, and the finding of the board upon this question that now arises. 10

(Question read.)

The Court. The objection will be overruled, and an exception will be noted.

(Exception to plaintiff.)

A I believe it came from Dexheimer, in Orange. I have no acquaintance with the firm, but I believe I was told that is where it came from. 20

Q And you subsequently saw the jacks and planks being used to keep the beams up, didn't you?

A Yes, sir.

Q And in the early part, after the wall had fallen down, you saw the jacks and things used to keep it from falling down further, didn't you?

A Yes, sir.

The Court. To keep the outside earth from falling in, do you mean? 30

Mr. Jones. Yes.

Q Did you see anybody there removing this debris from the cellar immediately after it had fallen in?

A Not for some time after.

Q Did you at any time afterwards?

A Yes, sir.

Q Did you see Charles Bahr there?

A I never seen him removing any, no, sir. 40

John Young, cross.

Q See his teams there?

A No, sir.

Q Who did you see removing them?

A Bahr's men, but no teams; threw it out on the bank.

10 Q Were you present at a conference in which the minister, and various members of the building committee were present, and the architect and you were present, with reference to the bonding of the east wall—by "bond" I understand is hitching it onto the other walls?

A Yes, sir.

Q Were you present at a conference at which various means were discussed affecting that?

A Yes, sir.

Q You asked for that conference, didn't you?

A I don't know whether I asked for it; it was mutually agreed upon.

20 Q You were very much interested in having that conference, weren't you?

A Yes, sir.

Q And that bonding was necessary in order to keep that east wall in place, wasn't it?

A Not necessarily.

Q How would you hitch your east wall onto the north and south walls otherwise in safety?

30 A The wall itself would have a tendency to form onto the wall that was broken, it was broken off in a jagged manner which would bond itself.

Q But the purpose of this conference was to determine a good safe way of bonding it on, wasn't it?

40 A Not particularly on the bonding; the purpose of the conference, as I understand it, was on account of my wanting to know what I was to do under this arbitration board, and how I was to be paid for it; and we were there together and Mr. Kilgor sent me an account of it.

John Young, cross.

Q You were present yourself?

A Yes, sir, surely.

Q And at this conference did you decide to put a kind of twist iron on there for the bonding?

A It was decided in three or four different ways.

Q You discussed at that conference the method which you finally used, didn't you?

A I had nothing to say how it was to be done at all. 10

Q You did finally make up your mind how to bond that east wall onto the north and south wall?

A By discussing with the arbitration—not the arbitration board, but the building committee, and they adopted the method I undertood the arbitration—

Q That is the conference I refer to.

A Oh, yes.

Q You were present and discussed it? 20

A Surely.

Q And before you went away that day you made up your mind what method you would use?

A Not that day, it wasn't settled then.

Q There was a day when you and the building committee got together and before you went away you determined what method you were going to adopt?

A Yes, sir.

Q And this bonding is the item included in the first of our list of items given on Exhibit D2, the first one of those items, that is the bonding that is included in that? 30

A Yes, that is the bonding, that is part of the iron work.

Q I mean this, the bonding, \$24.06, is the bonding we refer to?

A There is some other work in that besides that.

Q That is the bonding of the east wall to the 40

John Young, cross.

other walls, isn't it, that item I just showed you?

A Yes.

Q What held the building up from falling in the cellar?

10 *Mr. Hauser.* I object to that, I do not know that that is proper cross examination; the question of the building proper is not here; it is the question of this east and west wall.

The Court. I deem it refers to that, the falling of the wall; if it refers to the east and west walls that question may be answered.

Q What held up the girders which held up the building in turn, while the east wall was down?

A The construction of the floor beams on the flooring held it up until it was shored up.

Q And then the shoring held it up?

A Yes, surely.

20 Q I am showing you Exhibit P12, Mr. Young; you have extra work due, and then comes several items, extra stucco, and so forth, extra flooring and frame in study \$3 and work on new brick in basement, \$1.40. Now, why do you call those extras? Do you think those items come under your contract?

A No, sir.

Q Did you get a writing from the architect?

A No, sir.

30 Q Got no writing from the owner authorizing you to do that?

A No, sir.

Q Got no writing as to the price for doing it?

A No, sir, only a verbal agreement; didn't think it was necessary from a church.

Q Did the church ever speak about those items before or afterwards?

A Yes, sir.

40 Q With whom did you talk, and when, with reference to these items?

John Young, cross.

A I talked with Mr. McCance about them; I don't know the exact date.

Q Did he order you to go ahead and agree upon some price?

A There is one item there I have an order on now from the architect.

Q You have an order?

A On one of them, on the stucco on the front wall. 10

Q Where is your writing?

A It is in that order there about the work that was to be done by the arbitration board; the long list, at the bottom of that list; this item here (indicating).

Q Now, all those items you speak of are included in the \$208, aren't they?

A No, sir.

Q What is your \$208 for? 20

Mr Hauser. Do we need to go into any discussion on that? That amount is admitted.

The Court. Yes, it is admitted; the question now is whether these items are not included in that.

Mr. Jones. What I am getting at, this \$208 was paid him, and includes these items; the certificates of the architect included the extras up to that date.

The Court. Then your question is whether these items have not been paid for? 30

Mr. Jones. Yes, sir, that is the point.

Q Are not all these items included in your \$208?

A No, sir.

Q Didn't you receive certificates from the architects, and when you received them didn't they include the extra amounts then done up to date?

A Why, up until the last certificate, I didn't see that certificate at all. 40

John Young, re-direct.

Q But your previous certificates included extras, and you were paid for?

A Up to this, yes.

Q Were not some of those items included in the certificates you previously received?

A No, sir.

Re-direct examination.

10

Q Mr. Young, you have been asked about the wall falling in, do you know what caused that wall to fall in?

A Yes.

Q What?

A The back filling of the wall.

Q Tell the Court and jury exactly what you mean by the back filling.

A I will have to go into that in detail.

20

Q Well, that is what we are here for.

A That wall was built in the wintertime; before we could support the wall foundation gradually, from frost and rain, fell on the sides, the hole was from 11 to 12 feet deep, and by the time I got the forms up originally, there was only a foot outside the foundation wall to work the forms; by the time the forms were up the inner side, the east wall, the space was 9 feet at top by 2 feet at the bottom, a big hole. After the wall had been put up this dirt that fell in the cellar during the time after it had been excavated, and before I started to put up my forms, instead of being thrown out on the bank, to make the work faster, Mr. Bahr's men, who were doing the excavating, threw it in the cellar, and figured that when my foundation wall was up they would throw this out for back filling, and save them handling it twice. So after the wall had been up, Mr. Bahr—and the forms had been taken down—to avoid having to carry the dirt out they figured out to get the dirt

40

John Young, re-direct.

out cheaper, they tried to get the dirt out before the beams or anything was on there to help strengthen the wall, and they threw out this dirt into this big space of 9 feet wide at the top and 2 feet at the bottom; it was in the wintertime, the dirt was frozen, and before they stoped at that time—they stopped on my sending a letter to the architect protesting that it would break the wall in two—they had the center of the wall, the wall is 50 feet long and 12 feet high— 10

The Court. I think the witness is going far beyond the scope of the question.

Q I think you said a moment ago that the earth at that time was frozen, did you not?

Mr. Jones. I object to that testimony. I should have objected before. All that testimony was given by him before the arbitrators who were practical men. Now he is opening it up, and wants this Court to consider it. I object to any more testimony along this line as to the cause of it. 20

The Court. The objection will be sustained. (Exception to plaintiff.)

Q Mr. Young, you have been asked about this item of \$24.06 for reinforcing piers, and you have referred to plaintiff's Exhibit 6 of October 9, 1915. Did you furnish those reinforcing piers pursuant to that letter which you received from Mr. Kilgor? 30

A Partly pursuant to Mr. Kilgor's instructions, and partly the church; that was changed a little bit, the piers.

Q But you relied on this notification, did you not?

A Yes, sir.

Q So that was not included in your original contract, was it?

A No, sir— 40

John Young, re-direct.

Objected to.

Objection overruled.

A (*Continued.*)—it was not included in the original contract.

Mr. Hauser. I want to offer a letter written by Mr. McCance, chairman of the building committee on May 1, 1916.

10 (Same marked Ex. D. 13 and read.)

Mr. Hauser. On the strength of that submission, questions as to the reason for that wall falling are proper, since it is apparent from the reading of this letter that there was no mutual understanding as to what the report included.

20 *The Court.* There seems to be nothing before the Court for the Court to rule upon. I am inclined to regard this submission report as having been adopted by both parties in this case, and the finding of the board to be binding on both parties to the extent of the report itself, and regarding what you have now said as an offer to prove the responsibility for the falling of this wall I will overrule that offer, and you may have an exception to that.

(Exception to plaintiff.)

30 Q Mr. Young, since rendering your final statement on April 18th, p. 12, to the church, have you been paid anything further on account of your claim?

The Court. That is admitted.

By Mr. Jones.

Q When did you do the last work, when was the last item of work done?

A Under that agreement?

Q The last item of work done on the whole job?

40 A I would have to refer to my book; I cannot tell the exact date.

Adjourned to March 16, 1917.

John Young, re-cross.

SECOND DAY.

Newark, N. J., March 16, 1917.

Continued pursuant to adjournment.

Appearances as before.

JOHN YOUNG resumes the stand in his own behalf.

10

Re-cross examination by Mr. Jones.

Q The last question was when was the last item of work done by you for which you claim an allowance?

A The last item altogether?

Q I notice in your lien claim you say you worked from December 26, 1914, to April 3, 1915; is that the last work you did?

A As near as I can recollect it was in March, the last work was done.

20

Q (*By the Court.*) When did you say?

A About March 13th, the last time I was there doing any work.

Q What year?

A 1916.

By Mr. Jones.

Q What did you do at that time?

A Finished the hanging of the emergency stairs from the first floor to the basement.

30

Q Previous to that you had done no work for almost a year, had you?

A Oh, yes, sure, I had been there probably two or three months before that.

Q Do you recall when the next to the last item was done?

A Not unless I could refer to my books for the exact date.

Q Well, refer to your book?

A February 17, 1916.

40

John Young, re-cross.

Q What did you do at that time?

A The items that was on that list, under which they gave me a payment of \$500, and specified a few items to be fixed.

Q You said you could tell by looking at your books; have you any such item in your books?

A Yes.

Q Where?

10 A Of the time, not the work, the time.

Q Have you such an item in your book?

A No, sir.

Q When you received that receipt in February what did you do, or did you do anything?

A Did I do anything?

Q Yes?

A Yes.

Q What did you do?

20 A Fixed the side door from the main floor to the side in the old building.

Q You used to receive certificates from Mr. Kilgor, did you not?

A Yes, sir.

Q And when they were approved you used to sign them, did you not?

A Yes.

30 Q When you received the money. You said yesterday that you did not know whether the extra items were included in your certificates as they were issued, didn't you?

A The final one only; all the rest of them had been included, I believe.

Q You would recall if I showed you the various certificates, or a copy of them, that were given to you, wouldn't you?

A Yes.

