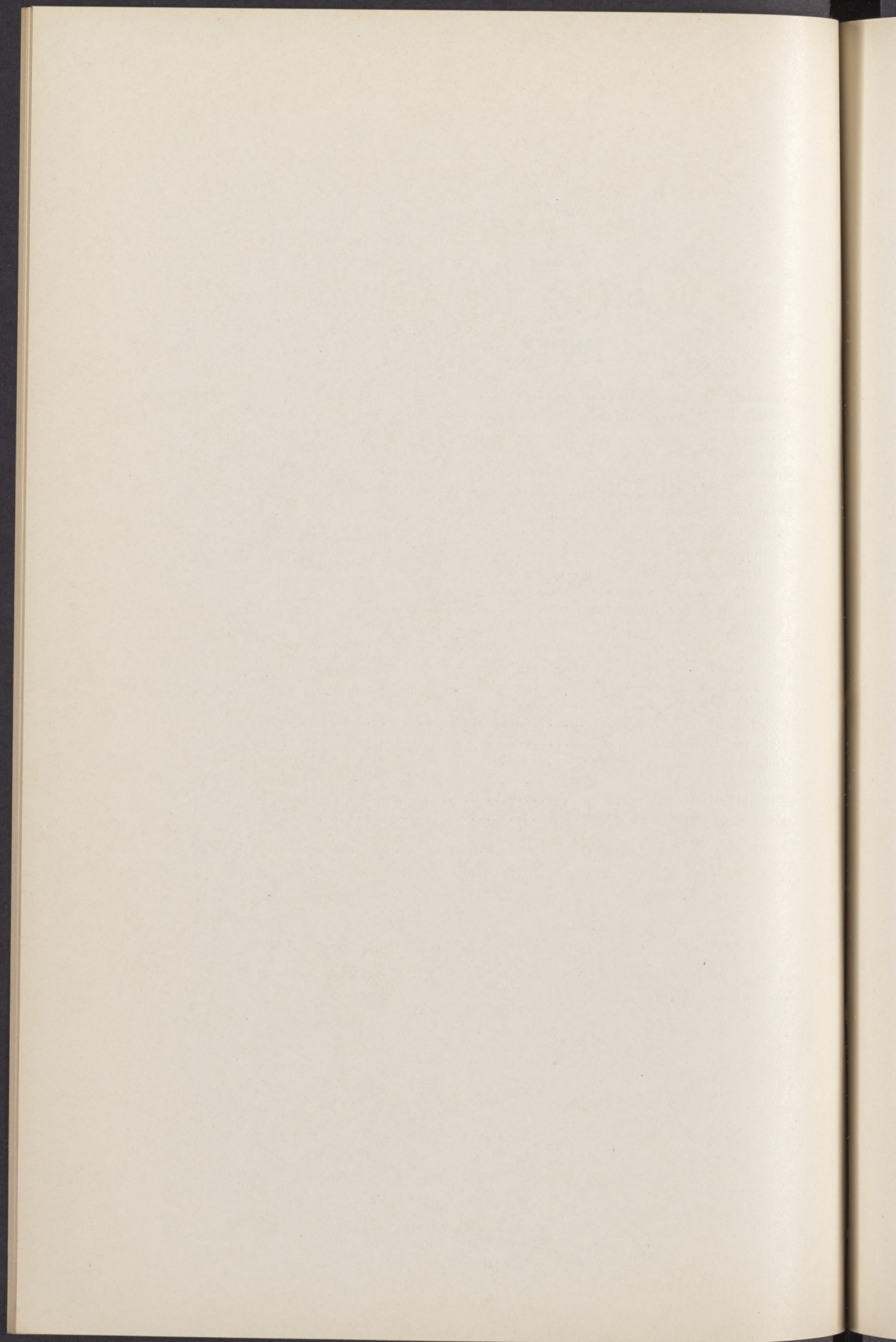


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NEW JERSEY
Court of Errors and Appeals

FRANK A. BERRY,
Plaintiff-Appellant,
vs.
THE KNIGHTS OF COLUMBUS
HOME ASSOCIATION, OF AT-
LANTIC CITY, NEW JERSEY,
a Corporation, etc.,
Defendant-Respondent.

On Appeal.

THE STATE OF NEW JERSEY, to the Knights of Colum-
bus Home Association of Atlantic
City, New Jersey, a corporation of
[SEAL] New Jersey: You are summoned
to answer the annexed complaint
of Frank A Berry in an action at
law, in the Atlantic County Circuit Court. And take
notice that unless you file your answer to the said com-
plaint with the Clerk of the Atlantic County Circuit
Court, at May's Landing, New Jersey, within twenty
days after service upon you of this writ, and the annexed
complaint, the plaintiff may proceed in the suit and judg-
ment may be entered against you.

Witness, Hon. W. Frank Sooy, Judge of the Atlan-
tic County Circuit Court, at May's Landing, this twenty-
seventh day of September, 1928.

WM. A. BLAIR,
Clerk.

LEE F. WASHINGTON,
Attorney.

ATLANTIC COUNTY CIRCUIT COURT.

	FRANK A. BERRY,	} Action at Law.
	Plaintiff,	
	vs.	
10	THE KNIGHTS OF COLUMBUS HOME ASSOCIATION, OF AT- LANTIC CITY, NEW JERSEY, a Corporation, etc.,	} Defendant.
	Defendant.	

COMPLAINT.

(Filed October 10, 1928.)

The plaintiff, Frank A. Berry, who resides in the City of Atlantic City, in the County of Atlantic and State of New Jersey, says that :

20 1. At all times herein stated, plaintiff has been and is an architect, practicing as such in and around the City of Atlantic City, in the County of Atlantic and State of New Jersey, and being duly registered and licensed as such under the laws of the State of New Jersey.

2. On or about July 12, 1926, the defendant entered into a written contract with plaintiff, a true copy of which contract is hereunto annexed, marked Exhibit "I" and hereby made a part hereof.

3. Plaintiff duly performed all of the acts and services to be performed by him under the terms of said written contract.

30 4. When plaintiff's work had progressed to a point where a contract was to be awarded for the erection of said building, defendant decided not to let said work under one contract, but determined to have substantially the entire work executed under separate contracts. In accordance with said decision and the instructions of defendant, plaintiff thereupon performed all of the additional work made necessary by the fact that defendant

had concluded to have all of the work on said building let under separate contracts instead of under one contract, such award of separate contracts making it necessary for plaintiff to take bids on upwards of thirty separate contracts, instead of on one contract; to analyze all of said bids; to recommend to defendant the successful bidders; to prepare upwards of thirty complete separate sets of contracts, instead of sets of only one contract; to see that none of said contractors interfered with any of the other of said various contractors in the progress of said work; to check-up on upwards of thirty separate requisitions for payments, instead of on one, each month; to issue architect's certificates, each month, on thirty separate contracts instead of on only one contract; to expedite the work done under upwards of thirty separate contracts, instead of on only one contract; the decision of defendant to award such separate instead of only one contract entailing a very great amount of necessary additional work upon the part of plaintiff. **10**

5. Towards the completion of said building, defendant also retained plaintiff to write the specifications for the staple furniture and equipment to go into said building and to select or design the additional decorative furniture for said building, upon the agreement that the defendant would forthwith pay plaintiff for his services in connection with such furniture and equipment the additional sum of \$1,500. **20**

6. The written contract between plaintiff and defendant (Exhibit "I") only provided a basic rate for services to be used when all of the work should be let under one contract. The work in question was not let under one contract, but was let under separate contracts, and defendant impliedly agreed that it would, in such case, pay plaintiff for his services the fair and reasonable value of the same. **30**

7. Annexed hereto, marked Exhibit "2" and hereby made a part hereof, is an itemized statement showing the fair and reasonable value of plaintiff's services, in connection with said operation. The defendant

is entitled to no further credits upon the balance of \$10,475, shown on said statement, except that plaintiff has authorized defendant to retain from said sum the sum of \$3,620.39, said last mentioned sum being a balance due from plaintiff to Eugene Powers & Son, for engineering services rendered on said operation, which last mentioned sum plaintiff admits he owes to the said Eugene Powers & Son, and stop notice as to which last mentioned sum has been served by said Eugene Powers

10 & Son upon defendant.

Plaintiff demands judgment against defendant for the sum of \$10,475 (subject to deduction for the above claim of Eugene Powers & Son, provided said claim has been paid before entry of judgment), plus interest thereon from June 13, 1928, besides costs of suit.

LEE F. WASHINGTON,
Attorney for Plaintiff.

20

EXHIBIT "I."

THIS AGREEMENT made the twelfth day of July in the year nineteen hundred and twenty-six by and between THE KNIGHTS OF COLUMBUS HOME ASSOCIATION, of Atlantic City, New Jersey, a corporation of the State of New Jersey, hereinafter called the Owner, and FRANK A. BERRY, of the City and State aforesaid, hereinafter call the Architect.

30 WITNESSETH: That whereas the Owner intends to erect a five or eight story combination club building and hotel, situate at the corner of St. James Place and Pacific Avenue in the City of Atlantic City, County of Atlantic and State of New Jersey.

Now, THEREFORE, the Owner and the Architect for the consideration hereinafter named, agree as follows:

The Architect agrees to perform, for the above-named work, professional services as stated in Article 1 of the "Conditions of Agreement between Owner and Architect," hereinafter set forth.

The Owner agrees to pay the Architect at the rate of five per cent., hereinafter called the basic rate, computed and payable as stated in the said "Conditions," and to make any other payments and reimbursements arising out of the said "Conditions."

Conditions of Agreement Between Owner and Architect.

ARTICLE 1. THE ARCHITECT'S SERVICES: The Architect's professional services consist of the necessary conferences, the preparation of preliminary studies, working drawings, specifications, large scale and full size detail drawing; the drafting of forms of proposals and contracts; the issuance of certificates of payment; the keeping of accounts, the general administration of the business and supervision of the work. 10

2. ARCHITECT'S FEES. The fee payable by the Owner to the Architect for the performance of the above services is the percentage hereinbefore defined as the basic rate, computed upon the cost of the work in respect of which such services have been performed, subject, however, to any modifications growing out of these conditions of agreement. 20

3. SEPARATE CONTRACTS: The basic rate as hereinbefore defined is to be used when all of the work is let under one contract. Should the Owner determine to have substantially the entire work executed under separate contracts, then the Owner shall employ a superintendent, acceptable to the Architect, and such clerical help as may be deemed necessary by the Owner and the Architect. 30

4. PAYMENTS: The Owner shall pay to the Architect \$500.00, the receipt of which is hereby acknowledged, and shall pay \$1,500 per month until the total payments aggregate \$5,000.00. At such time as the projected building is financed, and a contract or contracts awarded for the erection thereof, two and one-half per cent. ($2\frac{1}{2}\%$), less the amount previously paid, viz:

\$5,000.00, shall then become due, and shall be paid to the Architect by the Owner.

From time to time during the execution of the work and in proportion to the amount of service rendered by the Architect, payments shall be made until the aggregate of all payments made on account of the fee under this Article, shall be a sum equal to the Basic Rate of commission arising from this agreement, computed upon the final cost of the work.

- 10 5. SUPERVISION OF THE WORK: The Architect will endeavor to guard the Owner against defects and deficiencies in the work of contractors, but he does not guarantee the performance of their contract. The supervision of an Architect is to be distinguished from the continuous personal superintendence to be obtained by the employment of a clerk-of-the-work.

- 20 When authorized by the Owner, a clerk-of-the-work acceptable to both Owner and Architect, shall be engaged by the Architect at a salary satisfactory to the Owner and paid by the Owner, upon the Architect's monthly certificate.

6. PRELIMINARY ESTIMATE: When requested to do so, the Architect will make or procure preliminary estimates on the cost of the work, and he will endeavor to keep the actual cost of the work as low as may be consistent with the purpose of the building and with proper workmanship and materials, but no such estimate can be regarded as other than an approximation.

- 30 7. SUCCESSORS: The Owner and the Architect each binds himself, his successors, executors, administrators, and assigns, to the other party to this agreement, and to the successors, executors, administrators, and assigns of such other party in respect of all the covenants of this agreement.

The Owner and the Architect hereby agree to the full performance of the covenants contained herein.

IN WITNESS WHEREOF they have executed this agreement, the day and year first above written.

KNIGHTS OF COLUMBUS HOME ASSOCIATION,

THOMAS E. RANDOW (L. S.)

President.

As to FRANK A. BERRY (L. S.)

Attest:

FRANK J. BUCCI,

Secretary.

In the presence of

FRANK J. BLOOM

10

EXHIBIT "2."

Registered in

Penna. and New Jersey

FRANK A. BERRY

Architect

1321 Arch Street

Philadelphia, Pa.

June 13, 1928.

20

KNIGHTS OF COLUMBUS HOME ASSOCIATION, DR.

To FRANK A. BERRY.

To

Architectural Professional Services rendered on Club-Hotel Building in accordance with contract dated July 12, 1926, 5 per cent. on \$475,000.

\$23,750.

To

Fee on Furniture

1,500.

\$25,250.

30

Credit by Cash \$23,775.00

Credit by Note 500.00

24,275.

\$24,275.00

\$975.

2 per cent. \$475,000 a/c Builder's Services

9,500.

\$10,475.

Duly served within summons and complaint October first, 1928, on Knights of Columbus Home Association, of Atlantic City, New Jersey, a corporation, &c., by delivering a copy personally to Thomas J. Christensen, treasurer, at 2720 Atlantic Avenue, Atlantic City, Atlantic County, New Jersey.

JAMES CIMINO,
Sheriff.

By WILLIAM HOFFMAN,
Under Sheriff.

10

Sheriff's fees \$5.22.

ATLANTIC COUNTY CIRCUIT COURT.

FRANK A. BERRY,
Plaintiff,

vs.

