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SUMMONS.

ATLANTIC COUNTY, *ss.*

(Seal) *The State of New Jersey to Constantine S. Cummings, Owner, and Emma Parsons, Executrix of the Estate of Eugene Parsons, deceased, builder:*

You, Constantine S. Cummings, owner and Emma Parsons, executrix of the estate of Eugene Parsons, deceased, builder, are summoned to answer the annexed complaint of T. J. Kelly in an action at law in the Atlantic County Circuit Court in and for the County of Atlantic, in which the said T. J. Kelly claims a building lien on certain buildings and lands of said Constantine S. Cummings described in said complaint. 10

And take notice, that unless you file your answer to said complaint with the clerk of said court, at Mays Landing, New Jersey, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you. 20

Witness, W. FRANK SOOY, Judge of the Atlantic County Circuit Court, at Mays Landing, this 23rd day of December, 1927.

WM. A. BLAIR,
Clerk.

By LENA V. SCHENCK, 30
Special Deputy.

THOMPSON & HANSTEIN,
Attorneys.

COMPLAINT.

ATLANTIC COUNTY CIRCUIT COURT.

T. J. Kelly, *Plaintiff*, v. Constantine S. Cummings, owner, and Emma Parsons, executrix of the estate of Eugene Parsons, deceased, builder, *Defendants.*	Action at Law. On Mechanic's Lien. Complaint.

Plaintiff, T. J. Kelly, of the City of Ventnor City, County of Atlantic and State of New Jersey, says that:

1. At the time hereafter stated defendant, Constantine S. Cummings was the owner of a tract of land upon which he was erecting and constructing a house, which land is described as follows, situate, lying and being in the City and County of Atlantic, State of New Jersey:

BEGINNING in the north line of New Jersey Avenue 395 feet north of Sewell Avenue; thence (1) Northwestwardly, along the north line of New Jersey Avenue 25 feet; thence (2) northeastwardly at right angles to the first course 40 feet to the south line of Snug Harbor; thence (3) southeastwardly and parallel with the first course, 25 feet; thence

(4) southwestwardly and parallel with the second course 40 feet to the place of beginning. Being known as #551 North New Jersey Avenue.

2. That on a date unknown to plaintiff, Constantine S. Cummings contracted in writing with Eugene Parsons, whereby the latter agreed to erect a certain building on the land above described for the said Constantine S. Cummings.

10

3. Said contract was not filed in the office of the clerk of Atlantic County in accordance with the statute hereinafter referred to.

4. That between February 1st, 1927, and October 22nd, 1927, plaintiff sold and delivered to defendant's testator, Eugene Parsons, all the labor and material necessary to sufficiently furnish, install and perform the necessary plumbing and heating work, including the fixtures, in the building above mentioned, for which the defendant agreed to pay plaintiff the sum of $1360.00.

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5. The materials so stated as sold and delivered to defendant were used by him in the construction of said house.

6. Defendant has paid the sum of $500 on account of said indebtedness, leaving a balance of $860.00 still due and unpaid.

30

7. That on a date unknown to plaintiff said Eugene Parsons, died, leaving a last will and testament, which was on December 3rd, 1927, duly probated in the office of the surrogate of Atlantic County, and under the terms of which will letters

testamentary were issued to Emma Parsons, as executrix of his estate.

8. Said indebtedness is a lien upon said building and land by virtue of the provisions of "An Act to secure to mechanics and others payment for their labor and materials in erecting any building (Revision of 1898)" and the supplements thereto and amendments thereof.

10

Plaintiff therefore, demands as damages the sum of $860.00 with interest thereon from October 22nd, 1927, and costs of suit.

THOMPSON & HANSTEIN,
Attorneys of Plaintiff.

[ENDORSED]

20

Service acknowledged for Deft. Constantine S. Cummings, 12/23/27.
Cole & Cole,
Atty.

Service acknowledged for Deft. Emma Parsons, Executrix of Estate of Eugene Parsons, deceased, 12/23/27.

30

John W. Parsons, Jr.,
Atty.

Received Dec. 23, 1927. Sheriff.
I hereby deputize and appoint M. B.

Woodruff, to serve the within writ, witness my hand and seal this 23 day of December, 1927.

James Cimino,
Sheriff of Atlantic Co. (L. S.)

I hereby certify that on December 23rd, 1927, I had Cole & Cole acknowledge service for Constantine S. Cummings and had John W. Parsons, Jr., Esq., acknowledge service for Emma Parsons. 10

James Cimina,
Sheriff.
By M. B. Woodruff,
Special Deputy Sheriff.

Sheriff's fees $8.22.

Filed Dec. 28, 1927, at 9 A. M. 20

William A. Blair,
Clerk.

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ANSWER OF CONSTANTINE S. CUMMINGS.

ATLANTIC COUNTY CIRCUIT COURT.

T. J. Kelly, *Plaintiff,* v. Constantine S. Cummings, *et al.,* *Defendants.*	On Mechanic's Lien. Answer of Constantine S. Cummings.

Constantine S. Cummings of Atlantic City, New Jersey, answering the complaint says:

1. Paragraph 1 is admitted.

2. Paragraph 2 is admitted.

3. Paragraph 3 is denied.

4. Paragraph 4 is denied.

5. Paragraph 5 is denied.

6. Paragraph 6 is denied so far as this defendant is concerned.

7. Paragraph 7 is admitted.

8. Paragraph 8 is denied.

Cole & Cole,
Attorneys for Constantine S. Cummings, Defendant.

Filed Dec. 31, 1927, at 9 A. M.
William A. Blair,
Clerk.

ANSWER.

ATLANTIC COUNTY CIRCUIT COURT.

T. J. Kelly, *Plaintiff,* v. Constantine S. Cummings, *et al.,* *Defendants.*	Action at Law. On Mechanic's Lien. Answer.	10

Defendant, Emma Parsons, executrix of the estate of Eugene Parsons, deceased, residing in the City of Absecon, County of Atlantic and State of New Jersey, separately answering the plaintiff's complaint, says that: 20

1. As to statement in paragraph one of the complaint, defendant has not any knowledge or information thereof sufficient to form a belief.

2. She neither admits nor denies paragraph two of the complaint but puts plaintiff upon his proof.

3. She neither admits nor denies paragraph three of the complaint but puts plaintiff upon his proof. 30

4. She denies paragraph four of the complaint.

5. She denies paragraph five of the complaint.

6. She neither admits nor denies paragraph six of the complaint but puts plaintiff upon his proof.

7. She admits paragraph seven of the complaint.

8. She neither admits nor denies paragraph eight of the complaint, but puts plaintiff upon his proof.

SPECIAL DEFENSES.

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1. Eugene Parsons, deceased, died on the eighth day of October, 1927, and plaintiff has not presented verified copy of his claim mentioned in complaint to Emma Parsons, executrix of estate of Eugene Parsons, deceased, according to the statute in such cases made and provided.

2. Defendant alleges that this action was instituted within six months after the will of Eugene
20 Parsons, deceased, had been probated and letters testamentary granted to defendant and no special leave of Court was granted to plaintiff to institute this action.

JOHN W. PARSONS, JR.,
Attorney of Defendant,
Emma Parsons.

Filed January 11, 1928, at 9 A. M.
WILLIAM A. BLAIR,
Clerk.

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TESTIMONY.

NEW JERSEY CIRCUIT COURT.
ATLANTIC COUNTY.

T. J. KELLY,
Plaintiff,
v.
CONSTANTINE S. CUMMINGS, owner, and EMMA PARSONS, executrix of the estate of EUGENE PARSONS, deceased, builder,
Defendants.

10

20

Before HON. WILLIAM FRANK SOOY, J., and a jury.

Atlantic City, N. J.,

Tuesday, March 5, 1929.

APPEARANCES:
MESSRS. THOMPSON & HANSTEIN (by Mr. Hanstein), for the plaintiff.
MESSRS. COLE & COLE (by Clarence Cole, Esq.), JOHN W. PARSONS, ESQ., for the defendants.

30

(The jury was empaneled and sworn.)

Mr. Hanstein: May it please the Court and ladies and gentlemen of the jury:

This is a mechanics lien suit in which the plaintiff is Timothy J. Kelly, who is engaged in the plumbing and heating business. Now, the suit is brought, as all mechanics lien suits are brought, against the owner of the property on which we did our work, and also against the man who had the contract for the building of the building.

Now, the defendant Mr. Cummings was the owner of a property on North New Jersey Avenue, I think it was, and he entered into a contract with Mr. Parsons, who has since passed away, Mr. Eugene Parsons, for Mr. Parsons to erect a building for him on this lot that Mr. Cummings owned. Now, the contract between Mr. Parsons and Mr. Cummings was not filed in Mays Landing in the County Clerk's office, and the only reason I mention that to you is that if that was filed any subcontractors under Mr. Parsons would not have a right to file a lien, if it was filed, but it was not filed and therefore, any subcontractor who did work on this building as a subcontractor under Mr. Parsons, who was the main contractor, has a right of lien.

Now, we think that we are going to be able to show you that Mr. Cummings had a contract with Mr. Parsons for the building of a house, and Mr. Parsons engaged Mr. Kelly, who, as I said, is the plaintiff in this suit, to put in the plumbing and heating work of that house at the price of, I think, $1360. We will show you exactly by our witnesses what the price was.

Now, Mr. Kelly as the plumbing and heating contractor started in work there and finished his work in, I think it was October or November of 1927—October, I think it was. And we, not having been

paid except $500 on account of this whole bill of $1360, filed a lien for $860, and the purpose of this suit is for us to have you declare, if you believe our evidence, that Mr. Cummings' property is indebted to us for the sum of the amount due to us, and of course, for us to get a judgment also against the estate of Mr. Parsons with whom we had the contract.

Mr. Cole: May it please your Honor and ladies 10 and gentlemen of the jury: We represent Mr. Cummings, the owner of the property sought to be liened. As counsel has told you, our contract was with Mr. Parsons. He agreed to build the house completely and we were to pay him a certain sum of money. We had no contractual relations with Mr. Kelly whatever. We did not know him in this transaction. It is not claimed that we owe Mr. Kelly any money. The claim is that Mr. Parsons' estate owes the money, but as has been said, because 20 the contract was not filed at Mays Landing, that gives a right of lien against our property, even though we settled with Mr. Parsons with whom we had the contract, if it be true that Mr. Parsons owes Mr. Kelly any money and if it be true that this lien claim has been prosecuted accordingly.

Now, we don't know anything about the relation between Mr. Parsons while he was alive and Mr. Kelly, but we have a right, as the plaintiff here is asking to lien our property, to make him prove his 30 case against Mr. Kelly—against Mr. Cummings, I should say, just as much as the Parsons estate has a right to make him prove the amount due.

Now, it is our insistence that there is not as much due from Parsons to Kelly as Kelly claims, and, furthermore, that this lien was filed entirely too late to be operative against our property. But we

stand here asking that we be not required to answer for Mr. Parsons with whom we had the contract unless Mr. Kelly should show by the clear weight of the evidence that he has a right to lien our property, which we deny.

Mr. Parsons: May it please your Honor and ladies and gentlemen of the jury: I represent the estate of Eugene Parsons, and we are taking the
10 position only in this case that we want proof. As you may realize Mr. Parsons has passed beyond, and Mrs. Parsons has been made the administratrix of the estate—I beg your pardon, the executrix of the estate, and we are not in a position to know the facts as they actually are, and we want strict proof of the amount due this plaintiff from the defendant Eugene Parsons. If that is shown and you are satisfied, why of course, we will be satisfied.