40 Q I am showing you a list prepared by the architect, or said to be prepared by the architect, setting forth the various certificates. Will you look at that and see whether that is correct?

John Young, re-cross.

A Yes, I guess that is right.

Q Will you look at the amount of that last certificate, final certificate?

A \$708.42.

Q \$708.42, isn't it?

A Yes.

Q Keep that in mind.

Mr. Hauser. Will you have that marked at this time, I will consent to it going in evidence. 10

(Same marked Ex. D. 4.)

Q Now, after that certificate was issued, \$708.42, you received \$500, didn't you?

A Yes.

Q Now \$500 deducted from the amount of this certificate, \$708.42, leaves \$208.42?

A Yes.

Q That is just the amount that you are claiming for your final payment, isn't it? 20

A Yes.

Q On your second contract?

A Yes, sir.

Q How then, do you dispose of these items which you speak of as extra, \$8, \$9.20, \$2, sixty cents, \$2.80 and \$3?

A That first item is not included in that certificate, as I understand it.

Q Will you examine this again. I call your attention to the items which are included in that certificate of \$708.42, and on the right hand of the certificate there reads "Extra \$25.60" as being included in that, consisting of cement dash wall \$8, shelving closets \$3.40, that makes your \$2.80 and your sixty cents, isn't it? 30

A Yes.

Q "Fifteen square feet of flooring in study \$3?"

A Yes. 40

John Young, re-cross.

Q Resetting window frame \$2; mason work in old building \$9.20?

A Yes.

Q So they are all included in that certificate, aren't they?

A They are all included according to that.

Q So that item is out, according to that, isn't it?

10 A It is out. My impression was it had not been included in the certificate.

Q But you think it is now?

A Apparently it is.

Mr. Hauser. We will concede the plaintiff was in error in claiming those extras Mr. Jones has just called his attention to.

The Court. Amounting to how much?

Mr. Jones. \$25.60.

20 Q At the time, Mr. Young, this agreement Exhibit D. 1 was entered into the wall had already fallen, had it not?

A Yes.

Q Exhibit D. 1 is the agreement to submit to arbitration, isn't it?

A Yes.

Q The church and you disagreed as to the building of the wall just immediately prior to that?

30 *Mr. Hauser.* Objected to; it is in evidence this work was being done under contract, and the arbitration agreement was the result of some dispute.

Objection sustained.

An exception to this ruling is noted by the defendant as ground of appeal.

Q You appeared before the arbitration board, didn't you?

A Yes, sir.

40 Q And subsequent to the arbitration board's award you did various items, didn't you?

James A. Kilgor, direct.

A Yes.

Q And this Exhibit P. 12 in which several of the items you worked off twenty-five per cent., seventy-five per cent. were done after the award, were they not?

A Yes, sir.

Mr. Hauser. With your Honor's permission I would like to recall Mr. Kilgor in order to correct testimony he gave yesterday, and also in justice to himself.

10

The Court. You may recall him.

JAMES A. KILGOR, recalled for the plaintiff.

Direct examination by Mr. Hauser.

Q Mr. Kilgor, I obtained the impression yesterday that you answered his Honor with respect to your issuing the final certificate of the work which was occasioned by the falling of this wall, that you had approved of work done by Mr. Young in your own mind without seeing the wall, is that what you intended to say?

20

A I beg to withdraw that, if I made such a remark. I never issued a certificate without inspecting any of the work; and the wall was inspected before the final certificate was issued.

Q And did you as a matter of fact when this wall was rebuilt, and prior to issuing your final certificate, did you see and inspect that wall?

30

A I did.

Q But you did say that you did not report to the church, or the building committee, that you had approved it?

A I did not report to the committee.

Q But you had approved it after having inspected it?

A I did.

40

James A. Kilgor, cross.

Mr. Jones. I would like to ask him a question on further cross examination on another matter.

Cross examination by Mr. Jones.

Q You testified that P. 6 was mailed from your office; we had some discussion about it on the stand?

10 A Yes.

Q I show you a copy of a letter said to have been written by Mr. McCance to you June 13, 1916, and ask whether you received the original of that letter?

A I did receive a copy of this letter.

Q You did receive it?

A I did.

Mr. Jones. I will offer the letter.

20 *Mr. Hauser.* Oh, wait a minute; it has not been offered in evidence yet, I haven't seen it. (Letter shown to Mr. Hauser.) I cannot see that a letter to the architect is at all binding upon us on a matter not bearing on the subject matter of this suit.

The Court. Is it offered?

Mr. Jones. It is offered; yes, sir; he says he received it.

(Letter shown to the Court.)

30 *The Court.* What is the purpose of this letter. If it is denying testimony given by Mr. Kilgor, then it is proper.

Mr. Jones. For this reason. He wrote a rather important letter, P. 6, which he says he mailed, which we claim we did not receive.

Mr. Hauser. What is the date of this letter?

The Court. June 13, 1916.

Mr. Hauser. That was long after this cause of action accrued, and after this suit was begun.

40

Mr. Jones. I will withdraw it.

James A. Kilgor, cross.

Q I show you a letter dated January 1, 1916, referring to the final certificate which you signed, and ask you whether you received that letter?

A I do recall receiving such a letter.

(Letter shown to Mr. Hauser.)

Mr. Hauser. I do not think that is material or relevant to the matter. I am perfectly willing your Honor should pass upon it. I think it is immaterial, and object on that ground. 10

(Letter shown to the Court.)

The Court. What is the purpose of this?

Mr. Jones. P. 6 was sent, or said to have been sent by Mr. Kilgor, and never received. I want to put that in for identification at this time, or in evidence, just as your Honor determines.

The Court. Well, you may have it marked for identification. 20

(Said letter marked D. 5 for identification.)

PLAINTIFF RESTS.

Mr. Jones. I move for a non-suit, first, on the ground that the plaintiff should sue entirely on his award, and not on the items composing the mechanics lien.

The Court. The motion will be denied, and an exception to that ruling will be noted. 30

An exception to this ruling is noted by the defendant as ground of appeal.

William H. Senior, direct.

WILLIAM H. SENIOR, sworn for the defendant.

Direct examination by Mr. Jones.

Q Mr. Senior, what is your business?

A Inspector of buildings, Town of Montclair.

Q What is your trade?

A Mason.

Q You were a mason contractor for some years?

10 A Yes, sir.

Q You were the umpire, were you not, appointed by the two arbitrators in this dispute of the First Congregational Church of Verona?

A I was the third man; I don't know whether you would call it an umpire, or not.

Q You were the one selected by the two arbitrators?

A Yes, sir.

20 Q Will you tell the Court what matters were taken up by the arbitration board?

Mr. Hauser. I object, your Honor.

The Court. The objection will be sustained.

Mr. Jones. On that point I would like to be heard.

The Court. All right.

30 *Mr. Jones.* This witness is produced to give testimony as to the scope of the inquiry made by the arbitration board, and as to what is covered by the award in so far as the language of the award is doubtful. The dispute in this case comes down to this, the question whether the excavating of the debris, when this wall fell down, in order to replace the broken parts of the wall, debris that had to be removed. The other side contend that that was up to the church; we attack it; and we produce this witness to show that that matter was in dispute, and was one of the principal subjects discussed at the arbitration meetings, and

40

William H. Senior, direct.

that the award was based on that, and that the replacing and repairing of the walls was intended to include that.

(Argued.)

The Court. The offer will be overruled, and an exception to that ruling will be noted.

Mr. Jones. The entire offer of this witness is overruled?

The Court. The offer you just made. 10

Mr. Jones. The next offer is to prove by this witness the items intended to be covered by the language of the award?

Mr. Hauser. That is objected to.

The Court. That will be overruled. There is just one matter in your previous offer that, as you made it, I have some doubt about. My ruling overruling that offer is based upon the assumption that the language of the award is not doubtful. 20

Mr. Jones. This also mentions the language of the submission.

The Court. But I omitted that from my statement; my view being we are not concerned with the language of the submission, provided the award is within the language of the submission. Of course, then, if the language of the submission be doubtful, and it being a question of whether or not the award is within the submission then it may be an important question whether or not the submission included, and might be susceptible of oral testimony. There seems to be no question on either side but that the submission includes the matter which is before the Court as the award, for that reason the only question then is whether or not the award is doubtful, not the submission. 30

Mr. Jones. It comes down to this question; 40

William McCance, direct.

10 if something positive was asked in the submission and was not taken any notice of by the arbitrators, then their award is bad. That is, where there is the submission of a specific subject, and they do not take it up and do not include it in their award, then the award is bad. If we have a ruling at this time as to what is the meaning of that award, whether it includes the excavation, or not—

The Court. Counsel have both construed it, and when you do that the Court adopts the construction put on it, that is, that the award is within the terms of the submission. I have ruled upon the meaning of the award, that it is not doubtful, that is the reason for overruling the offer.

20 *Mr. Jones.* Does your Honor rule that the excavation and bonding is included in it?

The Court. I will meet that trouble when we come to it.

An exception to this ruling of the Court is noted by the defendant as ground of appeal.

(Witness withdrawn.)

30 *The Court.* If it had been your expectation to produce each of these arbitrators, you may make the same offer as to each one of them, if they are here ready to be produced upon your call.

WILLIAM McCANCE, sworn for the defendant.

Direct examination by Mr. Jones.

The Court. I ought to say that you have correctly apprehended the mind of the Court; there is no reason why you should proceed in the dark as to what the Court has in mind.

Q Mr. McCance, do you live at Verona?

40 A Yes, sir.

William McCance, direct.

Q Chairman of the building committee of the church?

A Yes, sir.

Q And had general charge of that in the church's behalf, of the building?

A Yes, sir.

Q The architect has stated that a letter marked Exhibit P6 was mailed to you. Did you ever receive that letter? 10

A I did not.

Q Did he ever refer to it at any time in conversation or otherwise with you?

Mr. Hauser. Objected to.

The Court. You mean the architect?

Mr. Jones. Yes, sir.

The Court. Well, the question may be answered. 20

A He told us he had sent a letter to Mr. Young, and would send us a letter.

Q Did you ever ask him for the letter?

A We have written and asked him for the letter.

Q I show you Exhibit D2, and ask you what that is?

A It is the original of the statement submitted to Mr. Young by me on behalf of the building committee. 30

Q After the building had been completed?

A Yes, sir.

Q And that set forth the items in detail of what you conceived to be due?

Mr. Hauser. The exhibit speaks for itself, I take it; it is in evidence.

The Court. The question may be answered.

Q That sets forth in detail the items you conceived to be due? 40

A Yes, sir.

William McCance, direct.

Q And Exhibit P12 was received in answer to that from Mr. Young?

A Yes, sir.

Q Referring to your Exhibit D2 will you tell us what the amount you conceived to be due—what is the balance?

A \$419.11.

10 Q From that must be deducted what?

A \$237.

By the Court.

Q Why \$237? It would not be but seventy-five per cent. of \$237, would it? The total cost of shoring and excavating was \$237, wasn't it?

A Yes, sir.

Q Of which Mr. Young, according to your contention, should pay seventy-five per cent.?