20 THE KNIGHTS OF COLUMBUS
HOME ASSOCIATION, OF AT-
LANTIC CITY, NEW JERSEY,
a Corporation, etc.,
Defendant. } Action at Law.

NOTICE OF MOTION.

To Lee F. Washington, Esquire,
Attorney of Plaintiff:

30 Take notice that we will move before Honorable
W. Frank Sooy, Judge of the Atlantic County Circuit
Court, at the court room, Guarantee Trust Building,
Atlantic City, New Jersey, on the nineteenth day of Oc-
tober, 1928, at ten o'clock in the forenoon, or as soon
thereafter as the matter can be heard for an order strik-
ing out the complaint filed in the above entitled cause
on the ground that the same fails to disclose any cause
of action in that the legal construction of the contract
annexed to the complaint, and marked Exhibit 1, is not
susceptible of an interpretation permitting the implying

of an agreement to pay plaintiff the reasonable value of his services for the work done under numerous contracts.

Respectfully,
THOMPSON & HANSTEIN,
Attorneys of Defendant.

ATLANTIC COUNTY CIRCUIT COURT.

FRANK A. BERRY,
Plaintiff,

10

vs.

THE KNIGHTS OF COLUMBUS
HOME ASSOCIATION, OF AT-
LANTIC CITY, NEW JERSEY,
a Corporation, etc.,
Defendant.

Action at Law.

ANSWER.

(Filed November 10, 1928.)

20

Defendant, The Knights of Columbus Home Association of Atlantic City, New Jersey, a corporation, says that:

1. It admits the allegations contained in paragraphs 1, 2 and 3 of plaintiff's complaint.
2. It denies the allegations contained in paragraph 4 of plaintiff's complaint.
3. It admits the allegations contained in paragraph 5 of plaintiff's complaint.
4. It denies the allegations contained in paragraphs 6 and 7 of plaintiff's complaint.

30

AFFIRMATIVE DEFENSES.

1. The contract made between the plaintiff and the defendant, a copy of which is annexed to the plaintiff's complaint, provided that a rate of compensation to be paid to the defendant, said contract being conclusive as to the rate to be paid.

RESERVATION.

1. Defendant reserves all rights under his motion to dismiss the complaint heretofore filed in this cause and intends at the time of trial to urge said motion.

THOMPSON & HANSTEIN,
Attorneys for Defendant.

10

ATLANTIC COUNTY CIRCUIT COURT.

FRANK A. BERRY,
Plaintiff,

vs.

THE KNIGHTS OF COLUMBUS
HOME ASSOCIATION, OF AT-
LANTIC CITY, NEW JERSEY,
a Corporation, etc.,

Defendant.

Action at Law.

20

REPLY.

(Filed November 13, 1928.)

Plaintiff denies every allegation in the answer.

LEE F. WASHINGTON,
Attorney for Plaintiff.

ATLANTIC COUNTY CIRCUIT COURT.

FRANK A. BERRY,
Plaintiff,

vs.

THE KNIGHTS OF COLUMBUS
HOME ASSOCIATION, OF AT-
LANTIC CITY, NEW JERSEY,
a Corporation, etc.,

Defendant.

Action at Law.

10

Appearances—LEE F. WASHINGTON, ESQ., *for the Plaintiff*; THOMPSON & HANSTEIN, ESQS. (Mr. Bishop, of counsel), *for the defendant*.

The above-entitled case was tried November 16, 1928, before Hon. William Frank Sooy, Judge, by consent without a jury.

20

PLAINTIFF'S OPENING.

Mr. Washington—If your Honor please, so as to straighten out the record here, we may as well make the statement that Mr. Bishop had previously noticed a motion to strike and that by stipulation of counsel it was agreed that Mr. Bishop should file an answer in lieu of the previous motion, reserving the right to raise at the trial the same questions which he attempted to raise in the notice of motion. We have replied to that, and we are here before the Court on the understanding that your Honor is to try questions of fact just as though you sat as a jury, and in addition decide any questions of law that you feel are involved in the matter, so that final judgment may eventually be entered as you conclude against either one or the other.

30

Now, I might make the suggestion, Mr. Bishop, to keep the record straight, that you state on the record, if you will, the particular point that you want to raise

in your original notice of motion, and get your side clear.

The Court—Yes, I would like to have that on the record.

DEFENDANT'S OPENING.

10 Mr. Bishop—The notice of motion that was served was to strike the complaint for the reason that it failed to set up any cause of action, in that Exhibit "I", which is the contract between the parties, is not susceptible of an interpretation permitting the implying of an agree-
ment to pay the plaintiff the reasonable value of his services for work done under numerous contracts.

I can also say that we admit that there is a sum of money due to Mr. Berry from the defendant, and we say that sum is \$1,174.48, and we arrive at that figure by using the basic rate on the cost of the building plus the \$1,500 fee which we paid him on account of services in connection with furniture and furnishings; the difference in his account and in our account being
20 occasioned by the fact that the cost of the building on which we owed him five per cent. was actually \$478,989.50 instead of \$475,000.00.

Mr. Washington—Is it admitted that is the cost of the building aside from furnishings?

Mr. Bishop—That is the cost of the building aside from furnishings; that is right, isn't it?

Mr. Washington—Now we are ready to admit that that was the cost of the building, and it is so stipulated in this agreement.

30 Mr. Bishop—Now, there has been a stop notice served on us.

Mr. Washington—Stop notice was served upon the defendant by Eugene Bowers and Sons for the sum of \$3,620.39. The plaintiff will admit that he is indebted to Eugene Bowers and Sons in the sum of \$3,620.39. We are calling that to your Honor's attention because we would like to keep the position of all three parties clear in any ruling which you may make.

Now, we are agreeable to this; we are agreeable to having the defendant pay, if they wish to, into court their check to the order of Eugene Bowers and Sons for the amount that they admit is due, and that an agreement be entered in this case, if you wish, to do that.

Mr. Bishop—Well, I assume that could be done, except that all of the money which we have available to pay anybody is now held up at the title company because of this suit. We are ready to pay that as soon as this is settled and that money is released.

10

Mr. Washington—Then your Honor in the ruling, if we may make the suggestion, will fix the rights of Bowers as well as the others—

Mr. Bishop—You cannot rule. It is admitted that Bowers is owed so much money, and we admit we owe Berry so much money, and we are both agreed that we pay Bowers that amount of money that we owe Berry up to the amount of Bowers' claim.

Mr. Washington—We might ask, if your Honor fixes a greater amount due from the defendant to us, than they admit to be due, that your Honor may find, if you wish, that that amount should be paid direct to Bowers to the full extent of Bowers' claim, if it extends so far.

20

The Court—I do not suppose I would have any right to do that.

Mr. Bishop—We can come with two checks and give a satisfaction of the judgment.

Mr. Washington—So long as any judgment that comes in fixes that it is all right.

Now, the position of the plaintiff, your Honor, touching the contract is this: Plaintiff contends that the contract on its face fixes a specific rate that is to be paid where the work was let under one contract; that at the same time the contract specifically provides that the basic rate named in the contract should only be used where the work was let under one contract, and that it should not apply where the work was let under more than one contract. So the theory of the plaintiff's case is that the contract shows on its face that that rate

30

was not intended to apply where the work was let as it was, under more than one contract; and, therefore, under the facts as they developed that the compensation which the plaintiff is entitled to is a reasonable charge for the services which he actually rendered.

Now, we may call your Honor's attention at this time—read into the record the reference to the case of *Naumberg v. Young*, 44 New Jersey Law, 331, and suggest that this case comes within the first exception
 10 set forth in paragraph two of the syllabus of *Naumberg v. Young*, which is the case where the written contract is incomplete and on its face does not purport to contain the whole agreement between the parties.

Now, the pleadings as finally before the Court admit paragraph one of the complaint; they admit paragraph two of the complaint; they admit paragraph three, paragraph five, and they deny paragraph four, paragraph six and paragraph seven. So that I assume we must prove those paragraphs.

20 *Frank A. Berry*, called as a witness in his own behalf, being sworn, was examined and testified as follows:

Direct examination, by Mr. Washington.

Q. Mr. Berry, you are familiar with the allegations in this complaint filed by you in this matter; are you not?

A. I am.

Q. You are the plaintiff in the suit, of course?

A. I am.

Q. Was the work of erecting the building in question done under one contract or more than one contract?

30 A. Under more than one contract.

Q. Under how many contracts?

Mr. Bishop—I object to that as irrelevant and immaterial.

The Court—The objection will be noted and an exception allowed to the overruling of it if I do overrule it, and that is so with any exception made by either party in the taking of this testimony.

Mr. Washington—That is right. That will keep us straight.

A. There was somewhere between thirty and thirty-five contracts. There were actually thirty-three contractors and some of them had more than one contract.

Q. How far had the work progressed before the defendant decided to award it under more than one contract?

Mr. Bishop—I object to that as irrelevant.

A. Well, it had proceeded to the stage where we had received bids from the contractors on the basis of awarding the work under more than one contract. 10

Q. The idea at first was—you don't understand my question. (Repeated by the stenographer.) How far had the work progressed before the defendant decided to award it under more than one contract?

Mr. Bishop—I move to strike it as irresponsible.

The Court—Yes.

Mr. Washington—Strike out the first answer. 20

The Court—Yes.

Mr. Washington—We admit it is not responsible.

Q. (Repeated by the stenographer.) How far had the work progressed before the defendant decided to award it under more than one contract? Had it progressed at all?

A. In the construction of the building the plans had been prepared and the specifications.

Q. To award under one contract?

A. No; we had taken bids under the separate contract proposition. 30

Q. In other words, no bids were ever solicited on the theory of one contract?

A. No.

Q. Between the time of the making of the contract we sued upon and before any work was done on it the defendant then did conclude to award the work under more than one contract?

A. Yes.

Q. That is before any work of actual construction was done?

A. Oh, yes.

Q. Now, Mr. Berry, what work did you actually do in this matter?

The Court—There is no dispute but what he did the work under the contract?

Mr. Washington—All the work called for by the contract.

10 The Court—Now, you are suing for extra compensation by reason of the fact that he did other work by reason of the submission of bids to thirty or more contractors?

Mr. Washington—We are proceeding on the theory that the rate which the contract provided has no application to this case.

The Court—Oh, I see.

20 Mr. Bishop—That is not my understanding of their suit. Now, it may be a difference which your Honor will not agree with; but when they make the statement that they are suing for work—for extra work performed by reason of the letting of various contracts—I do not think that that is their suit. Their suit cannot be said to be anything more nor less than a suit on this contract, in which they attempt to imply an agreement to pay for work done under a certain schedule of different contracts. So there is no suit for *quantum meruit* or reasonable compensation, but a suit on their pleadings under this contract and a term which they attempt to imply in it. The recovery cannot be on the basis of *quantum meruit*.

30

Mr. Washington—May we do this at this time, your Honor, to save time? May we offer proof showing all that he did and then your Honor will be in position, if necessary, to decide the theory later?

Mr. Bishop—My objection will run to all of that testimony.

The Court—Yes, all the way through, and an exception granted on everything that I decide against you.

Q. Now, Mr. Berry, will you please tell us the work which you did for the defendant following the execution of the written contract in question?

A. I prepared the working drawings and the specifications and submitted them to various subcontractors for bids.

Q. Go ahead.

10

A. And after the bids were received I analyzed each low bid of the respective subcontractors and recommended to the Building Committee of the Knights of Columbus Home Association that the contract be drawn in favor of this contractor, after I had analyzed the bid of each respective contractor in his branch or his work. I then drew—after the committee had voted to award the contract to this particular bidder—I then drew a contract which I submitted to the contractor and to the committee for execution.

20

Q. Was that done with respect to each separate contractor?

A. Each contractor.

Q. And there were how many separate contractors altogether?

A. Thirty-three.

Q. Thirty-three? So that you prepared thirty-three separate sets of specifications?

A. Yes.

Q. Thirty-three separate sets of contracts?

A. Yes—not specifications—well, I did.

30

Q. Partial sets of specifications?

A. Partial sets of specifications; yes.

Q. Those sets included the material which would have been in one contract, except that it was split up among different men?

A. Yes; that is it.

Q. Subdivided?

A. Yes.

Q. On the contract, however, you had to prepare entirely separate contracts?

A. Yes, sir.

Q. And even as to the specifications you had to prepare sets for thirty-three men instead of—thirty-three besides the defendant's, instead of just one for one contractor and the defendant; didn't you?

A. Yes.

Q. Now, when the bids came in from the different
10 contractors were there any changes made as to any of those contracts; or, rather, were contracts awarded the first time as to each set of bidders?

Mr. Bishop—A further objection to that is that it is irrelevant and immaterial.

Mr. Washington—The purpose of that offer being to show in some instances that the same work had to be repeated time and again to cut down the cost and that that was done.

The Court—All right; the objection is noted.

A. No, I don't think there was one case where the
20 contract was awarded just as the bid came in—the low bid came in.

Q. In other words, in practically all of those instances you had to advertise for bids the second time?

A. Not advertise for bids, although we did in some cases.

Q. In how many cases did you have to do that?

A. I don't remember exactly. I know I have one in mind particularly; that is the electrical work. We originally took bids on it in January and I wrote a new specification for it and took bids again in June. I think
08 it was the tenth of June. But, continuing to answer the question, practically all of the bids had to be analyzed in order to save money; that is, I took the low bidder and went over his bid with him, finding out just what he had figured on to see whether he had interpreted the plans and specifications as was in my mind when I wrote them, and in a number of instances I found that they had not, and had included cost for items other than

in the specifications at all. In that way I was able to save a great deal of money for the Knights of Columbus Home Association.

Mr. Bishop—I ask that part of the answer be stricken as irresponsible.

The Court—Yes.