20 Mr. Hanstein: I offer in evidence the lien claim.

The Court: It may be marked.

(Lien claim offered is received in evidence and marked Exhibit P1.)

30

TIMOTHY JOSEPH KELLY, the plaintiff, called as a witness in his own behalf, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Hanstein:

Q. Now, Mr. Kelly, you are the plaintiff in this suit, are you not? 10
A. Yes, sir.
Q. And you live where?
A. 108 South Troy Avenue.
Q. And how long—what business are you in?
A. Plumbing and heating business.
Q. How long have you been in that business in Atlantic City?
A. About eight years.
Q. Do you know Mr. Constantine S. Cummings, the defendant? 20
A. Slightly; yes, sir.
Q. Do you know Mr. Eugene Parsons?
A. I do; or I did.
Q. Did you know where the property was located on which Mr. Cummings engaged Mr. Parsons to build a house?
A. I did.
Q. Where was that?
A. 521 North New Jersey Avenue. 30
Q. 551, isn't it?
A. Well, I think there has been a change in the address.
Q. Well, I don't think that is material. Now, did you have any agreement with Mr. Parsons as to doing any of the work entailed in the building of this house for Mr. Cummings?

Mr. Cole: I want an answer yes or no to that. Did you have an agreement? Can be answered yes or no.

A. Yes.

Q. All right. Was it verbal or in writing?

A. Verbal.

Q. All right; will you state what the agreement was ——

10

Mr. Cole: I object.

Q. —— between you and—don't answer it; I will just ask the question—between you and Mr. Parsons relative to your doing the work on Mr. Cummings' property.

Mr. Cole: It is an attempt to show a transaction with the deceased. I am entitled to all the defences
20 in which the estate is entitled.

Mr. Hanstein: I supposed Judge Cole would make an objection, and the proposition is—the question is entirely and properly admissible. Now, the Evidence Act, Section 4, which relates to the testimony of parties to the action in which one of the parties is a representative of a deceased person, that is entirely and solely for the protection of the person suing or being sued in the representative capacity,
30 and that person—that is so clear that the cases hold that that person—that is, the representative of the estate can waive it. And now, the logic of the thing is apparent. It would be if the representative of an estate objected to some testimony which he was not in a position to deny by reason of the decease of the other party to the transaction, he—the law sets up a protection for him, and there is

no question as against a third party, and Judge Cole is representing here a third party, and he is in no different position than if Mr. Parsons were dead and Mr. Kelly testified as to his transaction with Mr. Parsons. He is no part of that transaction.

The Court: Let me see your reading of that section. Have you got the section there?

Mr. Hanstein: I don't think I have the reading of the section here, but I have some citations which I will be very glad to hand the Court. I have Low against D , 91 Atlantic, 321, in the Court of Errors. Messenger against Patterson Saving Institution, 103 Atlantic, 178. And in that latter case the defendant was sued in a representative capacity. The plaintiff answered two questions without objection on his direct examination which related to transactions with the deceased. After the plaintiff had answered the second question, counsel for the defendant objected and moved to strike it out. It was held that the objection came too late, from which it may be concluded—this is our suggestion as to it —from which it may be concluded that failure by the representative to object to testimony incompetent under the Evidence Act, Section 4, is a waiver of the protection of the statute. It is said—the same case at page 179—there is nothing in the Evidence Act which prevents a person who is being sued in a representative capacity from waiving the rule of evidence made for his protection. Now, if your Honor would like—I would like to get you that case.

The Court: There is no objection to this evidence from the Parsons ——

Mr. Hanstein: No, sir.

The Court: But simply the objection of Judge Cole representing the ——

Mr. Hanstein: Owner.

The Court: ——owner.

10 Mr. Hanstein: Now, I would like to get you that case, 103 Atlantic.

The Court: No, I think that is all right.

Mr. Hanstein: Here is the memorandum prepared by one of my associates. I personally haven't read those cases, but I have confidence in what they do.

20 (Hands paper to Court.)

The Court: I will overrule the objection and allow an exception.

Mr. Hanstein: Will you read that question?

(The question was read by the stenographer as follows: "Q. Will you state what the agreement was between you and Mr. Parsons relative to your
30 doing the work on Mr. Cummings' property?")

Q. Do you understand the question, Mr. Kelly?
A. Why, I would much rather you would ask me that again, if you don't mind.

(The question was again repeated by the stenographer.)

A. Why, it was around January 15th of 1927 that Mr. Parsons called me up and said he would like to meet me at 521 North New Jersey Avenue, that he was about to erect a home for Mr. Cummings; said that Mr. Cummings had went to Florida and was going to stay there ——

Mr. Cole: Attempt to bind Mr. Cummings in that conversation?

10

Mr. Hanstein: This doesn't purport to.

The Witness: That he was about to build a home for Mr. Cummings which had went to Florida for the winter, and he had left everything in the hands of Mr. Parsons to erect this home and have it completed for him when he would return in the summer. So Mr. Parsons asked me to look it over and told me just what he wanted in the building and to have plumbing fixtures and radiators, and so forth, and 20 asked me to get a quotation up on it and see him the next day. Which I went home and done. I had been doing work for him for so many years and he paid so promptly that we never ——

Q. Don't go into that. Just talk about this.

A. So, I came back the next day, and different details and so forth, there was a price of $1360, and he told me to go ahead and complete the work.

Q. Now, you gave him a bid of $1360 for doing 30 what?

A. Plumbing and heating, putting in an automatic Marion heater, hot water heater, and paying for the water permit from the center of the street to the curb, which the city installs. The plumbers don't do that, but they pay for it, and that included ——

Q. So that you were to do the complete plumbing job?

A. Yes, sir.

Q. Did you do it?

A. Yes, sir.

Q. And did you complete your work?

A. Yes, sir.

Q. And when was the last work done on that job?

A. Why, in October, 1927, the latter end.

10

Mr. Cole: Pardon me; the question is when was the last work completed on that job?

The Court: Yes.

The Witness: Is that just the question?

Mr. Cole: Yes.

20

The Witness: Well, October 22, 1927.

Q. Now, how much have you been paid?

A. $500.

Q. Who paid you that; Mr. Parsons?

A. Mr. Parsons gave me a check for that.

Q. And how much is due to you?

A. $860.

Mr. Hanstein: Cross-examine. Just a moment. Your answer denied the contract was not filed, but you make no point of that. You admit it was not filed, do you not?

30

It is stipulated on the record that the contract was not filed in Mays Landing.

Now, cross-examine.

Cross-examination.

By Mr. Cole:

Q. Do you keep books?
A. Yes, sir.
Q. Did you keep books with this contract?
A. Yes, sir.
Q. Are the books here?
A. Yes, sir. 10
Q. Produce them, please.
A. May I ——

Mr. Hanstein: Yes, you go get them. I will get them for you.

(Books produced.)

Q. What do you call the books you keep?
A. Well, in this case there was a very small job 20 and ——
Q. Never mind about the job, but what do you call your books—a cash book, ledger, or journal, or what?
A. It is a ledger, more or less. At that time I was keeping them myself. Since then why I have a young lady that takes care of all that.
Q. From January to October, 1927, you were keeping books, were you?
A. What was that again? 30
Q. From January, 1927, to October, 1927, you were keeping the books, were you?
A. Why, the contracts that I had made in 1927 at the first start of it, I completed them myself because I knew the entries, and I completed all those.
Q. What do you call the book you have in your hand?

A. Well, to me it is just a ledger.

Q. You call it a ledger, do you?

A. Yes, sir.

Q. All right. Have you any other record of any kind in connection with this job?

A. Why, no, sir.

Q. That is your only record?

A. On that particular job; yes, sir.

Q. What?

10 A. On that particular job; yes, sir.

Q. Now, sure about that?

A. The only record that I have outside of the records in the City Hall on the plumbing, when the permits were taken out and when I pay for the water permit and things like that. The City Hall has those records.

Q. Yes. D you have any slips from your workmen?

A. Why, no, sir.

20 Q. Did you ever have any?

A. Not on that particular job; no, sir.

Q. You had no slips from workmen at all?

A. No. No, sir.

Q. Who supervised the work?

A. I did.

Q. How many workmen did you have there?

A. Well, just one plumber and one steam fitter.

Q. Just one plumber and one steam fitter. How did you know how many hours he worked?

30 A. Well, you see, this was—it was a very small job, there wasn't really very much to it.

Q. I asked you how you knew how many hours he worked if you didn't keep any books with relation to him.

A. Well, you see I do the estimating myself and —I am trying to answer your question—I do the estimating myself, and of course, I figure so many

days for a plumber and so many days for a fitter, and as I send them over, why, I naturally check up from day to day, and I know if they are either getting behind or and so forth, and if they are getting a little behind I check up and get them to move a little faster, and we get out of there in schedule time.

Q. Now, then, we come back to the question. Did you keep any slips at all of your workmen in connection with that job? 10

A. Not time slips, no.

Q. Did you keep any kind of slips?

A. No slips outside of the payments when they were made.

Q. What payments?

A. Payments that Mr. Parsons gave, cash payments.

Q. How did you pay your workmen?

A. Oh, I pay them every week.

Q. I mean by cash or check? 20

A. Cash.

Q. Now, you want us to understand, do you, that there is no other record of any kind whatever, never was any other record, with relation to this job except that book you hold in your hand?

A. That is all.

Q. That is right, is it? Is that a cash book also?

A. Well, that would be the only record on that job.

Q. I didn't ask you about the record of this job. 30 I am asking you whether that is also your cash book?

A. Crediting different jobs, yes, the cash that comes in.

Q. Have you a cash book independent of that book?

A. Not on that particular job, no.

Q. If you just try to dissociate your mind for the

minute from this particular job and answer me whether you have a cash book, no matter whether it is on this particular job or any other job, independent of this book on your lap?

A. Yes, sir, I have.

Q. Where is that?

A. That is in the office.

Q. Now, what other book is there in the office that you kept during that period aside from your cash
10 book?

A. No other book during that period on that job.

Q. I don't care anything about that job. I want to have this jury enlightened about your system of bookkeeping. I want to know whether you have any other book now at home or abroad, anywhere, other than this cash book you have told about.

Mr. Hanstein: Now, your Honor, I must object, and the objection is I think the question should be
20 directed to the period of time when this job was in progress, not what books he keeps now.

The Court: He says during the period of his job.

Mr. Cole: Your objection is without merit. I am all the time calling his attention to the period of this job, and if he don't understand I will tell him now.

30 Mr. Hanstein: You keep on saying "dissociate your mind from this job."

Mr. Cole: I want him to keep his mind on the period of this job.

Q. Having your mind on the period of this job,

but forgetting this job for the purpose of asking the question, I ask you whether or not you have any other book at home or abroad than the cash book you say is there, except the cash book that is on your lap?

A. No. sir.

Q. Now, I see you have this book open under the name of Eugene Parsons?

A. Yes, sir.

Q. All right. This your writing? 10

A. Yes, sir.

Q. When did you write that in this book?

A. Around that time.

Q. All at one time?

A. No. Added to it at different times.

Q. Look at it and tell me whether you didn't write it all at one time.

A. Well, I wrote it all at one time, to be frank with you.

Q. That is what I want you to be with me. Being 20 frank with me, you admit you wrote it all at one time, didn't you?

A. The items in that book I didn't write all at one time, no, sir, if—if you let—I want to explain something else to you.

