

New Jersey Court of Errors and Appeals

ROBERT C. KLEMM,

vs.

THEOBALD HERRMANN,

Appellee,

Appellant.

On Contract.

*On Appeal
from the
New Jersey
Supreme
Court.*

Brief of Plaintiff.

The plaintiff brought suit on the common counts for professional services rendered by him to the defendant for drawing a set of plans and specifications for the erection of an apartment house at 558, 560 and 562 South Eleventh street, Newark, New Jersey.

After a number of adjournments the case was finally tried on the twenty-fourth day of April, one thousand nine hundred and thirteen, by the judge without a jury, and thereupon found, "I find as a fact that no price was mentioned when these plans were ordered and if there was an competent evidence that they did not exactly comply with the law, the deviation was so slight that an alteration could easily have been made, and that the architect had been given no opportunity to make such alteration. I believe the plaintiff and do not believe the defendant." Thereupon the court gave judgment for three hundred dollars and interest.

From this decision the attorney for the defendant appealed to the Supreme Court which said court rendered a decision on the ninth day of January, one thousand nine hundred and fourteen, which is as follows:

"There are no exceptions taken in the case and I am of opinion that the judgment should be affirmed."

From the decision of the Supreme Court, the defendant appeals to this court.

The printed State of Case sets forth nine contentions on the part of the defendant which are urged as reasons for reversal of the judgment but a careful perusal of said reasons will show that there are but three points involved on this appeal.

First. The defendant (appellant) contends that the Supreme Court should have considered the appeal without exceptions being taken at the trial in the District Court.

Secondly. Whether or not the plans had been rejected by the building authorities, and

Thirdly. Whether or not the court had the right to believe those witnesses whom he thought were telling the truth.

Under section twenty-five (25) of the Practice Act bill of exceptions in civil cases are abolished but objections should be made to rulings and the grounds of the objections stated as heretofore, but it does not, however, seem that even though an appeal by way of a bill of exceptions is abolished obviates the necessity of taking exceptions and stating the grounds thereof.

Under the rules of the Supreme Court, Rule 144, it is stated, "In order that an objection to evidence may be available on appeal the record must show that the ground of objection was stated to the trial judge and that he ruled thereon adversely to the appellant."

In the case at bar, there are but four objections made on the part of the appellant during the entire trial, one on page fifteen (15), line ten (10); one on page sixteen (16), line twelve (12); one on page twenty-two (22), line ten (10) and one on page thirty-five (35), line twelve (12).

In the case of "*O'Donnel vs. Weiler*" reported in 72 N. J. L., at page 144, the court HELD, "That on an appeal from a District Court, no formal exception is required to be sealed, but the State of the Case must show with what rulings the appellant was dissatisfied."

"It must appear that the attention of the court was called to language in the charge thought to be objectionable." At page 391 the court says, "That it is a fundamental rule in the administration of Justice in the Courts of Law, that the point must be clearly stated in which the judge is supposed to err."

The first and second objections are the same question and although overruled were answered in the questions which followed them:

"Q Now Mr. Klemm wall to hall what is the tenement law on wall for distance?

Objected to.

Mr. Kalisch. He says he knows and he is an architect.

Objection sustained. The Tenement House Law show for themselves.

Q Did you conform to the Tenement Law in one of the houses in making the hall seven feet?

A Yes, I think I did.

(Second objection), page 16 of State of Case, line 10.

Q What does the law require, do you know?

Objected to.

The Court. The law will speak for itself, Mr. Kalisch.

Q Now, then, were they made in accordance with the Building Inspection Law, so that he will pass them? A I believe they were."

The next objection was made after the question was answered by the witness (page 22 of State of Case, line 10):

“Q And did you give him an estimate, etc.?”

A I believe we gave him an estimate of the cost except the mason work.

Mr. Kalisch. One moment, I object. It is immaterial unless the estimate was made also by the mason; it would be immaterial to the court what only half the estimate was.

Objection overruled.”

The fourth objection appears on page 30 but the objection is sustained.

So that it would seem that if the appellant relied on objections, for a new trial, there would be no foundation for it. In any event it is difficult to conceive that any other decision could be arrived at under the circumstances.

The objection raised on page thirty-five (35) was answered by the court and evidently satisfied the appellant, as there was no exception taken. Neither were there any objections or exceptions to the final finding of the court and hence appellant must have been satisfied at the time and no appeal would thereupon lie.

The plans had never been rejected by the building authorities because they had never been presented to them. On page twenty-nine (29) of the State of Case, Eugene Doser, testified for the defendant that he was Inspector of Buildings for the City of Newark, and that the plans were never submitted directly to the building department but they were shown to him outside of his official capacity. On page thirty (30) of the printed case he says that all he noticed was, that the plans in one particular showed plaster block where it should have shown brick wall; and further on in his testimony he says that when such a thing exists they are not rejected but returned to the architect for corrections.

On the same page Edgar Leroy testified for the defendant that he was Assistant Plan Examiner of the Tenement House Department and that the plans in question were not formally filed but that similar plans were filed by another architect.

The summons in this case were served on the fifteenth day of January, one thousand nine hundred and thirteen, and Edgar Leroy says that he was asked to look over the plans about January seventeenth, or two days after suit. This clearly shows that defendant was trying to work up a defence when as a matter of fact the plans had never been submitted officially to any of the authorities.

He also testified, at the bottom of page thirty-one (31), that they comply in all respects, however, with the Tenement House Law except in minor respects which could have been corrected by the architect, the plaintiff, upon notice.

My opponent in his brief seems to think that the plans were rejected by the authorities but the testimony of the defendant's own witnesses, shows that Mr. Klemm's plans were never presented. This entire situation seems to be a matter of fact to be determined by the trial judge for which no appeal will lie.

The defendant also contends that the plaintiff was not allowed to answer the question, "Do you know the Law?"

Whether or not the question is proper would not have changed the verdict in the face of the testimony that the plans could have been easily corrected.

The judge sitting as a jury determines both questions of law and fact and the one was to determine the truthfulness of the witnesses on the stand is by his demeanor in testifying and the court must have found that the demeanor of the defendant and his

witnesses was such that they could not be relied upon.

So that this whole case resolves itself into a plain question of fact which cannot be reviewed on appeal. It is needless to submit citations on this point, and I respectfully submit that the appeal should be dismissed with costs.

Respectfully submitted,

FRANK W. LONG,
Attorney for and of Counsel with Appellee.

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John Enstice,	
Direct	21
Cross	28
Alfred Wolters,	
Direct	23
Cross	28

Defendant's:

Theobald Herman,	
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Cross	28

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Eugene Doser,	
Direct	29
Edgar Leroy,	
Direct	30
Adam Licht,	
Direct	32
Cross	33
Benjamin Herman,	
Direct	34
John Herman,	
Direct	34
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Raymond Browne,	
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EXHIBITS

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Judgment of Supreme Court*(Filed, January 9, 1914)*

NEW JERSEY SUPREME COURT

ROBERT C. KLEMM, vs. THEOBALD HERMANN,	Appellee, Appellant.	}	June Term, 1913.	10
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Submitted June Term, 1913. Decided January 8, 1914.

On Appeal.

For the appellant, Mr. Abner Kalisch. 20
 For the appellee, Mr. Frank W. Long.

Before Justices Swayze, Bergen and Voorhees.

PER CURIAM:

The defendant Hermann, was sued in this suit to answer unto Robert Klemm. The common counts were interposed as a state of demand, and added to them is a notice thae the action is brought to recover \$300 and interest, for professional services as an architect, rendered by the plaintiff to the defendant in drawing plans for an apartment house at #558-560 and 562 South Eleventh Street, Newark. No person appeared representing the defendant at the trial. The plaintiff was sworn in his own behalf, and the Court thereupon rendered judgment for \$300. On the 28th day of March, the judgment was opened and postponed until April 24th, and a judgment of \$315 was then entered in favor of the plaintiff against the defendant. 30 40

Notice of Appeal to Court of Appeals

The case was tried by the Judge without a jury.

The Court found: "I find as a fact that no price was mentioned when these plans were ordered, and if there was any competent evidence that they did not exactly comply with the law, the deviation was so slight that an alteration could easily have been made, and that the architect had been given no opportunity to make such alteration. I believe the plaintiff, and do not believe the defendant."

