

# New Jersey Court of Errors and Appeals

MEURER BROTHERS COMPANY,  
JACOB MEURER, trading as  
*Plaintiff-Appellant,*

vs.

FRED KILGUS,  
*Defendant-Appellee.*

On Appeal.

10

From New Jersey  
Supreme Court.

## BRIEF OF PLAINTIFF-APPELLANT.

Fred Kilgus, defendant, had a contract with the Board of Education of the City of Orange for the construction of a portion of a school building known as the Lincoln Avenue School. Kilgus contracted with the American Sky Light and Iron Works for the performance of the roofing and certain other work (Exhibit P-1). The main contract specified Meurer Brothers tin (Case, pages 26 and 37), and the American Sky Light and Iron Works, in order to perform its sub-contract with Kilgus, endeavored to procure from Meurer Brothers Company, upon credit, the material so specified and required (page 26). 20 30

Meurer Brothers, however, declined to sell the material to the American Sky Light and Iron Works, not being satisfied with that company's credit (pages 26 and 37). Mr. Bolles, general manager for Meurer Brothers Company, said (at page 36),

"They desired to purchase from us material to be used on a certain building being erected 40

in the State of New Jersey. The amount was large, and their credit was absolutely no good, and I refused to sell them without a guaranty which would be satisfactory to our company."

This was some time in September or October of 1908 (page 37). Mr. Jeter, who was the Superintendent of the American Sky Light and Iron Works, said (at page 26), that his company was  
10 unable to procure the material from Meurer Brothers at the time he applied for it "because our company had no credit," and for that reason Meurer Brothers declined to let his company have the material.

It was suggested that perhaps Fred Kilgus would guarantee the account for the American Sky Light and Iron Works, and thereupon Mr. Bolles instructed his telephone girl to call Fred Kilgus  
20 by telephone. Mr. Bolles had the conversation that ensued and he testified that (at page 39) "when I asked, 'Is this Fred Kilgus?' I was answered, 'Yes'".

Later he said that he received a written communication from Fred Kilgus appertaining to that conversation over the telephone (page 40, exhibit P-6). The Court excluded the telephonic conversation between Mr. Bolles and Fred Kilgus, to which ruling plaintiff noted an objection as  
30 ground of appeal (page 41).

The court confined the proof of the contract of guaranty sued upon (pages 7, &c), to the writings passing between Fred Kilgus and Meurer Brothers Company, which appear in the form of letters (Exhibits P-5, P-6, P-7, P-8, P-9, P-11.)

From this correspondence it appears that when the matter of guaranteeing the American Sky Light account was broached to Fred Kilgus he wrote to Meurer Brothers Company stating that  
40 he would

“Deduct from the American Sky Light and Iron Works figures one thousand dollars, and place same to the credit of your account, for payment when the work on the Lincoln Ave. School is completed at Orange, N. J.”

This letter, which was dated October 16th, 1908, appears to have reached Meurer Brothers Company on the same day, which was the day of the telephone communication already referred to, and on that same day Meurer Brothers Company wrote to Fred Kilgus as follows:—(Exhibit P-6.) 10

“We are in receipt of your esteemed favor of the sixteenth instant relative to the contract held by the American Sky Light and Iron Works for work on the Lincoln Ave. School, and in accordance with the telephone conversation which the writer held with you, *we understand that you are willing to agree to make the first payment to us, amounting to \$1,000.00, when the American Sky Light and Iron Works have done this amount of work. Will you be good enough to write us to this effect as on your original letter as pointed out to you the payment could be withheld by you until the work was done.*” 20

A post-script was added to this effect:—

“We understand according to contract that first payment is due American Sky Light and Iron Works when main work is done; second payment when cornice is on annex and roofing of three wings has been completed.” 30

On October 19th, 1908, Fred Kilgus wrote to Meurer Brothers Company as follows:— (Exhibit P-7.)

“In reply to yours of the 16th inst., beg to state that I will make first payment of \$1,000.00 to you for the account of the Ameri- 40

can Sky Light & Iron Works for material you are to furnish for the Lincoln Avenue School, Orange, New Jersey.”

On that same day Meurer Brothers Company wrote to Fred Kilgus as follows:— (Exhibit P-8.)

10 “We are in receipt of your favor of the 19th instant, and in accordance therewith we will deliver material to the American Sky Light and Iron Works for use on the Lincoln Avenue School.”

All this was before the order of the American Sky Light and Iron Works for the material was accepted by Meurer Brothers Company (page 46). Thereafter the material so ordered (Exhibit P-2) was furnished by Meurer Brothers Company to American Sky Light and Iron Works and delivered at its factory in Jersey City (page 29). It  
20 was all applied and used in the construction of the Lincoln Avenue School, except a small amount, of the value of less than one hundred dollars (pages 29, 31, 32). Mr. Jeter testified that the material so furnished, together with the value of the labor, was approximately two thousand dollars (page 34).

On December 7, 1908, Fred Kilgus wrote to Meurer Brothers Company and said— (Exhibit P-9),

30 “We are authorized today to make a payment of one thousand (\$1,000.00) to you by the American Sky Light and Iron Works of Jersey City, on account of materials furnished for the Lincoln Avenue School, Orange, N. J. We are sending you \$500.00 today and will make payment for the balance in a few days, as we have several heavy payments coming due this week, we are obliged to make it in two payments at this time, which we trust  
40 will meet with your satisfaction.”

And on December 9th, he again wrote (Exhibit P-11),

“You have \$500.00 coming to you on the original order, which we will send you in a few days when we get some money in.”

Later, difficulties arose between Kilgus and the American Sky Light which led to the American Sky Light abandoning its work on the Lincoln Avenue School without having completed it. 10 Meurer Brothers Company were notified that the American Sky Light had defaulted upon its work, and that there would be no further payments made to Meurer Brothers Company. (Exhibit P-12.) Meurer Brothers Company were given the opportunity to complete the work if they wished to under the terms of the original contract between Kilgus and the American Sky Light and Iron Works (Exhibit P-11.) The work was eventually completed by the Newark Cornice and Sky Light Com- 20 pany for about twenty-three hundred dollars (page 58). The amount of the original contract with the American Sky Light was twenty-seven hundred dollars (Exhibit P-1), and five hundred dollars had been paid on account to Meurer Brothers Company as above indicated.

The total amount of Meurer Brothers account with the American Sky Light and Iron Works was \$1,086.74; amount paid on account by Fred Kilgus \$500.00, leaving a balance due of \$586.74 (Exhibit 30 P-12). It was to recover this amount that the present suit was brought.

Plaintiff relies chiefly upon the first count of his declaration (page 7) alleging a contract of guar- anty on the part of Fred Kilgus to the extent of one thousand dollars for materials furnished by Meurer Brothers Company “when said American Skylight and Iron Works in the course of perform- 40 ance by it of its said contract with the said defendant, should do and perform work and fur-

nish material of the value of one thousand dollars in the erection and construction of said building.”

The gist of the defense interposed by defendant (pages 53 to 121) is that there was no direct contract of guaranty as alleged by plaintiff, but that on the contrary Kilgus was only to pay Meurer Brothers Company one thousand dollars when that amount of money should become due and payable to the American Sky Light and Iron Works.

- 10 And inasmuch as the necessity of completing the work of the American Sky Light and Iron Works through its failure to perform its contract involved an expense of twenty-three hundred dollars, the original contract price being but twenty-seven hundred dollars, defendant contends that not more than four hundred dollars, if anything, ever became payable to the American Sky Light and Iron Works under its contract. Hence, when defendant paid Meurer Brothers Company five  
20 hundred dollars on account, he not only paid the whole amount then due and owing to the American Sky Light and Iron Works, but one hundred dollars more, and that therefore Meurer Brothers Company had received all that they could legally ask for.

- Plaintiff objected to the admission of all the testimony offered by defendant, intending to show defective performance or lack of performance of the American Sky Light and Iron Works contract  
30 on the ground that he had nothing to do with the direct contract of guaranty between Kilgus and Meurer Brothers Company. The trial court, however, admitted all this testimony, and on cross-motions to direct verdict, ruled that the contract between the parties was as contended by the defendant, and that the right of Meurer Brothers Company to go against Fred Kilgus must of necessity be worked out through the American Sky Light and Iron Works Company to claim pay-  
40 ment from Kilgus; that the American Sky Light

and Iron Works had no claim whatever against Kilgus because of its failure to perform its contract and that no money became due thereunder; that hence no cause of action existed in favor of Meurer Brothers Company against Fred Kilgus.

A verdict was accordingly directed by the court in favor of the defendant and against the plaintiff (page 136).

Plaintiff submits that the court's ruling in this respect was erroneous and that a true construction of the contract is to be gathered not only from the letters which passed between plaintiff and defendant, but from the conversations relating thereto and the general setting or business situation which led to the arrangement between the parties. 10

If Meurer Brothers Company was to receive payment from Fred Kilgus only when money should become due to the American Sky Light and Iron Works, why did Meurer Brothers Company refuse to supply the material to the American Sky Light and Iron Works Company when Fred Kilgus offered in his first communication to make that arrangement? Instead of their accepting that proposition, they absolutely declined to do so and by their telephone conversation, as well as their letter of October 16th, 1908, specifically refused to supply material unless Kilgus would agree to pay them the one thousand dollars when material to that amount had been furnished and material and labor of that value had been supplied by the American Sky Light and Iron Works in the construction of the school building. The reference to first and second payments was a mere observation as to when those payments were due, but in no way fixes the time of payment as the criterion by which Meurer Brothers Company's right to receive payment from Kilgus was to be measured; and it was after Meurer Brothers Company had thus flatly declined to Kilgus, unless he should guarantee upon terms they had suggested, that 20 30 40

Kilgus again wrote them, directly referring to that communication, and said that he would make first payment of one thousand dollars to them for material they were to furnish the American Sky Light and Iron Works.

This construction is borne out by the admissions of Fred Kilgus that the thousand dollars had become due and his payment of one-half that amount on account, and it was not until he afterwards  
 10 learned that there was going to be difficulty in the completion of the contract by the American Sky Light and Iron Works that he shifted his position and tried to save himself harmless. It was then too late, and the evasive testimony of his office men (pages 54, 56, 60, 64, 68, 75, 79) upon this point should be enough to satisfy the court in this regard.

Taken altogether it must be apparent that no  
 20 business man of ordinary keenness and caution would have done anything else than what Meurer Brothers Company did, or would make any other arrangement than what they insist was made with Kilgus. This is the construction that should have been placed upon the contract, and in failing to give it this construction and in directing a verdict in favor of the defendant upon the converse construction, the trial court erred.

The court also erred in declining to admit the  
 30 telephone conversation between Bolles and Kilgus. It was clearly competent, regardless of its weight.

1 *Wigmore on Evidence*, p. 765, sec. 669;

3 *Wigmore on Evidence*, p. 2923, sec. 2155;

*State v. Urber*, 111 N. W. 811;

*Gen'l Hospital So. v. N. H. R. R. Co.*, 65 Atl. 1065;

*Kan. City S. Co. v. Standard W. Co.*, 99 S. W. 764;

40 *McCarthy v. Peach*, 186 Mass. 67;

1 *Chamberlayne on Evidence*, p. 971, sec. 794; p. 182, sec. 129.

3 *Chamberlayne on Evidence*, p. 2303, sec. 1741C.

The court also erred in not submitting the case to the jury after declining to direct a verdict in favor of the plaintiff.

Under all the circumstances of the case, if the court felt disinclined to direct a verdict in favor 10 of the plaintiff, it was for the jury to pass upon the credibility of the witnesses and to reconcile the evidence which had been admitted upon the contract between the parties.

The judgment of the Supreme Court should be reversed and set aside, and judgment entered in favor of the plaintiff in this court for the balance due with interest, or a *vernire de novo* should be awarded for the retrial of the case.

Respectfully submitted, 20

VREDENBURGH, WALL & CAREY,  
*Attorney for and of Counsel with  
Plaintiff-Appellant.*

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40



## New Jersey Court of Errors and Appeals

JACOB MEURER, trading as MEURER  
BROTHERS,

*Plaintiff-Appellant,*

*vs.*

FRED KILGUS,

*Defendant-Appellee.*

*On Appeal  
from New  
Jersey  
Supreme  
Court.*

### **Brief for Defendant-Appellee.**

This is an appeal from a judgment entered at the Essex Circuit upon a verdict directed by the Honorable Frederic Adams, the judge before whom the case was tried. At the conclusion of the case there were cross motions for the direction of a verdict, one made by the plaintiff, and the other made by the defendant. The motion of the defendant was granted. In granting the motion Judge Adams delivered a very careful and accurate statement of the facts and his conclusions thereon, which is printed on page 129. We call the court's particular attention to these findings by Judge Adams and think they fully vindicate the propriety of the judgment below. The appellant now argues that even though the court below denied its motion for the direction of a verdict, the case should have been left to the jury. It was, however, essentially a proper case for the direction of a verdict, since the facts were undisputed, and the sole question was one of the proper construction of the contractual relation between the plaintiff and defendant. Further-

more, while the rule is not universally settled, the better opinion is that where both sides make a motion for the direction of a verdict, the case is taken from the jury and the court may decide incidental questions of fact. This is undoubtedly so where, after the denial of his motion, the complaining party made no request for a submission to the jury. There was no such request in the case at bar, and therefore the appellant has no just cause for complaint if the finding of the court below was unexceptional in point of law.

*Schultes vs. Sickles*, 41 N. E. (N. Y.), 574.

*Empire State Co. vs. Railway &c. Co.*, 210 U. S., 1.

### **No Error of Law was Committed.**

The appellee was the general contractor on the Lincoln Avenue School at Orange, N. J. Among his sub-contractors was the American Skylight & Iron Works, a concern which desired to purchase some of its material from the appellant. The appellant refused to deliver this material unless it received some assurance with regard to the payment thereof. The agreement between the appellee and the American Skylight & Iron Works is printed at page 137. Under it, it is very clear that the American Skylight & Iron Works were entitled to nothing until they should have completed their work to the satisfaction of the architect. As preliminary to the introduction of the correspondence which took place between the appellee and appellant, counsel for the appellant endeavored to prove a telephone conversation between Mr. Bolles, the manager of the appellant, and the office of Mr. Kilgus (see p. 40) and the court's refusal to permit this evidence to go in is now alleged as error. We

submit there was no error. Even if error was technically committed, it was altogether harmless. Thus it appeared from Mr. Bolles' own statement that he did not know whether he was talking to Mr. Kilgus or not, in fact he said (p. 40) :

"I commenced to talk to some one whom I supposed was some one representing Fred Kilgus."

The particular question which was overruled by the court was :

"What was said Mr. Bolles at the time you were talking over the telephone to Mr. Kilgus' office?"

The court said :

"At present I will sustain the objection."

The plaintiff made no effort afterwards to identify the person who had talked from Mr. Kilgus' office, nor was the offer renewed. At any rate, in as much as the plaintiff made no allegation of any agreement other than that contained in the correspondence, and all the correspondence was offered in evidence, this matter is wholly unimportant.

The correspondence which it is alleged is the foundation of the claim against the defendant, was as follows: On October 16th, 1908, the defendant wrote to the plaintiff :

"I will deduct from the American Skylight & Iron Works \$1,000 and place same to the credit of your account, for payment when the work on the Lincoln Avenue School is completed, at Orange, N. J."

In reply to this letter the plaintiff wrote the defendant on October 16th, 1908, as follows :

"We are in receipt of your esteemed favor of the 16th inst. relative to the contract held by the American Skylight & Iron Works for work on the Lincoln Avenue School, and in accordance

with the telephone conversation which the writer held with you, we understand that you are willing to agree to make the first payments to us amounting to \$1,000 when the American Skylight & Iron Works have done this amount of work.

Will you be good enough to write us to this effect, as on your original letter as pointed out to you the payment could be withheld by you until the work was done.

We thank you very kindly for your consideration in this matter and beg to remain."

A postscript to this letter was as follows:

"We understand according to contract that first payment is due American Skylight & Iron Works when main work is done, second payment when cornice is on annex and roof of three wings has been completed."

On October 19th, 1908, the defendant wrote to the plaintiff as follows:

"In reply to yours of the 16th inst. beg to state I will make first payment of \$1,000 to you for the account of the American Skylight & Iron Works for material you are to furnish for the Lincoln Avenue School, Orange, N. J."

And on the same date the plaintiff replied to the defendant as follows:

"We are in receipt of your favor of the 19th inst. and in accordance therewith we will deliver the material to the American Skylight & Iron Works for use on the Lincoln Avenue School and thanking you very kindly for your consideration in this matter, we remain,"

As pointed out very clearly in the findings of Judge Adams, the agreement, if there was any agreement between the plaintiff and defendant, must be found in these letters. The original offer of the defendant was to make the payment when the work was

completed by the American Skylight & Iron Works. This was embodied in the letter of October 16th. On the same date a letter was written by the plaintiff expressing dissatisfaction with this arrangement, but on the 19th the defendant again wrote, and said that he would make the first payment of \$1,000 to the plaintiff "for the account of the American Skylight & Iron Works." Thus he did not say that he would make the payment when \$1,000 worth of work had been done as suggested in Meurer's letter of October 16th, but merely that he would make the first payment for the account of the American Skylight & Iron Works to Meurer. The agreement is, therefore, that contained in Mr. Kilgus' letter of October 16th as supplemented by his letter of October 19th, and as accepted by Meurer's letter of October 19th, in which it is expressly said that in accordance with Mr. Kilgus' letter of the 19th, plaintiff would deliver the material. The subsequent correspondence shows clearly that the plaintiff understood that there was no absolute guarantee upon the part of the defendant, but that the plaintiff's right to recovery had to be sought through the American Skylight & Iron Works.

This litigation has already been protracted, the plaintiff below having originally filed a claim for the amount in suit under the municipal lien law. This matter was heard in the Court of Chancery and the complainant's bill dismissed. The conclusions of Vice-Chancellor Howell in that case are reported in 77 N. J. Eq., p. 175. Vice-Chancellor Howell in that case said that as he construed the agreement between the American Skylight & Iron Works and Mr. Kilgus, there could be no recovery by the sub-contractor against Mr. Kilgus until the sub-contract had been finished to the architect's satisfaction. In accordance with the general rule, the Vice-Chancellor held that the right of recovery of Meurer Bros. in that case was

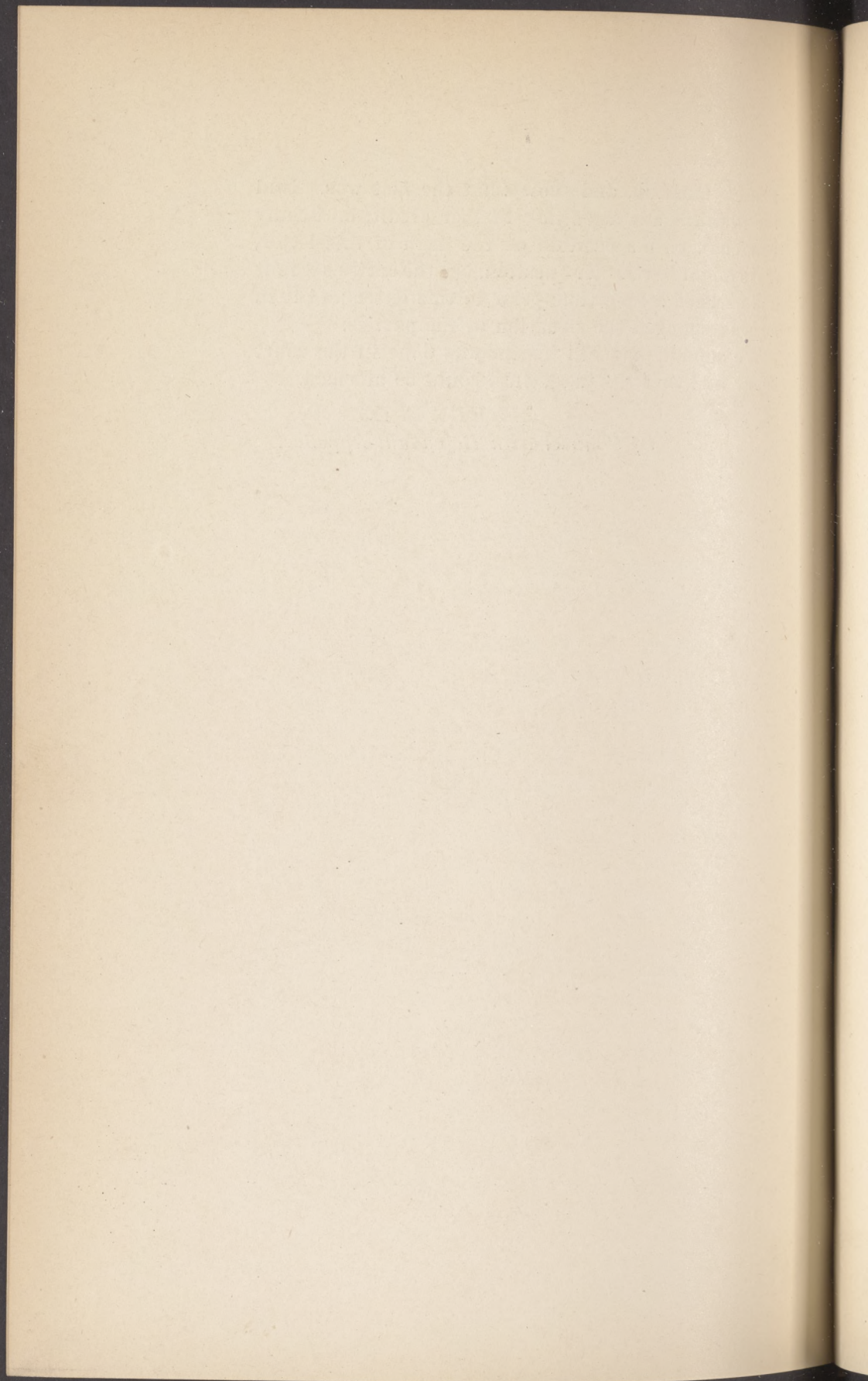
dependant upon the right of the sub-contractor to recover against Kilgus and in as much as there was no such right, there could be no right upon the part of Meurer Bros.

The facts are not disputed. The amount of the original contract between the American Skylight & Iron Works and Mr. Kilgus was \$2,700. Five hundred dollars was paid by Mr. Kilgus to the Meurer Bros. Company on account of the American Skylight & Iron Works. The American Skylight & Iron Works defaulted in the work and failed. It was necessary for Mr. Kilgus to expend \$2,300 in the completion of the work, therefore he suffered a net loss of \$100 and it is obvious that the American Skylight & Iron Works itself could not have recovered anything from Mr. Kilgus. It was the view of the court below, and we think a proper view, that in as much as the American Skylight & Iron Works could not have recovered against Kilgus, Meurer could not either. This was so since the agreement between the parties was that Meurer Bros. were to have the \$1,000 out of moneys that should become due to the American Company. All of the material upon which the claim is based was delivered prior to October 31st, 1908. Reliance is placed by the plaintiff upon the letter which the book-keeper of Mr. Kilgus wrote to the Meurer Bros. on December 7th, 1908, in which he said that the defendant was authorized to make a payment of \$1,000 to Meurer Bros. and the claim is that the defendant is now estopped to deny that there was \$1,000 due. The record shows clearly, however, that the statement in this letter was erroneous. It was made in sole reliance upon the fact that the American Company claimed that much, without any investigation, and subsequent investigation developed that \$1,000 had not become due and the eventual result, as above set forth, showed that it never became due. There was no reason why the defendant should not have been allowed to make

this explanation, and show what the fact was. Had the plaintiff advanced any further credit, or in any way changed his position on the faith of this letter, there might be another question, but the entire account had accrued a long time prior to this letter and it in no way changed the situation of the parties.

We submit that full justice was done in the court below and that the judgment should be affirmed.

ARTHUR F. EGNER,  
*Of Counsel with Defendant-Appellee.*



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For Plaintiff:

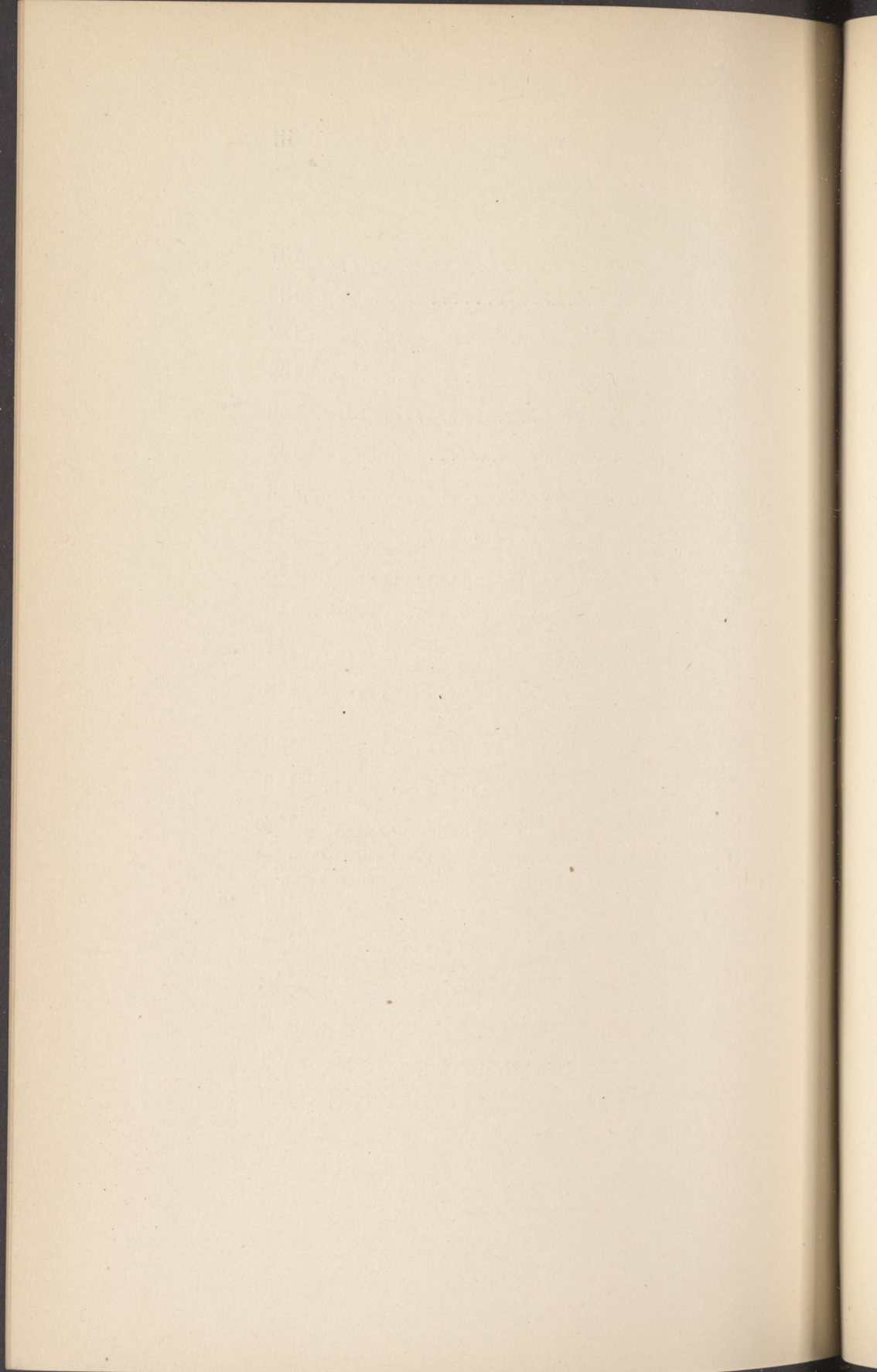
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Notice of Appeal.

(Filed November 20, 1913)

NEW JERSEY SUPREME COURT. 10

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JACOB MEURER, trading as  
MEURER BROTHERS COMPANY,  
*Plaintiff,*

*vs.*

FRED KILGUS,  
*Defendant.*

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On Contract.  
Notice of  
Appeal.

20

To

MESSES. McCARTER & ENGLISH,  
*Attorneys of Defendant:*

TAKE NOTICE, that the plaintiff appeals to the  
Court of Errors and Appeals of the State of New  
Jersey, from the whole of the judgment entered  
in the above entitled cause. 30

Yours respectfully,  
VREDENBURGH, WALL & CAREY,  
*Attorneys of Appellant.*

Dated July 2nd, 1913.

*(Endorsed)*

Service acknowledged July 7, 1913.

40

## Grounds of Appeal.

(Filed November 18, 1913)

### NEW JERSEY COURT OF ERRORS AND APPEALS

IN THE LAST RESORT IN ALL CAUSES.

10 JACOB MEURER, trading as  
MEURER BROTHERS COMPANY,  
*Plaintiff-Appellant,*

*vs.*

FRED KILGUS,  
*Defendant-Appellee.*

On Appeal  
from New  
Jersey Su-  
preme Court.  
Grounds of  
Appeal.

20 The following are the grounds upon which plaintiff appeals to the New Jersey Court of Errors and Appeals, in the last resort in all causes, from the judgment of the New Jersey Supreme Court:

FIRST. Said judgment was rendered in favor of defendant and against plaintiff, whereas it should have been in favor of plaintiff and against defendant.

30

SECOND. The trial court erred in directing a verdict in favor of defendant and against plaintiff.