Q. I am going to give you full opportunity to explain. Explain what you meant by saying a moment ago that you wrote it all at one time. You had it before you and you said you wrote it all at one time. Explain that. 30

A. I knew this book was coming up in court, and the original slip that had all these items on I generally scratched quite a few notes on them, and it didn't look very clean, and so you could read it very plainly and all those notes wouldn't be on there, I just politely wrote it out so it would look better.

Q. You put in that book all at one time from cer-

tain notes that you had with respect to this job, didn't you?

A. No, I just copied it from another ledger sheet the same way.

Q. Where is the other ledger sheet?

A. In my office.

Q. Well, I would like to have that here. I thought you said you had no other book than this that is the cash book.

10 A. Just a separate slip. I thought perhaps you would want to read it, and being all scratched up and everything ——

Q. You still have it?

A. Oh, certainly.

Q. We would like to see that. Can you send for it?

Mr. Hanstein: Can you call up and have them send it down?

20

The Witness: It is way down in Ventnor, 108 South Troy.

Q. You thought it would be nicer if you had a clean sheet?

A. I thought it would be nicer to read and you would not have a scratched up sheet.

Q. You are going to give us that sheet, are you?

A. Oh, certainly; yes, sir.

30 Q. Now, I notice there are no dates on this at all except the date of the contract, is it?

A. Read the back; there is notes on the back.

Q. Oh. I see. Now, you have some notes on the back. "Started work February first, 1927; finished work October 22, 1927." Now, when did you write that?

A. That was just copied from the other.

Q. When did you write that?

A. That there? That was written today but the original items were written long ago.

Q. Won't you please—we have got plenty of time —wont you please tell me when you wrote that in that book?

A. The "February first" was written the day we started the job and "October 22" was written in there the day the man who finished the job ——

Q. You mean to say that on the page where Mr. Parsons' name is you wrote that all at one time, didn't you? 10

A. No, at different times. And as the case came along—the progress of the work was written on there as the progress went along, when we started the job.

Q. Have you got a sheet somewhere besides this one where you say when you started or finished?

A. Yes.

Q. Where is that? 20

A. That is the same sheet. I only made it plain so you would not have those notes and scratches.

Q. "Started suit for balance of moneys; case in the hands of Thompson and Hanstein." When did you write that?

A. At the time I went up to Mr. Hanstein to have the case—to lien the building.

Q. Didn't you write all that at the same time?

A. Oh, no, sir; certainly not.

Q. Sure about that? 30

A. Certainly.

Q. But it is all your handwriting, isn't it?

A. Yes, sir.

Q. Now, you got the sheet from which you copied what you put on these two pages?

A. I have the original sheet, yes, sir.

The Court: And that which is on this sheet here which was copied, you copied all at one time?

The Witness: That is it. I wanted to make it look a little better, as I said.

Q. I don't care about that. The answer is you wrote it all at one time; is that so?

A. This here. But the original items on my other
10 ledger sheet was written in the progress of the work.

Q. But I want to know surely now so the jury will understand. Do you mean the jury—withdraw that. Did you write on the second page what is on there all at the same time?

A. No, sir.

Q. Then, when did you write that?

A. During the progress of the work, when things happened on the job.

20 Q. Well ——

Mr. Cole: I want to offer this book.

(Book offered is received in evidence and marked Exhibit D1.)

Q. Do you remember asking Mr. Cole to collect this claim against Mr. Parsons?

A. Yes, sir.

30 Q. And do you remember that I wrote Mr. Parsons?

A. Why, I ——

Q. Do you remember I wrote Mr. Parsons for you?

A. No, I don't remember that.

Q. Do you remember I wrote you afterwards?

A. You remember ——

Q. Pardon me. Do you remember that after you were in the office and asked me to collect this claim against Mr. Parsons that I wrote you a letter about it?

A. Yes, sir.

Q. Have you that letter?

A. Why, no; I don't.

Q. You were asked to produce it, weren't you?

A. Why, yes, sir.

Q. Why didn't you do it? 10

A. I lost the copy.

Q. Lost it?

A. Yes, sir.

Q. When did you lose it?

A. Why, I don't think I ever bothered saving it. I should but I didn't. I thought perhaps ——

Q. When was it that you came to the office of Cole and Cole to ask them to collect this claim?

A. I don't recollect the date.

Q. Now, I show you what purports to be a copy 20 of a letter from Cole and Cole to you under date of August 17, 1927, and ask you to read that and tell me whether you received the original of which that is a copy? (Shows paper to witness.)

A. Shall I read this?

The Court: No.

Q. You don't have to read it aloud. Read that and tell me whether you received the original of 30 which that, I say, is a copy.

A. I received a letter from your office; I remember that.

Q. Did you receive the original of that letter?

A. The original isn't here; I don't know what it is. You say, "Dear Sir: We have yours of yesterday ——"

The Court: Don't read it.

Q. Don't read it.

The Court: Is that a copy of a letter which they sent to you?

The Witness: Well, that has been two years ago; I wouldn't say.

10

Q. Do you deny you did not receive it?

A. No, I know you sent me a letter.

Q. Is that a copy of it?

A. Well, exact copy I won't say, but I know you wrote me a letter that you were trying ——

Q. Was it about that date, August 17, 1927?

A. The date I wouldn't say, to be sure. I wouldn't swear to that. I don't remember the date.

Q. You don't deny you received it, do you?

20 A. I received a letter from Mr. Cole stating that they were trying to get payment.

Q. All right, then, read that now and see if that is not what I wrote you in the original.

A. I wouldn't say to that. I know I received a letter; I will admit that.

Q. Have you hunted for the letter, the original?

A. Yes, sir.

Q. When did you hunt for it?

A. Yesterday.

30 Q. And couldn't find it?

A. No.

Q. And you are not willing to admit that is a copy of it?

A. It has been so long ago I couldn't remember what was in it exactly.

Mr. Cole: Mark that for identification.

(Paper referred to is marked Exhibit D2 for identification.)

Q. Give the jury your best recollection of when it was you placed this claim against Mr. Parsons in the hands of Cole and Cole for collection.

A. I wouldn't have the dates, the months, right.

Q. Did you hunt for a letter from Cole and Cole to you under date of August 30, 1927?

A. Yes, sir. 10

Q. Did you find that?

A. No, sir.

Q. You received it, didn't you?

A. I could tell you better if I look. I received some mail from you.

Q. I show you what purports to be a copy of a letter from Cole and Cole to you under date of August 30, 1927, concerning this claim against Parsons, and ask you to read that and say if you received the original? (Shows paper to witness.) 20

A. Yes, I received a copy of this.

Mr. Cole: I offer that—mark it for identification.

(Paper offered is marked Exhibit D3 for identification.)

Q. Now, you are very clear about receiving that, aren't you?

A. Yes, sir. 30

Q. And was your recollection helped about receiving this in the fact that this time you are making a claim against Mr. Cummings rather than against Mr. Kelly—I mean against Mr. Parsons?

A. Why, Mr. Parsons owed me the money.

Mr. Cole: Read the question.

(The question was read by the stenographer.)

Q. What is the answer to that?
A. Won't you read that again?

(The question was read by the stenographer as follows: ("Q. And was your recollection helped about receiving this in the fact that this time you are making a claim against Mr. Cummings rather
10 than against Mr. Parsons?")

The Court: If you don't understand the question, say so.

A. To explain—answer that question I would have to ——

The Court: No. Either answer it yes or no or say you don't understand it.

20

The Witness: Well, I don't really.

The Court: Then don't try to answer it.

Q. When did you place this claim against the Parsons estate and Cummings in the hands of Thompson and Hanstein?
A. Sometime in the first part of July we talked it over.
Q. When did you first place this claim in the hands
30 of Thompson and Hanstein for collection and suit?
A. In—shortly after I finished up the last of the work.
Q. I want you please to give me the month and the day, if you can.
A. In the first of December. That was around the first day of December.

Q. Had you placed this claim in the hands of Thompson and Hanstein in July before you placed it in the hands of Cole and Cole? I am talking now about the claim against Mr. Parsons. Keep that in your mind.

A. Well, to answer that question I will have to go into something else also.

Q. All right.

A. I think I should have that opportunity.

Q. I am asking you whether you placed this claim 10 against Mr. Parsons in the hands of Thompson and Hanstein before you placed it in the hands of Cole and Cole. You can certainly answer that yes or no, can't you?

A. Well, I took it up with Cole and Cole, knowing that they were Mr. Cummings' attorneys, before I went to Mr. Hanstein.

Q. Then, when did you place it in the hands of Thompson and Hanstein?

A. Right after I—about two months after I 20 finished up the balance of the work. That was in December first.

Q. What was the greatest number of men that you had working on that job at any one time?

A. Never more than four.

Q. When did you begin the work?

A. Around February first, 1927.

Q. How many men did you have on the job at that time?

A. Just one plumber. 30

Q. When did you put more than one on?

A. Why, after the brick work begin to round

Q. When with relation to the months and days?

A. Well, days, I couldn't really say the days.

Q. What month was it you put more men on?

A. Well, now, I wouldn't say that. During the progress of the work.

Q. Have you any record whatever to show the number of men and the days when they worked on this job?

A. No, sir.

Q. How many men did you have working on the job in July?

A. There was always one man there during the
10 progress of the work, from start to finish.

Q. During July?

A. Well, now, I won't say exactly. You see we have to put men on there as the work progresses.

Q. I am trying to get information. I want to know how many men you had working on this job in July, if you know.

A. Well, I couldn't really tell you. There is never more than one. It is only a small little job.

Q. Was the building completed by Parsons when
20 you completed your work?

A. Why, after we thought the job ——

Q. Pardon; won't you please answer the question? Was the building completed by Parsons when you completed your work?

A. Why, no, I didn't complete mine until, oh, two or three months after Mr. Parsons was out of there.

Q. Now, did you make or lose money on this job?

Mr. Hanstein: I object to that. I don't see how.
30 that is ——

Mr. Cole: I think it is quite a crucial question as to when this work was completed.

The Court: I don't see the question whether he made or lost money on it has anything to do ——

Mr. Cole: It has this to do. To find out whether in point of fact he ever kept any record of this work at all, and if he did where is the record.

The Court: Well, he says he didn't keep any record. I will sustain the objection.

Mr. Cole: Allow me an exception.

The Court: Yes. 10

Q. Did Mr. Parsons refuse to pay this bill?
A. No, sir.
Q. Did you know that in response to a letter that I wrote you he refused to pay it?

Mr. Hanstein: Now, I object to that. I don't think that has any bearing on it. Not proper cross-examination.

20

Mr. Cole: As the owner of this property we have a right to all the defenses that Mr. Parsons is entitled to have. Can't lien our property unless they show an indebtedness. And we are therefore entitled to examine him with a view of trying to show there was no indebtedness and he knew it and that Parsons told him there was none.

The Court: I will permit you to show Parsons told him there was no indebtedness, but whether he 30 knew that Parsons had told some one else there was no indebtedness seems not to cover it.

Mr. Cole: Exception.

The Court: Yes.

Q. Did Mr. Parsons tell you that he owed you $900 less $500, and that he didn't owe you that until you had finished some work for him in Absecon?

A. No, sir.

Q. Did you have any work to do for him in Absecon?

A. Why, yes, sir.

Q. What was it?

A. I done his own private home over there.

10 Q. And was that during the progress of the work for Cummings?

A. No, sir.

Q. Before or after?

A. Before.

Q. The Absecon work was before?

A. Yes, sir; that was ——

Q. Yes, and you said I believe that Mr. Parsons had always been very prompt in paying his bills?

A. Yes, sir.

20 Q. You have on the book here, "is very good."

A. Very good, yes, sir.

Q. Did you submit a bill to him for this balance?

A. Why—no.

Q. Did you submit a bill to him for this balance?

A. No—I didn't have to because he had that in his own record.

The Court: That is not an answer. Read the question.