Thereupon the Court gave judgment for \$300 and interest. There are no exceptions taken in the case and I am of opinion that the judgment should be affirmed.

20 Notice of Appeal to Court of Appeals

(Filed, January 14, 1914)

NEW JERSEY SUPREME COURT

SECOND DISTRICT COURT OF THE CITY OF NEWARK

30	ROBERT C. KLEMM, vs. THEOBALD HERMANN,	Appellee, Appellant.	} Notice of Appeal.
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To:

40 Frank W. Long, Esquire,
 Attorney of Appellee.

Grounds of Appeal

Dear Sir:

TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals from the judgment of the Supreme Court in this cause, affirming the judgment of the Second District Court of the City of Newark.

Dated, January 14th, 1914.

ABNER KALISCH, 10
Attorney for Appellant.

Grounds of Appeal

(Filed, January 26, 1914)

NEW JERSEY COURT OF ERRORS AND APPEALS 20

ROBERT C. KLEMM, vs. THEOBALD HERMANN, 	Appellee, Appellant.	}	Grounds of Appeal.
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The appellant states the following grounds of appeal. 30

The defendant appeals to the Court of Errors and Appeals from the judgment entered in the Supreme Court in this cause on the following grounds:

1. That the Court affirmed the judgment of the Second District Court on the ground that there were no exceptions taken at the trial. 40

Grounds of Appeal

2. That the Court should have considered the appeal without exceptions being taken at the trial in the District Court, as the law requires no exceptions to be taken at a trial in said Court, but as a matter of fact exceptions were taken at the trial.

3. That the Supreme Court should have con-
10 sidered the case upon the record, transcript and the proceedings transmitted to the Court under the seal of the Second District Court and certified by the Judge of the Court presiding at said trial, and the specifications of reasons filed under Rule 90 of the Supreme Court.

4. That the Supreme Court affirmed the judgment of the Second District Court when it should have reversed the same on the ground—

20 That the District Court held that the architect, the appellee in this case could recover for services rendered in drawing plans and specifications although the proof was that they were not drawn in conformity with the tenement law governing the erection of buildings in the City of Newark.

5. That the Court held that although the legal proof was that the plans and specifications were not drawn in conformity with the laws governing the erection of tenement buildings and there
30 being no proof that the architect made the necessary alterations or offered to make the necessary alterations, yet the Court held as a matter of law that the architect could recover if it was possible that such alterations could be made.

7. That the Court held that as a matter of law that the plaintiff the appellee in this case was entitled to recover even though under his own evidence he testified that the plans rejected by the proper authorities could not be followed in the
40 erection of a building.

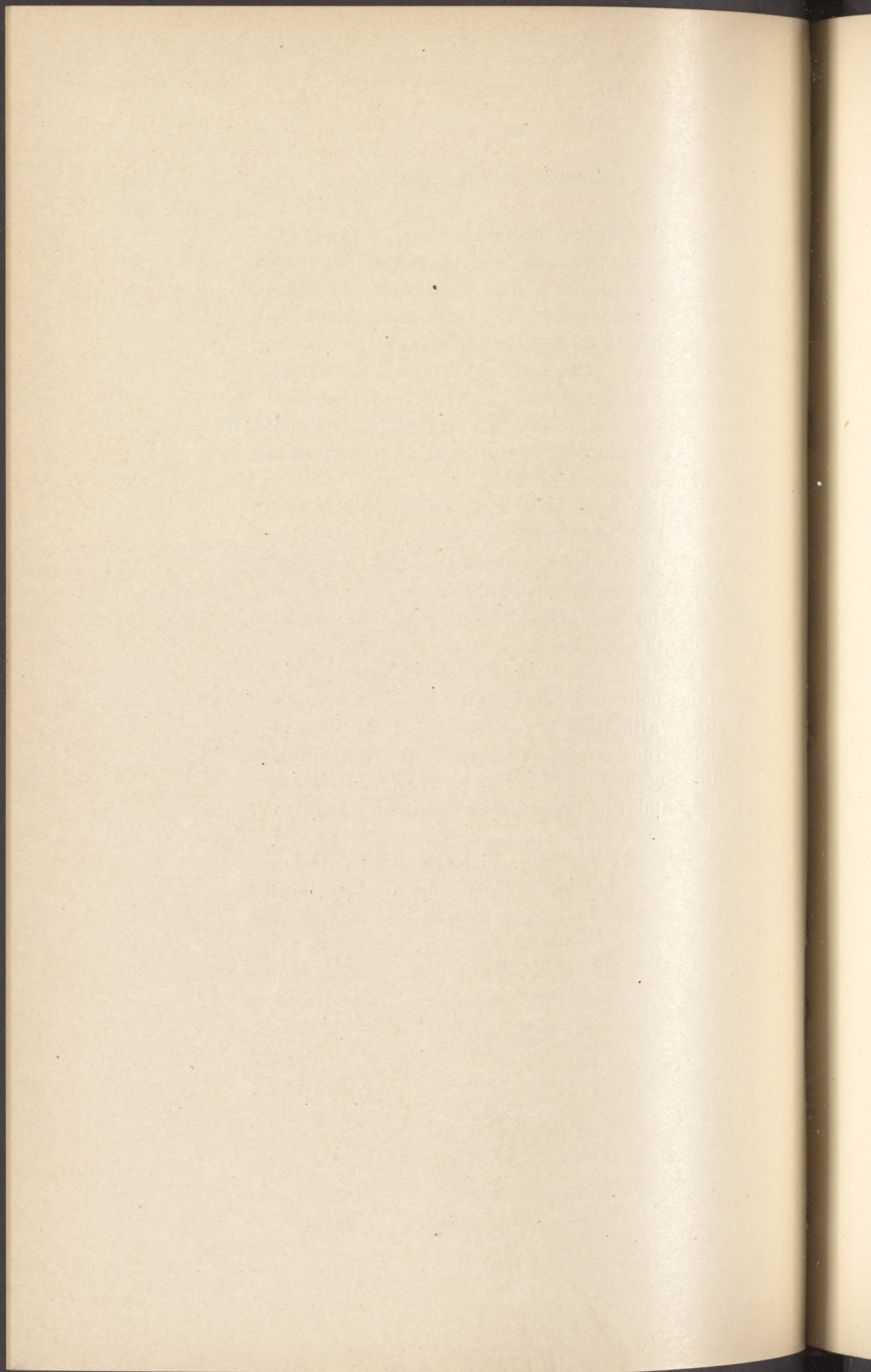
Grounds of Appeal

8. That the Court overruled the questions put to the architect, the appellee, by the attorney of the appellants, as to his knowledge of tenement house law, on the question as to the distance required from wall to wall in halls, and the law on walls distances, although the architect, the appellee testified as to his full knowledge of tenement law, and although he testified that no house could 10 be erected without the tenement law being complied with by the architect.

9. That the Court refused to allow the question to be asked of the appellee as to the law required regarding fire proof arrangement of a tenement house, although the architect had previously testified that he had prepared the plans in accordance with the law.

10. That the Court in giving judgment said, "I do not believe the defendant but I believe the 20 plaintiff," although the testimony of the defendant and witnesses were not inherently incredible, and the defendant and witnesses were not impeached, and the testimony remained uncontradicted.

ABNER KALISCH,
Attorney of Appellant.



New Jersey Supreme Court

Summons

(Filed,)

Essex County, ss:

The State of New Jersey, To any Constable of said county or to the Sergeant-at-Arms of the Second District Court:

20

SUMMON Theobald Hermann to appear before the SECOND DISTRICT COURT OF THE CITY OF NEWARK, to be held on the ground floor of the CITY HALL ON BROAD STREET, BETWEEN GREEN AND FRANKLIN STREETS, in the said City, on the Twentieth day of January, Nineteen Hundred and Thirteen, at HALF-PAST NINE o'clock in the forenoon to answer unto Robert C. Klemm in an action upon contract to the damage of the plaintiff, Five Hundred Dollars, hereof fail not.

30

WITNESS, THOMAS J. LINTOTT, Esq., Judge of said Court at Newark, aforesaid, the Thirteenth day of January in the year One Thousand Nine Hundred and Thirteen.