THIRD. The trial court erred in refusing to direct a verdict in favor of plaintiff and against defendant.

40 FOURTH. The trial court erred in not submitting the case to the jury after refusing to direct a verdict in favor of plaintiff.

*Grounds of Appeal*

The following questions were admitted:

FIFTH. To the witness Frederick Kilgus:

“Q. Did you have any complaints from the Architect?

“Q. How did you find it? (The work which had been done by the American Skylight & Iron Works.) 10

“Q. By whom was the work completed?

“Q. How much did you pay them to complete the work?”

SIXTH. To the witness, Lewis D. Kilgus:

“Q. What progress did the American Company make on this work, if you know?

“Q. Did they finally complete the work that they had contracted to do?” 20

SEVENTH. To the witness Henry M. Coleman:

“Q. Now, Mr. Coleman, at the time you wrote this letter, Exhibit P-9, had you been informed by the architect or anybody else that a payment of \$1000. had become due to the American Skylight & Iron Works?”

EIGHTH. To the witness, Ernest F. Guilbert:

“Q. What can you say as to the work that was done by them. (American Skylight & Iron Works.) Was it satisfactory or unsatisfactory?” 30

NINTH. To the witness, Gottlieb Yunker:

“Q. Now, do you remember having given a figure for completing the metal work on the Lincoln Avenue School?

“Q. Then do I understand that in your judgment these changes were necessary to make the work conform to the specifications?” 40

*Grounds of Appeal*

TENTH. To the witness, Grant A. C. Behee:

“Q. Now, at the time the American Skylight & Iron Works discontinued work was the work that they had done up to that stage satisfactory?”

The following questions were overruled:

10 ELEVENTH. To the witness, Grant A. C. Behee:

“Q. Well, now, what in your opinion was a fair cost for the construction of that entire work from start to finish?

“A. Of the entire roof as the sheet metal was involved?

“Q. That was required by the specifications?”

20 TWELFTH. To the witness Charles G. Bolles, Jr.

“Q. And did that written communication refer in any way to the conversation that you had over the telephone?

“Q. What was said Mr. Bolles, at the time you were talking over the telephone to Mr. Kilgus’s office?”

30 THIRTEENTH. The specifications in the contract between Frederick Kilgus and Newark Cornice and Skylight Works, marked Exhibit D-8, were admitted in evidence.

FOURTEENTH. The letter dated January 2, 1909, from Fred Kilgus to Meurer Brothers, marked Exhibit D-11, was admitted in evidence.

FIFTEENTH. The motion to strike out the testimony of witness Gottlieb Yunker referring to the condition of the cornices and seams was denied.

40 SIXTEENTH. The questions of the various wit-

*Recognizance*

nesses referring to the contract between Fred. Kilgus and American Skylight & Cornice Works, and the manner in which the work thereunder was performed, to which general objections were made, were admitted.

Dated November 15, 1913.

VREDENBURGH, WALL & CAREY,  
*Attorneys for Appellant.*

(*Endorsed*)

10

Service acknowledged and consent to file, dated November 17, 1913.

**Recognizance.**

(Filed December 10, 1913)

KNOW ALL MEN BY THESE PRESENTS, That we, JACOB MEURER of Brooklyn, New York, as principal, and INTERNATIONAL FIDELITY INSURANCE COMPANY, a body corporate, authorized to become surety upon bonds required or used in judicial proceedings within the State of New Jersey, as surety, are held and firmly bound unto FRED KILGUS, of Newark, New Jersey, in the sum of One Hundred Dollars (\$100.), lawful money of the United States, for which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents. 20 30

IN WITNESS WHEREOF, said principal has hereunto set his hand and seal, and said surety has caused these presents to be signed in its corporate name by its President and attested by its Secretary, and its corporate seal to be hereto affixed.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT

WHEREAS, said Jacob Meurer has taken an ap- 40

*Recognizance*

peal from the Supreme Court of the State of New Jersey to the Court of Errors and Appeals of said State, to remove a certain judgment obtained by said Fred Kilgus in an action upon contract in said Supreme Court, as appears of record in said Supreme Court:

10 NOW THEREFORE, if the said appellant Jacob Meurer shall prosecute said appeal with effect and also pay and satisfy, if said judgment be affirmed, all the damages and costs adjudged in said former judgment, and all costs and damages to be awarded for delay of execution, then this obligation shall be void; otherwise to remain in full force.

Sealed and delivered by}

JACOB MEURER, }

In presence of JACOB MEUER (Seal).

PIERRE F. COOK,

20 ARTHUR H. GRAHAM,

Notary Public, Queens County 7275,

Certificate filed in Kings County.

[Notary Seal]

International Fidelity Insurance Company,

By

A. A. ALTSCHULER, *President.*

C. T. JOHNSON, *Secretary.*

[Corporate Seal]

30 Taken and acknowledged this 4th day }

of December, 1913, before me }

PIERRE F. COOK,

*Supreme Court Commissioner of New Jersey.*

(Endorsed)

I approve the within bond as to form and sufficiency of surety.

PIERRE F. COOK,

*Supreme Court Commissioner of New Jersey.*

Dec. 4, 1913.

## Declaration.

(Filed November 29, 1911)

## NEW JERSEY SUPREME COURT,

OF THE FIRST DAY OF DECEMBER, NINETEEN HUNDRED AND ELEVEN.

ESSEX COUNTY, ss.:

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FRED KILGUS, the defendant in this suit was summoned to answer unto JACOB MEURER, trading as Meurer Brothers Company, the plaintiff therein, in an action upon contract, and thereupon the said plaintiff by Vredenburgh, Wall & Carey, his attorneys, complains:

FOR THAT WHEREAS, heretofore, to wit on the 19th day of October, 1908, at the City of Brooklyn, in the State of New York, to wit, at Newark, in the County of Essex, aforesaid, in consideration that the plaintiff at the special instance and request of said defendant, should furnish, sell and deliver certain goods, wares and merchandise to the American Skylight and Iron Works, for use by said American Skylight and Iron Works in the erection and construction for the defendant of a part of a certain building known as Lincoln Avenue School Building, in the City of Orange and State of New Jersey, which part of said building said American Skylight and Iron Works had theretofore contracted to construct and erect for said defendant, said defendant undertook and promised to pay to the plaintiff for and on account of the purchase price of said goods, wares and merchandise, the sum of One thousand dollars (\$1000.) when said American Skylight and Iron Works in the course of the performance by it of its said contract with said defendant, should do and perform work and furnish material of the value of One Thousand Dollars, in the erection and construction of said building.

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*Declaration*

And the plaintiff avers that in consideration of said promise and undertaking of the defendant, he did on the 31st day of October, 1908, furnish, sell and deliver to said American Skylight and Iron Works, the aforesaid goods, wares and merchandise by him to be furnished, sold and delivered to American Skylight and Iron Works, as

10 aforesaid, and said American Skylight and Iron Works did thereafter, to wit, on the 7th day of December, 1908, do work and furnish material for and in the erection and construction of said building, and in the course of the performance of its contract with said defendant, which work and material were of the value of One Thousand Dollars, whereby said sum of One thousand dollars became due and payable from said defendant to the plaintiff; and thereafter and on the seventh

20 day of December, 1908, said defendant, in part payment of said sum of One thousand dollars so due and owing by the defendant to the plaintiff, paid to the plaintiff on account thereof, the sum of Five hundred (\$500.) Dollars, and although the plaintiff has often requested said defendant to pay the balance of Five hundred dollars remaining unpaid and so due and owing from the defendant to the plaintiff, yet the said defendant

30 has thence hitherto neglected and refused and still does neglect and refuse so to do, to the damage of the plaintiff One thousand dollars.

AND ALSO FOR THAT WHEREAS, heretofore, to wit, on the 19th day of October, 1908, at the City of Brooklyn, in the State of New York, to wit, at Newark, in the County of Essex aforesaid, in consideration that the plaintiff at the special instance and request of the defendant, should furnish, sell and deliver to the American Skylight and Iron Works certain goods, wares and merchandise for use by said American Skylight and

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*Declaration*

Iron Works in the erection and construction for the defendant of a part of a certain building known as Lincoln Avenue School Building, located in the City of Orange and State of New Jersey, for the construction and erection of which portion of said building said American Skylight and Iron Works had a contract with said defendant, said defendant agreed to pay to said plaintiff for and on account of the purchase price of said goods, wares and merchandise, the sum of One thousand dollars when the work on the main or original building should be done by said American Skylight and Iron Works. 10

And the plaintiff avers that in consideration of the aforesaid promise and undertaking of the defendant, he did thereafter, on the 31st day of October, 1908, furnish, sell and deliver to said American Skylight and Iron Works said goods, wares and merchandise by him to be furnished, sold and delivered to it; and thereafter and on the 7th day of December, 1908, said American Skylight and Iron Works did perform and do the work by it to be done on said main or original building, whereby said defendant became and was indebted to the plaintiff in the sum of One thousand (\$1000) Dollars, which sum said defendant was then and there bound to pay to the plaintiff; and thereafter and on said 7th day of December, 1908, in part performance of such promise and undertaking to pay to the plaintiff said sum of One thousand dollars so due and owing by him to the plaintiff, said defendant paid to the plaintiff the sum of Five hundred dollars (\$500.), and although the plaintiff has often requested said defendant to pay the balance of Five hundred Dollars remaining unpaid and so due and owing by the defendant to the plaintiff; yet the defendant thence hitherto has neglected and refused, and 40

*Declaration*

still does neglect and refuse so to do, to the damage of the plaintiff One thousand (\$1000) Dollars.

10 AND ALSO FOR THAT WHEREAS, heretofore, to wit, on the 19th day of October, 1908, at the City of Brooklyn, in the State of New York, to wit at Newark, in the County of Essex aforesaid, in consideration that the plaintiff at the special instance  
20 and request of the defendant should furnish, sell and deliver to the American Skylight and Iron Works certain goods, wares and merchandise for use by said American Skylight and Iron Works in the erection and construction for the defendant of a part of a certain building known as Lincoln Avenue School Building, located in the City of Orange and State of New Jersey, for the construction and erection of which part of said building  
30 said American Skylight and Iron Works had a contract with said defendant, said defendant agreed to pay to said plaintiff for and on account of the purchase price of said goods, wares and merchandise the sum of One thousand Dollars when the first payment should become due from the defendant to said American Skylight and Iron Works, for and on account of the work done and the materials furnished by said American Skylight and Iron Works in the erection and construction of said building.

And the plaintiff avers that in consideration of the aforesaid promise and undertaking of the defendant, he did thereafter, to wit, on the 31st day of October, 1908, furnish, sell and deliver to said American Skylight and Iron Works the said goods, wares and merchandise by him to be furnished, sold and delivered to it; that on the 7th day of October, 1908, the first payment to said American Skylight and Iron Works for work done  
40 and material furnished by it in the erection and construction of said building became due and

*Declaration*

payable from said defendant to said American Skylight and Iron Works, and by reason of the premises said defendant became and was indebted to the plaintiff in the sum of One thousand Dollars, which sum said defendant was then and there bound to pay to the plaintiff, and in consideration of the premises said defendant then and there undertook and promised to pay to the plaintiff on request said sum of One thousand dollars; and thereafter, and on the 7th day of December, 1908, in part performance of his said promise and undertaking, said defendant paid to the plaintiff the sum of five hundred dollars, and although often requested by the plaintiff to pay the balance of \$500. remaining unpaid and so due and owing by the defendant to the plaintiff, yet the defendant thence hitherto has neglected and refused and still does neglect and refuse to pay the same to the plaintiff, to the damage of the plaintiff One Thousand Dollars.

AND ALSO FOR THAT WHEREAS, the said defendant on the first day of November, 1911, at the City of Newark, in the County of Essex aforesaid, was indebted to the plaintiff in the sum of One thousand dollars for the price and value of goods sold and delivered by the plaintiff to the defendant at his request; and in the like sum of money for the price and value of goods bargained and sold by the plaintiff to the defendant at his request; and in the like sum of money for the price and value of work done and materials for the same provided by the plaintiff for the defendant at his request; and in the like sum of money for money lent by the plaintiff to the defendant at his request; and in the like sum of money for money received by the defendant for the use of the plaintiff; and in the like sum of money for money paid by the plaintiff for the use of the defendant at his re-

*Declaration*

quest; and in the like sum of money for interest due from the defendant to the plaintiff for the plaintiff having foreborne moneys due from the defendant to the plaintiff at the defendant's request, for a long time then elapsed; and in the like sum of money found to be due from the defendant to the plaintiff on an account then and there stated between them; and the defendant afterwards, to wit, on the day and year last aforesaid, in the county aforesaid, in consideration of the premises, respectively promised to pay the said several last mentioned moneys respectively to the plaintiff on request; yet the defendant disregarded his promises and has not paid any of the said moneys or any part thereof; to the plaintiff's damage One thousand Dollars (\$1000.), and thereupon it brings its suit, &c.

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VREDENBURGH, WALL & CAREY,  
*Attorneys for Plaintiff.*

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**Bill of Particulars.**

(Filed November 20, 1913)

NEW JERSEY SUPREME COURT.

JACOB MEURER, trading as  
MEURER BROTHERS COMPANY,  
*Plaintiff,*

*vs.*

FRED KILGUS,  
*Defendant.*

On Contract. 10  
Bill of Particulars, &c.

PLEASE TAKE NOTICE:

That the following is a bill of particulars of the plaintiff's demand, together with a copy of the 20 writing on which the declaration herein is founded.

Yours respectfully,

Dated January 19, 1912.

VREDENBURGH, WALL & CAREY,  
*Attorneys for Plaintiff.*

To:

MESSRS. McCARTER & ENGLISH,  
*Attorneys for Defendant.*

30

BILL OF PARTICULARS.

MR. FRED KILGUS,

TO MEUBER BROTHERS COMPANY, DR.

1908.

10 Oct. 19 To amount agreed to be paid by defendant Kilgus to plaintiff Meurer for materials to be furnished by the plaintiff to American Skylight & Iron Works for Lincoln Ave. School, Orange, N. J..... \$1000.

1908.

Dec. 7 CREDIT by payment on account.... 500.  
 Balance due..... \$500.

20

COPY OF WRITINGS:

(Letter Head of Plaintiff.)

Oct. 16, 1908.

MR. FRED KILGUS,  
 13 South Sixth St.  
 Newark, N. J.

30 DEAR SIR:

We are in receipt of your esteemed favor of the 16th instant relative to the contract held by the American Skylight and Iron Works for work on the Lincoln Ave. School and in accordance with the telephone conversation which the writer held with you, we understand that you are willing to agree to make the first payments to us, amounting to \$1000.00 when the American Skylight and Iron Works have done this amount of work. Will you be good enough to write us to this effect as  
 40 on your original letter as pointed out to you the

*Bill of Particulars*

payment could be withheld by you until the work was done.

We thank you very kindly for your consideration in this matter, and beg to remain,

Yours respectfully,

MEURER BROS. CO.  
C. N. BOLLES, JR. 10  
*General Manager.*

P. S.—We understand according to contract that first payment is due American Skylight & Iron Works when main work is done second payment when cornice is on annex & roof of 3 wings has been completed?

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(Letterhead of defendant)

Oct. 19th/08

MESS MEURER BROS Co.  
#567/77 Flushing Brooklyn N. Y.

DEAR SIR:—

In reply to yours of the 16th inst. beg to state I will make first payment of \$1000.00 to you for the account of the American Skylight & Iron Works for material you are to furnish for the Lincoln Ave School, Orange, N. J. 30

Yours truly

FRED KILGUS  
H. M. C.

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*Bill of Particulars*

(Letterhead of defendant)

Dec. 7th/08

MESS MEURER BROS Co.  
Brooklyn N. Y.

DEAR SIRs:—

10 We are authorized to-day to make a payment of one thousand (\$1000.00) dollars to you by the American Skylight & Iron Works of Jersey City on account of material furnished for the Lincoln Ave School, Orange, N. J. we are sending you \$500.00 to-day, and will make payment for the balance in a few days, as we have several heavy payments coming due this week, we are obliged to make it two payments at this time, which we trust will meet with your satisfaction.

Yours truly

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FRED KILGUS  
H. M. COLEMAN.

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(Endorsed)

Service acknowledged January 20, 1912

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## Plea.

(Filed January 20, 1912)

## NEW JERSEY SUPREME COURT.

JACOB MEURER, trading as  
MEURER BROTHERS COMPANY,  
*Plaintiff,*

*vs.*

FRED KILGUS,  
*Defendant.*

On Contract. 10

PLEA.

And the said defendant, by McCarter & English, his attorneys, comes and defends the wrong and injury when &c. and says that he did not undertake and promise, in manner and form as the plaintiff hath above thereof complained against him and of this he, the said defendant, puts himself upon the country &c. 20

McCARTER & ENGLISH,  
*Attorneys of Defendant.*

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## Specification of Defences.

## NEW JERSEY SUPREME COURT.

10	<p>JACOB MEURER, trading as MEURER BROTHERS COMPANY,</p> <p style="text-align: center;"><i>vs.</i></p> <p>FRED KILGUS.</p>	}	<p>On Contract. Specification of Defences.</p>
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TO MESSRS. VREDENBURGH, WALL & CAREY,  
*Attorneys of Plaintiff.*

20 The following is a specification of the defences intended to be made under the plea of general issue filed by the defendant in the above entitled cause:

FIRST: The defendant is not indebted to the plaintiff as alleged in the declaration.

SECOND: The defendant owes the plaintiff nothing.

30 THIRD: The American Skylight & Iron Works did not perform the work and furnish the materials agreed by it to be performed and furnished.

FOURTH: The performance by the American Skylight & Iron Works of the work and labor and the materials furnished by it under its contract with the defendant for work on the Lincoln Avenue School building were defective.

40 FIFTH: The American Skylight & Iron Works did not perform and furnish work and material of the value of one thousand dollars, in the erec-

**Plea.**

(Filed January 20, 1912)

## NEW JERSEY SUPREME COURT.

JACOB MEURER, trading as  
MEURER BROTHERS COMPANY,  
*Plaintiff,*

*vs.*

FRED KILGUS,  
*Defendant.*

On Contract. 10

PLEA.

And the said defendant, by McCarter & English, his attorneys, comes and defends the wrong and injury when &c. and says that he did not undertake and promise, in manner and form as the plaintiff hath above thereof complained against him and of this he, the said defendant, puts himself upon the country &c. 20

McCARTER & ENGLISH,  
*Attorneys of Defendant.*

30

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## Specification of Defences.

## NEW JERSEY SUPREME COURT.

10	<p>JACOB MEURER, trading as MEURER BROTHERS COMPANY,</p> <p style="text-align: center;"><i>vs.</i></p> <p>FRED KILGUS.</p>	} On Contract. Specification of Defences.
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TO MESSRS. VREDENBURGH, WALL & CAREY,  
*Attorneys of Plaintiff.*

20 The following is a specification of the defences intended to be made under the plea of general issue filed by the defendant in the above entitled cause:

FIRST: The defendant is not indebted to the plaintiff as alleged in the declaration.

SECOND: The defendant owes the plaintiff nothing.

30 THIRD: The American Skylight & Iron Works did not perform the work and furnish the materials agreed by it to be performed and furnished.

FOURTH: The performance by the American Skylight & Iron Works of the work and labor and the materials furnished by it under its contract with the defendant for work on the Lincoln Avenue School building were defective.

40 FIFTH: The American Skylight & Iron Works did not perform and furnish work and material of the value of one thousand dollars, in the erec-

*Specification of Defences*

tion and construction of said Lincoln Avenue School building.

SIXTH: The work and materials performed and furnished by the American Skylight & Iron Works on the Lincoln Avenue School building amounted in value to less than five hundred dollars. 10

SEVENTH: The first payment never became due and owing from the defendant to the said American Skylight & Iron Works for work done on the Lincoln Avenue School building.

EIGHTH: Nothing at any time became due to the American Skylight & Iron Works from the defendant, in addition to the sum paid to the plaintiff on account of said American Skylight & Iron Works. 20

NINTH: The plaintiff did not furnish material to the American Skylight & Iron Works of the value of one thousand dollars.

TENTH: Goods, wares, and merchandise of the value of one thousand dollars, were not furnished to the American Skylight & Iron Works by the plaintiff and by said American Skylight & Iron Works used in the erection and construction of the Lincoln Avenue School building. 30

ELEVENTH: Because the American Skylight & Iron Works defaulted in its contract with the defendant for work and materials in the erection and construction of said Lincoln Avenue School building, whereby the defendant was compelled to complete the work to be done under said contract at a cost in excess of the amount remaining due 40

*Specification of Defences*

and payable to and on account of the American Skylight & Iron Works.

10 TWELFTH: No payments in excess of five hundred dollars ever became due and owing from the defendant to the American Skylight & Iron Works, or any one else, on its account, for work performed and materials furnished by the American Skylight & Iron Works, in the construction and erection of the Lincoln Avenue School building.

THIRTEENTH: The defendant did not make the alleged agreement relied on by the plaintiff.

20 FOURTEENTH: Neither the defendant nor any one authorized in his behalf ever promised the plaintiff to make any payments to him on account of the American Skylight & Iron Works.

FIFTEENTH: The defendant never made any agreement with the plaintiff as to payments to him on account of work done by the American Skylight & Iron Works.

Very Truly Yours  
McCARTER & ENGLISH.

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*(Endorsed)*

Service February 2, 1912.

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**Postea.**

(Filed June 13, 1913)

Afterwards, to wit, at the Circuit Court holden at Newark, in and for the County of Essex, before the Honorable FREDERIC ADAMS, to whom the said cause had been referred for trial by the Honorable WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, on the fifteenth day of April, 10 nineteen hundred and thirteen, according to the form of the statute in such case made and provided, comes as well the said plaintiff as the said defendant by their respective attorneys within mentioned, and the jurors of the jury between the parties aforesaid in the place aforesaid being also summoned, come, who to speak the truth of the matters and things therein contained, being chosen, tried and sworn, say upon their oaths that the said defendant Frederick Kilgus did not under- 20 take and promise in manner and form as the said plaintiff hath in his said declaration alleged. Therefore, &c.

FREDERIC ADAMS,  
*Circuit Court Judge.*

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**Judgment.**

(Entered June 3, 1913.)

Therefore it is considered that the said plaintiff Jacob Meurer, Trading as Meurer Brothers Company, take nothing by its said writ, and that the said defendant, Fred Kilgus, do go thereof without day &c.

- 10 And it is further considered that the said defendant Fred Kilgus, do recover against the said plaintiff, Jacob Meurer, Trading as Meurer Brothers Company, the sum of thirty-nine dollars and ten cents, for his costs and charges by him about his defence in this behalf laid out and expended by the Court now here adjudged to the said defendant and with his assent, according to the form of the statute in such case made and provided, and that the said defendant, Fred Kilgus,
- 20 have execution thereof, &c.

Judgment signed this third day of June, A. D. nineteen hundred and thirteen.

WILLIAM S. GUMMERE,  
C. J.

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## Testimony.

NEW JERSEY SUPREME COURT,  
ESSEX CIRCUIT.

Monday, April 14, 1913.

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JACOB MEURER, trading as MEURER BROTHERS COMPANY,

*vs.*

FRED KILGUS.

19

On Contract.

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Before Hon. FREDERICK ADAMS, J., and a Jury. 20

For Plaintiff appear MESSRS. VREDENBURGH, WALL & CAREY, by JOHN A. HARTPENCE, Esq.

For defendant appear MESSRS. McCARTER & ENGLISH, by ARTHUR F. EGNER, Esq.

A jury is called and sworn.

Mr. Hartpence opens for plaintiff.

Mr. Egner opens for defendant.

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ALAN H. JETER sworn in behalf of plaintiff.

*Direct-examination by Mr. Hartpence:*

Q. Mr. Jeter, where do you reside? A. 304 West One Hundred and Fifty-first street, New York.

Q. What is your business? A. Roofing and sheet metal.

Q. In what way are you engaged in that business? A. Superintendent.

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*Alan H. Jeter, for Plaintiff—Direct*

Q. Were you ever in the employ of the American Skylight & Iron Works? A. I was.

Q. Were you in their employ in the year 1908? A. I believe so.

Q. How long had you continued in their employ? A. I was in their employ during the time that this Lincoln avenue job was going on.

10 Mr. Egner: Answer the question, please.

Q. How long were you in their employ? A. I am sure seven or eight months.

Q. And in what capacity were you employed by them? A. Superintendent.

Q. Superintendent of the concern generally? A. Yes.

Q. General superintendent? A. Yes, sir.

20 Q. During the time you were acting in that capacity did the American Skylight & Iron Works have anything to do with the Lincoln avenue school building, in Orange, New Jersey? A. They had.

Q. When was that, Mr. Jeter? A. I don't recall the date.

Q. Well, can you recall generally? A. It was at the time that the contract was awarded, which is a matter of record.

30 Q. Well, do you remember whether it was in the early part of your employment or the latter part? A. It must have been the latter part, because after that the company failed, and that was the last job that we had.

Q. Now, what was the work which the American Skylight & Iron Works had to do upon the Lincoln avenue school building, in Orange?

Mr. Egner: I think the best way to show that would be by reference to the specifications.

40 The Court: It may be answered generally;

*Alan H. Jeter, for Plaintiff—Direct*

it may be considered as a general question and answered generally.

A. The roofing and sheet metal work.

Q. Did you have charge of that piece of work as the superintendent? A. Yes, sir.

Q. For whom did the American Skylight and Iron Works perform that piece of work? A. For 10 Fred Kilgus.

Q. Was there any contractual arrangement between Fred Kilgus and the American Skylight & Iron Works? A. I received an order.

Q. (Paper shown to witness.) I hand you a memorandum and ask you if you have ever seen that before. A. I have.

Q. What is that, Mr. Jeter? A. That was the order that Mr. Kilgus gave me—Mr. Fred Kilgus's son, the gentleman whom I recognize, sitting 20 before me now.

Q. An order for what? A. For the roofing and sheet metal work of the Lincoln avenue school.

Q. Does the signature of the American Skylight & Iron Works appear on this order? A. It does not—Oh, it does, yes, in my own handwriting.

Q. Did you sign that for the American Skylight & Iron Works? A. I did.

Q. And does Mr. Kilgus's signature appear on there? A. It does. 30

Q. In what form? A. Is that "L. D. Kilgus"?

Q. Well, I am asking you about it, Mr. Jeter.

Mr. Egner: I think the paper will speak for itself.

(Question withdrawn.)

Witness: This was signed by Mr. Kilgus. I don't know what those two first letters are, whether it is "L. D." or what it is. I recognize that as the signature he put on at the time.

*Alan H. Jeter, for Plaintiff—Direct*

Q. And was it in pursuance of this order that the American Skylight & Iron Works entered upon the performance of the work upon the Lincoln avenue school building? A. It was.

Mr. Hartpence: I offer it in evidence.  
(Paper marked Ex. P1.)

10 Q. Now, Mr. Jeter, after that order had been executed and accepted by you for the American Skylight & Iron Works, did the American Skylight & Iron Works take any steps to perform the work? A. It did.

Q. Now, who acted for the American Skylight & Iron Works in that capacity? A. I did.

Q. And what did you do first? A. I endeavored to buy the material from Meurer Brothers.

20 Q. Was there any particular reason why you endeavored to buy it from Meurer Brothers?

Mr. Egner: How is that material, if your Honor please?

The Court: Oh, merely to give an appearance of rationality to the transaction.

A. If my memory serves me correctly, the specifications called for Meurer's tin iron sheets.

30 Q. Did you procure the material from Meurer Brothers with which to perform the American Skylight's part of this contract? A. Not at that time.

Q. Why not? A. Because our company had no credit.

Q. And did Meurer Brothers decline to let your company have the material for that reason? A. They did.

40 Q. What occurred after that, if anything, pertaining to this matter? A. I went over later to see Mr. Bolles, who was manager for the Meurer Brothers, and tried to get this material, and he

*Alan H. Jeter, for Plaintiff—Direct*

at that time determined that he wouldn't deliver it unless we secured an order or he received an order from Fred Kilgus or his firm.

Q. Did you at any time after that succeed in procuring the material that you wished for that purpose? A. I did later.

Q. Under what arrangements did you succeed in procuring it? A. That Fred Kilgus was to— 10

Mr. Egner: If that is in writing—

The Court: Is that order the arrangement? That is the contract, is it, or is the contract outside of that?

Witness: No, sir; there is no contract outside of that, that I know of.

Mr. Egner: If your Honor please, the order is between Kilgus and the American Company, and I believe we are now talking about an arrangement by which Meurer 20 Brothers advanced material, and I think that appears in correspondence and letters, and therefore we ought not to have the witness's testimony about it.

The Court: I see. You are quite right about that.

Q. (Question read.)

The Court: Before you answer that question, tell us whether the evidence of that arrangement is in writing or whether it is not 30 in writing.

Witness: Why, I believe that that arrangement is in writing between Kilgus and Meurer Brothers.

By the Court:

Q. In letters? A. Yes, sir.

Q. Or an oral contract? A. Letters.

The Court: Then the letters will speak for themselves. He says the letters will tell the 40 story.

*Alan H. Jeter, for Plaintiff—Direct*

By Mr. Hartpence:

Q. Well, Mr. Jeter, did you after the time to which you have reference succeed in procuring from Meurer Brothers Company the material for the American Skylight & Iron Works to be used in their contract on the Lincoln avenue school? A. I did.

