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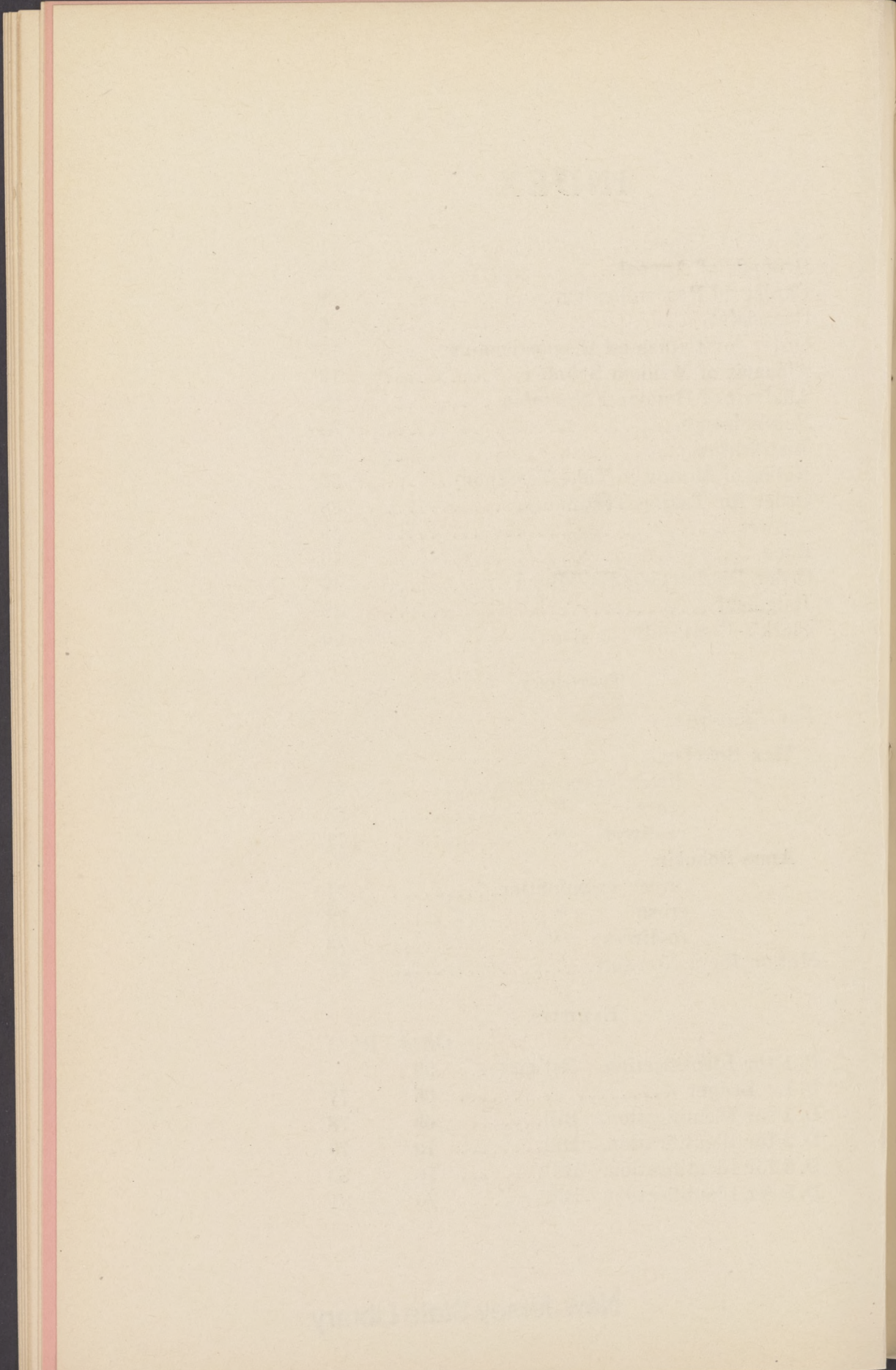
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NOTICE OF APPEAL.

Filed May 7, 1930.

Essex County Circuit Court

WILLIAM SOKOBIN and MAX
SOKOBIN, trading as R.
Sokobin & Sons,

Plaintiffs,

vs.

BENJAMIN ORNSTEIN and MORRIS
ORNSTEIN, individually and
trading as Ornstein Brothers,

Defendants.

*Action
at Law.*

*Notice
of Appeal.*

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Gentlemen:

YOU ARE HEREBY NOTIFIED that the plaintiffs, William Sokobin and Max Sokobin, trading as R. Sokobin & Sons, hereby appeal to the Court of Errors and Appeals of the State of New Jersey, from the judgment of non-suit rendered in the above-entitled court in respect to the issues raised by the complaint and answer, which said judgment so appealed from was rendered in, or as a result of the trial had in the above-entitled cause.

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Dated June 18, A. D. 1929.

IRVING W. TEEPLE,
Attorney for and of Counsel with Plaintiffs.

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Notice of Appeal.

To Benjamin Ornstein and Morris Ornstein,
defendants.

To LOUIS L. FEINSETH, Esq.,
Their Attorney.

10 Service of a copy of within notice of appeal is
hereby acknowledged this 19th day of June,
A. D. 1929.

LOUIS L. FEINSETH,
Defendant's Attorney.

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GROUND OF APPEAL

Filed May 19, 1930.

ESSEX COUNTY CIRCUIT COURT.

WILLIAM SOKOBIN and MAX SOKOBIN, trading as R. Soko- bin & Sons, <i>Plaintiffs-Appellants,</i> <i>vs.</i> BENJAMIN ORNSTEIN and MOR- RIS ORNSTEIN, individually and trading as Ornstein Bros., <i>Defendants-Appellees.</i>	} <i>Action</i> } <i>at Law.</i> } <i>On Appeal.</i> } <i>Grounds of</i> } <i>Appeal.</i>	10
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William Sokobin and Max Sokobin, trading as R. Sokobin & Sons, plaintiffs-appellants in the above-entitled cause, as and for the grounds of their appeal (heretofore noticed) from the judgment on the non-suit rendered against them in the above-entitled cause, assign the following:

1. On May 12, 1928, in the above cause, an order was made, at the instance of the defendants-appellees, by Hon. Worrall F. Mountain, Judge of the Essex County Circuit Court, that testimony concerning the truth of the matters set forth in the affidavit of William Sokobin, the plaintiff in this cause, and the further proofs upon which the order for the writ of *capias* was made and issued in this cause, be taken before Milton M. Unger, Esq., a Supreme Court Commissioner, in writing, and that the same be taken and completed on or before a day within 15 days from the date of said order.
- 30

Grounds of Appeal.

Pursuant thereto, the testimony of William Sokobin, one of the plaintiffs, was taken under oath before said Supreme Court Commissioner, and reduced to writing. The testimony included cross examination by the defendants' attorney, and supporting direct examination by plaintiffs' attorney.

10 Before the trial, the said plaintiff-witness, William Sokobin, died, the date of his death being June 28, 1928.

During the trial, it was stipulated concerning the said testimony of the party, that the original testimony of said party had been lost, and counsel agreed that the stenographer's copy of said testimony, certified to, "may be filed in the record in lieu of the original."

20 Counsel for the plaintiffs offered the said testimony in evidence, using the following language:

"Mr. Teeple: I am now only offering the testimony of William Sokobin, saving whatever objections and exceptions are shown thereby."

After argument, the Court ruled as follows:

30 "The Court: This is evidence taken for a specific purpose, that is, to permit the cross examination of a party on the question of whether or not the order to hold to bail should have been granted, and it is not the same issue, sir, as is involved in this case. I don't see how I can change the Evidence Act, no matter how much it would promote justice. I am bound by the Evidence Act, and I can permit evidence only which is permissible under the Act, and therefore I will deny your right to read that evidence here before the jury."

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Grounds of Appeal.

To this ruling plaintiffs' counsel noted exception.

The exclusion of the testimony before referred to was erroneous.

2. At the conclusion of plaintiff's evidence, the plaintiff rested and defendants' counsel moved for a non-suit, in the following manner: 10

"Mr. Feinseth: I move for a non-suit at this time on the ground that the alleged subject in their complaint—the plaintiffs have failed to make out or prove the five elements clause.

"The Court: You need not argue that. They have not made that out. What about the contract? 20

"Mr. Feinseth: He says the bills were made out to the Salem Construction Company, and I rest on that.

"My clients will take the stand, of course, and deny all that.

"I move for a non-suit at this time, reserving my right to put in a defense."

The learned trial judge granted the motion for the non-suit, and plaintiffs' counsel noted exception to that ruling. 30

The said ruling was erroneous.

3. This suit was brought to recover the sum of Eleven Hundred Forty-four Dollars and Fifty Cents (\$1144.50) from defendants-appellees, based upon an oral contract made between William Sokobin on behalf of the firm of plaintiffs-appellants, pursuant to an estimate dated November 3, 1927, copy of which is attached to the complaint and marked Schedule "A." The affidavits upon which the *caus ad respondum* was 40

Grounds of Appeal.

issued, set forth fraud on the part of the defendants-appellees at the inception and in the making of the contract sued upon, in that said defendants represented to the plaintiff William Sokobin that they, the said defendants, were putting up the buildings for which they assumed to order the work and materials from said plaintiff's firm, when, in fact, such was not the case. Not only the affidavits submitted on the application for the *capias*, but also all of the testimony submitted on behalf of the plaintiff, plus the testimony which was excluded by the aforesaid ruling of the trial judge, went to prove the contract and performance of it, as well as the false representations and fraud in the making of it by the defendants-appellees.

By the rulings aforesaid, the learned trial judge took from the jury consideration not only of the question of whether or not there was fraud at the inception of the contract, but also as to whether or not there was testimony and proofs from which the jury could infer performance of the contract by the plaintiff's firm. The exclusion of the testimony taken before the Supreme Court Commissioner weakened the proofs of the plaintiffs, and the non-suit ruling disregarded that which had been shown both by the witnesses and by the records of plaintiffs, kept in the usual course of business. This course of procedure, we contend, in this case was altogether erroneous.

Dated May 15, A. D. 1930.

IRVING W. TEEPLE,
Attorney for and of Counsel
with Plaintiffs-Appellants.

Capias ad Res.

Service of a copy of the within grounds of appeal, is herewith acknowledged, this 19th day of May, A. D. 1930.

LOUIS L. FEINSETH,
Attorney for and of Counsel
with Defendants-Appellees.

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CAPIAS AD RES.

ESSEX COUNTY, ss.

The State of New Jersey to the
Sheriff of the County of Essex, GREET-
(L. S.) ING:

We command you that you take Benjamin Ornstein and Morris Ornstein, if in your County he or they may be found, and him and them safely keep, so that you may have his or their body before the Essex County Circuit Court to be holden at Newark, in and for the County of Essex, to answer unto William Sokobin and Max Sokobin, trading as R. Sokobin & Sons, in an action at law, wherein the plaintiffs demand eleven hundred and forty-four dollars and fifty cents (\$1144.50) and have you then and there this writ.

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WITNESS, WORRALL F. MOUNTAIN, Esquire,
Judge of our said Circuit Court, at Newark, the
21st day of April, A. D. 1928.

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JOHN H. SCOTT,
Clerk.

IRVING W. TEEPLE,
Attorney.

40

Capias ad Res.

The within writ of *capias ad respondendum* is hereby allowed. Let the defendants, Benjamin Ornstein and Morris Ornstein be held in bail in the sum of eleven hundred and forty-four dollars and fifty cents (\$1144.50).

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CHARLES JONES,
Supreme Court Commissioner.

Affidavit and order to hold to bail filed before issuing this writ.

JOHN H. SCOTT,
Clerk.

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COMPLAINT.

ESSEX COUNTY CIRCUIT COURT.

WILLIAM SOKOBIN and MAX SOKOBIN, trading as R. Sokobin & Sons, <i>Plaintiffs,</i> <i>vs.</i> BENJAMIN ORNSTEIN and MORRIS ORNSTEIN, individually and trading as Ornstein Bros., <i>Defendants.</i>	}	Action at Law. Complaint.	10
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Plaintiffs, residing and transacting business in the City of Newark, County of Essex and State of New Jersey, say: 20

FIRST COUNT.

1. That at all the times hereinafter mentioned, they were, and still are, engaged in the business of buying and selling and installing glass for windows and doors, having their business at No. 33 Prince street, in the City of Newark, County of Essex and State of New Jersey. 30

2. That on or about the 3rd day of November, A. D. 1927, after furnishing an estimate to the defendants, a true copy of which is hereto annexed and made a part hereof, and marked Schedule "A" plaintiffs entered into an agreement with defendants, at the special instance and request of said defendants, wherein and whereby plaintiffs agreed to furnish for defendants the glass work referred to in the said estimate and 40

Complaint.

at the prices therein stated, for two buildings known by the street numbers 19 Pingry Place and 610 Salem avenue, in the City of Elizabeth, County of Union and State of New Jersey.

10 3. That before, and at the time of furnishing the said estimate to the said defendants, at their request, the said defendants represented to William Sokobin, of the plaintiffs' firm, that they, the said defendants, were putting up the said buildings at No. 19 Pingry Place and No. 610 Salem avenue, Elizabeth aforesaid, and were the owners thereof; and relying upon said representations, the plaintiffs furnished the said estimate and undertook and agreed to do the said work and furnish the said materials for the said defendants.

20 4. That the said plaintiffs thereupon, immediately thereafter entered upon the performance of the said work and the furnishing of the materials in connection therewith for the said defendants, in and about the said buildings at Elizabeth aforesaid, and did diligently prosecute, carry out and complete the said work and furnish the materials in connection therewith.

30 5. That later, on or about the 22nd day of November, A. D. 1927, and when the work agreed to be done was nearly finished, the defendants ordered some changes and additions thereto made, and extra work to be done, which changes additions, and extra work to be done, plaintiffs informed the defendants would cost about six hundred dollars (\$600.) more, and defendants, notwithstanding the additional cost as stated, ordered the said changes and additions and extra work to be done, and the said plaintiffs, 40 relying upon the representations of the said de-

Complaint.

defendants and their promises to pay, performed and carried out to completion the said changes, additions and extra work, and furnished the materials in connection therewith, and completed the same on or about the 14th day of December, A. D. 1927.