20 A Yes, sir. The other twenty-five per cent. is included in the \$417.11.

Mr. Jones. That is allowed for in the statement.

The Court. Yes, I see, it is carried out twenty-five per cent.

By Mr. Jones.

Q So those two items you have already paid?

A I have already paid.

30 *Mr. Hauser.* I object to that and ask that the answer be stricken out; that is calling for a conclusion, not bearing on the subject, and no evidence as to the witness' statement that such sums have been paid.

The Court. According to the Court's present view of the case that does not make any difference, but it may remain, so if it does make a difference it will be answered.

40 Q Were you present at any interview in which

William McCance, direct.

the matter of the iron rods and settings was discussed with Mr. Young?

A Yes, sir.

Q Who was present?

A The majority of the members of the building committee, Mr. Young, Mr. Kilgor, at least two of the arbitrators, I am not positive whether the three were there or not, and Mr. Pratt. 10

Q Was any disposition made of that at the time?

Mr. Hauser. Objected to as calling for a conclusion.

(Question withdrawn.)

Q Was anything stated about iron rods and settings, and if so, what?

Mr. Hauser. Objected to on the same ground, and no date being fixed, it is too indefinite. 20

Q About when was it?

A October 5th, Saturday afternoon, 1915.

Q What was said at that conference?

Mr. Hauser. I object.

The Court. That seems to be before the arbitration award, Mr. Jones. However, the plaintiff has treated that as not being within the arbitration award, Mr. Hauser. 30

Mr. Hauser. Not only that, but the defendant is precluded on its own offering of the statement of the architect dated February 28, 1916, in which that item is included in the \$179.83 of extras.

The Court. I will overrule the objection.

Exception to plaintiff.

(Question read.)

A There was quite a discussion. 40

William McCance, direct.

Mr. Hauser. I object to that, and ask for the conversation.

The Court. Yes, the conversation.

A (*Continued.*) We talked over the matter of bonding the new wall to the old, various ways of doing it, it was suggested that it be—

The Court. Who suggested it?

10 A (*Continued.*) The suggestion of the architect that the old walls be stepped out; that is, the concrete be cut off in regular steps, as there was a ragged edge of the remaining wall, the suggestion was to cut it out in steps to form a bond. It was thought that that would be considerable work—

Mr. Hauser. I object.

Q What was said?

20 *The Court.* Not what was thought; only what was said.

A It was suggested that iron bars be used to bond.

By the Court.

Q Who suggested it?

A To the best of my knowledge it was Mr. Senior suggested that twisted iron bars be used to bond the old wall to the new.

30 *By Mr. Jones.*

Q Did Mr. Young say anything?

A Mr. Young thought that would be the easier and better way to do it.

By the Court.

Q Is that what he said?

A Yes, sir.

Q You said "he thought"?

A Mr. Young said so.

40

William McCance, direct.

By Mr. Jones.

Q Was there any further conversation?

A They talked of anchoring the girders into the wall with government anchors.

Q Was there any talk of payment for this either by the church or by Mr. Young?

A I cannot say that there was positive talk of payment.

10

Q In your capacity as chairman of the building committee you had to pay the various bills, did you?

A By the authorization of the committee.

Q Do you know who excavated, did the actual excavation, of this cellar after the wall had fallen?

Mr. Hauser. Objected to as immaterial, and covered by the arbitration agreement; the church were to have it done; I will admit they had it done.

20

The Court. That comes right up to the decision of the Court on the question suggested, doesn't it?

Mr. Jones. Yes, sir.

The Court. Do you desire to say anything further upon that?

Mr. Jones. I have looked over a considerable number of cases on it; my impression last night was that the construction of an award like that might be strict. I find I am wrong about that, the construction of an award would be most liberal in order to keep it within the submission.

30

The Court. The objection will be sustained, and an exception will be noted.

Q What amounts were paid out by the church for the excavation and for the shoring?

Mr. Hauser. I make the same objection.

The Court. The objection will be sustained and an exception to that ruling will be noted.

40

William McCance, cross.

Cross examination by Mr. Hauser.

Q Mr. McCance, you remember that there was a meeting on October 5, 1915, do you?

A Yes, sir.

Q And there were at least two members of the board of arbitration there?

A Yes, sir.

10 Q Mr. Kilgor?

A Yes, sir.

Q Mr. Young?

A Yes, sir.

Q And how many members of the building committee? Well, they were all there, weren't they?

A I am not positive whether there were four or five.

Q And Mr. Pratt?

A And Mr. Pratt.

20 Q How long did that meeting last?

A Probably an hour.

Q Not any more?

A I can't recall.

Q Now, among other matters which were discussed, Mr. McCance, wasn't it agreed that Mr. Young was to build the forms for those parts of the walls which had fallen down?

A It was.

30 Q And he was to fill in the forms with concrete?

A Yes, sir.

Q At the rate of $22\frac{1}{2}$ cents per cubic foot?

A Yes, sir.

Q Those forms were to be build at the rate of $3\frac{3}{4}$ cents per square foot for each side?

A Yes.

Q Now, you spoke something about putting in these reinforcing bars. Do you recollect that distinctly?

40 A Yes, sir.

William McCance, cross.

Q Mr. Young was to drill the walls to put in those bars?

A Yes, sir.

Q And to do it by day's work?

A No, sir.

Q And the plastering which was damaged by the falling of the ways was to be taken off, replastered, and left in perfect condition, wasn't it?

10

A Yes, sir.

Q All stucco on the outside of the church which was cracked and fallen off through the east wall having given way was taken off and restuccoed to match the present wall?

A Yes, sir.

Mr. Jones. Objected to; that was included in all the items.

Mr. Hauser. Is it consented to that the items contained in P6 were discussed and agreed to at those meetings and were thereafter done by Mr. Young? If so, I will curtail my cross examination.

20

Mr. Jones. You had better proceed.

Q It was also agreed that the building proper was to be properly jacked and shimmed up, wasn't it?

A Yes, sir.

Q The steps of the east vestibule were to be reset?

30

A Yes, sir.

Q And the emergency stairs from the cellar to the east vestibule were to be reset and left in perfect working order?

A Yes, sir.

Q All work in the east vestibule was to be put in practically the same condition it was before the east wall fell in?

A Yes, sir.

40

William McCance, cross.

Q The window frame in the east cellar wall were to be the same as per contract?

A Yes.

Q The window frame in the east cellar wall of the present church to be taken out and set in the west wall of the present church?

A I didn't get that.

10 Q The window frame in the east cellar wall of the old church, the old building, was to be taken out and reset in the west wall of the old building; in other words, change about the position of the window, do you recall that?

A I don't recall that item taken up at that time.

Q But that was done, wasn't it?

A That work was done, yes.

20 Q Now, after that frame was set, the frame last referred to, it shall be enclosed from the present wall level to the underside of the plate with a 12 inch concrete wall, do you recall that?

A Read that again, please.

Q After this frame is set, meaning the frame taken from the one side to the other, it shall be enclosed from the present wall level to the underside of the plate with a 12-inch concrete wall?

A I don't recall that.

Q Do you know whether that was done or not?

30 A I don't recall it being done.

Q You won't say it was not done?

A No, not without an examination.

Q That portion of the present north wall of the old church which has fallen in, where it intersects with the new east wall, is to be filled in with concrete 12 inches thick, was that agreed upon?

A Read that again. Your Honor, may I ask a question?

The Court. Yes.

40 *Witness.* Do I understand these questions

William McCance, cross.

he asks me are questions that were taken up and acted on at that time?

The Court. Yes, I understand him to mean that.

Q Yes, I ask you whether these various things I have read to you were not discussed at that meeting, and agreed upon; you have answered me thus far "Yes."

10

The Court. Referring to the meeting of October 5, 1915.

A I did not understand it that way. I could not swear that all those items were taken up at that meeting; they were taken up at various times; taken up at some time.

Q And the remainder of the items which are contained in Exhibit P. 6 which Mr. Jones showed you were also either discussed at the meeting of October 5th, or at some other time?

20

A I would not care to answer that question without looking it up.

Q Let me read it to you: "An order to stucco the west stone wall of the present church at an extra cost of \$8 is to be given the contractor. Mr. Young is to scrape that portion of the wainscot in the new church which is discolored, without any further expense. The new walls to be erected on the east and north side of the church are to be 16 inches thick from the foundation to grade line, and from this point to the underside of plate 12 inches thick."

30

A That is not right.

Q You mean it was not discussed at that time?

A It was discussed, yes.

Q My question was these matters were either discussed at the meeting of October 5th, or at some other time?

A Yes, sir.

40

William McCance, cross.

Q "The extra four inches of concrete wall over the 12 inch thickness of the wall under the former contract, and all additional concrete at the intersection or bonding of the new work with the old work, to be paid for as an extra over the decision rendered by the arbitration board." Do you remember that being discussed?

10 A The extra four inches to be paid for, yes, sir.

Q "The furnishing and installation of the reinforcing bars to be paid for at their actual cost, plus installation. Do you recall that?"

A No, sir.

Q "Full payment for the work agreed upon to be made upon final completion and acceptance of same." Do you remember that being discussed?

A No, sir.

Q Mr. Kilgor was present during this entire meeting, was he not?

20 A Yes, sir, to the best of my knowledge.

Q And I understood you to say to Mr. Jones that you cannot remember whether there was or was not any talk about payments for this extra work, is that right?

A I could not swear either way.

Q But you did say a moment ago that the extra four inches of concrete wall was to be paid for, didn't you?

30 A Yes, sir.

Q Then there was some part of the extra work which was to be paid for by the church, wasn't there?

A Yes, sir.

Q Will you positively swear that there was no talk whatever at this meeting of October 5, 1915, respecting the payment to be made to Mr. Young for any work to be done by him as a result of the report of the board of arbitration?

40 A Repeat that question again.

William McCance, cross.

Q (Question read.)

A No, I would not.

Q And as a matter of fact in the statement which you sent Mr. Young, and in the statement which Mr. Young sent you, you allowed in accordance with the report of arbitration for a certain portion of this extra work, didn't you?

A Yes, sir. 10

Q Were not those allowances made pursuant to the agreement entered into at this meeting of October 5th?

A No, sir.

Q Was there any subsequent meeting to pass upon those payments?

A Those items were—

Q No, answer my question. Was there any subsequent meeting to pass upon the question of payment for that extra work recommended to be done by Mr. Young through your board of arbitration? 20

A Not to my knowledge.

Q Mr. McCance, who prepared that submission agreement, that arbitration agreement?

A The arbitration board.

Q Themselves?

A To the best of my knowledge.

Q You don't know whether there was any attorney connected with it or not?

A I do not. 30

Q Did Mr. Crane have anything to do with that?

A Not to my knowledge.

Q You did not ask Mr. Young to submit any agreement for the arbitration, did you?

The Court. How is this proper?

Mr. Hauser. I will withdraw it.

Q I show you exhibit D. 4. Did you get that from Mr. Kilgor?

A I did at my request. 40

William McCance, cross.

Q And you are familiar with the contents of it?

A I am.

Q You never returned it to Mr. Kilgor?

A I did not.

Q And found no fault with it?

A I did.

Q But you retained the statement?