10 Q. Was that material received by the American Skylight & Iron Works? A. It was.

Q. For that purpose, from Meurer Brothers Company? A. It was.

Q. Do you know where it was delivered? A. It was delivered to the factory at Randolph avenue; I believe the number was 221 Randolph avenue, Jersey City.

Q. (By the Court.) Your factory? A. Yes, sir.

20 Q. (By Mr. Hartpence.) Who was in charge of your factory there? A. A gentleman by the name of William K. Hamilton.

Q. Are you familiar with Mr. Hamilton's signature? A. I am.

Q. Have you seen his handwriting? A. I have.

Q. I show you what purports to be the signature of William K. Hamilton to this paper and ask you whether or not you recognize that handwriting [paper shown to witness]? A. I do.

30 Q. Whose handwriting is it? A. Mr. Hamilton's.

(Paper marked P2 for identification.)

Q. I show you another paper, which purports to contain the signature of W. K. Hamilton, and ask you if you recognize that handwriting (paper shown to witness)? A. I do; Mr. Hamilton's.

Q. Is that Mr. Hamilton's handwriting, too? A. Mr. Hamilton's handwriting, too.

(Paper marked P3 for identification.)

*Alan H. Jeter, for Plaintiff—Direct*

Q. I show you a third paper, which purports to contain the signature of Mr. Hamilton, and ask you if you recognize that (paper shown to witness)? A. Mr. Hamilton's.

Q. W. K. Hamilton's signature? A. W. K. Hamilton's, the same man, yes.

(Paper marked P4 for identification.)

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Q. Now, Mr. Jeter, do you know of your own knowledge whether or not the items mentioned in Exhibit P3 for identification were delivered to and received by the American Skylight Works from Meurer Brothers Company (paper shown to witness)? A. They were.

Q. (By Mr. Egner.) How do you know? A. Because I saw them; I counted them.

Q. (By Mr. Hartpence.) Do you know of your own knowledge whether or not the materials represented by the items in P4 for identification were delivered to and accepted by the American Skylight Company (paper shown to witness)? A. Yes, sir.

20

Q. Now, Mr. Jeter, where do you say these materials were delivered and received by the American Skylight Works? A. At our factory.

Q. Where was the factory? A. 221 Randolph avenue, Jersey City.

Q. What became of it after that, do you know? 30

A. It was delivered to the Lincoln avenue school, after being prepared in the factory.

Q. What happened to it after that, if you know?

A. It was applied on the roof and the cornices on the walls.

Q. How frequently did your duties as superintendent require you to visit the Lincoln avenue school during the progress of the work there? A. There was no stipulated time that I had to be there, but I was on the job nearly every day. Pos-

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*Alan H. Jeter, for Plaintiff—Direct*

sibly some days I was not there, but 'most every day I was there.

10 Q. How nearly was the material furnished by Meurer Brothers to the American Skylight Works for that job used up on the Lincoln avenue school at the time you ceased operations there? A. Well, substantially all of the tin was used, and all of the galvanized iron had been worked into cornices, with the exception of possibly a few sheets; I don't recall just the number. I am sure that it was not as many as twenty sheets left in the factory. I believe that one or two sections of this cornice after having been made was also left in the factory after our company had discontinued operations. The rest of it was delivered, and all of the cornices—all of the walls, rather, which were ready were set with the cornices, and sub-

20 stantially all of the tin was on and finished.

Q. And the cornices that you refer to were completed so far as the preparation of them was concerned? A. They were.

Q. And what remained to be done with those cornices? A. Set them on the wall and make the joints.

Q. And, of course, that would follow when the wall was ready for them; was that true? A. It was; yes, sir.

30 Q. This small amount of tin and the few pieces of cornice that you refer to that might have remained in the factory, did anything remain to be done on that so far as the American Skylight Works was concerned? A. I think you misunderstood me, counsellor. There was nothing left to be done on the tin.

Q. No, I separated the tin. A. I didn't say that there was any tin left in our factory; that was all carried to the Lincoln avenue school; but there was a few sheets of galvanized iron and some cor-

40 nices, I believe two or three 16 foot lengths.

*Alan H. Jeter, for Plaintiff—Direct*

Q. (By the Court.) Left at the factory? A. Left in our factory.

Q. (By Mr. Hartpence.) That was the galvanized iron? A. That was the galvanized iron; yes, sir.

Q. From which the cornices were made? A. Yes, sir.

Q. (By the Court.) Let me understand. Were these two or three 16 foot lengths of the iron which were left in the factory before it was shaped into cornices or of the cornices after they were shaped? A. These were the cornices all put together and finished, just ready to send to the job. By Juror No. 7:

Q. You have mentioned twenty sheets. What was that that you had reference to? A. About twenty sheets of iron that we had left over.

Q. Sheet-iron? A. Sheet-iron, galvanized iron; yes, sir.

Q. (By the Court.) That is, which you had not worked up? A. We had not worked up.

By Mr. Hartpence:

Q. What was the value, approximately, Mr. Jeter, of the sheets that you had not yet worked up? A. Oh, I should suppose possibly \$20 or \$25.

By the Court:

Q. You mean this 20 feet? A. No, sir; twenty sheets that were not worked up.

Q. I got the word wrong. Twenty sheets? A. Yes, sir.

Q. You say they were worth approximately \$25? A. Yes, sir.

By Mr. Hartpence:

Q. What approximately was the value of the pieces of cornice that had not yet left the factory? 40

*Alan H. Jeter, for Plaintiff—Direct*

The Court: You mean of the two or three 16-foot lengths of cornice?

Mr. Hartpence: Those that were made up, if your Honor please.

The Court: They were made up; is that what you refer to?

10 Mr. Hartpence: Yes, sir.

A. Do you mean of the raw material or the cornices completed, including the labor, and so forth, what was the value of those?

Q. Yes, the value as they were. A. Oh, I should judge \$50 or \$60.

By the Court:

20 Q. Are those the two or three 16-foot lengths of cornice? A. Yes, sir.

Q. \$50 or \$60? A. Yes, sir.

By Mr. Hartpence:

Q. Now, what remained to be done on those two or three 16-foot lengths except to place them on the building? A. There was nothing else to be done; they were all completed.

Q. The work had been done upon them? A. The work had been done upon them; yes, sir.

30 Q. Aside from that small portion of the material to which you have just referred, had all the material furnished by Meurer Brothers to the American Skylight Works for that job been used in the job at the Lincoln avenue school? A. It had.

Q. What was the value of the material that was used in the school building?

Objected to on the ground that it does not appear that witness is qualified to answer the question, and on the ground that the question is immaterial.

40

(Question withdrawn.)

*Alan H. Jeter, for Plaintiff—Direct*

By Mr. Egner:

Q. How long have you been in the skylight business, Mr. Jeter? A. Twenty-one years.

Q. And you have a thorough practical knowledge of it? A. Yes, sir.

Q. And you have figured jobs? A. Yes, sir.

Mr. Egner: All right.

The Court: Now you may answer the question. 10

Defendant's counsel object to this ruling of the Court.

Objection noted as ground of appeal.

Q. (Question read as follows: "What was the value of the material that was used in the school building?") A. The value of the material.

By Mr. Hartpence:

Q. Yes? A. The value of the material was what 20  
Meurer Brothers said: I don't recall offhand just what the bill amounts to—with the exception of the material that I have just mentioned that is remaining in the factory.

The Court: You are now asked with reference not to what they said, but your own knowledge on the subject, if you have any.

Q. What was the value, Mr. Jeter, including the 30  
labor expended on it, the work that had been put on it?

Mr. Egner: Let us either have the value of the material or both. The first question was "What was the value of the material?" Now it is with the labor.

The Court: The material and labor?

Mr. Hartpence: Yes, sir; and the work performed upon it.

A. Shall I answer that now?

The Court: Yes. 40

*Alan H. Jeter, for Plaintiff—Cross*

Witness: That was, I should say, approximately \$2000.

Q. Did the American Skylight & Iron Works ever receive any payment from Fred. Kilgus? A. Not to my knowledge.

10 Mr. Hartpence: I desire to offer in evidence P3 for identification and P4 for identification. (Papers marked respectively Ex. P3 and Ex. P4.)

*Cross-examination by Mr. Egner:*

Q. How long were you with the American Skylight & Iron Works all together? A. I must have been with them about eight months, if my memory serves me correctly.

20 Q. Why did you leave, Mr. Jeter?  
Objected to as irrelevant.  
(Question withdrawn.)

Q. Did the American Skylight & Iron Works go out of business during the pendency of this job? A. Yes, sir.

30 Q. Now, do you know of any of the tin work having been taken off while you were in charge of the job for the American Skylight & Iron Works?

Objected to as irrelevant, incompetent and immaterial.

The Court: (After argument.) Meurer Brothers might have taken it off, or taken it back. It does not appear from the question who took it off.

(Objection withdrawn.)

A. One course.

40 Q. What is that? A. One course.

*Alan H. Jeter, for Plaintiff—Redirect*

Q. What do you mean by "One course"? A. The sheets are put together, locked and soldered—

Q. (By the Court.) You are speaking of tin on the roof now, are you? A. Yes, sir; speaking of tin on the roof. I don't recall just the length of those rafters; I imagine about 16 feet. The tin was in one course, or one length, with two edges, one on either side, and the men had put down that course of tin, and the architect's representative called my attention to the fact that the specifications called for paper to be put under the tin, and I immediately had the men loosen the tine that was on this course and put the paper under. However, this course of tin wasn't damaged. It was put back after the paper had been put under it.

Q. (By Mr. Egner.) You say it was put back by your company? A. Yes, sir; that was the first course of tin put on the job.

Q. Was there paper under the tin on the rest of the job? A. Yes, sir.

Q. There was? A. Yes, sir.

Q. Why were not these remaining cornices put up that were in the shop? A. Our company failed before that part of the work got ready.

*Redirect-examination by Mr. Hartpence:*

Q. Mr. Jeter, was any of the material which was furnished by Meurer Brothers Company to the American Skylight & Iron Works for that job sent back or taken back by Meurer Brothers Company? A. Not to my knowledge.

Q. What was the work that you referred to that had not yet gotten ready for the cornices at the time of the failure of your company? A. The brick walls.

*Charles H. Bolles, Jr., for Plaintiff—Direct*

CHARLES H. BOLLES, JR., sworn in behalf of plaintiff.

*Direct-examination by Mr. Hartpence:*

Q. Mr. Bolles, where do you reside? A. Brooklyn.

10 Q. And what is your business? A. Tin-plate and metals.

Q. Where do you conduct your business? A. 575 Flushing avenue, Brooklyn.

Q. By whom are you employed? A. Meurer Brothers Company.

Q. Who are Meurer Brothers Company? A. Jacob Meurer is the proprietor, doing business under that name.

20 Q. How long have you been employed by Jacob Meurer? A. Six years.

Q. And what is your position? A. General manager.

Q. How long have you occupied that position? A. The entire time I have been there.

Q. And as general manager what are your duties? A. To pass on credits, making prices, and general supervision of sales, and so forth—the general conduct of the business.

30 Q. Were you employed in that capacity in the year 1908? A. I was.

Q. And did you at any time in that year have any business relations for Mr. Meurer with the American Skylight & Iron Works? A. We did.

Q. And did you in that same time have any business relations for Mr. Meurer with Fred. Kilgus? A. We did.

40 Q. Now, what was the business that you had with the American Skylight & Iron Works? When was it? In the year 1908, the latter part of the year. They desired to purchase from us material to be used on a certain building being erected in

*Charles H. Bolles, Jr., for Plaintiff—Direct*

the State of New Jersey. The amount was large, and their credit was absolutely no good, and I refused to sell them without a guaranty which would be satisfactory to our company.

Q. With whom did you have your negotiations with the American Skylight & Iron Works? A. Mr. Jeter, representing them.

Q. The gentlemen who just preceded you on the witness-stand? A. Yes, sir. 10

Q. Do you recall just when, or about when, Mr. Jeter and you had your first discussion in this matter? A. Not exactly to the month; the latter part of the year, some time in September or October, somewhere along there.

Q. Well, how did it first come about? A. Jeter came to see me and said that his company—

Mr. Egner: I object to any conversation between Jeter and Mr. Bolles. I do not see how it is binding on this defendant. 20

The Court: (After argument.) If you make your question sufficiently general, I do not see any objection. If you ask what a certain man said, he not being a party to the suit, you get into difficulties at once.

Mr. Hartpence: My question did not call for that.

(Question read.)

The Court: You may answer that question, if you can, without stating the conversation. 30

Witness: We were called upon by Mr. Jeter to deliver goods for use on the school which I have already referred to.

Q. In what way were you called upon to deliver the goods? A. He said that he had a contract where our tin was specified and wanted to know if we would sell him the material. 40

*Charles H. Bolles, Jr., for Plaintiff—Direct*

Q. Did he at that time give you an order for the material that he wanted? A. He tendered me an order.

Q. Now, I show you P2 for identification, and ask you if that was the order that he tendered (paper shown to witness)? A. That is the order.

Q. (By the Court.) You say he sent it to you?

10 A. He brought it.

Mr. Hartpence: "Tendered" was the word he used, if the Court please.

The Court: That is, Mr. Jeter?

Mr. Hartpence: Yes, your Honor.

Q. (By Mr. Hartpence.) Now, when Mr. Jeter tendered this order to you, P2 for identification, did you accept and fill the order? A. I told him we would not accept it.

20 Mr. Egner: Now, we are having conversations again. The questions are all right, but the answers are all wrong.

Mr. Hartpence: I am perfectly willing to have that answer stricken out, if you want it, Mr. Egner.

Mr. Egner: I do not want to be technical.

The Court: It is really what the witness has already substantially said: that he refused to sell without guaranty.

30

Q. When you told Mr. Jeter that you would not accept the order, what occurred, if anything? A. I told him it would be necessary for him to give security.

Mr. Egner: Now we are having conversations again.

Witness: Well, I declined to fill the same. Put it that way.

Q. Did anything further occur with regard to  
40 the order which had been tendered? A. Yes, sir.

*Charles H. Bolles, Jr., for Plaintiff—Direct*

Q. What?

The Court: Tell us what was done.

A. He stated—I have got to state a conversation here—he stated that he could give us a guaranty.

The Court: Why do you not get along and get down to the writings? 10

Q. As a result of your interview with Mr. Jeter at the time the order, P2 for identification, was tendered, did you have any transaction with Fred Kilgus? A. We did.

Q. (By the Court.) With whom? A. Fred Kilgus.

Q. (By Mr. Hartpence.) Now, what was that, Mr. Bolles? A. We called him on the telephone— 20

By the Court:

Q. Who did? A. Our office, sir.

Q. How do you know? A. I gave the girl instructions to do so, and was connected with a party answering to Fred Kilgus. I don't know whether it was Fred Kilgus or—

Q. Did you hear the conversation? A. I had the conversation, sir.

Q. You heard your end of it. You did not hear Kilgus's end of it? A. No, but when I asked, "Is this Fred Kilgus?" I was answered, "Yes." 30

Q. I am speaking of the conversation that followed. A. No, sir; I did not.

Q. Well, you understood that he was called up? A. He was called up; yes, sir.

By Mr. Hartpence:

Q. Who was present in your office at that time?

A. Mr. Jeter sat by the side of my desk.

Q. And what took place between you and Mr. Kilgus at that time? 40

*Charles H. Bolles, Jr., for Plaintiff—Direct*

Mr. Egner: Well, he did not say that he knows whether Mr. Kilgus was on the wire.

Witness: I can't say that.

Mr. Hartpence: He said that he called Fred Kilgus, and he answered that it was Fred Kilgus.

10 The Court: I do not understand that the conversation was with the witness.

Mr. Hartpence: Yes; the preliminary conversation was. The call was made by the telephone girl, and then I understood that the witness was connected with the office and talked.

Witness: The connection was made to my desk at that time.

20 Q. (By the Court.) You did the talking with somebody? A. Yes, sir; supposed to be somebody. After the instruction was given, the connection was made on my desk, and then I commenced to talk to someone whom I supposed was someone representing Fred Kilgus.

Q. (By Mr. Hartpence.) Did you after that time receive any written communications from Mr. Fred Kilgus appertaining to the conversation that you had over the telephone? A. Yes.

30 Q. And did that written communication refer in any way to the conversation that you had over the telephone?

Objected to.

The Court: The written communication will speak for itself.

Q. What was said, Mr. Bolles, at the time you were talking over the telephone to Mr. Kilgus's office?

Mr. Egner: I do not think that is admissible.

40

*Charles H. Bolles, Jr., for Plaintiff—Direct*

The Court: We are not quite prepared for that, are we? It does not yet appear that it was Mr. Kilgus himself, the party himself, and if it was not, it does not appear that the person who spoke for him was authorized to represent him.

Mr. Hartpence: The rule is, as I understand, that where a call is made over the telephone in the regular course of a business office, and the reply comes back that it is that office, it thereupon becomes competent, although its weight may be an entirely different matter. I do not offer this particularly with regard to its weight. I am simply trying to let the story be told, as nearly as possible as it took place, so that the whole picture will be before us. We will not stand on the telephonic conversation, of course. 10 20

The Court: I will be glad to look at any case you have.

Mr. Hartpence: I cannot cite it now.

The Court: At present I will sustain the objection.

Plaintiff's counsel objects to this ruling of the Court.

Objection noted as ground of appeal.

Q. Following the occasion to which you have just referred, did you have any further communication with the defendant in this case, Fred Kilgus? A. Yes. 30

Q. What sort of a communication, if any, did you receive from Kilgus? A. I received a letter.

Q. Following that occasion, did you or did you not furnish any material to the American Skylight & Iron Works for use upon the Lincoln avenue school building? A. I would like to understand that a little more clearly. 40

*Charles H. Bolles, Jr., for Plaintiff—Direct*

Q. (Question read.) A. Not upon that, no.

Q. Well, now, did you or did you not following that occasion—A. Oh, afterwards, yes.

Q. —furnish any material to the American Sky-light & Iron Works for use on the Lincoln avenue school building? A. Yes.

10 Q. Do you recall what material you did furnish, generally? A. As to value?

Q. Now, do you recall what material was furnished? A. Yes, roofing tin, galvanized iron and solder.

Q. Was it in pursuance of the order, P2 for identification, which we have already had under discussion, that the material was furnished?

20 Mr. Hartpence: You will recall, if your Honor please, that at the time the order was presented he did not fill it, because he was not satisfied with the credit. Now he has testified that he did furnish material, and my question is, Was it in pursuance of the order presented by Mr. Jeter, P2 for identification?

30 Mr. Egner: While I do not want to interfere with the plaintiff's conduct of his case, I think that before this evidence is all gone into the defendant ought to be tied up to this matter. He has the correspondence and letters, and he proposes to have them in evidence. It seems to me that the way to do would be to tie us up first. I think in the present stage of the proof this testimony is immaterial and incompetent.

Mr. Hartpence: There is nothing yet to show what P2 is. The question is, Was it in pursuance of P2 that the material was furnished? P2 might explain the whole situation, and, of course, it might not.

The Court: You may answer the question yes or no.

40 (Question read.)

*Charles H. Bolles, Jr., for Plaintiff—Direct*

A. Yes.

Q. And was the material set forth in the order, P2 for identification, furnished by Meurer Brothers Company to the American Skylight & Iron Works for the Lincoln avenue school job?

Mr. Egner: I do not think that is right. We are having a lot of testimony brought in on a paper that is not in evidence, and counsel refers to it in his question as an order. 10

Mr. Hartpence: The witness referred to it as an order.

The Court: The evidence is of no value, of course, unless P2 gets in evidence, because we do not know what the contents of it are, and it would not help the jury in its present form. It strikes me that you must first prove an acceptance of that order before you can use it.

Mr. Hartpence: The furnishing of the material, if the Court please, would be an acceptance of it. That is the basis of my present question. I might add to the question: Was the order accepted and the material furnished? 20

The Court: You may put the question in any form you like. I have not any wish to express about that. How do you want to ask it?

Mr. Hartpence: In that form: Was the order, P2 for identification, accepted and the material therein ordered furnished? 30

The Court: There are two questions. You had better divide them.

Q. (By the Court.) Was the order accepted?

A. Yes.

Q. (By Mr. Hartpence.) And was the material therein specified furnished by Meurer Brothers Company to the American Skylight & Iron Works 40

*Charles H. Bolles, Jr., for Plaintiff—Direct*

for the Lincoln avenue job? A. On the guaranty, yes.

Mr. Egner: I move that that be stricken out—"on the guaranty."

Mr. Hartpence: I will consent that the first portion of it be stricken out, and the mere answer "yes" remain.

10 The Court: Strike it out.

Mr. Hartpence: P2 for identification is now offered in evidence.

Mr. Egner: I object to it. I think it is incompetent and immaterial. It purports to be an order from the American Skylight & Iron Works, "per William K. Hamilton," and that signature has been proved—that it is Hamilton's signature—an order to Meurer Brothers to furnish for the account of this company certain materials therein specified.

20

The Court: (After argument.) I will receive P2 for identification.

Defendant's counsel objects to this ruling of the Court.

Objection noted as ground of appeal.  
(Paper marked Ex. P2.)

30 Q. Mr. Bolles, I call your attention to an annotation on Exhibit P2 in pencil, and ask you if that is in your handwriting (shown to witness)? A. Yes.

Q. How does it read? A. "O K, account guaranteed, 19th of October."

Q. Did you place that on the order yourself? A. Yes, sir.

Q. Now, prior to your making that annotation on Exhibit P2 did Meurer Brothers Company receive any written communication from Fred. Kilgus regarding that order? A. We did.

40 Q. Now, I hand you what purports to be a letter

*Charles H. Bolles, Jr., for Plaintiff—Direct*

from Fred. Kilgus, addressed to Messrs. Meurer Brothers Company, and ask you if that was received by you, or by Meurer Brothers Company, to your knowledge (paper shown to witness)? A. It was.

(Paper marked P5 for identification.)

Q. Did Meurer Brothers Company, to your knowledge, make any reply to the letter marked "P5 for identification"? A. We did. 10

Q. I show you what purports to be a letter from Meurer Brothers Company to Mr. Fred Kilgus, and ask you if that is the letter which was sent in reply to the letter P5 for identification (paper shown to witness)? A. That is the one, yes.

(Paper marked P6 for identification.)

Q. Was it prior to the sending of Exhibit P6 for identification that you had the conversation by telephone with Kilgus's office? A. Can I see what P6 is? (Paper shown to witness.) This letter was written after the telephone conversation. 20

Mr. Hartpence: Now, I will offer P5 for identification in evidence.

Mr. Egner: No objection.

(Paper marked Ex. P5.)

(Plaintiff's counsel reads Ex. P5.)

Mr. Hartpence: I will offer P6 for identification. 30

(Paper marked Ex. P6.)

(Plaintiff's counsel reads Ex. P6.)

Q. Now, Mr. Bolles, did Meurer Brothers receive any further communication from Fred. Kilgus in reply to the letter of October 16th, which is marked "Exhibit P6"? A. Yes.

Q. I hand you what purports to be such a letter, and ask you if that is the one that was received (paper shown to witness)? A. It is. 40

*Charles H. Bolles, Jr., for Plaintiff—Direct.*

Mr. Hartpence: I offer that in evidence.  
(Paper marked Ex. P7.)  
(Plaintiff's counsel reads Ex. P7.)

Mr. Egner: This is very wrong, because our letter-book shows that it was for the first account of the American Skylight & Iron Works. Now, I find in the original letter that that word "first" has been written in. It appears that there were some *xs* over it. I think that ought to be called to the attention of the Court and jury.

Mr. Hartpence: I will be glad to read it that way, although it is a matter of argument (reading).

Q. Now, Mr. Bolles, was any reply made to Exhibit P7 by Meurer Brothers to Fred. Kilgus? A. Yes, sir.

Q. I hand you what purports to be a letter from Meurer Brother Company to Fred. Kilgus dated October 19, 1908, and ask you if that is the reply that was sent to Exhibit P7 (paper shown to witness)? A. Yes.

Plaintiff's counsel offers in evidence and reads the paper identified by witness.  
(Marked Ex. P8.)

Q. Now, Mr. Bolles, with reference to Exhibit P7 and the order which has been marked in the case, Exhibit P2, can you state whether or not the notation on Exhibit P2 was made after the receipt of Exhibit P7 or before Exhibit P7?

The Court: What do you mean by "the notation"?

Mr. Hartpence: He has already testified to his notation on Exhibit P2.

The Court: The ink?

Witness: The ink.

*Charles H. Bolles, Jr., for Plaintiff—Direct*

A. The same day, Mr. Hartpence.

By Mr. Egner:

Q. The same date as what? A. The same date as your letter of October 19th— My letter of the 19th, isn't it?

Q. Yes. A. That is it. That day.

The Court: They are both dated on the 10 same day?

Mr. Hartpence: On the same day.

By Mr. Hartpence:

Q. Did you have any further communication by letter or in writing with Fred. Kilgus with regard to this American Skylight & Iron Works and the Lincoln avenue school matter after the OKing of the order, Exhibit P2? A. We did.

Q. I show you what purports to be a letter from 20 Fred. Kilgus to Meurer Brothers, dated December 7, 1908, and ask you if that was received by Meurer Brothers (paper shown to witness)? A. Yes.

Plaintiff's counsel offers in evidence and reads the paper identified by witness.

(Marked Ex. P9.)

Q. Mr. Bolles, did Meurer Brothers Company receive from Fred. Kilgus the \$500 referred to in the letter of December 7, 1908, marked "Exhibit 30 P9"? A. They did.

Q. Do you remember how it came, in what form? A. It was mailed to us in the form of a check.

Q. Is that the check that was received (paper shown to witness)? A. Yes.

Q. And was that check deposited by Meurer Brothers Company? A. Yes.

Q. And was payment made or refused upon the check? A. Payment was made.

*Charles H. Bolles, Jr., for Plaintiff—Direct*

Plaintiff's counsel offers in evidence and reads the check identified by witness.

(Marked Ex. P10.)

Q. Mr. Bolles, I hand you what purports to be a letter from Fred. Kilgus to Messrs. Meurer Brothers, dated December 9, 1908, and ask you if  
10 that was received from Mr. Kilgus in the course of the transaction referred to (paper shown to witness)? A. It was.

Plaintiff's counsel offers in evidence and reads the paper identified by witness.

(Marked Ex. P11.)

Q. Mr. Bolles, did Meurer Brothers Company ever receive any further payment from Fred. Kilgus upon this account for material furnished to  
20 the American Skylight & Iron Works for the Lincoln avenue school? A. They did not.

Q. And do you know how much that account still stands charged with? A. Not to the penny, sir.

Q. Have you prepared a copy of the account between Meurer Brothers Company and the American Skylight & Iron Works on this Lincoln avenue job? A. I have, certified to.

Q. And was that copy taken from the books of  
30 original entry of Meurer Brothers Company? A. Yes, sir.

Q. And shows accurately and correctly the account with the American Skylight & Iron Works? A. Absolutely.

Mr. Hartpence: We want to offer this in lieu of the production of the books, if the Court please.

Mr. Egner: I do not object on the ground that the books are not here, but I think that, even if the books were here, this evidence  
40 would be incompetent and immaterial.

*Charles H. Bolles, Jr., for Plaintiff—Direct*

The Court: (After argument.) It is competent in one possible view of what the contract was. The Court will have to make up its mind what the contract was. I will receive this as so much datta for the judgment of the Court to act on. If I do not adopt that view of the contract, it would have no effect at all. These are certified copies of the account on your books, as I understand? 10

Mr. Hartpence: Yes, sir.

The Court: As against the American Skylight & Iron Works.

Mr. Hartpence: Yes, sir.

(Paper marked Ex. P12.)

Mr. Hartpence: I have made the calculation to show what the account shows. It shows \$586.74 due. If Mr. Egner has no objection, we will have that stated without asking the witness. 20

The Court: You mean after giving credit for the \$500?

Mr. Egner: Well, that would appear, anyway. The stipulation is not showing that much due, but showing a balance of that much on the books.

Mr. Hartpence: A balance of that much on the books of Meurer Brothers as against the American Skylight & Iron Works. 30

Mr. Egner: Yes.

Q. Mr. Bolles, was any of the material furnished by Meurer Brothers Company to the American Skylight & Iron Works for the Lincoln avenue school job ever taken back by Meurer Brothers Company? A. It was not.

Mr. Egner: I would like to object. I think that is objectionable for the same reason that the offer of the account was objectionable. 40

*Charles H. Bolles, Jr., for Plaintiff—Cross*

Under our view of the case and of this contract, all those matters are immaterial, our obligation being to pay \$1000 out of the first payment, and the question at issue, in our view, being whether the first payment of \$1000 ever became due.

10 The Court: I will receive the evidence, for the same reason that I have received the account, somewhat tentatively. It may become important.

Defendant's counsel object to this ruling of the Court.

Objection noted as ground of appeal.

*Cross-examination by Mr. Egner:*

Q. Now, I understood you to say, Mr. Bolles, that you made a notation on that order, P2, on  
20 October 19th, the day you received the letter from Mr. Kilgus? A. Yes, sir.

Q. Had you, in fact, sent out any material under this order prior to October 19th? A. Not until we received Mr. Kilgus's letter.

