

## New Jersey Court of Errors and Appeals

BRUCE P. KITCHELL,  
*Plaintiff-Respondent,*

*vs.*

JAMES E. CROSSLEY, RENA P.  
CROSSLEY and CORNELIA V.  
PEDDIE,  
*Defendants-Appellants.*

*Action at Law.*

*On Appeal.*

### Brief for Respondent.

The plaintiff below, Bruce P. Kitchell, an architect of the City of Newark, brought his action in the Essex County Circuit Court, to recover on a *quantum meruit* the amount reasonably due him for services which he performed for the defendants in the preparation of plans, specifications, and other architectural services incident thereto, for the construction and erection of a proposed new building at the southwest corner of Market and Halsey streets, Newark, N. J. The evidence produced at the time of the trial, on behalf of the respondent, showed that the lowest bid for the work contemplated was the bid of one A. C. Windsor for \$89,989.00 (C. 27, l. 20; C. 84, Exhibit P. 6). It also appeared from the evidence (C. 29, ll. 14-30), that the usual and ordinary rate of compensation for architectural services in drawing and preparing plans and specifications is three-fifths of six per cent. of the lowest estimated cost of constructing the building, which, in this particular case, amounted to the sum of \$3,239.61. Respondent had received on account the sum of

\$750.00 (C. 29, l. 32). The jury brought in a verdict of \$2,757.26, that is, \$2,489.61, being the amount remaining due as shown by the evidence, together with lawful interest amounting to \$267.65. The answer filed by defendants sets forth an agreement in writing between the architect, Bruce P. Kitchell, and James E. Crossley, agent for the defendants Rena P. Crossley and Cornelia V. Peddie (Exhibit P. 5, C. 82). The reply sets forth that the agreement mentioned in the answer is null and void and of no effect.

### Facts.

Respondent, Bruce P. Kitchell, and James E. Crossley, agent for defendants, began negotiations for the performing of the work in question on or about August 5, 1914 (C. 22). The architect worked on the plans and specifications from the early part of August, 1914, to on or about the tenth day of October, 1914 (C. 40, l. 34). The time spent on the work, disbursements, etc., are stated by the architect (C. 41). From time to time Mr. Crossley called at the architect's office to go over the plans and specifications with him. Nothing was said by either Mr. Kitchell or Mr. Crossley as to the compensation which the architect should receive for his work until on or about the tenth of October, 1914 (C. 24, ll. 10-20). An argument then took place as to the compensation which the architect should receive, and the architect sent a bill for his services to date, amounting to \$2,520.00 (C. 24, l. 35; C. 80, Exhibit D. 1). Later, at another interview (C. 26, l. 3), Mr. Kitchell says, "that day we had come to an agreement whereby we would go ahead with the work, if he would proceed immediately and complete the building at once, etc." Thereupon the agree-

ment (Exhibit P. 5) was made. It was understood at the time that the architect would obtain bids for the construction of the building (C. 26, l. 38), but after obtaining the agreement from the architect, Mr. Crossley never came to his office again (C. 26, l. 30), nor did Mr. Crossley proceed with the erection of the building. The agreement (Exhibit P. 5) was the direct result of the dispute which arose between Mr. Kitchell and Mr. Crossley. See testimony of Howard E. Smith in corroboration of respondent's testimony (C. page 46, beginning l. 20, etc., and page 47). The fact that Mr. Crossley received the plans and specifications, as stated by respondent, is corroborated by the testimony of the witness, Howard E. Smith, and also by the testimony of the witness, C. A. Winston (C. 50, l. 30). The witness, James E. Crossley, himself, testifies (C. 60, l. 10) that the agreement (Exhibit P. 5), was in settlement of a dispute with Mr. Kitchell. The usual and reasonable rate of compensation to which the architect was entitled for the work of drawing plans and specifications was three-fifths of six per cent. of the lowest bid received. Respondent's testimony to this effect is corroborated by the testimony of the witness, John H. Ely (C. 43, l. 35; C. 44, ll. 25-30 and C. 45, l. 11). After abandoning respondent, appellants erected a building on the premises referred to in the agreement (Exhibit P. 5), but it was not erected under the superintendence of the respondent (C. 56, l. 38; C. 63, l. 38; C. 64, l. 1). After the making of the agreement (Exhibit P. 5), the architect received estimates for the construction of the building, as directed, and communicated with Mr. Crossley, advising him of the time when the bids would be opened (C. 83, Exhibit P. 8), but Mr. Crossley failed to attend to open the bids,

or to have any further dealings whatsoever with respondent (C. 63, l. 10). The names of the bidders were stated by respondent (C. 27, l. 21), and the bids were offered in evidence and marked Exhibit P. 6 (C. 27, l. 30). Respondent by letter and telephone advised Mr. Crossley that the bids had been received and were ready to be opened, and requested him to open them (C. 38, ll. 22-34). The bids were not opened by respondent, but after appellants had abandoned the architect, and had proceeded to erect a building on the premises in question, he contemplated bringing this suit, and then the bids were opened in the office of his attorney (C. 38, ll. 34-37; and C. 27, l. 17).

### Law.

#### I.

If the agreement, Exhibit P. 5, had not been made, the right of the architect to recover on a *quantum meruit* the reasonable value of his services could not be questioned. To establish this point, it is only necessary to quote from the case of *Conklin v. Kruger*, 79 N. J. L., 326, at page 328:

“It is well settled that where one performs services for another at his request, but without any agreement or understanding as to wages or remuneration, the law implies a promise on the part of the party requesting the services to pay a just and reasonable compensation, unless there is a family relation existing between the parties, and this remuneration is recoverable on a *quantum meruit*.” 15 Am. & Eng. Encycl. L. (2d ed.) 1081.

## II.

The agreement marked "Exhibit P. 5" is null and void. It was made in settlement of a dispute existing between the parties and with the understanding that the building would be erected, and that the architect would have the superintendence of it, as therein stated. The agreement was not carried out on the part of the appellants, and cannot now stand in the way of the respondent, Bruce P. Kitchell, in his action to recover what his services were reasonably worth. The case of *Stephen v. Camden and Philadelphia Soap Co.*, 75 N. J. L., 648, seems to be directly in point. The decision in the Stephen case was rendered by this Court. It was a suit brought by an architect to recover on a *quantum meruit* the reasonable value of his services, in spite of the fact that there existed an agreement in writing specifying what he should receive therefor. As in the case at bar, the defendant, for whom the architect had prepared plans and specifications, without right, abandoned the undertaking so that superintendence became impossible. We quote from this case at page 652:

"When a special contract for work and services has been abandoned and put an end to, and the employer has derived some benefit from the work done under it, he may be made liable upon an implied promise to make a reasonable remuneration in respect thereto. The final abandonment of the projected building by the defendant put an end to the existence of the special contract, and it could not be interposed by defendant so as to prevent a recovery for the reasonable worth of the services rendered by plaintiff upon the strength of its prior existence."

Also, at page 653:

“In some jurisdictions, if a price is fixed by the contract, that is made the conclusive test of the value of the services rendered, more frequently, however, the plaintiff is allowed to recover the real value of the services, though in excess of the contract price. The latter rule seems more in accordance with the theory on which the right of action must be based—that the contract is treated as rescinded and the plaintiff restored to his original position as nearly as possible. The plaintiff certainly could not perform further services by way of ‘supervision’ unless a building was constructed, and such was the implied condition of his contract.”

and also at page 653:

“The expressions of the master, and the other facts in the case, lead to the conclusion that he was evading the performance of his agreement. If he had not actually determined the contract, he had put off the fulfillment of it unreasonably and unjustly. The Lord Chief Justice therefore left the case properly to the jury, and they were at liberty to find an implied agreement that the plaintiff should have something for his services.”

It is to be noted that in the case at bar we are not all concerned with the measure of damages, as stated in the case of *Kehoe v. Rutherford*, 56 N. J. L., 23, and in the case of *Wilson v. Borden*, 68 N. J. L., 627, and *Westlecraft v. Barry*, 83 N. J. L., 53. In these cases, prior to the undertaking of the work, a valid contract for the performance of the work had been entered into, and plaintiff had performed part of the work, and was prevented from performing the

balance through the fault of the defendant. The theory upon which the case at bar was brought is entirely different. In the case at bar, no agreement of any kind had been entered into until after practically the whole of the work had been performed. The agreement which was then made was in the nature of a settlement of the dispute which existed between the parties, and was in the nature of an accord and satisfaction. In such case, we respectfully contend that the measure of damages which the plaintiff is entitled to receive is not limited or affected by the agreement, Exhibit P. 5, which was a special agreement, which was abandoned and put an end to. The agreement was procured from the architect upon the understanding and condition that the building would be erected and that he would have charge of the superintendence thereof. After paying the first installment of \$750.00, due under this agreement, the defendants immediately abandoned the architect.