10 A It was not a statement by Mr. Kilgor; it was an itemized list, at my request, of how payments had been made.

Q Does not that constitute a statement in your mind?

(Objected to.)

(Objection sustained.)

Q That exhibit I have shown you, Mr. McCance, shows the various payments made to Mr. Young on the different contracts, does it not?

20 A Shows some of the payments that have been made.

Q And showing balances due? Right?

A No, sir.

Mr. Jones. The statement speaks for itself.

Q How long before that statement was received by you did you receive the certificate, the final certificate issued by Mr. Kilgor?

A After this statement was received?

30 Q No, before that statement was received.

A I cannot recall the date.

Clifford H. Bishop, direct.

CLIFFORD H. BISHOP, sworn for the defendant.

Direct examination by Mr. Jones.

Mr. Jones. I am offering this witness, he is an architect who also inspected this building, and the purpose of his testimony is to show that the falling of the wall, and the consequent damage, was the fault of the contractor, my theory being the award covering this, or not covering it, if it does not cover it, we are entitled to go into that. 10

Mr. Hauser. Objected to.

The Court. That may be treated as an offer, and the objection is sustained, and an exception to the ruling of the Court will be noted.

Exception to this ruling is noted by the defendant as ground of appeal.

DEFENDANT RESTS. 20

The Court. Now, under the evidence as produced, and in view of the rulings of the Court on the question of shoring and excavating, what are the real items in dispute?

Mr. Jones. The defendant is asking for the direction of a verdict for \$204.74.

The Court. On what is that based?

Mr. Jones. Based on Exhibit D2. 30

The Court. Which is figured here to be \$182.11.

Mr. Jones. If you recall, in the testimony, the iron channels in the west wall.

The Court. \$11.81 added to \$182.11 would be \$193.92.

Mr. Hauser. We claim we are entitled to \$25 on the first contract, which is admitted; \$208.42 on the second contract which is admitted; \$1.40 on the extra which is admitted; 40

Motion for Direction of Verdict.

and \$179.83 for the extra work as covered by the report of the architect which is Exhibit 4, dated February 28, 1916.

The Court. I am not going to base it on the defendant's exhibit, I am going to base it on your claim.

10 *Mr. Hauser.* And on plaintiff's Exhibit 7, January 19, 1916, showing the issuance of the certificates for those respective amounts, except the \$1.40.

The Court. The items of that account have not been proven.

Mr. Hauser. Exhibit P12 shows \$170.35 for extras; probably I had better modify my request to that extent, plus \$1.40, our total would be \$405.17.

20 *The Court.* Do you think there is any question to be submitted to the jury on the item of \$24.06, Mr. Jones? That is the only one about which I have any doubt.

Mr. Jones. Except that it takes the same course. We are willing to take the same course that your Honor decided for the excavation. In other words, our contention is it is included.

30 *Mr. Hauser.* We say under P6 that was to be paid for in full. We join in the request for the direction of a verdict for that amount, \$405.17.

40 *The Court.* The only question of that \$24.06, Mr. Jones, Mr. McCance says that that was discussed, Mr. Senior suggested twisted iron bars be used, and Mr. Young said that would be the easier and better way to do it, and there was no positive talk about the payment. The only question that can arise, since you have not admitted that item—well, but you have admitted the item, that is, the

Charge to Jury.

amount of the item, the correctness of the item.

Mr. Jones. We admit the correctness of the item.

The Court. I do not think there is anything to submit to the jury.

Mr. Jones. I do not think there it; it is only a question of one amount or the other.

10

The Court charged the jury as follows:

DUNGAN, J.

Gentlemen: It is admitted in this case that the questions involved are really questions of law to be decided by the Court, and that if the defendant is entitled to have deducted seventy-five per cent. of the cost of the excavating and shoring, then the verdict in favor of the plaintiff should be \$193.42, according to the statement of the plaintiff, and that includes the same ratable portion for the setting of certain iron rods which were used for binding. On the other hand, it is admitted that if the defendant, in the view of the Court, ought not to have the plaintiff's claim reduced by seventy-five per cent. of the cost of shoring and excavating, that then the amount due the plaintiff is \$405.17.

20

It is the view of the Court, which has been expressed during the progress of this case, that by reason of the award of arbitrators, to which both parties have apparently agreed by having acted upon the award, it is within the submission, and that under this award of arbitrators, which, in the view of the Court, is not indefinite, the defendant is entitled to be compensated for any portion of the excavating and shoring which, in the submission, it was provided that the plaintiff should do, the responsibility for it to be determined by the arbitrators; and in view of the fact that the arbitrators in the award place no portion of the payment of that upon the contractor, the view of

30

40

Plaintiff's Exhibits.

the Court is that the defendant is not entitled to have any deduction on account of it.

The result of these views leads to the direction of a verdict in favor of the plaintiff, and against the defendant, for \$405.17, with interest from April 18, 1916, \$22.28, which altogether amounts to \$427.45, for which amount you may render your verdict in favor of the plaintiff against the defendant.

Mr. Jones. The defendant's counsel prays an exception to the refusal of the Court to direct a verdict for the amount asked for by the defendant.

The exception is noted by the defendant as ground of appeal.

Mr. Jones. And also an exception to the direction of a verdict as asked for by the plaintiff.

The exception is noted by the defendant as ground of appeal.

The following agreement is made as to certain exhibits:

Exhibit P. 1—A contract dated Dec. 26, 1914, for the foundation work on the church building of appellant.

Exhibit P. 2—A contract dated April 3, 1915, for alteration and addition to church structure.

Exhibit P. 3—Specifications. It is agreed that before appellees work on foundation began in the first instance appellant was to do the excavating.

Exhibit P. 4—Blue prints or plans.

Exhibit P. 5—Lien claim.

Exhibit P. 8—Letter from Young to appellant asking for payment or any reason why payment held up.

Exhibit P. 9—Appellant's reply.

Exhibit P. 10—Letter appellant to Young expressing wish to pay some money on account if they legally could.

Exhibit D. 4—Architects list of payments and certificates.

EXHIBIT P. 6.

Oct. 9, 1915.

FIRST CONGREGATIONAL CHURCH,
VERONA, NEW JERSEY.

October 5, 1915.

There were present two members of the Board of Arbitration, Mr. Kilgour, Mr. Young and the following members of the Building Committee of the aforesaid Church, Messrs. McCance, Pratt, Munger, Lynn, Tuers, and the Mason sub-contractor under Mr. Young. 10

THE FOLLOWING ITEMS WERE AGREED
UPON:

Mr. Young to build the forms for those parts of the walls which have fallen down, at the rate of $3\frac{3}{4}$ cents per square foot for each side of form. 20

Mr. Young is to fill in the forms with concrete, at the rate of $22\frac{1}{2}$ cents per cubic foot.

Mr. Young is to drill all walls to receive reinforcing bars, which drilling is to be done by days' work.

All plastering damaged by falling of said walls, is to be taken off and replastered and left in perfect condition, to be done by days' work.

All stucco on the outside of Church which is cracked or has fallen off, due to the east wall giving away, is to be taken off and re-stuccoed to match the present work, to be done by days' work. 30

The building proper is to be properly jacked and shimmed up.

Steps at east vestibule to be reset.

The emergency stairs from cellar to east vestibule to be reset and left in perfect working order.

All work in the east vestibule to be put in prac-

40

Plaintiff's Exhibits.

tically the same condition as it was before the east wall fell in.

The window frames for the new east wall to be the same as per contract.

10 The window frame in the east cellar wall of present Church to be taken out and reset in the west wall of the present Church. After this frame is set it shall be enclosed from the present wall level to the underside of plate with a 12" concrete wall.

That portion of the present north wall of old Church which has fallen in where it intersects with the new east wall, is to be filled in with concrete 12" thick.

An order to stucco the west stone wall of the present Church for an extra cost of \$8.00, is to be given the Contractor.

20 Mr. Young is to scrape that portion of the wainscot in the new Church which was discolored, without any further question.

The new walls to be erected on the east and north sides of the Church are to be 16" thick from the foundation to grade line and from this point to the underside of plate 12" thick.

30 The extra 4" of concrete wall (over the 12" thickness of wall under former contract) and all additional concrete used at the intersection or bonding of the new work with the old work, to be paid for as an extra over the decision rendered by the Arbitration Board.

The furnishing and installation of the reinforcing bars to be paid for at their actual cost, plus installation.

Full payment for the above work agreed upon, to be made upon final completion and acceptance of same.

Plaintiff's Exhibits.

P. 7 for identification

EXHIBIT P. 7.

Telephone, Madison Square 4554 William S. Sloan
James A. Kilgour

SLOAN AND KILGOUR
ARCHITECTS

1182 BROADWAY

10

NEW YORK, Jan. 19, 1916.

Mr. John Young,
Range Terrace,
Bloomfield, N. J.

Dear Sir:—

We have forwarded to Mr. McCance, one certificate for \$25.00, final payment on the first contract; one certificate for \$708.42, final payment on second contract; and one certificate for \$179.83, full payment for extra work done at the Verona Congregational Church.

20

Very truly yours,

SLOAN AND KILGOUR.

JAMES A. KILGOUR.

JAK/ M/ 609

EXHIBIT P. 11.

30

Verona, N. J., February 10, 1916.

In consideration of the payment of five hundred dollars on account of contract, receipt of which is hereby acknowledge, I agree to finish the above work on the Congregational Church to the satisfaction of the building committee before any further payments are made

Door on South side to open out use Present Door

40

Plaintiff's Exhibits.

- Stair String on Emergency Stair
 Bolts on trusses to be fixed
 Basement Windows wont open
 Molding in Back of Window in front in old Bld
 to be nailed
 Bolt in Bottom of front door is loose
 Bolts on Door between old and new Church
 10 Moldings under windows in Pulpit
 cement on Windows in Pulpit to be Cleaned
 Striking Plate on East side door.
 door to Vestibule to striking slate
 Hang stairs on Basement.

JOHN YOUNG.

EXHIBIT P. 12.

20

Telephone Connection

JOHN YOUNG,
 CARPENTER AND BUILDER
 General Contractor
 Estimates Furnished
 RAMGE TERRACE

Bloomfield, N. J., April 18th, 1916.

30 Mr. McCance, Chairman Bld Committee, Verona
 Church.

Dear sir:

In reply to your letter of the 6th regarding the money due me on the first and 2nd contract and the balance due me under the Arbitration Agreement I find that some of the items are correct but a few of them are not and some are omitted, The items should read

40

Plaintiff's Exhibits.