Q. The letter of the 19th? A. The 19th.

Q. Do you mean to say that you had not given them any tin whatever? A. No tin at all on that order.

30 Q. Did you give them anything on the Lincoln avenue school job? A. No, sir.

Q. Nothing whatever? A. No, sir.

Q. Now, there has been offered in evidence a statement of account showing a general credit on this job to the Skylight Works of slightly in excess of \$1000; is that right? A. Yes.

Q. Did you extend them any credit in addition to that on that job? A. No.

Q. That is your total account? A. That is our total account as it stands.

40 Q. And that is all that you advanced them on that job? A. Yes.

*Charles H. Bolles, Jr., for Plaintiff—Cross*

Q. Do you personally attend to shipping out material? A. I do not.

Q. Then how do you know that these materials actually went to the Lincoln avenue job? A. Because no order is passed outside of the shipping department without my O. K. on it, and that ought to show, and the shipping clerk's duty is to receive receipts for the goods. 10

Q. Then your testimony is based on the assumption that no goods would have been sent out without your O. K.? A. They absolutely would not sir.

Q. Aside from that assumption, you cannot say that these goods went to the Lincoln avenue school? A. The fact that I have seen the receipts showing delivery to the American Skylight & Iron Works.

Q. You have no personal— A. Absolutely not.

Q. —no personal knowledge that they went there, however? A. No. 20

Q. I show you, Mr. Bolles, a letter dated November 19, 1908, signed "Meurer Brothers Company," to Mr. Fred Kilgus (paper shown to witness). Can you tell me whose signature that is? A. Yes, sir; I can; that is Mr. Jacob Meurer's signature.

Q. That is, the proprietor? A. That is, the proprietor.

(Paper marked D1 for identification.) 30

Q. I show you another letter, Mr. Bolles, dated December 4, 1908, from Meurer Brothers Company, "C. H. Bolles, Jr., general manager," to Mr. F. Kilgus (paper shown to witness). Is that your signature? A. It is.

(Paper marked D2 for identification.)

Q. I show you another letter, Mr. Bolles, dated December 8, 1908, signed "Meurer Brothers Company, C. H. Bolles, Jr., general manager," to 40

*Charles H. Bolles, Jr., for Plaintiff—Redirect*

Fred Kilgus, and ask you if that is your signature (paper shown to witness)? A. That is.

(Paper marked D3 for identification.)

10 Q. I show you another letter, dated December 18, 1908, signed "Meurer Brothers Company," to Mr. Fred Kilgus, and ask you whose signature that is (paper shown to witness)? A. That is Mr. Jacob Meurer's signature.

(Paper marked D4 for identification.)

Q. I show you another letter, dated December 19, 1908, signed "Meurer Brothers Company, C. H. Bolles, Jr., general manager," to Mr. Fred Kilgus (paper shown to witness). Is that your signature? A. That is, sir.

(Paper marked D5 for identification.)

20 Q. I show you another letter, dated January 9, 1909, from Meurer Brothers Company to Mr. Frederick Kilgus, and ask you whose signature that is (paper shown to witness)? A. Mr. Jacob Meurer's.

(Paper marked Ex. D6 for identification.)

*Redirect-examination by Mr. Hartpence:*

30 Q. Mr. Bolles, the receipts that you referred to in your cross-examination, are they receipts which you saw in the usual course in the conduct of your business? A. Yes.

Q. And you have a large business, I suppose, have you not? A. We have.

The Court: The witness said, "I have seen a receipt showing delivery to the American Skylight Company." Did he say anything more than that?

Mr. Hartpence: I understood him to say "receipts."

*Frederick Kilgus, for Defendant—Direct*

Q. (By the Court.) Well, you are in the habit of taking receipts? A. Always, sir.

Q. (By Mr. Hartpence.) Of course, you do not attend to all of the details of the business yourself, personally? A. No, sir.

## PLAINTIFF RESTS.

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Defendant's counsel moves that plaintiff be nonsuited on the ground that no liability on the part of defendant has been shown.

(Counsel argue.)

At one o'clock P. M., the Court takes a recess of one hour.

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## AFTER RECESS.

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The Court: The case is not so entirely clear to me now that I feel inclined to nonsuit. I will hear the defense.

Defendant's counsel objects to this ruling of the Court.

Objection noted as ground of appeal.

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FREDERICK KILGUS, defendant, sworn in his own behalf.

*Direct-examination by Mr. Egner:*

Q. Mr. Kilgus, you are the defendant in this case? A. Yes, sir.

Q. And your occupation is what? A. Builder.

Q. How long have you been a builder? A. About thirty years. 40

*Frederick Kilgus, for Defendant—Direct*

Q. In the city of Newark? A. Yes, sir.

Q. Do you recall your contract which you had for the construction of the Lincoln avenue school, in Orange? A. I do.

Q. Who was the architect on that school? A. Mr. Guilbert.

10 Q. Do you recall having sublet the tin roofing, cornice, slate work, leaders and metal work to the American Skylight & Iron Works? A. I do; yes, sir.

Q. Was that done by you personally or by somebody on your behalf? A. My son usually attends to the subletting.

Q. Were you at all familiar with the progress of the work on the school? A. I was.

Q. You went there personally? A. Yes, sir.

20 Q. What can you say as to the progress made by the American Skylight & Iron Works? A. They didn't make very good progress.

Q. Did you have any complaints from the architect?

30 Mr. Hartpence: I object to that question, if the Court please, on the ground that it is irrelevant, incompetent and immaterial. The complaints made by the architect as to the work of the American Skylight & Iron Works is not relevant to permit the defendant to avoid any contract of guaranty or agreement to answer to the Meurer Brothers Company, upon the faith of which they furnished the material to the American Skylight & Iron Works, inasmuch as it does not appear that there was anything in that contract, upon which was predicated the right of Meurer Brothers to their payment, to avoid payment if the work was not in proper shape.

40 The Court: I suppose the question is asked upon the theory that the estimate, P1, shows

*Frederick Kilgus, for Defendant—Direct*

that the work is to be done to the satisfaction of the architect, and upon the further construction that the liability of Mr. Kilgus to pay anything to the plaintiff in this case is dependent upon the creation of a liability under P1 as between Mr. Kilgus and the American Skylight & Iron Works. It all goes back to the construction that you are going to put on this paper; in other words, it is a question as to what the contract is. I will take the testimony. 10

Plaintiff's counsel object to this ruling of the Court.

Objection noted as ground of appeal.

(Question read.)

The Court: Answer that yes or no.

A. I did. 20

Q. And what did those complaints have reference to? A. That the work wasn't properly done.

Q. Whose work?

The Court: Do you feel sure that that is not hearsay? The architect's certificate speaks for itself. What the architect says looks very much like hearsay. You can call the architect himself to say whether he was satisfied. 30

Q. Did you yourself examine the work which had been done by the American Skylight & Iron Works? A. I did.

Q. How did you find it?

Mr. Hartpence: I object, if the Court please, because the work was to be done to the satisfaction of the architect, not to the satisfaction of the contractor, and I think if there was any dissatisfaction, and it was relevant to the case, it must come from the architect's 40

*Frederick Kilgus, for Defendant—Direct*

finding, not from this witness's examination.

Mr. Egner: I can still show that the work was not satisfactory. That is proof to be added to the architect's own sayso about it.

10 The Court: A partial failure of consideration would reduce any amount that might be due on the contract between Mr. Kilgus and the American Skylight & Iron Works. It might reduce it if the contracts are really interlocked, so far as to affect the right of the plaintiff to recover. I think it is competent in that view.

Plaintiff's counsel object to this ruling of the Court.

Objection noted as ground of appeal.  
(Question read.)

20 A. I found it not up to the specifications.

Q. In what respects was the work not up to the specifications?

Mr. Hartpence: I desire to interpose an objection on the same ground as before stated.

The Court: You may have an objection to the whole line.

Objection noted as ground of appeal.

30 Q. In what way was the work not up to the specifications? A. They started with the tin, and the tin wasn't painted and had no paper under it.

Q. Was there any other way in which the work was not up to the specifications, that you can recall?

The Court: We are not now talking about specifications, and we have not the specifications before us.

By the Court:

40 Q. What specifications do you refer to? Mr.

*Frederick Kilgus, for Defendant—Direct*

Guilbert's specifications in regard to the building, in regard to the work.

Q. The original contract was between whom?

A. Between the Board of Education of Orange and myself.

Q. That is on file, I suppose? A. Yes, sir.

The Court: And the specifications attached to it. We need those, do we not? 10

Mr. Egner: We have got a copy of the specifications here.

By Mr. Egner:

Q. Did you call the attention of the American Skylight & Iron Works to the defects in their work? A. I think I did, after I was notified.

Q. By whom were you notified? A. The architect.

Q. And after you notified the American Skylight & Iron Works of the defects in the work what happened, what did they do, if anything? A. Well, they ripped up some of it. 20

Q. (By the Court.) What is that? A. They ripped up the tin on one portion of the building, what they had laid; they started to rip it up.

Q. (By Mr. Egner.) And what did they do? A. They started to relay it.

Q. And did they finish relaying it? A. No, sir.

Q. Did they complete their work on the building? A. No, sir. 30

Q. By whom was the work completed?

Mr. Hartpence: I object, if your Honor please, on the ground that that is irrelevant, incompetent and immaterial.

Mr. Egner: That is merely introductory to show what it cost us to complete their work.

Mr. Hartpence: We object on the ground that that matter is incompetent, irrelevant and immaterial and has no bearing on the 40

*Frederick Kilgus, for Defendant—Direct*

liability of this defendant on the contract of guaranty. It is not a term of the contract.

The Court: I will take the testimony.

Plaintiff's counsel object to this ruling of the Court.

Objection noted as ground of appeal.

10 Q. By whom was the work completed? A. The Newark Cornice & Skylight Company.

Q. Did you know that there had been certain correspondence between your office and the Meurer Brothers Company in reference to materials to be furnished to the American Skylight & Iron Works? A. I knew there was some correspondence.

Q. Do you recall that you paid \$500 to the Meurer Brothers Company? A. Yes, sir.

20 Q. You say that the work was completed by the Newark Cornice & Skylight Works? A. Yes, sir.

Q. How much did you pay them to complete the work?

Mr. Hartpence: I desire to enter a general objection, if the Court please.

The Court: You may enter a general objection. Objection noted as ground of appeal.

30 A. \$100 more than what was left.

Q. How much was it? A. I don't know the exact figures; somewhere around \$2300.

Q. And you do recall, however, that the total expense was \$100 more than your contract with the American? A. Yes, sir; I knew it was more.

Q. Who is Mr. Coleman? A. He is our book-keeper.

Q. And you knew that he had this correspondence with the Meurer Brothers Company? A. I don't know the details of it. I knew that he writes letters.

*Frederick Kilgus, for Defendant—Cross*

Q. I show you Exhibit P9, Mr. Kilgus, which was the letter of December 7th, in typewriting, from Fred. Kilgus to Messrs. Meurer Brothers Company, signed "Fred. Kilgus, H. M. Coleman" (paper shown to witness). Did you personally see that letter at the time it went out? A. I did not.

Q. Did you become aware of the defects in the American Skylight & Iron Works' work on this job before or after this letter was written, in point of time? A. Afterwards.

Q. Afterwards? A. Yes, sir.

Q. That is December 7, 1908? A. Yes, sir.

*Cross-examination by Mr. Hartpence:*

Q. How long had the work been progressing, Mr. Kilgus, before you wrote this letter of December 7th? A. Probably a couple of months.

Q. About how long? A. Probably a couple of 20 months. I don't know the exact time.

Q. What is the full name of your son, Mr. Kilgus? A. Lewis D.

Q. And he had charge of the figures, of the making of the prices, of your business, did he not? A. Yes, sir.

Q. You were aware, were you not, from time to time, that Mr. Coleman sent out letters pertaining to your business? A. Yes, sir.

Q. Used your letterheads for that purpose? A. 30 Yes, sir.

Q. That is his particular part of the business, is it not? A. Between him and my son; they write letters and attend to correspondence.

Q. You do not make it a point to read every letter that they send out from the office, do you?

A. Unless they were important; they are handed to me sometimes.

Q. Only when they call your attention to them?

A. Yes, sir.

*Frederick Kilgus, for Defendant—Cross*

Q. Now, you say that you knew of a payment of \$500 on account from Meurer Brothers. You knew that payment was to be made, did you not? A. Yes, I knew about that.

Q. And you knew that it was to be made, did you not, on account of the material which Meurer Brothers had furnished the American Skylight & Iron Works for the Lincoln avenue job? A. Yes, sir.

Q. And you knew at that time that you had been authorized to pay \$1000 to Meurer Brothers by the American Skylight & Iron Works, did you not? A. I don't know what correspondence they had with us; I didn't see that letter.

Q. You knew that \$500 was to be held back from Meurer Brothers at that time, did you not? A. Yes, sir.

Q. You did not make that entire payment because you were not in funds for the whole amount; isn't that right? A. Well, I don't know about that. I was afraid—we were always afraid that the work was not satisfactory, the way it was done.

Q. But you did not call that to the attention of Meurer Brothers, did you? A. I didn't see Meurer Brothers.

Q. You said that the reason for not paying the \$500 was because—

Mr. Egner: He said he had not seen the letter.

Q. Your reason for retaining it, then, was different from the reason assigned to Meurer Brothers; is that true? A. I knew that the work wasn't right and I hesitated paying; yes, sir.

Q. But you did not call that to the attention of Meurer Brothers? A. No, sir.

Q. Now, in what respects was it not right, Mr.

*Frederick Kilgus, for Defendant—Cross*

Kilgus, in this tin work that you have referred to?  
 A. The architect notified me that the tin work wasn't painted on the under side and it had no paper under it.

Q. And it was the business of the American Skylight & Iron Works to see that that was done, was it not? A. In turn we notified them.

Q. Now, Meurer Brothers Company had nothing to do with the work there, did they? A. Well, I don't know. 10

Q. They simply supplied the material, did they not? A. I don't know anything about that.

Q. Meurer Brothers were not contractors for you, were they? A. Not that I know of.

Q. Your contractual relation was with the American Skylight & Iron Works, was it not? A. I presume so.

Q. And they were to perform the work on the building, were they not? A. The American Skylight & Iron Works were to do the work; yes, sir. 20

Q. And Meurer Brothers had nothing whatever to do with that except to supply the material, had they? A. That is the way I understood it.

Q. So that they had nothing to do, then, with the defective tin work, had they—Meurer Brothers? A. Not that I know of.

Q. Now, when you found that the American Skylight & Iron Works had not finished this work what steps did you take to have it finished? A. We notified them, we wrote to them, sent them letter after letter, to proceed with the work. 30

Q. And then what did you do? A. They didn't do anything; they packed up their tools and went away.

Q. What did you do after that? A. We got other figures.

Q. From whom did you get other figures? A. Well, from different parties; I don't know who; 40

*Lewis D. Kilgus, for Defendant—Direct*

different parties that we got a number of figures from.

Q. Don't you recall someone from whom you got figures? A. Why, if I am right, we got it from—I don't know as I want to mention the names. I know we got figures. I think Baier & Conrad was one, if I am right; but I am not positive about  
10 those things.

Q. Well, as a matter of fact, you had the work completed by the Newark Skylight Works? A. Yes, sir.

Q. Do you remember whether they were the lowest bidders for the work? A. Yes, sir; they was the lowest bidders.

Q. Did you ever examine the specifications for that purpose, Mr. Kilgus? A. Yes, sir; I did.

Q. And those were the specifications, were they not, for the work of the American Skylight & Iron Works, for the work which they were to perform? A. They were attached to our specifications; their specifications was part of ours, part of the general contract.  
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LEWIS D. KILGUS, sworn in behalf of the defendant.

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*Direct-examination by Mr. Egner:*

Q. Mr. Kilgus, you are a son of Fred Kilgus, the defendant? A. I am.

Q. And are you associated with him in business? A. Yes, sir.

Q. Do you recall your father's contract for the construction of the Lincoln avenue school? A. Do I recall it?

Q. Do you recall the contract with the City of Orange for the construction of the Lincoln avenue school? A. I do.  
40

*Lewis D. Kilgus, for Defendant—Direct*

Q. Did you have anything to do with that work?

A. I looked after the office end of it.

Q. Did you yourself go up to the building at all?

A. Very rarely.

Q. You knew also, did you not, that your father had made a subcontract with the American Skylight & Iron Works? A. I did, yes.

Q. Did you have any occasion to observe the work that they were doing there at the building?

A. No, I did not.

Q. Do you recall the correspondence which passed between your office and Meurer Brothers Company? A. Yes.

Q. By whom was that conducted mostly, or practically all of it? A. Most of it was done—the letters were dictated by Mr. Coleman.

Q. And he is in your office? A. Yes, sir.

Q. Do you recall having seen a check for \$500 to the Meurer Brothers Company, which has been offered in evidence here? A. Yes.

Q. Do you remember ever having personally seen Exhibit P9, this letter of December 7th, sent by Mr. Coleman to the Meurer Brothers Company (paper shown to witness)? A. Yes.

Q. What progress did the American Company make on this work, if you know?

Objected to as immaterial, irrelevant and incompetent.

30

The Court: I will receive the evidence.

Plaintiff's counsel objects to this ruling of the Court.

Objection noted as ground of appeal.

Q. What progress did the American Skylight & Iron Works make on this work? A. Well, the American people started to work, and after they had done some work, if I recollect, they came to us and said they couldn't go ahead unless we would

40

*Lewis D. Kilgus, for Defendant—Direct*

assign a certain part of their payment when it was coming due to Meurer Brothers, as they couldn't get any material, and I think we wrote a letter, or somebody in the office wrote a letter, stating—  
Objected to.

10 Q. Do not state what you wrote; but you had correspondence. Now, I want to know particularly, Mr. Kilgus, if you know, how the American Company progressed in the work on the building?  
A. Well, until that time the work was very unsatisfactory and slow in progressing.

Q. Until what time? A. Until the time that we agreed to turn over a certain amount of money—

Q. The time of your correspondence with Meurer Brothers? A. Yes.

20 Q. Now, after that correspondence how did the work progress? A. Well, for awhile it went along a little more satisfactory.

Q. Well, now, tell me how it eventually progressed. Did they finish their work?

The Court: Confine your attention to that particular work.

Q. Did they finally complete the work that they had contracted to do? A. They did not.

30 Mr. Hartpence: I desire to interpose a general objection to this line of testimony on the ground that it is incompetent, irrelevant and immaterial.

The Court: Yes.

Objection noted as ground of appeal.

40 Q. Now, referring to this letter, Exhibit P9, of December 7, 1908, was it prior in point of time or after that in point of time that you became aware of the unsatisfactory nature of the work which they had done? A. Why, we became aware after this letter was written.

*Lewis D. Kilgus, for Defendant—Direct*

Q. And after having become aware of that fact did you have further correspondence with Meurer Brothers? A. We did.

Q. Now, did the American Company finish the work? A. They did not.

Q. By whom was the work finished? A. The Newark Cornice & Skylight Company.

Q. And who made the contract with the Newark 10  
Cornice & Skylight Works? A. I did.

Q. I show you a contract, or memorandum, dated January 2, 1909, "Newark Cornice & Skylight Works," signed "L. D. K." Is that the contract that you made with the Newark Cornice & Skylight Works (paper shown to witness)? A. Yes, that is the contract.

Mr. Egner: I offer that contract in evidence.

Mr. Hartpence: We object to it on the 20  
ground that it is incompetent, irrelevant and immaterial.

The Court: I will take it.

(Paper marked Ex. D7.)

Defendant's counsel reads Ex. D7.)

Q. Now, did the Newark Cornice & Skylight Works complete that work? A. They did.

Q. And how much did you pay them? A. \$2300.

Q. Aside from this \$500 payment, did you make 30  
any other payments on account of the American Skylight Works? A. No, sir.

Q. I show you a set of specifications entitled "Specifications for the general construction of additions and alterations for the Lincoln avenue school building," dated July 20, 1908, "Ernest F. Guilbert, Architect" (paper shown to witness). Those are the specifications which are referred to in Exhibit P1 and in the contract between yourself and the Newark Cornice & Skylight Works, 40

*Lewis D. Kilgus, for Defendant—Cross*

which have just been offered in evidence? A. Yes, sir; they are.

Mr. Egner: I offer those in evidence. They are really part of this general contract; they are part of Exhibit P1.

10 Mr. Hartpence: I object to them on the ground that they are irrelevant, immaterial and incompetent, and, further, there is no reference to them in Exhibit P1.

The Court: I will receive them.  
(Paper marked Ex. D8.)

*Cross-examination by Mr. Hartpence:*

Q. Do you know why the American Skylight & Iron Works did not finish the work, Mr. Kilgus?  
A. Finish their contract?

20 Q. Yes. A. I don't know why. They simply didn't go ahead; they laid down and didn't go on with their work. We didn't have any reply stating why they didn't complete it.

Q. Do you know whether they stopped because they were compelled to abandon the work? A. By and by, after they had stopped work for some time, we found out that they had failed.

Q. And that they were financially unable to proceed?

30 Mr. Egner: I do not see how that is material, why they did not do it.

Q. Is that true? A. It must have been, if they failed.

The Court: I will allow it.

Q. Do you know whether or not they were refused the right to complete the work because of any defect in the manner in which it was being performed? A. I don't quite understand that.  
40 Defect in what?

*Lewis D. Kilgus, for Defendant—Cross*

Q. In any part of their work? A. Why, they were stopped because there was a defect in their work; they had to take off what they had on.

Q. When was that? A. Why, that was some time in December.

Q. Well, did they take it off? A. They did.

Q. And did it go back again? A. They started to put it back again, and then they stopped altogether. 10

Q. Now, as a matter of fact, did they not put back all the tin which they took off at that time? A. That I couldn't say, whether it was the same tin or not.

Q. You do not know? A. I know they started to put it back. Whether they put it all back or partly back or how much went back, I couldn't tell you.

Q. You were not there? A. No, I wasn't at the building. I only get this from reports at the office. 20

Q. You did not notify the American Skylight & Iron Works that their work was defective and you would not permit them to proceed with it because of any defects in it? A. Oh, yes.

Q. After the piece was placed back on that you have referred to? A. Yes, sir. There was a continual complaint; perhaps it was made on the telephone and letters written saying that the work was not satisfactory. 30

Q. When was that? A. I can't tell you the exact time.

Q. When do you think it started in? A. From the time they started to go to work there there was complaints about the work; they weren't following the specifications.

Q. When did they start the work? A. Some time in September, I should say; I don't know exactly; I can't say when they started to work. 40

*Lewis D. Kilgus, for Defendant—Cross*

Q. Then you did have some knowledge of the unsatisfactory character of their work before this letter was written in December? A. I had some; yes, sir.

Q. Then why did you say on direct examination that it was not until after this was written that you learned that their work was unsatisfactory?

10 A. Defective in the part whereby they had to take their tin roof off. Most of the objection was that they didn't get their men on the job, didn't do the work, and little odds and ends of complaints came up every day, that they weren't going on with the work correctly. There were constant complaints, all the time.

Q. In other words, they were serious enough to lead you to think that the complaints were continued from the time they started? A. Yes, sir.

20 Q. When this \$500 was paid on account, have you any knowledge why the \$500 in addition there-to was not paid at that time? A. Why, I believe there is a letter written there stating just why it was, stating at the time that we didn't— The letter is there; I don't know just the contents.

Q. Do you know of your own knowledge why the \$1000 was not paid? A. Yes, I do; we had kind of a fear that they wouldn't complete their work.

30 Q. At the same time you, or Mr. Coleman, to your knowledge, wrote this letter—

Mr. Egner: He did not say that it was with his own knowledge.

Q. You knew P9 was written at the time it was written, did you not—this letter of December 7, 1908, inclosing a check for \$500? A. I signed the check.

Q. You knew the letter was sent? A. I didn't know the contents of the letter at that time.

40 Q. You did not? A. No.

*Lewis D. Kilgus, for Defendant—Cross*

Q. Do you know what reason was assigned to Meurer Brothers for not paying the \$500?

Mr. Egner: The letter speaks for itself.

The Court: Not do you know now, but did you know at the time the correspondence was going on?

A. Well, there was a check given me to sign— 10  
yes.

Q. What reason was assigned to Meurer Brothers for the payment of \$500 and not \$1000?

Objected to.

The Court: That is to be settled by the letter. The question whether he knew about the letter is another question. The question, what was said? is to be settled by the letter itself.

Q. How long had Mr. Coleman been in the em- 20  
ploy of the Kilgus office—the office of Mr. Kilgus?

A. I think about five years.

Q. And you and he conducted the office end of the business, did you not? A. Yes, sir.

Q. Did you examine and read all letters that were sent out of the office in the course of your—

A. Only those I signed.

Q. And were all the letters that were sent out of the office by either you or Mr. Coleman submitted to your father before they were sent? 30

A. No.

Q. He looked after the outside work, I suppose?

A. Yes, sir.

Q. And you attended to the office details? A. Yes, sir.

Q. With Mr. Kilgus? A. Yes, sir.

By the Court:

Q. You said you read over the letters that you signed. What determined what letters you should 40

*Lewis D. Kilgus, for Defendant—Cross*

sign, was there any rule about it? A. No, there wasn't any particular rule about it. Sometimes Mr. Coleman would write the letter and sometimes I would write it.

Q. Just as it happened? A. Yes, sir.

By Mr. Hartpence:

10 Q. You signed those that you dictated and he signed those that he dictated; is that correct? A. Yes, sir.

Q. Did you have any conversation, Mr. Kilgus, with Mr. Bolles, of Meurer Brothers Company, regarding this account of the American Skylight Company? A. Not that I can recall.

20 Q. Did you not have any conversation or negotiations with the office of Meurer Brothers Company regarding the account of the American Skylight & Iron Works? A. There were some letters written; whether I wrote them or who wrote them I can't recall at this time.

Q. Do you recall some time about between the 12th and 16th of October, 1908, talking by telephone with Mr. Bolles or some other gentleman in Meurer Brothers Company's office with regard to the account of the American Skylight & Iron Works?

30 Objected to as not cross-examination.

The Court: The testimony related to the correspondence, I think, not to the telephonic conversation. Do you think it is cross-examination?

(Question withdrawn.)

Q. Now, you have stated that the work of the American Skylight & Iron Works progressed very unsatisfactorily until you agreed to turn over a certain amount of money to Meurer Brothers Company. Have you not so stated, Mr. Kilgus?  
40 A. I think I did.

*Lewis D. Kilgus, for Defendant—Cross*

Q. In what respect do you mean it proceeded unsatisfactorily up to that time? A. Well, the work didn't go along fast enough; there was complaints coming up from the superintendent on the building over the telephone; the work wasn't going along as rapidly as it should.

Q. Then the unsatisfactory part of it relates to the speed they were making? A. Yes, sir. 10

Q. As a matter of fact, they could not do any work until they got this material from Meurer Brothers? A. I don't know. They could have gotten material from somebody else.

Q. Are you acquainted with the specifications for the Lincoln avenue job? A. To a certain extent; yes, sir.

Q. You saw the contract, did you not? A. Yes, sir.

Q. And the specifications are part of the contract? A. Yes, sir. 20

Q. Now, are you familiar with what the specifications called for in the way of tin work? A. Not word for word.

Q. They called for Meurer Brothers tin, did they not? A. Possibly. They had other things besides tin to furnish.

Q. So that after the agreement had been made with Meurer Brothers regarding the account of the American Skylight & Iron Works, then matters progressed more expeditiously, did they not? A. For a time. 30

Q. Then when you referred to the unsatisfactory condition of affairs, you referred, did you not, to the actual progress that was being made? A. The progress was never the way it should be on a building of this kind.

Q. You did not have anything to do with the manner in which they were performing their work at that time, did you? A. At what particular time? 40

*Harry M. Coleman, for Defendant—Direct*

Q. Prior to the time of the arrangement with Meurer Brothers. A. Ask that over again.

Q. Prior to the arrangement with Meurer Brothers the unsatisfactory condition did not refer to the workmanship? A. We had complaints that the workmanship wasn't right at times.

10 Q. That had nothing to do with the tin work or cornice work, had it? A. That is what they were doing, tin work and cornice work.

Q. But they had not got any material with which to work up to the time of this arrangement with Meurer Brothers? A. Oh, yes.

Q. From Meurer Brothers? A. I don't know where they got it from.

20 Q. Well, in what respect was that unsatisfactory? A. In delays. We had to call the American Skylight people up two or three times a day and tell them to get there. They only had one man there, when they ought to have fifteen and twenty, and day by day we got complaints that the work wasn't done right here and there.

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HARRY M. COLEMAN, sworn in behalf of defendant:

30 *Direct-examination by Mr. Egner:*

Q. Mr. Coleman, you are connected with Mr. Fred Kilgus? A. Yes, sir.

Q. In what capacity? A. Bookkeeper.

Q. How long have you been with Mr. Kilgus? A. About six years or six years and a half, somewhere around there.

Q. Are you familiar with the circumstances connected with the work on the Lincoln avenue school, in Orange? A. To a certain extent, yes.

40 Q. What was your connection with the work?

*Harry M. Coleman, for Defendant—Direct*

What is your general function in the office of Mr. Kilgus? A. Well, we take care of the general routine of the office and the correspondence.