Q. After the bids were analyzed what did you then do?

A. So after the bids were analyzed I recommended to the committee that the contract be awarded. 10

Q. Contract or contracts?

A. Well, the contract in each respective case.

Q. Who drew the different sets of contracts?

A. Well, I drew the great majority of them. Sometimes they were in the nature of—I will amend that. Some of the contractors would not accept a contract that was drawn by me. They have their own forms and that was the only way they would sign up; notably the Bethlehem Fabricators and the Pittsburgh Plate Glass, which are the two instances that I recall. 20

Q. What did you do as to those contracts—you yourself? Were they checked over by anybody after they were prepared by the contractors?

A. Oh, yes, by me. I was responsible for it.

Mr. Bishop—Objected to as leading.

The Court—Oh, that obviously is so.

Q. After the various contracts were let, Mr. Berry, what did you do then?

A. You mean after they were executed?

Q. After the various contracts were executed I want you to tell us what you did. 30

The Court—Supervise the building.

Mr. Washington—I want the witness to tell us that.

A. Yes. I didn't get the trend of the question.

Q. I would like to have the witness read paragraph four of his complaint and ask if the statements in that paragraph as to the work you did are true. Read it over and if they are not true tell us—

Mr. Bishop—I object. I think that is not proper at all.

The Court—I will sustain the objection to that. I assume there is no dispute in this case at all that he did all the work he says he did; although it may be—

Mr. Washington—Paragraph four is denied.

The Court—Yes, it is denied, but he has testified substantially.

10 Mr. Bishop—I do not think he is entitled to read the complaint as prepared by counsel, to tell him what he did.

Mr. Washington—Does the defense admit or deny that he did the work set forth in that paragraph?

The Court—I assumed there was not any denial that he did the work, but they simply said under the contract that he was not entitled to any additional pay for it.

20 Mr. Washington—Is that correct? That you admit that work was done?

Mr. Bishop—He did some of it undoubtedly. No other architect was on the job. But let him tell us what he did.

The Court—You proved that he analyzed the bids; that he made several sets of contracts and that he checked up on the contracts. He has not said yet that he issued architect's certificates, but—

30 Mr. Washington—The pleadings deny that was done, and I don't want to be told later that we didn't prove what their answer denied.

The Court—Well, he cannot prove it in that way.

Mr. Washington—I will offer further proof then.

The Court—Yes.

Q. Mr. Berry, after the contracts were awarded, just tell us, if you will, what you further did in connection with this operation?

A. I supervised the construction of the building as an architect and I acted in the capacity of general contractor because there wasn't anyone else to do it.

Q. Who checked up, if anyone, on the work of the various contractors?

Mr. Bishop—I do not think that is proper.

The Court—I will permit it. I think that is all right.

Q. (Repeated by the stenographer.) Who checked up, if anyone, on the work of the various contractors? 10

A. I did.

Q. Who prepared, if anyone, requisitions for various payments?

A. I did.

Q. How often—

A. No, I didn't prepare the requisitions. The contractors sent the requisitions in.

Q. That was not the question. Who checked up on the various requisitions?

A. Oh! Excuse me. I did. 20

Q. How often? How often did you check up on them?

A. The great majority of them once a month.

Q. On all the contracts?

A. Not all the contracts in one month.

Q. Some were finished?

A. Some were finished and some had not started yet.

Q. On all the contracts which during that current month were unfinished and in progress?

A. Yes.

Q. Did you issue architect's certificates? 30

A. Yes, sir.

Q. How often?

A. Well, in the same way. The contracts that were in progress and had not been finished each month.

Q. Did you take any steps to expedite the work on the different contracts?

Mr. Bishop—I object to that.

The Court—Yes, it is leading.

Mr. Washington—Withdraw that question.

Q. What other work did you do, if any, in the progress of this work?

A. Well, I acted—I performed the duties that the general contractor usually performs.

Q. Of what did they consist?

A. Of getting the different contractors on the job and seeing that they dovetailed both as to time and work. I expedited the work in that if a contractor
10 wasn't on the job when he was supposed to be there I found out why he was not there and got him on the job; and I ordered material for the job and I expedited the shipments.

The Court—I think you have covered paragraph four.

Mr. Washington—Now, as to paragraph six, if your Honor please, the other side denies, but it is a question of law.

The Court—Yes, it is a question of law.
20 Paragraph seven you have stipulated about.

Mr. Washington—Well, we have stipulated as to the cost.

Mr. Bishop—The rest is a mere matter of calculation.

Mr. Washington—Whether or not that charge is a fair and reasonable charge has not yet been proved.

The Court—I know it has not.

Mr. Washington—Now, we have stipulated as to the cost. There is no dispute that the item of \$1,500 was a correct item. There is no admission, however, that the charge which Mr. Berry
30 now asserts is a fair and reasonable charge for what he did, and that is denied.

Q. Mr. Berry, do you know what the customary charge is for supervising architects in Atlantic City for the work of a supervising architect in the erection of any building and how the charge is determined?

Mr. Bishop—I object to that upon the ground that he has not been qualified.

Mr. Washington—Well, the answer admits that he is an architect.

Mr. Bishop—It may be he is not familiar with conditions in Atlantic City.

Mr. Washington—We will prove it.

Q. Mr. Berry, how long have you been an architect?

A. You mean how long I have been practicing?

Q. Yes.

A. Since 1913.

Q. Continuously? **10**

A. Yes, sir, except during the war.

Q. How long during the war were you not practicing?

A. About a year and a half, I guess, or two years.

Q. What work were you doing then?

A. I was working for the Emergency Fleet Corporation as an architect.

Q. Have you an office in Atlantic City as an architect?

A. No.

Q. How long have you been doing architectural work in Atlantic County? **20**

A. Well, off and on since 1913.

The Court—Is there any dispute if this charge is an authorized charge; that it is excessive? I assumed that there was not—if it is an authorized charge?

Mr. Bishop—Well, I am willing to say this: if he is entitled to any extra compensation on either the law or the facts, that two per cent. is not excessive.

Mr. Washington—All right. Then if we may stipulate that, that closes our case. **30**

The Court—Now then, as I understand it, you are asking for your extra services, over that which you would have gotten under the terms of the contract, \$9,500.

Mr. Washington—That is right, and that is stipulated as fair. Now, of course, the amount of the two per cent.—we would be limited to what

we claim here, which is a total of \$10,475.00, and not the additional excessive amount. It would run heavier.

Mr. Bishop—We want you to have everything you are entitled to, and I understand the law of architect's fees is if they are entitled to compensation on a percentage, the percentage is based on the actual cost and not anything else. Now we have stipulated the actual cost.

10 Mr. Washington—Well, we will stipulate here that the amount of judgment if you conclude we are entitled to it may exceed the amount claimed in the complaint.

The Court—I do not suppose you want to stipulate any such thing.

Mr. Washington—That is just what counsel was saying.

Mr. Bishop—I may wish to amend since there is now an additional cost in.

20 Mr. Washington—May we argue after those amendments are made?

The Court—Yes.

Mr. Washington—All right, your Honor.

The Court—So that you claim that you are entitled to five per cent. on the \$478,589.50 and in addition to that your furniture, and in addition to that two per cent. on the sum of \$478,589.00 or whatever it was?

30 Mr. Washington—That is right, changing the figure \$475,0000. in each case in the complaint to the larger amount and varying the totals accordingly.

The Court—All right.

Cross-examination, By Mr. Bishop.

Q. Now, Mr. Berry, you said in answer to what work you did on this building that you prepared working drawings and specifications?

A. Yes, sir.

Q. That you would have had to do whether work was made under one contract or a thousand?

A. Yes.

Q. You said that you submitted the specifications to subcontractors, to various subcontractors?

A. Yes.

Q. To enable them to make a bid. You would have had to submit those specifications to various contractors if the work had been let under one contract, wouldn't you?

A. Only to about one-thirtieth or one-thirty-third.

Q. You would have submitted them to some class of contractors and subcontractors and in each case you would have submitted the whole of the specifications instead of the segregated part of them that each subcontractor was to perform; is that it? 10

A. Yes; it was just multiplied by thirty-three.

Q. So instead of giving the whole thing to five men you gave one-thirtieth of it to fifty men?

A. One hundred and fifty.

Q. Or some amount. You say that you analyzed the bids. You would have had to analyze the bid or bids received if the work had been done under one contract, wouldn't you? 20

A. No; I would have had to analyze only one—no; I would not have had to analyze the bids, except that I would have had to compare them. Comparing the bids is different from analyzing.

Q. In what respect does that differ?

A. If it had been done under one general contractor the bids would have been submitted in a lump sum for the whole works.

Q. Yes.

A. Now, we would have compared those bids and selected the low bid. Now, on the other hand, in analyzing the bid when—in each branch of work in each of the thirty-three branches, I took the low bid and went over each item in that contractor's make-up sheet to see just what he had figured, on what items, and in that way I was able to see whether he had interpreted the specifications and plans rightly. 30

Q. Do you mean to say that you would not have done that if it had been let under one contract?

A. No; I would never have seen those bids. The general contractor would never have shown me those sub-bids, and he would not do it because it is not his custom.

Q. The supervision of the construction of the building as an architect you would have had to perform whether the work was let under one contract or not?

10 A. Oh, yes.

Q. I think you said you didn't draw all the contracts; some had their own forms?

A. I didn't actually draw the contract; that is, the form of it. Some had their own forms; but all the other work leading up to that was the same as in all contracts.

The Court—Did the owner employ a superintendent?

The Witness—Yes, sir.

20 The Court—Consult with you with reference to the work?

The Witness—Beg pardon?

The Court—And consulted with you with reference to the employment of a superintendent?

The Witness—Oh, yes.

The Court—And did they employ any additional clerical help by reason of the issuance of these various contracts instead of the one contract?

The Witness—Yes; they had an auditor.

08 Q. Any other clerical help outside of the auditor?

The Witness—No, nothing except in the auditor's office.

The Court—Well, in the auditor's office they employed extra clerical help, occasioned by reason of the letting of the contracts to various people instead of one general contractor?

The Witness—Yes. Of course, I couldn't say how much.

The Court—No, I understand that.

Q. What did the superintendent do?

A. Well, the superintendent was on the job continually.

Q. He was on the job all the time?

A. Yes.

Q. What was he paid; do you know?

A. His salary, do you mean?

Q. Yes.

A. \$550 a month.

10

Q. \$550 a month? And he was employed by the owner after consulting with you?

A. Yes, sir.

Q. He was suitable to you?

A. Yes, sir.

Q. What were his duties on the job all the time?

A. Well, the superintendent is the general contractor's representative on the job, and we realize that a general contractor cannot be on the job all the time, and he must have somebody there to represent him, and the superintendent is his representative on the job.

20

Q. He represented the owners?

A. Well, you might put it that way. He represented the owners and he represented me because I was acting as the general contractor.

Q. Were you paying him?

A. No, I was not.

Q. Who was paying him?

A. The owner was paying him.

Q. The owner was paying him. Did this superintendent—Everett, I think was his name; wasn't it?

30

A. That is right.

Q. Didn't he order materials?

A. He ordered materials that a superintendent would ordinarily order on a job.

Q. Didn't he make requisitions for material out and hand them to the owner?

A. Yes; he made purchase orders.

Q. Purchase orders?

A. Yes.

Q. Did he make those purchases after they were approved by the owner?

A. After they were approved by me.

Q. Didn't the owner have to approve them?

A. No; I just—

Q. Well, he made the purchases after they were approved?

A. They were approved by me.

10 Q. Didn't he on several occasions go out of town to trace up material and get it on the job?

A. Yes, at my direction.

Q. For the owner?

A. Yes, for the owner, at my direction.

Q. You didn't pay him?

A. No, I didn't pay him. The general contractor doesn't pay the superintendent out of his profit or fee.

Q. I am not asking that.

Mr. Bishop—I ask it be stricken as irresponsible.

20 Q. Are you a member of the American Institute of Architects?

A. I am.

Q. Are you familiar with their form of contract?

A. Yes, I am. Quite familiar with it.

Q. And will you look at this sheet of paper that I hand you, to which I direct your special attention to paragraph numbered four, entitled "separate contracts," and tell me whether that is their form of contract?

A. Yes, that looks like the American Institute form.

Mr. Bishop—I offer this in evidence.

30

Mr. Washington—For what purpose?

Mr. Bishop—I want the Court to have the form of it before him. It is the American Institute's form of architect's contract and agreement between owners and architects.

Mr. Washington—We think it is entirely incompetent, immaterial and irrelevant. We have here a specific contract which is in evidence.

The Court—Yes, Mr. Bishop. I do not see how that could be of any assistance unless you

admit that the terms of this contract are ambiguous so that it requires outside testimony.

Mr. Bishop—We say the contract is complete. They are trying to add to it. I want to show what this contract is on the American's form.

The Court—It won't do you a bit of good unless—

Mr. Bishop—Just to put before your Honor that he left out—

Mr. Washington—What has that got to do with it? Are you trying to supply something to the contract? You say we cannot do it. 10

The Court—If you are proceeding on the theory that there is an ambiguity in the contract entered into between the parties—

Mr. Bishop—No, no.

The Court—Under *Naumberg vs. Young*, I will receive your evidence; but if on the other hand you are saying there is not any ambiguity—

Mr. Bishop—But you have permitted testimony— 20

The Court—You mean—

Mr. Bishop—Of what the thing is worth if they are entitled to it.

Mr. Washington—You have admitted that.

Mr. Bishop—Or, I admitted an amount. I admit the percentage.

The Court—I haven't got anything to do with this. I am firmly convinced—

Mr. Bishop—What I am saying is this: they offered testimony—and Mr. Washington says I admitted—I admitted two per cent. is the percentage. They offered testimony and offered to show that they are entitled to extra compensation outside of this contract. 30

The Court—Yes.

Mr. Bishop—Now, in an effort to meet that, if that is accepted and received, I want this special form of contract in so that in comparison with what is in our contract you will see that the

parts of this contract he left out are the very parts that provide for other features.