Iron Rods and setting.....	\$ 24.06—100%	\$ 24.06
Plastering walls inside and stucco outside	27.95— 25%	\$ 6.99
forms for East Wall.....	56.70— “ “	\$ 14.17
Concrete in Wall	170.00 “ “ =	42.52
3 Cellar frames & Hardware.....	9.65 “ “ =	2.41
Carpenter labor on Stairs, and steps labor		
16 hrs	11.20 “ “ =	2.80

Iron Channels in West Wall... 50.25	} 69.77— 50%= 34.88
Woodwork to Truss same.....72	
Labor on Woodwork..... 2.80	
footings for Channels..... 16.00	

10

Extra Concrete in East Wall.....	42.52—100%	42.52
----------------------------------	------------	-------

Balance due under agreement.....	170.35
Balance due under 1st Contract.....	25.00
Balance due under 2nd Contract.....	208.42

	\$403.77
Extra Work	27.00

Balance due	\$430.77
-------------------	----------

Extra Work due		
Extra Stucco on front of old Building.....	\$8.00	
Mason Work on Closet on old Building.....	\$9.20	
resetting Cellar frame “ “ “	2.00	
Shelving in Closet “ “ “60	
Labor on finishing inside Closet 4 hrs.....	2.80	20
Extra flooring & framing on study.....	3.00	
Work on New String on Basement Stairs 5-60		
@ 25%	1.40	
	<u>27.00</u>	

As to the items for water and Mr. Seniors Bill. I am Perfectly Satisfied to Pay for same when I see the bills for same, as for the Shoring and Excavating on the list they do not come under my agreement as Per itemised list received by me from the Architects october 5th of the items to be done as agreed upon between the committee and myself at the meeting we had at the Church.

30

Hoping that the above Statement is Satisfactory and that you will be able to settle the above account at your earliest convenience, I remain

very truly yours

John Young General Contractor

40

EXHIBIT P. 13

Verona, New Jersey.

May 1st, 1916.

Mr. John Young,
Ramage Terrace,
Bloomfield, N. J.

10 My dear Mr. Young:

We have carefully examined the statement which you sent us under date of April 18th; and as per your request, we enclose herewith receipted bill from Mr. W. H. Senior for twenty dollars (\$20.00).

Regarding our charge of six dollars for three-fourths of the water bill, would say that this water bill was included in another and we will have to obtain a separate bill from our Water Department, which we will forward to you when received.

20 Permit us to call your attention that the several items amounting to twenty seven dollars in your letter of April 18th are included in the two hundred eight dollars and forty-two cents, "balance due under second contract."

Our items for iron channels in the west wall seems to differ in its amount in your statement. Our figures were submitted to us by our architect and we supposed they were correct. We will investigate this matter and report to you as promptly as possible.

30 With the possible exception of the price in the iron channels in the west wall and the exact amount of water bill, we find that our statement submitted to you under April 8th is correct. The iron rods in the east wall, the shoring and the excavating were all made necessary by the caving in of that wall. Our understanding of the report of the Arbitration Board was that the Verona Congregation Church should pay 25% and the con-

40

Defendants' Exhibits.

tractor 75% of all expenses incurred, due to the falling in of the wall, which includes shoring, excavating, back-filling and necessary iron rods to bind the new wall to the old. The wording of the report was perfectly plain to us and on submitting the matter to Mr. William H. Senior, whom I believe wrote the report for the Board and Mr. W. H. Grimes, one of the other members, we find that our understanding is correct. 10

Very truly yours,

WM. McCANCE.

Chairman of Building Committee.

EXHIBIT D. 1.

Agreement between John Young Contractor and The Building Committee of the First Congregational Society of Verona, New Jersey. 20

We, the undersigned, contractor and members of the Building Committee of the First Congregational Society of Verona, agree to submit to arbitration the matters regarding the foundation of the First Congregational Church of Verona.

The matters in dispute shall be presented to a Board of Arbitration consisting of three members composed as follows: The contractor shall select one member who shall be approved by the Building Committee of the First Congregational Society of Verona; the Building Committee of the First Congregational Society of Verona shall select one member who shall be approved by the contractor; and these two members of the Arbitration Board to select a third member. The decision of any two of this Board shall be final and binding on both the contractor and the Building Committee of the First Congregational Society of Verona. The con- 30 40

Defendants' Exhibits.

tractor and the Building Committee of the First Congregational Society of Verona each agree to pay one-half of the expense of such reference.

10 It is further agreed that the Building Committee of the First Congregational Society of Verona shall employ men to do the required excavating and that the responsibility for the cost of same shall be determined by the above mentioned Arbitration Board.

It is further agreed that when the work of excavation shall be completed to the satisfaction of the architect, the contractor shall at once proceed to the erection of the foundation.

John Young, Contractor.

20	Wm. McCance Hugh Lynn Paul A. Munger E. A. Wolff C. A. Tuers	}	Building Committee of the First Congregational Society of Verona
----	--	---	---

John R. Pratt Witness

30

40

Defendants' Exhibits.

Exhibit D. 2.

Verona N. J. April 8th. 1916

Iron rods & setting.....	24.06	25%	6.01	
Plastering walls inside & stucco outside....	27.95	"	6.99	
Forms on east wall.....	56.70	"	14.17	
Concrete in wall.....	170.10	"	42.52	
3 Cellar frames 1sash 3sets hardware.....	9.65	"	2.41	
Carpenter labor on stairs & steps & inside, (16 hrs)	11.20	"	2.80	
Shoring	35.00	"	8.75	10
Excavating	202.00	"	50.50	
Iron channels in west wall.....	27.62			
Woodwork to truss same.....	.72			
Labor putting up woodwork.....	2.80			
Footings for channels E. W. 2.....	16.00			
	47.14	50%	23.57	
Extra cement in east wall.....	42.52	100%	42.52	
Total			200.19	
Less half fee paid Mr. Senior.....	20.			
" ¼ water bill.....	6		14.50	
Net A'mt.			185.69	
Balance on foundation contract.....	25.00			
" " contract	208.42			
Net A'mt on East & West wall.....	185.69			20
Total	419.11			

Mr. John Young,

Dear Sir:—

Above is a statement of accounts between the Bldg. Com. and John Young as we understand and figure them out. Kindly let me here from you and we can settle the matter in a very short time.

Very truly yours,

Wm. McCance. 30

Defendants' Exhibits.

EXHIBIT D. 3.

Copy

Montclair, N. J.

October 7, 1915.

To the Building Committee
 of the Verona Congregational Church
 10 and Mr. Young Carpenter and Builder
 Verona, N. J.

Gentlemen:—

In order to fix the responsibility for the defective and fallen walls at the Verona Congregational Church constructed by Mr. Young, general contractor, the Arbitration Committee appointed by the Building Committee of the Verona Congregational Church and Mr. Young, general contractor, met at the church Wednesday, September
 20 22nd, Saturday, October 2nd and Tuesday, October 5th. After listening to arguments advanced by the different members of the Building Committee, Mr. Young and Mr. Gilgour, architect, we have reached the following decision:

That the contractor is in a major degree, responsible for the defective work. We have therefore decided that the contractor should pay 75% of the cost of replacing and repairing wall on east-
 30 erly side of building, and the Verona Congregational Church 25%. We have further decided that the wall on the westerly side of building is unsafe and should be re-inforced, contractor to pay 50% of the cost of re-inforcement and the Verona Congregational Church 50%.

Respectfully submitted,

Wm. H. Grimes

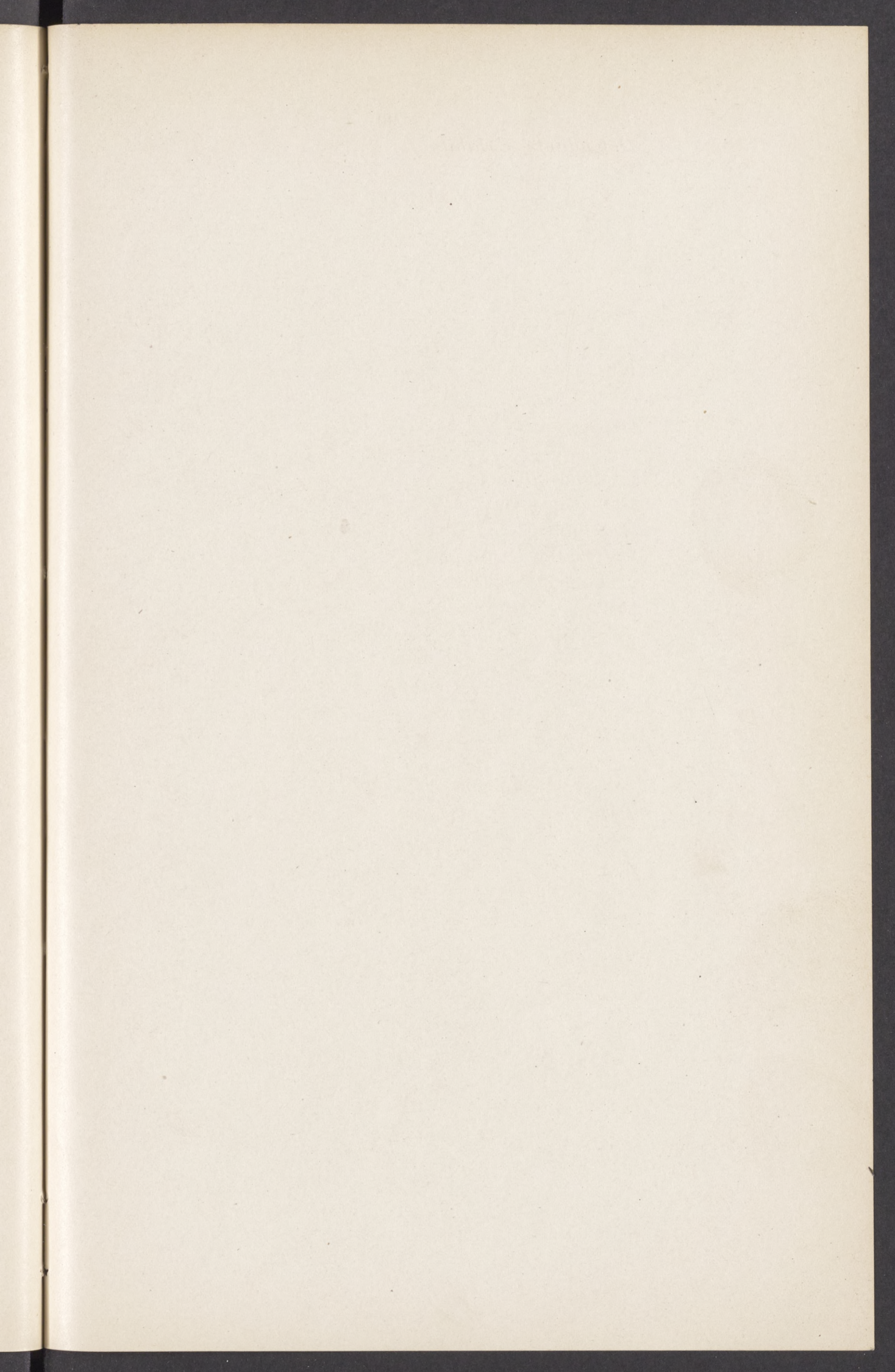
For Building Committee.