Q. Do you ever personally go out and examine work? A. Never.

Q. You are always in the office? A. Yes, sir.

Q. And keep that end up? A. Yes, sir.

Q. Now, do you recall having had certain correspondence with Meurer Brothers? A. I remember from time to time as they came in, yes. 10

Q. And you conducted that correspondence, did you not? A. Well, I guess, most of it.

Q. Now, there has been a letter offered in evidence, Exhibit P9, dated December 7, 1908, signed "Fred Kilgus," with your name under it, to Meurer Brothers (paper shown to witness). You wrote that letter? A. Yes.

Q. Now, previous to writing that letter do you recall having received a letter from the American Skylight & Iron Works purporting to authorize you to pay anything to Meurer Brothers? A. There was a letter to that effect. 20

Q. I show you a letter dated December 5, 1908, from the American Skylight & Iron Works to Mr. Fred Kilgus, and ask you whether that is the letter (paper shown to witness)? A. Yes, that is the letter; that is the authorization.

Defendant's counsel offers in evidence and reads the paper identified by witness. 30

(Marked Ex. D9.)

Q. It was after the receipt of that, was it, that you sent this letter, Exhibit P9, to Meurer Brothers (paper shown to witness)? A. Yes.

Q. Now, Mr. Coleman, at the time you wrote this letter, Exhibit P9, had you been informed by the architect or anybody else that a payment of \$1000 had become due to the American Skylight & Iron Works? 40

*Harry M. Coleman, for Defendant—Direct*

Mr. Hartpence: I object on the ground that it is incompetent, irrelevant and immaterial whether it had become due and payable to the American Skylight & Iron Works.

10 Mr. Egner: What I am proposing to show, if your Honor please, is that at the time Mr. Coleman wrote this letter he had no other information before him but the letter just shown him of the American Skylight & Iron Works, and this letter of his of December 7th was written without any further investigation. It is quite evident that what we are attempting to do in this case is to explain what appears by that letter, that it was not true that \$1000 became due.

20 Mr. Hartpence: It is our contention that whether \$1000 ever became due to the American Skylight & Iron Works from Kilgus is immaterial.

The Court: I will take the testimony.

Plaintiff's counsel objects to this ruling of the Court.

Objection noted as ground of appeal.  
(Question read.)

A. We presumed that the work so far was satisfactory.

30 The Court: Answer the question.

Q. Had you been informed by anybody that \$1000 had become due? A. Not that I know of, no.

Q. Had you had any information on that subject other than that contained in the letter from the Skylight Works, Exhibit D9? A. No.

Mr. Hartpence: I desire to enter an objection to that whole line.

The Court: I make the same ruling.

Plaintiff's counsel objects to this ruling of the Court.

40 Objection noted as ground of appeal.

*Harry M. Coleman, for Defendant—Direct*

Q. Did a question arise as to whether the American Skylight & Iron Works had become entitled to \$1000? Did that question arise? A. Before this check went out?

Q. No, did it arise at any time? A. It did afterwards, yes.

Q. That is, after you wrote this letter of December 7, 1908; the question arose as to whether they had completed work to that amount? 10

Objected to as leading.

A. Yes, sir.

The Court: I think that question has been substantially answered.

Q. What was your personal connection with that? How did the question arise, if you know?

A. Well, the work didn't go ahead and it was lagging behind, and eventually they laid down. 20

Q. Do you know whether complaints were made by the architect as to the work which had been done? A. When it was?

Q. Do you know whether there were complaints made? A. There was complaints made after that check had been sent.

Q. After that check had been sent? A. Yes, sir.

Q. Did you subsequently conduct other correspondence with Meurer Brothers about this matter? A. I don't know; I don't think there was anything further; there may have been; I don't remember it just exactly. 30

Mr. Egner: There are a few letters which I should like to offer in evidence. I will offer D1 for identification, date of November 9, 1908, from Meurer Brothers Company to Fred Kilgus.

(Marked Ex. D1.)

(Defendant's counsel reads Ex. D1.)

Mr. Egner: I also offer in evidence letter 40

*Harry M. Coleman, for Defendant—Direct*

of December 4, 1908, previously marked D2 for identification, from Meurer Brothers Company to Fred Kilgus (reading).

(Marked Ex. D2.)

10 Mr. Egner: I also offer in evidence D3 for identification, letter from Meurer Brothers Company, by Mr. Bolles, to Mr. Kilgus (reading).

(Marked Ex. D3.)

Mr. Egner: I offer D4 for identification, letter from Meurer Brothers Company to Mr. Fred Kilgus (reading).

(Marked Ex. D4.)

Mr. Egner: I offer in evidence D5 for identification (reading).

(Marked Ex. D5.)

20 Mr. Egner: I offer in evidence D6 for identification (reading).

(Marked Ex. D6.)

Defendant's counsel calls upon plaintiff to produce letter dated December 17, 1908, from defendant to plaintiff.

(Plaintiff's counsel produces letter.)

30 Q. Mr. Coleman, I show you a letter dated December 17, 1908, signed "Fred Kilgus, H. M. C.," to Meurer Brothers, and ask you if you wrote that letter (paper shown to witness)? A. Yes.

Defendant's Counsel offers in evidence and reads the letter identified by witness.

(Marked Ex. D10.)

Q. I show you another letter, Mr. Coleman, dated January 2, 1909, signed "Fred Kilgus, H. M. C.," to Meurer Brothers (paper shown to witness). Did you write that letter? A. Yes.

40 Mr. Egner: I offer that in evidence.

Mr. Hartpence: I object to its admission

*Harry M. Coleman, for Defendant—Direct*

on the ground that it is incompetent, irrelevant and immaterial.

The Court: I will take it.

Plaintiff's counsel objects to this ruling of the Court.

Objection noted as ground of appeal.

(Marked Ex. D11.)

(Defendant's counsel reads Ex. D11.) 10

Q. Mr. Coleman, I show you what purports to be a copy of a letter sent by Fred Kilgus to Meurer Brothers Company on January 7, 1909 (paper shown to witness). Will you look at that and see if you recall having sent a letter like that?  
A. Yes, sir.

Q. You did send such a letter? A. Yes, sir.

Mr. Egner: I offer that in evidence.

Objected to as incompetent, irrelevant and immaterial. 20

Objection overruled.

Plaintiff's counsel objects to this ruling of the Court.

Objection noted as ground of appeal.

(Marked Ex. D12.)

(Defendant's counsel read Ex. D12.)

Mr. Hartpence: I will withdraw my objection to that letter.

Mr. Egner: It will be stipulated, will it not, that Vredenburgh, Wall & Carey have been the attorneys for Meurer Brothers? 30

Mr. Hartpence: We will admit that, yes; that is, in relation to this particular letter.

Mr. Egner: Yes. Now, I want to offer in evidence a letter from Vredenburgh, Wall & Carey to Mr. Kilgus, dated February 2, 1909.

Mr. Hartpence: We will object to its admission on the ground that it is irrelevant, incompetent and immaterial. It is a general 40

*Harry M. Coleman, for Defendant—Cross*

communication from counsel which refers to another matter; it refers to a matter that is not in the present case at all.

The Court: I sustain the objection to this letter.

Defendant's counsel object to this ruling of the Court.

10           Objection noted as ground of appeal.

*Cross-examination by Mr. Hartpence:*

Q. Mr. Coleman, what is your position with Fred Kilgus? A. I am bookkeeper for Mr. Kilgus.

Q. And you have charge of the office work chiefly, do you? A. Well, largely so, yes.

Q. I believe you stated that you did not attend to the outside work; is that correct? A. No, sir;  
20 I have nothing to do with the outside work.

Q. You carried on the correspondence with Meurer Brothers pertaining to this American Skylight & Iron Works job at the Lincoln avenue school, did you not? A. Yes, sir; partly so.

Q. And I think you stated, did you not, that you wrote this letter of December 7th, which has been marked Ex. P9? A. Yes.

Q. That is your signature following "Fred Kilgus"? A. Yes, sir.  
30

Q. Now, in what way did the work lag behind that the American Skylight & Iron Works was doing? A. Well, they never at any time had sufficient men, as I understood it, on the work to push it along, in order to get the work completed within a reasonable time.

Q. Right from the beginning? A. Right from the beginning, yes.

Q. When did the work begin? A. Well, I don't know as I can tell you exactly; it must have been  
40 in September some time that they started to work.

*Harry M. Coleman, for Defendant—Cross*

Q. And you had trouble with them right from the start? A. Well, they didn't push their work fast enough; that was the only trouble. We were under contract to complete the building in a certain length of time; we were under penalty; and we had to push them along in order to get it done.

Q. Did you have any particular trouble with them about it? A. Well, no particular trouble 10  
about this thing, only they worked slow on it.

Q. Did you have any communication with the American Skylight & Iron Works yourself? A. No, not myself.

Q. Then all you know about it is what you heard; is that it? A. Practically, yes.

Q. You heard about that? A. Oh, I heard it, yes.

Q. Long before you wrote Exhibit P9, in December? A. In December. Well, it must have 20  
been up along about that time.

Q. But you say you heard about it from the start, did you not? A. Well, yes, more or less, on account of not having sufficient men on the job.

Q. Do you remember just what reason you assigned in Exhibit P9 for not sending the full amount of \$1000 that you were authorized to make by the American Skylight & Iron Works?

The Court: I think, under the rule, the witness should be shown the letter, if you want 30  
to refer to it.

Q. I believe you stated that you wrote that letter (paper shown to witness)? A. Yes, sir.

Q. What is the reason assigned in that letter for withholding \$500 of the \$1000 that was authorized?

Mr. Egner: The letter speaks for itself.

A. The letter expresses itself exactly. 40

*Ernest F. Guilbert, for Defendant—Direct*

The Court: Well, what does it say?  
(Witness reads Ex. P9.)

Q. That was the real reason for your withholding the \$500, was it not? A. Yes, sir.

10

ERNEST F. GUILBERT, sworn in behalf of defendant:

*Direct-examination by Mr. Egner:*

Q. Mr. Guilbert, you are an architect? A. Yes, sir.

Q. And I believe you are the architect of the City of Newark? A. No, sir; the Board of Education only.

20 Q. The Board of Education of the City of Newark? A. Yes, sir.

Q. You were the architect of the Lincoln avenue school, in Orange? A. I was.

Q. And who was the general contractor on that job? A. Frederick Kilgus.

Q. Do you recall the fact that the American Skylight & Iron Works was the subcontractor for the sheet-metal work? A. I do.

30 Q. What can you say as to the work that was done by them, was it satisfactory or unsatisfactory?

Mr. Hartpence: I object on the grounds already stated, that it is incompetent, irrelevant and immaterial, and I desire to have the objection noted generally to all the line that this may take.

The Court: I will make the same ruling.

Plaintiff's counsel object to this ruling of the Court.

Objection noted as ground of appeal.

40

*Ernest F. Guilbert, for Defendant—Cross*

Q. Was the work satisfactory or unsatisfactory? A. The work was unsatisfactory.

Q. Did you ever make any certificate stating that the work was satisfactory? A. No, sir.

Q. Did you ever advise Mr. Kilgus to a contrary effect? A. Contrary to the fact that it was?

Q. Did you ever advise him that it was not satisfactory? A. I did. 10

Q. Do you know whether the American Skylight & Iron Works completed their work? A. I think they did not; I don't know positively.

Q. Who was your personal representative on the ground? A. Mr. Behee, Grant A. C. Behee.

*Cross-examination by Mr. Hartpence:*

Q. In what respect was the work of the American Skylight & Iron Works not satisfactory, Mr. Guilbert? A. The tin on the roof had been laid without back painting; there had been no paper placed under it; the galvanized iron cornice had not followed in accordance with the details; the brackets under the cornice were not sufficiently strong to carry the work properly. Those are the principal items. 20

Q. When did you first discover that these defects existed? A. I can't state the dates; I don't recall them. If you have reference to date, or as to progress of work, I can tell you approximately as to the progress of the work, but not as to the date. 30

Q. Well, approximately, or generally, when did you discover that the defects existed? A. As to date?

Q. I do not care for the exact date. A. I can't tell. As to the progress of the work, when there was probably seven or eight hundred feet of tin on the roof.

Q. What proportion is that? A. Maybe ten to 40

*Ernest F. Guilbert, for Defendant—Cross*

fifteen per cent., from eight to fifteen per cent., I should say.

Q. What did you discover when seven or eight hundred feet of tin was on the roof? A. That the tin had not been back painted and that the paper was not under the tin.

10 Q. What sort of paper was it? A. I don't recall just what the specifications called for.

Q. You were familiar with the specifications, were you not? A. I was, but those conditions vary sometimes, and it is hard to say.

Q. Did you compare the specifications with the conditions of the work? A. I did. I didn't have to compare so far as finding out that there was no paper there at all.

Q. Do you know whether or not the specifications required paper? A. I do.

20 Q. You do know that about the specifications? A. I do.

Q. And do you know whether or not the specifications required the tin to be back painted? A. Yes, sir.

Q. Can you state in what respects the cornice did not conform to the details? A. The dentals were not placed according to the drawings.

Q. What? A. The dentals, or decorative ornaments.

30 Q. Are they an ornament? A. Yes, ornaments placed along in the bed of the cornice.

Q. What about the brackets that you referred to, not being strong enough? A. Those are structural elements, furrings, that have to do with the support of the cornice.

40 Q. When you discovered that the tin had not been back painted what did you do? A. Notified Kilgus that the work was not in accordance with the contract and that the tin that was there must be removed and that tin that was properly back painted must be laid as specified.

*Ernest F. Guilbert, for Defendant—Cross*

Q. You notified Kilgus? A. Yes, sir.

Q. After you notified Kilgus was anything done to remedy that situation? A. Not immediately.

Q. Well, was anything done? A. Yes, sir; the tin was all removed, new tin was put on and properly back painted and put on paper.

Q. Properly papered? A. Yes, sir.

Q. Then the tin was all replaced, back painted 10 and the paper placed, so far as the work was carried, was it not? A. As far as it had been carried up to that time, yes.

Mr. Egner: I think this question is a little ambiguous, and it may lead to a misunderstanding. I think it may tend to make the witness say that all this was done by the American company. I understand that the witness is not prepared to say that. He does not know by whom it was done or when it was done. 20

By the Court:

Q. Somebody did it? A. Somebody did it.

Q. Made it right? A. Yes, sir.

By Mr. Hartpence:

Q. How about the dentals on the cornices, was anything done with those after Mr. Kilgus's attention was called to it? A. The difficulty was 30 corrected.

Q. How about the brackets? A. Also corrected.

Q. You, as a matter of fact, Mr. Guilbert, did not deal with any of the subcontractors of Fred. Kilgus, did you? A. Never.

Q. Your relations as the architect were with the general contractor? A. Only.

Q. And after you had notified him your duty in that respect ceased? A. Yes, sir. 40

*Ernest F. Guilbert, for Defendant—Cross*

Q. Except to see that the work was properly done? A. I had no business with any subcontractor.

By the Court:

Q. The result, by whoever produced, had to come up to the specifications? A. Yes, sir.

10 Q. That is the idea? A. Yes, sir.

By Mr. Hartpence:

Q. These brackets that you have referred to, Mr. Guilbert, just where were they located? A. They are the supports for the cornice, underneath it.

Q. Of what do they consist? A. Forming the general contour, to carry the galvanized iron, sheet-metal.

20 Q. And of what were they to consist under the specifications? A. Without looking up the specifications I will not attempt to say.

Q. Do you recall in what respect they failed to comply with the specifications? A. I do not; no, sir.

Q. They were simply, in your opinion, insufficient to carry it? A. Yes, sir.

Q. And you do not recall in what respect they failed to conform to the specifications? A. I do not at this time; no, sir.

30 Q. You have already stated, I believe, that you do not know whether or not the American Skylight & Iron Works completed their part of the contract with Kilgus? A. I do not.

Q. Did you observe or pass upon any other defects in the workmanship of the American Skylight & Iron Works except those to which you have referred? A. I don't recall any.

*Gottlieb Yunker, for Defendant—Direct**Redirect-examination by Mr. Egner:*

Q. You never go further than the general contractor, do you? A. Never; I only go as far as the man with whom the owner deals, never with the subcontractors.

Q. And in this case Mr. Kilgus was responsible for the entire work? A. Mr. Kilgus signed the contract with the Board of Education, and he was 10 the only man I dealt with.

GOTTLIEB YUNKER, sworn in behalf of defendant.

*Direct-examination by Mr. Egner:*

Q. Mr. Yunker, you are secretary and treasurer of the Newark Cornice & Skylight Works? A. 20 Yes, sir.

Q. And you are also generally in charge of the outside business? A. Yes, sir.

Q. And you were so employed in 1909? A. Yes, sir.

Q. Now, do you remember having given a figure for completing the metal work on the Lincoln avenue school? A. I do.

Mr. Hartpence: I object on the ground that it is incompetent, irrelevant and immaterial, and I desire to enter a general objection to this line of testimony, as heretofore. 30

The Court: I will receive it.

Plaintiff's counsel objects to this ruling of the Court.

Objection noted as ground of appeal.

Q. You gave a figure to Mr. Kilgus? A. Yes, sir.

Q. Do you recall what that figure was? A. I think it was \$2300. 40

*Gottlieb Yunker, for Defendant—Direct*

Q. And did you thereupon go on and complete the work? A. Yes, sir.

Q. And were you paid the \$2300? A. Yes, sir.

The Court: What is the name of your company?

Witness: Newark Cornice & Skylight Works.

10

Q. And did you then go on and complete the work? A. Yes, sir.

Q. How much experience have you had in the cornice and skylight business? A. Well, I am working at it for thirty years.

Q. And during that time you have figured a great many jobs? A. I have.

20 Q. What can you say as to the sum of \$2300, was that reasonable compensation for the work done? A. It was a very reasonable price for a good class of work.

Q. This work was done to the satisfaction of the architect, was it? A. Yes.

30 Q. In what condition did you find this work when you started on it? A. Most of the seams in the cornices were open. There had been a field seam, a seam made up in a field, after the cornice was set in the field, every 16 feet. Most of them were open and had to be remade, which was a very nasty job.

Mr. Hartpence: I desire to have my general objection extend to this particular testimony.

The Court: Yes.

Plaintiff's objection noted as ground of appeal.

40 Witness: The roof which was made hadn't been properly seamed; most of it was only seamed once, where two operations are required. It is what we call a standing seam

*Gottlieb Yunker, for Defendant—Direct*

tight roof. On a slanting roof it is done by making a long, thin strip and bringing one close up to the other, over-seaming it twice. Most of it was only seamed once, and where the strip joins with the gutter, also where it is joining with the flat decked roof, it hadn't been properly soldered and pointed up. 10

Mr. Hartpence: I move to strike out that portion of the testimony of the witness which refers to the condition of the cornices and seams on the further ground that, in any event, the work was only to be to the satisfaction of the architect, and the architect has already testified that the only defects to which he made objection were those that were referred to: the failure to back paint and the fact that there was no paper and the cornice not right as to detail and the brackets not strong enough to carry. Now, it seems to me that any defect or condition looking to a defect by any other person than the architect would be incompetent. 20

Mr. Egner: We would still have failure of consideration, and counsel did not quote the architect correctly. He said that was all he recollected at the present moment.

The Court: I will receive it subject to your objection, and then consider it in connection with the whole case. 30

Plaintiff's counsel objects to this ruling of the Court.

Objection noted as ground of appeal.

Q. Was it necessary for you to take out any work which had been done by the American company A. No.

Q. Can you now recall any other defects? A. 40

*Gottlieb Yunker, for Defendant—Cross*

Well, they wasn't just defects, as I say, but a large portion of the tin was laid and never finished up, but the seams in the gutter weren't soldered, also the tubes, the connection which was later to receive the leaders—there was no leaders up yet—they all had to be removed; they were wrong.

- Q. They were wrong? A. Every one of them.  
 10 We had to put them in in lead. If I recollect, we had to make a change in all of them.

*Cross-examination by Mr. Hartpence:*

Q. When you took up the work for the Newark Cornice & Skylight Works did you enter into a contract with Fred Kilgus? A. Yes, sir.

Q. And were there specifications annexed to that contract? A. Well, the general specifications were to govern my contract—my order.

- 20 Q. Do you know whether or not those specifications were the same as the specifications under which the work had been done by the American Skylight & Iron Works? A. Positively.

Q. You compared them, did you? A. I didn't compare them; I saw that was the specifications when the estimates were taken for the general contract.

- 30 Q. Now, just in what respect did the tin work fail to comply with the specifications when you took up the work? A. Well, I can't say anything in that line, because we didn't tear anything off, and to say the back painting, and so forth, or proper painting or sheeting was right under it, we couldn't say unless we were forced to take off a portion of the roof.

Q. Well, you did not take off any portion of the roof, did you? A. I did not.

Q. It remained just as you found it, did it not? A. Whatever was laid; yes, sir.

- 40 Q. And that was afterwards accepted by the architect, was it not? A. Yes, sir.

*Gottlieb Yunker, for Defendant—Cross*

Q. With the whole job; wasn't that right? A. After I reseamed it and pointed whatever had to be pointed, which was a small portion.

Q. Now, why did you reseam it? A. Finish the job, go through the second operation.

Q. What remained to be done in that respect? A. A great portion of it.

Q. In what respect was it not finished? A. That 10 is what I stated: the seaming wasn't finished, the pointing up wasn't done.

Q. Had not the seaming been done by the American Skylight & Iron Works? A. Not finished, not properly.

Q. Then the point was that it was not properly seamed; is that right? A. Partly so; yes, sir.

Q. In your opinion, it was not properly seamed? A. Partly so.

Q. In what respect did the seaming done by the 20 American Skylight & Iron Works fail to comply with the specifications? A. It didn't absolutely fail, only they didn't finish it; they went through the first operation just to make a big showing, covering a whole lot of roof, with the expectation of coming back and finishing later.

Q. That is your assumption, is it not? A. Yes, sir.

Q. You have assumed a whole lot, have you not? 30  
Mr. Egner: He has not said so.

A. I had to.

Q. Well, have you or have you not? A. I did.

Q. You assumed that this work was not done properly, did you not? A. I did.

Q. And yet you cannot state in what respects it failed to conform to the specifications, can you? A. Absolutely so.

Q. Well, state it. A. I stated that the connections along the gutters were not properly made, 40 neither along the decked roof, the seaming wasn't

*Gottlieb Yunker, for Defendant—Cross*

properly done, the connections wasn't properly made.

Q. In what respect were they not properly made? A. They weren't soldered at all; they were simply hooked in.

Mr. Egner: Do I understand that counsel waives his objection by his examination?

10

Mr. Hartpence: Oh, no; I am not obliged to lie down and let it stand on the record, even though I objected to it.

The Court: Proceed.

Q. What was the proper way to do the seaming?

A. Just to go through the two operations, make a complete finish.

20

Q. Tell us what the two operations are. A. First the tin is turned up one inch and one inch and a quarter. There is two different ways of doing it. That is the usual way. Now, you first have a tool which takes over about quarter of an inch; it turns that over the first, the lower edge. When that is done you turn it over again; that is the second operation. In most cases that wasn't done.

Q. Just where was it not done, on what portion of the roof? A. Well, I can safely say over half of the roof that was put on.

30

Q. (By the Court.) What is this seaming, what is it done for? A. That is to join the two individual sections together.

Q. (By Mr. Hartpence.) And you mean to say, then, that when you took charge of that work these different courses of tin had been laid on the roof that had not been soldered together? A. They hadn't all been properly joined, not finished.

40

Q. Well, what remained to be done in order to properly finish them? A. We had to finish the seaming; we had to do the soldering along the

*Gottlieb Yunker, for Defendant—Cross*

bottom edge and the top seaming; most of the gutter seams wasn't soldered.

Q. How long did it take you to do that soldering? A. Well, that is a question, for it got wet, and if sand and dirt is washed into the seams you may solder a seam three or four times, as long as you can make a clean seam. Generally a man will be able to do a very small portion of this kind of 10 pointing up and make a good job of it.

Q. Aside from that, do you know how long it actually took?

Objected to as immaterial.

The Court (after argument): I will take the testimony.

Q. Can you state whether it took you half a day or ten days to do that? A. Oh, that will take over three weeks, three or four men, to do this over- 20 hauling.

Q. Well, did it take that long? A. I will venture to say yes.

Q. Well, can you say what you venture to say? A. Yes.

Q. Well, state how long it took you to do it. A. Well, I can't say just exactly how long it took, but to do it quickly, to do a good job, you couldn't do it.

Q. What else did you find there besides this 30 defective seaming that you refer to that didn't quite suit you? A. Well, the large amount of work not done, which had to be done under our contract. There was a tower worth about \$500 which had never been started.

Q. (By the Court.) What is that? A. A tower, sort of an observation tower. I built it completely.

Mr. Hartpence: I move to strike out this evidence as not responsive, if the Court please:

*Gottlieb Yunker, for Defendant—Cross*

Mr. Egner: It is directly responsive.  
(Question and answer read.)

The Court: He said he did work that had not been done at all. That might not have suited him.

Mr. Hartpence: Then I will have to let it stand, I suppose.

10

Adjourned until tomorrow, Tuesday, April 15, 1913, at ten o'clock A. M.

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SECOND DAY.

Tuesday, April 15, 1913.

Met pursuant to adjournment.

Present, counsel as before stated.

20

Gottlieb Yunker resumes the stand in behalf of defendant.

*Cross-examination (continued) by Mr. Hartpence:*

Q. Mr. Yunker, just when did you take up the work on the Lincoln avenue school building in pursuance of your contract? A. Some time in January, I believe, of 1909.

Q. Of 1909? A. Yes, sir.

30

Q. And at that time how much tin did you find already laid on the roof? A. Well, perhaps there has been twenty-five per cent. of the roof laid. There was some tin left on the job.

Q. Some tin there? A. Yes.

Q. Which had not been laid? A. Yes.

Q. And did you use that? A. Yes, sir.

Q. In the completion of the work? A. Yes.

Q. How much was that, do you know? A. I can't just exactly say how much it was, no.

Q. Was it as much as had already been laid?

40

A. I couldn't say.

*Gottlieb Yunker, for Defendant—Cross*

Q. Was there half as much as had already been laid? A. No, there may have been more. I put the balance of Meurer Brothers' up. Perhaps somebody can give it more—

By the Court:

Q. You mean it might have been more than half as much? A. Well, I can't recollect it just exactly. 10

Q. I merely wanted to know what you meant by what you said. You said there might have been more. More than what? A. More than half again as much as had been laid.

Q. More than half as much as had been? A. More than again as much.

Q. More than as much again? A. Yes, sir.

Mr. Egner: "I think there might have been more than half again as much as had been laid." 20

The Court: The answer was ambiguous, and he said it might have been more than as much again.

Q. (By Mr. Egner.) Just explain that.

Mr. Hartpence: Well, his answer is on the record.

A. There was about—

Mr. Hartpence: One moment. I ask that 30 the question and answer be read.

(The stenographer reads from the record.)

Q. (By Mr. Hartpence.) How much of the cornice was on at that time, Mr. Yunker? A. Well, we erected about 200 feet of it.

Q. And all the rest was on? A. The rest was on, yes.

Q. And I believe you stated upon your direct examination yesterday, did you not, that you did 40

*Gottlieb Yunker, for Defendant—Cross*

not remove or tear out any of the work that had been done at the time you took charge? Is that true? Did you so state? A. Yes.

Q. Under whose direction did you complete the work, Mr. Yunker? A. Mr. Kilgus's.

Q. And subject to the specific directions of the architect on the building? A. Yes, sir.

10 Q. Were you directed by him to make any changes in the work that had been done? A. Simply requested to do the work right.

Q. Were you directed by him to make any specific changes? A. Not necessarily; no.

Q. (By the Court.) You say you were not? A. No.

Q. (By Mr. Hartpence.) And the changes that you did make then, in order to make it right, as you have stated, were changes which were necessary, in your judgment? A. Yes, sir.

Q. Is that correct? A. That is correct.

Q. In laying a tin roof and cornice such as was laid on this Lincoln avenue building, the tin work, of necessity, must follow the carpenter work and mason work that has preceded it, must it not, Mr. Yunker? A. Yes, sir.

Q. And whatever arrangements had been made by the carpentering and by the masonry, the tin work must conform to it; isn't that correct? A. Yes, sir.

Q. My recollection is that you stated in your direct examination that you were not satisfied with some of the outlets; is that correct? A. Yes, sir.

Q. By that you mean the water outlets, do you not? A. Yes, sir.

Q. To the conductors? A. The connections to the conductors.

Q. And there again the tin work had to follow whatever had been done in the carpenter work or

40

*Gottlieb Yunker, for Defendant—Redirect*

mason work preceding it, did it not? A. The outlet followed the laying of the tin roof.

Q. And the tin, of course, had to be laid on the roof that is constructed by the carpenters; isn't that correct? A. Yes.

Mr. Egner: I will admit that.

*Redirect-examination by Mr. Egner:*

10

Q. Now, Mr. Yunker, when you say that these changes were necessary, in your judgment, upon what was your judgment based? A. On my personal knowledge of the work.

Q. And what else? A. And the specifications, to fulfill the specifications.

Q. Then do I understand that, in your judgment, these changes were necessary to make the work conform to the specifications?

Objected to.

20

A. Yes, sir.

Mr. Hartpence: I object on the general ground of the objection stated to the same line of examination yesterday: that the architect was the judge.