The Court—Oh, no, no.

Mr. Bishop—Well, that is rejected?

The Court—Yes; that is rejected.

Mr. Washington—It may be well to leave it with the stenographer, have it marked, and if your Honor wants to have it put into the record—

10 The Court—I will take it as it is as an exhibit and then I will rule on it the same as I have all other questions.

Mr. Washington—And we object to it.

The Court—Yes.

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

Q. When was it first agreed—

Mr. Bishop—Withdraw that.

20 Q. At the time the owner decided to let the work under separate contracts instead of under one contract, who made the suggestion that the contracts for the work be so let?

A. I did.

Mr. Washington—I object to that as entirely incompetent, irrelevant and immaterial. What difference does that make?

The Court—I will let it stand subject to the objection and exception.

Q. And what did you tell them at that time that letting the contract so would save them?

30 A. That they could save a lot of money, which they did.

Q. Did you tell them what they would save?

A. In percentages.

(Recess to 1:30 P. M.)

AFTER RECESS

Frank A. Berry, recalled.

Cross-examination by Mr. Bishop (resumed):

Q. Mr. Berry, when a superintendent is employed on a construction job of this kind, who pays the superintendent, the owner or the general contractor?

A. Well, of course, the owner pays for it. The owner pays for it in the end just the same as he does the general contractor.

Q. He pays for it in the end, but who pays the superintendent's wages?

A. The contractor pays his wages.

Q. The general contractor pays his wages; doesn't he? **10**

A. Yes.

Q. When a clerk of the work is put on who pays for that?

A. The owner.

Q. The owner originally and not the architect?

A. The owner pays for the clerk of the work.

Q. That is the usual custom?

A. Yes—well, it is sometimes changed. It depends on the contract. It is sometimes changed. But unless it is stipulated in the contract the owner pays it. **20**

Q. Now answer me this question: where the contract is let in separate contracts, or where contracts are let for the construction of a building under separate contracts and the owner pays for a superintendent and pays for a clerk of the work, is it usual for the architect to also charge a greater rate than the basic rate?

A. You mean the basic rate that would be charged under one contract?

Q. That is right.

A. Oh, yes; surely it is.

Q. Even where the owner pays for those two things? **30**

A. Oh, yes.

Q. And you say that is the general custom?

A. Yes.

Q. Well, have you had another job at the time you were erecting this building?

A. Yes, sir.

Q. Where was that, in Elizabeth?

A. Elizabeth, New Jersey.

Q. You were up there quite frequently?

A. I was up there at an average one day a week.

Q. How many days did you average down here?

A. I would average at least three days a week down here.

Q. Did you put in the entire day down here?

A. Practically, yes.

Q. What do you mean by practically?

10 A. Well, I mean when I would stay down here that would be the only reason—you see, my office is in Philadelphia, and when I would stay down here that would be all I would have to be down for, the K. of C. job.

Q. How many hours each day that you stayed down would you put on that job?

A. Well I would say that I put practically the whole day. I might not have been right on the job but I would be around town in reference to that job practically the whole day. As a matter of fact for the last
20 three weeks I don't think I left the job at all.

Q. That is just as it was being completed. That is all. Did the defendant, the Knights of Columbus Home Association of Atlantic City, New Jersey, ever agree to pay you any other money for your services in connection with this building than the five per cent. the basic rate that was agreed on in the contract, and the item that was paid you for furniture?

A. There was never an agreement, no.

Q. Never any agreement with you verbally or written?

30 A. I protested at a meeting that I could not—that I was not prepared to go on with the thing under separate contracts unless there was something done about paying me for it; but there was never any agreement. It was discussed but there was no agreement.

Q. As a matter of fact what did happen at the meetings where you did protest?

A. Well, there was a lot of discussion but there was never any agreement.

Q. Weren't you told very definitely that there would be no further payment except the five per cent.?

A. I may have been told that.

Q. You were a member of this committee, weren't you?

A. Yes.

Q. Member of the Local Council of the Knights of Columbus?

A. Yes.

Q. Did you ever state to this committee that you were not receiving anything extra for this work done by reason of separate contracts? 10

A. No.

Mr. Bishop—That is all.

Witness excused.

Daniel J. McLaughlin, called as a witness, for the defendant, being sworn, was examined and testified as follows:

Direct examination by Mr. Bishop.

Q. Mr. McLaughlin, you are a member of the Local Council of the Knights of Columbus? 20

A. Yes, sir.

Q. Do you remember what week it was—do you remember what committee it was that had this building in charge?

A. The Ways and Means Committee.

Q. Of the Council.

A. Of the Council.

Q. Mr. Berry was a member of that committee?

A. Yes, sir.

Q. Were you present at a meeting of that committee at which it was decided to build the present Knights of Columbus Home by letting out a various number of contracts instead of doing it all under one contract? 30

A. Yes, sir.

Q. Who proposed that that method should be followed?

A. Mr. Berry, the architect.

Q. Will you give, as nearly as you can recollect, his statement to the committee and the reasons that he gave, if any, for the following of that method?

A. Well, his reasons for giving it to subcontractors was that the general contractor as a usual thing put a charge of ten per cent. on the subcontractor's bids and that by letting it out to subcontractors ourselves Mr. Berry said that we would be able to save that ten per cent. that the general contractor usually tacked on to the subcontractors' bids.

10 Q. Was there any additional items of cost to the association by letting it under that method?

A. Not to my recollection.

Q. Superintendent—that is what I mean.

A. Oh, yes; superintendent was to be hired by the Home Association.

Q. And clerical help was also provided for in the contract?

A. Yes, sir.

20 Q. Aside from the superintendent and clerical help provided by the contract to be employed by the owner, did Mr. Berry say there would be any further additional expense of having the work done under separate contracts instead of one?

A. He did not.

Q. What?

A. He did not.

Q. Did he say that that would be all the expense?

A. He said that he would save us that ten per cent.

Q. Now, were you present at a meeting which was held in the Turn Verein?

30 A. No, I was not present.

Q. You were not at that meeting? Did Mr. Berry at any time during the course of construction state to that committee that he expected to receive an additional two per cent. compensation?

A. Not until the building was completed and we were about ready to make settlement.

Q. And what happened at that meeting?

A. He brought in a bill totaling something around \$9,900 or claiming that was for work done by him instead of the general contractor.

Q. What happened?

A. The bill was rejected by the committee.

Q. Did you ever hear Mr. Berry at any time during the course of the construction at meetings of the committee say that he was not getting any extra compensation for the work, as it was being done under separate contractors?

10

A. No, sir.

Mr. Bishop—Cross-examine.

Mr. Washington—No questions.

Witness excused.

Dennis E. Kelly, called as a witness on behalf of the defendant, being sworn, was examined and testified as follows:

Direct examination, by Mr. Bishop.

Q. Mr. Kelly, you are a member of the local organization of the Knights of Columbus and a member of the Ways and Means Committee?

20

A. Yes, sir.

Q. And served in that committee during the course of construction of the building?

A. Yes, sir.

Q. Were you present at the meeting at which it was determined that the work should be done under separate instead of one contract?

A. I was.

Q. And who made that proposition?

A. Mr. Berry.

30

Q. What was the reason that he gave?

A. His reason was that we would save the usual ten per cent. surplus that the contractor always adds on to the subcontractor's bill.

Q. Did he say it would cost you an extra fee for him by doing it that way?

A. He did not.

Q. You knew, of course, that by doing it that way under your contract you were required to employ a superintendent and clerical help?

A. We employed a superintendent at his suggestion.

Q. Well, you were required to do that under your contract?

A. Yes.

Q. Did the committee figure out the cost of doing it both ways?

10 A. We did not. We took his word for it.

Q. Took his word for it?

A. Took his word absolutely.

Q. Were you present at the meeting that took place at the Turn Verein?

A. I was.

Q. What was said on that occasion?

A. Mr. Berry put in a requisition for a thousand dollars that night.

Q. As part of his fee?

20 A. As part of his fee.

Q. Yes.

A. Which he was entitled to. One of the members on the committee, Mr. Kavanaugh, objected, saying that it was not due at that particular time. Mr. Berry said he was not getting paid for anything else outside of what he was doing there. He made that statement at that time.

30 Q. Did you hear Mr. Berry say at any other time during the course of the construction of this building that he was not receiving any extra compensation by reason of the fact that the work was let under separate contracts?

A. No; never raised that point.

Q. But you did hear him say that at that time?

A. I did at that particular time.

Q. Did he ever demand or request of the committee or the council payment of extra compensation for the work?

A. Not until the final settlement.

Q. And what happened on that occasion?

A. Mr. Berry brought in a bill there for the two per cent. that he alleges was due him. One of the members of the committee moved that it be laid on the table. I passed a remark that it was a shake-down pure and simple and that he was not entitled to it.

Q. And what was done?

A. It was rejected.

Mr. Bishop—cross-examine.

Cross-examination, by Mr. Washington.

10

Q. You speak of a conversation with Mr. Kavanaugh?

A. Mr. Kavanaugh was at that meeting at the Turn Verein. He was the gentleman on the committee who objected to Mr. Berry getting the thousand dollars. He said it was not due at that time. The thousand was, according to the terms of his contract, understand. That is how the argument arose.

Q. Now, when was it that that conversation was had; at what time?

20

A. Well, that was in the fall of 1927.

Q. How far had the work progressed then?

A. Oh, the work was—well—

Q. Finished?

A. No, nothing like it.

Q. Half done?

A. Possibly about half done.

Q. Who were present at the conversation?

A. Kavanaugh is the one I recollect. Most of the members of the committee were there; but there are several of these men out of town today; couldn't get in touch with them. Kavanaugh for one is not here.

30

Q. Was this a committee meeting?

A. Yes.

Q. What was said by Mr. Berry?

A. He said he was not getting paid for anything else. That was about the exact expression he used at that meeting.

Q. He objected then that he was not being paid for anything?

A. He said he was not getting paid.

Q. Exactly. He objected at that time that he was not getting paid for anything except in accordance with the contract?

A. Yes, sir; wasn't getting paid for anything else.

Mr. Washington—That is all.

Witness excused.

William L. Nappier, called as a witness on behalf of
 10 the defendant, being sworn, was examined and testified as follows:

Direct examination, by Mr. Bishop.

Q. You are a member of the local council of the Knights of Columbus?

A. Yes, sir.

Q. A member of the Ways and Means Committee of that association?

A. Yes, sir.

20 Q. Were you present at the meeting of that committee which determined that the work on the new home should be let under separate contracts instead of one contract?

A. Yes.

Q. And at whose suggestion was that determination arrived at?

A. The architect's, Mr. Berry.

Q. Did he give a reason for asking that it be done that way?

A. He claimed that we could save money by it.

30 Q. Did he say anything at that time about an extra fee being paid through him if the work was done on that basis?

A. No.

Q. As a member of that committee and of the council did you ever hear Mr. Berry claim that he was entitled to any extra compensation by reason of the fact that the work was done under separate contracts instead of one contract?

A. No.

Q. Were you present at the final meeting, just before settlement, when Mr. Berry presented a bill?

A. No; I was not present then.

Q. You were not at that meeting?

A. No.

The Court—I do not remember any testimony on the part of Mr. Berry that he ever said to anyone that he was going to ask for extra money.

Mr. Washington—Not yet, and the complaint, your Honor will note, is on the implied agreement to pay. 10

The Court—And he also says that he had told them that they would save certain money by letting out separate contracts.

Mr. Washington—Yes.

Mr. Bishop—He told them they would save money. These men say he told them—

The Court—That is not denied.

Mr. Bishop—Nothing was said at that time by him telling them that it was going to cost them anything else extra. 20

Mr. Washington—He has not been examined as to that.

The Court—Unless it is controverted I do not see any reason for accumulating this testimony.

Mr. Bishop—The testimony of three or four other gentlemen is cumulative.

Mr. Washington—Our complaint states that it was implied.

Witness excused.

Defendant rests.

30

Frank A. Berry, recalled in rebuttal.

Direct examination in rebuttal, by Mr. Washington.

Q. Mr. Berry, Mr. McLaughlin testified as to some talk about your stating that there would be a saving by not having a general contractor. Did you make such a statement?

A. Yes.

Q. What did you tell the committee?

A. Beg pardon?

Q. What did you tell the committee about a saving through not having a general contractor?

Mr. Bishop—I object. He has already testified to this on cross-examination.

Mr. Washington—You brought it out.

10 The Court—He said in his direct examination he told them there would be a saving. You brought testimony to show that there would be a saving of ten per cent. Now, he is asking what the conversation was.

The Witness—I told them they would save money by not having a general contractor.

Q. Did you tell them how much they would save?

A. I think the figure was put at twenty-five to thirty thousand dollars.

Q. Do you know how much they have actually saved even if you are paid what you claim, through not having a general contractor?

20 Mr. Bishop—I think that is irrelevant.

The Court—Let it come.

Mr. Bishop—Exception.

The Court—How much?

The Witness—You mean aside from my bill?

Q. Aside from your bill how much have they saved through that fact that no general contractor was employed, even if you should eventually be paid the additional amount that you are claiming? How much will they still have saved above your charge on the general contract?

A. I would say at least sixty thousand dollars.

30 Q. Now, Mr. McLaughlin testified, did he not, after having some conversation with you that you weren't going to be paid—was it Mr. McLaughlin or Mr. Kelly?

The Court—Mr. Kelly.

Q. Mr. Kelly testified as to some statement having been made by you that you were not being paid for certain work. Will you tell us just what that conversation was; how it came about?

A. I was endeavoring to collect a thousand dollars.

Q. On what account, for what?

A. On the five per cent. on the basic rate, and I was not getting it. I don't remember just how it came up; but I said that—they said that I was getting plenty of money. "Well," I said, "that is just the point," I was not getting it.