6. That plaintiffs have done, performed, carried out and completed each, every and all matters and things upon their part agreed to be done and performed upon and in connection with the aforesaid work on the two aforesaid buildings at Elizabeth aforesaid. 10

7. That plaintiffs thereupon later demanded from the defendants payment for their said work done and materials furnished in and about the two aforesaid buildings at Elizabeth aforesaid, and then learned for the first time that the said defendants were not the owners of said premises or any part thereof, and were not, in fact, putting up the said buildings. 20

8. That the defendants, at said last mentioned date were, and still are, indebted to the plaintiffs in the sum of eleven hundred and forty-four dollars and fifty cents (\$1144.50) for the work done and materials furnished for them and at their special instance and request as aforesaid, relying upon the truth of the representations heretofore referred to, made at the inception of the contract by said defendants to the plaintiff William Sokobin, no part of which has been paid, although duly demanded. 30

9. That the said defendants fraudulently, and by means of the wrongful, unlawful and false representations that they were the owners of the said premises at No. 19 Pingry Place and No. 610 Salem avenue, both in the City of Elizabeth, County of Union aforesaid, and that they were 40

Complaint

putting up the said buildings, made before and at the time of making and entering into the aforesaid contract for the said work and materials and the incurring of the said debt, to the said plaintiffs or one of them, as aforesaid, thereby induced the said plaintiffs to make and
 10 enter into the said contract and to perform the work and furnish the materials in connection therewith, well knowing that the said plaintiffs relied upon the truth of their representations so as aforesaid made, when in truth and fact, said representations were false and fraudulent, and by defendants, and each of them, known so to be, and were, in fact, made with the intent fraudulently to induce the said plaintiffs to enter into the said contract and perform the work and
 20 furnish the materials for the buildings aforesaid in connection therewith.

WHEREFORE, plaintiffs demand judgment against the defendants for the sum of eleven hundred and forty-four dollars and fifty cents (\$1144.50) with lawful interest and costs of suit.

SECOND COUNT.

Plaintiffs further say:

30 1. They repeat the allegations of paragraphs "1," "2," "4," "5," "6" and "8" of the First Count of this Complaint, with the same force and effect as though the same were here set forth in so many words.

WHEREFORE, plaintiffs demand judgment against defendants upon this Second Count, for the sum of eleven hundred and forty-four dollars and fifty cents (\$1144.50) with lawful interest and costs of suit.

40 IRVING W. TEEPLE,
 Attorney for Plaintiffs.

Complaint.

SCHEDULE "A."

November 3rd, 1927.

ORNSTEIN BROS.
NEWARK, N. J.

Gentlemen:

We hereby agree to furnish and set glass in steel sash at 25c per light, size of lights being 8 x 12. 10

Also plate glass in iron doors, consisting of 10 lights of plate glass for the sum of \$121.00.

Leaded glass to match adjoining building @ \$20 per light.

Beveled plate glass for French doors, set @ 55c per light.

Glass for interior openings in lobby, consisting of three to a set @ \$20 per set. 20

The above job located at Salem Road, and North Broad St., Elizabeth, N. J.

Trusting to be *favord* with your contract, we beg to remain

Yours very truly,

R. SOKOBIN & SONS.

WS:A

I hereby appoint and depute Oliver Werkheiser, to serve the within writ. 30

Witness my hand and seal this 24 day of April, 1928.

CONRAD DEUCHLER,
Sheriff.

By: ALFRED C. WALKER,
Under Sheriff.
(L. S.)

Sheriff fees, 10.56. 4/24/28.

Complaint.

Served the within capias and complaint April 28, 1928, personally upon Benjamin Ornstein and Morris Ornstein, trading as Ornstein Bros., the within-named defendants, and at the same time took them into my custody and had them appear before Supreme Court Commissioner Henry
10 Hahn, who duly entered them into a recognizance of bail and they were released from custody.

CONRAD DEUCHLER,
Sheriff.

By: OLIVER WERKHEISER,
Special Deputy.

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**ORDER FOR CAPIAS AD RESPONDENDUM
AND AFFIDAVITS.**

Filed April 20, 1928.

ESSEX COUNTY CIRCUIT COURT.

WILLIAM SOKOBIN and MAX
SOKOBIN, trading as R.
Sokobin & Sons,

Plaintiffs,

vs.

BENJAMIN ORNSTEIN and MORRIS
ORNSTEIN, individually and
trading as Ornstein Bros.,

Defendants.

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*Action
at Law.*

*Order for
Capias Ad
Respond-
endum.*

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I, CHARLES JONES, a Supreme Court Commissioner of the State of New Jersey, having read the affidavits of William Sokobin and Hannah F. Sokobin, and having duly considered the same, do hereby adjudge that sufficient proof has by said affidavits been given to satisfy me that there is due to William Sokobin and Max Sokobin, trading as R. Sokobin & Sons, from Benjamin Ornstein and Morris Ornstein, individually and trading as Ornstein Bros., the sum of eleven hundred and forty-four dollars and fifty cents (\$1144.50) for work done and materials furnished under contract, the nature and particulars of which transaction being set forth in the said affidavits, and that the said Benjamin Ornstein and Morris Ornstein fraudulently incurred the aforesaid obligation.

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It is, therefore, ORDERED, that the said Benjamin Ornstein and Morris Ornstein be held in

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Affidavit of William Sokobin.

bail in the sum of eleven hundred and forty-four dollars and fifty cents (\$1144.50), to answer unto the said William Sokobin and Max Sokobin, trading as R. Sokobin & Sons, in an action at law.

10 Dated this 20th day of April, A. D. 1928.

CHARLES JONES,
Supreme Court Commissioner.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

WILLIAM SOKOBIN, of full age, being duly sworn according to law, on his oath deposes and says:

20 I am a member of the firm of William Sokobin and Max Sokobin, trading as R. Sokobin & Sons. We are engaged in the business of buying, selling and installing glass for windows and doors. Our place of business is at No. 33 Prince street, in the City of Newark, County of Essex and State of New Jersey.

30 On the morning of the second of November, A. D. 1927, I received a telephone call from Mr. Benjamin Ornstein, asking me to come to Pingry Place and Salem avenue, in the City of Elizabeth, County of Union and State of New Jersey, for the purpose of giving him an estimate on some glass work to be installed in houses which he and his brother, Morris Ornstein claimed they were erecting at the aforementioned place in the City of Elizabeth, New Jersey. Pursuant to the said telephone call I went to Pingry Place and Salem avenue at about 3 P. M. in the afternoon of the same day—that is, on November 2, 1927.

Affidavit of William Sokobin.

At said place were two pretentious looking apartment houses of brick and stone and apparently made to house one hundred and fifty-six families, having one court yard in common; one of the buildings being in a greater degree of completion than the other and known as No. 19 Pingry Place, Elizabeth. The less completed building was known as No. 610 Salem avenue, Elizabeth. A description of the premises upon which the buildings were is shown by the records as follows:

“All that certain lot, tract or parcel of land and premises situate, lying and being in the City of Elizabeth, County of Union and State of New Jersey.

“BEGINNING at a point in the westerly line of Salem avenue where the same intersects with the northerly line of Pingry Place; thence along the northerly line of Pingry Place south seventy-two degrees, thirty-three and one-half minutes west three hundred and thirty-three feet and eighty-six one-hundredths of a foot to a point, being the dividing line between property herein described and property now or formerly of Stamler; thence north seventeen degrees, fifteen minutes west along the boundary line between the premises herein described and Stamler and others, two hundred and thirty feet more or less to lands of Hilda S. Fowler; thence along said land north seventy-two degrees thirty-three and one-half minutes east three hundred eleven feet and thirty-four one-hundredths of a foot more or less to the westerly line of Salem avenue; thence southeasterly along the westerly line of Salem avenue two hundred and thirty

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Affidavit of William Sokobin.

feet more or less to the point and place of Beginning.

“Being the same premises conveyed to the Salem Construction Company by deed from the Jersey Land Company, which deed is dated July 15, 1926.”

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I met Mr. Benjamin Ornstein and his brother, Morris Ornstein, at 610 Salem avenue at 3 P. M. on November 2, 1927, and Benjamin Ornstein said to me, “We are putting up these buildings,” and I said to him, “Who is we?” and he said, “Me and my brother, Morris.” I then said, “Gee, you fellows must have become millionaires; how do you do it?” Then Morris Ornstein said, “Well, we had some lucky breaks; things are good now. Come with us and I’ll show you what we want you to do. Most of the work is done; we’re just finishing up.” Then Benjamin Ornstein and Morris Ornstein took me through both buildings and pointed out places wherein glass should be installed. They showed me doors in the interiors of the buildings where they indicated they wanted plain glass put in; also windows where they wanted fancy leaded glass put in; and explained just what they wanted done. Benjamin Ornstein said to me, “I want you to give me an estimate for this work.” I said, “All right; to whom do I make the estimate out?” Morris Ornstein said, “Make it out to us, of course—Ornstein Bros.” I went home and had my sister, Anne, who does our bookkeeping, typewrite an estimate for me. The estimate was made out pursuant to Mr. Morris Ornstein’s instructions to Ornstein Bros.

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The next day I went to the said premises again and met Morris Ornstein in the construction

Affidavit of William Sokobin.

booth or office on the grounds, and I there and then gave him the aforementioned estimate covering the work which both Benjamin and Morris Ornstein had pointed out to me the day previous in the presence of each other. A copy of said estimate is hereto annexed and made a part hereof. 10

Morris Ornstein looked over the estimate and said, "You're all right, Sokobin; go ahead and do the work; put in whatever glass you see necessary and you will get your money as you do the work. Don't worry about anything; we will pay you as soon as you do the work."

Thereafter, from day to day, Morris Ornstein and Benjamin Ornstein were in the two said buildings and were watching the work and giving directions and instructing me and my workmen how they wanted the work done. When, up to and including November 22, A. D. 1927, I had installed 600 lights of glass in the Salem avenue house, and the beveled plate glass in the vestibule doors in the Pingry Place house I said to Benjamin Ornstein, "How about some money? We've been putting in all this glass and you know I have to pay my men. Say, we ain't no millionaires, and you promised that you would pay me as soon as I did the work, and you have given me nothing." Benjamin Ornstein said to me, "Listen Sokobin, don't worry about your money; it's good. Can't you trust me and Morris? We will pay you. We are negotiating for a loan from the United States Mortgage Company and as soon as this loan is granted we will pay you, but Mr. Kramer (referring to one Hyman Kramer) wants some changes made in the glass work." That is the first time I heard him mention the name of Kramer to me, and I 20 30 40

Affidavit of William Sokobin.

said, "Who's Kramer?" and Benjamin Ornstein said, "Gee, don't you know who Kramer is? He's the big boss. He's a millionaire and owns the Kramer Lumber Company of Clifton, New Jersey. His company holds the mortgage on these buildings, so we have to put the stuff in
10 to suit him, too. You know Kramer, Morris and me are really the owners of these buildings, so you make the changes as Kramer wants and the three of us will be satisfied." I said to Benjamin Ornstein, "All right, as long as you say I'll get paid for it, I'll make the changes, but you know, Bennie, we're no millionaires and I need the money, and these changes that you say Kramer wants will amount to about \$600 more." Then Benjamin Ornstein said, "For
20 goodness sake, Sokobin, what are you afraid of—you don't suppose we would stick you, do you? Good Lord! If you think we Ornsteins haven't enough money to pay you, I tell you Kramer's a millionaire, and he'll pay you if we don't. Kramer has swell ideas and \$600 more means nothing to him. He wants the best of every-thing." I had never seen Mr. Kramer up to
30 this time. Benjamin Ornstein then pointed out what changes in the glass work he said Mr. Kramer wanted made, and relying upon his promise that I would be paid I went and made the changes indicated by Benjamin Ornstein.

After I had made changes which brought the cost of the work up \$600 more, on December 2, A. D. 1927, I saw Benjamin Ornstein and said to him, "What about some money for this work?" He said, "That's all right. We did not get our money yet from the mortgage company. You needn't worry; Kramer is a millionaire and will positively pay for every bit of work done if
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Affidavit of William Sokobin.

we don't get the money from the mortgage company." I said, "Well, what's the idea of these expensive changes if you can't pay right away?" and he said, "That's all right; Mr. Kramer wants everything first class and will pay everything, as he (Kramer) has bought the buildings from us. We are having some trouble about the mortgage, but Kramer is buying the buildings from us and you will be paid. Go ahead with the work; you needn't worry about your money. We will pay you all right." 10

On December 2, A. D. 1927, I saw Benjamin Ornstein and Morris Ornstein, and nearly every day thereafter on the premises. We continued on with the finishing of the work, and finished about December 14, A. D. 1927. Prior to this time I had never met Mr. Kramer, and only heard of him from Morris and Benjamin Ornstein and I heard other men on the job speak of him. 20

During the period between December 2 and December 14, A. D. 1927, I saw Morris Ornstein and Benjamin Ornstein on the premises almost every time I was there. They were continually giving me orders and supervising me concerning the work and the different changes they wanted made. They said to me, "Kramer is a very particular guy and everything's got to be just so." I had to put in leaded glass in places where we were supposed to have put in bevel glass and both Morris and Benjamin Ornstein would examine the work critically and show me just how Kramer wanted the work done. If I said, "This will take much more time and will be dearer; you are running up extra expense" they would say, "What are you worrying about; you're going to get paid for it. Kramer's got 30 40

Affidavit of William Sokobin.

plenty of money to stand for these changes." Up to this time I had never seen Kramer.

I finished the work about December 14, A. D. 1927. A day or two after the work was finished I went down to the aforementioned premises and there saw Morris and Benjamin Ornstein and Mr. Hyman Kramer. That was the first
10 time I had met Mr. Kramer. They were all together when I saw them. Benjamin Ornstein introduced me to Mr. Kramer; then I spoke to the three of them together and said, "How about my money for this work I've been doing here?" Benjamin Ornstein then spoke up and said, "Oh, that's all right; just mail the bill to us and you will get a check immediately." I said, "Where do I mail it to?" and he said, "Salem Construction Company, 19 Pingry Place, Elizabeth."
20 Then Mr. Kramer said, "Wait there, Sokobin, before you do that, I want you to fix up some work here." I said to Kramer, "Say, who's going to pay for all these fancy changes and all these fixings up?" and Kramer said, "Just do as I tell you and I'll pay the bill." Mr. Kramer then pointed out some little changes that he wanted made in the glass work that had been done and the next day I made the changes that Mr. Kramer had requested me to make, and
30 finished the job.