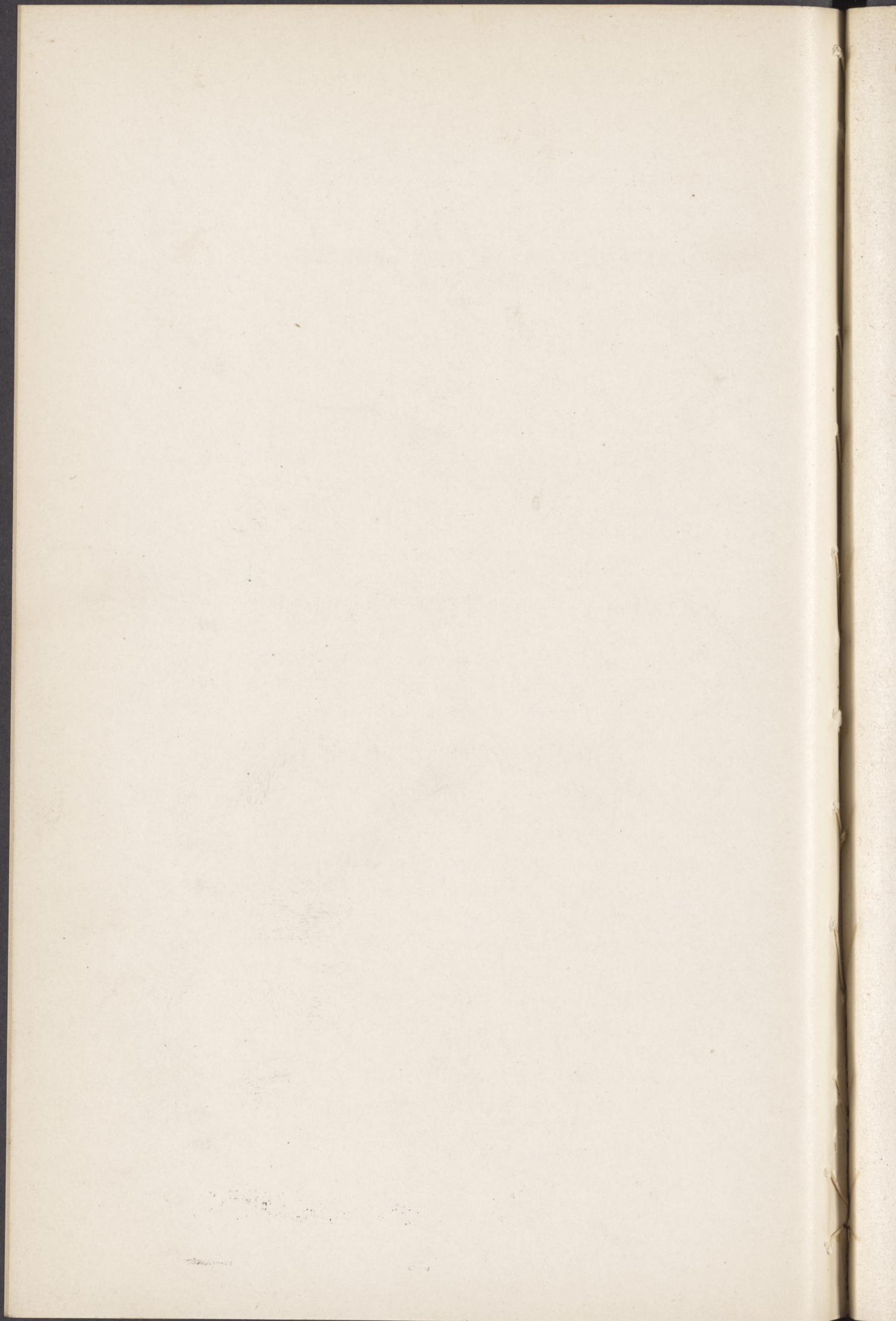
W. W. Schouler

For Mr. Young.

Wm. H. Senior

Selected by Mr. Grimes
 and Mr. Schouler.





**.NEW JERSEY COURT OF ERRORS
AND APPEALS.**

<p style="text-align: center;">JOHN YOUNG, Plaintiff-Appellee, vs. THE SOCIETY OF THE FIRST CON- GREGATIONAL CHURCH OF VER- ONA, N. J., Defendant-Appellant.</p>	}	<p>Action-at-Law. On Appeal from Essex Circuit Court.</p>	<p>10</p>
---	---	--	-----------

BRIEF OF PLAINTIFF-APPELLEE. 20

Statement.

The statement of facts contained in defendant's brief requires enlargement as well as elucidation. There is a very material omission, in that no reference is made to the circumstance that the defendant delivered an excavated plot to the plaintiff, upon which the foundation walls were to be erected; that the work was done in mid-winter and that the defendant, despite the warnings and objections of the plaintiff, filled in the space behind the Easterly wall with frozen earth, untamped, which, after the Spring thaw, caused an excessively heavy pressure against a wall which originally,—as per directions of the defendant,—was not sufficiently strong for its length, resulting in its buckling

and falling in, in part (see case pp. 52, 53). The cause of the falling of the wall was a matter of dispute and was taken up and considered by the Arbitration Board, which found, by its report of October 7th, 1915 (Ex. D. 3) that both plaintiff and defendant were responsible, the former in a major degree, and decided that the cost of *replacing and repairing* the wall on the Easterly side of the building should be paid, in the proportion of 75% by the contractor, and 25% by the Church, and another arrangement was made as to the Westerly wall, for its re-inforcement.

Under the arbitration agreement, (D. 1) the defendant was to employ men to do the required *excavating*, and that the responsibility for the cost of same was to be determined by the Board of Arbitration.

“It is further agreed that when the work of *excavation* shall be completed to the satisfaction of the architect, the contractor shall at once proceed to the erection of the foundation.”

At the meeting of the Board of October 5th, 1915, (p. 6) at which all but one of the Board, and all of the Building Committee, the architect and the contractor and sub-contractor were present, the work which was found necessary to be done by the plaintiff was agreed upon and itemized, and a list furnished the contractor. This work was all completed and the architect issued his final certificates (P. 7) covering contracts and extra work. Subsequently the defendant made a payment on account of the amount certified to (P. 11), and exacted some additional work of the contractor, without con-

sideration, all of which was done. Judgment was directed for the plaintiff for the amount shown by these certificates, less payments on account and allowances agreed upon at the trial.

10

POINT I.

Defendant having gone to trial on the issues raised by the pleadings, the motion for non-suit on the ground that plaintiff should have sued on the award and not on his contracts, was properly denied.

20

Failure to raise this objection at the proper time is a waiver of the right, and such objection will not be heard on appeal.

The alleged award is not in conformity with the findings and report of the Board of Arbitration, and said report is neither ambiguous nor uncertain. The Board having gone fully into the matter, with all parties present, discussing every detail of the work required to be done, the fair implication follows that everything which could have been considered, with a view to hold the contractor liable, was in fact considered, and if anything was omitted, it was intentionally so. The words used in the original agreement and in the report are clear and concise and it must be obvious that

30

40

the committee had all the records and facts before them when their findings were made.

Both sides admitted that it was a question of law for the Court, and the direction for a verdict for the plaintiff was correct.

10 “Arbitrators will be presumed to have acted within the terms of the submission, unless the contrary appears.” *Hoffman v. Hoffman*, 26 Law, 175.

In the absence of corruption or partiality of arbitrators, or fraud, practiced by one of the parties to the arbitration, the award cannot be reviewed as not justified by the evidence submitted to the arbitrators. Thus an award is final as to the facts.

20

Muth v. Booye, 69 Law, 266; 55 Atl. 287;

Richardson v. Lanning, 26 Law. 130;

West Jersey R. Co. v. Thomas, 21 Eq. 205.

3) Where the award appears on its face to be within the submission, parol evidence is inadmissible to show that arbitrators exceeded their powers.

Ruckman v. Ransom, 35 Law 565.

and conversely, that they did not exercise their full power, since it is to be assumed that they passed upon all matters submitted.

On error for refusal to non suit, the Court may look into the evidence introduced on both

40

sides after such refusal, in order to sustain the verdict on the merits.

Hibernia M. I. Co. v. Meyer, 39 Law
482.

The Court of Errors and Appeals, with a view to determining only the relevancy of evidence, will regard as the issue of fact that which was treated as such by the parties in the Court below without objection. 10

Axel v. Kraemer, 75 Law, 688.

Where there is evidence to sustain the findings of the lower court, they will not be disturbed on appeal.

Mundy v. Fountain, 76 Law, 701;
Rauchwanger v. Katzin, 82 Atl., 510;
Dreisbach v. Eckelkamp, 82 Law, 726;
Upton v. Slater, 85 Atl. 225;
Marten v. Brown, 81 Law, 599. 20

Where defendant entered upon its defense, it is immaterial whether, when it moved for a non-suit, it should have prevailed, if it appears that at the close of the case there was sufficient evidence to warrant the verdict for the plaintiff. 30

Lewis v. National Cash Reg. Co., 87 Atl.,
345.

POINT II.

The Court properly excluded evidence tending to contradict the report of the Board.

- 10 The submission agreement was prepared by the defendant, and the reports of the Board under its supervision, with the assistance of its architect. Clearly under the ordinary rules of construction, these papers are to be taken to mean exactly what they set forth, and the one preparing them will not be permitted to contend that they bear an entirely different construction. The wording of these papers is not doubtful and meaningless. The appellant gives
- 20 the Century Dictionary definition of "replace, to restore to its former condition"—To restore what? Surely nothing but the wall, since plaintiff never had anything to do with the excavating or filling in, and the latter was the primary cause of the occurrence. It requires greater imagination and intelligence than the writer has, to compel the words replace and repair to include the words excavate and shore up.
- 30 Appellant says that the award must be read in the light of the submission, and every intendment will be made to support the award as within the submission. No fault is found with this principle, and the learned Court below, in the charge (case p. 79) says:

40 "that by reason of the award of the arbitrators, to which both parties have agreed by having acted upon the award, it is within the submission, * * * and in view of the

fact that the arbitrators in the award place no portion of the payment of that (the shoring and excavating) upon the contractor, the view of the Court is that the defendant is not entitled to any deduction."

The real trouble lies in the fact that the defendant desires to ignore the award and wishes to rely upon its own statement of the account between it and the plaintiff, as set out in D. 2, and not included in any award whatsoever.

10

Mr. McCance and Mr. Senior, being of the Board, present at the meetings, taking part in the findings and awards, cannot be heard to explain away the results arrived at and so vitiate the entire proceedings.

The question of the cost of removal of the debris or of shoring was immaterial and irrelevant, and testimony on these lines was properly excluded, since such matters were before the Board, and were not included in their findings.

20

In *Kaplan v. Niagara Fire Ins. Co.*, 65 Atl., 188, at p. 191, Vredenburgh, J., says:

"The offer was not to prove a defect or mistake apparent on the face of the award but in effect was to contradict its very terms by insertion of an additional item in order to increase the amount of damages therein in favor of the plaintiff—in other words, to show an erroneous finding of fact made by the arbitrators. But the rule (quoted) is opposed to the admissibility of the offer. The judgment of the arbitrators as to conclusions of fact is final, except as above stated. Their award cannot be impeached at law for erroneous judgment upon facts, nor can it be for the omission of items of

30

40

account which are within the terms of the submission. Even in equity, except in cases of accident or mistake, such decision is final unless corruption or misconduct be imputed to them" (citing cases).