Q. Whom did you tell that to?

A. To the committee—oh! I remember now how the question came up. The steel was erected, or partly 10 erected, and Mr. Kavanaugh wanted to know what I was getting all this money for, because he couldn't see anything over there but a hole in the ground and some pieces of steel erected, and I explained that if they had waited for me—until the steel got there to do my work, they would never get the job finished; in other words, that my work on the plans and details was all finished long before the steel got there.

Q. In other words, they were complaining that they had paid you a whole lot on account of your contract before there was anything to show in actual construction? 20

A. Exactly, and I was arguing to get this thousand dollars.

Q. Which you claimed was then due you on account of the main contract?

A. Yes, exactly.

Q. Did you ever make any statement to anybody that you were not going to get paid anything beyond that five per cent.?

A. No.

Q. Ever agree that you were not to be paid anything beyond the five per cent.? 30

A. No.

Mr. Bishop—No questions.

Witness excused.

The Court—I would like to have your briefs as soon as you can do it and I would suggest that you send me briefs on the law; that Mr. Washington send you a

brief on the law and you send him your brief, and you send me your briefs also. At the same time send me these copies of the pleadings. I won't need the file; just the pleadings and the notes and then I will have it altogether, and depending on my court engagements I will try to give it my earliest possible attention.

EXHIBIT D-1.

10 CONDITIONS OF AGREEMENT BETWEEN OWNER AND ARCHITECT.

Article I. *The Architect's Services.*—The Architect's professional services consist of the necessary conferences, the preparation of preliminary studies, working drawings, specifications, large scale and full size detail drawings; the drafting of forms of proposals and contracts; the issuance of certificates of payment; the keeping of accounts, the general administration of the business and supervision of the work.

20 2. *The Architect's Fee.*—The fee payable by the Owner to the Architect for the performance of the above services is the percentage hereinbefore defined as the basic rate, computed upon the cost of the work in respect of which such services have been performed, subject, however, to any modifications growing out of these Conditions of Agreement.

30 3. *Reimbursements.*—The Owner is to reimburse the Architect the cost of transportation and living incurred by him and his assistants while travelling in discharge of duties connected with the work, and the costs of the services of heating, ventilating, mechanical, and electrical engineers.

4. *Separate Contracts.*—The basic rate as hereinbefore defined is to be used when all of the work is let under one contract. Should the Owner determine to have certain portions of the work executed under separate contracts, as the Architect's burden of service, expense, and responsibility is thereby increased, the rate in connection with such portions of the work shall be four per

cent. greater than the basic rate. Should the Owner determine to have substantially the entire work executed under separate contracts, then such higher rate shall apply to the entire work. In any event, however, the basic rate shall, without increase, apply to contracts for any portions of the work on which the Owner reimburses the Engineer's fees to the Architect, and to the cost of articles not designed by the Architect but purchased under his direction.

5. *Extra Services and Special Cases.*—If after a definite scheme has been approved, the Owner makes a decision which, for its proper execution, involves extra services and expense for changes in or additions to the drawings, specifications or other documents; or if a contract be let by cost of labor and material plus a percentage or fixed sum; or if the Architect is put to labor or expense by delays caused by the Owner or a contractor, or by the delinquency or insolvency of either, or as a result of damage by fire he shall be equitably paid for such extra service and expense. 10

Should the execution of any work designed or specified by the Architect, or any part of such work be abandoned or suspended, the Architect is to be paid in accordance with or in proportion to the terms of Article 6 for the service rendered on account of it up to the time of such abandonment or suspension. 20

6. *Payments.*—Whether the work be executed or whether its execution be suspended or abandoned in part or whole, payments to the Architect on his fee are, subject to the provisions of Article 5, to be made as follows: 30

Upon completion of the preliminary studies, a sum equal to 20% of the basic rate computed upon a reasonable estimated cost.

Upon completion of specifications and general working drawings (exclusive of details) a sum sufficient to increase payments on the fee to 60% of the rate or rates of commission arising from this agreement, computed

upon a reasonable cost estimated on such completed specifications and drawings, or if bids have been received then computed upon the lowest bona fide bid or bids.

From time to time during the execution of work and in proportion to the amount of service rendered by the Architect, payments shall be made until the aggregate of all payments made on account of the fee under this Article, but not including any covered by the provisions of Article 5, shall be a sum equal to the rate or rates of

10 commission arising from this agreement, computed upon the final cost of the work.

Payments to the Architect, other than those on his fee fall due from time to time as his work is done or as costs are incurred.

No deduction shall be made from the Architect's fee on account of penalty, liquidated damages, or other sums withheld from payments to contractors.

7. *The Owner's Decisions.*—The Owner shall give thorough consideration to all sketches, drawings, specifications, proposals, contracts, and other documents laid
20 before him by the Architect and, whenever prompt action is necessary, he shall inform the Architect of his decisions in such reasonable time as not to delay the work of the Architect nor to prevent him from giving drawings or instructions to contractors in due season.

8. *Survey, Borings and Tests.*—The Owner shall furnish the Architect with a complete and accurate survey of the building site, giving the grades and lines of streets pavements, and adjoining properties; the rights, restrictions, easements, boundaries, and contours of the building site, and full information as to sewer, water gas, and
30 electrical service. The Owner is to pay for borings or test pits and for chemical, mechanical, or other tests when required.

9. *Supervision of the Work.*—The Architect will endeavor to guard the Owner against defects and deficiencies in the work of contractors, but he does not guarantee the performance of their contracts. The super-

vision of an architect is to be distinguished from the continuous personal superintendence to be obtained by the employment of a clerk-of-the-works.

When authorized by the Owner, a clerk-of-the-works acceptable to both Owner and Architect shall be engaged by the Architect at a salary satisfactory to the Owner and paid by the Owner, upon presentation of the Architect's monthly certificates.

10. *Preliminary Estimates.*—When requested to do so, the Architect will make or procure preliminary estimates on the cost of the work and he will endeavor to keep the actual cost of the work as low as may be consistent with the purpose of the building and with proper workmanship and material, but no such estimate can be regarded as other than an approximation. 10

11. *Definition of the Cost of the Work.*—The words "the cost of the work" as used in Articles 2 and 6 hereof are ordinarily to be interpreted as meaning the total of the contract sums incurred for the execution of the work, not including Architect's and Engineer's fees, or the salary of the Clerk-of-the-Works, but in certain rare cases, e. g., when labor or material is furnished by the Owner below its market cost or when old materials are re-used, the cost of the work is to be interpreted as the cost of all materials and labor necessary to complete the work, as such cost would have been if all materials had been new and if all labor had been fully paid at market prices current when the work was ordered, plus contractor's profits and expenses. 20

12. *Ownership of Documents.*—Drawings and specifications as instruments of service are the property of the Architect whether the work for which they are made be executed or not. 30

13. *Successors and Assignment.*—The Owner and the Architect, each binds himself, his successors, executors, administrators, and assigns to the other party to this agreement, and to the successors, executors, administrators, and assigns of such other party in respect of all the covenants of this agreement.

The Architect shall have the right to join with him in the performance of this agreement, any architect or architects with whom he may in good faith enter into partnership relations. In case of the death or disability of one or more partners, the rights and duties of the Architect, if a firm, shall devolve upon the remaining partner or partners or upon such firm as may be established by him or them, and he, they or it shall be recognized as the "successor" of the Architect, and so on until

10 the service covered by the agreement has been performed. The Owner shall have the same rights, but in his case no limitation as to the vocation of those admitted to partnership is imposed.

Except as above, neither the Owner nor the Architect shall assign, sublet or transfer his interest in this agreement without the written consent of the other.

14. *Arbitration.*—All questions in dispute under this agreement shall be submitted to arbitration at the choice of either party.

20 No one shall be nominated or act as an arbitrator who is in any way financially interested in this contract or in the business affairs of either party.

The general procedure shall conform to the laws of the State in which the work is to be erected. Unless otherwise provided by such laws, the parties may agree upon one arbitrator; otherwise there shall be three, one named in writing by each party and the third chosen by these two arbitrators, or if they fail to select a third within ten days, then he shall be chosen by the presiding officer of the Bar Association nearest to the location of

30 the work. Should the party demanding arbitration fail to name an arbitrator within ten days of his demand, his right to arbitration shall lapse. Should the other party fail to choose an arbitrator within said ten days, then such presiding officer shall appoint such arbitrator. Should either party refuse or neglect to supply the arbitrators with any papers or information demanded in writing, the arbitrators are empowered by both parties to proceed *ex parte*.

The arbitrators shall act with promptness. If there be one arbitrator his decision shall be binding; if three, the decision of any two shall be binding. Such decision shall be a condition precedent to any right of legal action, and wherever permitted by law it may be filed in Court to carry it into effect.

The arbitrators shall fix their own compensation, unless otherwise provided by agreement, and shall assess the costs and charges of the arbitration upon either or both parties.

10

The award of the arbitrators must be in writing and, if in writing, it shall not be open to objection on account of the form of the proceedings or the award, unless otherwise provided by the laws of the State in which the work is to be erected.

The Owner and the Architect hereby agree to the full performance of the covenants contained herein.

IN WITNESS WHEREOF they have executed this agreement, the day and year first above written.

In Presence of

20

..... }
..... }
..... }
..... }

as to

as to

ATLANTIC COUNTY CIRCUIT COURT.

FRANK A. BERRY,
Plaintiff,
vs.
 THE KNIGHTS OF COLUMBUS
 HOME ASSOCIATION, OF AT-
 LANTIC CITY, NEW JERSEY,
 10 a Corporation, etc.,
Defendant.

CONCLUSIONS.

(Filed December 21, 1928.)

Lee F. Washington, Esq., for Plaintiff.

Thompson & Hanstein, Esqs., for Defendant.

Sooy, J.

20 This case was submitted on a stipulation of facts and testimony taken before me without a jury.

The case arises out of a contract between the parties by the terms of which plaintiff was to have been paid and has, in part, been paid for his services as architect in the erection of a building for defendant.

Defendant admits that there is a balance due to the plaintiff which balance it is willing to pay but plaintiff says that the balance due is in excess of that conceded by defendant, hence this suit.

30 Plaintiff says that the contract between the parties provided that he was to be paid for his services the basic rate of 5 per cent., provided that the work contemplated by said contract should be let under one contract, but that the work was, in fact, not so done, but some thirty contracts were awarded; that the work of plaintiff under the thirty contracts was greatly in excess of what it would have been under one contract; that the contract between the parties is silent as regards compensation for the extra work and that the law will read into the con-

tract an implied promise on the part of defendant to pay for this extra work and that parol evidence is admissible to complete the original contract in those respects in which it is obviously incomplete.

Counsel for plaintiff has cited numerous authorities in support of the well recognized rules of law supporting his contention that in certain cases, the law will imply promises unexpressed in the contract and that parol evidence is admissible under plaintiff's construction of the contract.

10

I have no quarrel with the principals of law contended for by plaintiff but it is quite obvious that if, upon a careful reading of the contract, a complete contract is disclosed so that the parties have, in fact, contracted for compensation for the plaintiff either under the separate contract or the multi-contract theory, then the application of these principals so ably presented will not be necessary.

Let us look at the contract itself.

Article 1. Architects' Services: (*inter alia*) "the drafting of forms of proposals and Contracts." 20

Article 2. Payment of fee is the basic rate, subject, however, to any modification growing out of these conditions of agreement."

Article 3. Separate Contracts: "The basic rate as hereinbefore defined is to be used when all of the work is let under one contract. Should the owner determine to have substantially the entire work executed under separate contracts, *then the owner shall employ a superintendent, acceptable to the architect, and such clerical help as may be deemed necessary by the owner and architect.*" 30

Article 4. Payments: To be made "at such time as the projected building is financed, and a *contract or contracts* awarded.

Article 5. Supervision of the Work: Provides for employing clerk of work.

Article one does not help materially in a construction of Article 3. It does provide that the architect shall

draft "contracts" and tends to show that the contingency of more than one contract was in mind.

Article 2 merely provides that the modifications of the contract may be made.

Article 3 seems to me to be clear, explicit and to fully state the agreement between the parties in such manner as to require no outside aid either for parol evidence or implication of law to incorporate therein some duty or liability not therein provided for.

- 10** The parties say in this article that the basic rate is to be used when the work is under one contract, if not, but under more than one, then the owner shall employ a superintendent and such clerical help as may appear to be necessary.

It clearly appears that the superintendent and clerical force was to be provided by the owner, at its expense, and that this superintendent and clerical force was to be employed in order that the architect might be relieved of the extra duties and expenses that would naturally

- 20** follow as an incident to the letting of more than one contract. In other words, to do the very things which plaintiff says he was compelled to do and for which he seeks extra compensation notwithstanding the fact that the owner did employ a superintendent and extra clerical help as provided for in Article 3.

Again "the basic rate is to be used if the work is let under one contract." Then what do the parties say? Do they say, if let under more than one contract extra compensation shall be paid? No. But they do say, clearly, I think, that if let under more than one contract

- 30** then the owner shall be put to the added expense of more help for the architect, to wit, "a superintendent and clerical force." The penalty for letting the work by more than one contract was not in paying the architect more money but in relieving him of, at least, some of the work incident to the multi-contract system and the payment by the owner for the help necessary so to do. To construe this article in any other manner would be to say that the parties failed to contract on a most im-

portant subject of the contract, to wit, payment of the architect.

Article 4 clearly shows that, when the contract was drawn, the minds of the parties were not settled on the question of how many contracts, because, in that article it is provided that the 2½ per cent. is to be paid when "a contract or contracts" is or are awarded. Is it likely that the parties would have thus referred to the "contract or contracts" with no provision for architect's fees in the event "contracts" were let? 10

If plaintiff's contention is sound it results in this situation. The parties to the contract agreed to the payment of a basic rate of 5 per cent. if only one contract was let but, if more than one contract was determined upon, that then the payment of the architect was to depend on, either a further agreement between the parties, or, upon an implied promise to pay. I cannot bring my mind to any such a result after carefully studying the contract. I cannot see how the parties could have more clearly expressed their agreement than they have. They have 20 evinced an uncertainty as to how the building would be erected—whether by one or many contracts. They have said if by more than one contract, then the owner would be bound to pay the architect 5 per cent. and, further, to employ a superintendent and such clerical help as necessary, if by one contract, then the basic rate alone, the architect to employ his own clerical force and to do his own superintending, other than as provided in Article 5, i. e., "clerk-of-the-work" to be employed under certain conditions.