30 (The question was read by the stenographer as follows: "Q. Did you submit a bill to him for this balance?")

The Court: Yes or no.

A. Yes, I submitted a final bill to him.

Q. Now, just now you said you didn't. Which is correct?

A. I sent a bill to him when the ——

Q. You say you submitted a final bill. What do you mean by that?

A. When the building was all finished.

Q. When did you send him a bill?

A. Shortly before Mr. Parsons died.

Q. When was that?

A. Why, I don't have the records. 10

Q. That was after this suit was brought, wasn't it?

A. I couldn't answer that.

Q. Have you any record of having sent him a bill?

A. No record of it; no.

Q. You sent him a letter?

A. No. Shortly before he died, after I received a letter from Cole and Cole stating that—in your letter that he didn't owe me that moneys, I went over to see Mr. Parsons. He was very sick, And 20 he told me that he even had me credited with more than I claimed, and he said, "I have it in my records here that you will get every dollar that is coming to you." And I had good reason to believe so.

Q. Now, you say Mr. Parsons—withdraw that.

Mr. Cole: Please read that answer.

(The answer was read by the stenographer.)

30

Q. Now, is this letter of August 30th, which has been marked and which you say you received, the one to which you refer that Mr. Parsons denied that he owed you the money?

A. Yes.

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

A. That is the letter I received from Cole and Cole.

Q. Exactly; telling you that Mr. Parsons had denied he owed you the money?

A. Yes, sir.

Q. And in response to that you went to see Parsons?

A. I did.

Q. How long after you received this letter?

10 A. Well, now, I wouldn't say how soon. As soon as I got to it. I was very, very busy, and he lived away over in Absecon.

Q. Now, you have no idea how long it was?

A. No, sir.

Q. Who were the last men to work on that job?

A. Mr. Joseph Harrod, a steam fitter.

Q. Is he here?

A. Yes, sir.

Q. Where does he live?

20 A. He lives in Park Avenue, Pleasantville.

Q. Were you there when he finished up?

A. Why, the day—no. He called me up the day that he finished up.

Q. What was the work that he did on the day that he finished?

A. To answer that question I will have to ——

Mr. Hanstein: No; just tell them what he did.

30 The Witness: Why, he went out there at the request of the owner. He drained the heating plant down. Took a radiator valve off—a radiator ell off and put on a radiator valve. Put on some floor plates, and adjusted some leaking spigots and things throughout the building. I guess he was there, and a helper, about a day.

Q. Did you see him do it?

A. Why, I sent him out there.

Q. Did you see him do the work?

A. No, I didn't see him do the work.

Q. All right. Now, what date was that?

A. Around the latter end of October. I think it is somewhere around the 22nd or 23rd, somewhere there.

Q. Have you any record of that?

A. Outside of the book—yes, I was keeping tabs on the job. 10

Q. Where is that record?

A. That is in the ledger that you have here for file. That is in that October 22, that date is in the book there.

Q. Have you any record that this man that you have just named worked on that job on October 22nd?

Mr. Hanstein: He just answered. 20

Mr. Cole: I don't think he did. If you don't mind I will ask him again. If you want to object

——

Q. I want to know if you have any record that that man by name in any book, worked on that job in October 22nd?

A. Only in the ledger. I put it in there for a purpose—I put in there —— 30

Q. When you came to the office of Cole and Cole to get them to collect the money from Parsons, it was due you, wasn't it?

A. Not all of it; no. I hadn't completed my work at that time.

Q. And you were making a demand in August,

1927, to Mr. Parsons to pay you for work that you had not yet completed; is that so?

A. Yes; I was protecting myself, yes.

Q. By making demand for money that was not yet due; is that right?

A. Well, if I demand ——

Q. And you were protecting yourself by making a demand on Mr. Parsons when the money was not due you?

10 A. It was due me all right.

Q. Well, now, just now you said it was not. Was it or wasn't it?

A. It was due.

Q. Very well. And it was due you in August, 1927, wasn't it?

A. Not all of it. Just the trimmings up. Floor and ceiling plates and things like that we have to put on at the finish.

Q. How much of this money was not due you in

20 August, 1927?

A. To be frank, there was more due than I claimed because I done plenty of extra work and I didn't charge Mr. Parsons, to help him out.

Q. Extra work on your books?

A. No, I didn't charge him for it because when Mr. Cummings came back from Florida nothing suited him.

Mr. Cole: I object to this.

30 The Court: Yes.

Q. Now, tell us, please, just what you say that you did under this agreement you had with Mr. Parsons.

A. Oh, I installed the heating system, less a gas fire boiler which he bought from the Gas Company

himself. I installed the plumbing throughout the building, and also a water service from the center of the street to the curb, which I paid the city of Atlantic City $30 for.

Q. Now, was there no writing at all passed between you and Mr. Parsons?

A. No, sir.

Q. No letter?

A. No, sir.

Q. Every thing by word of mouth? 10

A. Yes, sir.

Q. Were there any plans or specifications for you to work by?

A. Why, just what he told me. He had all ——

Q. Did you have any plans and specifications to work from?

A. Why, they had a building plan, yes; the ordinary building plan.

Q. Did you work by that plan?

A. Well, we cannot very well work with that. We 20 have to do what the builder tells us; the different class of fixtures and radiation, he has to tell us about that, because some owners like built-in tubs and some corner tubs. And the fixtures are altogether different. We have to work from what he tells us he wants.

Q. Was there somebody working on that job every day except Sunday from the time you began until October 22nd?

A. No, sir.

Q. What was the period during which nobody was 30 working on the job?

A. Well, that I couldn't say. We don't keep a record ——

Q. Why can't you say?

A. Well, because we don't keep a record of that; it is not necessary in small jobs.

Q. How do you know there was a period when nobody was working on the job?

A. I know if I had a man on there that long I would not be a good business man to do a job of $1360 if I had mechanics there that length of time.

Q. Exactly. Now, Mr. Kelly ——

A. Yes, sir.

Q. How long was it before October 22nd that you did not have any men working on that job?

10 A. That I couldn't say.

Q. Had you practically finished that work on August 17th when you placed the claim in the hands of Cole and Cole for collection?

A. Why, no, we had changes to make after that.

Q. Then, you had not practically completed it?

A. It was completed according to the contract, but when Mr. Cummings ——

Q. Just a moment.

20 Mr. Cole: Read that.

(The answer was read by the stenographer.)

Q. You mean your contract with Mr. Parsons?

A. With Mr. Parsons; yes, sir.

Q. That was completed on August 17th?

A. Not altogether completed, no. Practically.

Q. Practically completed.

A. All but the general cleaning up. We can never 30 complete a job until every one else is off, and generally it takes a month after that before the plumber can complete his work, because they have to lay hardwood floors.

Q. When did you first find out that the question of whether this lien was filed in time arose?

Mr. Hanstein: What is that question?

Mr. Cole: I withdraw it. I think it is somewhat ambiguous.

Q. Did you know before you came in here today that it was going to be claimed that this lien was filed too late?

A. Why, no, sir.

Q. Find it out for the first time today, did you?

A. Yes, sir.

Q. You were told by your counsel to produce these letters, weren't you? 10

A. I had a letter from him, if I had any correspondence between your office and mine, to produce them.

Q. And were you told by your counsel that there was going to be a question raised as to whether you had filed this lien in time?

A. Do you mind asking that again, Mr. Cole, please? 20

Mr. Cole: Read it to him.

(The question was read by the stenographer.)

A. No.

Q. Now, wasn't it because you knew that there was going to be a question raised whether this lien was filed in time that you made this nice, clean sheet and put on it here, "Finished work October 22, 1927"? 30

A. No, sir; that was just a record of the job that I always keep.

Q. Well, you have said first this work was completed on August 17, 1927. But you did something more for Mr. Cummings?

A. No, I didn't do—what we call completed is not completed. We never can complete ——

Q. Didn't you start to say ——

Mr. Hanstein: Let him finish.

The Witness: We can never complete ——

Mr. Cole: He don't answer my questions.

The Witness: After the building is done, we are
10 never completed until maybe thirty or sixty days after.

Mr. Cole: I object. Let him answer my question.

The Court: Yes.

Q. Didn't you start to say after you had answered a question and said the work was completed on
20 August 17th, "except something that I did for Mr. Cummings"?
A. No, I didn't say that.

Mr. Cole: Won't you be kind enough to go back and see what he did say?

(The testimony was read by the stenographer as follows: "Q. Then, you had not practically completed it? A. It was completed according to the
30 contract, but when Mr. Cummings ——")

Q. What were you going to say when you said, "When Mr. Cummings"?

Mr. Hanstein: Let her read what follows that, after that.

Mr. Cole: She did.

Mr. Hanstein: She didn't read what followed after where she stopped.

(The testimony was read by the stenographer as follows: "Q. Then, you had not practically completed it? A. It was completed according to the contract, but when Mr. Cummings ——Mr. Cole: Just a moment.") 10

Q. You started to say, when I interrupted you, "When Mr. Cummings." What were you going to say?

A. When Mr. Cummings returned from Florida, the radiators under the—he didn't like the radiators underneath the windows, he wanted them taken out and he wanted wall radiators put in around a bay window in the back, and he wanted this door out and that door out, and he wanted sun glass in there, the 20 sun couldn't come through; and he tied up the work for two or three months more to complete the work to his satisfaction.

Q. Then, the work you did after August 17th was done for Mr. Cummings, wasn't it?

A. No, it was not.

Q. Didn't you just say he asked you to make those changes?

A. He didn't ask me. He asked Mr. Parsons, and Mr. Parsons in turn took that up with me. 30

Q. Certainly if you knew that your work was not completed on the 17th of August, 1927, you would not have made demand on Mr. Parsons to pay for that work, would you?

A. It is in the trade; they generally pay everything or hold—when you have to put in your final bill for the full amount, anything that is coming to you,

whether fully completed or not, you make a demand for it; and we guarantee our work for a year, and sometimes in the course of a year it takes us two or three hundred dollars to complete our work which we have to go back on, and that is always understood with good builders and people that take care of their work after that time. I have spent five hundred dollars on other jobs in a year after we have been completed and paid.

10 Q. Now, whom did you have working on that job after August 17, 1927?

A. Why, I had a Mr. Gross and—a young helper, and I had Mr. Harrod and a Mr. Seeley.

Q. What days did they work on the job after August 17th?

A. Now, I don't exactly have the days and dates.

Q. You made no record?

A. Why, if we did I would have to have the girl on the job every day all day.

20 Q. Did you make any record of the days they worked there?

A. Not the days and dates; no.

Q. You expected to file a lien against this property, didn't you, if Mr. Parsons didn't pay you?

A. Well ——

Q. Did you or didn't you?

A. If he didn't pay me, I have to protect myself, certainly.

Q. And you always expected to file a lien on this 30 property if Mr. Parsons didn't pay you?

A. Not always, no. I never had that idea until near the finish.

Q. How did you come to get the idea?

A. Well, when Mr. Cummings come back he found so much fault and trouble with everything Mr. Parsons had done that I knew there was going to be

trouble or a lawsuit at the finish, so I politely protected myself, which I have a right to do.

Q. Certainly; I am not finding fault with you for that. You knew that you had to file a lien within four months from the time you completed the work?