About two days after that, that is on December 16, 1927 I mailed the bill as directed by Benjamin Ornstein to Salem Construction Company, 19 Pingry Place, Elizabeth, Union County, New Jersey, but I received no money.

Early in the morning of December 19, 1927, not having received my check as Benjamin Ornstein had promised me in the presence of Morris Ornstein and Hyman Kramer, I went to the
40 aforementioned place where I had done the

Affidavit of William Sokobin.

glazing, but could not see either Benjamin or Morris Ornstein. I asked some of the men who were working on the premises where the Ornstein's were, and one of the electricians said to me, "You're out of luck, sonny. They and Kramer have been doing some crooked work and no one is being paid. They are stalling everybody off." I then went at once on the same day to the office of Hyman Kramer, at the Kramer Lumber Company at Clifton, New Jersey, and there I saw Mr. Kramer. I said to him, "How about a check?" He said, "I can't give it to you now. It will be after New Years." And I said "What do you mean by after New Years?" He said "The 15th" (meaning January 15th, 1928) and I said, "All right; I'll be here for it." He said, "Never mind, I'll mail it to you. Don't worry; your money is as good as gold; just be patient."

On January 16th, 1928, not having received the check from Mr. Kramer which he had promised to send me and not having received any money from Morris or Benjamin Ornstein, I went to Mr. Kramer's office again, at the same place in Clifton, New Jersey, and I said, "Where's the check you promised to send me?" He said, "Oh, you mean the money for the glass work? I haven't gotten it from the mortgage company yet. You see they granted us a loan but we did not get the money yet, but as soon as I get it I will pay you." I said, "All right" and started to leave. Mr. Kramer called me back and said, "Don't you believe me, Sokobin? You can call up the mortgage company and find out if they didn't grant me a loan" so I said "All right" and left.

I then went to the office of my sister, Hannah F. Sokobin who is a practicing attorney in the

Affidavit of William Sokobin.

State of New Jersey, and asked her to call up the United States Mortgage & Title Guaranty Company of New Jersey to make inquiries if a loan had been granted by them to Ornstein Bros. or to Hyman Kramer. I heard the conversation she had with someone from the aforementioned mortgage company and she told me that no loan had been granted to Benjamin Ornstein or Morris Ornstein or to Hyman Kramer, and she said that the girl at the mortgage company wanted to know where the property was located. I gave her the location of the property and the girl said that a mortgage had been granted a long time ago to the Salem Construction Company on the corner building at Pingry Place. That was the first time that I heard that the buildings belonged to a corporation, because when Benjamin Ornstein had told me on December 14th to mail the bill to Salem Construction Company at 19 Pingry Place, Elizabeth, New Jersey, I thought it was merely the way mail was addressed to the construction booth or office on the premises.

I furthermore heard my sister speak to someone else whom she called Mr. Perselay of the mortgage company, who repeated the fact that the only loan made by the said mortgage company referred to by her had been made to the Salem Construction Company; that foreclosure proceedings had been brought against the property and that the property had been sold to Kramer's company. I heard her repeat what he said and that is what I gathered from the conversation. I then went to my bank on January 18, 1928, Federal Trust Company, and asked one of the men to give me the financial standing of the Salem Construction Company

Affidavit of William Sokobin.

and he informed me that the Salem Construction Company was in the hands of a receiver. I then turned the matter over to my sister entirely and I was informed by her, from the records in the Court of Chancery and in the United States District Court, that the Salem Construction Company was in the hands of a receiver and that Benjamin and Morris Ornstein had filed a petition in bankruptcy. 10

I never did get the money either from Morris or Benjamin Ornstein, nor from Hyman Kramer. My work and materials on this job done pursuant to the aforesaid directions of Morris Ornstein, Benjamin Ornstein and Hyman Kramer, were of the fair and reasonable worth and value of \$1,144.50.

At the times when the aforesaid agreement for the work and materials supplied by me was made, the owner of said premises wherein the same were installed, as appears by the records in the office of the Register of the County of Union, was the Salem Construction Company. I did not know this fact at the time I made the agreement for the work and materials with Morris Ornstein and Benjamin Ornstein, but relied upon their statement that they were putting up the said buildings, which statements they knew were false, because when I met Benjamin Ornstein in a restaurant in Newark sometime after the 19th of January and asked him "Why didn't you tell me you weren't the owner when you asked me to do the work for you on that job in Elizabeth" and he said, "Say, don't you know the way to get out of paying your bills is by working it through a corporation? Why should I have told you that we weren't the owners of the buildings? Let our creditors worry; all they can do is try and collect from 40

Affidavit of William Sokobin.

the Salem Construction Company. We ain't responsible if the Salem Construction Company goes up the flue." I said, "What did you want to lie to me for? You know, Bennie, we're no millionaires and it is hard on my brother and me, and \$1,100, means a lot to us" and he
10 shrugged his shoulders in reply.

Neither Benjamin Ornstein nor Morris Ornstein had any right, title or interest in the said buildings or premises whatsoever, and the afore-said statements by them made to me concerning their interest in the premises were false and untrue, and were known to them so to be at the time of making the said statements and at the time of inducing me to do the work and provide the materials for same, as hereinbefore referred
20 to. And at the time when the said Hyman Kramer first saw me and ordered me to alter the work, namely on or about December 14, 1927, the said Kramer was not the owner of said premises and had no right, title or interest therein, nor did he ever become the owner thereof.

The owner of the premises in question at the time when the agreement was made with me for the installing of the glass work by the said Morris Ornstein and Benjamin Ornstein, on or about
30 the 3rd day of November, A. D. 1927, was the Salem Construction Company a corporation of New Jersey, which company had been placed in the hands of a receiver on December 2, 1927, at which time I was doing work on the premises under the supervision and direction of Benjamin and Morris Ornstein and Hyman Kramer, and upon their express promise to pay for the aforementioned work.

I did the glass work and furnished the materials upon the premises aforesaid at the special
40

Affidavit of William Sokobin.

instance and request of the said Benjamin Ornstein and Morris Ornstein, relying upon their statements that they were putting up the said buildings on the premises and were, in fact, the owners thereof, believing said statements to be true, when, in fact, the same then and there were false and were then and there known by the said Benjamin Ornstein and Morris Ornstein to be false and untrue, and made for the purpose of inducing me to do the said work and furnish the said materials with intent to defraud me and my partner of the reasonable worth and value thereof. 10

After all my work, materials and labor had been furnished I learned, and it is a fact appearing of record, that neither Morris Ornstein nor Benjamin Ornstein have ever been the owner or owners of the said premises where the said work was done for them as aforesaid. The said Hyman Kramer has never been the owner of said premises. 20

WILLIAM SOKOBIN.

Sworn and subscribed to before
me this 14th day of April,
1928.

ANNE SOKOBIN, 30
Notary Public of N. J.

November 3, 1927.

Ornstein Bros.,
Newark, N. J.

Gentlemen:

We hereby agree to furnish and set glass in steel sash at 25¢ per light, size of lights being 8 x 12. 40

Affidavit of Hannah F. Sokobin.

Also plate glass in iron doors, consisting of 10 lights of plate glass for the sum of \$121.00.

Leaded glass to match adjoining building at \$20. per light.

Beveled plate glass for French doors, set at 55¢ per light.

10 Glass for interior openings in lobby, consisting of three to a set at \$20. per set.

The above job located at Salem Road and North Broad street, Elizabeth, N. J.

Trusting to be favored with your contract, we beg to remain

Yours very truly,

R. SOKOBIN & SONS,

WS:A

20

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. }*ss.*

HANNAH F. SOKOBIN, of full age, being duly sworn according to law, on her oath deposes and says:

I am a practicing attorney in the State of New Jersey. My law offices are in the Military Park Building, 60 Park Place, Newark, New Jersey.

30 I am a sister of William and Max Sokobin, trading as R. Sokobin & Sons, whose place of business is at No. 33 Prince street, Newark, New Jersey.

40 On January 16, 1928, at about 1 P. M. my brother, William Sokobin, came to my office and told me that he had been having a hard time in collecting money for work he and my brother, Max, had done in an apartment house that was worth about one million dollars in Elizabeth, New Jersey.

Affidavit of Hannah F. Sokobin.

I tried to learn who the owners of the premises on which my brothers had done the work were, and made a county search of the title to the premises. Said examination of the records in the Register's Office of Union County, the result of my county search made by me shows that neither Benjamin or Morris Ornstein or Ornstein Bros. or Hyman Kramer were ever the owners of the aforesaid premises, or ever had title to the said property. 10

On January 24, 1928, I went to the office of the Clerk in Chancery at Trenton, New Jersey, where I examined the files and made a copy of all the pleadings and instruments filed in the matter of the Salem Construction Company, defendant, in the foreclosure suit brought by the Jersey Land Company. I am herewith attaching a copy of the docket entries up until January 24, 1928. 20

From a perusal of the papers on record I found that a bill to foreclose had been filed on December 2, 1927, by the Jersey Land Company; that a Special Master's Sale had been held on January 12, 1928, and that on that day the Home Builders' Realty & Mortgage Company, of which Hyman Kramer was the President, had purchased the property for \$162,000 and that Hyman Kramer, on January 12, 1928, had acknowledged himself as President of the Home Builders' Realty & Mortgage Company, to be the purchaser of the aforementioned property for the sum of \$162,000. 30

I furthermore learned that on January 17, 1928, a receiver had been appointed for the Salem Construction Company, which receiver was continued on January 31, 1928.

I furthermore learned that both Benjamin and Morris Ornstein had filed petitions in bankruptcy 40

Affidavit of Hannah F. Sokobin.

in the United States District Court on January
23, 1928, and had been adjudged bankrupt on
that day, and furthermore, that from December
2, 1927, to December 14, 1927, at the time that
both Benjamin and Morris Ornstein and Hyman
Kramer were giving my brothers orders to
10 change the work and supply them with more
material and labor, the buildings on which my
brothers had been working were under fore-
closure; and that Benjamin Ornstein was the
President of the Salem Construction Company
and knew of such foreclosure proceedings.

HANNAH F. SOKOBIN.

Subscribed and sworn to before
me this 19th day of April,
20 1928.

JOSEPH ZEMEL,
A Master in Chancery of New Jersey.

Affidavit of Hannah F. Sokobin.

DOCKET ENTRIES.

66/328

THE JERSEY LAND COMPANY,
Complainant,

and

THE SALEM CONSTRUCTION COM-
PANY, *et als.*

10

Bill filed Dec. 2, 1927, by Bilder & Bilder.

3 subpoenas.

Notice to have encumbrance reported upon,
filed Dec. 9, 1927, by Levy, Fenster & McCloskey.

Order to Show Cause, filed Dec. 13, 1927.

20

Petition and Affidavit, filed Dec. 13, 1927,
Bilder & Bilder.

Acknowledgment of Service, filed Dec. 21, 1927.

Affidavit of Service, filed Dec. 22, 1927.

Order for Sale of Property *Pendente Lite*, filed
Dec. 18, 1927.

Stipulation, filed Dec. 29, 1927, Julius Stein,
sol'r.

Order Amending Order, filed Dec. 20, 1927.

Answer, filed Dec. 31, 1927, Levy, Fenster &
McCloskey, sol'rs.

30

Stipulation, filed Jan. 5, 1928, Julius Stein,
sol'r.

Petition and Affidavit, filed Jan. 3, 1928, Julius
Stein, sol'r.

Order to Show Cause, filed Jan. 3, 1928, Julius
Stein, sol'r.

Answer and Counter-Claim, filed Jan. 10, 1928,
Julius Stein, sol'r.

Decree *Pro Confesso*, filed Jan. 10, 1928.

40

Affidavit of Hannah F. Sokobin.

Order as to Bid, filed Jan. 7, 1928.

Subpoena, tested Jan. 11, 1928.

Petition, filed Jan. 10, 1928, Saul and Joseph E. Cohn, sol'rs.

Petition, filed Jan. 10, 1928, Osborne, Cornish & Scheck, sol'rs.

10 Notice, filed Jan. 10, 1928, Osborne, Cornish & Scheck, sol'rs.

Order to Show Cause, filed Jan. 10, 1928, Saul & Jos. E. Cohn, sol'rs.

Order Admitting Party, filed Jan. 10, 1928, Osborne, Cornish & Scheck, sol'rs.

Acknowledgment of Service, filed Jan. 20, 1928, Julius Stein, sol'rs.

Answer, filed Jan. 21, 1928, Osborne, Cornish & Scheck, sol'rs.

20 Conditions of Sale, filed Jan. 17, 1928.

Proof of Posting Notices, filed Jan. 17, 1928, John A. Bernhardt.

Master's Report of Sale, filed Jan. 17, 1928, Bilder & Bilder.

Proof of Publication, filed Jan. 17, 1928, Bilder & Bilder.

Order Confirming Sale, filed Jan. 24, 1928, Bilder & Bilder.

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RECOGNIZANCE.

Filed April 28, 1928.

ESSEX COUNTY CIRCUIT COURT.

WILLIAM SOKOBIN, <i>et als.</i> , <i>Plaintiffs,</i> <i>vs.</i> BENJAMIN ORNSTEIN, <i>et als.</i> , <i>Defendants.</i>	}	<i>Action at Law.</i> <i>Recognizance.</i>	10
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STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } *ss.*

BE IT REMEMBERED, that on the twenty-eighth day of April, nineteen hundred and twenty-eight (1928), Grace Ornstein and Jeannette Ornstein, of Newark, as sureties, and Benjamin Ornstein and Morris Ornstein, defendants, all of the County of Essex, New Jersey, personally appeared before me, Henry Hahn, one of the Supreme Court Commissioners of the State of New Jersey, and severally acknowledged themselves to owe unto William Sokobin and Max Sokobin, trading as R. Sokobin & Sons, the sum of twenty-two hundred eighty-nine (\$2289.00) dollars each to be levied upon their and each of their several goods and lands upon condition that if the defendants, Benjamin Ornstein and Morris Ornstein, shall be condemned in this action, at the suit of William Sokobin, *et als.*, the plaintiffs, they shall pay the costs and condemnation of the Court or render themselves into the custody of the Sheriff of said County for the same, or if they fail so to do, that the said

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Recognizance.

Grace Ornstein and Jeannette Ornstein will pay the cost and condemnation for them or render them into the custody of the Sheriff of the said County.

Taken and acknowledged the day and year above written before me.

10

HENRY HAHN,
A Supreme Court Commissioner
of New Jersey.