My views, as above expressed, may be effecuated by 30 the entry of judgment for the plaintiff for the amount admitted by the defendant to be due.

Filed December 21, 1928, at 9 A. M.

WILLIAM A. BLAIR,
Clerk.

ATLANTIC COUNTY CIRCUIT COURT.

FRANK A. BERRY,
*Plaintiff,**vs.*THE KNIGHTS OF COLUMBUS
HOME ASSOCIATION, OF AT-
LANTIC CITY, NEW JERSEY,
a Corporation, etc.,*Defendant.*

} Action at Law.

10

RULE FOR JUDGMENT.

(Filed January 16, 1929.)

This action coming on to be heard before Honorable W. Frank Sooy, Judge of the Atlantic County Circuit Court, without a jury, on Wednesday, the sixteenth day of December, 1928, and the cause having been heard and the Judge being of the opinion that the judgment should be entered in favor of the plaintiff and against the defendant for the amount admitted by the defendant to be due the plaintiff, to wit, the sum of \$1,174.48;

20

It is on this twelfth day of January, 1929, adjudged that the plaintiff recover of the defendant the sum of \$1,174.48 together with costs.

W. F. SOOY,
C. C. J.

Filed and entered January 16, 1929, at 1 P. M.

WILLIAM A. BLAIR,
Clerk.

30

ATLANTIC COUNTY CIRCUIT COURT.

January Term, 1929.

FRANK A. BERRY, <i>Plaintiff,</i> <i>vs.</i> THE KNIGHTS OF COLUMBUS HOME ASSOCIATION, OF AT- LANTIC CITY, NEW JERSEY, a Corporation, etc., <i>Defendant.</i>	}	Action at Law.	10
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JUDGMENT.

Judgment entered January 16, 1929, at 1 P. M.

Damages	\$1,174.48	
Costs	62.47	
Total	\$1,236.95	20

This action was tried before Honorable W. Frank Sooy, Judge, without a jury on December 16, 1928, and the cause having been heard and the Judge being of the opinion that judgment should be entered in favor of the plaintiff and against the defendant.

Whereupon it is ordered that the plaintiff, Frank A. Berry, recover of the defendant, The Knights of Columbus Home Association of Atlantic City, New Jersey, a corporation, &c., the sum of one thousand one hundred seventy-four dollars and forty-eight cents, damages and sixty-two dollars and forty-seven cents, costs of suit.

WILLIAM A. BLAIR,
Clerk.

County Circuit Judge Book No. 15, page 397.
Notice of Appeal filed February 26, 1929.

WILLIAM A. BLAIR,
Clerk.

ATLANTIC COUNTY CIRCUIT COURT.

FRANK A. BERRY,
Plaintiff,

vs.

THE KNIGHTS OF COLUMBUS
HOME ASSOCIATION, OF AT-
LANTIC CITY, NEW JERSEY,
a Corporation, etc.,

Action at Law.

10 *Defendant.*

NOTICE OF APPEAL.

(Filed February 26, 1929.)

To Thompson & Hanstein, Attorneys of Defendant:

Gentlemen:

20 Please take notice that the plaintiff in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in our Atlantic County Circuit Court in said cause.

Respectfully,

LEE F. WASHINGTON,
Attorney of Plaintiff.

Due and legal service of the foregoing notice hereby acknowledged this twenty-fifth day of February, 1929.

THOMPSON & HANSTEIN,
Attorneys for Defendant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

FRANK A. BERRY,
Plaintiff,

vs.

THE KNIGHTS OF COLUMBUS
HOME ASSOCIATION, OF AT-
LANTIC CITY, NEW JERSEY,
a Corporation, etc.,

Defendant.

Action at Law.

10

GROUND OF APPEAL.

(Filed March 22, 1929.)

The plaintiff-appellant in the above entitled cause hereby assigns the following as grounds of appeal from the judgment entered in our Atlantic County Circuit Court in said cause:

1. The trial Judge, over the objection of plaintiff, admitted in evidence a printed form of "Conditions of Agreement between Owner and Architect" (Exhibit D-1), although it was not shown or claimed that plaintiff and defendant ever executed, discussed, or even saw said Exhibit D-1, the pleadings and uncontradicted proof being that plaintiff and defendant had in fact executed another written contract, to wit, the contract sued upon and annexed to the plaintiff's complaint as Exhibit "1." 20

2. The trial Judge found, as a question of law, that under the written contract sued upon (annexed to plaintiff's complaint as Exhibit "1") the plaintiff could not recover for his services the fair and reasonable value thereof, although said written contract provided that the basic rate fixed by said contract should not apply if the work of construction was let under more than one contract, and the uncontradicted proof showed that such work was actually let under more than thirty separate contracts. 30

3. The trial Judge erred in giving final judgment in said cause upon the theory that plaintiff's right of recovery was limited to the basic rate set forth in the written contract between the parties (annexed to plaintiff's complaint as Exhibit "1"), although said written contract provided that such basic rate should only apply if the work of construction was let under one contract and the uncontradicted proof showed that such work was actually let under more than thirty separate contracts.

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LEE F. WASHINGTON,
Attorney for Plaintiff-Appellant.

Due and legal service of the foregoing grounds of appeal is hereby acknowledged this twenty-first day of March, 1929.

THOMPSON & HANSTEIN,
Attorneys for Defendant-Respondent.

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NEW JERSEY COURT OF ERRORS AND APPEALS.

FRANK A. BERRY,
Plaintiff,

vs.

THE KNIGHTS OF COLUMBUS
HOME ASSOCIATION, OF AT-
LANTIC CITY, NEW JERSEY,
a Corporation, etc.,
Defendant-Respondent.

} On Appeal.

30

ANSWER TO PETITION OF APPEAL.

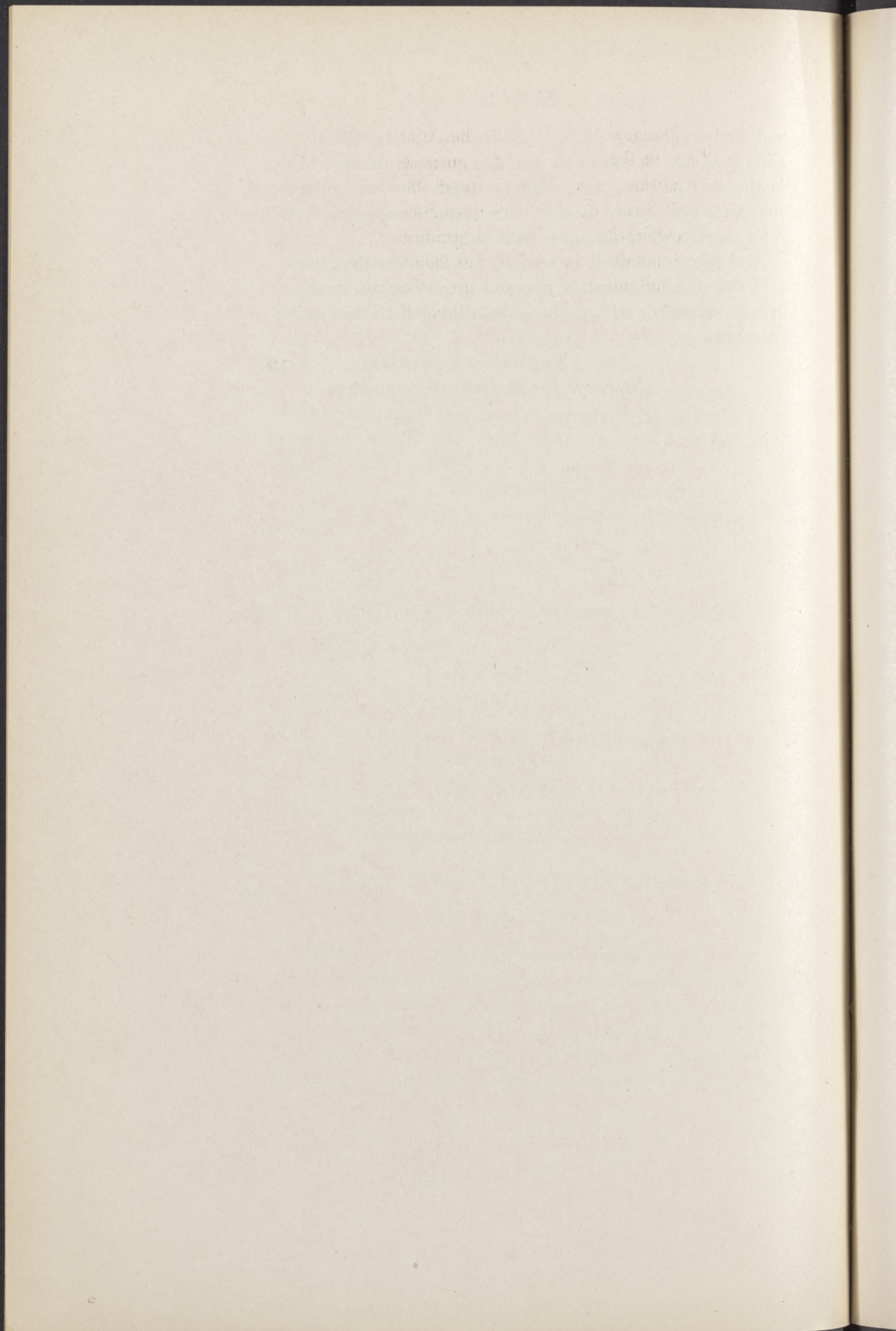
(Filed March 25, 1929.)

The answer of the above named respondent to the petition of appeal of the appellant says that this respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained, to be true, for answer thereto, nevertheless, says and admits that on January 12th, 1929, a rule for judgment was allowed

and filed on January 16th, 1929, in the Atlantic County Circuit Court, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced.

And this respondent is advised and believes that the said rule for judgment is just and prays that the same may be affirmed, with costs to be adjudged to this respondent.

THOMPSON & HANSTEIN, 10
Attorneys for Defendant-Respondent.



NEW JERSEY
Court of Errors and Appeals

FRANK A. BERRY,
Plaintiff-Appellant,

vs.

KNIGHTS OF COLUMBUS HOME
ASSOCIATION OF ATLANTIC
CITY, NEW JERSEY, A CORPO-
RATION, ETC.,

Defendant-Respondent.

} On Appeal.

BRIEF OF PLAINTIFF-APPELLANT

STATEMENT OF FACTS

Frank A. Berry, an architect, brought suit in the Atlantic County Circuit Court for moneys claimed by him to be due him from the defendant, The Knights of Columbus Home Association of Atlantic City, New Jersey, a corporation of New Jersey (Complaint, Case, p. 2). He claimed as due him the sum of \$10,475.00, besides interest thereon from June 13, 1928, besides costs of suit (Case, p. 4). He arrived at said amount as shown by a statement annexed to his complaint as "Exhibit 2" (Case, p. 7).

Plaintiff and defendant had entered into a written contract and a copy of said contract was annexed to the complaint (*Exhibit I*, Case, p. 4).

Upon service of the summons, the defendant served plaintiff with a notice of a motion before Hon. W. Frank Sooy, Judge of the Atlantic County Circuit Court, for an order striking out the complaint "on the ground that the same fails to disclose any cause of action in that the legal construction of the contract annexed to the complaint, and marked *Exhibit I*, is not susceptible of an interpretation permitting the implying of an agreement to pay plaintiff the reasonable value of his services for the work done under numerous contracts" (Case, p. 8).

The attorneys for both sides thereafter consented that the point raised by said notice of motion be raised, *inter alia*, in an answer of defendant, and said answer was thereupon filed (Case, p. 9). Aside from the point raised by said motion, the answer admitted all the statements in the complaint except those in paragraphs two, six and seven of the complaint.

The case was tried before Judge Sooy, by consent, without a jury (Case, p. 11). Defendant admitted upon the trial (Case, p. 12) that the actual cost of construction of the building in question, aside from furnishings, was actually \$478,989.50, instead of \$475,000.00. The complaint was thereupon amended in Court by changing the figures \$475,000.00 wherever they appeared in the complaint to \$478,989.50, so that the complaint thereafter claimed an extra 2 per cent. on the sum of \$478,989.50, changing the figures \$475,000.00 to the larger amount and varying the totals accordingly (Case, p. 24).

After such amendment, *Exhibit 2* (Case, p. 7), as so amended, thereafter read as follows:

Exhibit "2"

Registered in
Penna. and New Jersey.

FRANK A. BERRY
Architect
1321 Arch Street
Philadelphia, Pa.
June 13, 1928.

Knights of Columbus Home Association, *Dr.*
To Frank A. Berry.

<i>To</i>	Architectural Professional Services rendered on Club-Hotel Building in accordance with contract dated July 12, 1926, 5 per cent. on \$478,989.50....	\$23,949.48
<i>To</i>	Fee on Furniture.....	1,500.00
		<hr/>
		\$25,449.48
	Credit by Cash.....	\$23,775.00
	Credit by Note.....	500.00
		<hr/>
		\$24,275.00
		<hr/>
		\$1,174.48
	Two per cent. \$478,989.50 a/c Builder's Services.....	9,579.79
		<hr/>
		\$10,754.27

Accordingly, plaintiff thereafter claimed as due him the sum of \$10,754.27, besides interest thereon from June 13, 1928, besides costs of suit.