A. No; this is my first court case.

Q. You didn't know that this work had to be—that this lien had to be filed in four months from the time you completed your work?

A. Not familiar with that. That is my first case. 10

Q. You don't know that now, do you?

A. Not looking into it, no. I couldn't say—because I have heard different contractors talk at different times about it—I have been pretty fortunate on my work.

Q. Are you going to bring the papers up, all the other papers you have in connection with this case?

A. Yes, sir.

Mr. Cole: That is all. 20

Re-direct examination.

By Mr. Hanstein:

Q. So, that there is no misunderstanding, will you just state now, so that Judge Cole will know it before you leave here today, what papers you are planning to bring? I don't want you to promise to 30 bring in something you have not got.

A. Just a copy of the original copy of the ledger.

Q. You promise to bring the original paper from which you copied this. Now, do you have anything else?

A. Nothing else.

Q. Do you have those letters he has been talking about?

A. No. Only the original copy of the ledger.

Q. He asked you if your counsel did not ask you to bring some letters in because he, Judge Cole, wasn't going to contend the lien was not filed in time, or something like that. How did my office—I know I didn't get in touch with you—how did my office communicate to you you were to bring up some
10 letters Judge Cole wanted?

A. Why, just sent me a letter asking me if I had any correspondence between the office, kindly bring it in. Well, I didn't have any.

Q. Do you have that letter with you?

A. I do not. It is home on the desk. I don't think so. One second. Perhaps I have. I doubt it, though. No, I don't.

Q. You don't have it?

A. No.

20 Q. Well, all you promise to bring up now is this ledger?

A. That is all.

Q. The original ledger entry. Now, the letter that my office sent you didn't say he was going to make a point that the lien was not filed in time?

A. No, sir.

Q. Now, Judge Cole has asked you questions about this sheet and sometimes it seemed to me you were answering him about this sheet and sometimes
30 about the original of it. Let us straighten it out once for all. Every single word written on this sheet that is in the book now you wrote at one time; is that correct?

A. No, sir. I ——

Q. On this sheet?

A. Oh, on that sheet; yes, sir. On that sheet, yes, sir.

Q. This sheet that you brought to court was written at one sitting?

A. Yes, sir.

The Court: Front and back?

The Witness: Yes, sir.

Q. Front and back. And the sheet from which you copied these is the sheet that you wrote on at various times? 10

A. That is it.

Q. Now, we are clear on that. All right. Now, then, did you keep a cash book at the time that you were doing this work?

A. No, sir.

Q. You did not have a cash book in your system. You were doing all the bookkeeping yourself?

A. Yes, sir.

Q. Now, I understand you have a young lady who keeps your books; you have a regular system? 20

A. Regular system now.

Q. You didn't have it then?

A. I didn't have it then, no, sir.

Q. All right. Now, as I understand it you had this contract for the doing of certain work?

Mr. Cole: I object to that. Very leading. And it is not re-cross. It is leading.

30

Mr. Hanstein: Well, I don't think it is going to be very harmful; and besides, I am not finished.

Mr. Cole: Better let me ——

Mr. Hanstein: Whether it is finished or not?

Q. What I want to find out from you, Mr. Kelly, is this: At the time you went in to Judge Cole's office about this bill—no, what I want to find out is this: After you went in to Judge Cole's office, you did certain work on this job, didn't you?

Mr. Cole: I object. That is very leading.

Mr. Hanstein: My heavens! You brought it out
10 twenty times.

Mr. Cole: You are leading.

Mr. Hanstein: Well, it may be a little leading.

Q. Well, did you do work on this job after you had been to see Judge Cole?

A. Yes, sir.

20 Q. All right. Was that work done at the request of anybody?

A. Of Mr. Cummings' secretary.

Q. All right. And was there anything up till the time you went back to do that work—had your people been working continuously on the job?

A. We were back and forth on minor complaints, yes, sir.

Q. All right. So off and on you were going back and forth?

30 Mr. Cole: I object; leading.

Mr. Hanstein: All right; I won't lead him.

Mr. Cole: If you want to testify, go ahead.

Mr. Hanstein: I am not going to testify, Judge,

and I am not going to ask a question you don't want asked.

Q. Now, this work, before you went into Judge Cole's office had you completed the contract at that time?

A. No, sir.

Q. Had not completed it at that time?

A. No, sir.

Q. Did you receive any complaints about the work after that time? 10

A. Why, yes, from Mr. Cummings' secretary.

Q. Yes. And did you go back and do this work?

A. We done it at her request, we went back and done just what she wanted.

Q. Did you make any charge for doing those things?

A. No—that was in the original contract. She complained about ——

Q. What she—you mean that that work —— 20

Mr. Cole: I object to what she means. Let the jury decide that. You know how to ask questions properly.

The Court: The question was not answered, anyhow. The question was, "Did you make any charge for that extra work." That was the question and it was not ansyered.

Mr. Hanstein: I did think he answered it. 30

The Witness: No, I didn't make any charge.

Q. You did not make any charge for that extra work?

A. No, sir.

Q. Did you make any extra charge for the work that you did on October 22, 1927?

A. No extra charge.

Mr. Cole: I object; irrelevant and immaterial whether he did or not. It is not re-cross or re-direct.

Mr. Hanstein: Well, I think it is.

10 The Court: It has been answered. I won't strike it out.

Mr. Hanstein: I didn't hear the answer.

(The answer was read by the stenographer, as follows: "No extra charge.")

Mr. Hanstein: That is all.

20 Mr. Cole: I want to ask a question or two I overlooked.

Re-cross examination.

By Mr. Cole:

Q. Mr. Kelly ——

A. Yes, sir.

Q. I am going to ask you a question. If you don't
30 understand it, will you tell me so?

A. Yes, sir.

Q. All right. When did you first begin to write in this book?

A. That I couldn't answer. That has been, that book has been in the—down the place with those in there for him three years or more, and since I have

had a new bookkeeping system I only have to go back to it for jobs previous.

Q. Well, I look this over and I cannot find but two other entires in it except the one you have made against Mr. Parsons.

A. I took those all out of there because I don't want my records going around any way. They are loose leaf, and I took those all out of there, and they are down the office.

Q. You didn't take them all out because there are a couple here. Why did you leave them? 10

A. Maybe I missed them.

Q. What you tried to do was to take everything out of this book except the charge against Parsons?

A. Well, I don't want my books up here, leaving them around.

Q. Is that what you tried to do, take everything out of this book except the charge against ——

A. Certainly not. They are loose leaf ledgers, and when the job is completed you take them out of that. I don't want my books laying around so every one can read them on all my customer's business. 20

Mr. Hanstein: Just answer his questions.

The Court: Yes.

Q. Now, I will ask you again. Didn't you say a moment ago that you undertook to take out of this book all of the accounts that you had in it except the account against Parsons? 30

A. No, sir.

Q. Did you take any of them out?

A. Work that was completed.

Q. Well, now ——

A. I don't think you have ——

Q. Isn't the work completed in the two cases you left the sheets in, or is that still open?

A. That has been all paid.

Q. Well, why did you leave it in there?

A. I guess I slipped up on that.

Q. That is what you say, you slipped up on not taking those out?

10 A. Why, no, these here is paid.

Q. Had it occured to you you slipped up on this day when you finished this work?

A. No.

Q. Sure about that?

Mr. Cole: That is all.

Mr. Hanstein: That is all. You come back to-morrow morning with the papers.

20

Joseph A. Harrod, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Hanstein:

30

Q. Mr. Harrod, where do you live?

A. 133 East Park Avenue, Pleasantville.

Q. And for whom—by whom are you employed?

A. T. J. Kelly.

Q. Still employed by him?

A. Yes, sir.

Q. Were you employed by him in 1927?

A. I was.

Q. Did you do any work on the Cummings job?

A. I did.

Q. I am talking about the Cummings job on North New Jersey Avenue.

A. Yes, sir.

Q. Will you state when was the last date you worked on that job?

A. The latter part of October, 1927. 10

Q. Latter part of October, 1927. All right. What date—what work did you do there?

A. Why, there was a radiator ell on a wall radiator, I changed that into a valve, put a valve on there at the request of Mr. Cummings' secretary. And I put a couple of floor plates on, and I believe I done something up in the bathroom, put a curtain stop or something on. Of course, I had to empty down the system to do that.

Q. I was just going to ask you. How long did 20 you work doing that work?

A. Well, I judge I was there two-thirds of the day.

Q. About two-thirds of one day?

A. Yes.

Q. And that date, was it October 22, 1927?

A. I couldn't say whether it was the 22nd, but it was in October. I give Mr. Kelly the date when I turned the job in.

Mr. Hanstein: All right. Cross-examine. 30

Cross-examination.

By Mr. Cole:

Q. Why did you empty the system?

A. Why, I couldn't take the valve off—the ell off without emptying the system; run all over the place.

Q. Was it a hot water plant?
A. Yes, sir.
Q. Was it working?
A. Yes, sir.
Q. Was the heat in it?
A. No, sir.
Q. What did you do, empty the water?
A. Yes, sir, emptied the water out of it.
Q. Then it had been filled, the system?
10 A. Yes, sir.
Q. When was the system filled?
A. When you start the fire up, the other steam fitter—I don't know.
Q. When was the last time you were there before October 22nd?
A. I judge about six weeks previous to that.
Q. Well, you judge. Do you know?
A. Well, I don't keep it down.
Q. Did you keep a record of the time?
20 A. No, sir; I did not.
Q. Sure about that?
A. Yes, sir.
Q. But this day you went up and you found the system filled for working?
A. Yes, sir.
Q. And at the request of the secretary of Mr. Cummings you did something to it, and you had to ——
A. Empty the system.
30 Q. —— empty the system?
A. Yes, sir.
Q. Now, what was the work you did there before that time? You said it was about six weeks before.
A. Why, I believe there was a down-stairs toilet stopped up.
Q. And whom did you do that for?

A. Mr. Kelly sent me there.

Q. Mr. Kelly sent you there to unstop something that had been stopped?

A. Yes, sir.

Q. How long were you there then?

A. I judge half a day.

Q. That was six weeks before?

A. I can't ——

Q. When was the time you were there before that? 10

A. I wasn't there previous to that.

Q. So that you were there October 22nd and six weeks before to unstop something in the toilet. Now, when you were there the six weeks before was the job finished? Anybody working there that day besides you?

A. Yes.

Q. Who?

A. Not of our men.

Q. That is what I mean. Were any of your men 20 working there on the day you went there to unstop something that was stopped up?

A. I believe they were painting the floor, the painter was painting the floor.

Q. I am talking about plumbers. Anybody for Mr. Kelly?

A. No.

Q. So that when you went there six weeks before October 22nd none of Mr. Kelly's men were working there, and you went there to empty a sys- 30 tem that was stopped up. That is all.

The Court: We will adjourn until tomorrow at ten o'clock.

(Whereupon an adjournment was taken to Wednesday, March 6th, 1929, at 10 o'clock A. M.)

March 6, 1929.

TRIAL CONTINUED.

TIMOTHY JOSEPH KELLY, recalled.

Re-cross examination.

10 By Mr. Cole:

Q. Find the receipt, Mr. Kelly?
A. Yes, sir.
Q. Let's see it.

(Paper produced by witness.)

Mr. Cole: Now, mark that for identification.

20 Mr. Hanstein: You can mark it in evidence. You can mark the book and this in evidence.

Mr. Cole: Well, I will put that in evidence in a moment.

Mr. Hanstein: I want to ask Mr. Kelly some more questions, anyway.