10 That this situation exists in the case at bar need not be debated. Clearly the award of the Board of Arbitration is silent on the matter of excavating and shoring, although such matter was within the terms of the submission. The statement of account thereafter made up by the defendant, and upon which it apparently relies, is no part of the award. There is no suggestion of corruption or mistake by the arbitrators, and the mere fact of the omission warrants no assumption in favor of the defendant. The
20 fair inference is that all matters included in the submission were considered and passed upon by the arbitrators.

The utmost which can be claimed by the defendant is that the entire award is void because it did not decide all of the matters submitted, but if this be granted, it cannot avail the defendant, since the action was disposed of on the theory of breach of contract and not for the enforcement of an award, and defendant proceeded with the trial without objection, and consequently
30 cannot now insist upon a different theory.

The report of the Board of Arbitration is complete and definite on its face and neither requires nor permits parol evidence to explain it.

Where the proofs will not support any other verdict than that directed by the trial judge, the direction is proper.

Where the evidence will support a verdict for the plaintiff, a motion to nonsuit is properly denied.

Dayton v. Boettner, 82 Law 421.

When the facts are undisputed and the inferences from them not in doubt, the issue is one of law, and the direction of a verdict is not erroneous. 10

Belcher v. Manchester B. & L. A., 74 Law 833;

Ryle v. same, 74 Law 840;

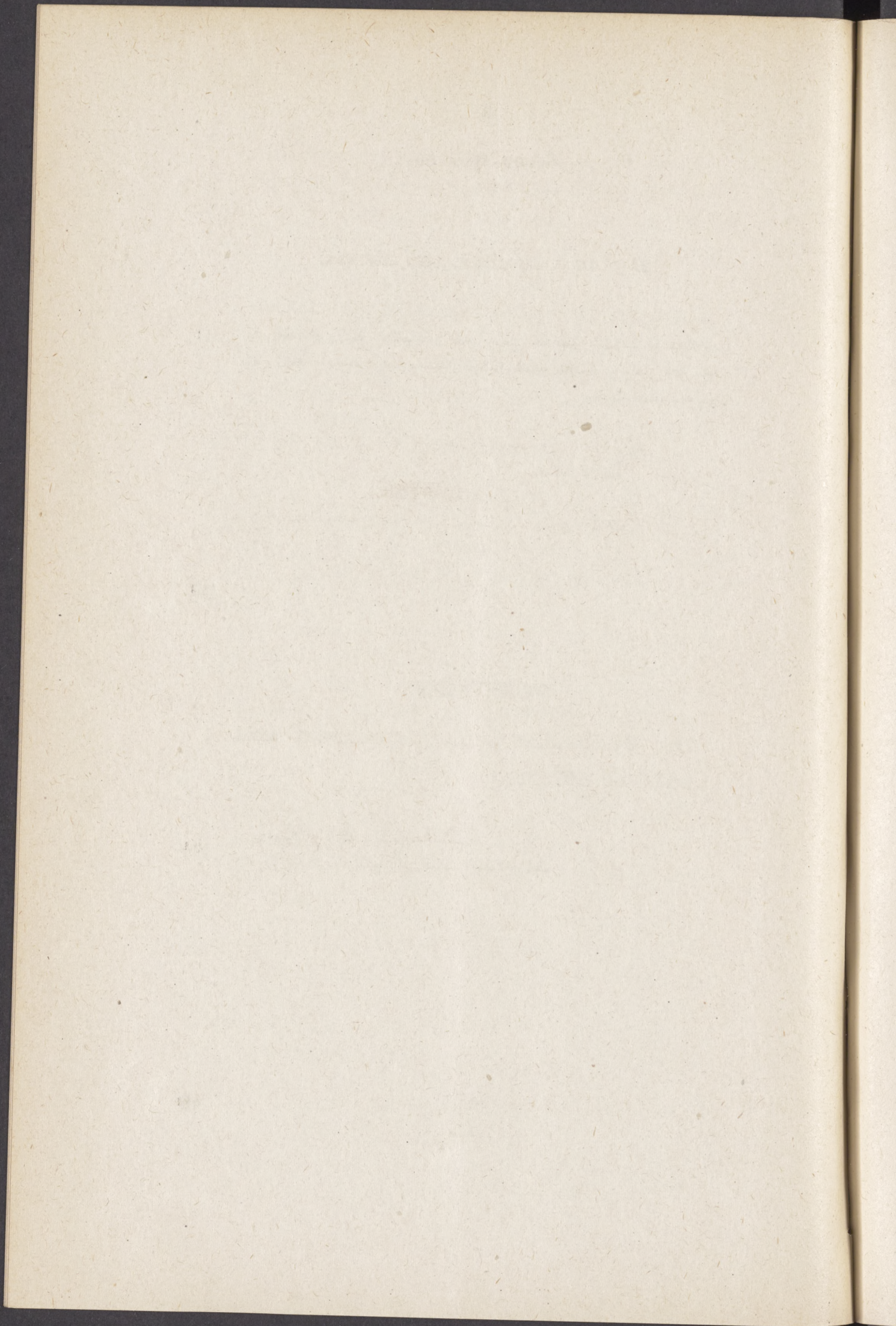
Vandergrift Cons. Co. v. Camden, &c., Co., 74 Law 669;

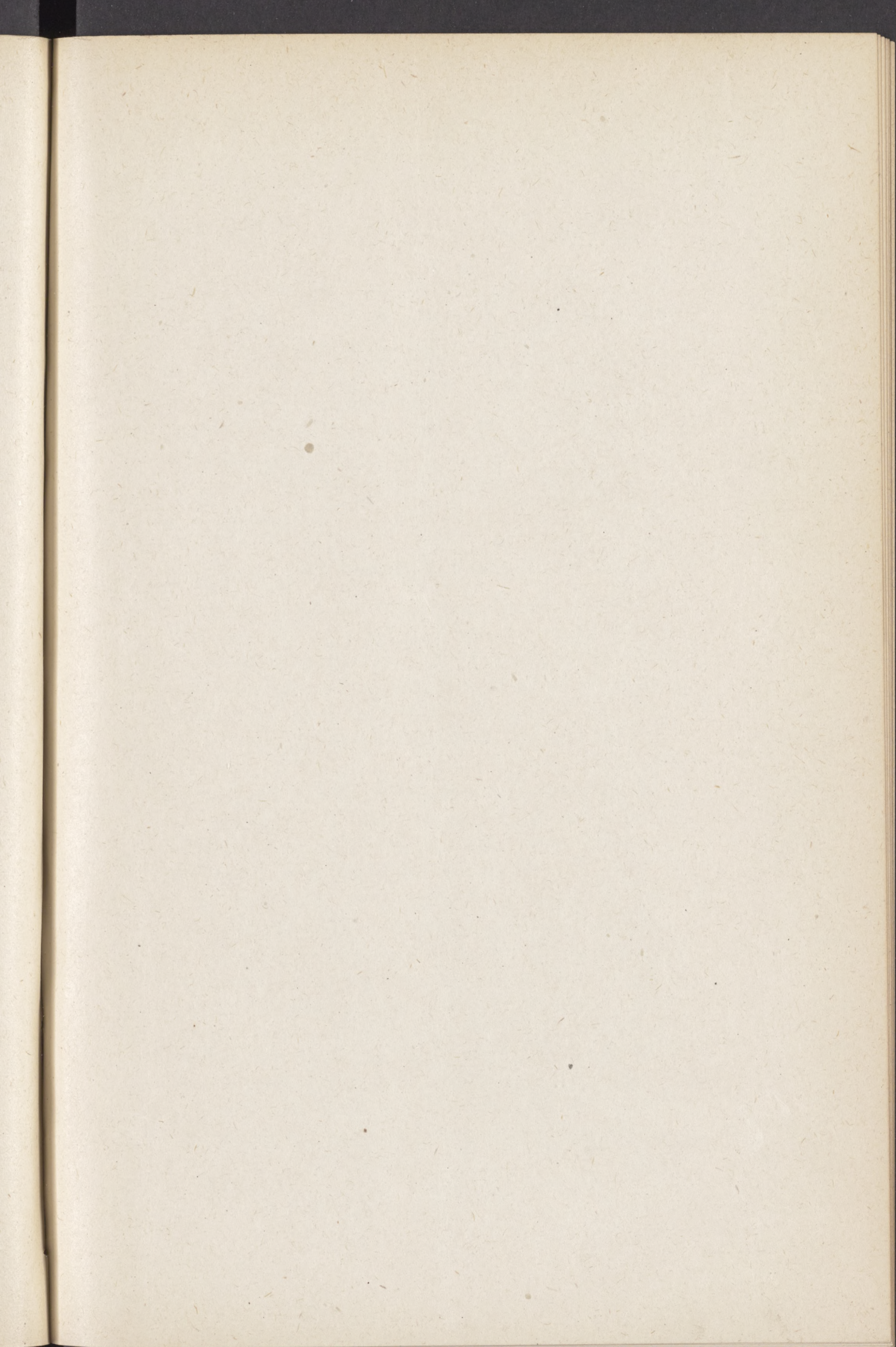
Crosby v. Wells, 73 Law 790. 20

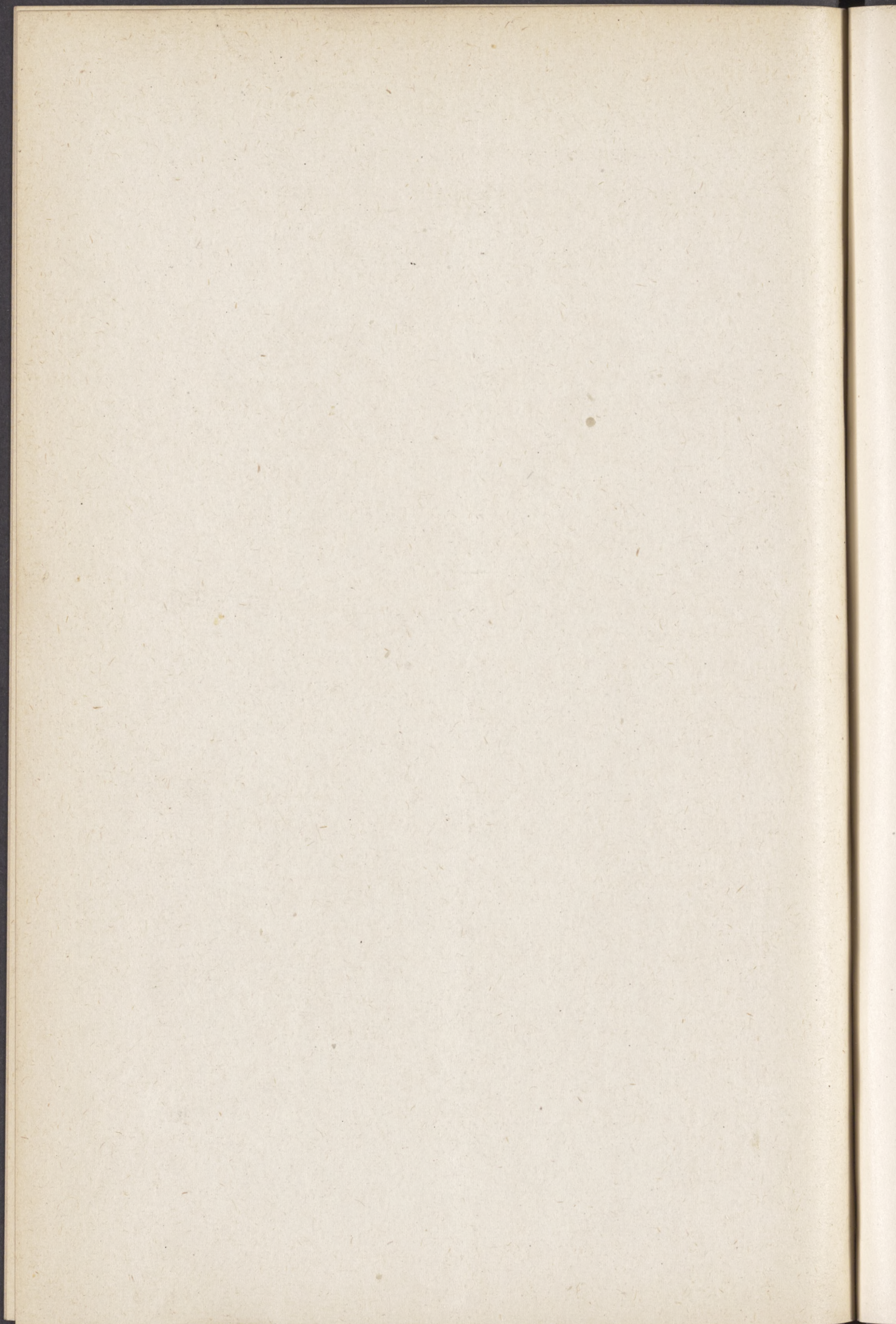
POINT III.