### III.

If the agreement, Exhibit P. 5, be considered as an accord and satisfaction of the dispute which had arisen between the parties, then, inasmuch as it was not carried out according to its terms, it cannot be set up as a bar to plaintiff in his action to recover his reasonable compensation upon a *quantum meruit*. The case of *Rose v. American Paper Co.*, 83 N. J. L., 707, is in point. At page 709 it is said:

“To constitute an accord and satisfaction in law, dependent upon the offer of the payment of a less sum than that claimed, it is necessary that the money should be offered in full satisfaction of the demand and be accompanied by such acts or declarations as

amount to a condition that if the money is accepted it is to be in full satisfaction, and be of such a character that the creditor is bound to understand such offer.”

and again at the bottom of the page:

“Whether a tender is accompanied by such acts and declarations as are necessary on its acceptance to constitute an accord and satisfaction must, of course, be determined from the facts of each particular case. If the evidence is conflicting, the question is to be determined by a jury.”

citing authorities. The agreement, Exhibit P. 5, owing to the failure of the appellants to strictly adhere to its terms, does not amount to an accord and satisfaction. It amounts to nothing more than an attempt, by the parties, to make a settlement between themselves, which attempt failed. The so-called agreement, therefore, became a nullity, and the architect was in a position to disregard it and to bring his suit to recover what his services were reasonably worth.

#### IV.

In this connection it may be well to consider the doctrine of *Hochster v. De la Tour*, which has been adopted in this State. *O'Neil v. Supreme Council*, 70 N. J. L., page 410. Quoting from the case above cited, at page 413:

“When a party announces his intention not to fulfill the contract, the other side may take him at his word and rescind the contract. That word ‘rescind’ implies that both parties have agreed that the contract shall be at an end, as if it had never been.”

Under the circumstances under which the agreement, Exhibit P. 5, came into existence, although we are not here concerned with an anticipatory breach of contract, the respondent, Kitchell, owing to the failure of the appellants to perform their part, was certainly entitled to treat the agreement "as if it had never been," and bring his suit for the compensation to which he was fairly and reasonably entitled.

The grounds of appeal are not well taken. The respondent properly established the amount of compensation to which he was justly entitled for the work which he had performed for the appellants. Exhibit P. 11 being about fifty estimates obtained by the architect, was properly admitted as it tended to show that the respondent had done his part toward the carrying out of the agreement which he had made with appellants. The Court properly refused to non-suit and to direct a verdict, for it appeared on respondent's case, that he was not relying in any way upon agreement P. 5 to establish the amount of damages which he was entitled to receive. The Court properly prefaced appellants' requests to charge, making them conditional upon the question of fact which was left to the jury, as to whether or not the agreement, Exhibit P. 5, was a settlement of the matters in dispute between the parties. Furthermore, the Court properly charged the jury that if the agreement of October 27th was not in settlement of the work done by the respondent, then he would be entitled to recover for his services whatever they were worth, up to that time, less the \$750.00 which he received at that time.

Attention is called to Exhibits P. 9 and P. 10 (C. 79-80). These exhibits refer to an entirely different work which was performed by the re-

spondent prior to the time when the work was undertaken, to recover compensation for which, the present suit was instituted. These exhibits are explained by respondent (C. 66-67). These exhibits were identical, one being a carbon copy of the other, excepting that the words "on the alterations to," contained in Exhibit P. 9, had been crossed out in ink where they occurred in Exhibit P. 10.

If we are to believe respondent's testimony on this point, it is evident that Mr. Crossley altered his copy of this old agreement (Exhibit P. 10), so that it appeared to be an agreement for drawing plans, etc., for a new building, and not an agreement concerning the alteration of an old building. Mr. Crossley's copy of this document, as altered, was shown to respondent on the first day of the trial of this case, and he at once denied its correctness (C. 31, l. 38), and stated that an alteration had been made in it (C. 32, ll. 1-35). Respondent was asked by appellants' attorney to find and produce on the following day, his copy of the letter. On the next day the letter (Exhibit P. 9), was produced, being a carbon copy of Exhibit P. 10, but signed by both Mr. Kitchell and Mr. Crossley, and containing the words "on the alterations to" in type-writing, in their proper place, unaltered and unerasd. If Exhibit P. 9 had not been found by respondent, it is perfectly evident that much importance would have attached to Exhibit P. 10, which, with the words indicated crossed out, was an agreement dated July 8, 1914, for making plans, etc., for a new building for the price therein stated. It is interesting to note also, that it became necessary for the architect to bring suit in the District Court before the amount due him for this old work was finally paid (C. 65, ll. 20-38).

It should be borne in mind that in the case at bar, suit was not instituted to recover damages for breach of contract; the architect's work, so much thereof as he was compensated for by the verdict of the jury—that is, the work of preparing the plans and specification—had all been performed before the agreement set forth in the answer of the appellants, was made (C. 67, l. 15). It is admitted that the architect was hired to do the work and that no price for the work had been agreed upon at the time he undertook it, or prior to the time when it was completed. Under these circumstances, the architect was entitled to recover the reasonable value of his services; and a contract or agreement made, as in this case, and not performed by the parties, was neither a settlement of the respondent's claims, nor an accord and satisfaction between the parties. It became a "*nudum pactum*" and void. After appellants failed to perform the agreement, the rights of the parties became as they were before the agreement was made. It is to be noted that the so-called agreement is signed by Mr. Crossley, as well as by Mr. Kitchell (C. 82-83, Exhibit P. 5). The argument that the judgment cannot be justified because it awards to the architect \$2,750.26 (\$2,489.61 and interest amounting to \$267.65) over and above the \$750 already paid him, for doing three-fifths or a major portion of the work, when he was willing to do it all for \$1,500, has no weight and no possible bearing upon the legal problem presented. If no agreement had been made, of course the architect would have then been entitled to receive for the work done—exactly what the jury awarded him—that is, three-fifths of six per cent. of the lowest bid. That percentage was the usual rate of compensation, but it also appears that architects sometimes

receive as much as ten per cent. The question naturally arises—why then did the architect agree to take \$1,500? Because it was a settlement of difficulties and because he relied upon the appellants to perform their part of the agreement. Failing this, the agreement became nothing, and the parties were left in the same position in which they stood in the first place. This reasoning, perhaps, is borne out by the fact that the appellants, in their answer, counter-claimed against the respondent the sum of \$750, which had been paid to him on account (C. 12, l. 20).

It is respectfully submitted that the case at bar is readily distinguishable from the cases of *Kehoe v. Rutherford* and *Wilson v. Borden*, and that the rules there laid down for computing the damages which a plaintiff would be entitled to receive, who has performed part of a valid contract for a specified work, and has been prevented from performing completely, through no fault of his own, have no bearing upon the measure of damages allowed by the jury in this case. On the other hand, the reasoning of this Court in the case of *Stephen v. Camden & Philadelphia Soap Company*, above cited, can be applied directly to the case at bar.

It is respectfully submitted that the judgment of the Essex County Circuit Court, awarding to the respondent the sum of \$2,757.26 and costs, should be in all things affirmed.

CHURCH & HARRISON,  
*Of Counsel with Respondent.*

March Term, 1917.

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*Notice of Appeal.*

**Notice of Appeal.**  
Filed October 21, 1916.

## Essex County Circuit Court.

BRUCE P. KITCHELL,  
*Plaintiff and Respondent,*

10

*vs.*

JAMES E. CROSSLEY, RENA P.  
CROSSLEY and CORNELIA V.  
PEDDIE,  
*Defendants and Appellants.*

*Notice of  
Appeal.*

To Church & Harrison, Esqs.,  
Attorneys of the Plaintiff.

20

SIRS:

TAKE NOTICE, that the defendants, Rena P. Crossley and Cornelia V. Peddie (judgment of non-suit having been entered at the trial in favor of James E. Crossley) appeal to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

RAYMOND, MOUNTAIN,  
VAN BLARCOM & MARSH,  
*Attorneys and of Counsel for  
Defendants-Appellants.*

30

Dated October 23, 1916.

Service of the within Notice is hereby acknowledged this 24th day of October, 1916.

CHURCH & HARRISON,  
*Attorneys of Plaintiff.*

Filed October 31, 1916.

JOSEPH McDONOUGH,  
*Clerk.*

40

*Grounds of Appeal.***Grounds of Appeal.**

Filed.

**New Jersey Court of Errors and Appeals**

10

BRUCE P. KITCHELL,  
*Plaintiff-Respondent,*

*vs.*

JAMES E. CROSSLEY, RENA P.  
CROSSLEY and CORNELIA V.  
PEDDIE,  
*Defendants-Appellants.*

*On Appeal  
from Essex  
County  
Circuit Court.  
Grounds of  
Appeal.*

20

The appellants state the following grounds of appeal:

1. The following questions asked of the plaintiff were admitted over the objection of the defendants, to which an exception was noted as a ground of appeal.

“How are the fees of the architects governed, how are they based, on what percentage?”

30 (The point involved in this question was argued with the court, and the objection overruled, but the form of the particular question was held to be objectionable.)

The plaintiff was then asked the following questions involving the point upon which the ruling was made.

Q Is there an ordinary and usual rate of compensation for architectural services? A There is.

40 Q What is the ordinary and usual rate? A Six per cent. on the total cost of the building

*Grounds of Appeal.*

or plans, specifications, and supervision with the necessary working details.

Q Did you figure in this particular case what that six per cent. amounted to? A Yes, sir.

Q In reaching your figures you used the lowest bids which you received? A We did.