(Paper referred to is marked Exhibit D4 for identification.)

30

Q. Now, the paper you produce seems to be and I think is a loose leaf ledger sheet; is that right?
A. Yes, sir.
Q. From what book did you take this?
A. The book that you have—this book over here.
Q. This book?

A. Yes, sir.

Q. That was shown you yesterday?

A. Yes, sir.

Q. When did you buy that book?

A. Oh, must be over three years ago.

Q. Where did you buy it?

A. That I won't say. I don't recall.

Q. Did you buy it?

A. No, I don't think so.

Q. Do you know who did buy it? 10

A. I believe my wife bought it while she was going up town.

Q. Was it bought in Atlantic City?

A. I believe so.

Q. Don't know from whom you bought it?

A. No, I do not.

Q. Well, why didn't you leave this sheet in the book rather than take it out?

A. Well, it doesn't look very neat, and you get so darn tired sometimes when you can't afford a 20 bookkeeper that you don't put it in there the way it should.

Q. Having been in the book and you having written it, why take it out?

A. To get it out, why I sort of tore it.

Q. I understand that, but why did you take it out?

A. Just because I put the copy in there.

Q. Well, now, I notice that some of the writing is in pen and some in pencil; is that right? 30

A. Yes, sir.

Q. Now, tell me who wrote that.

A. Everything on there I wrote myself.

Q. Now, the writing about the starting of the work and the finishing of it is in lead pencil?

A. Yes, sir.

Q. Why wasn't that in ink?

A. I tell you, when you get done going around all day chasing bills and everything else, when you get home at night you are pretty tired and liable to put it down in anything.

Q. I am tired at night, too.

A. The plumbing business is no cinch, trying to get your money.

Q. Tell me, when did you put that lead pencil there?

10 A. As things happened. The start I might have put there a few days after I started, but the finish I put there the day it was finished.

Q. What about the start?

A. Not maybe the first day I started; might have been a day later than that, because sometimes you don't just get to it.

Q. When did you write the lead pencil writing in there?

20 A. On the day that is on there.

Q. What date?

A. October 22nd.

Q. When did you write February first in there?

A. About a day after that.

Q. Day after what; February?

A. February first. Might have been a day, might have been two days later than that.

Q. What is this item here in lead pencil, June 7, 1927? What is that?

30 A. I took out a plumbing permit on that day.

Q. Why didn't you say so?

A. Just for my own record. A plumbing permit you can't take out sometimes for a month after the job starts. You don't know really what you are going to do, and the plumbing department grants us that permission.

Mr. Cole: I will offer that. I will offer that in evidence and also the book and the letters.

Mr. Hanstein: Are you through?

Re-direct examination.

By Mr. Hanstein:

Q. Mr. Kelly, Judge Cole produced some letters —copies of letters yesterday that he sent to you. Did you get any other letters from him? 10
A. Yes, sir.

Mr. Hanstein: Do you have copies of any other letters, Judge?

Q. Do you have the originals of them?
A. No, I don't.

20

Mr. Cole: I have only two letters that I wrote to Mr. Kelly, and they are the two letters I have introduced. I find no other copies in my files.

Mr. Hanstein: May I see them?

Q. Is this letter, D3, Mr. Kelly, the other letter that you think you got from Mr. Cole?
A. What is that, Mr. Hanstein?
Q. Well, you had spoken of some other letter, and I wondered if that was really the letter that you had in mind. 30
A. No, I had a letter previous to this from Mr. Cole's office. I am sorry I don't have the copy of it.
Q. Well, here is one August 17. Do you think you had a letter in between those two?

A. Why, this is an answer to a letter, a bill, that I sent to Mr. Cole due to the direction of Mr. Cummings. I was out to see Mr. Cummings ——

Mr. Cole: I ask that be stricken.

The Court: Yes.

Q. This first letter of August 17th—that is the
10 date of that first letter, isn't it, the short one?
A. Yes.
Q. The short one is August 17th. Now, that letter says—let me see it a moment—that letter says: "We have yours of yesterday enclosing memorandum of your claim against Eugene Parsons. We are writing him requesting payment." Now, did you send to Judge Cole a memorandum of your claim against Parsons?
A. I did; yes, sir.
20 Q. And how did you come to send it to Judge Cole?

Mr. Cole: I object.

Mr. Hanstein: Well, now, I think in view of the fact that on cross-examination they brought in these letters for some purpose or other, that we are entitled to show why it was he sent a memorandum of the Parsons claim to Judge Cole.

30

Mr. Cole: The only purpose of introducing letters was to show the work was completed on or about the time of that claim and therefore this lien was filed too late.

Mr. Hanstein: And my purpose is to show that is not actually the situation.

The Court: I don't think this witness can testify what his purpose was.

Q. Had you prior to sending this claim to Judge Cole against Mr. Parsons had a talk with Mr. Cummings?

A. Yes, sir.

Mr. Cole: I object. Just a moment; I object.

10

The Court: Mr. Cummings is one of the defendants in this case, isn't he?

Mr. Cole: Yes.

The Court: A conversation with Mr. Cummings would be binding in so far as Mr. Cummings is concerned.

Mr. Cole: Conversation with Mr. Cummings could not bind with respect to the right to file this lien, or when it was filed. They are not suing Mr. Cummings to get a personal judgment against him.

20

The Court: That is true. On the other hand, they are suing him in order to protect their lien against him. I will permit the answer to stand.

Mr. Cole: Exception.

30

The Court: Yes.

Mr. Hanstein: He didn't answer.

(The answer was read by the stenographer, as follows: "Yes, sir.")

Q. What was your conversation with Mr. Cummings? Just tell what you said to Mr. Cummings and not why you went to him.

A. I saw Mr. Cummings and he told me he had a very wordy battle with the contractor and they came to words and he ordered him out of his house.

Q. Who ordered whom?

A. He ordered the builder out of his house.

Q. Cummings ordered Parsons out of his house?

10 A. Cummings ordered Parsons out of his house. They had some trouble due to some extra work, and he was very much perturbed at Mr. Parsons, and he would not speak to him any more, and he said everything was in the hands of his attorney, Mr. Cole, and he said, "If you have any claim against him, kindly send the bill to Mr. Cole," which I did. Mr. Cummings said everything was in the hands of Mr. Cole, his attorney, because he wouldn't speak to Mr. Parsons on account of the wordy battle

20 that they had.

Q. I see. So you then sent your claim to Judge Cole?

A. Judge Cole; yes, sir.

Q. And this letter of August 17th, D2, was the reply you got from Judge Cole after you sent him the memorandum?

A. Yes, sir.

Q. Now, did you hear from Judge Cole after that and prior to this letter of August 30th that you have

30 in your hand?

A. The last letter I received from ——

The Court: No.

Mr. Cole: Objected to.

The Witness: Well, I received a letter.

The Court: Yes, or no.

The Witness: Yes, I received a letter.

Q. All right. You received a letter between August 17th and August 30th?

A. Well, I won't say between August 17th and 30th. I received another letter. I won't mention the dates. I am not certain of the dates.

Q. Do you know when you received that letter with respect to the letter of August 30th; before or after? 10

A. Oh, it was after this.

Q. It was after that. And do you recall what that said?

Mr. Cole: I object, what I may have said to him; can't bind Mr. Cummings in this lien suit. There is no evidence this man has made an effort to find the letter. 20

The Court: And there has been no call for production of the original of the letter.

Mr. Hanstein: Your Honor, of course, the situation that we are confronted with is that this letter business is all something that just developed in this case, that they have injected into it.

Mr. Cole: Why do you say that, when notice was served on you to produce the original of these two and he said he can't produce because he didn't have them? Now, you are talking about some other letter. 30

The Court: No call made for the production of the original of the other letter.

Mr. Hanstein: I, of course, was not in any position to call for it. Do I understand that ——

The Court: Yes; I sustain the objection.

Mr. Hanstein: —— the objection is sustained? I ask an exception.

The Court: Yes.

10

Mr. Hanstein: Now, I want to have this D4 marked in evidence.

The Court: I think Judge Cole offered it.

Mr. Hanstein: Well, I think it was only marked for identification.

The Court: Then he offered it.

20

Mr. Hanstein: And the bill—the copy of it that was made in the ledger.

(Copy of ledger page is received in evidence and marked Exhibit P2.)

(Paper previously marked Exhibit D4 for identification received in evidence and marked D4 in evidence.)

30

Re-cross examination.

By Mr. Cole:

Q. Do you remember that yesterday you were not willing to admit that you received from Cole and Cole the letter of August 17, 1927?

A. I was not quite certain, no, sir.
Q. You certain of it now?
A. No, sir, not ——

The Court: Are you certain of it now?

The Witness: Why, yes, I received that letter.

Q. What has refreshed your recollection? 10
A. Why, memory.
Q. You have been digging, have you, since ——
A. No, no, it has been—the case has been two years ago.
Q. You admit now, do you, that on August 17th, this letter was written to you, and also you admit that you did enclose a claim against Mr. Parsons?
A. Enclose a claim?
Q. Memorandum of your claim?
A. Yes, sir. 20
Q. $860?
A. Yes, sir.
Q. Which is the claim you are now suing upon?
A. Yes, sir.
Q. Yes.

Mr. Cole I think that is all.

The Court: That is all, Mr. Kelly.

Mr. Hanstein: We rest. 30

Mr. Cole: We rest. And I am asking for a direction. There is no proof here satisfactory to go to this jury to warrant a finding that this work was not completed within the period which would justify the filing of this lien. I don't see how this jury

can say in the light of this proof that this lien was filed in time.

The Court: I overrule the motion and allow you an exception.

Mr. Hanstein: I move for direction of verdict in favor of the plaintiff for the amount of the claim, to be a special judgment against the land and a general judgment against the contractor.

The Court: It seems to me that there is a question of fact on your testimony for the jury to consider: First, whether or not you have proved that the work was done within four months of the filing of the lien. The amount, of course, is admitted. There is no question about that. That is, if there is a right of lien, there is a right to the $860. But the question as to whether or not the work was performed—I mean, the lien was filed within the four months seems to me is a question of fact. I don't believe I have a right to pass upon it.

Mr. Hanstein: I don't just see what there is in the way of ——

Mr. Cole: There are items in the claim not lienable.

The Court: I don't know of any items in the claim that are not lienable, because the $860, according to the uncontradicted testimony in the case, is the contract price for doing this work, nothing having been added by reason of any changes that were made in the contract work, and nothing having been

added for the correction of mistakes or faults in the work, but this being merely the contract price.

Mr. Hanstein: The balance of the contract price.

The Court: I mean the balance of the contract price. So that it seems to me that in so far as that phase of the case is concerned there cannot be any other result. 10

Mr. Cole: If the contract included items not lienable—couldn't lien our building.

The Court: There is nothing in the testimony that I know of.

Mr. Cole: Water service, $30, connecting water from the street to the main. I am not so sure about this Marion heater, whether that is a lienable 20 item. I think it is at least a question of fact.

Mr. Hanstein: I don't see any dispute as to the facts.

The Court: I don't see any dispute as to the facts there. Now, then, the only question in my mind is whether or not on this testimony as submitted, I am justified in taking from the jury the question of fact as to whether or not the work was all performed within four months of the filing of 30 the lien.

Mr. Hanstein: Well, now, your Honor, it seems to me that the testimony must be taken to be true, that the last work done was in October of 1927, which date, of course, was within the four months'

period. Now, then, it is Kelly's contention that what was done on that date was to go back and do some things that the parties said were—had not been finished.

The Court: Yes.