It was admitted upon the trial (Case, p. 12) that a stop notice had been served upon defendant, before suit, by Eugene Powers & Sons, for the sum of \$3,620.39. Plaintiff admitted said indebtedness and expressed his

willingness that defendant pay said sum direct to Eugene Powers and Sons, and that defendant have the right, provided it made such payment, to take a credit for said amount (Case, p. 13). Defendant denied that it owed plaintiff the sum claimed by him, but it admitted that it owed plaintiff at the time of trial the sum of \$1,174.48 (Case, p. 12).

The answer admitted that the parties had entered into the written contract annexed to the complaint (Case, p. 9), plaintiff proved that he had rendered all of the services set forth in the complaint (Case, pp. 17-22), it was admitted (Case, p. 23) that if the plaintiff was entitled to any extra compensation on either the law or the facts, that the extra 2 per cent. claimed by him was not excessive (Case, p. 23), and it was also proven that the work in question was let not under one contract but under upwards of thirty separate contracts (Case, p. 15).

Upon the trial below, the testimony and arguments of counsel all centered around the effect, interpretation and construction of the written contract (*Exhibit I*, Case, p. 4). The plaintiff contended (Case, p. 16) that the rate which the written contract provided had no application to the case, because the work was let, not under one contract, but upon upwards of thirty separate contracts, and that the contract distinctly provided that the contract rate should not apply in such case (Case, p. 5, par. 3). The defendant contended that under the terms of said written contract plaintiff, in the event that the work should be let under more than one contract, could not recover upon any other basic rate than the one fixed by the contract, insisting that said contract rate of 5 per cent. applied even though the work was let under more than one contract. Judge Sooy filed written conclusions (Case, p. 48), holding that plaintiff could recover nothing beyond the basic rate of 5 per cent., even though the work was let under more than one contract. Pursuant to said conclusions, judgment was

entered in favor of the plaintiff only for the amount admitted by the defendant to be due, plus costs (Case, p. 53). This appeal brings up the judgment so entered.

GROUNDS OF APPEAL

The plaintiff assigned only three grounds of appeal (Case, p. 55). They are as follows:

"1. The trial judge, over the objection of plaintiff, admitted in evidence a printed form of 'Conditions of Agreement between Owner and Architect' (*Exhibit D-1*), although it was not shown or claimed that plaintiff and defendant ever executed, discussed or even saw said (*Exhibit D-1*), the pleadings and uncontradicted proof being that plaintiff and defendant had in fact executed another written contract, to wit, the contract sued upon and annexed to the plaintiff's complaint as *Exhibit "I"*.

"2. The trial judge found, as a question of law, that under the written contract sued upon (annexed to plaintiff's complaint as *Exhibit "I"*) the plaintiff could not recover for his services the fair and reasonable value thereof, although said written contract provided that the basic rate fixed by said contract should not apply if the work of construction was let under more than one contract, and the uncontradicted proof showed that such work was actually let under more than thirty separate contracts.

"3. The trial judge erred in giving final judgment in said cause upon the theory that plaintiff's right of recovery was limited to the basic rate set forth in the written contract between the parties (annexed to plaintiff's complaint as *Exhibit "I"*), although said written contract provided that such basic rate should only apply if the work of construction was let under one contract and the uncontradicted proof showed that such work was actually let under more than thirty separate contracts."

We must admit that a careful examination of the testimony leaves us uncertain as to whether said *Exhibit D-1* was ever actually admitted in evidence.

The paper was marked for identification as an exhibit for the defendant as *D-1* (Case, p. 30). Plaintiff had objected to its admission (Case, p. 30). The Court said (Case, p. 30, line 10): "The Court—I will take it as it is as an exhibit and then I will rule on it the same as I have all other questions." We find no subsequent statement showing whether said paper was or was not ever actually admitted in evidence, and we must admit that the conclusions (Case, p. 48) contain nothing showing that Judge Sooy paid any attention whatsoever to said unexecuted contract *Exhibit D-1* (Case, p. 42), so that we must conclude that the admission of said *Exhibit D-1* in evidence, if it was admitted in evidence, was harmless. We accordingly abandon our first ground of appeal and will confine our argument to the second and third of said reasons.

ARGUMENT

Our Practice Act of 1912 abolished writs of error (except in criminal cases), substituting appeals in lieu thereof (P. L. 1912, p. 382). Our present practice touching appeals in civil cases is governed by Chapter 62 of the Laws of 1916 (P. L. 1916, p. 109), which reads as follows:

"Bills of exceptions and writs of error in civil cases are abolished. In lieu of a writ of error, an appeal may be taken in any case in which the appellant would, heretofore, have been entitled to that writ. Subject to rules, such appeal shall be in the nature of a rehearing upon any question of law involved in any ruling, order, or judgment below. Where causes are submitted to the court to be heard without a jury, any error made by the court in giving final judgment in the cause shall be subject to change, modification or reversal without the grounds of objection having been specifically submitted to the court."

The present case having been tried before the Circuit Judge alone, without a jury, it becomes important that we consider the interpretation given by our decisions to the words of the statute just quoted.

The leading case construing said statute is *Pannonia B. & L. Association v. West Side Trust Co.*, 93 N. J. L. 377, which came before this court on appeal from our Supreme Court. The opinion of Chancellor Walker, which seems to have settled the law in this State as to the effect of said statute, reads, in part, as follows:

"This is an appeal from a judgment entered in the Supreme Court in a cause tried before Hon. Frederic Adams, Circuit Court judge, without a jury, the cause having been referred to him under the statute. The trial judge made certain findings of law and fact, which were made a part of the *postea* and judgment record. While it is quite usual in cases tried before a judge without a jury to submit requests for findings of law and fact, that appears not to have been done in this case. Any findings requested herein must have been made in the oral arguments presented to the trial judge, who found for the defendant and against the plaintiff.

"In the state of the law as it existed prior to the amendment of the Practice Act, approved March 15, 1916 (P. L., p. 109), the judgment before us would not be reviewable for want of objections taken in the court below. In *Blanchard v. Beveridge*, 86 N. J. L. 561, this court held that when a cause is submitted to a trial court on an agreed state of facts, it is incumbent upon the parties to request the court to make a finding or findings of law or fact, or law and fact, and to except or object to an adverse finding, when made, in order to lay the foundation for a review on appeal. See, also, *Webster v. Freeholders of Hudson*, Id. 256. All of the grounds of appeal in this case are directed to the findings of the court.

"We apprehend that when a cause was submitted to a trial judge for his determination on the law and the facts prior to the passage of the act of 1916, if he filed a memorandum of his decision in the office of the clerk of the court instead of sending for counsel and announcing his decision in open court, counsel might have filed proper objections to his findings in the clerk's

office also, and thus laid a foundation for an appeal. It was apparently, however, to remedy the situation created by the filing of a judge's findings in the clerk's office, whereby counsel and parties in given causes are first informed of the court's decision some time after it is made, they having had no previous opportunity to object, that the statute of 1916 was passed, so as to afford protection to, and an opportunity for review of a decision by, defeated litigants. And while the successful litigant would still be informed of his opponent's attitude by the filing of objections to findings in the office of the clerk of the trial court, he is not now required to do so, and is as well informed, and is in nowise harmed, by those objections being first made to appear in grounds of appeal, which have to be filed and served. This was the course taken in the case before us.

"The act of 1916 is an amendment to section 25 of the Practice Act (1912), the pertinent part of which amendment provides that when causes are submitted to the court to be heard without a jury, any error made by the court in giving final judgment in the cause shall be subject to change, modification or reversal without the grounds of objection having been specifically submitted to the court.

"As defeated litigants have always had a right of review on questions of law by the laying of a proper foundation in the trial court at the time of adverse rulings, it is clearly competent for the Legislature to postpone the time in which that foundation may be laid, and to permit of the filing of objections after the findings of the judge in causes where juries are waived and the issues of law and fact are submitted to him for determination.

"The procedure provided in the act of 1916 is analogous to that in criminal cases under section 136 of the Criminal Procedure Act (Comp. Stat., p. 1863), which provides that the entire record of the proceedings had upon the trial of any criminal case may be returned with the writ of error, and on the argument such entire

record shall be considered and adjudged by the appellate court, whether objection was made to the admission or rejection of testimony, or in the charge of the court, or in the denial of any matter which was a matter of discretion, whether a bill of exceptions was settled, signed and sealed thereto or error assigned thereon or not; provided, as required by section 137, that the plaintiff in error shall specify the causes in the record relied upon for relief or reversal and shall serve a copy of the causes so relied upon on counsel representing the State. And this court decided in *State v. Lyons*, 70 N. J. L. 635, that section 136 of the Criminal Procedure Act enlarged the privilege and right of one convicted of crime to question the propriety of his conviction beyond the limits of the privileges and right previously conferred of a review of errors assigned upon the record or upon exceptions duly taken and allowed.

"Counsel for respondent argues that if this statute is valid it imposes upon the court the duty to search through the record and transcript for any possible errors. This is obviously not so. While the act of 1916 does not, in terms, require that any error residing in the final judgment given in a cause submitted to the court to be heard without a jury shall be made the formal ground of an appeal, that act neither expressly nor impliedly abrogates or impairs rule 139 of the Supreme Court (1913), which provides for the filing and service of grounds of appeal. One is a complement of the other. They are in *pari materia*.

"In our opinion, the amendment of the Practice Act of March 15, 1916 (P. L., p. 109), is constitutional, and permits a review of any error of law residing in the findings of appeal filed and served under rule 139 of the Supreme Court (1913)."

The opinion of Chancellor Walker in the Pannonia case was also approved by this court in its opinion by Mr. Justice Black in *Hayes v. Hoboken*, 93 N. J. L. 433, at page 435.

In *Smith v. Cruse*, 101 N. J. L. 82, this court, again speaking by Chancellor Walker, said:

"It is not necessary for a party to request the court, in cases where a jury is waived, to make specific findings of law or fact, or law and fact. It is sufficient if he claims judgment in his favor upon testimony adduced upon the judgment for either party without finding in favor of that party. A judgment presupposes a finding of facts in favor of the successful party, even if such finding be not expressed in terms, and also presupposes that, in the opinion of the judge, that party is entitled to the judgment by the law arising upon the facts.

"In the case at bar it does not appear that either side made any request for findings. But the judge of the District Court, in the state of the case settled and signed by him said, 'I find the facts to be as follows,' and then goes on and specifically finds the facts upon which he rests his judgment. Now, the amendment to the Practice Act (P. L. 1916, p. 109) provides that when cases are submitted to the court to be heard without a jury, any error made by the court in giving final judgment shall be subject to change, modification or reversal without the grounds of objection having been specifically submitted to the court. There is no requirement that the defeated party must have preferred a request for a finding of law or fact, or law and fact, and except to an adverse finding, in order to secure a review of judgment; but appeal is given to him, as matter of right although he did not submit the grounds of objection to the trial judge. But this refers only to errors residing in the final judgment, and not to any occurring in the proceedings on the trial.

"The reason for this statute is obvious, and is fully explained in our opinion in *Pannonia Building and Loan Association v. West Side Trust Co.*, 93 N. J. L. 377, 381, wherein we held that this act of 1916 permits a review of any errors of law residing in the findings of

the trial judge, provided such errors shall be specified in grounds of appeal filed and served."

As we view this matter, one question stands out above all others. This question is the construction of the written contract. There seems to be little, if any, dispute as to fact. On the other hand, from whatever angle the case is viewed, we always return to the single, fundamental question of the construction of the written contract. Accordingly, as was suggested by the trial judge, we will address ourself mainly to this question.

The fifth paragraph of the written contract provides as follows (Case, p. 5, lines 1-5):

"The owner agrees to pay the architect at the rate of 5 per cent., hereinafter called the basic rate, computed and payable as stated in the said 'Conditions,' and to make any other payments and reimbursements arising out of the said 'Conditions.'"

Paragraph numbered "2" of said written contract (Case, p. 5, lines 17-23) reads:

"2. Architect's Fees. The fee payable by the owner to the architect for the performance of the above services is the percentage hereinbefore defined as the basic rate, computed upon the cost of the work in respect to which such services have been performed, subject, however, to any modifications growing out of these conditions of agreement."

The next paragraph of said written contract (Case, p. 5, lines 23-30) further provides:

"3. Separate Contracts: The basic rate as hereinbefore defined is to be used when all the work is let under one contract. Should the owner determine to have substantially the entire work let under separate contracts, then the owner shall employ a superintendent, acceptable to the architect, and such clerical help as may be deemed necessary by the owner and the architect."

The uncontradicted proof before the court shows that the work was not let under one contract, but under thirty-three separate contracts. The question is, under

such a situation, what compensation is the architect to receive, if anything, for his services?

The decisions have laid down certain definite rules to assist in the interpretation of contracts. Let us run over a few which seem pertinent.

First: The construction and effect of a written instrument is a matter of law, to be determined by the court and not by the jury. *Smith v. Fidelity & Deposit Co.*, 98 N. J. L. 534, 120 A. 322.

Second: Whether a contract is complete in itself as expressing the complete agreement of the parties is also a question for the court. *Brautigam v. Dean & Co.*, 89 A. 760, 85 N. J. L. 549, affirmed in 92 A. 344, 86 N. J. L. 676.

Third: In construing a contract, the cardinal rule is to ascertain the intention of the parties. *International Signal Co. v. Marconi Wireless Tel. Co.*, 104 A. 378, 89 N. J. Eq. 319, affirmed in *International Radio Tel. Co. v. Marconi Wireless Tel. Co.*, 106 A. 891, 90 N. J. Eq. 271.

Fourth: If the intention is doubtful or obscure, the most fair and reasonable construction imputing the least hardship on either of the contracting parties, should be adopted. *International Signal Co. v. Marconi Wireless Tel. Co.*, 104 A. 378, 89 N. J. Eq. 319, affirmed in *International Radio Tel. Co. v. Marconi Wireless Tel. Co.*, 106 A. 891, 90 N. J. Eq. 271.