Q At that rate what were you entitled to receive for the work which you had done? A \$3,239.61. 10

2. The Court admitted in evidence upon the re-direct examination of the plaintiff estimates received by him from bidders for the work, marked Exhibit P. 11 over the objection of the defendants, to which an exception was noted as a ground of appeal.

3. The Court refused to strike out the testimony of the plaintiff referred to under the first ground of appeal to which ruling an exception was noted as a ground of appeal. 20

4. The Court refused a motion for a nonsuit and the direction of a verdict for the defendants upon the following grounds:

"First, that the written contract was that the plaintiff agreed to draw the plans for \$750.00 and he has been paid for that."

"Second, that the action was wrongfully brought because it was not on the written contract but on a *quantum meruit*." 30

"Third, that no legal damages have been proved; I mean by legal damages that he has not proved the proportion of value of the work done."

To which ruling an exception was noted as a ground of appeal.

*Grounds of Appeal.*

5. Because the Court refused to charge the jury as requested in the first request to charge as follows:

10 "1. When under a valid contract to perform a specified work for a specified price, the plaintiff has done part and has been prevented from performing completely through the fault of the defendant, the legal measure of the plaintiff's damages is generally for the work done such a proportion of the entire price as the fair cost of that work bears to the fair cost of the whole work."

Adding to the request to charge the following:

"That, gentlemen, is the law provided you find the contract of October 27th governs."

20 To which an exception was noted as a ground of appeal.

6. Because the Court refused to charge the jury as requested in the third request to charge as follows:

30 "3. If the jury find that the plaintiff was prevented from performing completely through the fault of the defendant, he may recover for the work done such a proportion of the entire price as the fair cost of that work bears to the fair cost of the whole work."

The Court adding to the request to charge the following:

"That is true if the contract of October 27th applies."

7. Because the court refused to charge the jury as requested in the fourth request to charge as follows:

*Grounds of Appeal.*

The judge prefacing his reference to the fourth request as follows:

“The fourth request to charge also applies in case you find the agreement of October 27th is binding upon the parties.”

“4. If the jury find that the plaintiff was prevented from performing completely through the fault of the defendant, he may recover for the work done such a proportion of the entire price as the fair cost of that work bears to the fair cost of the whole work, but the plaintiff cannot recover more than the contract price for the work already done.” 10

8. The Court charged the jury as follows:

“Now, gentlemen, on the other view of the case, if you should find that the agreement of October 27th was not in settlement of all the work that had been done prior to that time, that it was obtained by fraud—but I understand that there is no proof of the contract having been obtained by any fraud on the part of either party, both parties appear to have been acting in good faith—then the architect, Mr. Kitchell, would be entitled to recover for his services, whatever they were worth up to that time less the \$750 which he received at that time.” 20 30

Exception was noted to this part of the judge's charge as a ground of appeal.

9. The Court charged the jury as follows:

“Now, gentlemen, this is a case entirely to be governed by the evidence of which you are to be the sole judges. Take the case. If you find that the contract of October 27th governs then the rule of law which I have laid down fixing the price the architect should receive for 40

*Grounds of Appeal.*

his services should govern your determination and your verdict should be accordingly. If, on the contrary, you find that the contract of October 27th did not settle the matter then your verdict should be for such services that the architect had rendered up to that time less the \$750 which he had received on account.”

10

Exception was noted to this part of the judge's charge as a ground of appeal.

RAYMOND, MOUNTAIN,  
VAN BLARCOM & MARSH,  
*Attorneys for and of Counsel*  
*with Appellants.*

Service of the within Grounds of Appeal is hereby acknowledged as of time.

20

CHURCH & HARRISON,  
*Attorneys of Plaintiff-Respondent.*

30

40

*Summons and Complaint.***Summons.**

Issued December 15, 1915.

STATE OF NEW JERSEY TO JAMES E. CROSS-  
 [SEAL] LEY, RENA P. CROSSLEY and CORNELIA  
 V. PEDDIE: You are hereby summoned  
 to answer the annexed complaint of Bruce P. 10  
 Kitchell in an action at law in the Essex County  
 Circuit Court, and take notice that unless you  
 file your answer to said complaint with the clerk  
 of said court, at Newark, New Jersey, within  
 twenty days after service upon you of this writ  
 and the annexed complaint, the plaintiff may  
 proceed in the suit and judgment may be entered  
 against you.

WITNESS, William S. Gummere, Esq., Judge  
 of said Circuit Court, at Newark, New Jersey, 20  
 this fifteenth day of December, Nineteen Hun-  
 dred and Fifteen.

JOSEPH McDONOUGH,  
*Clerk.*

CHURCH & HARRISON,  
*Attorneys.*

**Complaint.** 30

Plaintiff, Bruce P. Kitchell, residing in the  
 City of Newark, County of Essex and State of  
 New Jersey, says that:

1. He is an architect regularly licensed to  
 practice in the State of New Jersey.
2. That during the year 1914, at the special  
 instance and request of defendants, plaintiff  
 rendered services to defendants as architect  
 in forming and drawing plans and specifications, 40

*Summons and Complaint.*

and receiving bids for the erection of a certain office building to be erected by the defendants at the southwest corner of Market street and Halsey street in the City of Newark, which plans and specifications were accepted by said defendants.

10 3. That the usual and reasonable architect's fees and commissions for said services amount to the sum of \$3,239.61.

4. That plaintiff has received from said defendants on account of said fees and commissions, the sum of \$750.00.

5. That plaintiff has demanded of said defendants the balance of \$2,489.61, remaining due to this plaintiff for said fees and commissions, and that said defendants have neglected and  
20 refused to pay said balance.

Plaintiff demands of the defendants, James E. Crossley, Rena P. Crossley and Cornelia V. Peddie, the sum of \$2,489.61 together with interest from January 1, 1915.

CHURCH & HARRISON,  
*Attorneys of Plaintiff.*

30 Form S. H. 11.

STATE OF NEW JERSEY, } ss:  
ESSEX COUNTY.

Daniel Demarest, Jr., Special Deputy Sheriff of the county aforesaid, being duly sworn, on his oath deposes and says that on the 18th day of December, A. D. 1915, he delivered personally to the said defendant James E. Crossley a true copy of the within summons and complaint, with a ten days' notice endorsed thereon.

40

DANIEL DEMAREST, JR.

*Summons and Complaint.*

Subscribed and sworn to this  
18th day of December, A. D.  
1915.

GEORGE F. BRANDENBURGH,  
*Notary Public of New Jersey.*

Endorsed:

ESSEX COUNTY CIRCUIT COURT.

BRUCE P. KITCHELL,

*Plaintiff,*

*vs.*

JAMES E. CROSSLEY, RENA P.  
CROSSLEY and CORNELIA V.  
PEDDIE,

*Defendants.*

*Action at  
Law.*

*Summons and  
Complaint.* 20

*To the Within Named Defendants.*

TAKE NOTICE that if the within summons and  
complaint be served upon you personally and  
you intend to make defense, then you must file  
an affidavit of merits within ten days of such  
service and must file an answer within twenty  
days of such service; and that in default there-  
of, judgment will be entered against you. 30

CHURCH & HARRISON,  
*Attorneys.*

Sheriff's fees \$4.82.

Filed December 22, 1915.

JOSEPH McDONOUGH,  
*Clerk.* 40

*Summons and Complaint.*

I hereby appoint and depute Daniel Demarest, Jr., to serve the within writ.

Witness my hand and seal this 17th day of December, 1915.

RALPH B. SCHMIDT,  
*Sheriff.*

10 (Seal)

By HARVEY W. KEOUGH,  
*Under Sheriff.*

Served the within summons and complaint with ten days' notice endorsed thereon personally upon James E. Crossley December 18, 1915, within named defendant at his usual place of abode, 97 North Arlington avenue, E. Orange.

20 Served the within summons and complaint December 18, 1915, upon Rena P. Crossley within named defendant by leaving a true copy thereof with her husband at her usual place of abode, 97 North Arlington avenue, East Orange, N. J.

Served the within summons and complaint December 18, 1915, upon Cornelia V. Peddie within named defendant by leaving a true copy thereof with James E. Crossley at his usual place of abode, 97 North Arlington avenue, E. Orange, N. J.

30

RALPH B. SCHMIDT,  
*Sheriff.*

By D. DEMAREST, JR.,  
*Special Deputy.*

40

*Answer.*

**Affidavit of Merits.**

Filed December 24, 1915.

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

James E. Crossley, Rena P. Crossley and Cornelia V. Peddie, being severally sworn upon their respective oaths, say, that they are the defendants in the above stated cause, and that they believe that they each have a just and legal defense to said action on the merits of the case. 10

J. E. CROSSLEY,  
RENA P. CROSSLEY,  
C. VICTORIA PEDDIE.

Sworn and subscribed to before me, at Newark, N. J., this 23d day of December, 1915. 20

(SEAL) ADELINE HOLLOWAY,  
*Notary Public of New Jersey.*

**Answer.**

Filed February 5, 1916.