Benjamin Ornstein (SEAL)
Morris Ornstein (SEAL)
Grace Ornstein (SEAL)
Jeannette Ornstein (SEAL)

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JUSTIFICATION.

Filed April 28, 1928.

ESSEX COUNTY CIRCUIT COURT.

WILLIAM SOKOBIN, <i>et als.</i> , <i>Plaintiffs,</i> <i>vs.</i> BENJAMIN ORNSTEIN, <i>et als.</i> , <i>Defendants.</i>	}	<i>Action at Law.</i> <i>Justification.</i>	10
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STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. }ss.

GRACE ORNSTEIN and JEANNETTE ORNSTEIN, each
 being duly sworn, on *her* oath says, that they are
 the surety in the within-named bond; that they
 are freeholders in the County of Essex and have
 property subject to execution worth the sum of
 five thousand (\$5,000) dollars over and above all
 their just debts and liabilities.

GRACE ORNSTEIN,
 JEANNETTE ORNSTEIN.

Subscribed and sworn to before
 me, this 28th day of April,
 1928.

HENRY HAHN,
 A Supreme Court Commissioner
 of New Jersey.

I approve the within recognizance as to form
 and sufficiency. Let it be filed.

HENRY HAHN,
 A Supreme Court Commissioner
 of New Jersey.

April 28, 1928.

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NOTICE OF MOTION.

Filed May 14, 1928.

ESSEX COUNTY CIRCUIT COURT.

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WILLIAM SOKOBIN and MAX
SOKOBIN, trading as R.
Sokobin & Sons,

Plaintiffs,

vs.

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BENJAMIN ORNSTEIN and MORRIS
ORNSTEIN, individually and
trading as Ornstein Bros.,

Defendants.

*Action
at Law.*

*Notice of
Application
for an Order
for the taking
of testimony
as to the
truth of the
affidavit on
which the
order to hold
to bail was
based.*

*To Irving W. Teeple, attorney for plaintiff in the
above-entitled cause:*

30

PLEASE TAKE NOTICE, that I shall apply to the
Honorable Worrall F. Mountain, Esq., Judge of
the Essex County Circuit Court, at his Chambers,
in the Court House, in the City of Newark, on
the twelfth day of May, 1928, for an order for
the taking of testimony concerning the matters
set forth in the affidavit of William Sokobin and
proofs upon which the order for the granting of
said writ of capias was heretofore allowed in this
case and upon which order said writ was issued.

LOUIS L. FEINSETH,
Attorney for Defendant.

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Dated May 11, 1928.

Notice of Motion.

Service of the within copy of the notice of motion is hereby acknowledged this 11th day of May, 1928.

IRVING W. TEEPLE,
Plaintiff's Attorney.

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ORDER FOR TAKING TESTIMONY.

Filed May 14, 1928.

ESSEX COUNTY CIRCUIT COURT.

10	WILLIAM SOKOBIN and MAX SOKOBIN, trading as R. Sokobin & Sons, <div style="text-align: right;"><i>Plaintiffs,</i></div>	}	<i>Action at Law.</i>
	<i>vs.</i>		<i>Order for Taking Testimony.</i>
	BENJAMIN ORNSTEIN and MORRIS ORNSTEIN, individually and trading as Ornstein Bros., <div style="text-align: right;"><i>Defendants.</i></div>		

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Having heard argument on behalf of the plaintiff and defendant on the above cause and having examined all the proceedings heretofore taken therein, it is on this 12th day of May, 1928,

ORDERED, that testimony concerning the truth of the matters set forth in the affidavit of William Sokobin, the plaintiff in this cause, and the further proofs upon which the order for the writ of *habeas corpus* was made and issued in this cause, be taken before Milton M. Unger, Esq., a Supreme Court Commissioner, in writing and that the same be taken and completed on or before a day within 15 days from the date of this order.

WORRALL F. MOUNTAIN,
Judge.

Dated May 11th, 1928.

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BOND.

Filed June 26, 1929.

INDEPENDENT BONDING AND CASUALTY
INSURANCE COMPANY.

NEWARK, NEW JERSEY.

10

KNOW ALL MEN BY THESE PRESENTS: That We, Max Sokobin, as Principal, and Independent Bond and Casualty Insurance Company, a corporation of New Jersey, authorized to transact business in the State of New Jersey, as surety, are held and firmly bound unto Benjamin Ornstein and Morris Ornstein, individually and trading as Ornstein Brothers, in the sum of One Hundred Fifty Three Dollars and Twenty Cents (\$153.20), lawful money of the United States

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of America for payment of which sum, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 25th day of June, A. D. 1929.

MAX S. SOKOBIN (SEAL)

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WHEREAS, a judgment for non-suit was rendered in the Essex County Circuit Court on the 24th day of May, A. D. 1929, in a suit therein pending, wherein William Sokobin and Max Sokobin, trading as R. Sokobin & Sons, are the plaintiffs, and Benjamin Ornstein and Morris Ornstein, individually and trading as Ornstein Brothers are the defendants, for the sum of seventy-six dollars and sixty cents (\$76.60), and the plaintiff is about to appeal from said judgment for non-suit of the said Essex County Circuit Court to the New Jersey Supreme Court;

40

Bond.

Now, the condition of this obligation is such, that if the said Max Sokobin, surviving partner of William Sokobin and Max Sokobin, trading as R. Sokobin & Sons, shall pay the costs of the said appeal, whatever be the result thereof, and shall pay to the said Benjamin Ornstein and Morris Ornstein, individually and trading as Ornstein Brothers, the judgment of the Essex County Circuit Court so as aforesaid rendered against the said William Sokobin and Max Sokobin, trading as R. Sokobin & Sons, if the said appeal be not prosecuted by the said Max Sokobin, surviving partner of William Sokobin and Max Sokobin, trading as R. Sokobin & Sons or be dismissed, then this obligation to be void; otherwise, to remain in full force and virtue. 10

MAX S. SOKOBIN, (SEAL) 20

INDEPENDENT BONDING &
CASUALTY INSURANCE COMPANY,

By ROBERT S. HUDSPETH,
President.
(SEAL)

Signed, sealed and delivered in
the presence of

V. T. WYCKOFF. 30

Attest:

V. T. WYCKOFF,
Assistant Secretary.

Bond.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

10 On this 25th day of June, 1929, before me personally appeared Robert S. Hudspeth, President of the Independent Bonding & Casualty Insurance Company, a corporation organized and existing under the laws of the State of New Jersey and having its principal office or place of business at Newark, New Jersey, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in Newark, New Jersey; that he is the President of the said Independent Bonding & Casualty Insurance Company, the corporation described in and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed
20 to the within instrument is such corporate seal; that it was so affixed in pursuance to Resolution of said corporation, and that he signed his name thereto as President by like order, and deponent further said that the liabilities of said Company do not exceed its assets as determined by an audit of the Company's annual statement filed with the Superintendent of Insurance of the State of New Jersey and that the said Company is authorized to do business in the State of New
30 Jersey.

(SEAL)

A. W. CUBELLIS,
Notary Public.
My Commission Expires
February 11, 1932.

Bond.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

On this 25th day of June, 1929, before me personally appeared V. T. Wyckoff of the Independent Bonding & Casualty Insurance Company, a corporation organized and existing under the laws of the State of New Jersey and having its principal office or place of business at Newark, New Jersey, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in Newark, New Jersey; that he is the Ass't Secretary of the said Independent Bonding & Casualty Insurance Company, the corporation described in and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to the within instrument is such corporate seal; that it was so affixed in pursuance to Resolution of said corporation, and that he signed his name thereto as Assistant Secretary by like order, and deponent further said that the liabilities of said Company do not exceed its assets as determined by an audit of the Company's annual statement filed with the Superintendent of Insurance of the State of New Jersey and that the said Company is authorized to do business in the State of New Jersey.

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(SEAL)

A. W. CUBELLIS,
Notary Public.
My Commission Expires
February 11, 1932.

40

Bond.

Copy of Resolution Authorizing Certain Officers of the Independent Bonding & Casualty Insurance Company to Execute Bonds:

Resolved, That any two (2) of the following Officers, to Wit: the Prresident of the Company, the Chairman of the Board, any Vice President
 10 of the Company, the Secretary of the Company, any Assistant Secretary and the General Manager, are hereby authorized, acting as Attorneys on behalf of the Independent Bonding & Casualty Insurance Company, to execute, on behalf of the Company, any Bonds, recognizances, stipulations, undertakings, deeds, releases, mortgages, contracts, agreements, policies, and to affix the Seal of the Company thereto.

20 I hereby certify the above to be an exact copy of the Resolution made by
 (SEAL) the Board of Directors of the Independent Bonding & Casualty Insurance Company on the 19th day of November, 1926.

V. T. WYCKOFF,
 Ass't Secretary.

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Bond.

COPY

INDEPENDENT BONDING & CASUALTY
INSURANCE COMPANY

Financial Statement December 31, 1928

ASSETS:

Market Value of Bonds	\$510,646.00		10
Market Value of Stocks	54,300.00		
	<hr/>	\$564,946.00	
Cash in Banks and in Office	110,449.50		
Gross Premiums in Course of Collec- tion	32,695.94		
Interest accrued on Investments	8,310.12		
Reinsurance recoverable on paid Losses	276.75		
	<hr/>	\$716,678.31	20

LIABILITIES:

Reserve for Losses	\$ 98,085.78		
Reserve for Unearned Premiums	95,936.94		
Reserve for Commissions, Expenses and Taxes	13,466.93		
Partial Payments on Stock Subscrip- tions	7,260.00		
Capital paid up	\$440,805.00		
Surplus over all Liabilities.	61,123.66		
Surplus as regards Policyholders	501,928.66		30
	<hr/>	\$716,678.31	

.....

Bond.

I, JOHN R. SHIELDS, Vice President of the Independent Bonding and Casualty Insurance Company, do hereby certify that the above is a true statement of the Assets and Liabilities of said Company, as of December 31st, 1928, taken from the books and records of said Company, and as reported to the Banking and Insurance Department of the State of New Jersey.

JOHN R. SHIELDS,
Vice President.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

Subscribed and sworn to, before me, a Notary Public of the State of New Jersey of the County of Essex, this 10th day of April, A. D. 1929.

A. W. CUBELLIS,
Notary Public.

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ORDER DISCHARGING BAIL BOND.

Filed September 3, 1929.

ESSEX COUNTY CIRCUIT COURT.

46109

WILLIAM SOKOBIN and MAX
SOKOBIN, trading as R.
Sokobin & Sons,

Plaintiffs,

vs.

BENJAMIN ORNSTEIN and MORRIS
ORNSTEIN, individually and
trading as Ornstein Brothers,

Defendants.

10

*Action
at Law.*

*Order
Discharging
Bail Bond.*

20

This matter being open to the Court by Louis L. Feinseth, attorney for defendants Benjamin Ornstein and Morris Ornstein, and it appearing that a writ of *capias ad respondendum* was issued in the above cause against the said defendants; and it further appearing that the said defendants were apprehended by the Sheriff of the County of Essex, and taken into custody by virtue of the said writ, and it further appearing that in order to obtain a release of the said defendants the said defendants as principals and Grace Ornstein and Jeannette Ornstein as sureties entered into a bond whereby they were held and firmly bound in the penal sum of five thousand (\$5,000.00) dollars which bond was filed in the Essex County Clerk's office, and docketed in Book M 1-136 on the 28th day of April, 1928; and it further appearing that this matter came on for trial on the 24th day of April, 1929, in the

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Order Discharging Bail Bond.

above-entitled court and that a non-suit was granted in favor of the defendants and against the plaintiffs.

It is therefore on this 29th day of August, 1929, ORDERED that the said bond, above described, be and is hereby discharged and cancelled of
10 record.

WM. A. SMITH,
Circuit Court Judge.

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JUDGMENT.

ESSEX COUNTY CIRCUIT COURT.

46109

WILLIAM SOKOBIN and MAX
SOKOBIN, trading as R.
Sokobin & Sons,

Plaintiffs,

vs.

BENJAMIN ORNSTEIN and MORRIS
ORNSTEIN, individually and
trading as Ornstein Brothers,
Defendants.

*Action
at Law.*

10

On Non-suit.

*Judgment
Entered*

May 24, 1929.

Costs \$76.60.

Louis L. Feinseth, attorney for defendants.

20

Judgment on non-suit in the above-entitled action was rendered on the twenty-fourth day of May, A. D. nineteen hundred and twenty-nine in favor of the defendants Benjamin Ornstein, Morris Ornstein individually and trading as Ornstein Brothers and against the plaintiffs William Sokobin, Max Sokobin for the sum of seventy-six dollars and sixty cents, costs of suit.

Judgment entered and signed May 24, 1929.

30

Book 107, page 467, C C Judgments.

Clerk's Certificate.

ESSEX COUNTY CLERK'S OFFICE.

STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. }ss.

10 I, JOHN H. SCOTT, Clerk of the Circuit Court,
 in and for the County of Essex in the State of
 New Jersey,

20 DO HEREBY CERTIFY That the foregoing is a
 true and correct copy of all the pleadings in the
 case of William Sokobin and Max Sokobin, trad-
 ing as R. Sokobin & Sons, plaintiffs, *vs.* Benjamin
 Ornstein and Morris Ornstein, individually and
 trading as Ornstein Brothers, defendants, to-
 gether with a copy of the judgment record en-
 tered in Book 107, page 467, of Circuit Court
 Judgments on May 24, 1929, and the same is
 taken from and compared with the original copies
 of all records and as the same now remains on
 the files of said court.

IN TESTIMONY WHEREOF, I have here-
 unto set my hand and affixed the of-
 (SEAL) ficial seal of said Court and County
 at Newark, N. J., this nineteenth day
 of May, A. D. 1930.

JOHN H. SCOTT,
 Clerk.

30

Max Sokobin, direct.

TESTIMONY.

ESSEX COUNTY CIRCUIT COURT.

Monday, May 27, 1929.

WILLIAM SOKOBIN, *et al.*,

vs.

BENJAMIN ORNSTEIN, *et al.*

10

*Action
at Law.*

Before Hon. William A. Smith, *J.*, and a jury.

For plaintiff appears Irving W. Teeple.

For defendant appears Louis F. Feinseth.

(A jury is called and sworn.)

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Mr. Teeple opens for plaintiff.

Mr. Feinseth opens for defendant.

MAX SOKOBIN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Teeple.