JOHN H. O'CONNOR,
Clerk.

Demand

(Filed,)

SECOND DISTRICT COURT OF THE CITY
OF NEWARK

10	ROBERT C. KLEMM,	Plaintiff,	} On Contract. State of Demand
	vs.		
	THEOBALD HERRMANN,	Defendant.	

Essex County, ss:

20 Theobald Herrmann, the defendant in this suit was summoned to answer unto Robert C. Klemm, the plaintiff herein in an action upon contract, and thereupon the plaintiff, by Frank W. Long, his Attorney, complains:

30 For that whereas, the said defendant heretofore to wit, on the Twenty-second day of June, One Thousand Nine Hundred and Twelve, at Newark, in the County of Essex, was indebted to the said plaintiff in the sum of Five Hundred Dollars, for goods sold and delivered by the plaintiff to the defendant at his request; And in the like sum for work done and materials furnished by the Plaintiff for the defendant at his request; And in the like sum for money lent by the plaintiff to the defendant at his request; And in the like sum for money paid by the plaintiff for the use of the defendant at his request; And in the like sum for money received by the defendant

40 for the use of the plaintiff; And in the like sum

Demand

for interest for the forbearance by the plaintiff at the defendant's request of money due and owing from the defendant to the plaintiff; And in the like sum for money due from the defendant to the plaintiff on an account stated between them and being so indebted, the defendant in consideration thereof, then and there promised the plaintiff to pay the said several sums of money 10 on request. Yet the defendant disregarded the said several promises, and has not paid the said several sums of money, nor any of them, or any part thereof, although often requested so to do, but to do so has hitherto wholly refused, and still does refuse to the damages of the Plaintiff Three Hundred Dollars and therefore he brings his suit, &c.

FRANK W. LONG,
Attorney for Plaintiff. 20

To the within named defendant:

PLEASE TAKE NOTICE, that this action is brought to recover the sum of Three Hundred Dollars, together with interest and costs of suit, for professional services as an architect rendered by plaintiff to defendant in drawing plans and specifications for an apartment house to be erected at #558, 560 and 562 South Eleventh Street, Newark, New Jersey. 30

FRANK W. LONG,
Attorney for Plaintiff.

District Court Record

SECOND DISTRICT COURT OF THE CITY OF NEWARK

	ROBERT C. KLEMM,		
10	vs.	Plaintiff,	}
	THEOBALD HERRMANN,	Defendant.	

Frank W. Long,
Plaintiff's Attorney.

Plaintiff's Costs

	Summons	2.10
20	Mileage08
	Listing fee	1.50
	Attorney's fee	15.00
		18.68
	Total costs	18.68

30 A summons in the above stated cause was issued on the Thirteenth day of January, 1913, returnable on the Twentieth day of January, 1913, wherein the plaintiff demands of the defendant the sum of Three Hundred Dollars.

The plaintiff filed a state of demand January 13th, 1913. The summons was served and returned as follows:

40 "The said defendant not being found I served the within summons January 15th, 1913 by leaving a copy thereof at his resi-

District Court Record

dence with a member of his family above the age of Fourteen years, informing her of its contents.

PH. NEWMARK,
Constable."

Jany. 20. This cause was adjourned by the plaintiff to Feby. 3rd.

10

Feby. 3. This cause was adjourned by plaintiff to Feby. 10th, and from time to time thereafter until March 27th.

March 27. The plaintiff appeared and the defendant not appearing and no reason being assigned for his absence this cause was tried and determined at this time, the plaintiff was sworn in his own behalf.

The evidence being closed the Court rendered judgment in favor of the plaintiff and against the defendant in the sum of Three Hundred Dollars damages with costs whereupon judgment is entered in favor of the plaintiff and against the defendant in the sum of Three Hundred Dollars damages with costs.

20

March 28. Consent to open judgment filed and trial set for April 17.

April 17. This cause was adjourned by plaintiff to April 24th.

April 24. The Plaintiff and defendant appeared and this cause was tried and determined at this time:

30

Elizabeth Denman was sworn as stenographer.

The Plaintiff was sworn in his own behalf, also John Entice, Alfred Walters and Raymond C. Brown.

The Defendant was sworn in his own behalf, also Eugene Loezer, Edgar R. Leroy, Adam Licht, Bernard Hermann and John Hermann, the

40

Clerk's Certificate

evidence being closed the Court rendered judgment in favor of the Plaintiff and against the defendant in the sum of Three Hundred Fifteen Dollars damages with costs whereupon judgment is entered in favor of the Plaintiff and against the Defendant in the sum of Three Hundred Fifteen Dollars damages with costs.

10 April 25. Statement for docketing judgment, in the Court of Common Pleas issued.

April 28th. Defendant filed appeal bond.

Clerk's Certificate

SECOND DISTRICT OF THE CITY OF NEW-
ARK

20

ROBERT C. KLEMM,

Plaintiff,

vs.

THEOBALD HERRMANN,

Defendant.

On Contract

Certificate.

30 I, John H. O'Connor, Clerk of the Second District Court do hereby certify that hereto attached are true copies of the summons, state of demand and order filed in the above cause and the foregoing is a true transcript of the record and proceedings had therein.

Dated, May 2nd, 1913.

JOHN H. O'CONNOR,
Clerk.

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Testimony

FIRST DISTRICT COURT OF THE CITY OF NEWARK

ROBERT C. KLEMM, <div style="text-align: center;">vs.</div> THEOBALD HERMAN, 	}	Plaintiff, Defendant.	10
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Transcript of testimony, etc., taken in the above entitled cause, this 24th day of April, 1913, at 10:30 a. m., o'clock, before the Hon. Cecil H. McMahon, Judge of the First District Court of the City of Newark, N. J.

20

Appearances:

Frank W. Long, Esq., for Plaintiff.
 Abner Kalisch, Esq., for Defendant.

MR. ROBERT C. KLEMM, plaintiff, being duly sworn, testified as follows:

Direct-examination by Mr. Long:

Q. Mr. Klemm, what is your business? A. Architect. 30

Q. You are a licensed architect? A. Yes.

Q. How long have you been an architect? A. Licensed for five years, practicing four.

Q. And where is your place of business? A. Union Building, Newark.

Q. And do you know Mr. Herman in this case? A. Yes.

Q. Did you do any work for him? A. Yes.

Q. When? A. The beginning of April, last year. 40

Robert C. Klemm—Direct

Q. What work did you do? A. I prepared plans and specifications for a three-story brick building to be erected in Eleventh Street, Newark, N. J.

Q. And have you the original plans and specifications? A. The original drawings and tracings were delivered to you.

10 Mr. Kalisch: I have the plans and specifications, which were submitted to Mr. Herman.

(Defendant produces plans and specifications.)

Q. Are these the plans and specifications—just look them over carefully and see if they are just the same as when you delivered them. A. Some figures have been placed in here evidently in pencil. They were placed on the drawings when I computed the iron and steel, so they are
20 all right. I placed those marks there on the tracings when I computed the iron and steel.

Q. Then what you said just now regarding the pencil marks was in error? A. Yes.

Mr. Long: I offer the plans and specifications in evidence.

Received in evidence and classed together, being marked "Exhibit P-1."

Q. These are the original tracings? A. Yes, these are the original of which you presented Mr.
30 Herman copies? A. Yes.

Mr. Long: I offer these also.

Mr. Kalisch: Before they are offered in evidence, one moment please.

By Mr. Kalisch: Q. Do they show all the pencil marks and all the alterations as the copy? A. No, sir.

Q. Then this is not a copy of the original. That is a copy of the original, with the exception of
40 pencil marks which do not appear on the original.

Robert C. Klemm—Direct

A. They were pencil marks placed on these originals at the time these blueprints were made. I want to know whether, as it is now offered in Court, that is an exact copy of the other.

The Court: Is Exhibit P-1 an exact copy of the original tracings, with the exception of the figures about iron and steel?

The Witness: Yes.

10

Q. What are those pencil marks? A. They were placed on there when I was computing the iron and steel.

Q. What was that purpose? A. Framing, the plan was prepared, steel framing, a plan was necessary for the building and in computing the iron and steel framing plan I used the tracings and where the beams were to be placed I marked the size of the steel beams necessary. They were placed on the tracings. Later the tracings were cleaned up, as is customary.