Mr. Hanstein: Floor plates, and properly install
10 washers and a valve on a radiator that should have been there and wasn't there. He said it was all part of the contract work; didn't make any charge for doing it, and he said that he went back and did it on that date. Now, I don't see what the jury has to pass on.

The Court: What evidence is there in the case that the last item of work was so related to the other items of work as to make it one continuous job with-
20 out an interruption purposely for the purpose of extending the time in order that they might file their lien claim?

Mr. Hanstein: I would say the testimony as to that would be that there would be an estoppel against the owner asserting that it was not part of the contract because it was through the owners' suggestion and request, communicated, he said, through Mr. Pasons, and also through the secretary
30 to the owner, that he went back and finished that part of the work, these floor plates and valve, and there is nothing by way of even an intimation that the work—that there was something omitted for the purpose of preserving a lien. I mean there is no suggestion of anything. I don't see how there could be any inference as to that.

The Court: Did Kelly testify that prior to October 22nd he had men working there, or a man?

Mr. Hanstein: Continuously?

The Court: Continuously.

Mr. Hanstein: Oh, no; that is not in the case.

10

Mr. Cole: To the contrary, he produced one man who said on October 22nd he went there when the system was in operation and he emptied it for the purpose of making some change. He had not been there for six weeks before that time.

The Court: That man had not.

Mr. Cole: That man had not, and nobody was there when he went six weeks before but himself, and then he went there to unstop something that had been stopped up. And you have the fact that Mr. Kelly testified he practically finished this job at the date of his letter, when he sent the memorandum of his claim to Mr. Parsons for collection.

20

The Court: No, I don't think he testified that.

Mr. Cole: He said he sent the memorandum of this claim for collection on August 17th, and I wrote him a letter.

30

Mr. Hanstein: I don't see anything in the way of dispute here, your Honor. It seems to me that there is no contest as to the fact.

The Court: Well, the evidence as it now stands

is not controverted by anything offered by the defendant at all. So that unless it is entirely discredited I am bound by it, I suppose.

Mr. Hanstein: I think so.

Mr. Cole: Here is a man who has testified both ways upon several phases of this case. That is
10 enough to discredit him. At least it is enough to have the jury say whether he is not discredited. Now, on or before August 17th he places his claim against Mr. Parsons in the hands of the attorney for collection—the same $860 for which he is now suing—at which time the jury could say he must have felt he had finished his job or he would not have done the unusual and improper thing to make a person pay what was not due. Mr. Parsons filed an answer. Of course, that don't make proof. You
20 have the further fact, the only proof there is in this case after August the 17th is one man goes up there on two occasions to do something to a plant which he testified was in operation.

The Court: My understanding is that one man testified he went there but that in addition to that there was another steam fitter who was doing some work there or had been doing some work there.

30 Mr. Cole: The only steam fitter that was doing any work was this very man.

The Court: No, he testified there was another. My further recollection is Mr. Kelly testified that off and on up until the 22nd he had had a man there during all that time; not every day, I don't mean,

but off and on from the 22nd back to whatever date you may want to go.

Mr. Hanstein: And, your Honor, let me say that this letter business and making of a claim in August, it develops, was due solely to the instigation of Mr. Cummings who said, "You hand your bill to Judge Cole who is handling this matter for me." And Kelly on the stand yesterday said his work was not finished at that time, and Judge Cole said to him, with indignation in his voice, "Do you mean to say that you filed—asked somebody to pay your bill when your work is not done?" And, of course, the reason why he was doing it was because Cummings had told him to do it. Nor it doesn't seem to me there is anything in dispute as to the time for finishing. He said he went back and put things on that work that these people said was coming to them. You see he made no additional charge. If he had made an additional charge it might be said that he did something outside of his contract. And if he went back on his own initiative it might be implied that he had held the thing open so as to preserve his lien. But it was done at the request of Cummings himself. Doesn't seem to me there can be any question about it.

The Court: I am rather inclined to think, in view of the fact there are two motions, one for a direction on the part of the plaintiff and one for direction on the part of the defendant, that it is a court question rather than a jury question, and it seems to me there is sufficient proof so that I would be justified in directing a verdict for the plaintiff. And I will so do.

Mr. Cole: Exception for Cummings.

The Court: Yes. And the amount of the claim now is what? I mean the amount which you should have judgment entered for.

Mr. Hanstein: $860 and interest from the date of the filing of the lien. Now, I am not quite certain as to the date of the filing of the lien, Judge.

10

Mr. Cole: Received December 22, 1928.

The Court: Received December 22, 1927.

Mr. Hanstein: $61.92.

The Court: Yes. $921.92.

Mr. Hanstein: $921.92.

20

The Court: All right, then, the clerk may take the verdict; $921.92.

Mr. Hanstein: Did the Clerk get that as a special judgment—that will be a special judgment against Cummings for that amount and a general judgment against Parsons for that amount, or the estate of Parsons.

30

RULE FOR JUDGMENT.

ATLANTIC COUNTY CIRCUIT COURT.

T. J. Kelly, *Plaintiff,* v. Constantine S. Cummings, owner, and Emma Parsons, executrix of the estate of Eugene Parsons, deceased, builder, *Defendants.*	On Mechanic's Lien. Rule for Judgment.

10

The summons and complaint in this cause having been duly served upon the defendants above named, and the issues joined having been tried before W. Frank Sooy, Judge of the Atlantic County Circuit Court, and a jury, and the Judge on March 6th, 1929, having directed a verdict in favor of the plaintiff for $921.92 damages against the defendants, Constantine S. Cummings specially and Emma Parsons, executrix of the estate of Eugene Parsons, deceased, generally.

20

It is thereupon ordered that judgment final be entered in favor of the plaintiff for the sum of $921.92 with costs to be taxed, generally against Emma Parsons, executrix of the estate of Eugene Parsons, deceased, builder, and specially to be made of the land and building in the complaint described.

30

W. F. Sooy,
C. C. J.

Filed and entered March 7, 1929, at 9 A. M.
WILLIAM A. BLAIR,
Clerk.

JUDGMENT.

ATLANTIC COUNTY CIRCUIT COURT.

10

January Term, 1929.

20258 T. J. KELLY, *Plaintiff,* v. CONSTANTINE S. CUMMINGS, owner, and EMMA PARSONS, executrix of the estate of EUGENE PARSONS, deceased, builder, *Defendants.*	Action at Law. On Verdict. On Mechanic's Lien. Thompson & Hanstein, Attys.

20

Judgment entered March 7, 1929, at 9 A. M.

Damages	$921.92
Costs	77.35
Total	$999.27

30

This action was tried before W. Frank Sooy, Judge, with a jury on March 6th, 1929.

The Judge having directed a verdict in favor of the plaintiff and against the defendants.

Whereupon it is ordered that the plaintiff, T. J. Kelly, recover of the defendants, Emma Parsons, executrix of the estate of Eugene Parsons, deceased, builder, generally the sum of nine hundred twenty-one dollars and ninety-two cents damages and seventy-seven dollars and thirty-five cents costs of suit and specially to be made of the land and building in the complaint described:

Situated in the City and County of Atlantic, State of New Jersey, bounded and described as follows: 10

BEGINNING in the north line of New Jersey Avenue 395 feet north of Sewell Avenue; thence (1) northwestwardly, along the north line of New Jersey Avenue 25 feet; thence (2) northeastwardly at right angles to the first course 40 feet to the south line of Snug Harbor; thence (3) southeastwardly and parallel with the first course 25 feet; thence (4) Southwestwardly and parallel with the second course 40 feet to the place of beginning. Being known as #551 North New Jersey Avenue. 20

WILLIAM A. BLAIR,
Clerk.

Circuit Court Judgment Book No. 15, page 416.

30

NOTICE AND GROUND OF APPEAL.

ATLANTIC COUNTY CIRCUIT COURT.

T. J. Kelly, *Plaintiff*, v. Constantine S. Cummings, owner, and Emma Parsons, executrix of the estate of Eugene Parsons, deceased, builder, *Defendants.*	Action at Law. Notice and Ground of Appeal.

10

20

To Thompson & Hanstein, Attorneys of Plaintiff:

Take notice that the defendant, Constantine S. Cummings, appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause, upon the following ground:

1. The Court directed a verdict in favor of the plaintiff and against the defendant when it should have directed a verdict in favor of the defendant or submitted the case to a jury.

30

Cole & Cole,
Attorneys of Defendant-Appellant, Constantine S. Cummings.

[Endorsed]

Service acknowledged this 20th day of March, 1929.

Thompson & Hanstein,
Attorneys of Plaintiff.

Filed March 22, 1929, at 9 A. M.

William A. Blair,
Clerk. 10

20

30

D-2 Iden
3/5/29 M

August 17, 1927.

Mr. T. J. Kelly,
108 S. Troy Avenue,
Atlantic City, N. J.

Dear Sir:

We have yours of yesterday, enclosing memorandum of your claim against Eugene Parsons. We are writing him requesting payment.

Very truly yours,

Cole & Cole

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August 30, 1927.

Mr. T. H. Kelly,
Margate City, N.J.

Dear Sir:

Mr. Cummings is willing to pay the claim you have against Parsons, and we wrote Parsons saying that we would pay you unless he had some objection thereto. This morning, we have a letter from him advising us not to pay the amount you claim, as he does not owe you that amount.

In this situation, Mr. Cummings cannot safely pay the amount you claim, and there seems nothing open except for you either to look to Parsons for the payment of your claim or file a lien, if you deem that course your only protection.

Very truly yours,

Cole & Cole

New Jersey Court of Errors and Appeals

T. J. KELLY,
Plaintiff-Respondent,
v.
CONSTANTINE CUMMINGS,
Defendant-Appellant.

APPELLANT'S BRIEF.

STATEMENT.

Mechanics' lien action in Atlantic Circuit, in which builder and owner filed a separate answer. There was a directed verdict in favor of plaintiff and from the judgment thereon the owner appeals. Trial errors and error in directing a verdict are alleged.

ARGUMENT.

THE DIRECTED VERDICT WAS ERRONEOUS.

The jury would have been justified in finding that the lien was not filed nor the summons issued within

the statutory four months. The lien was filed and the summons was issued December 23, 1927. The plaintiff says that the work was performed, and the materials furnished between February 1, 1927, and October 22nd, 1927.

There was evidence tending to show that on August 17th, 1927, plaintiff treated his contract as completed. If it were completed, on that day, then plaintiff's action was begun too late to establish his lien. The effect of the direction was to exclude from the jury's consideration certain facts and justifiable inferences.

It was appellant's contention that certain work alleged to have been done after August 17th lacked legal continuity to keep the lien alive.

At one time during the colloquy the Court seemed to entertain this view. He said to counsel (p. 68), "What evidence is there in the case that the last item of work was so related to the other items of work as to make it one continuous job without an interruption purposely for the purpose of extending the time in order that they might file their lien claim?"

This inquiry touched the exact spot. The jury might well have found that there was no relation.

But the Court changed its mind, apparently, because no witness was sworn for the defense.

This view will require the Court to read the entire testimony of plaintiff, with especial reference to his cross-examination. It is our prophesy this court will find that the jury would have been warranted, if not required to conclude that he was generally unworthy of belief.

His testimony was evasive and contradictory, and too uncertain as to essential dates as to require a jury to determine that he was correct when he said

work was done and materials furnished after August 17th.

He attempted corroboration by only one witness—Harrod.