Q Mr. Sokobin, how old are you? A I am 30
32 years old.

The Court: Before we go on, I suppose it is stipulated, as I understand it, the amount alleged as expended for materials, \$1,144.50, were delivered to this building. It is disagreed as to whether or not this defendant ordered it, and whether it was fraudulently represented?

Mr. Teeple: That is the way we look at it. 40

Max Sokobin, direct.

Mr. Feinseth: We have no information or knowledge on which to form a belief as to that. I spoke to my client and he does not know.

The Court: You want proof on that?

Mr. Feinseth: Yes, sir.

10

Q What is your business, Mr. Sokobin? A Wholesale glass business and contracting.

Q What is the name of your concern? A R. Sokobin & Sons.

Q Now, who composed R. Sokobin & Sons on the 2nd day of November, 1927? A My brother Willie and myself.

Q What is your brother's full name? A William Sokobin.

20

Q And were you both at that time in active conduct of the business? A Yes, sir; my brother was at the head of the business.

Q Now, has your brother since passed away? A Yes. He died June 28, 1928.

Q And where did he die? A At 75 13th avenue, at his home.

Q Is that your home also? A No; that is my mother's home.

Q And were you present when he died? A Yes, sir.

30

Q Did you attend his funeral afterwards? A Yes, sir.

Q Where is he buried? A At a cemetery on 20th street.

Q Now, do you know Benjamin Ornstein and Morris Ornstein? A Do I know them now?

Q Yes. A Yes.

Q Did you ever have any conversation with either Benjamin or Morris Ornstein in the month of October, 1927? A Yes, sir.

40

Max Sokobin, direct.

Q When was it? A We were making a delivery of some glass to a man that was doing some work on that building in Elizabeth and we were going on further to Carteret, and when I delivered the glass he said to me—

Q Who? A One of the Ornsteins.

Q Do you see the one? Will you two gentlemen stand up. (Two men stand up in the court room.) Do you see the one it was? A I did not know them at that time, prior to that.

10

The Court: Which one did you talk to?

The Witness: I haven't seen either one since that time.

The Court: You don't know which one it is?

The Witness: It is the younger chap there. I am more than positive now.

20

The Court: What is his name?

Mr. Feinseth: Morris.

The Witness: I am more than positive now that it was him.

Mr. Feinseth: This man?

The Witness: Yes.

Q You say you had a talk with him? A Yes.

30

Q On what date was it? A It was about the middle of October.

Q 1927? A Yes, sir.

Q And where was this talk? A On Pingry Place in Elizabeth.

Q Was there a building in the process of construction there? A Yes, sir. There were two buildings.

Q Now, state what conversation you had.

40

Max Sokobin, direct.

10 Mr. Feinseth: I object, your Honor, on the ground that the proof coming out now is at variance with the allegations set forth in the complaint. According to the complaint, the agreement was entered into on the 3rd of November and this representation was made in the middle of October.

The Court: I think it is just preliminary.

A That is, the truck driver, another man and myself were going to Carteret to install some mirrors there and on the way we delivered glass to a party by the name of Schaff that was doing some glass work there.

20 Q Where? A At Pingry Place, Elizabeth. When I delivered the glass I asked, "Where is Schaff?" "Why, he is not here right now, but we will take care of the glass."

Q Who did you ask that from— A One of the Ornsteins there.

Q Which one? A The young chap.

Q Morris Ornstein? A The young chap there.

30 Q Sitting by the rail? A Sitting by the rail. He said, "Why, Sokobin, I did not know that you do big work like this at the time. I might have given you. We are very dissatisfied with Schaff's work and we want to let you compete for us on this next building, the corner building."

Q What kind of a building—what kind of buildings were they? A They are—one apartment house ran into something like eighty some odd families to it and one some seventy odd families to it.

40 Q Two separate apartments? A Two separate apartment houses.

Max Sokobin, direct.

Q What was their state of construction? Were they both being built at the time? A They were both being built at the time. One was pretty near finished and one was in the course of construction and had—it had no windows in it or anything—it was open, and the inside needed, that is, the walls, the tiling, plaster of paris, whatever it is. 10

Q Which building was it you saw Morris Ornstein in? A On the Pingry Place Building.

Q They are both on Pingry Place? A No; one is on Salem avenue, and one is on Piggly Place.

Q Which building was nearer finished? A The one on Pingry Place.

Q And that is the building in which you saw Morris? A Yes, sir. 20

Q Go on and tell us the whole conversation. A He said, why, "I am dissatisfied with Schaff's work. We can't get him to come here and do any work at all. He said, "We have to call him up a dozen times before he does this work." And he says "the tenants are moving in here and they are all giving me the devil about it. We have lost money because the job was not completed. If you can give us better service, I might give you the job." I said, "I don't know if we can give you better service or not, but we will try our best." And so he kept on going on, and we delivered the glass and— 30

Q (Interrupting.) Wait a minute. Is that all he said? A Why, he says, "What do you think of these buildings we are putting up here?" I said, "They are mighty nice looking buildings."

Q Well, did he tell you—

Mr. Feinseth: I object to leading the witness, if your Honor please. 40

Max Sokobin, direct.

Q Did he tell you he was putting the buildings up?

Mr. Feinseth: I object to that as leading.

The Court: I will allow it.

10 A Yes; he said, "My brother and I are putting up these buildings."

Mr. Feinseth: I ask for an exception to your Honor's ruling.

The Court: You may have it.

Exception noted as ground of appeal.

Q Was anything else said in that conversation? A I don't remember anything else.

20 Q Did you ever go down to either one of those buildings after that? A After November we went down there. After we got the contract.

Q Were you there at any time when your brother Willie was there? A The latter part of December before we installed some—when they wanted some changes made in some glass installed there, I was there at the time.

Q Who else was there? A Why, two glaziers that we had there, my brother Willie and the Ornstein boys.

30 Q Did you have anything to do with figuring on this job? A Yes, sir; I helped my brother figure the job.

Q When was that? A About the 3rd of November. The 3rd or 4th of November.

Q Do you know what was done about the figures? A My brother went out. We received a telephone call at the store on November 3rd to come out. My brother answered the telephone. And he told me then—he said, "I just received—"

40

Max Sokobin, direct.

The Court: (Interposing.) Never mind what he told you. He received the call when?

The Witness: November 3rd.

The Court: November 3rd. All right. Now, what resulted?

The Witness: It resulted, he went out to Elizabeth to figure on the job for the Ornstein Brothers. 10

Mr. Feinseth: Were you there?

The Court: He left your place to go to Elizabeth?

The Witness: Yes.

The Court: I will strike out the rest of it.

Q When he came back, did he do any figuring? A Yes, sir. 20

Q In your presence? A When he came back, he said—

Mr. Feinseth: (Interrupting.) I object to what he said.

The Court: Objection sustained. You cannot testify to what your brother told you. Get that in your mind now.

The Witness: He handed me measurements of the building, and he said—"What shall we figure on—" 30

The Court: (Interposing.) I just told you, you cannot say what he told you.

The Witness: He—

The Court: He handed you measurements; and what did you do, and what did he do? Not giving us your conversation.

The Witness: We both figured on it. 40

Max Sokobin, direct.

Q And what did you do with the figures, if anything? A Why, he took them home to my sister Annie, who does our bookkeeping, to submit the estimate to Ornstein Brothers.

Q Is that the reason that you figured with him? A Well, all estimates that went out of that store at that time were figured by the two of us.

Q Together? A Together. Nothing went out without the other's consent.

Q Did you figure the estimate on that building? A With him, yes, sir.

Q What was done with the estimate after you figured it? A My sister Annie typed it.

Q Did you do anything with it? A No, sir.

Q Did you see anything done with it? A My brother took it out to Elizabeth.

Q Your brother took it away? A Took it away.

Q Did you ever see it again after that? A Yes, sir.

Q Where? A When he came back from the job, that they had given him the job and we put it in the regular folder.

Q Now, I show you a paper here and ask you if that is what you call the estimate that you saw (handing paper to witness)? A Yes, sir.

Q Is that the identical one? A That is the very one.

Q Where did you see that again? A We kept all our estimates in the folder, at the store.

Q Now, did you do anything about that yourself, about the estimate after it came back? A I started on the job, to do the work.

Mr. Teeple: I ask that that be marked for identification.

Max Sokobin, direct.

The Court: Did he take more than one over?

The Witness: I don't remember.

(Paper referred to received and marked Exhibit P. 1 for identification.)

Q You say you started on the job? A Yes, 10
sir.

Q What did you do there? A Why, he came 20
back with the size and I started cutting the
glass. And there was some glass to be bevelled
and I immediately sent out to the beveller to be
bevelled, and we asked the beveller to rush that
thing through, and we got the bevelled lights in-
stalled. And we started working on the Salem
avenue building, supplying the small glass, 8 by
11s, I think.

The Court: You installed the work in
these two buildings, is that so?

The Witness: We installed part of the
work in one building and the balance in the
other building.

The Court: Which did you do first?

The Witness: On Pingry Place.

Q Whom did you see there when you were 30
installing that work? A There was two Orn-
stein brothers that were there all the time—
well, not all the time—alternating.

Q And did you receive any orders while you
were working on that job? A Yes, sir.

Q From whom did you receive the orders? A
I received the orders from both of the Orn-
steins.

Q Did you ever receive any orders from 40
anybody else on that job? A No, sir.

Max Sokobin, direct.

Q At any time? A No, sir.

Q Just what work did you do there? A On the Salem avenue building we installed about 600 lights of steel sash glass, 8 by 11s, and we put in 20 lights of glass to be on the top there with lettered design. And then in the Pingry Place
10 building, we got plain plate glass to install in the front doors, and we were told to hold off and put bevelled plate glass in there.

Q Who told you that? A The Ornsteins.

Q Yes? Go ahead. A And then we glassed up 80 odd some pair of doors, with double thick glass.

The Court: What was the other?

The Witness: Plain—bevelled plate glass.

20 A (Continuing.) With double thick glass, and then we changed on one side of the building, that is, on the road, where the bath rooms were glassed, and we changed that to Florentine glass and we installed some breakage there.

Q And when did you get through with that work? A December the 13th—the 14th we got through on it. The 14th we actually got through there.

30 Q 1927? A 1927.

The Court: November?

The Witness: December.

The Court: December what?

The Witness: December the 14th, 1927.

The Court: Completed?

The Witness: Yes.

Q Now, did you keep any account of this work in books? A Yes, sir.

Max Sokobin, direct.

Q Are the books here? A Yes, sir. There are two small day books there.

Q I show you two small books (handing to witness). What are they? A These are day books.

Q Who keeps those books? A Why, either he or I kept this book; either. Any order that came in at the time, it was always entered in this book and it was checked out of this book. 10

Q Does that book show orders for the various portions of this wrk? A Yes, sir.

Q Can you turn to that and tell in whose handwriting they are? A Yes, sir. This here on November the 14th is my brother's handwriting.

Mr. Feinseth: I object to that, if your Honor please. 20

The Court: Why?

Mr. Feinseth: It is his brother's handwriting.

The Court: The brother is dead.

Mr. Feinseth: That is true. He is not competent to testify.

The Court: On what ground? (To the witness.) These are regularly kept books, aren't they? 30

The Witness: Yes.

The Court: And then what do you do; post these into a ledger?

The Witness: Yes, sir; we make out a charge ticket from this here.

The Court: And then what do you do with that?

The Witness: And then the charge book is posted into the ledger. 40

Max Sokobin, direct.

The Court: Where do the charge tickets go?

The Witness: They go into a regular folder; into that ledger there.

The Court: Explain the method—explain the books to us.

10

Mr. Teeple: Explain.

The Court: Explain the other, and how they go in, and you can offer them altogether.

The Witness: Every job that comes into the store, any telephone call, is first entered in this book.

The Court: That is a sort of an order book?

20

The Witness: A sort of an order book. He at the time went out there and measured the job, and this is his handwriting there, and this is the first item (indicating)—we call that two lots, 2 B. P. 21 $\frac{7}{8}$ by 58 $\frac{1}{4}$, 4 B. P. P. 10 by 58 $\frac{3}{8}$, 700 lights, 8 by 11s, sets, and steel sash.

The Court: Now, as I understand it, you have got marked in that book the different places where the different other work is entered; is that it?

30

The Witness: Yes, sir.

The Court: Now, just follow that November 4th item into your books, where it goes.

The Witness: The charge is made out, a charge slip.

The Court: Let's see what that is.

Q And what is the book you have in your hand? A This is the ledger.

Q And what are those slips there? A After we get through with the job we make out these

40

Max Sokobin, direct.

slips here and each slip is numbered and posted into this book accordingly.

The Court: And you have got those slips?

The Witness: Yes, sir.

The Court: And where is your ledger entered?

10

The Witness: This is the ledger.

The Court: I know, but whereabouts is the item? Where is this November 4th item?

The Witness: The November 4th item is not in here because we were not through with the job on November 4th.

The Court: Where does it get in there? Where is the item?

20

The Witness: This particular item was changed. We had to take these lights of glass out and install letter glass for the other because Ornstein did not want—

The Court (interposing): Go on to your next item, if that is not charged.

Q Give us the date first, and then the item.
A The next item which is not charged in this book, 4 B. P. P. 30 by 70.

30

Mr. Feinseth: Not charged in this book?

The Witness: Not charged in this book, because this is an item that was changed.

The Court: All right. Then this is not here?

The Witness: No, sir.

The Court: Get us the first item you have charged.

40

Max Sokobin, direct.

The Witness: We only charge for the entire job. When we would get through on the job we made one entry in round figures, when it was complete. That is our method of doing a large construction job.

10 The Court: I see. Let's see these slips. Then those are really the only original slips that you have?

The Witness: No. This book is an original.

The Court: That is your order; where you enter your order?

The Witness: Yes.

The Court: Oh, this is your only slip of what you deliver?

20 The Witness: Yes.

The Court: These are the slips that you have showing that you originally made delivery?

The Witness: Yes.

The Court: Does a copy of this go—

The Witness: As a rule they do.

The Court: You have no other record of the items other than these slips?

30 The Witness: We have it in this book—order book.

The Court: Outside of that book—and then these have been entered in that book?

The Witness: Yes, sir.

The Court: Let's see the item of December 13th.

(Witness indicates in book.)

The Court: You may cross examine on the books.

40

Max Sokobin, cross.

Cross examination as to books by Mr. Feinseth.