20

Q. Just simply an oversight that they were not cleaned up?

Mr. Kalisch: One moment.

Q. Why weren't they taken off the blueprint?

A. I tell you, at the time, as I recall it, Mr. Herman was very anxious to get those plans and as soon as the tracings were completed they were sent over to the blueprint office for prints. There was other work that I had not completed at the time they were delivered to Mr. Herman.

30

Q. Did these effect the drawing in any way?

A. No, sir.

Copies of plans and specifications offered in evidence.

Received and marked "Exhibit P-2."

Q. Are these the specifications that were presented to Mr. Herman by you? A. Yes.

Mr. Long: I offer those in evidence.

40

Robert C. Klemm—Cross

Carpenter specification received in evidence and marked Exhibit P-3.

Painting specifications received in evidence and marked Exhibit P-4.

Steel and Iron specification received in evidence and marked Exhibit P-5.

10 Plumbing specification received in evidence and marked Exhibit P-6.

Q. Now, this is the original of those which have been offered in evidence? A. Yes.

Mr. Long: I also offer that in evidence.

Mr. Kalisch: This is supposed to be the whole specification?

Mr. Long: Yes.

A paper purporting to be the original of all the specifications received in evidence and marked Exhibit P-7.

20 Q. That building—where was that building to be located? A. In South Eleventh Street, I don't recall the exact number.

Q. What do you consider a reasonable charge for drawing those plans and specifications? A. My charge is \$300, I consider that reasonable.

30 Q. Upon what do you base your claim? A. On what I consider the cost of the building, \$20,000, at 1 and 1/2 per cent. My customary charge is 1 and 3/4 per cent. "I did not prepare mason's specifications for these plans, and I allowed 1/4 of 1 per cent for that."

Q. And you presented Mr. Herman with a bill for \$300? A. Yes.

Q. Did he ever make any complaint to you about the plans and specifications? A. No, sir.

CROSS-EXAMINATION by Mr. Kalisch:

40 Mr. Kalisch: Mr. Long, have you brought with you the supplemental plans

Robert C. Klemm—Cross

that were submitted to the Tenement House Commission and disapproved by them?

Mr. Long: We haven't any such supplemental plans and don't know of any that were disapproved.

A. I never submitted any plans for the approval to any department. 10

Mr. Kalisch: Have you the original sketch presented to Mr. Herman?

Mr. Long: Have you any such sketch, Mr. Klemm?

The Witness: No, I haven't.

Q. Mr. Klemm, when did Mr. Herman first speak to you about drawing plans? Did you make an original sketch? A. Yes.

Q. Where is this sketch? A. I don't know, it isn't in my possession. 20

Q. Didn't he return it to you? A. I believe he did.

Q. What became of it? A. My opinion is he came in for it and took it away again.

Q. That is your opinion? A. Yes.

Q. By that sketch, what did you, if you remember what was the price of the building to be? A. There was no price set on that scale.

Q. Didn't he say to you that the most he would spend would be \$15,000? A. Emphatically no. 30
Mr. Herman never mentioned a price.

Q. Were you to build a building without having any price stated or what to spend? A. Mr. Herman told me that he desired to build.

Q. Didn't he tell you what the neighborhood was and what he required there? A. I don't know whether he did or not.

Q. Then, did he not even speak to you about the floors, that he didn't want any paraquet but he wanted pine set floors? A. No, sir. 40

Robert C. Klemm—Cross

Q. And did you raise it up to seven, eight or twelve cents a square foot? Wasn't that your price on your plans? A. Why, no, I never gave any figures to Mr. Herman.

Q. But your specifications called for that kind, didn't they? A. For what?

Q. For the floors that would call for twelve
10 cents a square foot? A. I don't know.

Q. Don't you know anything about your specifications? A. They were written six or eight months ago.

Q. Then you say you made those specifications irrespective of what the plans would cost? A. I made it to conform with his request.

Q. Didn't you in your specification have carpenter work specify floors that would cost twelve cents a square foot? A. I can not tell you what
20 class of floor was specified.

Q. And did you make what would call for more than \$20,000? A. I think it would cost approximately \$20,000.

Q. Now, then didn't Mr. Herman come to you and tell you that that would never do, that he could not build a building for that price? A. No.

Q. That the most he could plan or spend was \$15,000? A. I have no recollection.

Q. Don't you know that the plans that you
30 had made were submitted to the Tenement House Commission and rejected? A. No, not to my knowledge.

Q. Didn't Mr. Herman tell you so? A. No, sir.

Q. And don't you know that Mr. Herman had other plans made and had the building erected? A. I know Mr. Herman had other plans made following mine.

Q. Following yours? A. Yes.

40 Q. Don't you know that the house only cost him

Robert C. Klemm—Cross

\$14,000 to build? A. Mr. Herman filed his application for \$16,000.

Q. Don't you know it cost \$14,900? A. No, sir.

Q. If it followed your plans, how did it cost \$14,900 and yours only \$20,000?

The Court: How do you mean "following"?

Mr. Kalisch: I don't mean the mere following. Wouldn't you take that to mean that he copied them? 10

Q. Do you mean to say that the architect copied your plans? A. The plans filed in the building as the house that Mr. Herman has erected were patterned after my plans, yes.

Q. Then if he had patterned them after your plans, the specifications must necessarily follow the same way? A. They was.

Q. And why is it that you say the plans and specifications that you had made would cost \$20,000 and all that was filed was \$16,000? Can you account for that? A. I didn't say—I made an error, the application was made for a building to cost \$16,000. 20

Q. And you are a practical architect? A. I hope so.

Q. I will ask you this question: Can you account, taking for granted that the house only cost \$14,900—can you account—if your plans were copied, and in your plans it was to cost \$20,000? A. I can not account. 30

Mr. Long: I object to this line of questioning. I don't see how it is relevant to this case.

Objection overruled.

Q. Do you know Mr. Leroy? A. Yes.

Q. Do you know what his position is in the City of Newark? A. He is connected with the Tenement House Department, I believe. 40

Robert C. Klemm—Cross

Q. Did you have any talk with him about this plan? A. Not particularly, no, sir.

Q. Didn't he tell you that your plan was contrary? Weren't you informed by the Tenement House Commission that the plans were contrary to the laws regarding tenement houses? A. Emphatically no. I received no word from the Tenement House Commission or City Department concerning these plans.

Q. Don't you know that your plans did violate the Tenement House Law? A. No, sir.

Q. Didn't Mr. Herman tell you? A. No.

Q. Was there fireproof doors base of vent-shaft in proper shape? A. How is that?

Q. Was the fireproof doors base of vent shaft in proper shape on your plan according to the Tenement House Law? A. I believe they were.

20 Q. Will you swear that they were? A. No, I won't swear they were.

Q. Did you know that you had placed an arch on your plans in a dining room which was contrary to the tenement law? A. No, sir.

Q. Will you swear you didn't do so? A. No, sir, I don't.

Q. Do you know the Tenement House Law? A. Yes.

30 Q. Kitchen first and second floor window are not sufficient or not 1/10 of room, do you know what that means? A. Yes.

Q. What was the law? A. My window was 1 and 4/10 of a square foot short.

Q. And that was contrary to the Tenement House Law? A. Yes.

Q. Did you show wall plans? A. Yes.

Q. Sure of that? A. Yes, they were prepared.

40 Q. Did they show on your plans? A. They show on the plans prepared for that building.

Robert C. Klemm—Cross

Q. Did you show property lines? A. Yes, the property lines were indicated, yes.

Q. Now, Mr. Klemm, wall to hall, what is the tenement law on wall, for distance?

Objected to.

Mr. Kalisch: He says he knows and he is an architect.

Objection sustained. The Tenement 10 House Law show for themselves.

Q. Did you conform to the Tenement Law in one of the houses in making the hall seven feet?

A. Yes, I think I did.

Q. Will you swear that you did not make it seven feet and that is not in accordance with the Tenement Law? A. May I explain it? It shows seven feet.

Q. That's not sufficient. A. The law says the stairway shaft shall be 3 feet wide and one foot 20 wellhole.

Q. Welled to hall, isn't it? Seven feet is not sufficient, is it? A. Two three-foot stairways and one foot wellhole makes seven feet.