The defendants, of the City of East Orange, County of Essex and State of New Jersey, say that: 30

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

2. That on the twenty-seventh day of October, nineteen hundred and fourteen, plaintiff agreed in writing to make the plans, specifications and supervise the work on a new four-story and basement building on the corner of Market 40

*Answer.*

and Halsey streets, Newark, New Jersey, for the sum of fifteen hundred dollars (\$1,500), seven hundred and fifty dollars (\$750) on completion of plans, three hundred seventy-five dollars (\$375) when building was half erected, and the balance as the work progressed. Although  
 10 plaintiff was paid the sum of seven hundred and fifty dollars (\$750) he never delivered any plans and specifications whatsoever to defendants, neither did he supervise the works on the proposed new building.

3. Defendant, James E. Crossley was acting as the agent of Rena P. Crossley and Cornelia V. Peddie in whatever dealings there were with the plaintiff.

20

#### COUNTERCLAIM.

By way of counterclaim against the plaintiff, defendants say that:

30

1. On or about October 27th, 1914, defendants paid to plaintiff seven hundred and fifty dollars (\$750) for plans to be delivered for new four-story and basement building to be erected at the corner of Market and Halsey streets, in the City of Newark, New Jersey. That plaintiff never delivered said plans to defendants, and although requested to return said sum of \$750 has refused and neglected so to do.

Defendants demand seven hundred and fifty dollars (\$750) damages, with interest from October 27th, 1914.

RAYMOND, MOUNTAIN,  
 VAN BLARCOM & MARSH,  
*Attorneys of Defendants.*

40

*Reply.*

We hereby consent to the filing of within answer as of time.

CHURCH & HARRISON,  
*Attorneys of Plaintiff.*

February 5, 1916.

10

**Reply.**

Filed March 7, 1916.

1. Plaintiff denies that he agreed in writing as alleged in paragraph 2 of the answer, to make the plans, specifications, and supervise the work on the new four-story and basement building on the corner of Market and Halsey streets, Newark, New Jersey, for the sum of \$1,500.00 or any other sum, but says that the plans and specifications referred to in paragraph 2 of the answer, were entirely finished and completed, when the agreement referred to was procured from this plaintiff. At that time plaintiff had received only \$750.00 of the amount then due him for commissions as set out in the complaint, but finally agreed, provided said defendants would build and erect the building in question, to accept in full for his services, the sum of \$1,500.00. Said defendants failed and neglected to build and erect said building, but erected another and different architect, and said memorandum in writing referred to in paragraph 2 of the answer is null and void and of no effect.

20

30

2. Said agreement or memorandum in writing referred to in paragraph 2 of the answer was procured through the fraud and misrepresentation of defendants.

40

*Reply.*

3. The agreement mentioned in paragraph 2 of the complaint is a nude pact, without consideration and void.

By way of answer to the counterclaim.

10 Plaintiff denies that he failed to deliver the plans mentioned in said counterclaim. Plaintiff avers that he did in fact deliver said plans to said defendants, which plans were accepted by them. Plaintiff denies that he is indebted to said defendants in the sum of \$750.00, or any other sum. Plaintiff denies that said defendants, or any or either of them, have ever requested of plaintiff the return of said sum of \$750.00.

20 CHURCH & HARRISON,  
*Attorneys of Plaintiff.*

Consent is hereby given to the filing of the within reply as of time.

RAYMOND, MOUNTAIN,  
VAN BLARCOM & MARSH.

Filed March 7-10/42 A. M. 1916.

30 JOSEPH McDONOUGH,  
*Clerk.*

*Judgment.*

## ESSEX COUNTY CIRCUIT COURT.

26779

BRUCE P. KITCHELL,	} <i>Action at Law.</i>	
<i>Plaintiff,</i>		} <i>After Verdict</i>
<i>vs.</i>		<i>On Non-Suit.</i> 10
JAMES E. CROSSLEY and RENA	} <i>Judgment Entered</i>	<i>October 12th, A. D.</i>
P. CROSSLEY and CORNELIA		<i>1916.</i>
V. PEDDIE,		<i>COSTS.</i>
<i>Defendants.</i>		Damages, \$2,757.26
		Costs, 69.36
		Total, \$2,826.62

Church and Harrison, Attorney of Plaintiff. 20

Judgment After Verdict in the above entitled Action at Law was rendered on the Seventeenth day of October, A. D. Nineteen hundred and sixteen in favor of the said plaintiff Bruce P. Kitchell and against the said defendants Rena P. Crossley and Cornelia V. Peddie for the sum of Twenty-seven hundred fifty-seven dollars and twenty-six cents damage and also find in favor of the defendant James E. Crossley On a Non-Suit and against the plaintiff Bruce P. Kitchell for the sum of Sixty-nine dollars and thirty-six cents costs of suit. 30

Judgment entered and signed October 17, 1916.

WM. S. GUMMERE,

*J.*

Book 93, page 560.

*Order Extending Time.*

**Order Extending Time.**

Filed October 31, 1916.

ESSEX COUNTY CIRCUIT COURT.

10 BRUCE P. KITCHELL,  
*Plaintiff-Respondent,*  
*vs.*  
 JAMES E. CROSSLEY, RENA P.  
 CROSSLEY and CORNELIA V.  
 PEDDIE,  
*Defendants-Appellants.*

*On Appeal.*  
*Order Extending*  
*Time to*  
*File Recognizance of*  
*Bail on*  
*Appeal.*

20 It appearing to the court that Rena P. Crossley and Cornelia V. Peddie, two of the defendants-appellants above named, have appealed to the Court of Errors and Appeals of this state from the whole of the judgment entered in this cause, and for good cause shown,

30 It is THEREUPON, on this            day of October, 1916, ORDERED, that the said Rena P. Crossley and Cornelia V. Peddie have up to and including the 6th day of November, 1916, within which to file the necessary recognizance of bail in order to stay execution.

Let this rule be entered.

Oct. 27, 1916.

WILLARD W. CUTLER,  
*Circuit Court Judge.*

*Recognizance.*

On motion of

RAYMOND, MOUNTAIN,  
VAN BLARCOM & MARSH,  
*Attorneys of Defendants-Appellants.*

We hereby consent to the making of this order.

10

CHURCH & HARRISON,  
*Attorneys of Plaintiff-Respondent.*

**Recognizance.**

Filed October 31, 1916.

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

20

Be it remembered, that on this twenty-eighth day of October, nineteen hundred and sixteen, personally appeared before me, Jacob L. Newman, one of the Commissioners appointed by the Supreme Court to take recognizance of bail, Rena P. Crossley, Cornelia V. Peddie, Minnie A. Crossley, all of the City of East Orange, County of Essex and State of New Jersey, who jointly and severally acknowledge themselves to owe unto Bruce P. Kitchell the plaintiff above named, the sum of five thousand six hundred fifty-three dollars and twenty-four cents (\$5,653.24) (double the amount of the judgment rendered in the above court in the above stated cause) to be made and levied of their several goods and chattels, lands and tenements, hereditaments and real estate, to the use of the said Bruce P. Kitchell, his executors, administrators and assigns, if failure be made in the following condition;

30

40

*Recognizance.*

Whereas, Rena P. Crossley and Cornelia V. Peddie, two of the defendants-appellants above named (judgment of non-suit having been entered against James E. Crossley, the other defendant at the trial), have given notice of appeal, dated October 23d, 1916, and served upon  
 10 Church and Harrison, attorneys of the above plaintiff-respondent, on the 24th day of October, 1916, whereby the said Rena P. Crossley and Cornelia V. Peddie have appealed to the Court of Errors and Appeals of the State of New Jersey, from the judgment entered in the above stated cause in the above stated court, as appears of record in said court.

Now, THEREFORE, the condition of this recognizance is such that if the said Rena P. Crossley and Cornelia V. Peddie in said appeal, shall  
 20 prosecute the said appeal with effect and pay and satisfy (if the said judgment be affirmed) all the damages and costs adjudged in the former judgment and all costs and damages to be awarded for the delay of execution, then this recognizance to be void, else to remain in full force and virtue.

IN WITNESS WHEREOF, the said Rena P. Crossley, Cornelia V. Peddie, Minnie A. Crossley and  
 30 Charlotte M. Crossley, have hereunto set their hands and seals the day and year first above written.

RENA P. CROSSLEY	(L. s.)
CORNELIA VICTORIA PEDDIE	(L. s.)
MINNIE A. CROSSLEY	(L. s.)
CHARLOTTE M. CROSSLEY	(L. s.)

*Recognizance.*

Taken and acknowledged before me, at Newark, the day and year first above written.

JACOB L. NEWMAN,  
*A Supreme Court Commissioner  
of New Jersey.*

10

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

BE IT REMEMBERED, that on this 28th day of October, in the year of our Lord, one thousand nine hundred and sixteen, before me, Jacob L. Newman, one of the Commissioners appointed by the Supreme Court to take recognizance of bail, personally appeared Rena P. Crossley, Cornelia V. Peddie, Minnie A. Crossley and Charlotte M. Crossley, who I am satisfied are the persons named in the foregoing recognizance, and to whom I first made known the contents thereof and thereupon they severally acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

20

JACOB L. NEWMAN,  
*A Supreme Court Commissioner  
of New Jersey.*

30

I approve the within Recognizance as to form and security.

October 28, 1916.