Mr. Egner: I am merely explaining what you tried to bring out in your cross-examination.

Mr. Hartpence: I will renew my objection, on the ground that it is irrelevant, incompetent and immaterial, if the Court please. 30

The Court: I will overrule the objection.

Plaintiff's counsel objects to this ruling of the Court.

Objection noted as ground of appeal.

Q. Now, Mr. Yunker, you say that the Newark Cornice & Skylight Works, your concern, put up about 200 feet of the cornice. Can you tell us how much cornice there was all together? A. On the entire building? 40

*Gottlieb Yunker, for Defendant—Redirect*

Q. Yes. A. No.

Q. Can you give us an approximate figure? A. There must have been somewhere in the neighborhood of 1500 feet.

10 Q. Well, if you do not know, all right. Now, you have testified on your cross-examination in reference to the amount of tin which was present on the job, but not actually laid down, and there is some doubt in my mind as to just exactly what you meant. You said that there was about twenty-five per cent. of the roof laid down. Now, how much tin was there on the job that was not laid down, referring in figures of per cent, if you can?

Objected to.

A. About even, about twenty-five per cent.

20 Mr. Hartpence: I object on the ground that the question has already been asked and answered.

The Court: The witness was asked about that on cross-examination. Do you mean that he was asked about it on direct examination.

Mr. Egner: No, sir; he was asked on cross-examination, and the reason I ask this question now is that I think the answer on cross-examination was not entirely clear. It certainly confuses the Court and jury.

The Court: What was the objection?

30 Mr. Hartpence: The question was asked and answered by this witness, and it was in response to the Court's question.

Mr. Egner: Well, I am just asking it for the sake of clearness.

The Court: Well, it was really on cross-examination, was it not.

Mr. Egner: Yes, sir. The Court tried to elucidate what the counsel brought forth on cross-examination.

40 The Court (after further argument): Then,

*Gottlieb Yunker, for Defendant—Redirect*

in my view, the objection is not good, because on redirect examination Mr. Egner has a right to come back against your cross-examination. Proceed.

(Question and answer read.)

Witness: About twenty-five per cent.

Q. Now, this twenty-five per cent. of the roof 10  
that was laid down, did anything further remain  
to be done on that twenty-five per cent.? A. On  
the very twenty-five per cent.?

Q. Yes, that was laid down. A. Repairs, yes,  
finishing.

Q. And what else? A. In connection with this  
twenty-five per cent.?

Q. The twenty-five per cent. that was down, was  
that a complete, finished, satisfactory job? A. No.

Q. And have you already detailed the particu- 20  
lars in which it was unsatisfactory? A. Yes, sir.

Q. Your direct testimony as to the reference to  
the necessity of seaming, did that refer to this  
twenty-five per cent.? A. Yes, sir.

Q. Now, Mr. Yunker, in addition to the seventy-  
five per cent. of the roof work which remained to  
be done and the 200 feet of cornice that remained  
to be done, what else remained to be done? A. A  
metal tower.

Q. Was that an elaborate or a simple affair? 30  
A. Yes, sir; a very elaborate affair.

Q. Just what kind of a tower was it? A. It was  
a circular tower, with a circular roof, with a dor-  
mer ceiling, round, tapered columns, with an orna-  
mental balustrade all around.

Q. What was the approximate value of that?  
A. Well, offhand, I would say from \$400 to \$500.

Q. How much? A. Offhand, \$400 to \$500.

Q. What else was there? A. There was gal-  
vanized iron cornices, or panels, rather, to be put 40

*Gottlieb Yunker, for Defendant—Redirect*

between the second and third story windows, on the old wing, I think it was.

Q. Did that amount to much? What did that amount to? A. Well—

Q. If you cannot recall now— A. I can't hardly do it.

10 Q. This is four years ago. What else remained to be done? A. We had some work to do on the side entrance.

Q. Of what nature? A. Sort of a storm house that we added.

Q. Store house? A. Storm house, some sort of a storm house we added on the old part of the school. There was quite some work in connection with that. We also furnished and put up all the copper leaders on the entire building.

Q. Was that much of an item? A. Why, yes.

20 Q. (By the Court.) Did the specifications require it? A. Yes, sir.

Q. (By Mr. Egner.) All these things that you testified to were required by the specifications? A. Yes, sir.

Q. Can you give us an idea of the approximate value of the copper leaders on the entire building? A. No, I don't remember how much it was.

Q. Was it as much as \$400 or \$500? A. Yes, I think it was nearer \$600.

30 Q. Nearer \$600? A. Yes, sir.

Q. (By the Court.) What does that cover? What does the figure you mention cover, what work? A. Copper leaders on the entire school building.

Q. (By Mr. Egner.) Was there anything else, Mr. Yunker? A. There was some slating, which wasn't of very great value.

40 Q. Slating? A. Yes. Then we took the old cornices down on the original school building and re-erected new cornices, which necessitated a new

*Gottlieb Yunker, for Defendant—Recross*

gutter lining on the inside, to make the connection between the old tin roof and the gutter, the cornice, and repaired the old tin roof.

By the Court:

Q. You say you took down the old cornices and put up new ones? A. Yes, sir.

Q. Did you say that? A. Yes, sir. 10

Q. Well, did the specifications require that? A. Yes, sir.

Q. (By Mr. Egner). Anything else? A. Then there was tubes.

Q. (By the Court.) What? A. New tubes; that is, the inlet to the leaders.

By Mr. Egner:

Q. Is that on the old building or the new building? A. On the entire structure. 20

Q. On the entire building? A. Yes, sir. They were block tin.

Q. Anything else? A. Not that I can recall just now. Painting of the surface of the entire roof when finished, on completion.

Q. Was that in your specifications? A. Yes, sir.

Q. Painting the entire roof? A. Yes, sir.

Q. And approximately what is that worth? A. I couldn't say.

Q. Can you give us any approximate figure— 30

\$100 or \$200? A. It was a very large roof. It is so long I don't like to make any fixed statement.

Q. Was it as much as \$100, would you say?

A. Oh, it is more than that.

Q. More than \$100? A. Yes, sir.

*Recross-examination by Mr. Hartpence:*

Q. All this work, Mr. Yunker, was the work which you did in the performance of your contract, was it not? A. Yes, sir.

*Grant A. C. Behee, for Defendant—Direct*

Q. And for which you were paid the sum of \$2300? A. Yes, sir.

Q. And that was work which yet remained to be done? A. Yes, sir.

Q. When you took charge? A. Yes, sir.

10 Q. And the cornices that you spoke about on your redirect examination as having taken down did not refer to the cornices which had been put up by the American Skylight & Iron Works, did it? A. No, they were old cornices.

Q. Now, you have stated on your redirect examination that the twenty-five per cent. of the tin work which was laid was not a complete, finished job. In what respect was it not a complete, finished job?

Objected to as repetition.

20 The Court: I think the question may be asked, in order that we may understand what the witness meant by that expression. You may ask the question.

Q. In what respect was it not a complete, finished job? A. Well, the seaming was not finished, neither was the soldering done.

30 Q. And that is the seaming and the soldering to which you referred yesterday in your testimony, is it not? A. Yes, sir.

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GRANT A. C. BEHEE, sworn in behalf of defendant.

*Direct-examination by Mr. Egner:*

Q. Mr. Behee, what is your occupation? A. Superintendent of construction.

40 Q. How long have you been engaged in that business? A. Twenty-five years; twenty-seven

*Grant A. C. Behee, for Defendant—Direct*

years I have been identified with the building business and twenty-five years in charge of work.

Q. Are you associated with Mr. Guilbert? A. Not at the present.

Q. Were you in 1908 and 1909? A. I was.

Q. In what capacity? A. I had full charge of his work outside and I ran the office as well. 10

Q. And what in particular was the work that you did on the outside for Mr. Guilbert? A. I beg your pardon!

Q. What was the nature of the work that you did on the outside for Mr. Guilbert? A. Superintendent.

Q. Did you superintend buildings on which he was architect? A. Yes, sir.

Q. Did you superintend the construction of this Lincoln avenue school? A. I did. 20

Q. Did you have any connection whatever with the defendant, Mr. Kilgus? A. None whatever.

Q. Now, you know, of course, that Mr. Kilgus was the general contractor for that job? A. I do.

Q. Do you know that the American Skylight Works was the original subcontractor for the metal work? A. I do.

Q. Did you have occasion to inspect and examine the work which had been done by them? A. Yes, sir. 30

Q. Do you know whether they completed the work? A. They did not.

Q. Did they or did they not abandon that work? A. Well, they simply discontinued working on the building.

Q. Do you know who finished the work? A. The Newark Cornice & Skylight Company.

Q. Now, at the time the American Skylight Works discontinued work, was the work that they had done up to that stage satisfactory? 40

*Grant A. C. Behee, for Defendant—Direct*

Mr. Hartpence: I object, if the Court please, on the ground that it is incompetent, irrelevant and immaterial, and I desire to have a general objection noted to this line of testimony, as heretofore.

The Court: Just why do you think it is so bad?

10 Mr. Hartpence: I think it is simply the commencement of the testimony with which the defendant is seeking to establish the failure of the American Skylight & Iron Works to properly perform their contract, and our theory is that that is irrelevant to any suit between Meurer Brothers and Kilgus. I merely desired my general objection noted, as heretofore.

20 The Court: I have taken a different view of this case. I have regarded the contracts as interlocking, so to speak. I will therefore overrule your objection.

Plaintiff's counsel object to this ruling of the Court.

Objection noted as ground of appeal.

Q. At the time, Mr. Behee, they abandoned the work, was the work that they had done up to that time satisfactory? A. No, sir.

30 Q. Please specify in what particulars it was not satisfactory? A. In starting in the work certain galvanized cornices were to be erected. Perhaps before the wall was up within thirty inches of its height these cornices were built into the wall. The specifications required that they be back painted, painted on the back side, to prevent rust when the cornices got wet, and certain material is placed in the back of those things to shape them up, to hold them in shape, until they  
40 are placed in position. There is a wooden base

*Grant A. C. Behee, for Defendant—Direct*

built as they are working at the top, and in the meantime they must be supported by these iron braces. They weren't painted and they weren't sufficiently strong to hold the cornice in shape.

By the Court:

Q. What were not strong? A. The irons in back? 10

Q. What was it that was not back painted? A. Both the sheet metal and these braces. This permits—where they are not sufficiently strong it permits the cornice to sag and leaves a very bad line and—

Q. Let me ask you, what light do the specifications throw on this particular question? A. That they must be built in accordance with the details. Details were furnished for a full sized cornice, showing this. 20

Q. Showing what? A. Iron braces.

Q. And what did they show? A. Well, I am not prepared to say now just how heavy they were, but they are usually made of wrought iron.

Q. What do the details show as to the supports, the braces, if you remember? A. Yes, it was a wrought-iron brace fitted in to conform to the contour of the cornice.

Q. And were the braces that were put in not wrought-iron? A. They were wrought iron, but not sufficiently heavy to hold the work in shape. 30

Q. What light did the details throw on the size or strength or weight required? A. I don't recall at this time just what size they were, but they didn't hold the metal in position; and that was afterwards gone into and straightened out by these people in the first section. This building was built in four different sections.

Q. But the point, I suppose, you recognize to be whether the work conformed to the specifica- 40

*Grant A. C. Behee, for Defendant—Direct*

tions? A. Well, it did, in a measure, excepting that these irons were not as specified. The details required that they be made in accordance with the detail—the full sized drawings, in other words, of this cornice.

Q. Can you give us any more information as to wherein they differed from the details? A.  
 10 Only that they were light. I am not prepared to say just now wherein they differed. It is some years ago.

By Mr. Egner:

Q. Was there anything else, Mr. Behee? A. The connections on the cornices, where they join together—they were made in lengths of perhaps 8 feet, and the connections where they come together, the different sections, one butting the  
 20 other, they weren't soldered.

Q. Anything else? A. That was principally— Well, the dentals under the bottom of the cornice weren't properly spaced; they had to be gone into and changed. The spacing of the dentals was not properly carried out; and the corners—the dentals weren't provided on the corners, so that it left quite a little space on the bottom, and at the intersection; the miters, in other words,  
 30 where the corners changed their direction.

Q. Anything else? A. The connections between these cornices and the leaders were of galvanized iron, which is not permissible, for the reason that there is galvanic action between a galvanized iron and copper.

By the Court:

Q. What do your specifications show? A. Tin. This was afterwards made of tin.

Q. Can you tell us what the specifications or details require? A. All gutters are to be lined  
 40 with tin, and other connections.

*Grant A. C. Behee, for Defendant—Direct*

By Mr. Egner:

Q. Anything else, Mr. Behee? A. The grading of the gutters to carry the water to the leaders had to be gone into and changed, reset, so that it would carry the water. In some places the water laid in the gutter.

Q. Can you recall anything else? A. Nothing with reference to the cornices especially. 10

Q. Now, directing your attention to the roof. At the time they abandoned work how much of the roof had been laid down? A. I should judge about twenty-five per cent.

Q. And this twenty-five per cent that had been laid down, was that completed in a satisfactory manner? A. No.

Q. In what respects was that unsatisfactory? A. The connection between the roof—this roof had two pitches, almost a flat portion, that we call a deck, and then a greater slope. Between the deck and the slope, there was no connection made there, no connection soldered; the tin was simply allowed to project over; and as the roof went down at the gutter, the tin was allowed there simply to project over and hadn't been soldered down. The standing seams on this roof required a double lock. That means that the tin is raised, one portion a little higher than the other, and that is turned over, and then taken and turned down, so that it leaves a standing seam about three-quarters of an inch. That had only been turned over once. The deck of the roof had been soldered—that was the flat portion—but not its connections. A great deal of that had to be gone over, for the reason that great quantities of rosin had been used, which prevents the paint from sticking, and that all had to be removed. Also, I might add, the specifications, as I remember, required cleats—that is, a slat put on the tin and nailed to the roof 40

*Grant A. C. Behee, for Defendant—Direct*

—and it required about four of those to a sheet, spaced about eight inches. These were not spaced that way and soldered. Nailing had been resorted to, a nail driven through the tin, that we had to cap with a piece of tin, soldered down.

By the Court:

10 Q. Do you know that or do you only think it is so? A. Oh, no, I saw it.

Q. Are you sure about what was in the specifications? A. Yes, sir; I superintended the writing of them.

The Court: Because you spoke somewhat indefinitely about it.

Witness: I don't remember whether it said four pieces or whether the spacing of this was eight inches. This roof wasn't laid down in block pieces, but sheets soldered together.

20 The Court: See if you can find that in the specifications (paper shown to witness).

Witness (reading): "All standing seam roofs to be fastened to the roof with two-inch wide tin cleats spaced eight inches apart, with cleats locked into seam, and each cleat to be fastened with three-quarter-inch barbed wire nail. All flat roofing must be fastened to the roof with two-inch wide tin cleats."

30 Q. Now, you say there were no cleats? A. No, I say they weren't spaced as closely as should be, and surface nailing was resorted to. That standing seam business is gone into here very carefully.  
By Mr. Egner:

Q. So that it was not satisfactory in that respect also? A. Yes, sir.

Q. Now, can you recall anything else? A. There was considerable delay all through this thing, which was very annoying.

40 Q. I do not mean delay, but the work that had

*Grant A. C. Behee, for Defendant—Direct*

been done, whether it was satisfactory or not, if you have any other things to specify, that you can recall? A. No, excepting a little carelessness in handling the leaders. Certain copper leaders were on the building, which were required to be taken off and to be used again.

Q. They had to be replaced? A. Yes, sir; but, through careless handling, they were practically 10 all destroyed—

Q. They were? A. Yes. —so that new leaders had to be provided.

Q. Did you report these circumstances to Mr. Guilbert? A. Yes, sir.

Q. Did you also report the unsatisfactory condition of the work to Mr. Kilgus? A. Yes, sir.

Q. And what instructions did you give Mr. Kilgus? A. I called his attention to the fact that this work was being badly done and slowly done. 20 It was a continual annoyance. As few as four men were employed on that work, where twenty could have been used just as well as not, and this thing had gone on continually, and Mr. Kilgus was up against it, as he expressed it, and I suggested that he serve them with a three days' notice, to hustle that work and to see that it was done satisfactorily.

Q. Can you recall when it was that you made this suggestion to Mr. Kilgus, about when, as near 30 as you can? A. It was in, probably, the middle of December.

Q. About the middle of December? A. About the time—just before they quit the job.

Q. Just before they quit the job? A. Yes.

Q. Now the work that was done by the Newark Cornice & Skylight Works, was that satisfactorily done, in accordance with the specifications? A. It was; it was accepted.

Q. Have you yourself had experience in figuring jobs? A. Yes.

*Grant A. C. Behee, for Defendant—Direct*

Q. Estimating the cost of work? A. Yes.

Q. What can you say, as an expert, as to whether \$2300 was a reasonable sum for completing that work in the condition it was in when the American Skylight & Iron Works left it to final completion, in accordance with the plans and specifications? A. I should consider that was a

10 fair price.

Q. A fair price? A. Yes.

Q. Now, also speaking as an expert, just tell us what you think the fair value of the work that had been put in by the American company at the time they left? A. Do you mean in its condition at that time?

Q. In its condition, just as it was, with those defects and everything that you have specified?

20 A. Well, that is hard to arrive at, in view of the fact that it required considerable labor to make it good. Those are things that are hard to go into, because you never know what you get up against. That tin wasn't painted on the bottom in some places, and at the edges, it was necessary to raise them where this soldering was to be done, and dirt gets in that in storms, and it requires a good deal of labor to rough that tin up. To make a soldering point, it has got to be roughed up. Solder won't stick to dirty or greasy tin. So that the labor at-

30 tached to that, I should imagine, would be quite considerable.

Q. As near as you can, I want you to say what you consider this work was worth, with these imperfections and with these unsatisfactory conditions which had to be remedied. If you cannot say so, give us an approximate figure, what that was worth? Or I might put it this way: Was it worth \$500?

Objected to as leading.

40

Objection sustained.

*Grant A. C. Behee, for Defendant—Direct*

Q. Well, tell us what it was worth, if you can.

The Court: You are not bound to tell us, if you do not know.

A. That is, placing it in the position it was in, I would consider that work was worth very little. If it was a subcontractor under me, I wouldn't give him anything. The tin roof that had been applied without paper, when we took that off it was a dead loss, simply dumped over the wall. 10

Q. (By the Court.) The tin? A. Yes, sir. The roof was stripped right off and dumped down on the sidewalk below, or the lot. That tin we couldn't use, so that that makes that a dead loss. I should say, though, perhaps between \$400 and \$500.

Q. (By Mr. Egner.) How often were you on this job while you were superintending it? A. I made it a point to get there as often as required, usually every other day. I had other work to attend to. Oftentimes I wouldn't go back to the work the next day; but it was an average of every other day. 20

Q. When you were there how long on an average did you stay? A. It might be an hour to three hours, sometimes half a day.

Q. Did you see Mr. Jeter on the stand yesterday? A. I did. 30

Q. How often did you see him up there on the job? A. I only recall having seen Mr. Jeter once.

Q. (By the Court.) What is that? A. Once. That is all I recall having seen him. That was the time when the dispute arose over taking off the tin roof. Mr. Kilgus had taken the matter up with this American Skylight Company, and they, in turn, called me up on the 'phone and asked if I would permit them to leave the roof there that was already laid. I couldn't do that; it wasn't accord- 40

*Grant A. C. Behee, for Defendant—Cross*

ing to specification requirements, and the Board of Education of Orange were entitled to what they required, and I insisted on its being done. So that Mr. Jeter came on the job, as I remember, and we had a talk there.

Q. (By Mr. Egner.) And that is the only time you saw him on the job? A. That is the only time  
10 I saw him on the job, that I recall.

*Cross-examination by Mr. Hartpence:*

Q. Mr. Behee, when did you first discover that the work of the American Skylight & Iron Works was not satisfactory?

Objected as not cross-examination.

Objection overruled.

(Objection withdrawn.)

(Question read.)

20

A. Almost the time they started in with the cornice work.

Q. When did you call Mr. Guilbert's attention to the fact that it was not satisfactory? A. I can't recall when I called Mr. Guilbert's attention.

Q. How soon after you discovered it? A. I don't remember that. I didn't give attention to those little items.

Q. When did you call Mr. Kilgus's attention to the fact that it was not satisfactory? A. I don't  
30 think I did that, because it was corrected right away. Like the back painting of these cornices. They brought a little pot of paint there and started to correct that on the west wing. That was the first starting point.

Q. And the back painting was on the cornice, was it not? A. Yes, sir.

Q. Do you recall approximately when you first  
40 spoke to Mr. Kilgus about the matter? A. I don't believe it was more than a week or more after that

*Grant A. C. Behee, for Defendant—Cross*

that I had occasion to call his attention to these unsoldered joints.

Q. What else did you call his attention to besides the unsoldered joints? A. As the work on this tin roof progressed, I naturally called his attention to the defects in the manner in which the roof was laid, and that the tin hadn't been laid on the felt paper. That was, I should judge, in the 10 early part of December.

Q. Whatever you discovered which, in your judgment, you did not think was right, you called Mr. Guilbert's attention to it, or Mr. Kilgus's? A. Not everything. There is other things that we don't bother, if we can get them corrected. I deal with the foreman, and if they correct them we don't carry it further.

Q. And if they are not corrected— A. We carry 20 it further.

Q. And then you call the contractor's attention to it? A. Yes, sir.

Q. And from time to time as the work progressed you called Mr. Kilgus's attention to it, did you not? A. Yes, sir.

Q. When was the tin that you have referred to stripped off the roof? A. That I cannot tell you, for the reason that there was some controversy between Mr. Kilgus and the Skylight people, and they finally called me up on the wire. Several 30 days elapsed, maybe a week, and then a day or two afterward we had an interview on the roof with this gentleman, Mr. Jeter, and I don't recall. It was more than a day or two after that, perhaps, before the roof was taken off.

Q. How soon after work began was that? A. On the roof?

Q. Yes. A. I imagine it was two weeks; it may have been a little more than that.

Q. How much tin was actually on the roof at 40

*Grant A. C. Behee, for Defendant—Cross*

that time? A. I should judge it was between 1200 feet, square feet.

Q. That was stripped off? A. Yes, sir. One wing of the building had a roof that pitched off at the end and came up to a point, and that whole end had been laid, and that was removed.

10 Q. What was the defect in that? A. Not on the paper; there was no paper under it. It called for a tar front paper, I am quite sure.

Q. Then the stripping off of the tin roof that you refer to was the stripping of the tin at the time you discovered there was no paper underneath; is that right? A. Yes.

Q. And that was replaced by the American Skylight & Iron Works, was it not? A. Yes, sir.

By the Court:

20 Q. The tin that was stripped off and dumped on the ground was made good? A. Yes. That same tin wasn't used, but there was other tin replacing it.

Q. But the American Skylight company made it good? A. Yes, they replaced that portion.

By Mr. Hartpence:

30 Q. That was not a defect that existed at the time the American Skylight & Iron Works relinquished the job, then, was it? A. No, that had been completed, although the connection between the gutter and the deck had not been made on that section either.

Q. And the failure to back paint the cornice, that was corrected also by that company, was it not? A. On that wing; the rest of it wasn't. We had trouble all along on that painting. They only had a little can on the job, a little pot, that held perhaps a quart of paint.

40 Q. You eventually passed that, did you not—

*Grant A. C. Behee, for Defendant—Cross*

approved it? A. Some of it was back painted by the Newark Skylight & Cornice Company.

Q. But what had been done by the American Skylight & Iron Works, you passed it and approved it, did you not? A. Oh, yes.

Q. What part did the dentals play? A. They are an ornamental feature under the bottom of the cornice. 10

Q. They have no utility feature, have they? A. Not at all.

Q. When you say they were not properly spaced, in what respect were they not properly spaced? A. Certain distances between, given lengths there for the dentals, spaced in between there properly. You are bound to get a wide space for a dental. That destroys the effect of the cornice, or something of that sort; it makes a very botchy job of it. 20

Q. Was that remedied? A. By the Newark Skylight & Cornice Company.

Q. How much of a job was it to remedy that? A. That was quite a job. They had to put in swing scaffolds to get at the cornice; and other places extension ladders were used.

Q. You say you had to change the grading of the gutter? A. Yes.

Q. In what respect was that defective? A. They had a false bottom, as we term it; that is, the cornice forming its members. There is a sloping thing put in, so that the water will be carried away. That wasn't properly graded. There was a low point where it should be a high point, and the water would lay there. We had considerable trouble in the cold weather where icicles came down and broke some of the cornice. 30

Q. Who constructed these cornices, the carpenter or the tin man? A. The tin man.

Q. Who constructed the framework on which they rest? A. The carpenter. 40

*Grant A. C. Behee, for Defendant—Cross*

Q. And then the cornice is formed on that? A. Yes, sir. The frame was placed all right, but the tin work was allowed to buckle, and in some places it hung down, a very slight edge on the lining of the gutter, and caused it to sag at that point.

10 Q. What difference did it make in the roof that the cleats that you have referred to were not spaced quite so carefully as the specifications called for? A. A tin roof is more or less affected by the elements, heat and cold, and it will expand and contract, and under wind pressure those things will have a tendency to work loose, and when a tin roof gets loose once it has a tremendous effect on the neighborhood.

20 Q. How much difference would it make to the utility of the roof because of the difference in spacing that existed at the time you examined the roof? A. I couldn't say that, because if the roof would work loose great damage might result if the tin rolled up.

Q. Was there enough difference in the spacing as it existed from what was specified to have caused that result? A. Yes, I felt so.

Q. How much difference was there between the actual spacing of those cleats and the spacing required by the specifications? A. In some cases as much as 3 feet.

30 Q. How many such instances as that do you recall? A. I couldn't tell you. We condemn what we see; we don't take up the roof.

Q. But you sum that up by saying they were not as carefully spaced as they should be? A. Quite true.

By the Court:

Q. You are now speaking of the cleats? A. Yes.

40 Q. The spacing of the cleats? A. The spacing of the cleats.

*Grant A. C. Behee, for Defendant—Cross*

By Mr. Hartpence:

Q. Did the specifications call for the replacing of the leaders that were taken from the old building? A. Yes, sir. I said the old leaders might be used—could be used. They were all right; they were good copper leaders. There were some galvanized leaders that we marked to be replaced, but all copper leaders could be used over again. 10

Q. Well, if they were not used over, who suffered the loss, the contractor? A. No.

Q. Was he not bound to place them on the job? A. Well, he was the general contractor. Of course, it would be eventually up to him to replace them, but that was all specified under sheet metal, for the sheet metal man to take them into consideration and make good everything that might be wrong.

Q. How about the subcontractor, was he not bound to complete the job? A. That is what I refer to, the sheet metal; he would be the subcontractor. 20

Q. On what do you base your opinion, Mr. Behee, that \$2300 was a fair sum for the completion of the work by the Newark Cornice Company? A. From practical experience and my knowledge of the prices of materials. It is part of my business to estimate on work.

Q. Did you examine the roof of this school building at the time the American Skylight & Iron Works dropped out—the whole roof? A. You mean to go into it specifically and measure it up? 30

Q. Yes. A. I didn't measure it; I only took general observations.

Q. Did you make any definite calculations as to how much work remained to be done? A. Only from general observation; I didn't go into that, because it wasn't up to me to do that kind of business. 40

*Grant A. C. Behee, for Defendant—Cross*

Q. But from that general observation you estimated that \$2300 was a fair price for the completion of the work to be done? A. It wasn't any too much; it was a fair price.

Q. That is merely based, however, is it not, on a general observation? A. Yes. I didn't go into it carefully. At the time the plans were made I  
10 did go into all that thing and figure it up, because we had to bring that building down to a certain figure, and I went into it carefully.

Q. It is just possible, is it not, that if you had figured the conditions accurately and exactly that you might change your mind with regard to that?

Mr. Egner: I object to that. Possibilities are not subject to inquiry here.

The Court: I think the question might be asked, Do you feel that, if you had gone into it more carefully, you might have reached a  
20 different result?

Witness: I don't know any reason why I should. You can tell what figures will tell you. If I had gone into it carefully, it might possibly have been a little more or less, but I imagine that was about the right price.

Q. How many jobs of that kind have you figured, in your experience, Mr. Behee? A. I  
30 have figured more or less for the last twenty-five years. I couldn't think of how many I have figured.

Q. Did you ever submit a bid for yourself or any one that you were employed by on a mere general observation of the work? A. No, but in this case I wasn't estimating.

Q. But you are basing an estimation of the work that was done here upon the stand, are you not, upon that general observation? A. Yes, sir.

40 Q. How much dirt did you find in the seams of

*Grant A. C. Behee, for Defendant—Cross*

the tin where the soldering was not completed?

A. I didn't find any dirt. Those were things that the contractor in working through—he has an instrument, a tool, that he uses to scrape these connections when they are sealed. How much he found I couldn't tell you.

Q. Then you do not know that there was dirt in there at all? A. Yes, I do know, because I asked 10 that it be scraped off and pointed up some places. It is an important factor to get the connections right.

Q. Did you prepare the specifications for the whole building that was constructed there? A. I superintended, or, rather, dictated a lot of it. I had a man do the writing of the specifications under my dictation. Again, the plans were discussed and the features.