Q. Will you swear that that was according to the Tenement House Law? A. To the best of my knowledge it is.

Q. You are an architect? A. Yes.

Q. You draw plans? A. Yes.

Q. Your plans must necessarily be allowed by 30 the proper legal authorities? A. Yes.

Q. If they are not allowed they are worthless, isn't that so? A. Not necessarily.

Q. Probably, in your opinion? You can not go on and build under those plans? A. Under what plans?

Q. You could not build under a plan that is rejected by the authorities? A. Oh, no, certainly not.

Robert C. Klemm—Cross

Q. How about the fireproof scuttle of the house? A. Scuttle?

Q. Yes, were they fireproof? A. Yes.

Q. In accordance with the Tenement House Law? A. Yes, the scuttles are indicated.

Q. I don't mean indicated, I mean, say whether you have designed and ordered them in the man-
ner that the law requires? A. Yes, sir.

Q. Sure? A. Yes.

Q. What does the law require, do you know?
Objected to.

The Court: The law will speak for itself,
Mr. Kalisch.

Q. Now, then, were they made in accordance with the Building Inspection Law, so that he will pass them? A. I believe they were.

Q. Will you swear they were? A. No, sir, I
can not. I never submitted them to the Build-
ing Department.

Q. Is it your duty as an architect to submit these plans? A. No, sir.

Q. Are you not the person to give the information when there are errors or discrepancies in a plan, to explain them to the commissioner himself? A. Any discrepancies I am willing to explain.

Q. Isn't it customary, I believe O'Rourke is the
head man—isn't it customary and necessary for you to make the proper explanation of plans when there is doubt about them by the commissioners? A. Yes.

Q. The owner is not supposed to know these things or does not know them as you know them?
A. No.

Q. Your experience is supposed to aid the commissioner in giving him your ideas as to the lines, depths, size, height and solidity of the work? A.
Yes.

Robert C. Klemm—Cross

Q. Then it is so that when the plans are submitted you are supposed to make the explanation? A. Well, but there may be a difference in the interpretation of the law.

Q. But you admit that these were rejected, do you not? Do you admit that? A. No.

Q. Did you hear that they were rejected? A. No, sir, I never did.

10

Q. Didn't Mr. Herman tell you that they were? A. I testified before that Mr. Herman did not tell me.

Q. Didn't he bring you back your specifications and say to you that in the first place you had exceeded the price, secondly, that the house could not be built because the Tenement House Commission would not allow it? A. No, sir, emphatically no.

Q. Now, have you built any other tenement houses here in town? A. Yes.

Q. How many? A. I can not tell you the exact number. I have no knowledge of it.

Q. You have planned so many that you have no knowledge? A. I have quite a number, yes.

Q. Was the plans anything like the one you have here? A. No, sir.

Q. How many houses have you built? How big a house was this to be? A. 69 feet 8 inches front, 89 feet deep.

30

Q. One building, three stories, or was it divided off? A. Divided off.

Q. The fronts divided off; I mean to say, was it one roof or was there a division? A. There was a division wall carried up through the roof, dividing the roof into three parts.

Q. So that it was virtually only one house? A. Oh, yes.

Q. But one house, one building? A. Yes.

40

Robert C. Klemm—Cross

Q. And what was it, frame or brick? A. Brick.

Q. And was to be all the way through brick? A. Yes.

Q. Look at your plans and see if you have made it all the way through brick. Find out whether your plans and specifications show brick all the way through. (Witness examines plans, P-1.)

10 Q. Doesn't your plans show wooden partition? A. Yes.

Q. Show me where they are in the rooms (Witness shows plans.)

Q. Look in the hall; I am not an architect. A. Plaster block.

Q. And follow that hall up all the way. We call it #1 of Exhibit P-1. Mr. Klemm, don't you know that that should have been a brick partition, I mean the partition shown on the past sheet of
20 P-1, the partition shown in the hallway of the plans of the first floor of the building? Does it show a wooden partition there? A. No, sir, plaster block partition.

Q. Ought that not to have been brick? A. No, sir.

Q. Sure of that? A. Yes.

Q. You say that you charged \$300. What do you base your service on for drawing plans? A. Drawing plans and specifications?

30 Q. Yes. For that alone, not for overseeing, etc.? A. Yes.

Q. Drawing only? A. Yes.

Q. Based upon what sum of money? A. \$20,000.

Q. Did you not have three or four conversations with Mr Herman about these plans by telephone?

A. Not that I recollect, no, sir.

Robert C. Klemm—Re-cross

RE-DIRECT-EXAMINATION by Mr. Long:

Q. As a matter of fact, do you know whether or not these plans have been submitted to the Tenement House Commission? A. I don't know, no, sir.

Q. Do you know whether or not they have been rejected in any way? A. No, sir.

Q. Now, supposing there had been an error in that window—I believe on cross-examination you were asked the question and you said it was 1-4/10 short—if that would be a cause for rejection? A. No, sir. 10

Q. Would it be possible to make it larger? A. Very easily, yes.

Q. And in the event of such an error or oversight being made on a plan and it is submitted to the Board of Tenement House Commission, would it be rejected? 20

Mr. Kalisch: I object. How does he know whether it would be rejected or not?

Objection sustained.

Q. Who usually files the plans and specifications for a building? A. The architect.

Q. Under what condition does he file them? A. At the owner's request.

Q. Did you have any request in this matter? A. No, sir.

Q. Did Mr. Herman ever say anything to you about any of the points which have just been asked by Mr. Kalisch? A. No, sir. 30

RE-CROSS-EXAMINATION by Mr. Kalisch:

Q. When were your plans ready, when did you finish your plans? A. Why, all the work on the job was completed June 22d, 1912.

Q. Did you ever call up Mr. Herman on the 40

Robert C. Klemm—Re-cross

telephone and ask him the question whether you were to finish the plans? A. No, not to my knowledge or recollection; I don't believe I did. I won't swear that I did not.

By the Court: Q. How did you come to draw these plans? A. Mr. Herman came to my office and asked me to prepare them.

- 10 Q. Tell us just what he asked you? A. He had a plot of ground in Eleventh Street and he said he desired to develop it, and asked me to prepare sketches for it. I can not remember exactly what was said, but the substance was that he desired to build a tenement house—develop the property for dwelling purposes, and wanted to utilize all the ground he possibly could. I prepared the sketches accordingly—they were 1/8-inch scale drawings—they were submitted to Mr. Herman,
- 20 and I think he took them away—I know he did. He returned them later on and told me to proceed with quarter-inch scale drawings. I did that, and about the time the drawings were very nearly completed Mr. Herman came to my office one morning and said he desired a set of blueprints, in order that he might take off the number of bricks necessary, because he desired to use second-hand bricks from the old asylum on South Orange Avenue. Plans were given to him that evening, a set of
- 30 blueprints, and specifications were delivered to him some time later—I don't know exactly when. Mr. Herman came in one day and asked to have, I think it was, nine windows taken out. They were marked on the drawings. To the best of my knowledge, that was the last conversation I had with him.

- Q. When did you find out he was not going to use the plans prepared by you? A. August 25th,
- 40 there was a notice in the paper stating that plans

John Enstice—Direct

had been filed for buildings on this property. I examined the plans and found they were my plans with a few alterations.

Q. Did you say anything to Mr. Herman about it? A. On October 4th Mr. Herman's son came to my office and I told him—

Q. Never mind what you told him. Did you see Mr. Herman since then? A. No, sir. 10

Q. Did you send him a bill? A. Yes.

Q. Did he say anything with respect to the bill? A. No, sir.

RE-CROSS-EXAMINATION by Mr. Kalisch:

Q. Did he refuse to pay the bill? A. He never paid it.

Q. Did he refuse to pay it?

By the Court: Did he refuse to pay it or just ignored it? 20

A. He just ignored the bill.

JOHN ENSTICE, sworn in behalf of the plaintiff, testified as follows:

Direct-examination by Mr. Long:

Mr. Enstice, what is your business? A. I am a builder—contractor. 30

Q. Where is your business located? A. 45 Clinton Street.

Q. And how long have you been a builder? A. Twenty-five years.

Q. Do you remember Mr. Klemm's calling on you sometime in February? A. He has called on me several times.

Q. Do you remember his calling on you sometime in February? Do you remember him calling 40

John Entice—Direct

on you for the purpose of presenting these plans?