JACOB L. NEWMAN,  
*A Supreme Court Commissioner  
of New Jersey.*

Filed October 31, 1916.

40

*Certificate of Clerk.*

## ESSEX COUNTY CLERK'S OFFICE.

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

10 I, JOSEPH McDONOUGH, Clerk of the Circuit Court, in and for the County of Essex in the State of New Jersey.

Do HEREBY CERTIFY, that the foregoing is a true and correct copy of the Notice of Appeal and entire transcript of all the Pleadings and Proceedings and the Judgment record in the case of Bruce P. Kitchell *vs.* James E. Crossley, *et al.*, as the same is taken from and compared with the original papers and record in my office and as the same now remains on the files of said office.

20 IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of said Court and County at Newark, N. J., this 10th day of November, A. D. 1916.

JOSEPH McDONOUGH,  
*Clerk.*

[SEAL]

*Bruce P. Kitchell, direct.*

ESSEX COUNTY CIRCUIT COURT.

Monday, October 16, 1916.

BRUCE P. KITCHELL,

*vs.*

JAMES E. CROSSLEY, RENA P.  
CROSSLEY and CORNELIA V.  
PEDDIE.

10

Transcript of shorthand notes of testimony, and so forth, taken in the above stated cause, upon the trial thereof, at the Court House, Newark, N. J., before Hon. Willard W. Cutler, Judge, and a jury.

20

Church & Harrison, by Auguste Roche, Jr., for plaintiff.

Raymond, Mountain, Van Blarcom & Marsh, by Andrew Van Blarcom, for defendants.

Jury impanelled and sworn.

Mr. Roche opens for plaintiff.

Mr. Van Blarcom opens for defendants.

BRUCE P. KITCHELL, sworn in his own behalf.

30

*Direct examination* by Mr. Roche.

Q Mr. Kitchell, where do you reside? A Red Bank.

Q Is your business in Newark? A Yes, sir.

Q What is your business? A Architecture.

Q Where is your office? A 207 Market street, Ordway building.

40

*Bruce P. Kitchell, direct.*

Q Are you duly licensed to practice architecture under the laws of the State of New Jersey?

A I am.

Q When did you first receive your license?

A My first license was given to me by virtue of the fact that I had been practicing. My second  
10 license was given to me some five or six years ago—more than that, ten years ago when I qualified to practice.

Q Have you been actually engaged in the practice of architecture for ten years or more?

A Yes, sir.

Q When did you have an interview with Mr. Crossley about the specifications and plans mentioned in this suit? A Around the 5th or 6th  
of August, 1914.

20 Q What was said at that first conference?

A Mr. Crossley ordered me to make a set of plans for the building on the southwest corner of Market and Halsey streets to eventually to be made a twelve-story building so that they could be made into offices. The first building was to be a four-story building to be laid out so that eight or ten stories could be added any time he desired.

30 Q Did you know at that time who Mr. Crossley represented beside himself? A Oh, yes.

Q You had had former dealings with him?  
A I had.

Q Who else was interested in that building?

A His wife, Mrs. Crossley, and Miss Peddie; so was the Peddie estate.

Q The other defendants in this suit? A Yes.

40 Q What did you do after that first interview with him? A I started to work preparing the plans and specifications and worked for some

*Bruce P. Kitchell, direct.*

two months up to the first of October, 10th of October, around that date; under consultation with Mr. Crossley at least two or three times a week the whole two months I was working on them.

Q You say under consultation with Mr. Crossley. How often did you see him during that period? A At least twice a week and sometimes every day in the week. 10

Q What was his object in coming in to see you? A To watch the progress of the plans so they were developed the way he wanted them.

Q Are these the original drawings that you made? A Some of them are the original drawings. These tracings are the original drawings from which the blueprints were made to afterwards obtain estimates. The sketches are different types of fronts and different schemes for the front and different openings, and so forth. 20

Q Are these the specifications that were prepared to accompany the plans? A Yes, sir, they were used by the several contractors to take off their quantities and make their estimates. Those are the blueprints that the several contractors used in making up their figures.

*Mr. Roche.* I offer the plans, blueprints and specifications. 30

Q These are all duplicate sets? A They are.

Q These are the originals? A Those are the original tracings and sketch drawings and the blueprints are the drawings which were used to obtain the figures.

*The Court.* The tracings will be marked Ex. P-1 and the specifications will be marked Ex. P-2. 40

*Bruce P. Kitchell, direct.*

*Mr. Roche.* And the copy of the original drawing made for the various men to estimate on the job.

Marked Ex. P-3.

10 Q About when did you finish these plans and specifications? A Around the week of the 3rd or 10th of October, somewhere in that week.

Q 1914? A 1914.

20 Q Did you give to Mr. Crossley a complete set? A Mr. Crossley came in and an argument ensued about the payment. He let me go that far on the presumption that I would be paid six per cent., and he made a remark one afternoon in a conversation that he would pay me a thousand dollars and the job stopped then and there until Mr. Crossley came to some sort of an understanding with me. I wrote him several letters and sent him a bill for services rendered. Finally Mr. Crossley came in and saw me. Then he agreed to go ahead with it. Then the plans and specifications were handed to Mr. Crossley by my draftsman in my presence.

30 Q And he went off with those plans? A He went off with those plans and with the understanding that estimates would be submitted and handed to me on the 3d of December, which was done, and Mr. Crossley 'phoned me a couple of times and wrote me a letter that he had been sick and hadn't been able to come to my office; he would come in a few days but he never came.

Q I show you a letter on your letterhead, dated October 17, 1914, and a bill dated October 13, 1914, for \$2,520 on your letterhead. Did you mail those letters to Mr. Crossley under those dates? A I did.

40 *Mr. Roche.* I offer these letters in evidence.

*Bruce P. Kitchell, direct.*

*Mr. Van Blarcom.* I don't think they are material. They are letters written by the plaintiff sending the defendant a bill. I don't see how they can be evidence.

*The Court.* I will overrule them on the objection.

*Mr. Roche.* Letters of October 20, 1914, 10  
October 22, 1914, written by Mr. Kitchell to Mr. Crossley and letter of December 3, 1914, written by Mr. Crossley to Mr. Kitchell.

*Mr. Van Blarcom.* I don't object to the one to Mr. Crossley but I think the other two written by the plaintiff, I don't think that they are material in this case.

*The Court.* I do not think they are competent now. They may be on cross examination or afterward, but not now. 20

Q Did you receive on December 3d this letter from Mr. Crossley? A I did.

*Mr. Roche.* I offer this in evidence.

Marked Ex. P-4.

Ex. P-4 read to the jury.

Q You have testified that you rendered a bill in October, 1914, for how much? A \$2520, as I remember it, based on an estimate of what the building would cost. 30

Q Then, you had a dispute with Mr. Crossley, is that right? A The dispute occurred before that bill was sent. That bill was sent to Mr. Crossley to try and bring the thing to a head. He had told me a few days previous to that he would only pay me a thousand dollars for my services which was entirely out of proportion for the work done and that bill was sent to him to bring that matter to a head. The estimates had not been received at that time. 40

*Bruce P. Kitchell, direct.*

Q Did Mr. Crossley come in to see you again?

A He did, right after that.

Q What was the result of your interview with Mr. Crossley? A The first one wasn't very satisfactory and he went out and came back the next day or the day afterwards. That day we had come to an agreement whereby we would go ahead with the work if he would proceed immediately and build the building at once, and that is when he ordered me to receive the estimates, send the plans and specifications out for figures and receive the estimates.

Q And those plans and specifications were handed to him at that time? A Yes, sir.

Q What was the nature of the agreement which you made settling these matters of difference with Mr. Crossley; was it in writing? A Yes, sir.

Q Is this the agreement that was made signed by you and Mr. Crossley? A Yes, sir.

Q Is this the same agreement signed by both Mr. Kitchell and yourself, yourself and Mr. Crossley? A Yes, sir.

*Mr. Roche.* I offer it in evidence.

Admitted in evidence and marked Ex. P-5.  
Ex. P-5 read to the jury.

Q Did you proceed, did Mr. Crossley proceed with the erection of that building? A No, after that signature had been obtained, before that I had threatened to go to your office. He told me to get those figures and then went out and I never saw Mr. Crossley in my office after that. He called me up two or three times and sent me that letter but Mr. Crossley never appeared himself.

Q At that time that agreement was entered into were you authorized to receive bids? A I was ordered to.

*Bruce P. Kitchell, direct.*

Q To receive bids? A Yes, sir.

Q Did you go out and get bids for the erection of that building? A I did and sent Mr. Crossley a letter of the day they would be open, which his letter is in response to.

Q Are these the various bids which were submitted for the construction of that building? A 10  
Yes, sir, they are.

Q Have you figured the total amount of those bids? A Yes, sir, it was figured when they were opened in your office, the total was figured up at that time; never opened the bids until they were opened in your office.

Q By whom were they opened? A Mr. Whinery, your assistant.

Q What was the total amount of those bids? A Eighty-nine thousand and some hundred, 20  
\$89,989.

Q Who are the contractors offering those bids? Just read them off. A David Henry Building Company, the New Jersey Cement Construction Company, the American Concrete Steel Company, William G. Sharwell Construction Company, Essex Construction Company, William M. Waldron & Company, Incorporated, and A. C. Windsor.