Q. You were in charge of it? A. Yes, sir; I 20 had charge of the office.

Q. And you were familiar with all the details of the job? A. Yes, sir.

Q. And you know, do you not, of your own knowledge, just what the metal work of the building involved, just what was necessary to be done with the metal work of the building? A. I don't quite get your question.

Q. You know of your own knowledge just what metal work was required in the construction of 30 the building? A. Oh, yes.

Q. And the completion of it? A. Yes.

Q. And just what was required to be done in that respect under the contract with Mr. Kilgus? A. Yes, sir.

Q. And the subcontract which he had with the American Skylight & Iron Works? A. Yes.

Q. Well, now, what, in your opinion, was a fair cost for the construction of that entire work from start to finish? A. Of the entire roof as the sheet 40 metal was involved?

*Grant A. C. Behee, for Defendant—Cross*

Q. That was required by the specifications.

Mr. Egner: I object to that. It seems to me you might as well ask him what the fair value of the court house is. It seems to me it is going into the realms of speculation. We have got a contract. How can that be a proper inquiry now? You cannot throw  
10 aside this contract.

The Court (after argument): I do not quite see how it is going to help us. I will sustain the objection.

Plaintiff's counsel object to this ruling of the Court.

Objection noted as ground of appeal.

Q. Now, Mr. Behee, upon what do you base your opinion that the work done by the American  
20 Skylight & Iron Works was worth between \$400 and \$500? A. The amount of work having been done and the possible cost of making it satisfactory.

Q. That valuation, then, is in favor of the new contractor—the valuation that you have placed upon it? A. In what way? I do not understand the question.

Q. The valuation that you have placed on it of between \$400 and \$500 is a valuation that you  
30 place on it in favor of whoever might be compelled to go on and complete the work, allowing that person the cost? A. Of the—

Q. Of the renovation. A. Placing the value of the work when satisfactorily completed at \$400?

Q. Yes. A. No, I don't. His contract, as I understood it, was not to involve anything that might be due to the other concern; he was simply to make the work satisfactory, taking the work as he found it.

40 Q. You say, in view of these defects and what

*Grant A. C. Behee, for Defendant—Cross*

it would cost to make it right, you think it would be worth only \$400 or \$500? A. Between \$400 and \$500, I should think.

Q. That is because it would cost whoever made it right a certain sum of money to make it right, is it not? But aside from that feature of it, it had a value in excess of \$400 or \$500, did it not?

Objected to.

10

The Court (after argument): Well, you may answer the question.

(Question read.)

Q. (By the Court) Do you understand it? A. Not entirely, no; I don't understand the excess valuation over \$400. Aside from what feature?

The Court: I think that question is a very harmless one. More or less, it amounts to this: If it had been right it would have been worth more? 20

Witness: Absolutely.

The Court: I will overrule your objection. Defendant's counsel objects to the ruling of the Court.

Objection noted as ground of appeal.

Q. Well, if these defective features that you have referred to had not been present, involving the cost to rectify them, what, in your opinion, Mr. Behee, was the value of the work that had been done by the American Skylight & Iron Works on this job? 30

Mr. Egner: How can an estimate of that be of any value?

The Court (after argument): This witness is under cross-examination, and he may not be here again, and Mr. Hartpence wants to get this answer to aid him in rebutting. I think he may have it answered. 40

*Grant A. C. Behee, for Defendant—Cross*

Defendant's counsel objects to this ruling of the Court.

Objection noted as ground of appeal.  
(Question read.)

A. I don't know what to answer.

10 Q. (By the Court) That amounts to this: What was the fair cost of this portion of the work? What proportion would the fair cost of this portion of the whole work have borne to the contract price of the work? A. About twenty-five per cent. of the work having been done, it would amount to about a quarter of the contract, in estimating this job in the office. We had an allowance—

20 Q. (By Mr. Hartpence) Is this in response to my question, Mr. Behee? A. Well, only to show how I arrived—

Mr. Hartpence: I have not interrogated this witness upon that matter, if your Honor please.

The Court: There is no question. Therefore there can be no answer.

30 Q. The occasion upon which you saw Mr. Jeter, Mr. Behee, as you have stated, was the dispute that existed over the taking off of the tin roof; is that correct? A. That is the only time I recall having seen Mr. Jeter.

Q. Do you refer to the dispute early in the work? A. When the roof had to be removed on account of its not having the paper under it.

40 Q. That is the occasion? A. They had a foreman on the job that I had most of my dealings with, but on this occasion—that is the only one I recall Mr. Jeter having been on the job. He might have been there when I wasn't there, but that is the only time I have occasion to remember.

*Grant A. C. Behee, for Defendant—Redirect*  
*Alan H. Jeter, for Plaintiff—Direct*

Q. Who was the foreman that they had, do you know? A. No.

Q. He was there pretty regularly, was he not?  
 A. Oh, yes, he had charge of the work all the time, so far as I know.

*Redirect-examination by Mr. Egner:*

10

Q. The necessity of double-seaming on the twenty-five per cent. of the roof that was down, that was not taken care of by the American company? A. No, that was done by the Newark Cornice & Skylight Company.

DEFENDANT RESTS.

ALAN H. JETER, recalled in behalf of plaintiff in rebuttal: 20

*Direct-examination by Mr. Hartpence:*

Q. Mr. Jeter, at the time the American Skylight & Iron Works stopped work upon the Lincoln avenue school building how much of their contract for the metal work on that building had been actually done?

Objected to as not rebuttal.

(After argument, the question is withdrawn.) 30

Q. Mr. Jeter, it has been testified by Mr. Yunker and by Mr. Behee in this case that at the time the American Skylight & Iron Works stopped work on the Lincoln avenue school job not more than twenty-five per cent. of the metal work under their contract had been performed—

Mr. Egner: Twenty-five per cent. of the roof.

40

*Alan H. Jeter, for Plaintiff—Direct*

Q. —not more than twenty-five per cent. of the roof work, the tin work, under their contract, had been laid. Is that or is it not true? A. It is not true.

Q. Did you examine the roof at the time the American Skylight & Iron Works quit work there?

A. I did.

10 Q. How much of the roof had been laid at that time?

Objected to as not rebuttal.

The Court: It seems to me that there is justification enough for answering this question, in that it is rebuttal on a distinct proposition advanced by witnesses for the defendant.

Defendant's counsel objects to this ruling of the Court.

20

Objection noted as ground of appeal.  
(Question read.)

A. Approximately ninety squares.

Q. What proportion to the whole contract of the American Skylight & Iron Works of the roofing did that ninety squares bear? A. Approximately \$1500.

Mr. Egner: I move that that be stricken out as not responsive.

30

The Court: That is not an answer to the question. Measure it in area, if you can.

Mr. Hartpence: I will consent to striking out the answer.

Witness: I may have misunderstood you, counsellor. You said the tin work. You did not have reference to all the sheet-metal work?

Mr. Hartpence: No, just the tin work.

Q. (Question read) A. Well, I don't recall just  
40 the area of the roof.

*Alan H. Jeter, for Plaintiff—Cross*

By the Court:

Q. Do you recall enough about it to give us an approximate figure? A. I should judge fifty per cent.

Q. What? A. Fifty per cent.

*Cross-examination by Mr. Egner:*

Q. You have no recollection of the total number of squares in the roof? A. There was fifty-three boxes of tin, which covers an area of one and three-quarters squares. 10

Q. How many? A. One and three-quarters squares approximately to the box. That was besides the gutter. I don't remember just how many boxes we used; I should judge 200 lineal feet. The gutter, about thirty inches, two and a half feet; that was also used. That is the ground on which I base my calculation. 20

Q. Is not fifty per cent. your guess, rather than your calculation? A. I said approximately fifty per cent.

Q. And that is a guess, is it not? A. It is approximately, and approximately is a guess.

Q. You have no recollection at this time of the total number of squares, have you? A. No definite recollection, no.

Q. Therefore you have no recollection of the proportion which ninety squares bear to the total number of squares? A. No, sir. 30

*Redirect-examination by Mr. Hartpence:*

Q. But approximately, Mr. Jeter, as you observed, from your familiarity with the job and your observation of it—

The Court: Has he not already answered that question?

Mr. Egner: Yes, several times.

*William G. Woodruff, for Plaintiff—Direct*

WILLIAM G. WOODRUFF, sworn in behalf of plaintiff in rebuttal:

*Direct-examination by Mr. Hartpence:*

Q. Mr. Woodruff, what is your business? A. Salesman for Meurer Brothers.

10 Q. How long have you been engaged in that business? A. Twenty-three years.

Q. During that time have you had any practical experience with the roofing business? A. I have.

Q. What? A. Seventeen years of it.

Q. In what respect? A. Foreman of the shops, one in the Southern country and one here in the North.

Q. And during that time have you constructed tin roofs? A. I have.

20 Q. You are familiar with all the requirements of the construction of tin roofs? A. Thoroughly.

Q. In your employment with Meurer Brothers did you have occasion to visit the Lincoln avenue school, in Orange? A. I had.

Q. In 1908? A. Yes.

Q. When did you go there, do you recall, Mr. Woodruff? A. It was either the early winter of 1908, either in December or January. My recollection takes me to December.

Q. December, 1908? A. 1908, yes.

30 Q. Do you know of your own knowledge whether Meurer Brothers at that time were supplying material to the American Skylight & Iron Works for that roof? A. Well, it was our material, stamped so.

Q. How did you come to go out there? A. By direction of Mr. Meurer.

Q. For what purpose? A. To see how much was laid.

40 Q. And at that time did you examine the roof? A. Well, I took a casual glance at it, of course.

*William G. Woodruff, for Plaintiff—Cross*

Q. Well, did you examine the work that was being done there with your material? A. I did.

Q. What did you see had been done there? A. Well, as to what?

Q. As to the roof and the cornice and all the work. A. As to the amount?

Q. All the work that your material figured in.

Objected to.

10

Objection overruled.

Defendant's counsel objects to this ruling of the Court.

Objection noted as ground of appeal.

(Question read.)

A. The roof, from my observation, without measurements, without actual measurements, was about one-half covered. The cornices were about three-quarters up, set in place, and there was probably 150 feet of cornice made up and laid about the building, ready to be laid in there. 20

*Cross-examination by Mr. Egner:*

Q. You say that your estimate was made upon a casual glance? A. From a practical knowledge of the business, without measurements.

Q. Answer my question, please. You testified that your estimate was based upon a casual glance; was that correct? A. Well, taking it that way, yes, it was, of course. 30

Q. And you made no measurements? A. I did not.

Q. Did you examine the soldering and seaming, and so forth? A. In a casual way; yes, sir; of course. I didn't get right down to it.

PLAINTIFF RESTS.

Defendant's counsel asks the Court to direct a verdict for the defendant on the ground 40

*William G. Woodruff, for Plaintiff—Cross*

that there is no liability shown on the part of the defendant, and that there is no question of fact to go to the jury.

(Defendant's counsel argues.)

10 Mr. Hartpence: The plaintiff desires to move for the direction of a verdict in its favor at this time, if your Honor please, and to combine what we have to say in favor of our motion with our opposition to the direction of a verdict for the defendant.

20 Our theory of the case is, as indicated during the progress of the trial, that the contractual relation existing between Fred Kilgus, the defendant, and the American Skylight & Iron Works, the company which had the subcontract for the metal work on the Lincoln avenue school, had nothing whatever to do with the liability of Kilgus to Meurer Brothers; and while we have very vehemently insisted that the opinion of Vice-Chancellor Howell in the case cited by the defendant has no bearing upon this case and should not have been injected into the case at all, we can seize upon the statement made by counsel in support of that statement as the basis of our argument in this respect. He says that the Vice-Chancellor, in disposing of the question before him, said that the American Skylight & Iron Works was not entitled to any payment from Kilgus until the work was done. That, if your Honor please, is the very reason why, and the testimony so states, Meurer Brothers would have nothing to do with supplying material to the American Skylight & Iron Works unless the account was guaranteed unconditionally by Fred Kilgus. The testimony is absolutely uncontradicted on that point, and the correspondence bears out our

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*William G. Woodruff, for Plaintiff—Cross*

contention in that respect, and it was not until Meurer Brothers had in writing called the attention of Kilgus to the fact that he could withhold the payment until the work was done and completed, and that they had objected to that and had stated that they would not let the American Skylight & Iron Works have this material until that feature was eliminated 10  
—it was not until all that was done, which will appear very conclusively from the correspondence which forms the contract, that Meurer Brothers would permit a cent's worth of material to go to the American Skylight & Iron Works.

So that we feel that, in view of the correspondence in the case and the testimony which is in, which is uncontradicted in that respect, 20  
the Court must construe that contract to mean just exactly what we contend that it does mean, and in the face of that, and in the face of the testimony as it exists, which shows that every dollar's worth of material—and its value is not contradicted—\$1086.34, went to the American Skylight & Iron Works, and by them was placed in the Lincoln avenue school building, in the process of construction, and to that was added by the American Sky- 30  
light & Iron Works the value of the labor necessary to make it over and put it on the roof, and there is nothing in the case to show that there was not at least \$1000 worth of material put in the building—at least that. Now, that labor was performed. That was the very term of the contract under which Meurer Brothers consented to let the American Skylight & Iron Works have its material, after Kilgus had written to the effect that that \$1000 would be forthcoming. 40

*William G. Woodruff, for Plaintiff—Cross*

Now, we think that the whole situation is so clear, that the contract will bear that construction, and that construction only, that we are moving for the direction of a verdict in favor of the plaintiff and opposing the direction of a verdict in favor of the defendant.

10 At half-past twelve o'clock, P. M., the court takes a recess of one hour.

20

30

40

### Court's Findings.

#### AFTER RECESS.

The Court: There are cross motions, the plaintiff asking for the direction of a verdict in favor of the plaintiff and the defendant asking for a verdict in favor of the defendant.

This suit was brought by Jacob Meurer, trading as Meurer Brothers Company, against Fred 10  
 Kilgus. The plaintiff is in the business of iron, or metal, building material. The defendant is a building contractor, who had the whole contract for the erection of a public school building in the City of Orange. His contract was with the Board of Education of the City of Orange, I suppose. He made sub-contracts, and, among others, a contract with the American Skylight & Iron Works for the doing of work and the supplying of material such as they were in the habit of furnishing and performing. The name of the company indicates the character of their line of business. The American Skylight & Iron Works wanted to buy of the plaintiff, Jacob Meurer, material to be installed in this building. Their credit was not thought to be good, and the plaintiff refused to extend credit unless he was in some way made sure of his contract, and, accordingly, correspondence ensued between the plaintiff and 20  
 Mr. Kilgus, the general contractor, having in view 30  
 an arrangement by which Mr. Kilgus would devote to the payment of such material as the American Skylight & Iron Works might buy of the plaintiff up to a certain sum a portion of the money that would be due to the American Skylight & Iron Works from the contractor. The contract between the American Skylight & Iron Works and Mr. Kilgus is contained in the compact form of the proposal and the acceptance. It is this: "American Skylight & Iron Works. Tin 40

*Court's Findings*

roofing, cornice, slate work, leaders and all metal work for *Lincol Avenue School*, as per plans and specification by E. F. Gilbert, architect, and to his satisfaction, for the sum of twenty-seven hundred dollars. *Lincoln Avenue School*. Accepted, *American Skylight & Iron Works.*" Signed by Mr. Kilgus. That is dated August 17, 1908.

- 10 It is quite apparent that, as no time of payment of this \$2700 was specified, none could be demanded by the *Ameircan Skylight & Iron Works* until the performance of the whole work to the satisfaction of the architect and according to plans and specifications—those plans and specifications being the plans and specifications of the whole building covered by the contract of Mr. Kilgus with the school authorities of the City of Orange. This feature of the case comes out of the correspondence. Whatever contract there is is constituted by letters, as far as the proof goes. There is something said about a conversation over the 'phone, but that did not get into the proof, because there did not seem to be sufficient evidence of authority to conduct the Kilgus end of it, Mr. Kilgus himself apparently not being on the wire.
- 20

- The first letter I refer to is marked Exhibit P5; it is written on the heading of Mr. Kilgus, and reads as follows: "October 16, 1908. Messrs. Meurer Brothers Company. Dear sirs: I will deduct from the *American Skylight & Iron Works* \$1000., and place same to the credit of your account, for payment when the work on the *Lincoln avenue school* is completed, at Orange, N. J." Signed "Fred Kilgus." That did not suit Mr. Meurer, because he did not want to wait so long for his money, and he answered the letter by a letter bearing date October 16, 1908, addressed to
- 30
- 40 "Mr. Fred Kilgus," which reads as follows:

*Court's Findings*

"Dear sir: We are in receipt of your esteemed favor of the 16th instant relative to the contract held by the American Skylight & Iron Works for work on the Lincoln Avenue School, and in accordance with the telephone conversation which the writer held with you, we understand that you are willing to agree to make the first payment to us, amounting to \$1000., when the American Skylight & Iron Works have done this amount of work. Will you be good enough to write us to this effect, as on your original letter, as pointed out to you, the payment could be withheld by you until the work was done. We thank you very kindly for your consideration in this matter. P. S. We understand according to contract that first payment is due American Skylight & Iron Works when the main work is done, second payment when cornice is on annex and roof of three wings has been completed." There is nothing to show that there was any such contract as that. The contract is as I have read it, and the postscript received no attention in the answer to the letter. The answer to this letter bears date on the 19th of October, three days later, and is from Mr. Kilgus to Meurer Brothers Company. He was asked, you observe, in the last letter to be so good as to write a letter to the effect that the first payment, amounting to \$1000, should be due when the American Skylight & Iron Works had done that amount of work. He does not write that letter as asked for, but writes this: "Dear Sirs: In reply to yours of the 16th instant, beg to state I will make first payment of \$1000 to you for the account of the American Skylight & Iron Works for material you are to furnish for the Lincoln avenue school, Orange, N. J." In other words, he says nothing about the precise point which the letter from Meurer Brothers presented and asked

*Court's Findings*

him to write about. The letter, in fact, leaves the matter precisely as it was on his first letter. On that same day, the 19th of October, Meurer Brothers answered to Fred Kilgus: "We are in receipt of your favor of the 19th instant, and in accordance therewith we will deliver the material to the American Skylight & Iron Works for use on the  
10 Lincoln avenue school, and thanking you very kindly for your consideration in this matter, we remain, Yours truly, Meurer Brothers Company."

In writing that letter Meurer Brothers Company closed a contract. What was it? It was not a contract that the payment, amounting to \$1000, should be due when the American Skylight & Iron Works had done this amount of work. Mr. Kilgus had never said that. He was asked to say that, and he never did say it. If we have to suppose  
20 that the minds of the parties met at all, the only possible construction is that the contract was closed on the basis of the original letter. I think, then, that was the contract; that it was tied up to and subject to the terms of the original contract between the American Skylight & Iron Works and Mr. Kilgus, the money for which would not become due between them until the work had been completed; and, in a sense, it may be said that it would stand or fall with that contract.  
30 There is nothing to show that the parties regarded this as a divisible job. It is to be treated, I think, as a unit. So much for the contract.

The American Skylight & Iron Works could recover nothing for work not conforming to the plans and specifications and not done to the satisfaction of the architect. The approval of the architect is a preliminary to payment to them. It is only when his approval is wrongfully withheld that it could be dispensed with. There is in this  
40 case no evidence of wrongful withholding. The

*Court's Findings*

architect, Mr. Guilbert, was architect of the whole work. While he had no duties as to subcontractors, he had responsibility as to the work which they did.

Aside from the question of the architect's approval, how would the question stand as to the American Skylight & Iron Works if the American Skylight & Iron Works were the plaintiff? The contract price, as I have said, was not due until the work was completed. The work was never completed. It was not completed because the American Skylight & Iron Works failed. That was their misfortune, and, I suppose, it was, in a legal sense, their fault. It certainly was not the fault of Mr. Kilgus. At any rate, they became dilatory, and a three days' notice was given, and the contract was taken out of their hands. It is admitted that they could not carry it on.

There is a rule, but it is a rule not applicable to this case—the rule laid down in *Kehoe v. Rutherford* and *Wilson v. Borden*—and it is this: “When, under a valid contract to perform a specified work for a specified price, the plaintiff has done part and has been prevented from performing completely through the fault of the defendant, the legal measure of the plaintiff's damages is generally, for the work done, such a proportion of the entire price as the fair cost of that work bears to the fair cost of the whole work, and, in respect to the work not done, such profits as he would have realized by doing it.” So that if the American Skylight & Iron Works had been wrongfully thrown off the job by Mr. Kilgus when it was only partly done, their right would have been to be paid for what they had done a proportionate part of the whole contract price and to be paid such profit as they would have made if the contract had been fully completed. That same rule

*Court's Findings*

- is laid down in the other case I mentioned, but the difference between that case and this, and what makes it inapplicable to this, is that the American Skylight & Iron Works was not thrown off the job by the fault of Mr. Kilgus, but they were put off of it because, through their own inability to carry it on, it became necessary for Mr.
- 10 Kilgus to take that action. Therefore that rule cannot apply to this case. We have two cases, *Bozarth v. Dudley*, 15 Vroom, 304, and *Feeney v. Bardsley*, 37 Vroom 239, where this question has arisen. They are both cases of buildings, entire buildings, buildings completed, but not completed exactly according to contract, and there the question has arisen whether the builder, who has not quite come up to the mark could recover anything, and the Court said that if he had substantially
- 20 complied with his contract, if he has only come short in some minor, nonessential particulars, he might recover, after a deduction to make the job good. I will take the case of *Bozarth v. Dudley*, which is the earlier. "When a contract for building on land has not been so performed as to justify a recovery thereon, a recovery in assumpsit on the common counts, for the work and materials used in the erection, will only be permitted when the owner has actually accepted the building.
- 30 Such acceptance may be express or implied from circumstances; mere occupation of the building does not necessarily imply such acceptance." In the case of *Feeney v. Bardsley*, about ten years later, it was said: "If a contractor contracts to erect a building, he cannot recover, even upon a *quantum meruit*, unless he has substantially complied with the contract. But if he substantially complies with the contract, even though he has failed in some minor particulars, he is entitled
- 40 to recover the contract price, less what will be a

*Court's Findings*

fair allowance to the owner to make good the defects in the performance of the contract. When there is not a substantial compliance with the contract, there may be a recovery for what the building is reasonably worth, if the owner has accepted it; but in determining the question of acceptance, it is not sufficient to find that the owner has occupied it—the jury must find some positive act on his part showing an intention to accept it.” You see how the courts hold onto the contract where there is a special contract. That idea is emphasized in the recent case of *Osterling v. Cape May Hotel Company*, in 83 Atlantic Reporter p. 887, where the Court of Errors and Appeals, Justice Parker reading the opinion, says this “The contract was entire on the plaintiff’s part; it was express as to its terms, and in writing, so that the terms were settled beyond dispute. The express promise was not the same as the law would imply, so that the declaration should have been on the special contract. An implied contract cannot exist when there is an express contract embracing the identical subject. Recovery might be had on a *quantum valebat* if the contract was unfulfilled and was rescinded by the parties, but such was not the case here.” The mistake of the trial judge in that case was in trying an action which arose out of a special contract on the common counts. I have in a book that is not very well known as a law book a very neat description. I read from *Wait’s Engineering and Architectural Jurisprudence*, page 629, section 700: “One who has begun the performance of work under a special contract, by which he is bound to finish it, cannot abandon the work without the consent or fault of his employer, and sue and recover for the value of the work which he has performed.” He cannot abandon it and sue for its value. “But

*Court's Findings*

where the work is actually performed, though not in exact conformity with the contract in immaterial particulars, or with variations assented to by the employer, or where the employer accepts the work as and for a complete performance of the contract, the contractor may recover."

10 So that my conclusion is that the right of the plaintiff to recover in this case is to be tested by the right of the American Skylight & Iron Works to recover on their contract if they were the plaintiffs. It may be said from the proof before us that the American Skylight & Iron Works would be met with two unsurmountable difficulties if they were to sue for work which they had done: First, that they could not show that it was done with the approval of the architect, and they could not show, of course, that the job had been completed.

20 There is one feature of this case which requires some attention, and that is the payment of \$500. If that payment had been a payment on which some action by the material company depended, if it had been an inducement to them to change their situation, to do something on the faith of it, that would raise what is called an *estoppel*; but the case is entirely clear of any *estoppel*; and my view of the payment of \$500. is that it is a feature of the case to be considered, and nothing more; and, regarded merely as a payment, it does not require a construction of the written contract different from that which appears to be naturally implied from the language which the parties themselves used.

I am very much indebted to counsel on both sides for the very admirable way in which they have tried the case.

30 My result is that the motion to direct a verdict for the defendant should be granted. I therefore  
40 grant it.

*Court's Findings.*

Mr. Hartpence: If your Honor please I should like to have an objection noted to the denial of the motion to direct a verdict for the plaintiff, and to the granting of the motion to direct a verdict for the defendant.

The Court: The objection will be noted.  
 (The jury accordingly returns a verdict for the defendant.) 10

---

**PLAINTIFF'S EXHIBITS.**
**Ex. P-1.**

Aug 17 8

AMERICAN SKYLIGHT &amp; IRON WORKS

Tin Roofing cornices Slate work leader & all 20  
 metal work for Lincoln Ave School as per plans  
 & spec by E. F. Gilbert Arch. & to his satisfaction  
 for the sum of Twenty seven Hundred Dollars  
 \$2700.00.

Lincoln Ave School.

Accepted—AMERICAN SKYLIGHT & IRON WKS  
 per J W R  
 L. D. KILGUS.

30

40

## Ex. P-2.

AMERICAN SKYLIGHT &amp; IRON WORKS,

Office and Works: 221 Randolph Avenue,  
Near Arlington Avenue Station, C. R. R. of N. J.

Order No. 31 Ship by.....

O K

A/C granted

10 10/19

Jersey City, N. J., Oct 12 1908

MESS. MEURER BROS.,

569 Flushing Ave Bklyn

N. Y.

Please furnish for account of this Company

53 Box 14x20 Tin T I S 10.75

5 " 20x28 "

1 Keg 1" Rfg nails

250 lbs. solder

20 35 Bdls 26x36x96 Galv.

25 " 26x24x96 "

26

(Noted) 5 bdls Oct 20

Oct 21—39

16 bdls 26x30 Oct 21

60 bdls

A C/B

All for Orange Valley School

30 Please acknowledge receipt of this order and give  
Order No. on invoice.

AMERICAN SKYLIGHT &amp; IRON WORKS,

per William K. Hamilton.

(Written across face) E E

(Stamped across face) Ent. &amp; Chgd. Miss K.

**Ex. P-3.**

Brooklyn, N. Y., Oct 20 1908.

Received from MEURER BROS. Co.

569-577 Flushing Ave. and 266-270 Wallabout St.

New York Store: 130 East 129th St.

For AMERICAN SKYLIGHT &amp; IRON WKS

221 Randolph St.

10

53 Boxes 10 14/10 T-I Sheets

5 " 10 20/28 "

1 Keg 1" Wire Nails

250 lbs. M R Solder

5 Bdl 26x26x96 Gal.

W. K. HAMILTON

JOE

(Stamped across face) Ent. &amp; Chgd. Miss K.

**Ex. P-4.**

20

Brooklyn, N. Y., Oct 21 1908

Received from MEURER BROS. Co.

569-577 Flushing Ave. and 266-270 Wallabout St.

New York Store: 130 East 129th St.

For AMERICAN SKYLIGHT &amp; CORNICE WKS.

215 Randolph St.

16 Bdl. 26x30x96 Galvd.

30

39 " 26x36x96 "

(Stamped across face) Ent. &amp; Chgd. Miss K.

W. K. HAMILTON

40

Ex. P-5.

Newark Telephone 5340.  
Long Distance Tel.

FRED KILGUS  
Builder

Nos. 13-21 South Sixth Street  
At Central Avenue.

10

Newark, N. J. Oct 16th/08

MESS MEURER BROS Co.  
N. Y. C.

DEAR SIRs:—

I will deduct from the American Skylight &  
Iron works \$1000.00, and place same to the credit  
of your account, for payment when the work on  
the Lincoln Ave School is completed, at Orange

20 N. J.

Yours truly

FRED KILGUS  
H. M. C.

30

40

## Ex. P-6.

All orders and contracts subject to strikes, accidents and causes beyond our control.

Guaranteed brands of	Telephone:	
Roofing Tin	1567 Wm'burgh.	
Meurer Genuine	1568 Wm'burgh.	
Tinned Iron Sheets I C		
Meurer Old Methods I C		10
Meurer Roofing I C		
Flushing I C		
Pullman I C		
New York Branch, 130 East 129th St.		

Kansas City.                      Denver.  
Salt Lake City.      San Francisco.

## MEURER BROS. CO.

MANUFACTURERS OF  
Tin Plates,                      20  
DEALERS IN  
Sheet Iron & Metals.

Galvanized Iron, Black Iron, Solder, Elbows,  
Nails, Etc.

MANUFACTURERS OF  
Stove Pipe & Leaders.  
Anchor Ventilators, Metal Spanish Tiles &  
Unique Metal Shingles  
567 to 577 Flushing Ave. and                      30  
266 to 270 Wallabout St.

E.O.                      Brooklyn, N. Y. Oct. 16, 1908.

MR. FRED KILGUS,  
13 South Sixth St.  
Newark, N. J.