A. Yes.

Q. Will you look at the plans (handing witness Exhibit P-k). Are those the plans and specifications that he showed you? A. These are the plans, apparently.

Q. Are those the specifications? A. Yes.

- 10 Q. And did you give him an estimate of what it would cost to build such a building? A. I believe we gave him an estimate of the cost except the mason work. There is no mason's specifications here, I have not seen any at any time.

Mr. Kalisch: One moment, I object. It is immaterial, unless the estimate was made also by the mason; it would be immaterial to the Court what only half the estimate was.

- 20 Objection overruled.

Q. What was your estimate? A. I believe, I have no copy with me, but I think it was \$12,000.

Q. Was this the estimate you made at that time? A. Yes.

Q. Is it the one that you sent to Mr. Klemm? A. It is.

Q. What does the estimate purport to be? A. \$12,750.00.

- 30 Q. For what? A. For the carpentry, plumbing, painting, steel and iron, roofing and electrical work.

Mr. Long: I offer that in evidence.

Paper received in evidence and marked Exhibit P-8.

Q. You had no mason's specifications presented to you? A. No.

Q. In looking at those plans, what would you say would be a fair estimate for the mason work?

- 40 A. Well, I couldn't hardly give a price that way.

Alfred Wolters—Direct

I could only guess at it and we are not very good at guessing. I should judge about \$8,000. That's taking the portion of the other work.

CROSS-EXAMINATION by Mr. Kalisch:

Q. It may be more too? A. It is possible, yes.

101

ALFRED WOLTERS, sworn in behalf of plaintiff:

Direct-examination by Mr. Long:

Q. What is your business, Mr. Wolters? A. Architect.

Q. And how long have you been an architect?

A. About twenty years.

Q. I show you these plans and specifications that in evidence. You have seen these before, have you? A. This looks like a copy, or it is a copy of the plans and specifications. 20

Q. Will you look at the specifications? A. I did not see the specifications.

Q. Will you look at them now (handing witness Exhibit P-1)? A. I would have to read over the specifications and I don't know whether you want me to take the time.

The Court: Oh, no.

30

Q. You have examined these plans, have you not? A. Yes.

Q. Did you examine the specifications? A. I have not.

Q. What would you say would be a reasonable charge for the drawing of those plans, and specifications to conform with the plans of such a building? A. \$500.00.

Q. What would you say would be the cost of a 40

Theobald Herman—Direct

building such as those plans indicate? A. I went over the figures, I estimated this building to cost about \$25,000.

RE-CROSS-EXAMINATION by Mr. Kalisch:

Q. Twenty-five thousand dollars? A. Yes.

10

THEOBALD HERMAN, the defendant, being duly sworn, testified as follows:

Direct-examination by Mr. Kalisch:

Q. Mr. Herman, you are a builder, are you? A. Yes.

Q. And you have been in business how long? A. Twenty-three years.

20 Q. You ordered Mr. Klemm to make a plan or specification for you? A. Yes.

Q. And you own some vacant land? A. Yes.

Q. Where? A. Eleventh Street, in the City of Newark.

Q. What is that neighborhood, is it a low class neighborhood?

Objected to.

Mr. Kalisch: The object is to show what sort of a building he wanted to erect there.

30 The Court: Let him tell.

Q. You own property in that neighborhood, do you? A. Yes.

Q. And did you see Mr. Klemm? A. Yes.

Q. For what purpose? A Drawing me up a plan.

Q. For what sort of a house?

Objected to.

40 Q. What sort of a house did you tell Mr. Klemm? A. I wanted him to build a house that would not cost more than \$15,000.

Theobald Herman—Direct

Q. Did you tell him about the renting income of the house? A. Yes, I told him it was a neighborhood where I could not expect more than \$15.00.

Q. How many flats were there to be in that house? A. Nine.

Q. And you figured them at how much? A. \$15,000.

Q. The rental value? A. From \$15, \$14, \$16. 10

Q. Did he draw you a plan or specification or sketch? A. He made a sketch, yes.

Q. Did you look at it? A. I took the sketch and all on Saturday night and me and my two sons looked over it and we decided—

Objected to.

Q. What did you do? A. Looked it over and brought the sketch back again and told him to go ahead with the sketch that he had drawn for me.

Q. Well, did he draw plans according to the sketch? A. No, sir, this is not the plan. 20

Q. You are a practical builder? A. Yes.

Q. And from the sketch that was submitted to you could that building have been put up for \$15,000? A. No, sir.

Q. How much? A. I told him he could not do it. He says he could cut it down and fix his specifications according to it, so it would not come so high.

Q. When was that conversation? A. Right from the beginning. 30

Q. Was it before or after you returned the sketch? A. When I returned it.

Q. When were the plans ready for you, then? A. About a week afterwards I brought the sketch I came back again in the office and wanted to know how far he went with his plans, so he showed me those plans.

By the Court: Q. Which plans? A. These right here. The whole set. 40

Theobald Herman—Direct

Q. Those marked "P-1"? A. Yes.

By Mr. Kalisch? Q. Did you look over them?

A. I looked over the plans, I told him "that is not the plans I picked out for the sketch." He says "I know, but I think they are better than the other sketch." I said "No, I picked out the other sketch, we can not build that house at all for
10 \$15,000." He said "We will fix them up." I said "If you can't fix them up for \$15,000 I can't use them."

Q. Then did you submit those plans to the Tenement House Commission? A. Yes.

By the Court: Q. When? A. Before he had given me the other plans.

Q. What date? A. I don't remember; it was about the middle part of May, 1912.

Q. You submitted to the Tenement House Com-
20 mission, the middle part of May? A. About that.

By Mr. Kalisch: Q. When were they returned to you? A. About two days afterwards.

Q. Accepted or rejected? A. Not accepted.

Q. Did you tell Mr. Klemm? A. I did.

Q. What did he say? A. He says it could be fixed up. I told him "Well, fix the whole house up too."

Q. Did he fix it up? A. No, sir, he found out
30 the house came over \$20,000. I couldn't build them.

Q. Did you build the houses on that lot? A. Yes.

Q. Did you use these plans or some other plans? A. I used some other plans.

Q. Who was the architect? A. Mr. Kleemann.

Q. How soon after the middle of May did you consult another architect? A. About the first part of June.

Q. And from that time on you have built that
40 house? A. Yes.

Theobald Herman—Drect

Q. And what did that house cost? A. \$14,900.00.

Q. Now, Mr. Klemm demanded the money of you, did he? A. He wanted me to pay for the plans.

Q. He did? A. After he found I had another architect.

Q. What did you tell him? A. I told him I 10
would never pay for plans like that, because they were not in accordance with the Tenement House Rules.

Q. Did you tell him anything else? A. I couldn't pay him such a price for anything I couldn't use.

Q. And that you told him right after you got the other architect? A. When he sent the bill he wanted to know if I had used the plans. I told him "No, I couldn't use them." 20

Q. Was that after you had the architect? A. No, he called me up at home three or four times and wanted to know if he should go ahead with the plans and finish them. I told him "No, I couldn't use them." Could not spend \$20,000.

Q. But I mean after you had the other architect were you presented with the bill? A. Yes.

Q. Did you agree to pay it? A. No, sir.

Q. What did you say? A. I told him when I met him on Broad Street. 30

Q. What did you say? A. I told him I had another architect who could draw them for \$50.00 and I could not pay him any such price. I told him it took eight sets of plans to that building, some goes to the building inspectors, some to the Tenement House and each contractor had to have one. That makes six; one had to be on file in the Court House and all I had was one set of plans and one set of specifications which are no good and I couldn't afford to pay him for that. 40

Theobald Herman—Cross

CROSS-EXAMINATION by Mr. Long:

Q. When was it you had the conversation with Mr. Klemm in which you told him you wanted an apartment house built so that the flats would rent for about \$15 or \$16? A. In the beginning—around the middle of May when I ordered the plans, the middle of April.