The Judgment below is correct and should be affirmed.

WILLIAM HAUSER,
Attorney for Plaintiff-Appellee. 30







New Jersey Court of Errors and Appeals

JOHN YOUNG,

Plaintiff-Appellee,

vs.

THE SOCIETY OF THE FIRST CON-
GREGATIONAL CHURCH OF
VERONA, N. J.,

Defendant-Appellant,

*Action-at-
Law.*

*On Appeal
from Essex
Circuit Court.*

*Brief of
Defendant-
Appellant.*

Statement of Facts

The plaintiff is a building contractor. On December 26, 1914, plaintiff and defendants entered into a contract, whereby plaintiff was to erect the foundation work in connection with an addition to the church of the defendant. The defendant did the excavating itself, in the first instance.

On April 3, 1915, a contract was entered into between plaintiff and defendant, for the superstructure, and the balance of the work for completing the addition to the church.

On August 4, 1915, after the foundation had been completed, and the superstructure all erected, except certain minor matters, the foundation of the east wall, which had been erected by the contractor "buckled in," and fell into the cellar. The superstructure sagged, and was also in danger of falling into the excavation, being held only by the steel girders which, in the absence of the sustaining wall, rested for the time being on the earth. The defendant failing in its efforts to immediately

reach the contractor, hired jacks and other supporting apparatus, and put matters in shape, so as to prevent the entire structure from falling.

There was a dispute, of course, as to a contractor's responsibility. The church could not be used without the foundation being restored. In order that the church might be restored promptly to its former condition, and made usable, plaintiff and defendant agreed to submit all the matters in dispute, arising out of the falling of this wall, to arbitration; while the arbitration was going on, and in order not to delay matters, the church was to clear out the excavation caused by the fallen wall, and the contractor was to go right ahead and rebuild the east wall, leaving the adjustment of the cost to the arbitrators. The parties agreed upon, and signed a submission set forth in a rather loosely drawn document, (Exhibit D-1).

The arbitrators appointed as a result of this submission, after several hearings, made an award (Exhibit D-3) in which they find "the contractor in a major degree responsible for the defective work," and decide that the "contractor should pay 75 per cent. of the cost of *replacing and repairing* the wall on the east side of the building"; the church 25 per cent.

The work was done, both sides adopting the award of the arbitrators, or at least their interpretation of it, and settling on this basis as they went along.

Just prior to April, 1916, a dispute arose between the parties as to whether certain items were covered by the award. The plaintiff's figures are set forth in his statement (Exhibit P-12) \$430.77; the defendant's is shown in (Exhibit D-2) \$185.69. The dispute narrows down, therefore, as to whether the award covers three items (a) the

excavation or removal of the debris from the cellar resulting from the fall of the wall (b) the bonding of the wall which had to be erected to replace the fallen wall, so as to fasten it on the intersecting walls, (c) the cost or rather the amount paid, for the shoring and shoring apparatus to keep the superstructure in place, both immediately after the accident, and during all the time contractor was restoring the wall. The church contends that all these matters being necessitated by reason of the falling of the wall, which in turn was due to defective construction, the award clearly contemplates that all these items should be paid for by the contractor, in the same proportion as the other matters. The defendant taking the position at the trial, that these matters were entirely outside of the award.

First Point

THE NON SUIT ASKED FOR BY DEFENDANT SHOULD HAVE BEEN GRANTED.

See Case, p. 61, L. 25.

The award merged and extinguished the former cause of action. Plaintiff should have sued on the award and not on the items composing his original claim.

See 3 Cyc., pp. 728-729.

The award is conclusive until set aside.

See *Richardson vs. Lanning*, 26 N. J. L., p. 130.

Second Point

A VERDICT OF \$193.42 AGAINST DEFENDANT RATHER THAN \$427.45 SHOULD HAVE BEEN DIRECTED.

As indicated above, the decision rests on the interpretation given by the Court to the award of the arbitrators. It should be kept clearly in mind, that the defendant was to do the excavating only in the first instance, before the contractor ever began his work. This excavation it completed. On August 4, 1915, the foundation had been finished, and the superstructure practically completed, and ready for occupancy; the foundation wall on the east side fell down. The cement, concrete, dirt, etc., resulting from this fall, naturally filled up a large part of the cellar. Little portions of wall jagged off were left standing. The superstructure rested only on the steel girders, which in turn had been deprived of their support, and were in danger of toppling down.

In this situation the church first tried to get in touch with the contractor, and then procured jacks and shoring apparatus to keep the superstructure from falling down. The defendant then wished to have its church building put back in shape and made available as quickly as possible, and thrash out the question of responsibility later. Accordingly the submission to arbitration resulted (Exhibit D-1).

Keeping in mind this situation as shown by the evidence, the words "the cost of *replacing and repairing*," used in the award (Exhibit D-3) clearly included the removal of the debris and excavating caused by plaintiff's negligent building of the wall.

Replace—to restore to its former condition; to put back again (See Century dictionary).

If through my negligent act, I should cause the ceiling of the Court room to fall down, and fill the room with plaster and debris, and it was subsequently adjudged that the "repairing and replacing" should be paid for by me, could it be seriously urged that I would simply have to put in a new ceiling, and that I need not clear out the debris and plaster from the room. How else could it be replaced, *i. e.*, restored to its former condition?

You cannot read the award except in the light of this submission; you cannot tell just what the submission means until the situation and the questions in dispute referred to is explained by testimony.

See 3 Cyc., p. 674.

"The award must be read in the light of the submission and every intendment will be made to support the award as within the submission."

Hoffman vs. Hoffman, 25 N. J. L., p. 177.

Hence, in view of what was submitted to arbitration, *i. e.*, the dispute concerning the fallen foundation and the excavation of the debris resulting therefrom, the words "replacing and repairing," should be construed as broad enough to cover the cost of the removal of the fallen wall from the cellar.

That the question of excavation or getting this debris out was one of the "matters of dispute," is shown in next to the last paragraph of the submission.

See Exhibit D-1, p. 88, L. 7 *et seq.*, where it speaks of "required excavation" and that the responsibility for it shall be taken up and determined by the arbitrators.

The Court should assume that the arbitrators did their duty, took up all these questions referred

to them, and that the award is within the submission.

See *Hoffman vs. Hoffman*, 26 N. J. L., p. 177.

When the final judgment of the arbitrators is that "replacing and repairing" should be paid for by each of the parties in a certain proportion, it included this excavation, which was referred as one of the matters in dispute. Otherwise we have the ridiculous situation of the arbitrators saying, "Yes, we find the contractor responsible for defective construction, and this caused the wall to fall; let him put up a new wall in place of the old one which fell; but he can leave the old one in the middle of the cellar; moreover he does not need to attach or bond the new wall we have directed him to put up, to the other walls; furthermore, if the church paid for the jacks and shoring apparatus, to hold up its structure, prevent further damage, and keep it in place while the new wall was being built, it did so at its own risk." Did the arbitrators say or mean this?

Third Point

The language of the submission standing alone is doubtful and meaningless, without the testimony of McCance or the arbitrators or both.

This testimony was excluded.

See Case, p. 69, LL. 16-38.

Case, p. 62, LL., 19-40.

Case, p. 63, LL. 1-12.

Defendant was entitled to show what the words "arbitration on matters regarding foundation," and "the matters in dispute," mentioned in the submission referred to.

How can the meaning of "matters in dispute" be determined except by evidence—excluded.

See 3 Cyc., 805.

Evans vs. Clapp, 123 Mass., p. 165.

"The submission does not include all matters, but only those in dispute."

3 Cyc., p. 679.

Fourth Point

IT WAS ERROR TO EXCLUDE THE OFFER OF THE TESTIMONY OF WILLIAM H. SENIOR AND THE ARBITRATORS, BECAUSE IT DID NOT CLEARLY APPEAR FROM THE DOUBTFUL LANGUAGE OF THE SUBMISSION, OR FROM THE AWARD, WHAT MATTERS WERE CONSIDERED, AND PAROL EVIDENCE IS ADMISSABLE TO SHOW THAT.

Excluded. See Case, p. 62, LL. 19-40, pp. 63,64.

See 3 Cyc., p. 806, Sec. 4.

Fifth Point

Senior should have been allowed to testify whether rebonding of walls and excavation or removal of debris was considered and intended to be included in the award.

This was excluded.

See Case, p. 63, LL. 10 *et seq.*, p. 64.

Testimony is admissible to show what matters were decided where not clearly shown by the award itself.

Hale vs. Huse, 10 Gray (Mass) 99.

Sixth Point

THE COURT ERRED IN EXCLUDING TESTIMONY OF McCANCE, AS TO COST OF REMOVAL OF DEBRIS RESULTING FROM THE FALLING OF THE WALL, AND THE COST OF REBONDING.

Case, p. 69, L. 37 *et seq.*

It was necessary to introduce this evidence in order to show part of the cost of "replacing and repairing" spoken of in the award.

Seventh Point

The Court by its construction, finding the award silent on the question of paying for the removal of the debris (a construction we differ with) it might be assumed to have been omitted. The testimony of the architect produced by the defendant should have been allowed to show that the fact debris was in the cellar, was the plaintiff's fault, and should be paid for by him. Excluded.

See Case, p. 77, LL. 1-26.

JONES & GLEESON,
Attorneys of Defendant-Appellant.

CHARLES JONES,
Of Counsel with Defendant-Appellant.