Fifth: Whenever a dispute arises as to the meaning of a contract, that construction which the parties have placed upon it, as between themselves, is the one to be adopted by the courts. *Van Dyke v. Anderson*, 91 A. 593, 83 N. J. Eq. 568. *Basic Iron Ore Co. v. Dahlke*, 5 N. J. Adv. R. 750.

Sixth: Usage enters into every contract, and may be shown for the purpose not only of elucidating the contract, but also of completing it. *Bitulithic Co. v. Algiers Railway & Lighting Co.*, 130 La. 830, 58 So. 588.

It is probably not stating the matter too strongly to say that no written contract has ever yet been drawn that stated in express words every term, condition and obligation which the law attached to it upon its execution. Such a statement seems startling, but let us consider the authorities.

In *Langberg v. Wagner*, 5 N. J. Adv. R. 1777, a contract of sale of defendant's business was held to include the good-will, although the good-will was not specifically referred to in the contract.

Even where a building contract fails to so specify, there is an implied agreement that the work shall be done in a proper and workmanlike manner. *Mayer Ice Mach. etc. Co. v. Van Voorhis*, 95 A. 735, 88 N. J. L. 7.

It has been held that a contract providing for payment of work after "a satisfactory test has been made" means satisfactory to one who is to pay for the work, though the contract is silent as to the person. *Williams v. Hirshorn*, 103 A. 23, 91 N. J. L. 419.

Where agreements are silent as to the time within which the work therein specified is to be performed, the law presumes that the work is to be performed within a reasonable time. Evidence of the circumstances surrounding the parties and of the facts which have come to their knowledge at the time the agreements were made is admissible. Evidence as to the declarations and representations made by one of the parties as to what they considered a reasonable time for performance is admissible. *Perth Amboy, &c., Co., v. Crawford*, 5 N. J. Adv. R. 154.

Where there is an express contract to pay for extra work, but the amount is not fixed, plaintiff is entitled to a reasonable sum. *Fortunato v. Cicalese*, 108 A. 183, 93 N. J. L. 461.

In all of the cases above cited the law has said that the parties agreed to things which they did not expressly state in words. The law reads many things into contracts in order to do justice.

We suggest that the parole evidence rule has nothing whatever to do with the construction of the contract in question. The promise of defendant to pay a fair and reasonable rate for the service rendered by plaintiff, the work being let under more than one contract, became a part of the contract by implication of law.

In a recent case in this State an agreement between an architect and an owner, stipulating compensation for work in accordance with plans and specifications, was held to provide only for the architect's compensation in the event of the use of the plans and specifications in the structure for which the plans were prepared, and not to preclude a recovery by him of the reasonable value of the services rendered where the intended construction was abandoned by the owner. *Klemmt v. Yeskel*, 4 N. J. Adv. R. 247.

In the same case it was also held that the compensation set forth in an agreement between an architect and an owner, stipulating compensation for work in accordance with plans and specifications, is not controlling in determining the reasonable value of the services where the intended construction is abandoned by the owner. *Klemmt v. Yeskel*, 4 N. J. Adv. R. 247.

It has also been held in this State that where a contractor for a building does extra work, and is paid a sum in excess of the contract price, he may still recover for a part of such work not within any of the payments received by him. *Aakjer v. Mair* (N. J. Sup.), 87 A. 99.

As we stated *supra*, the uncontradicted proof before the court shows that the work was not let under one contract, but under thirty-three separate contracts. In view of the provisions of the contract above quoted and of the above authorities, the question is, under such a situation, what compensation is the architect to receive, if anything, for his services?

We must conclude that both parties intended that the architect should be paid for his services. Not only did the contract provide a basic rate for his charges

where the work should be let under a single contract; in addition, the statement annexed to the complaint (Case, p. 7) and admitted in the answer (Case, p. 9) shows that although the work was let under more than one contract, nevertheless the defendant actually paid to plaintiff before suit the sum of \$24,275.00, and the defendant admitted in court its indebtedness in the sum of \$1,174.48 additional (Case, p. 12). Under such circumstances, it certainly could not have been the intention of the parties that plaintiff should not be paid at all in the event that the work should be let under more than one contract. The parties themselves, by their own conduct, have interpreted the contract for us.

Assuming then, that both parties intended that the defendant should be paid for his services, even though the work should be let under more than one contract, the next question is how much should the plaintiff be paid and how should such pay be determined?

The contract distinctly provides, as above quoted, "the basic rate as hereinbefore defined is to be used when all of the work is let under one contract." By inference, said basic rate is only to apply in such event. If this construction is correct, how can we conclude that the basic rate of the contract is to apply whether the work be let under one contract or under thirty-three separate contracts, as was the case herein? We contend that the contract clearly shows that the parties intended that the basic rate, as above defined, should be used only when the work should be let under one contract and not when it should be let under more than one contract.

Under the decisions above cited, the law supplies the rate, and says that the defendant agreed to pay plaintiff the fair and reasonable value of his services. As stated *supra*, it was admitted upon the trial that the rate claimed by plaintiff (the contract rate of 5 per cent., plus 2 per cent. extra for acting as builder, plus a \$1,500 fee on the furniture) was a fair and reasonable rate, the defendant, however, contending that the contract precluded any recovery for the plaintiff beyond 5 per cent.,

plus the \$1,500.00 fee on the furniture. As stated *supra*, it was also admitted upon the trial that the total cost of constructing the building alone was \$478,989.50. Plaintiff accordingly contends that the judgment should have been entered in his favor for \$10,754.27 (arrived at as shown in *Exhibit "2,"* as amended, heretofore set forth herein), plus interest thereon from June 13, 1928, besides costs of suit. Plaintiff admitted that the defendant had the right to have deducted from said sum of \$10,754.27 the sum of \$3,620.39, provided the judgment be so molded as to also show that said sum of \$3,620.39 should be paid by defendant direct to Eugene Powers & Sons. After this case was tried below and before the trial judge decided same, it was (unknown to said judge) agreed between the respective attorneys herein that the defendant should forthwith pay direct to Eugene Powers & Sons the sum of \$1,174.48, admitted by defendant to be due, said agreement and payment to be made without prejudice, except that the defendant should thereupon be entitled to credit such amount on whatever sum might ultimately be found to be due from defendant to plaintiff, plaintiff in turn thereby getting a credit for such amount from Eugene Powers & Sons upon account of the sum of \$3,620.39, which both sides admitted to be due from plaintiff to said Eugene Powers & Sons. Such payment of \$1,174.48 was thereupon made by defendant to Eugene Powers & Sons, and this statement is made herein so that this court may take said credit into consideration in ultimately disposing of the questions hereby raised.

The trial judge seemed to feel (Case, p. 50) that the plaintiff could not recover anything beyond 5 per cent. because it appeared that a superintendent and clerical force was to be provided by the defendant, at its expense, in the event that the work was let under more than one contract, and that this superintendent and clerical force were to be employed by the defendant so that the architect might be relieved of extra duties and expense that would follow as an incident to the letting of more than one contract. We contend that such a view over-

looks the fact that while said written contract expressly required the defendant to make such payments, nevertheless such payments were not to be made to the plaintiff nor received by him, but were made to strangers. Let us bear in mind also that the contract also provided, by clear implication at least (Case, p. 5, lines 24 to 26), that the basic rate of five per cent. should not be used if all of the work were let under more than one contract. In addition, it was testified by the plaintiff and nowhere contradicted (Case, p. 31) that in the absence of any provision in the contract to the contrary, it was the practice for the owner to pay not only for the superintendent but also for the clerk of the work. The consequence is that under the contract as construed by the trial court the architect will receive no pay whatsoever beyond the pay due him in the event that the work had been let under only one contract, although the work was actually let under thirty-three separate contracts and the contract itself provided, as we have said, that the basic contract rate of 5 per cent. should only apply in case the work were let under a single contract.

We accordingly respectfully submit that the trial court erred in giving judgment for the plaintiff only for the amount admitted to be due, appellant contending that such judgment should have been entered below for \$10,754.27, besides interest, the defendant being now entitled to an additional credit of \$1,174.48, because of the payment made, without prejudice, by defendant to Eugene Powers & Sons, as above.

As we see it, the salient facts are all clear upon the record, and we accordingly feel that the judgment should be here amended and ordered entered in favor of plaintiff for \$10,754.27, besides interest thereon from June 13, 1928, besides costs of suit, less a credit of \$1,174.48 upon account of said principal.

Respectfully submitted,

LEE F. WASHINGTON,
Attorney for and of Counsel
with Plaintiff-Appellant.

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77
May '29

New Jersey Court of Errors and Appeals

FRANK A. BERRY,
Plaintiff-Appellant,

v.

THE KNIGHTS OF COLUMBUS HOME ASSO-
CIATION OF ATLANTIC CITY, NEW
JERSEY, a corporation, &c.,
Defendant-Respondent.

ON APPEAL.

BRIEF OF DEFENDANT-RESPONDENT.

The plaintiff was the architect engaged by the defendant to prepare plans and supervise the erection of a building about to be erected by the defendant. The building was erected under numerous contracts made by the defendant with various contractors, instead of under a single contract made with an individual main contractor. The plaintiff contends that by reason of the fact that the building was erected under numerous contracts, instead of one contract, he is entitled to a larger amount of compensation than he would have been entitled to

had the building been erected under a single contract.

There was a written contract made between the parties, which we contend covered fully the rights and liabilities of the parties, whether the building was erected under a single contract, or under numerous contracts. The plaintiff contends in his complaint (S. C. p. 3, l. 27, paragraph 6):

“* * * The work in question was not let under one contract, but was let under separate contracts, and defendant impliedly agreed that it would, in such case, pay plaintiff for his services the fair and reasonable value of the same.”

It is apparent that the plaintiff contended that out of the written contract there was implied an obligation on the part of the defendant to pay plaintiff the reasonable value of his services, if the work was done under separate contracts. In other words, plaintiff contends that an implied contract arises out of the written agreement.

The case was tried before Honorable W. Frank Sooy, Atlantic County Circuit Court Judge, without a jury, and resulted in a decision for the defendant on the contraverted issue. While it is true that judgment went for the plaintiff, it went merely for the unpaid balance conceded by the defendant to be due, and the point at issue was determined against the plaintiff.

The entire case turns upon the construction of the contract between the parties. The contract provides, in part:

“The owner agrees to pay the architect at the rate of five per cent, hereinafter called the basic rate, computed and payable as stated in

the said 'Conditions,' and to make any other payments and reimbursements arising out of the said 'Conditions' " (S. C. p. 5, ll. 1-6).

Under Article 3 of the Conditions (S. C. p. 5), the following is provided:

"3. SEPARATE CONTRACTS: The basic rate as hereinbefore defined is to be used when all of the work is let under one contract. Should the owner determine to have substantially the entire work executed under separate contracts, then the owner shall employ a superintendent, acceptable to the architect, and such clerical help as may be deemed necessary by the owner and the architect."

It is contended by the plaintiff that when the work is done under separate contracts, there is an implied agreement that the plaintiff should be paid the reasonable value of his services arising therefrom, in addition to the 5% commission provided for in the contract.

For the Court to add to this contract any construction of its own, it must be first determined that the contract is incomplete on its face, or ambiguous. It seems to us that the contract is absolutely clear as to what is to be the relationship of the parties if the work is let under separate contracts. The contract very clearly provides that "in that event the owner is to employ a superintendent and clerical help, if the same shall be deemed to be necessary by the owner and the architect." Judge Sooy's opinion, it seems to us, sets forth the only rational interpretation of the words used. He says:

"It clearly appears that the superintendent and clerical force was to be provided by the owner, at its expense, and that this superin-

tendent and clerical force was to be employed in order that the architect might be relieved of the extra duties and expenses that would naturally follow as an incident to the letting of more than one contract. In other words, to do the very things which plaintiff says he was compelled to do and for which he seeks extra compensation, notwithstanding the fact that the owner did employ a superintendent and extra clerical help as provided for in Article 3.

Again 'the basic rate is to be used if the work is let under one contract.' Then what do the parties say? Do they say, if let under more than one contract extra compensation shall be paid? No. But they do say, clearly, I think, that if let under more than one contract then the owner shall be put to the added expense of more help for the architect, to wit: 'a superintendent and clerical force.' The penalty for letting the work by more than one contract was not in paying the architect more money but in relieving him of, at least, some of the work incident to the multi-contract system and the payment by the owner for the help necessary so to do. To construe this article in any other manner would be to say that the parties failed to contract on a most important subject of the contract, to wit: payment of the architect" (S. C. p. 50, ll. 15-8; p. 51, ll. 1-2).

It, therefore, seems to us to be entirely clear that it is not possible for this Court to say that by any implication the plaintiff is entitled to more than the 5% whether the work was done under one contract, or under numerous separate contracts.

The testimony shows that while the work was being done under separate contracts, the defendant

engaged a superintendent and clerical help (S. C. p. 34).

It should be noted that the testimony shows that the work was let under separate contracts on the suggestion of the plaintiff, who advised the defendant that they would save money by so doing, but nowhere in the testimony is there any suggestion that the plaintiff advised the defendant, or made any suggestion whatever, that he would be entitled to compensation, in addition to the 5%, if the work was let under separate contracts. We think that that may be very fairly considered by this Court in concluding that even the plaintiff did not consider that he was entitled to any additional compensation if the building was erected under separate contracts.

It is respectfully contended that the obligation of the defendant, in the event that the building was built under separate contract, was fully provided for in the written contract between the parties, and there being in that contract no obligation on the part of the defendant to pay any additional moneys, no implied obligation arises.

It is, therefore, respectfully submitted that the judgment of the Circuit Court was right, and should be sustained.

THOMPSON & HANSTEIN,
Attorneys for Defendant-Respondent.