10 Q. Where did the conversation take place? A. One conversation took place in his office.

Q. This one where you mentioned the price of the flats, in his office? A. Yes.

Q. Now, have you got that sketch that was drawn? A. I brought that sketch back to him.

Q. And did you take it away with you? A. No, sir.

20 Q. Don't you know that these plans that are offered are exactly like the sketch that was given to you? A. No, sir.

Q. You say they are not? A. No, sir.

Q. In what way do they vary? A. I can not say exactly. If he had his sketch here I could tell you.

Q. Do you know anything particular that they differ? A. The rooms all laid out different on this plan, than it was on the other.

Q. Did you tell him you wanted changes made? A. I told him to go ahead with the other sketch, not with this.

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

Q. Did you submit these plans to the Tenement House Board? A. After he had told me?

Q. Yes? A. He thought he could cut them down to \$15,000 but he found out it would cost over \$20,000.

Q. You said they were not accepted? A. No, sir.

40 Q. They were not rejected, were they? A. Marks made, they gave me the slip saying that

Eugene Doser—Direct

they don't conform with the Tenement House Law.

The Court: The tenement house records must be produced to prove anything of that kind.

Q. Did you tell Mr. Klemm afterwards that you had been to the Tenement House Board? A. Yes.

Q. When was that? A. I can't remember, some time in September, in July, I can't remember now just when.

10

The Court: I would not waste much time cross-examining this witness. You may call him again.

EUGENE DOSER, sworn in behalf of defendant: 20

Direct-examination by Mr. Kalisch:

Q. Mr. Doser, what is your employment? A. Inspector of building.

Q. Did you inspect the building—the plans for a building which was to be erected for Mr. Herman? A. I inspected the plans, yes, sir.

Q. Whose plans? A. Mr. Kleeman's. Mr. Klemm's plans were not presented, Kleeman's were.

30

Q. Weren't Mr. Klemm's plans presented by Mr. Herman? A. Not directly to the Building Department. They were shown to me.

Q. You are an expert on buildings? A. Not exactly an expert.

Q. On plans of buildings? A. Yes.

Mr. Kalisch: I offer him now as an expert.

Q. Did you see the plans of Mr. Klemm? A. Yes, Klemm's plans outside of the office.

40

Edgar Leroy—Direct

Q. I don't care if you saw it in Jerusalem. Did you see it? A. Yes.

Q. Did you read them? A. I looked them over, yes.

Q. Were they in conformity with the law?
Objected to.

The Court: He will have to identify the plans in some way.

10 Q. Look at those plans in front of you (plans referred to are Exhibit P-1). See if you find your own marks on that plan. What does that plan show? A. That plan shows plaster block.

Q. That should be what? A. A brick wall.

Q. What does the plan show? A. Shows plaster block partition. That's all I found on the plans, when they were presented to me by Mr. Herman.

20 Q. When such a thing exists in a plan are they passed by the Tenement House Commission, the Building Department? A. They are returned for correction.

Q. Besides that you have nothing else so far as you are concerned? A. Nothing else.

By the Court: Q. When did you see these plans? A. I couldn't remember just the time.

The Court: You needn't cross-examine this witness, Mr. Long.

30

EDGAR LEROY, sworn in behalf of defendant:

Direct-examination by Mr. Kalisch:

Q. Mr. Leroy, what is your position? A. Assistant plan examiner of the Tenement House
40 Department.

Edgar Leroy—Direct

Q. And can you identify these plans (referring to Exhibit P-1)? Look at them? A. There was no mark of identification placed on these plans by me; I can simply say that they appear to be similar to the plans that I saw.

Q. Do you know whether Mr. Herman presented to you plans for the erection of a tenement house? A. He brought in one set of plans some time during January, 1913, with the request that I look them over to let him know if everything was satisfactory from a tenement house standpoint. There was no formal filing of the plans at that time. 10

By the Court: Q. Merely asked you for your opinion? A. For my opinion.

By Mr. Kalisch: Q. Are those the plans (referring to Exhibit P-1)? A. They are similar plans, I can not testify that this is the exact plans. 20

Q. Don't you remember any other plans being filed long before January? A. No, I do not, not a plan made by Mr. Klemm, I have another plan on file by another architect.

Q. You are familiar with what the requirements are of the tenement house buildings? A. Yes.

By the Court: Q. Do I understand you to say that these plans that you think are similar to "P-1" were shown you in January, and a long time prior to that plans had been filed for the erection of a building? A. I don't know how long prior to that of Mr. Kleeman's plans were filed for the building at this location; Mr. Klemm never filed any plans for this building. 30

Q. Nor anyone for him? A. Nor anyone for him. As near as I can get from the date I have here it is January 17, 1913.

By Mr. Kalisch: Q. Do those plans conform 40

Adam Licht—Direct

with the Tenement House Law, except in minor respects? A. Yes.

Q. Were there some errors? A. There were some corrections to be made.

Q. But what was asked of you in January? A. January 17th, as near as I can make this out.

10 Q. You don't know of any plan that was submitted to you in August? A. I certainly do not; not Mr. Klemm's plans.

Q. Are you sure about that? A. Yes, personally I am.

Q. You don't know whether they were filed in the office and returned? A. It is very possible that the sketch may have been submitted, but the plan itself would have to have been criticised by me.

20 Q. You say that it would not be possible that the plans were submitted the latter part of July?

A. A sketch?

Q. A sketch and a plan? A. It is very possible that may have been; that I might not have seen, Mr. Bowerman might have had it.

The Court: You can reserve the cross-examination of this witness.

30 ADAM LICHT, sworn in behalf of defendant:
Direct-examination by Mr. Kalisch:

Q. Mr. Licht, what is your business? A. Builder.

Q. Do you know Mr. Herman? A. I know Mr. Herman, yes.

Q. Do you know Mr. Klemm? A. Yes

40 Q. Were you in the office of Mr. Klemm when Mr. Herman was speaking about a plan? A. I was.

Adam Licht—Cross

Q. Did you hear the conversation? A. I did.

Q. Did you hear what Mr. Herman said to him as to the price? A. I was asked personally about that.

Q. What did you hear, if anything, between Mr. Herman and Mr. Klemm about that? A. Mr. Herman asked me if I could give him an approximate estimate—

Q. I asked you the question; did you hear any conversation between Mr. Herman and Mr. Klemm? A. No.

10

Q. You weren't present then? A. No.

Q. You made an estimate of your own, did you? A. I was asked in the office.

Q. What office? A. In Mr. Klemm's office, by Mr. Herman.

Q. Who asked you? A. Mr. Herman.

Q. And Mr. Klemm was present? A. Yes.

20

Q. What did you say? A. I looked over the plans and I says "How do you want to build that?" I said "That building comes over \$20,000, in rough guess." Mr. Herman said "What do you think that building comes over," that it would not pay him to—

Q. What did Mr. Klemm say? A. Mr. Klemm said the building would come to over \$20,000.

Q. What did Mr. Herman say? A. He couldn't use it.

30

Q. Was anything said as to the price of the building was to cost? A. No, not while I was present.

CROSS-EXAMINATION by Mr. Long:

Q. The plans were all prepared at that time?

A. The blueprint was shown me that morning.

John Herman—Direct

BENJAMIN HERMAN, sworn in behalf of defendant:

Direct-examination by Mr. Kalisch:

Q. Mr. Herman, did you see the sketch which was sent to the Architect Klemm? A. Yes, pop brought it home on Saturday afternoon.

Q. You are in the building business? A. Yes.

10 Q. Look at those plans (referring to Exhibit P-1); were those plans in accordance with the sketches which was sent to Mr. Klemm? A. No, sir.

Q. In what way do they differ? A. Well, I could not just exactly say, but the rooms were laid out different.

The Court: You may reserve the cross-examination of this witness.

20

JOHN HERMAN, sworn in behalf of defendant:

Direct-examination by Mr. Kalisch:

Q. Did you see this sketch that was sent to Mr. Klemm? A. Oh, yes.

30 Q. Just look at those plans (referring to Exhibit P-1). Are those plans in accordance with that sketch? A. No, sir.

The Court: You may reserve the cross-examination of this witness.

Defendant rests.