Q This slip dated December 13, 1927— A Yes.

Q This represents materials actually furnished to the apartment houses? A Yes.

Q And, Mr. Sokobin, this is made out to Salem Construction Company, December 13th; isn't that so? A Yes, sir. 10

The Court: And all of the goods which you have on those slips you actually put on the job; do you know that?

The Witness: Yes, sir.

The Court: And the prices are reasonable prices?

The Witness: Yes, sir. 20

The Court: All right.

Mr. Teeple: I offer the books in evidence—to be marked by consent.

(Books referred to received and marked in evidence, Exhibits P. 1 and P. 2.)

By Mr. Teeple.

Q How much is due and owing you on that work? A \$1,144.50. 30

Q With interest from what date? A From December 14, 1927.

Mr. Teeple: Take the witness.

Cross examination by Mr. Feinseth.

Q When was the first time, the first occasion that you visited the apartment houses on Pingry Place and Salem avenue? A The middle of October. 40

Max Sokobin, cross.

Q The middle of October? A 1927.

Q And who did you see on the job? A That young Ornstein over there.

Q The young one? A Yes, sir.

Q And are you certain this was the man you saw? A Yes.

10 Q What? A Positive.

Q What makes you positive? A I placed my memory very, very good.

Q You were unable to identify him at first. A I haven't seen them in over a year's time, but now I look back I am more that positive.

Q You are sure now that this was the Ornstein that was on the job? A Yes.

Q And was this the only Ornstein you saw or had seen on the job? A I saw the other fellow.

20 Q When did you see him? A After we were doing the job.

Q After you were through with the job? A When were you doing the job.

Q How many times were you on the job? A Well, I worked steady there for a while—we installed this steel sash, I worked there two or three times in a stretch, and when we installed the glass in the doors I worked there that day, and then we installed all the letter glass, I worked there with the men that day.

30 Q Who did you have with; anybody on the job? A With both.

Q With both of them? A Yes, sir.

Q What did Mr. Morris Ornstein say to you? A The first time I was there?

Q Yes. A In October?

Q Yes. A He said, "What do you think of the buildings we're putting up?" He said, "I am dissatisfied with Schaff's work." He says, "I am dissatisfied with Schaff's work, and we

Max Sokobin, cross.

are going to throw Schaff out here because he is very unreliable in his work. We have called him up several times to come out here, and the tenants are kicking because we cannot close up this apartment house."

Q And as a result of the conversation you had with Mr. Ornstein, did you say anything to your brother William? A No, sir. 10

Q He knew nothing about it? A No, sir.

Q When did he first learn, if you know, that the Ornsteins wanted someone to put glass work in there? A He must have learned it November 3rd, when they called up.

Q You said nothing to your brother? A No.

Q And are you one of the partners? A Yes.

Q And this is quite a large sized job; isn't it? A Yes. 20

Q And it meant quite a little money for you? A Yes.

Q A lot of money, isn't that so? A Not necessarily.

Q And weren't you interested in getting the job? A We had plenty of work at that time.

Q You had plenty of work at that time? A Yes, sir.

Q Did you ever come back and ask for the job? A No, sir. 30

Q You made no attempt or no effort to have the Ornsteins give you the job again? A No, sir.

Q When next were you on the premises, about? A November the 4th or 5th, when we installed the bevelled glass.

Q And whom did you see then? A The young chap there was around there all the time—most of the time. 40

Max Sokobin, cross.

Q And did you have a conversation with him at that time? A Well, he says the glass is all right. "This is fine service, to have the glass up so the cold—so we can keep steam in the place."

Q Did you see the construction booth at the corner of Pingry Place and Salem avenue? A
10 Yes, sir.

Q Did you see the sign on top of the construction booth? A There is a sign there.

Q There was a sign there? A Yes. "Three and four room apartments to rent. Renting Agent on the Premises."

Q And did you see "Salem Construction Company" on the sign? A No, sir.

Q Are you certain? A Yes.

Q When you went back, you testified on direct
20 examination, that you returned to the job late in December; is that right? A That I returned to the job? During November and December while we were doing the job, I returned.

Q You testified on direct examination that you returned to the job late in December; is that right? A If I returned late in December?

Q Did you return to the job late in December? A Yes; late in December.

Q How late in December; do you recall? A
30 Middle.

Q And by "middle" what do you mean? A About the 13th would be the middle.

Q And do you recall on the 13th—I withdraw that question. When you returned to the job on the 14th, did you know who were the owners of the building at the corner of Pingry Place and Salem avenue? A The night of the 13th we found out who were the owners of the building.

Q You found out on the 13th? (No answer.)
40

Max Sokobin, cross.

The Court: Did you find out; that is the question?

The Witness: I was under the impression—

The Court: That is not what it is; not your impression. Did you find out?

10

The Witness: We knew the Ornsteins owned the building.

The Court: I didn't ask you that. Strike it out. Did you find out then?

The Witness: My brother—

The Court: Your brother.

Q But you were still under the impression that the Ornsteins were the owners— A Yes.

Q On the 14th and 15th; isn't that so; yes or no? A What is that?

20

Q (Question repeated by the stenographer.)
A Yes, sir.

Q And on the 15th and on the 16th? A The 16th, no.

Q On the 17th? A No, sir.

Q But you were under the impression on the 15th that they were still the owners; isn't that so? A Yes, sir.

Q I show you this bill and ask you whether that is the hand writing of your brother William (handing paper to witness)? A Yes, sir.

30

Q And will you read the date. A December the 13th.

Q And to whom is the bill made out? A To the Salem Construction Company.

Mr. Feinseth: I offer that to be marked for identification.

(Paper referred to received and marked Exhibit D. 1 for identification.)

40

Max Sokobin, cross.

Q I show you another bill, or what purports to be a bill, made out to the Salem Construction Company, dated December 14th, for glass sold to the Salem Construction Company and ask you whether this is in your brother's hand writing (handing paper to witness)? A Yes, sir.

10

Mr. Feinseth: I offer that to be marked for identification.

(Paper referred to received and marked Exhibit D. 2 for identification.)

Q And I ask you whether this purports to be a bill made out to the Salem Construction Company, and dated December 14th (handing paper to witness)? A Yes, sir.

20

Mr. Feinseth: I ask that that be marked for identification.

(Paper referred to received and marked Exhibit D. 3 for identification.)

Q I show you another paper which purports to be a bill made out by the firm of Sokobin to the Salem Construction Company and ask you if this is in your brother's hand writing (handing paper to witness)? A Yes, sir.

30

Q And dated December 14th? A Yes.

Mr. Feinseth: I ask that that be marked for identification.

(Paper referred to received and marked Exhibit D. 5 for identification.)

Q Let me ask you, Mr. Sokobin: When was the work completed? A On December 14th.

40

Anne Sokobin, direct.

The Court: Do those bills represent this work?

Q Do the bills represent the work done, or are they for the materials furnished? A Yes, sir. We were actually through on the job on December 13th.

10

The Court: Is that all?

Mr. Feinseth: Yes.

Re-direct examination by Mr. Teeple.

Q When Mr. Morris Ornstein spoke to you on the 18th of October and told you what you have told us he said, did you believe or disbelieve him?

20

Mr. Feinseth: I object to that as not proper rebuttal.

The Court: Sustained.

ANNE SOKOBIN, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

30

Direct examination by Mr. Teeple.

Q Miss Sokobin, you are the sister of Morris Sokobin who just left the stand? A Yes, I am.

Q Did you do anything in connection with the business of R. Sokobin & Sons in November, 1927? A Yes, sir; I did whatever typewriting was necessary, and I kept the books.

Q These books which have been put in evidence here and referred to by your brother (indi-

40

Anne Sokobin, cross.

eating books), were any of them kept by you? A Yes; that ledger.

Q Will you please explain to us your method of keeping the books and explain the account that you have in the books? A When the boys got an order for glass they entered it here.
 10 When the job was complete they gave me these slips as an indication of the name, that glass had been delivered or work had been done. From there I—

Q And what did you do with them? A From there I opened the account and made proper entries here.

Q And are the entries in the ledger there in your handwriting? A Yes, sir; these are in my handwriting.

20 Q And what is the name or designation of the account? A The designation—

The Court: Well, it is in evidence.

Q And in whose handwriting are those slips? A These tickets are in my brother's, Willie's.

Q And your handwriting is the writing in the book? A Yes; in the ledger.

Q In the ledger? A Yes.

30 Q What does your account indicate is due?

Mr. Feinseth: It is in evidence, I believe.

The Court: Yes.

Cross examination by Mr. Feinseth.

Q Miss Sokobin, did your brother William contract for this particular job? A He asked me to make the estimate.

40 Q Did he contract for this job? A The firm did. I am—

Anne Sokobin, re-direct.

Q Did your brother act for the firm? A
Certainly he did.

Q And your brother would know with whom
he contracted; isn't that so? A If the repre-
sentation was correct.

Q Isn't that so? A He would know with
whom he contracted, whoever it is? 10

The Court: How can this witness testify
to that? How would she know what he
did?

Re-direct examination by Mr. Teeple.

Q When did your brother die, Miss Sokobin?
A In June, 1928. June 28th.

20

(Stipulated by and between counsel that
the buildings referred to were in fact owned
on November 3, 1927, by the Salem Construc-
tion Company.)

Mr. Teeple: Now, if the Court please,
pursuant to an order of this court—

The Court: I have seen the order—order
to take testimony, I suppose.

Mr. Teeple: Yes. Dated on the 12th day
of May, 1928, the testimony of William Soko-
bin was taken before Milton M. Unger,
Supreme Court Commissioner, in writing, at
his office, and the evidence before us now
discloses that William Sokobin has since
died. 30

I desire now to offer in evidence the testi-
mony taken before the Supreme Court Com-
missioner on the date indicated upon it—I
believe it is a filed instrument now—as 40

Anne Sokobin, re-direct.

though the witness were present here in court.

10 He was examined, I might state on the record, by Mr. Feinseth, my adversary, under an order taken at the instance of the defendants concerning the proof of the statements contained in his affidavit upon which the order for the *capias* in this case was granted.

The Court: And I understand further that the testimony, original testimony has been lost and that counsel have agreed that the stenographer's copy, certified to, may be filed in the record in lieu of the original. Is that correct?

20 Mr. Teeple: That is correct, sir.

The Court: But you object to its being read to the jury?

Mr. Feinseth: Yes.

Mr. Teeple: I am now only offering the testimony of William Sokobin, saving whatever objections and exceptions are shown thereby.

The Court: What authority have you got for it?

30 (Argument.)

Mr. Teeple (continuing): So we have in support of our contention for the admission and reading of this testimony not only the statute but we are further fortified in this matter by an order of the judge of this court in obedience to which this witness appeared and submitted to examination at the instance of the defense and was subject to a lengthy examination concerning the

40

Motion for a Non-suit.

very basis of the proofs to support the order of arrest in this case.

So, therefore, if your Honor please, it appears to me that this testimony taken under such formality and with such solemnity, and a copy of which has been filed, conceded to be a true copy, and the witness having died, that the testimony is admissible and should be read. 10

(Further argument.)

The Court: This is evidence taken for a specific purpose, that is, to permit the cross examination of a party on the question of whether or not the order to hold to bail should have been granted, and it is not the same issue, sir, as is involved in this case. I don't see how I can change the Evidence Act, no matter how much it would promote justice. I am bound by the Evidence Act, and I can permit evidence only which is permissible under the Act, and therefore I will deny your right to read that evidence here before the jury. 20

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal. 30

PLAINTIFF RESTS.

Mr. Teeple: That is our case.

Mr. Feinseth: I move for a non-suit at this time on the ground that the alleged subject in their complaint—the plaintiffs have failed to make out or prove the five elements clause.

The Court: You need not argue that. They have not made that out. What about the contract? 40

Motion for a Non-suit.

Mr. Feinseth: He says the bills were made out to the Salem Construction Company, and I rest on that.

My clients will take the stand, of course, and deny all that.

10 I move for a non-suit at this time, reserving my right to put in a defense.

(Argument).

The Court: I will grant the motion for the non-suit.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

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Exhibit P. 1.

Account No. 19A

Sheet No.....

Mail Bills NAME Salem Construction Co.
 to ADDRESS 19 Pingry St.
 Elizabeth, N. J.

TERMS. Glass for Ornstein Bro. job
 RATING
 CREDIT LIMIT

Date	Items	Folio ✓	Debits	Date	Items	Folio ✓	Credits
Dec. 13	6271	S 163	256 —				
14	6311	S 164	324				
14	6312	“	414.50				
14	6313	“	150				
			<u>1,144.50</u>				

Exhibit P. 1.

77

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20

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Exhibit D. 1 for Identification.

Exhibit D. 1 for Identification.

Received of R. SOKOBIN & SONS

French and American
Window, Picture, Plate and Looking Glass

10 Tel. Market 8123 33 Prince Street No. 6271
Newark, N. J., Dec 13 1927

M Salem Construction
Elizabeth N J ?

Terms:

Goods shipped at Purchaser's risk

Quan.	Box	Size	Description
20	56 doors	Glazed	
	15 lts to a door		168.00
		840 lts @ 20	
	120 lts of Flor	Set in	48.00
	Toilets @ .40		
	16 lights of Rough Wire	Set	40.00
	in doors 22x36 @ 2.50		
			256.00

30 *Sign here*

Exhibit D. 2 for Identification.

Exhibit D. 2 for Identification.

Received of R. SOKOBIN & SONS

French and American

Window, Picture, Plate and Looking Glass

Tel. Market 8123 33 Prince Street No. 6311 10

Newark, N. J., Dec 14 1927

M Salem Construction

Terms:

Goods shipped at Purchaser's risk

Quan.	Box	Size	Description		
13 lts			of Leaded Glass	260.00	20
			with Coat of Arms @ 20.00		
4 lts			11x58 Leaded		
2			24x58 Set	40.00	
2			8x76 Coat of Arms Leaded	16.00	
4			8x18 Top	8.00	
				324 —	

Sign here

30

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Exhibit D. 3 for Identification.

Exhibit D. 3 for Identification.

Received of R. SOKOBIN & SONS

French and American
Window, Picture, Plate and Looking Glass

10 Tel. Market 8123 33 Prince Street No. 6312
Newark, N. J., Dec 14 1927

M Salem Construction

Terms:

Goods shipped at Purchaser's risk

Quan.	Box	Size	Description
20	1	Bevelled Leaded Glass 36x121	152.50
		@ 5.00 a square ft	
	2	30x69	146.00
	2	22½x70 @ 58.00	116.00
		Bevelled Leaded Glass	
			414.50

30 *Sign here*

Exhibit D. 5 for Identification.