From his testimony (pp. 52-55), it will be seen that in October (exact date he could not fix) he made certain changes, in completed work done by plaintiff, at the request of Cummings, owner. It consumed two-thirds of a day. At that time the heating system installed by plaintiff was filled with water and had to be emptied to make the change. Six weeks before he had been sent to the property by plaintiff to clean a toilet downstairs which was "stopped up." Neither of these items could be tied to the original work.

Aside from the foregoing, there is no testimony of anything being done after August 17th save the mere conclusion of plaintiff.

He kept no time book. Produced no book or record showing specifically what work was done or material furnished after said date in August. No workman or materialman gave support to his general statement. On page 44 he was asked who worked on the job after August 17th. He said: "Why, I had a Mr. Gross and a young helper, and I had Mr. Harrod and a Mr. Seeley."

We have adverted to Harrod's testimony. Not one of the other workers was produced or their absence explained. He could not say what days they worked, nor did he attempt to show for what days he paid them, or the character of work they did.

On or before August 17th he asked attorneys to collect from Parsons, his contractor, the claim he is now urging. The attorneys made a written demand on Parsons, who denied liability, and plaintiff was so notified in writing. (Testimony, pp. 28, 29, 30, 31, and Exhibits D2 and 3.)

It is not the usual or honest thing for a person to demand money before it is due.

If the money was due from Parsons to plaintiff on or before August 17th, as plaintiff then claimed, his lien and suit were too late. The jury would have been justified in finding that plaintiff's action in claiming the work was completed in August and he was therefore entitled to be paid, spoke louder than his indefinite testimony that it was not completed until October.

A fair reading of his testimony, at page 40, warrants the conclusion that he treated his work, completed on August 17th, and that what was done thereafter were mere changes ordered by the owner. It was a typical jury question and should not have been withdrawn from its consideration.

II.

THERE WAS NO EVIDENCE PRODUCED TO SHOW WHEN PAYMENT WAS DUE FROM PARSONS TO PLAINTIFF.

Counsel assumed the money was due when the lien was filed and summons issued. But proof is lacking. The complaint lacks allegation as to when payment was due. Parsons' executor filed a general denial.

III.

THE ALLEGED CONTRACT BETWEEN PARSONS AND PLAINTIFF WAS NOT LEGALLY ESTABLISHED.

Over objection of the owner, plaintiff was permitted to show transactions with Parsons, deceased.

It is conceded that counsel for Parsons was permitted to waive his right to invoke the statute, so far as the estate was involved. But it is contended that the owner is entitled to invoke the statute, notwithstanding it may be waived by the estate.

In short, there can be no verdict against the owner unless there can be a verdict against the builder, and that all defenses available to the builder are available to the owner.

The judgment should be reversed.

Respectfully submitted,

COLE & COLE,
Counsel for Appellant.

New Jersey Court of Errors and Appeals

T. J. KELLY,
Plaintiff-Respondent,

v.

CONSTANTINE S. CUMMINGS, owner,
Defendant-Appellant.

On Appeal.

BRIEF OF PLAINTIFF-RESPONDENT.

This is a mechanics' lien suit in which no testimony whatever was offered by either of the defendants, and it, therefore, resulted in the direction of a verdict for the plaintiff. The owner, Cummings, appeals. The defendant contractor does not appeal.

The first objection made is that there was a question which should have been submitted to the jury on the question as to when the last work was done, in order to determine whether or not the lien was filed and suit started within four months from the date of the doing of the last work. The lien claim was filed on December 23rd, 1927. The complaint and the lien claim each set forth that the last

work was done on October 22nd, 1927. If that was the date upon which the last work was done, there is, of course, nothing to appellant's first point:

Plaintiff testified as follows:

"Q. And when was the last work done on that job?

A. Why, in October, 1927, the latter end.

Mr. Cole: Pardon me; the question is when was the last work completed on that job?

The Court: Yes.

The Witness: Is that just the question?

Mr. Cole: Yes.

The Witness: Well, October 22, 1927" (S. C. p. 18, ll. 8 to 20).

Plaintiff also testified as follows:

"Mr. Hanstein: No; just tell them what he did.

The Witness: Why, he went out there at the request of the owner. He drained the heating plant down. Took a radiator valve off—a radiator ell off and put on a radiator valve. Put on some floor plates, and adjusted some leaking spigots and things throughout the building. I guess he was there, and a helper, about a day" (S. C. p. 36, ll. 29 to 36).

The plaintiff also testified:

"Q. You started to say, when I interrupted you, 'When Mr. Cummings.' What were you going to say?

A. When Mr. Cummings returned from Florida, the radiators—under the—he didn't like the radiators underneath the windows, he wanted them taken out and he wanted all radiators put in around a bay window in the back, and he wanted this door out and that door out,

and he wanted sun glass in there, the sun couldn't come through; and he tied up the work for two or three months more to complete the work to his satisfaction.

Q. Then, the work you did after August 17th, was done for Mr. Cummings, wasn't it?

A. No, it was not.

Q. Didn't you just say he asked you to make those changes?

A. He didn't ask me. He asked Mr. Parsons, and Mr. Parsons in turn took that up with me" (S. C. p. 43, ll. 12 to 30).

(Mr. Parsons was the contractor.)

Plaintiff also testified as follows:

"Q. Did you make any extra charge for the work that you did on October 22, 1927?

A. No extra charge" (S. C. p. 50, ll. 1 to 3).

One Joseph A. Harrod, a mechanic employed by the plaintiff, testified as follows:

"Q. Will you state when was the last date you worked on that job?

A. The latter part of October, 1927.

Q. Latter part of October, 1927. All right. What date—what work did you do there?

A. Why, there was a radiator ell on a wall radiator, I changed that into a valve, put a valve on there at the request of Mr. Cummings' secretary. And I put a couple of floor plates on, and I believe I done something up in the bathroom, put a curtain stop or something on. Of course, I had to empty down the system to do that.

Q. I was just going to ask you. How long did you work doing that work?

A. Well, I judge I was there two-thirds of a day.

Q. About two-thirds of one day?

A. Yes.

Q. And that date, was it October 22, 1927?

A. I couldn't say whether it was the 22nd, but it was in October. I give Mr. Kelly the date when I turned the job in" (S. C. p. 53, ll. 8 to 29).

The plaintiff also produced his ledger sheet, which was the only book kept by him. In the book there were two enties, reading as follows:

"Started work February 1st, 1927;

Finished work October 22nd, 1927" (S. C. p. 24, l. 32).

All of that testimony established clearly, it seems to us, that the last work was done October 22nd, 1927, and that the lien claim and suit were started within time. The defense put in no testimony and, therefore, it is very difficult to see what fact there was to go to the jury. Certainly there was no way in which the jury could find different than that the last work was done October 22nd, 1927. Defendant's counsel makes much of the fact that in August of 1927 the plaintiff came in to see him about the job, and as a result of his coming in to see defendant's counsel, defendant's counsel wrote a letter to Parsons, the contractor, relative to the work. This visit to the office of the appellant's counsel is explained by the plaintiff as follows:

"Q. This first letter of August 17th—that is the date of that first letter, isn't it, the short one?

A. Yes.

Q. The short one is August 17th. Now, that

letter says—let me see it a moment—that letter says: 'We have yours of yesterday enclosing memorandum of your claim against Eugene Parsons. We are writing him requesting payment.' Now, did you send to Judge Cole a memorandum of your claim against Parsons?

A. I did; yes, sir.

Q. And how did you come to send it to Judge Cole?

Mr. Cole: I object.

Mr. Hanstein: Well, now, I think in view of the fact that on cross-examination they brought in these letters for some purpose or other, that we are entitled to show why it was he sent a memorandum of the Parsons claim to Judge Cole.

Mr. Cole: The only purpose of introducing letters was to show the work was completed on or about the time of that claim and therefore this lien was filed too late.

Mr. Hanstein: And my purpose is to show that is not actually the situation.

The Court: I don't think this witness can testify what his purpose was.

Q. Had you prior to sending this claim to Judge Cole against Mr. Parsons had a talk with Mr. Cummings?

A. Yes, sir.

Mr. Cole: I object. Just a moment; I object.

The Court: Mr. Cummings is one of the dedefendants in this case, isn't he?

Mr. Cole: Yes.

The Court: A conversation with Mr. Cummings would be binding insofar as Mr. Cummings is concerned.

Mr. Cole: Conversation with Mr. Cummings could not bind with respect to the right to file

this lien, or when it was filed. They are not suing Mr. Cummings to get a personal judgment against him.

The Court: That is true. On the other hand, they are suing him in order to protect their lien against him. I will permit the answer to stand.

Mr. Cole: Exception.

The Court: Yes.

Mr. Hanstein: He didn't answer.

(The answer was read by the stenographer, as follows: 'Yes, sir'.)

Q. What was your conversation with Mr. Cummings? Just tell what you said to Mr. Cummings and not why you went to him.

A. I saw Mr. Cummings and he told me he had a very wordy battle with the contractor and they came to words and he ordered him out of his house.

Q. Who ordered whom?

A. He ordered the builder out of his house.

Q. Cummings ordered Parsons out of his house?

A. Cummings ordered Parsons out of his house. They had some trouble due to some extra work, and he was very much perturbed at Mr. Parsons, and he would not speak to him, any more, and he said everything was in the hands of his attorney, Mr. Cole, and he said, 'If you have any claim against him, kindly send the bill to Mr. Cole,' which I did. Mr. Cummings said everything was in the hands of Mr. Cole, his attorney, because he wouldn't speak to Mr. Parsons on account of the wordy battle that they had.

Q. I see. So you then sent your claim to Judge Cole?

A. Judge Cole; yes, sir.

Q. And this letter of August 17th, D2, was the reply you got from Judge Cole after you sent him the memorandum?

A. Yes, sir" (S. C. p. 60, l. 8, to p. 62, l. 27).

The defendant, Cummings, could have easily shown, had such been the fact, that Kelly completed his work prior to the date alleged by Kelly; or he could have shown, if such had been the fact, that Kelly did not do any work on the premises on the last date alleged by Kelly; or he could have shown, if such had been the fact, that the work which Kelly did on that date was not connected in any way with the original contract. He did none of these things. He did not take the stand to deny Kelly's testimony, which was to the effect that the reason Kelly went to see Judge Cole, Cummings' lawyer, in August of 1927, was because Cummings had told him to do so. In view of that, there was no testimony in the case, except Kelly's and Harrod's, and that testimony clearly establishes that the last work was done on October 22nd, 1927.

II.

There is no merit to appellant's second point. In the absence of a special agreement as to when money shall be due for labor performed, it is due upon the completion of the work, or certainly, within a reasonable time thereafter. Furthermore, no point has ever been made, in the Court below, by the appellant, as to whether the payments were due or not; nor is that question raised in the grounds of appeal.

III.

The third point in the appellant's brief sets up the contention that, inasmuch as this suit was against Cummings, the owner, and the Estate of Eugene Parsons, the contractor, Parsons' executor had the right to waive the statute prohibiting oral testimony as to transactions with a deceased, but that the waiver would not be effectual to permit the testimony to go as against Cummings, the owner.

This point is not raised in the grounds of appeal. In addition, we contend that the right is a right strictly personal to Parsons' executor, and there is no authority for the appellant's contention, in fact, the authorities are to the contrary.

> *Lowe v. Doremus,* 91 Atlantic Reporter, 321;
>
> *Messenger v. Paterson Savings Inst.,* 103 Atlantic Reporter, 178.

It is respectfully submitted that the judgment below should be sustained.

THOMPSON & HANSTEIN,
Attorneys for Plaintiff-Respondent.