*Mr. Roche.* I offer these bids in evidence. 30  
Admitted in evidence and marked Ex. P-6.

Q How are the fees of the architects governed, how were they based, on what percentage?

*Mr. Van Blarcom.* The testimony is objected to because there is a written contract between the parties which is now in evidence, and the measure of damages is, therefore, governed by the case of *Kehoe v. Rutherford, Wilson v. Borden* and other similar 40

*Bruce P. Kitchell, direct.*

10 cases, and as *Kehoe v. Rutherford* holds that when the plaintiff has been prevented from completing his contract by the action of the owner the legal measure of damages is for the work done, such a proportion of the entire price as the fair cost of the entire work bears to the fair cost of the whole work; and in respect to the work not done such profits as he would have realized by doing it, or as it is more simply expressed in *Wilson v. Borden*, if the plaintiff has completed one-quarter of the whole work contracted for he would have been entitled to one-quarter of the entire price.

20 Therefore the question of the measure of damages in this case is not the reasonable value of the plaintiff's work but is controlled by the cases above mentioned.

*Mr. Roche.* The contract was never carried out. It was a contract made after the work was performed and cannot be set up now, in bar of the reasonable value of the work that was performed.

*The Court.* I will allow you to take the testimony at this time, subject to your objection.

30 Counsel for defendants prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q (Question read.)

*Mr. Van Blarcom.* I object to that question.

*The Court.* Yes, that is objectionable.

Q How long have you practiced architecture?

40 A About seventeen years, sixteen years.

*Bruce P. Kitchell, direct.*

Q Are you acquainted with the rules and regulations governing the profession? A I am.

Q What are architects' fees fixed by, what institution?

*Mr. Van Blarcom.* I object to that. I don't see how an institution can fix fees that can be binding on anybody unless they have knowledge of it. 10

Q Is there an ordinary or usual rate of compensation for architectural services? A There is.

Q What is that ordinary and usual rate? A Six per cent. on the total cost of the building or plans, specifications, and supervision with the necessary working details.

Q Did you figure in this particular case what that six per cent. amounted to? A Yes, sir.

Q In reaching your figures you used the lowest bids which you received? A We did. 20

Q At that rate what were you entitled to receive for the work which you had done? A \$3,239.61.

*By the Court.*

Q That includes the superintending as well? A No, that is for the making of the drawings and specifications, three-fifths of the total commission of six per cent. 30

Q You have already received from Mr. Crossley a payment, have you not? A \$750.

Q How much does that leave due you on your claim?

*The Court.* That is a computation for the jury.

Q Was anybody present at the time you had your interviews with Mr. Crossley besides yourself? A Yes, sir, Mr. Smith, my draftsman, 40

*Bruce P. Kitchell, direct.*

was practically present at every interview I had with Mr. Crossley.

10 *Mr. Roche.* Without further evidence Mr. Van Blarcom admits that these two defendants, Rena P. Crossley and Cornelia V. Peddie, are liable for any judgment which we may be able to obtain against them. I had them here this morning or one of them here this morning and was going to ask her to take the stand but Mr. Van Blarcom consented to that admission.

Q Do you know if James E. Crossley, with whom you had your dealings in this matter, is an owner of the building and the ground where the building was to be erected? A I understood he was interested in it.

20 Q Interested in what way? A A financial way; part ownership along with his wife and sister-in-law.

Q You understood that it belonged to his wife, Rena P. Crossley, and his sister-in-law, Cornelia V. Peddie, and himself? A I understood he was interested in it, yes.

30 *Mr. Roche.* I think we may save time rather than make Mr. Crossley testify that he is only an agent and has no interest in the subject matter, we will consent to a non-suit as to James E. Crossley, who is one of the three defendants in this case, it being stipulated that Miss Peddie and Rena P. Crossley are the responsible parties.

*Mr. Van Blarcom.* There is no objection. They are the responsible parties and Mr. Crossley has only been their agent. I do not object to the non-suit.

*Bruce P. Kitchell, cross.*

*Cross examination by Mr. Van Blarcom.*

Q Mr. Kitchell, you first consulted with Mr. Crossley about altering this building instead of building a new building, didn't you? A That was months before this new proposition came up, months before and under a different agreement altogether. 10

Q How many months before? A I suppose about four or five; some time early in the spring we started with that. That was just to put a new front on the old building for which I was to receive \$700.

Q Didn't you discuss with him at that time whether he would alter or build a new building?

*Mr. Roche.* I object. This matter is not cross examination. We have said nothing whatever in our direct examination about alterations. The only thing Mr. Kitchell has testified to is he prepared plans and specifications for a new building and I think this question should embody only that. 20

*The Court.* You may find out what that conversation was, what they were talking about.

Q Didn't you say previous to the time you drew these plans for a new building, didn't you discuss with Mr. Crossley it would be advisable to build a new building or rebuild the old one? A I advised him to build a new one but he would not do it because it cost too much money. 30

Q Didn't you agree to make alterations as well as build a new building? A No, sir.

Q Look at this letter of July 8, 1914. See if that will refresh your recollection? A I didn't send this letter in the form it is in now. 40

*Bruce P. Kitchell, cross.*

Q You mean to say the alteration was made after you sent it? A Yes, sir.

Q Have you got a copy of that? A I think I have; not here. That has been changed since I sent it.

10 Q Where is the copy of this? A I presume it is in my office, in my files. It has no connection with this new building and that originally said, "alterations to an old building."

Q It may have been in there when it was first written but didn't you have an argument with Mr. Crossley about it when this matter was signed in July, 1914, and were not the words, "old building or alterations," whatever was in there, scratched out? A No, sir.

20 Q You didn't agree to prepare not only alterations but if that scheme was not satisfactory to prepare new plans for \$700? A No, sir, I did not.

Q You did prepare a plan for an alteration? A Yes, sir, and got figures on it.

Q And that was not satisfactory? A No, sir.

Q When was the plans for the alterations prepared and submitted? A I can tell you when the plans were finished; July 15, 1914.

30 Q Will you see if you can find the copy of this letter of July 8, 1914, and bring it here tomorrow? A A copy of the one you showed me?

Q Yes. A Yes, sir, there is no new building in it.

Q Then you discussed the question of new plans after you found the alteration was too much? A At which time?

40 Q After the alteration was too much, the cost of that being too much you then discussed with Mr. Crossley about new plans, you say? A Yes,

*Bruce P. Kitchell, cross.*

we took up the question of new plans at that time.

Q Didn't you come to any agreement as to the cost at that time? A I presume I was to be paid six per cent.

Q Why did you presume that? A Because Mr. Crossley and I had already had trouble over prices. That is how he come to get that agreement for \$700. 10

Q After one controversy over prices do you want us to understand you went ahead with more extensive work without having a price? A I did. That \$700 was based on a \$14,000 alteration to his original building which was based on a ratio of five per cent. on his expected cost.

Q Didn't the alteration come to \$55,000, as a matter of fact? A No, sir. 20

Q What was it? A Something like forty-four after Mr. Crossley practically built a new building. With his alteration I would have been stuck on that proposition.

Q When you came to your alteration how did you arrive at that figure of \$700, rather, when you were altering? A The alteration bid was based on a five per cent. of an expected cost of \$14,000. The original agreement, as I remember it for the alteration, was for \$750 and Mr. Crossley took that home to show to his wife and sister-in-law and came back and informed me he would pay \$700 and that agreement was drawn up for \$700, which was only five per cent. of the expected cost of the building which set on the southwest corner of Market and Halsey streets and didn't cover any new work. 30

Q You went ahead and made a more expensive alteration? A He ordered more things put in it. First, he was only going to tear out 40

*Bruce P. Kitchell, cross.*

the front and he tore out the front and side, according to the figures—

Q When did you start on these plans of the new building? A Somewhere around the 8th or 10th of August.

Q 1914? A 1914.

10 Q When were they finished? A Around the middle of the first week in October, somewhere between the 3d and 10th.

Q You finished the plans then? A Yes, sir.

Q Weren't they finished before that? A No, sir.

Q Are they dated at all? A Yes, sir.

Q What do the dates indicate, the time they were finished? A Yes, sir.

Q Just show the date. A Right there, 10-3-14.

20 Q How about the other ones, Exhibit 1? A Just the same. Those blueprints were made from the tracings. These pencil tracings are different schemes that Mr. Crossley had in mind, the division of windows, and so forth. Those blueprints are copied from these drawings here.

Q What do the drawings show, how they made their bids? A Those blueprints, right from those specifications.

30 Q They used Exhibit P-2? A They used them whatever number they are.

Q They are Exhibit P-2. Did you have a standard specification or did you get an original specification? A I got up original specifications for that particular drawing, had to make three or four drawings of them before getting the final one completed.

40 Q After you got them all done what happened then between you and Mr. Crossley? A When we were ready to go out Mr. Crossley informed me he would pay me \$1,000 for work I had done.