Raymond Browne—Direct

RAYMOND BROWNE, called in rebuttal, being duly sworn, testified as follows:

Direct-examination by Mr. Long:

Q. You work for Mr. Klemm, do you not? A. Yes.

Q. And how long have you worked for him? A. A little over two years.

Q. Did you see the sketch that was drawn by Mr. Klemm for Mr. Herman? A. Yes. 10

Q. And do you know whether there was any changes as to this plan before you (indicating Exhibit P-1)?

Objected to.

Mr. Kalisch: I object, because it is not relevant. He was notified in Court that he was to produce the original sketch; he says it is lost; he then had an opportunity on the direct case to prove the contents of that sketch. He has testified on that sketch, as to what that sketch contained and what it did not contain. 20

The Court: Your witnesses have testified in an indefinite way that the plans, P-1, did not follow; that sketch it is claimed is the one defendant submitted to the plaintiff. This is in rebuttal of that testimony.

Objection is overruled.

Q. Just look at it. You worked on those plans, did you? A. Yes. 30

Q. And did you make any changes from the sketch? A. The sketch was given to me and to the best of my knowledge it was followed exactly in these here plans.

Raymond Browne—Cross

CROSS-EXAMINATION by Mr. Kalisch:

Q. Will you swear you followed them exactly?

A. Yes, I followed the sketch as submitted to Mr. Herman.

Q. And those plans are in accordance with the sketch? A. Yes.

10 Q. What does the sketch show? A. Do you mean how many drawings and what they are?

Q. What kind of a wall does the sketch show in the hall of the first floor in the building? A. Practically it is not there.

Q. I want you to tell me what it shows? A. As I told you I followed the sketch. I don't recall exactly what the sketch was.

Q. Just exactly what I thought; you can not recall what that sketch was, can you? A. Why, certainly not.

20 Q. And if I was to ask you now of the different plans as laid upon that sketch you could not give it to me, could you? A. Redraw it?

Q. Yes? A. No.

Q. And you don't know whether the rooms were to be one size or another on that sketch according to Tenement House Law? A. Yes.

Q. Don't you know there was a wall there that was not in accordance with the Tenement House Law? A. I don't know.

30 Q. Then, do you think the sketch had it right and the plan had it wrong or the sketch had it wrong and the plan had it right? A. I did not say either way.

Q. Will you swear that the sketch had that wall what it should be under the law? A. No.

Q. Will you swear that this plan is as it should be under the law? A. No.

Q. You merely say to the best of your knowledge and belief that this is what the sketch was?

40 A. Yes.

Defendant's Counsel summed up

Q. You won't swear positively? A. No.

Q. Will you swear there were no changes made on the sketch marked by Mr. Herman himself?

A. There may have been.

Q. Then you don't know whether these changes appear here, do you? A. If there was any changes marked they would appear there.

Q. Do you remember, do you know how Mr. Herman returned that sketch, whether he returned it to the office or sent it, or came there personally? A. I believe personally. 10

Q. Didn't he then show what he had changed on that sketch? A. Most likely he did.

Q. And didn't he say that that would cost \$20,000? A. No, sir, the price was never mentioned.

Q. Didn't he say he wanted a \$15,000 house built?

The Court: This is not cross-examination. He said he followed the sketch. 20

Mr. Kalisch: Mr. Herman says under that sketch a fifteen thousand-dollar house could not have been built; if he followed the sketch, and he says that that could not be built for that amount of money, he could not have followed that sketch.

Mr. Kalisch summed up for defense.

Mr. Kalisch: The preponderance of evidence, as I say, is a matter of law in this case; is on with the part of the defendant showing that he ordered a plan for a house not covering a sum over \$15,000. As a matter of law I say that if the defendant ordered a plan, that the structure should not cost over \$15,000 and the plans were drawn and exceeded a larger amount than the gross sum mentioned, then as a matter of law he can not 30 40

Defendant's Counsel summed up

recover; but if the plans were in violation of any health law, building law, tenement law, I care not whether the same can be remedied or not, if rejected or not accepted, either way, the architect can not recover.

The Court: Will you point out the evidence that these plans were ever officially presented to
10 the Board or Commission?

Mr. Kalisch: In answer I say that it is not necessary to prove it, because an officer who your Honor allowed to testify said that that was an objection to the law. I was somewhat doubtful whether he was entitled to testify to that, but your Honor allowed him.

Then, if your Honor please, the evidence goes further on part of the plaintiff by his own witness testifying that the building would cost \$25,-
20 000. That again, is a matter of law prohibits the plaintiff from recovering, because he himself says that it was \$20,000 showing either incompetency on his part to plan a building at a sum of money which he might be informed he could build it for. Not coming within \$10,000 or his own testimony, not coming within \$5,000.00. His own witness testified \$25,000.

Now, speaking of the first, is it reasonable to believe that Mr. Herman blindly went into this
30 building, to put up a building without telling the architect what it should cost? Was ever a building put up without the owner going to the architect and saying, "I have just so much money to spend on it." Of course we all know a few little extras—but when it goes up to five and ten thousand dollars—it should be right on the plan, and no man would go to an architect and say "Put me up a building" unless it is going to be day's
40 work, and not tell him what it should cost. And

Judge's Certificate

when Mr. Klemm said he didn't say so, I am sorry I must say it is untrue and he knows it. How could he have possibly made specifications if he did not know the price? How could he have possibly made a specification if Mr. Herman did not tell him "I can spend \$15,000." Is it reasonable to believe that he went blindly into it and agreed to whatever it might cost? I think I am entitled to a verdict. 10

Opinion and Judgment of Court

The Court: (Mac Mahon, J.): I find as a fact that no price was mentioned when these plans were ordered. If there is any competent evidence in the case that the plans as ordered, completed and furnished to the defendant did not exactly comply with the law, the deviation is so slight that the alterations could easily have been made; that the architect was given no opportunity even to make the alterations. 20

I believe the plaintiff and do not believe the defendant. I will give judgment to the plaintiff for three hundred dollars and interest.

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Judge's Certificate

I do hereby certify the foregoing to be the true transcript and record of the trial and proceedings in the foregoing case.

Dated, May 5th, 1913.

CECIL H. McMAHON,

Judge. 40

New Jersey Supreme Court

SECOND DISTRICT COURT OF THE CITY OF NEWARK

ROBERT C. KLEMM,

vs.

THEOBALD HERMANN.

On Contract.

On Appeal from Second District Court.

Specifications and the determination and directions of the District Court.

Specification of Reasons

The appellant certifies to the Supreme Court that he is dissatisfied with the determination and direction of the District Court as follows:

The Court determined as a matter of law:

1st. That the architect, the appellee, in this case could recover for services rendered in drawing plans and specifications although the proof was that they were not drawn in conformity with the tenement law governing the erection of buildings in the City of Newark.

2nd. That although the legal proof was that the plans and specifications were not drawn in conformity with the laws governing the erection of tenement buildings and there being no proof that the architect made the necessary alterations or offered to make the necessary alterations, yet

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the Court held as a matter of law that the architect could recover if it was possible that such alterations could be made.

3rd. The Court overruled the questions put to the architect, the appellee, by the attorney of the appellants, as to his knowledge of tenement house law, on the question as to the distance required from wall to wall in halls, and the law on walls distances, although the architect, the appellee testified as to his full knowledge of tenement law, and although he testified that no house could be erected without the tenement law being complied with by the architect.

4. The Court held as a matter of law that the plaintiff the appellee in this case was entitled to recover even though under his own evidence he testified that the plans rejected by the proper authorities can not be followed in the erection of a building.

5. That the Court refused to allow the question to be asked of the appellee as to the law required regarding fire proof arrangement of a tenement house, although the architect had previously testified that he had prepared the plans in accordance with the law.

6. The Court in deciding the case said, "I do not believe the defendant but I believe the plaintiff." The testimony of the defendant and witnesses not being inherently incredible, and the defendant and witnesses not being impeached and the testimony remaining uncontradicted must as a matter of law be considered by the Court, under the rule that every person is presumed to tell the truth particularly under oath, and therefore the arbitrary disbelief of the de-

fendant in this case and his witnesses, as to those matters which were uncontradicted and were not inherently incredible, and they not being impeached, was error in law, with which this appellant is dissatisfied.

THEOBALD HERMANN,
Appellant.

ABNER KALISCH,
Attorney for Appellant.

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