Exhibit D. 5 for Identification.

Received of R. SOKOBIN & SONS

French and American
Window, Picture, Plate and Looking Glass

Tel. Market 8123 33 Prince Street No. 6313 10

Newark, N. J., Dec 14 1927

M Salem Construction Co.

Terms:

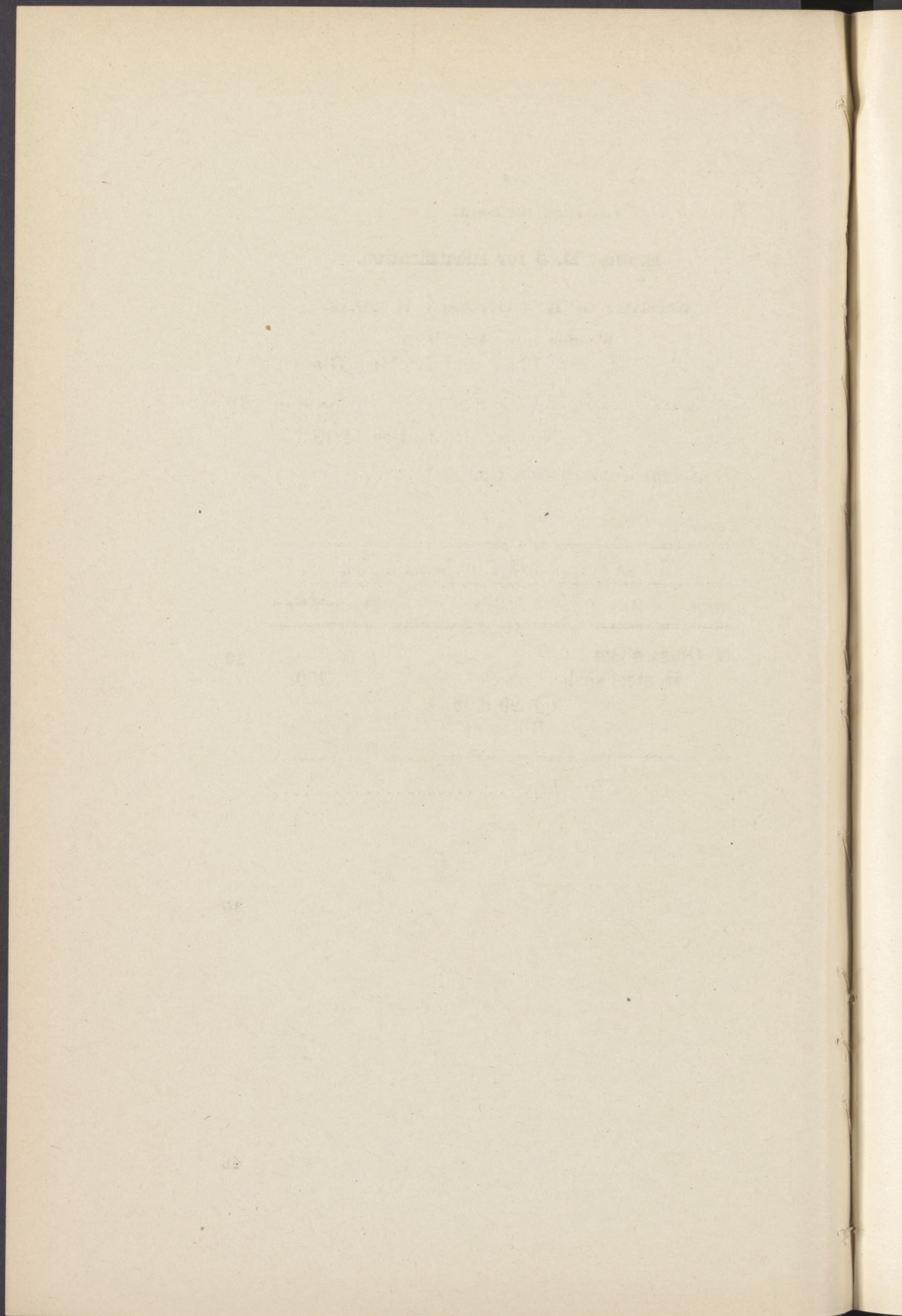
Goods shipped at Purchaser's risk

Quan.	Box	Size	Description	
600	Glasses Set in steel sash			20
		@ .25 a lt	150.	
		Bill sent		

Sign here

30

40



Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

WILLIAM SOKOBIN and MAX SOKOBIN, trading as R. SOKOBIN & SONS,

Plaintiffs-Appellants,

vs.

BENJAMIN ORNSTEIN and MORRIS ORNSTEIN, individually, and trading as ORNSTEIN BROTHERS,

Defendants-Appellees.

*Action
at Law.*

*On Appeal
from Judgment of Non-suit.*

BRIEF OF PLAINTIFFS-APPELLANTS.

This action was brought by the plaintiffs, in the Essex County Circuit Court, to recover from the defendants the sum of eleven hundred forty-four dollars and fifty cents (\$1,144.50), with lawful interest, for work done and materials furnished for two apartment house buildings at No. 19 Pingry Place and No. 610 Salem avenue, in the City of Elizabeth, Union County, New Jersey.

The case was tried before Honorable William A. Smith, Judge of the Essex County Circuit Court, and a jury, on May 24, 1929, and judgment on a non-suit was entered May 24, 1929, in Book 107, page 467, of Circuit Court Judgments.

Plaintiffs have appealed from the said judgment of non-suit.

Short Statement of Facts.

Plaintiffs were partners, engaged in the wholesale glass business and contracting, on November 2, 1927. The partnership consisted of William Sokobin and Max Sokobin. William Sokobin died June 28, 1928 (p. 52). Suit was started by a *capias ad respondendum*. The order for the *capias* (pp. 15-16) was made and filed April 20, 1928. The writ of *capias ad respondendum* was issued April 21, 1928 (p. 7). Two witnesses, namely, Max Sokobin and Anne Sokobin, were called and examined on behalf of plaintiffs (pp. 51-76). The plaintiffs' ledger page was admitted in evidence, and is printed at page 77.

On May 21, 1928, order was made upon application of the defendants, by Honorable Worrall F. Mountain, Judge of the Essex County Circuit Court, that testimony concerning the truth of the matters set forth in the affidavit of William Sokobin, the plaintiff in this cause, and the further proofs upon which the order for the writ of *capias* was made and issued, be taken before Milton M. Unger, Esq., a Supreme Court Commissioner, in writing, and that the same be taken and completed on or before a day within fifteen (15) days from the date of said order.

Pursuant thereto, the testimony of William Sokobin, one of the plaintiffs, was taken under oath, before said Supreme Court Commissioner, and reduced to writing. After that, and before the trial, the said plaintiff witness, William Sokobin, died.

The trial judge refused to admit that testimony in evidence, when offered, and granted defendants' motion for a non-suit (pp. 73-76).

POINT I.

The granting of a non-suit was error.

The testimony of the plaintiff Max Sokobin showed, that he and his brother William furnished an estimate for certain glass work and materials to be done and furnished defendants (p. 58); that plaintiffs did the work and furnished the materials (p. 60) and finished the job December 14, 1927 (p. 60); that the work and materials amounted to eleven hundred forty-four dollars and fifty cents (\$1144.50), with interest from December 14, 1927 (p. 65); that they had books of account which were kept by the sister, Anne Sokobin (p. 71). Although bills were rendered to Salem Construction Company (pp. 78, 79, 80, 81), the ledger entry (p. 77) Exhibit "P. 1," reads at the top:

"Account No. 19 A	Sheet No.
Mail Bills NAME Salem Construction Co.	TERMS Glass for Ornstein
	Bro. job
to ADDRESS 19 Pingry St.,	RATING
Elizabeth, N. J.	CREDIT LIMIT"

That was explained, however, by the defendant William Sokobin in his affidavit on application for the writ (p. 22), as follows:

"I finished the work about December 14, A. D. 1927. A day or two after the work was finished I went down to the aforementioned premises and there saw Morris and Benjamin Ornstein and Mr. Hyman Kramer. That was the first time I had met Mr. Kramer. They were all together when I saw them. Benjamin Ornstein introduced me to Mr. Kramer; then I spoke to the three of them together, and said, 'How about my money for this work I've been doing here?' Benjamin Ornstein then spoke up and said, 'Oh, that's all right; just mail the bill to us

and you will get a check immediately.' I said, 'Where do I mail it to?' And he said, 'Salem Construction Company, 19 Pingry Place, Elizabeth.' * * * About two days after that, that is December 16, 1927, I mailed the bill as directed by Benjamin Ornstein, to Salem Construction Company, 19 Pingry Place, Elizabeth, Union County, New Jersey, but I received no money." (p. 22.)

The arrangements for the job were made by the defendants with the plaintiff William Sokobin. The testimony of William Sokobin could not be had at the trial, because, as previously stated, he died June 28, 1928, while this case was pending. Nevertheless, there was testimony from the plaintiff Max Sokobin, sufficient to show that the defendants controlled the work there (pp. 54, 55, 56, 58, 60, 63, 66, 67, 68, 69), and that the work was done and the materials furnished upon their orders.

There were two counts in the Complaint (pp. 9-13). The second count (p. 12) repeated paragraphs "1," "2," "4," "5," "6" and "8" of the first count of the Complaint.

Paragraph "8" of the first count of the Complaint (p. 11), repeated in the second count of the Complaint, states:

"That the defendants, at said last mentioned date were, and still are, indebted to the plaintiffs in the sum of eleven hundred and forty-four dollars and fifty cents (\$1144.50) for the work done and materials furnished for them and at their special instance and request as aforesaid * * * no part of which has been paid, although duly demanded."

The answer of the defendants (p. 39) dated October 19, 1928, contained a simple denial, in the following words:

“1. They deny the truth of the matters contained in the complaint.”

Therefore, it will be seen, as we contend, that the plaintiffs, at the request of the defendants, after defendants had received an estimate, furnished the glass materials and the work of installing the same, in the two apartment house buildings at Elizabeth, and completed the work, amounting to eleven hundred forty-four dollars and fifty cents (\$1144.50), and that the prices charged were fair and reasonable.

Leaving out of consideration, for the moment, the question of fraud, misrepresentation, etc., there was enough in this evidence to require the submission of the case to the jury under the second count of the complaint (p. 12).

We contend that the way in which the books were kept and the bills sent out, whether regular and orderly, or not, had nothing to do with the contract itself. If the contract was made with someone else, that was a proper matter to be shown on defense in the face of the testimony of Max Sokobin.

As appears by the evidence, clearly the work was done and completed and the materials were furnished by the plaintiffs pursuant to the orders of the defendants, and the money, fair and reasonable in amount, was earned and due to the plaintiffs.

POINT II.

There was fraud at the inception of the contract; and it was error for the trial judge to exclude the testimony of a deceased plaintiff who made the contract with the defendants.

The affidavit of the deceased plaintiff William Sokobin, made April 14, 1928, upon which the Supreme Court Commissioner acted in making the order for the *capias* (pp. 15-27), including also the affidavit of Hannah F. Sokobin (pp. 28-32), clearly showed that Benjamin Ornstein and Morris Ornstein fraudulently incurred the obligation in question in this case. The defendants, however, questioned the truth of the affidavit, and pursuant to the statute (Sec. 62 of the Practice Act, 3 C. S. 4071) obtained an order (p. 38) that testimony concerning the truth of the matters set forth in the affidavit of William Sokobin, the plaintiff in this cause, and the further proofs upon which the order for the writ of *capias* was made and issued in this cause, be taken before Milton M. Unger, Esq., a Supreme Court Commissioner, in writing, etc., and the testimony of William Sokobin was taken and reduced to writing and filed (p. 73). The plaintiff William Sokobin having died after that, to-wit: June 28, 1928, and being not in Court and not available and there being no other person living from whom the evidence could be obtained, and there being no other known way to avail of that evidence, because no other person save the defendants was present and concerned in the making of the contract sued upon, the plaintiffs offered that testimony in evidence. The learned trial judge rejected it (p. 75), using the following language:

“The Court: This is evidence taken for a specific purpose, that is, to permit the cross

examination of a party on the question of whether or not the order to hold to bail should have been granted, and it is not the same issue, sir, as is involved in this case. I don't see how I can change the Evidence Act, no matter how much it would promote justice. I am bound by the Evidence Act, and I can permit evidence only which is permissible under the Act, and therefore I will deny your right to read that evidence here before the jury."

To the above ruling, plaintiffs' counsel duly noted an exception.

The affidavit of the plaintiff William Sokobin (pp. 16-28) upon which the order for the *capias* was based, in compliance with the statute contained his narrative of the facts and circumstances giving rise to the contract or transaction sued upon. He was examined at length before the Commissioner by the defendants' counsel. No collateral matter was referred to in the affidavit. While it is true, as the learned Judge said, that the issue on the affidavit was different from that upon the trial, in the sense that the question involved in the examination was as to whether or not the order for the *capias* ought to have been made, still it was the same issue as that presented upon the trial in the sense that it involved the truth of his statements concerning the self-same transaction.

The Evidence Act, Sections 10 and 11 (P. L. 1900, p. 364) makes provision for admitting the testimony of deceased parties and witnesses given upon a former trial. The same reasoning which gave rise to those Sections of the Evidence Act ought, we contend, to apply to a situation like that in question here.

So far back as the case of *Berney v. Mitchell*, 34 N. J. L. 337, at 338, the Court said:

“Most, if not all, the elementary treatises and abridgements of the law lay down the rule to be, that not only the testimony of deceased witnesses given on a former trial between the same parties may be received, but likewise the testimony of witnesses who are out of the jurisdiction of the court, or cannot be found after diligent search. 1 Greenleaf’s Ev., Sec. 163; Peake’s Ev. 62; 1 Starkie’s Ev. 264; 12 Vin. Abr. 107; Roscoe’s Ev. 78; Gilbert on Ev. 60; 1 McNally’s Ev. 287.”

The last case was followed in *N. Y. L. E. and W. R. R. Co. v. Haring*, 47 N. J. L. 137, at 139.