*Bruce P. Kitchell, cross.*

Q What was the conversation? A It was something to the effect that I would not make very much money if I did it for the same price that I made the alteration for, to which I agreed, and the next day when he came in we tried to settle the matter and Mr. Crossley would not settle it and the result of it was that \$2,500 bill to try to bring Mr. Crossley to some kind of an agreement. 10

Q When did you first have a dispute with him about the price, about what you were going to get? A Why, he informed me a thousand dollars was not very much and that is what he would pay me and the plans were all finished.

Q When was that? A Somewheres between the 3d and 5th of October, 1914.

Q That conversation took place in your office? 20  
A Yes, sir.

Q Had you sent for him to come in? A No, sir.

Q He came in? A He came in the same as he had been coming in every day for two months.

Q To see about the plans? A To consult about what was in the plans and specifications.

Q And then you had a conversation about what you were to get? A After he made that remark I had quite a conversation with him. 30

Q And he went out? A He went out about as hot as I was.

Q Little feeling on both sides? A Considerable feeling on my part.

Q And he came back again? A Why, I sent him several letters and sent him that bill.

Q You didn't have any basis to put that bill on that time? A Yes, I did. My work was completed and I was entitled to a payment if I desired. 40

*Bruce P. Kitchell, cross.*

Q How did you know how much to send him a bill for? A I had to approximate to figure on an approximate cost of \$100,000 which he expected to expend.

10 Q Did you think that that would cover the plans and specifications? A I wasn't thinking anything about it. I knew he expected to spend about \$100,000.

Q You didn't make your bill out on that basis? A I don't think I did make my bill out on the exact ratio of the percentage. I didn't think I had to.

Q Anyhow, you sent him a bill for the entire work up to that time? A I certainly did when he told me he was going to pay me a thousand dollars.

20 Q That was to bring the matter to a head?  
A Yes.

Q Then he came in on the 27th and signed this bill? A After a couple of hours wrangling I thought it might be better for me to go ahead and take the best I could get.

Q You signed the agreement? A Yes, sir.

Q Received at that time \$750? A Yes, sir.

30 Q That was, I believe, on October 27th, that is the date? A The date that agreement was signed is the date he gave me a check for \$750.

40 Q What happened next? A I sent the plans out for figures and a notification that the bids should be in our office on the 3d of December. I notified Mr. Crossley to the effect that if he was receiving any bids from the plans he had in his possession to bring them along so that he could compare them. He called me up and told me he was indisposed or sick or something to that effect and he also wrote me a letter, said he couldn't get in on that day but he would be in in a

*Bruce P. Kitchell, cross.*

couple of days, as soon as his health would permit, but he never came.

*By the Court.*

Q Were you intending to use the same plans that you have offered here today? A Yes, sir, the plans are the plans from which the building would have been built. 10

Q And the plans and specifications which you intended to use, those that you referred to in your contract for \$1,500? A Part of them were. There would have been built plans before the building could have been finished, the details, and so forth which would have been the means of—

*By Mr. Van Blarcom.*

Q You don't build the plans? A Yes, sir, the plans and working drawings were built, also, to build the building. Everything I agreed to do in that agreement are here ready to proceed with. 20

Q What did you mean, you would have to do something more in order to get it in shape? A There would have to be other drawings which the millmen might make themselves or the architect might make under certain conditions.

Q You had to make detail drawings? A After the work was ready there would have to be detail drawings which are not in that agreement. 30

Q What makes you say that? A "I will make the plans, specifications and supervise the work on the new four-story basement building on the corner of Halsey and Market streets for the sum of \$1,500." It doesn't say anything about details which the contractors would have had to make or whatever I had to make at further compensation. 40

*Bruce P. Kitchell, cross.*

Q You agreed to— A I agreed to see that the building was built and I would have carried out my agreement absolutely. Somebody would have had to lose some money. It might have been me and it might not.

10 Q Why did you agree to take less for your work than was coming to you? A Because of the position I was in.

Q You thought you had a legal claim against Mr. Crossley for \$2,500? A I should have walked out the room. I would not take Mr. Harrison's advice which I should have taken and never had anything to do with Mr. Crossley, hoping to escape a lawsuit.

Q Did you ever go to Mr. Crossley and see him at his office after you got your bids? A He didn't have any office.

20 Q Do you know where he lived? A I knew where he lived.

Q Did you ever write him any letters after that? A Yes, sir, that letter he sent to me was an answer to a letter I had sent to him telling him when the bids would be ready for opening.

Q Did you ever write and tell him the bids were all in? A Yes, he was telephoned that the bids were in.

30 Q When did you telephone to him? A At his house. That letter was written after he received the telephone call on December 3d.

Q You never opened these bids? A Not until they were opened in Mr. Harrison's office.

*By the Court.*

Q When? A When the case was started.

40 Q That bill of \$1,500 meant that you were to furnish the plans and build that building for that sum? A The contracts were already made.

*Bruce P. Kitchell, cross.*

Q Were they sufficient to build that building?

A Yes, sir.

Q Then what do you mean by details that you had to be paid for extra? A If it was supplemented by any details it would be a case of out-lining of special work. All that has to be made by the mill people. If the architect is paid enough he makes them. If he is not paid he lets the millmen make them. 10

Q Under your plans could any one proceed with the work of building? A Absolutely. Everything is detail right there and specified but not full sized details.

*By Mr. Van Blarcom.*

Q Not full sized details. What do you mean by that? A These drawings are all made to a scale of a quarter of an inch to a foot. Some parts of your work you make full size, sometimes you make quarter size. 20

Q Do I understand before a contractor can use building plans he would have to have other drawings? A Not before he could use them. They would facilitate his work.

Q Is that the custom to have them? A That all depends on the condition.

Q Would it have been necessary in this case? A Not for the kind of building that Mr. Crossley wanted. 30

Q Why did you mention it? A The difference in ratio. I would not have given for \$1,500 what I would give for \$6,000.

Q You were going to give him a cheap job? A No, I wasn't going to give him a cheap job, maybe considerably better than he has got. I had made up my mind what to give him before I made this agreement. My work was finished on a presumption that I was to be paid a regu- 40

*Bruce P. Kitchell, cross.*

lar commission. I went ahead with it the best I could without the lawsuit.

Q You wanted to make the regular— A No, he got drawings that he would have gotten on that basis but it would not have affected his building. It would have been more difficult to  
10 erect.

Q How long would it have taken to build that building? A About five or six months.

Q And it took you how long to draw the plans? A About two full months. The major portion of the work is done when your plans are made.

*By Mr. Roche.*

Q Have you got a record of the work you did in connection with the preparation of the  
20 plans and specifications? A Yes, sir.

Q Where is that record? A On that ruled sheet there, on those two sheets.

Q What do these sheets show? A Those sheets are out of a form, a book that I keep which is a record of a job from the minute you go to see a prospect, client, until you get your final check, which shows I went to work on the 8th, that is August 11th.

30 *Mr. Van Blarcom.* I Object unless the witness made this memorandum.

Q Did you make it? A Yes, sir.

*Mr. Van Blarcom.* All right.

Q Go ahead. A It says I went to work on the 11th of August and finished approximately on the 10th of October and it gives the number of hours in which my office was employed on this particular job.

40 Q How many? A And the amount of money that has been paid to me on it.

*Bruce P. Kitchell, cross.*

Q Did you work every day during that period on this job? A I can't say that I did. Sometimes I worked for a week, fifty-six hours, and another one forty, forty-four. It appears I worked on it and the actual number of hours noted on it.

Q How many hours' time is shown on that slip? A 328 hours of my own time. 10

Q Have you a record of the disbursements which you incurred in connection with this work? A Why, I have some of them, not all of them.

Q Do you know how much you have spent in connection with this work? A My disbursements, time and everything figured up it would run to all told about \$1,788. That is on a basis of six per cent. commission.

Q I ask you if you can give me a statement of what you have actually spent? A Outlay for materials other than time amount to \$133, \$134. 20

Q What was that for? A For writing the specifications and the necessary paper, cloth to make the drawings. That does not include any wages to my draftsman or to myself.

Q You figured your draftsman and your own time or does your time not figure in the \$1,600? A Not myself and draftsman. My time is in at \$3 an hour and my draftsman at \$1.50 an hour. 30

Q What is a fair charge per hour for an architect's services? A I don't know that there is any way of settling it.

*Mr. Roche.* I served on Mr. Van Blarcom to produce a letter of November 30th. He has not been able to find that letter and I ask that this copy be received in evidence.

Admitted in evidence and marked Exhibit P. 8. 40

*Bruce P. Kitchell, cross.*

Q You received that letter? A Yes, sir, I did and received a telephone call that the time was satisfactory.

Q You mailed the letter? A I did and Mr. Crossley answered it by telephone.

10 Q Did you receive a reply to this letter of November 30th? A Received by mail?

Q Any reply? A I received a reply over the telephone.

Q From Mr. Crossley? A Yes.

Q Did he say he would be in to receive those bids? A He did.

Q Did he come in? A No.

Q Did he ever give any account? A Not to my knowledge.

20 *By Mr. Van Blarcom.*

Q You don't mean to say you had the bids on November 30th, did you? A It doesn't say I had bids on November 30th.

Q Do I understand you had the bids on November 30th? A It says "There will be received by me at ten o'clock, A. M., on December 3d," but doesn't say I had them. I didn't have them.