DEAR SIR:

We are in receipt of your esteemed favor of the  
16th instant relative to the contract held by the  
American Skylight and Iron Works for work on 40

*Ex. P-6*

the Lincoln Ave. School and in accordance with the telephone conversation which the writer held with you, we understand that you are willing to agree to make the first payments to us, amounting to \$1000.00 when the American Skylight and Iron Works have done this amount of work. Will you be good enough to write us to this effect as on your original letter as pointed out to you the payment could be withheld by you until the work was done.

We thank you very kindly for your consideration in this matter, and beg to remain,

Yours respectfully,

MEURER BROS. CO.  
C. N. BOLLES, JR.,  
*General Manager.*

P. S. We understand according to contract that first payment is due American Skylight & Iron Works when main work is done second payment when cornice is on annex & roof of 3 wings has been completed?

30

40

**Ex. P-7.**

Newark Telephone 4042.  
Long Distance Tel. 2980.

FRED KILGUS  
Builder

Nos. 13-21 South Sixth Street  
At Central Avenue.

Newark, N. J. Oct 19th/08 10

MESS MEURER BROS Co.

#567/77 Flushing Brooklyn N. Y.

DEAR SIRs:—

In reply to yours of the 16th inst. beg to state  
I will make first payment of \$1000.00 to you for  
the account of the American Skylight & Iron  
Works for material you are to furnish for the  
Lincoln Ave School, Orange, N. J.

Yours truly

FRED KILGUS 20  
H. M. C.

30

40

**Ex. P-8.**

All orders and contracts subject to strikes, accidents and causes beyond our control.

Guaranteed brands of	Telephone:
Roofing Tin	1567 Wm'burgh.
Meurer Genuine	1568 Wm'burgh.
Tinned Iron Sheets I C	
10 Meurer Old Method I C	
Meurer Roofing I C	
Flushing I C	
Pullman I C	

New York Branch, 130 East 129th St.  
Salt Lake City. San Francisco.  
Kansas City. Denver.

**MEURER BROS. CO.**

20 Manufacturers of Tin Plates, Dealers in Sheet Iron  
and Metals. Galvanized Iron, Black Iron.  
Solder, Elbows, Nails, Etc.  
Manufacturers of Stove Pipe & Leaders.  
Anchor Ventilators, Metal Spanish Tiles & Unique  
Metal Shingles.

567-577 Flushing Ave. and 266-270 Wallabout St.

Brooklyn, N. Y. Oct. 19, 1908

Mr. Fred Kilgus,  
Newark, N. J.

30 Dear Sir:

We are in receipt of your favor of the 19th instant and in accordance therewith, we will deliver the material to the American Skylight & Iron Works for use on the Lincoln Avenue School, and thanking you very kindly for your consideration in this matter, we remain,

Yours truly,  
MEURER BROS. CO.

C. H. BOLLES, JR.,  
General Manager.

40

Ex. P-9.

Newark Telephone 4042. Long Distance Tel. 2980.

FRED KILGUS  
BUILDER

Nos. 13-21 South Sixth Street, at Central Avenue.

Newark, N. J. Dec. 7th/08

Mess Meurer Bros. Co.

10

Brooklyn N. Y.

Dear Sirs:—

We are authorized to-day to make a payment of one thousand (\$1000.00) dollars to you by the American Skylight & Iron works of Jersey City on account of material furnished for the Lincoln Ave. School, Orange, N. J. we are sending you \$500.00 to-day, and will make payment for the *balance in a few days*, as as we have sevaral heavy payments coming due this week, we are obliged to make it two payments at this time, which we trust will meet with your satisfaction. 20

Yours truly,

FRED KILGUS.

H. M. Coleman.

30

40

**Ex. P-10.**

Fred Kilgus, Builder, 13 to 17 South Sixth St.

No receipt is necessary.

This check is in settlement of the following. If incorrect please return.

Date	Amount	Invoice	Cash	Disc't	Claims
		For a/c Amer. Skylight & Iron Work			

10

No. 5386

Newark, N. J., Dec. 7th 1908

Pay to the order of Meurer Bros. Co. \$500.00  
 Five hundred and no/100—Dollars.

FRED KILGUS.

LOUIS D. KILGUS, Atty.

To Union National Bank, Newark, N. J.

(Stamp perforated) Paid 12—9—08

20

(Indorsed) Pay Mercantile National Bank, or  
 order. Meurer Bros. Co.

(Indorsed) Pay to the order of Union Nat. Bank  
 Newark, N. J. The Mercantile Nat'l Bank of  
 the City of New York.

30

40

**Ex. P-11.**

Newark Telephone 4042. Long Distance Tel. 2980.  
**FRED KILGUS**  
BUILDER

Nos. 13-21 South Sixth Street, at Central Avenue.  
Newark, N. J. Dec. 9th/08

Mess Meurer Bros Co. 10  
#567 Flushing Ave Brooklyn N. Y.

Dear Sirs:—

I note what you write a bout an order for \$800. but this we do not know anything about at this time, but I believe one of their men is coming here to-day, possibly for that purpose, you have \$500.00 coming to on the original order, which we will send you in a few days, when we get some money in

Yours truly

FRED KILGUS 20  
H M C

30

40

**Ex. P-12.**

No claims for deduction will be allowed unless made within 10 days from receipt of goods.

No responsibility for loss or damage to Goods after obtaining Shipping Receipts or Bill Lading from Railroad, Steamboat or Transportation Co., signed in good order.

- |    |   |  |
|----|---|--|
| 10 | Guaranteed brands of<br>Roofing Tin<br>Meurer Genuine<br>Tinned Iron Sheets I C<br>Meurer Old Method I C<br>Meurer Roofing I C<br>Flushing I C<br>Pullman I C | Telephone:<br>1567 Wm'burgh.<br>1568 Wm'burgh. |
|----|---|--|

**MEURER BROS. CO.**

- 20 Manufacturers of Tin Plates, Dealers in Sheet Iron and Metals. Galvanized Iron, Black Iron. Solder, Elbows, Nails, Etc.  
Manufacturers of Stove Pipe & Leaders.  
Meurer Anchor Ventilators, Meurer Metal Spanish Tiles.  
567-577 Flushing Ave. and 266-270 Wallabout St.  
New York Branch, 130 East 129th St.

- 30 Terms: Tinplate & Iron 2% 10 Days. Copper Solder, Sheet Zinc, 1/2 of 1% 10 Days.  
(Stamped on face) Positively no cash discount allowed unless remittance is made within Ten Days from date of invoice, interest charged on all overdue accounts.  
Payable in New York Exchange.

*Ex. P-12*

Brooklyn, N. Y. October 20, 1908

Sold to American Skylight & Iron W'ks,

221 Randolph Ave J C

CORRECT COPY OF MEURER BROS. CO. DAY BOOK

# 46 FOLIO 943

53 Box I C 14x20 T. I. Sheets .....	1075	569	75	10
5 " " 24x28 " " .....	2150	107	50	
1 Keg 1" Wire Nails .....		3	75	
250 lb M R Solder.....	19	47	50	
5 Bales 26x36x96 Galv 795@4c.....		31	80	
		—————6760		30

Sworn to before me as being correct.  
January 7th, 1913.

ARTHUR H. GRAHAM  
Notary Public  
Queens Co. 3857

20

(Seal)

Certificate filed in Kings County.

No Claims for deduction will be allowed unless made within 10 days from receipt of goods.

No responsibility for loss or damage to Goods after obtaining Shipping Receipts or Bill Lading from Railroad, Steamboat or Transportation Co., signed in good order.

Guaranteed brands of  
Roofing Tin

Telephone: 30

Meurer Genuine

1567 Wm'burgh.

1568 Wm'burgh.

Tinned Iron Sheets I C

Meurer Old Method I C

Meurer Roofing I C

Flushing I C

Pullman I C

*Ex. P-12*

MEURER BROS. CO.

Manufacturers of Tin Plates, Dealers in Sheet Iron  
and Metals. Galvanized Iron, Black Iron.  
Solder, Elbows, Nails, Etc.

Manufacturers of Stove Pipe & Leaders.  
Meurer Anchor Ventilators, Meurer Metal  
Spanish Tiles.

10 567-577 Flushing Ave. and 266-270 Wallabout St.  
New York Branch, 130 East 129th St.

Brooklyn, N. Y. October 21, 1908

Sold to American Skylight & Iron Wks

CORRECT COPY OF MEURER BROS. Co. DAY BOOK  
45 FOLIO #953

	16 Bales	26x30x96 Galv	2383 3 <sup>3</sup> / <sub>4</sub>	89 36	
20	39 "	26x36x96 "	5927	4 237 08	
					326 44
					1086 74
					500
					586 74

Sworn to before me as being correct.  
January 7th, 1913.

30 ARTHUR H. GRAHAM  
Notary Public  
Queens Co. 3857

(Seal)  
Certificate filed in Kings County.

*Ex. P-12*

All orders and contracts subject to strikes, accidents and causes beyond our control.

Guaranteed brands of	Telephone:	
Roofing Tin	1567 Wm'burgh.	
Meurer Genuine	1568 Wm'burgh.	
Tinned Iron Sheets I C		
Meurer Old Method I C		10
Meurer Roofing I C		
Flushing I C		
Pullman I C		

## MEURER BROS. CO.

Manufacturers of Tin Plates, Dealers in Sheet Iron and Metals. Galvanized Iron, Black Iron.

Solder, Elbows, Nails, Etc.

Manufacturers of Stove Pipe & Leaders.

Anchor Ventilators, Metal Spanish Tiles & Unique 20 Metal Shingles.

567-577 Flushing Ave. and 266-270 Wallabout St.

New York Branch, 130 East 129th St.

Kansas City. Denver.

Salt Lake City. San Francisco.

Seattle, Wash.

Los Angeles, Cal.

Portland, Ore.

Brooklyn, N. Y. 30

## AMERICAN SKYLIGHT &amp; IRON WORKS

Correct Copy of Meurer Bros. Co. Ledger #10

Folio 15

Dec. 8, 1908 By Check on account.....\$500.00

Sworn to before me as being correct.

January 7th, 1913.

ARTHUR H. GRAHAM

Notary Public

Queens Co. 3857

(Seal)

Certificate filed in Kings County.

40

## DEFENDANT'S EXHIBITS.

## Ex. D-1.

All orders and contracts subject to strikes, accidents and causes beyond our control.

	Guaranteed brands of	Telephone:
	Roofing Tin	1567 Wm'burgh.
10	Meurer Genuine	1568 Wm'burgh.
	Tinned Iron Sheets I C	
	Meurer Old Method I C	
	Meurer Roofing I C	
	Flushing I C	
	Pullman I C	

## MEURER BROS. CO.

Manufacturers of Tin Plates, Dealers in Sheet Iron and Metals. Galvanized Iron, Black Iron. Solder, Elbows, Nails, Etc.

20 Manufacturers of Stove Pipe & Leaders. Anchor Ventilators, Metal Spanish Tiles & Unique Metal Shingles.

567-577 Flushing Ave. and 266-270 Wallabout St.  
 New York Branch, 130 East 129th St.  
 Kansas City. Denver.  
 Salt Lake City. San Francisco.

Brooklyn, N. Y. Nov. 19, 1908

30 Mr. Fred Kilgus,  
 Newark, N. J.

Dear Sir:

Referring to your letter of Oct. 19th in regards to first payment of \$1000 on Lincoln Avenue School, Orange, for account of the American Skylight & Iron Works, will you please advise when this payment will be made. Thanking you for reply, we remain,

Yours truly,  
 MEURER BROS. CO.

40

**Ex. D-2.**

All orders and contracts subject to strikes, accidents and causes beyond our control.

Guaranteed brands of	Telephone:	
Roofing Tin	1567 Wm'burgh.	
Meurer Genuine	1568 Wm'burgh.	
Tinned Iron Sheets I C		
Meurer Old Method I C		
Meurer Roofing I C		10
Flushing I C		
Pullman I C		

**MEURER BROS. CO.**

Manufacturers of Tin Plates, Dealers in Sheet Iron and Metals. Galvanized Iron, Black Iron. Solder, Elbows, Nails, Etc.

Manufacturers of Stove Pipe & Leaders. Anchor Ventilators, Metal Spanish Tiles & Unique Metal Shingles. 20

567-577 Flushing Ave. and 266-270 Wallabout St.  
New York Branch, 130 East 129th St.  
Kansas City. Denver.  
Salt Lake City. San Francisco.

E.O.

Brooklyn, N. Y. Dec. 4, 1908.

Mr. F. Kilgus,  
Newark, N. J.

Dear Sir:

30

We understand that the American Skylight & Iron Works have placed a requisition with you for their first payment and if such is the case we will be glad if you will send us check as per our agreement with you and thank you for your consideration in the matter.

Yours truly,  
MEURER BROS. CO.

C. H. BOLLES, JR., 40  
General Manager.

**Ex. D-3.**

All orders and contracts subject to strikes, accidents and causes beyond our control.

Guaranteed brands of	Telephone:
Roofing Tin	1567 Wm'burgh.
Meurer Genuine	1568 Wm'burgh.
Tinned Iron Sheets I C	
Meurer Old Method I C	
10 Meurer Roofing I C	
Flushing I C	
Pullman I C	

**MEURER BROS. CO.**

Manufacturers of Tin Plates, Dealers in Sheet Iron and Metals. Galvanized Iron, Black Iron. Solder, Elbows, Nails, Etc.

Manufacturers of Stove Pipe & Leaders. Anchor Ventilators, Metal Spanish Tiles & Unique Metal Shingles.

20 567-577 Flushing Ave. and 266-270 Wallabout St.  
New York Branch, 130 East 129th St.  
Kansas City. Denver.  
Salt Lake City. San Francisco.

Dec. 8, 1908

Fred Kilgus,  
Newark, N. J.

Dear Sir:

30 We are in receipt of your favor of the 7th instant and thank you very kindly for check for \$500.00. We are perfectly willing to wait for the balance for a few days as you speak of in your letter.

We understood we were to have another order from you covering \$800.00 for the American Skylight Co. in order that they may have enough material to complete the work on this School. Will you please let us hear from you on this subject.  
40 Thanking you very kindly for your consideration, we remain,

Yours truly,  
**MEURER BROS. CO.**  
C. H. BOLLES, JR.,  
General Manager.

**Ex. D-4.**

All orders and contracts subject to strikes, accidents and causes beyond our control.

Guaranteed brands of	Telephone:	
Roofing Tin	1567 Wm'burgh.	
Meurer Genuine	1568 Wm'burgh.	
Tinned Iron Sheets I C		
Meurer Old Method I C		10
Meurer Roofing I C		
Flushing I C		
Pullman I C		

**MEURER BROS. CO.**

Manufacturers of Tin Plates, Dealers in Sheet Iron and Metals. Galvanized Iron, Black Iron. Solder, Elbows, Nails, Etc.  
Manufacturers of Stove Pipe & Leaders.  
Anchor Ventilators, Metal Spanish Tiles & Unique Metal Shingles. 20

567-577 Flushing Ave. and 266-270 Wallabout St.  
New York Branch, 130 East 129th St.  
Kansas City. Denver.  
Salt Lake City. San Francisco.

Brooklyn, N. Y. Dec. 18, 1908

Mr. Fred Kilgus,  
Newark, N. J. 30

Dear Sir:

We are in receipt of your favor of the 17th instant and in reply beg to say this is not according to our agreement. You wrote us 2 or 3 times that the money was due us and that you had paid \$500.00 on account, and would send the balance of \$500.00 in a few days, and under this agreement we insist upon \$500.00 being paid to us. We have nothing to do with the work of the American Sky-light Works, this matter is between yourself and 40

*Ex. D-4*

10 them; they have done enough work to pay the \$1000 coming to us, and we want check for the amount, and do not want to be held up for our money on their account. We therefore trust you will see your way clear to send us the \$500.00 due us, and any further contract you have with them it is up to them and not to us to withhold our money.

Yours truly,  
MEURER BROS. CO.

20

30

40

**Ex. D-5.**

All orders and contracts subject to strikes, accidents and causes beyond our control.

Guaranteed brands of	Telephone:	
Roofing Tin	1567 Wm'burgh.	
Meurer Genuine	1568 Wm'burgh.	
Tinned Iron Sheets I C		
Meurer Old Method I C		
Meurer Roofing I C		10
Flushing I C		
Pullman I C		

**MEURER BROS. CO.**

Manufacturers of Tin Plates, Dealers in Sheet Iron and Metals. Galvanized Iron, Black Iron.

Solder, Elbows, Nails, Etc.

Manufacturers of Stove Pipe & Leaders.

Anchor Ventilators, Metal Spanish Tiles & Unique Metal Shingles. 20

567-577 Flushing Ave. and 266-270 Wallabout St.  
New York Branch, 130 East 129th St.

Brooklyn, N. Y. Dec. 19, 1908.

E.O.

Mr. Fred Kilgus,  
Newark, N. J.

Dear Sir:

Referring to the conversation held with you over telephone to-day please note that we afterwards talked to the American Skylight & Iron Works and they assure us that all changes or objections that were raised by the architect have been complied with and that they are therefore entitled to the first payment on the school in question. We would like to have you advise us that this is the fact as we understand this report was made after they had seen Mr. Gilbert, the architect, yesterday.

Yours truly,

MEURER BROS. CO.

C. H. BOLLES, JR.,

General Manager. 40

**Ex. D-6.**

All orders and contracts subject to strikes, accidents, and causes beyond our control.

Guaranteed brands of Telephone:

- 10 Tinned Iron Sheets I C  
 Meurer Old Method I C  
 Meurer Roofing I C  
 Flushing I C  
 Pullman I C

**MEURER BROS. CO.**

Manufacturers of Tin Plates, Dealers in Sheet Iron and Metals. Galvanized Iron, Black Iron. Solder, Elbows, Nails, Etc.

Manufacturers of Stove Pipe & Leaders. Anchor Ventilators, Metal Spanish Tiles & Unique Metal Shingles.

- 20 567-577 Flushing Ave. and 266-270 Wallabout St.  
 New York Branch, 130 East 129th St.  
 Salt Lake City. San Francisco.  
 Kansas City. Denver.

Brooklyn, N. Y. Jan. 9, 1909

Mr. Fred Kilgus,  
 Newark, N. J.

30 Dear Sir:

We are in receipt of your favor of the 7th instant and in reply beg to say we have your letter of Oct. 16th, also your letter of Oct. 19th, and we also know that the American Skylight & Iron Works have done enough work to pay our order for \$1000.00. We have this information, and had it before we said anything to you. We are well aware that the money is due us on this work, if they have defaulted in finishing it, it has nothing  
 40 to do with us, except there is enough work com-

*Ex. D-6*

pleted to pay the order we hold on which you paid \$500.00, and we are going to get the balance, as you have refused to pay, and the matter is now in the hands of our attorneys, Messrs. Vredenberg, Wall & Cary, who are taking up the matter at once for us.

Yours truly,  
MEURER BROS. CO. 10

**Ex. D-7.**

4207

Jan 2 9

Newark Cornice &amp; Skylight Works

The completing of all Metal work for the Lincoln Ave School Orange N. J. as per plans Specification & Detail by E. F. Guilbert Arh & to his satisfaction for the sum of Twenty three Hundred Dollars \$2300.00. 20

D D K

30

40

## Exhibit D-8.

Form 19642-Pl.

THE  
UNIFORM CONTRACT

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## FORM OF CONTRACT

Adopted and Recommended for General Use by the

- 10 AMERICAN INSTITUTE OF ARCHITECTS  
and the  
NATIONAL ASSOCIATION OF BUILDERS.
- 

Copyrighted 1905 by the American Institute of Architects, Washington, D. C. E. G. Soltmann, N. Y., Licensee for Exclusive Publication.

---

Revised 1907

20

THIS AGREEMENT, made the sixth day of August, in the year one thousand nine hundred and eight by and between Fred Kilgus, 13 South 6th Street, Newark N. J. party of the first part (hereinafter designated the Contractor), and The Board of Education, of the City of Orange, in the County of Essex New Jersey party of the second part (hereinafter designated the Owner),

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

ARTICLE I. The Contractor shall and will provide all the materials and perform all the work for the Erection and completion of Alterations and Additions to the Lincoln Avenue School Building, Lincoln Avenue, Orange, N. J., not including Telephone Instruments and Wiring and  
40 Clocks and Wiring. Also substituting Terra

*Ex. D-8*

Cotta for Stone and omitting 1 electric Light Circuit and 1 Switch from each class room. all as shown on the drawings and described in the specifications prepared by Ernest F. Guilbert, 589 Main Street, East Orange N. J. Architects, which drawings and specifications are identified by the signatures of the parties hereto, and become hereby a part of this contract. 10

ART. II. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said Architects, and that their decision as to the true construction and meaning of the drawings and specifications shall be final. It is also understood and agreed by and between the parties hereto that such additional drawings and explanations as may be necessary to detail and illustrate the work to be done are to be furnished by said Architects, and they agree to conform to and abide by the same so far as they may be consistent with the purpose and intent of the original drawings and specifications referred to in Art. 1. 20

It is further understood and agreed by the parties hereto that any and all drawings and specifications prepared for the purposes of this contract by the said Architects are and remain their property, and that all charges for the use of the same, and for the services of said Architects, are to be paid by the said Owner. 30

ART. III. No alterations shall be made in the work except upon written order of the Architects; the amount to be paid by the Owner or allowed by the Contractor by virtue of such alterations to be stated in said order. Should the Owner and Contractor not agree as to amount to be paid or allowed, the work shall go on under the order re- 40

*Ex. D-8*

quired above, and in case of failure to agree, the determination of said amount shall be referred to arbitration, as provided for in Art. XII of this contract.

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

ART. V. Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architect, the Owner shall be at liberty, after three days written notice to the Contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the Architects shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner shall also be at liberty to terminate the employment of the Contractor for the said work and to enter upon the  
30 premises and take possession, for the purpose of  
40

*Ex. D-8*

completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Contractor he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work, such excess shall be paid by the Owner to the Contractor; but if such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expense incurred by the Owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Architects, whose certificate thereof shall be conclusive upon the parties.

ART. VI. The Contractor shall complete the several portions, and the whole of the work comprehended in this Agreement by and at the time or times hereinafter stated, to wit:

In two divisions as described in specifications, page 8.

ART. VII. Should the Contractor be delayed in the prosecution or completion of the work by the act, neglect or default of the Owner, of the Architects, or of any other contractor employed by the Owner upon the work, or by any damage caused by fire or other casualty for which the Contractor is not responsible, or by combined action of workmen in no wise caused by or resulting from default or collusion on the part of the Contractor, then the time herein fixed for the completion of

*Ex. D-8*

the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid, which extended period shall be determined and fixed by the Architects; but no such allowance shall be made unless a claim therefor is presented in writing to the Architects within forty-eight hours of the occurrence of such delay.

10

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

20

ART. IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Contractor for said work and materials shall be Seventy Thousand Dollars (\$70,000.00) subject to additions and deductions as hereinbefore provided, and that such sums shall be paid by the Owner to the Contractor, in current funds, and only upon certificates of the Architects, as follows:

30

First Payment .....	\$12,000.00
When new opening in old bldg shoring old bldg	
1rst tier on 3 new wings	
Second Payment .....	5,000.00
2nd tier on new wings	

40

*Ex. D-8*

Third Payment .....	11,000.00	
When Wall plates are on 3 wings		
Fourth Payment .....	14,000.00	
When 3 wings are plastered		
Fifth Payment .....	6,000.00	
When old bldg walls have been veneered wall plates on		
Sixth Payment .....	6,000.00	19
When interior changes in old bldg & plastering done		
Seventh Payment .....	1,000.00	
When connecting cordor is rebuilt wall plates on		
Eighth & Final Payment.....	15,000.00	
done (30 days)		

8th & The final payment shall be made within thirty days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued. 20

If at any time there shall be evidence of any lien or claim for which, if established, the Owner of the said premises might become liable and which is chargeable to the Contractor, the Owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify it against such lien or claim. Should there prove to be any such claim after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the Contractor default. 30

ART. X. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be 40

*Ex. D-8*

construed to be an acceptance of defective work or improper materials.

10 ART. X. The Contractor shall during the progress of the work maintain insurance on the same against loss or damage by fire, as required by specifications the policies to cover all work incorporated in the building, and all materials for the same in or about the premises, and to be made payable to the parties hereto, as their interest may appear

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

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

*Ex. D-8*

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

FRED KILGUS.  
 FREDERICK BERG, JR.,  
 for Board of Education.

In Presence of 10

FRANCIS P. WARD

Attest

WILLIAM G. McCURDY  
*Secretary*

(Seal)

THE UNIFORM CONTRACT

---

FORM OF CONTRACT 20

Adopted and Recommended for General Use by  
 the American Institute of Architects and the Na-  
 tional Association of Builders. (Revised 1905 and  
 1907)

---

AGREEMENT between

FRED KILGUS

*Contractor, 30*

and

BOARD OF EDUCATION, ORANGE,  
*Owner,*

for

CONTRACT, LINCOLN AVE. SCHOOL  
 Architects

Amount of Contract, \$70,000.00.

40

*Ex. D-8*

(Copyrighted 1905 by the American Institute of  
Architects, Washington, D. C. Revised 1907.)

Licensee for Exclusive Publication  
E. G. SOLTMANN,  
125 East 42d Street, New York, N. Y.  
10 (Form 19642-Pl.)

**Ex. D-9.**

All agreements are contingent upon strikes, inter-  
ferences, accidents and other delays beyond and  
over which we have no control.

20 HENRY BERG, Pres.

AMERICAN SKYLIGHT & IRON WORKS  
Puttyless Skylights and Glass Roofs, Sectional  
and Portable Skylights, Sash Operating Devices  
for all kinds of buildings which can be operated  
in any position, light Structural Steel. Sheet  
Metal Work of every description.

Office and Works: 221 Randolph Avenue  
Telephone Connection.

Jersey City, N. J. Dec. 5, 1908.

30 Mr. Fred Kilgus,  
Newark, N. J.

Dear Sir:

Replying to your letter of Dec. 3, 1908. We  
hereby authorize you to pay Messrs. Meurer Bros.  
Co., of Brooklyn, N. Y. the sum of ONE THOU-  
SAND DOLLARS (\$1,000.00) and charge same  
to us.

Yours very truly,  
40 AMERICAN SKYLIGHT & IRON WORKS  
Wm. K. Hamilton, Mgr.

**Ex. D-10.**

Newark Telephone 4042. Long Distance Tel. 2980.

**FRED KILGUS**  
**BUILDER**

Nos. 13-21 South Sixth Street, at Central Avenue.

Newark, N. J. Dec. 17th/08

Mess Meurer Bros. Co.

#567 Flushing Ave

Brooklyn N. Y.

10

Dear Sirs:

In reply to your favor of the 16th inst, in which you request payment for the balance of \$500.00 coming to you from the American Skylight & Iron Works, Jersey City, N. J. for material furnished them for the Lincoln Ave School we are obliged to state they are moving so slowly on the work, that we are afraid we will have to take up the work ourselves in order to get it done, the Architect is complaining very hard about their work, as the progress they are making, we do not see our way clear to make any more payments until they push the work along, and we feel justified in holding this payment back for a few days to say the least.

20

Yours truly,

**FRED KILGUS**

H. M. C.

30

Ex. D-11.

\$586.74.

Newark Telephone 4042. Long Distance Tel. 2980.

FRED KILGUS

BUILDER

Nos. 13-21 South Sixth Street, at Central Avenue.

10 Newark, N. J. Jan 2/09

Mess Meurer Bros. Co.

#567/577 Flushing Ave, Brooklyn, N. Y.

Dear Sirs:

In reply to yours of the 31st ult, I beg to say the American Skylight & Iron Works has a contract, on the Lincoln Ave. School, Orange N. J. for which I agreed to pay the first \$1000.00 when due to you, and charge it to the American Skylight & Iron Works account, I find by closer investigation they  
20 have not a \$1000 worth of work as per the contract, and what they have done is not satisfactory to the terms of the contract, and they have laid down on the job altogether, and I have been obliged to serve them with a three days notice, which has expired, and I haven't heard from them.

Their contract price is \$2700.00 to do this work, and if you care to complete the work according to the terms of the contract you can do so, for the  
30 balance of same which is \$2200.00 I must know immediately, as the building is being damaged for the want of roof, I have been served with a notice to proceed with our work, which has expired, and I must know by Monday if you want to complete the work, otherwise I will have the work finished by somebody and charge it to the American Skylight & Iron Work, as this work must be done, without further delay.

They have not had any men on the work for a week or ten days, and all this nice weather, what  
40 progress could be made

Yours truly

FRED KILGUS

H. M. C.

**Ex. D-12.**

(Copy.)

January 7, 1909.

Messrs. Meurer Bros. Co.,  
567 Flushing Ave.,  
Brooklyn, N. Y.

Gentlemen:—

I have your favor of the 4th. inst., in reference 10  
to the American Skylight & Iron Works. If you  
will refer to your letter of October 16th., and your  
letter of October 19, 1908, you will note that pay-  
ments up to the amount of \$1000.00 were to be  
made to you when the American Skylight & Iron  
Works had done that amount of work. The Amer-  
ican Skylight & Iron Works have not only failed  
to do work to the extent of \$1000.00, but have  
defaulted upon the Lincoln Ave. School contract  
to our great inconvenience and damage. Nothing 20  
is due on their contract consequently there can be  
no further payments.

Yours truly,  
FRED KILGUS.

30

40