Professor Wigmore, in his work on “The Law of Evidence,” Vol. 2 (1904), Sec. 1402, says:

“The principle upon which depositions and former testimony should be resorted to is the simple principle of necessity, *i. e.*, the absence of any other means of utilizing the witness’ knowledge. If his testimony given anew in court cannot be had, it will be lost entirely for the purposes of doing justice, if it is not received in the form in which it survives and can be had.”

In Jones on Evidence, chap. 10, page 758, par. 344, the author says:

“*Death of Former Witness.* Under the English Common Law the courts seldom if ever, admitted the testimony of a witness given at a former trial except in case of death. This strictness has however, since been modified in England by statute; and the present rule so far as it bears on this subject is thus stated by Stephen: ‘Evidence given by a witness in a previous action is relevant for the purpose of proving the matter stated in a subsequent proceeding, or in a later stage of the same proceeding, when the witness is dead, or is mad, or so

ill that he will probably never be able to travel, or is kept out of the way by the adverse party, or in civil, but not it seems in criminal, cases, is out of jurisdiction of the court, or perhaps in civil, but not in criminal cases, when he cannot be found.' ”

Looking again at Section 10 of our Evidence Act, entitled, “Testimony of Deceased Party on Former Trial,” we find the following wording:

“In case of a new trial of any civil action wherein the parties have been examined as witnesses, if either party shall have died since the former trial, and the action shall have been duly revived and proceeded with at the suit of or against the legal representatives of such deceased party, * * * the testimony of such deceased party on the former trial of said action may also be proved and admitted on the new trial thereof.”

There is no statute or provision that we have been able to find which excludes testimony taken as was the testimony in question as to the truth of the affidavit upon which the order to hold to bail was based.

While, strictly speaking, the trial of the case at bar was not “a new trial,” wherein the deceased plaintiff had been examined as a witness, we contend that it was “a new trial” within the intent and meaning of Section 10 of the Evidence Act, since it was between the same parties, concerning the same subject matter, and arising out of the same transaction. In other words, it is our contention, that the examination taken before the Commissioner in obedience to the Order of Judge Mountain, at the instance of the defendants, and conducted by their counsel, in the presence and under control of the Commissioner, who administered the oath to the plaintiff William Sokobin, later deceased,

was, in and of itself, so far as dealing with an issue arising in the regular course of procedure in the case at bar, and so far as the evidence of that witness alone and of himself was concerned "a former trial of said action," within the meaning of the aforesaid Section 10 of the Evidence Act, and that the witness being dead and therefore, unavailable at the trial, his testimony taken upon such former examination should have been received.

POINT III.

The judgment should be reversed.

The affidavits upon which the *capias ad respondendum* was issued set forth fraud on the part of the defendants at the inception and in the making of the contract sued upon, in that the defendants represented to the now deceased plaintiff, William Sokobin, that they, the said defendants, were putting up the buildings for which they assumed to order the work done and materials furnished from the plaintiffs' firm, when, in fact, such was not the case. Not only the affidavits submitted upon the application for the *capias*, but also all of the testimony submitted on behalf of the plaintiffs, as well as the testimony which was excluded by the aforesaid ruling of the trial judge, went to prove the contract and the performance of it, as well as false representations and fraud in the making of it on the part of the defendants.

By the rulings aforesaid, the learned trial judge took from the jury consideration, not only of the question as to whether or not there was fraud at the inception of the contract, but also as to whether or not there was testimony and proofs from which the jury could infer performance of the contract by the plaintiffs' firm.

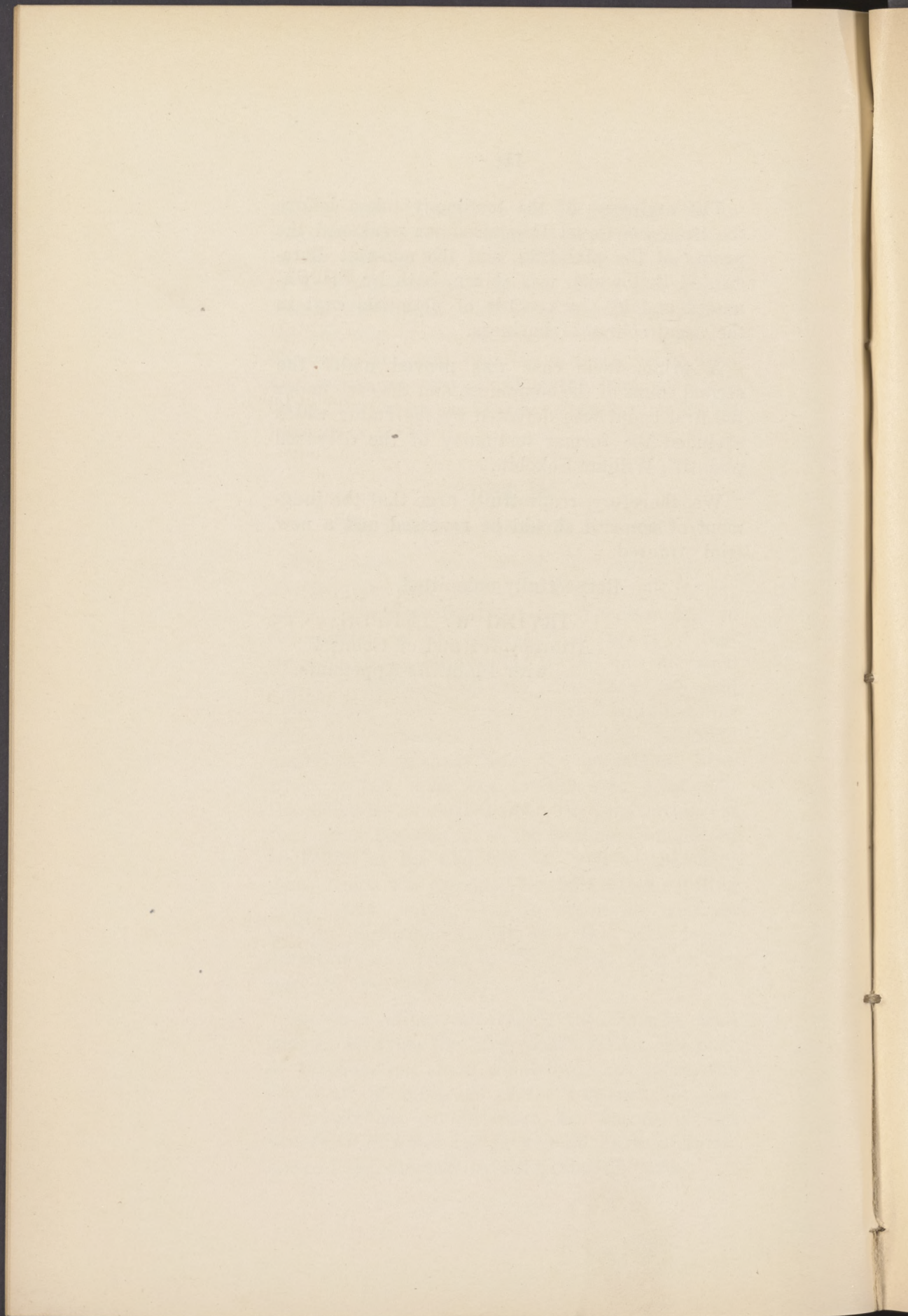
The exclusion of the testimony taken before the Supreme Court Commissioner weakened the proofs of the plaintiffs, and the non-suit disregarded that which was shown, both by the witnesses and by the records of plaintiffs kept in the usual course of business.

A prima facie case was proved under the second count of the complaint, and the case under the first count was defeated by the ruling which excluded the former testimony of the deceased plaintiff, William Sokobin.

We, therefore, respectfully urge that the judgment of non-suit should be reversed and a new trial ordered.

Respectfully submitted,

IRVING W. TEEPLE,
Attorney for and of Counsel
with Plaintiffs-Appellants.



NEW JERSEY

Court of Errors and Appeals

WILLIAM SOKOBIN and MAX SOKOBIN, trading as R. SOKOBIN & SONS,

Plaintiffs-Appellants,

vs.

BENJAMIN ORNSTEIN and MORRIS ORNSTEIN, individually, and trading as ORNSTEIN BROTHERS,

Defendants-Appellees.

Action at Law.

On Appeal from Judgment of Nonsuit.

ANSWERING BRIEF OF DEFENDANTS-APPELLEES.

The facts are stated in the brief of the plaintiffs-appellants and therefore do not require any re-statement.

POINT I.

The Court was warranted in granting the motion for non-suit.

The authorities in this State are in accord with the elementary proposition of law as set forth in the case of *Coyne v. Erie R. Co.*, reported in 150 A., page 333:

“A motion for a nonsuit or to direct a verdict for the defendant, based upon the insufficiency of the evidence to establish a cause of action, admits the truth of the plaintiffs’ evidence and of every inference of fact, which can be legitimately drawn therefrom, but denies the sufficiency in law.”

The action at bar is based upon a contract alleged to have been entered into between the plaintiffs-appellants and the defendants-appellees.

The appellants in the first point raised in their brief quote from an affidavit made by the deceased plaintiff, William Sokobin. This affidavit is not in the record of evidence nor did it appear in the trial of this cause and appellants therefore improperly quoted therefrom to sustain their contention that a nonsuit should not have been granted.

In perusing the plaintiffs' brief, we find on page 6, beginning with the third sentence, the following statement:

"The plaintiff William Sokobin having died after that, to-wit: June 28, 1928, and being not in Court and not available and there being no other person living from whom the evidence could be obtained, and there being no other known way to avail of that evidence, because no other person save the defendants was present and concerned in the making of the contract sued upon, the plaintiffs offered that testimony in evidence."

It is clear and apparent from this argument and statement made by the appellants in their brief that without the aid of the testimony of William Sokobin, deceased, the plaintiffs could not prove the making of the contract sued upon. The plaintiffs sought to introduce this testimony at the trial, but the testimony was rejected by the Court and not admitted as evidence (p. 75). The Court, therefore, in deciding the motion for a nonsuit, based its decision solely upon the evidence before it, exclusive of William Sokobin's testimony. There being no evidence of a contract between the parties to this suit, and by the plaintiffs' own admission in their argument and brief that the contract could

not be proved without William Sokobin's testimony, the Court was therefore justified in granting the motion for a nonsuit.

A careful analysis of the testimony given by the two witnesses produced by the plaintiffs reveals nothing from which the Trial Court could say that a contract may be inferred and consequently nothing in the testimony from which the jury could say that a contract ought to be inferred. All the bills for the alleged work done were made out directly to the Salem Construction Company, a New Jersey corporation (p. 65, lines 10-12; pp. 69-70-71).

We respectfully submit that there being no evidence upon which an inference might be drawn to sustain the plaintiffs' cause of action, the Court was justified in granting the motion for a nonsuit.

POINT II.

The Court properly excluded the testimony of the deceased plaintiff.

After suit was instituted and a capias issued and served, the defendants applied for an order under Section 62 of the Practice Act to take testimony. An order was granted (p. 38) and pursuant thereto testimony was taken to determine the truth of the matter set forth in the deceased plaintiff's affidavit. At the trial plaintiffs sought to introduce this testimony under the assumed authority of Sections 10 and 11 of the Evidence Act. This was objected to and the objection sustained by the learned Trial Judge (p. 75). Appellants contend in their brief that this testimony was admissible under Sections 10 and 11 of our Evidence Act. If it is not admissible under that act, its rejection was proper.

We take leave to set up the sections in full for a proper discussion of the question.

“10. TESTIMONY OF DECEASED PARTY ON FORMER TRIAL. In case of a new trial of any civil action wherein the parties have been examined as witnesses, if either party shall have died since the former trial, and the action shall have been duly revived and proceeded with at the suit of or against the legal representatives of such deceased party, the surviving party and also such legal representative shall be competent witnesses on such new trial, and the testimony of such deceased party on the former trial of said action may also be proved and admitted on the new trial thereof” (P. L. 1900, p. 364).

“11. TESTIMONY OF DECEASED WITNESS ON FORMER TRIAL. In case of a new trial in any civil action wherein the testimony of any witness was taken stenographically by the official stenographer of the court in which the former trial was had, it shall be lawful on the new trial, if any witness who gave evidence on the former trial has since died, to prove and admit on the new trial the testimony given on the former trial by such deceased witness” (P. L. 1900, p. 364).

We call attention to the fact that Sections 10 and 11 deal with testimony of a deceased party at a former trial and also speak of a new trial.

The appellants concede in their brief (p. 9) that the case at bar was not a new trial as contemplated by the statute. From a careful analysis of this section, it appears that it applies only to a case that has previously been tried and either because of a mistrial or a reversal or a rule to show cause, a new trial was had. In this case there was no previous trial, nor was there any new trial, and the testimony cannot be rendered admissible by any

interpretation beyond the clear intention of the statute. There are no cases to be found to support appellants' contention.

As far back as the case of *Jessup v. Cook*, 6 N. J. Law 434, the proposition of law was propounded that evidence taken before arbitrators was not admissible in court on a trial of the same cause, though the witness be dead. All the cases cited in the plaintiffs' brief agree on the proposition that in order for the testimony of a deceased person to be admissible, it must have been given upon a former trial. The authorities mentioned by the appellants can in no way modify or change the interpretation of the statute, which is clear and unambiguous in its intent and meaning.

The testimony which the appellants sought to introduce as evidence had been taken solely for the purpose of determining whether there was fraud in the inception of the alleged contract. The issue involved in the case at bar was the existence of a contract and was, therefore, not the same issue as that involved in the hearing before the Supreme Court Commissioner.

We therefore respectfully submit that the exclusion of the testimony of the deceased plaintiff, William Sokobin, was proper.

POINT III.**The judgment should not be reversed.**

At the conclusion of the testimony given by the witnesses for the plaintiffs there was not a scintilla of evidence to show that there was a contract between the plaintiffs-appellants and the defendants-appellees.

The plaintiffs failing to make out a *prima facie* case, there was no evidence to go to the jury, and the Court was therefore justified in granting a nonsuit.

The Court was justified in excluding the testimony taken before the Supreme Court Commissioner, since the testimony was not given at a former trial, as required by the statute, and therefore clearly objectionable.

The plaintiffs having failed to make out a *prima facie* case, and the testimony of William Sokobin having been properly excluded, we respectfully submit that the judgment of nonsuit of the Essex County Circuit Court should be affirmed.

Respectfully submitted,

LOUIS L. FEINSETH,
Attorney for and of Counsel
with Defendants-Appellees.