30 Q So that the bids at the time you sent that had not actually come in? A No, they came in on the 3rd and 4th of December.

Q Have you got here all the paper that you used, and so forth, in making these plans? A No.

40 Q How much more did you have; twice as much? A I would make a sketch. If it is right you would use it and if it wasn't you would throw it away. Those are the sketches that I used to bring the work to a finished state.

*John H. Ely, direct.*

Q Is that what cost you \$133? A No, sir. If you will give me that I will tell you what it cost me.

Q I see it says, "Expense, \$30.60?" A The paper, cloth, tracing paper and all the paper materials used on the job with the finished tracing cloth amounted to \$30.60. The other item 10 that pushes that up is for the typist. That represented the original draft of the specification. First made two copies and then made the final addition of it.

Q She got \$100 for that altogether? A She got \$102 for it.

Q Did she work in your office? A No, sir, public typist. Twenty cents a page and ten cents for carbon copy.

JOHN H. ELY, sworn in behalf of plaintiff. 20

*Direct examination by Mr. Roche.*

Q Mr. Ely, where do you live? A Newark.

Q Your place of business is in Newark? A In the Firemen's building.

Q You are an architect? A Yes, sir.

Q For how many years have you been practicing architecture? A About thirty.

Q Are you connected with the City of Newark? A Yes. 30

Q Mr. Ely, how are architects' fees and commissions usually fixed? A We have a rule, general rule of six per cent.

Q Six per cent. of the cost of erecting a building? A Six per cent. of the cost of erecting a building.

Q How is that usually due and payable? Is that all due as soon as the plans and specifications are made by the architect? A No. 40

*John H. Ely, cross.*

Q How much is due as soon as the plans and specifications are made by the architect?

A Three-fifths.

Q The balance is due when? A As the work progresses.

Q Have you printed rules and regulations under which architects proceed? A Yes, sir.

Q I show you a printed copy of the American Institute of Architects, signed by Glenn Brown, secretary, and ask you if that is a correct and true copy? A Yes, sir.

Q Which section relates to the fees of architects? A The first section.

*Mr. Roche.* I offer this copy of the rules in evidence.

20 *Mr. Van Blarcom.* I don't think they are material. I object to that as being incompetent to prove a reasonable value of the services he has testified to.

*The Court.* I do not think it is competent.

Q Mr. Ely, in making this estimate of six per cent. of the cost do you figure on the lowest bids or the highest of those received? A The lowest bids.

30 Q On the lowest bids received for the construction of the building? A Yes, sir.

*Cross examination by Mr. Van Blarcom.*

Q Of course, there are cases where architects make agreements for less than six per cent? A Yes, there are prices by special arrangement.

*By the Court.*

40 Q What do you mean by supervision? A Why, supervision is the supervising the work after the builders begin operations.

*Howard E. Smith, direct.*

Q Have someone there all the time? A Until the completion—not necessarily. You might not have to be there more than once a week, you might have to be there every day.

Q If you are there only once a week don't you make it five per cent. and six per cent. if you have a man there all the time? A No, 10  
sir, it makes no difference. Sometimes we get as much as ten per cent.

HOWARD E. SMITH, sworn in behalf of plaintiff.

*Direct examination by Mr. Roche.*

Q Mr. Smith, what is your business? A I am a draftsman.

Q And are you connected with Mr. Bruce P. Kitchell? A I am. 20

Q Were you working for him in 1914 at the time Mr. Crossley had some negotiations with him? A I was.

Q Did you work on the plans and specifications that were prepared and given to Mr. Crossley? A I did.

Q Are those the plans? A These are the plans and some paper sketches that were made.

Q And those are the specifications, Exhibit P. 2? A These are. 30

Q Do you recall for how long a time your office was engaged in the work of those plans and specifications? A A little over two months as I can remember.

Q Were you present at any of the interviews with Mr. Crossley? A I was.

Q How often did Mr. Crossley come into the office? A On the average of about every other day. 40

*Howard E. Smith, direct.*

Q Were you there when the dispute arose after the plans and specifications had been finished as to payment for them? A I was.

Q What happened as nearly as you can remember? A The way it first came about was Mr. Crossley had come in to go over the final arrangements before the tracings were blue printed and during the course of the conversation he spoke, at the present rate that you won't make very much on this, and after he had gone out it occurred to me that there was something wrong, and I spoke to Mr. Kitchell about it. Mr. Kitchell said, "No, I don't think there is anything in that."

Q That didn't happen when Mr. Crossley was present? A No.

Q What happened when Mr. Crossley was there? When did he come back to the office? A Then he came in the next day and when he came in the next day Mr. Kitchell spoke to him about the agreement and then he said he would pay a thousand dollars and then there was a dispute.

Q What did Mr. Kitchell say to that? A He would not agree to it at all.

Q How long was it before Mr. Crossley came back to the office after that interview? A I can't say exactly how long it was.

Q Were you present when this so-called agreement was made? A I was.

Q What was said at the time of the making of that agreement, what happened before the agreement was made? A There was a very heated argument over the price that should be paid. Mr. Kitchell insisted that he had fully expected he was to receive his full six per cent. for the work and Mr. Crossley refused to pay

*Howard E. Smith, direct.*

any more than a thousand dollars, so they finally made an agreement.

Q What happened before the signing of that agreement? A There was a very heated discussion; in fact, it came almost to a fight. Mr. Kitchell asked me for the drawings, the complete drawings and specifications of the building, and I got them from our files and handed them to Mr. Kitchell and he left and finally Mr. Crossley stood there for two or three minutes. Afterwards he ran out after Mr. Kitchell and then I didn't hear any more of it for about fifteen or twenty minutes and they came back together and that is when the agreement was made. 10

Q Now, did you hear Mr. Crossley authorize Mr. Kitchell to do all this for the construction of that building? A I did. 20

Q I show you a yellow paper with some names of contractors, and so forth on it. Do you recognize that paper? A I do.

Q Was it made at that time, at the time of the signing of the agreement? A It was made at the time of the signing of the agreement, the same date that the agreement was made.

Q Who made it? A Mr. Kitchell made it and submitted it to Mr. Crossley. 30

Q Did Mr. Crossley ask him as to the names to be written down? A Mr. Crossley suggested some of the names and Mr. Kitchell suggested some for Mr. Crossley's approval.

Q What is that list of names? A It is a list of the contractors who were to estimate on the job.

*Mr. Roche.* I offer this paper in evidence.

*Mr. Van Blarcom.* I don't see the materiality of it. 40

*Howard E. Smith, cross.*

*The Court.* I sustain the objection.

Q Did Mr. Kitchell receive a complete set of these plans and specifications? A He did.

Q Did you see him take them? A I handed them to him.

10 Q Who told you to give them? A Mr. Kitchell requested that I get a complete set of plans and specifications together and get them to Mr. Crossley.

Q And then what happened, did Mr. Crossley take them with him? A Mr. Crossley took them with him.

Q Have you seen that set since? A I have not.

*Cross examination by Mr. Van Blarcom.*

20 Q Was the set of plans that he took blueprints? A They were blueprints and the original drawings.

Q How many blueprint copies were there? A He took one copy of each tracing.

Q I mean in the office, how many did you have? A I can't say exactly how many we had printed at the time but I know there were a number of sets printed.

Q You worked for Mr. Kitchell how long?

30 A Between four or five years, I guess.

Q You still work for him? A I do.

Q You are a draftsman there? A Yes.

Q Do you remember the date that Mr. Crossley came in and said something to the effect, "You won't make much out of it at this rate."

A No, but I know about when it was, not the exact date but I know in what connection it came.

40 Q Tell us about that? A It came two or three days before this agreement was signed.

*Howard E. Smith, cross.*

Q What was that as near as you can recollect on that particular point? A Why, Mr. Kitchell, after I had spoken to him and said that I thought that Mr. Crossley didn't intend—

Q No, not what was said between you and Mr. Kitchell but what was said by Mr. Crossley or Mr. Kitchell when they were all there together? A Mr. Kitchell absolutely refused to take anything less than his six per cent. 10

Q I mean before that, when Mr. Crossley came in and said, "You won't make much out of it at this rate." What was that conversation? A They were discussing a glass proposition that Mr. Crossley wanted included in the specifications.

Q Tell us the conversation. A During the conversation Mr. Crossley asked the price of different things and finally he said things were going to cost some money. Then he spoke, "You won't make very much on this proposition, the same as you did the other one." 20

Q Didn't he then say, "You agreed to do this whole business for \$700"? A No, he did not.

Q You think about three days after that they came together and signed this written agreement? A Yes. 30

Q Were you in the same room as they were when the telephoning went on? A At part of the time and part of the time I was in the adjoining room which opens directly into the room.

*Charles A. Winston, direct.*

CHARLES A. WINSTON, sworn in behalf of plaintiff.

*Direct examination by Mr. Roche.*

Q Mr. Winston, you are town engineer of West Orange? A Yes, sir.

10 Q You are acquainted with Mr. Kitchell and Mr. Crossley? A Yes, sir.

Q How were you employed in 1914? A As a civil engineer.

Q At that time did you meet and see Mr. Crossley frequently? A Very often, yes, sir.

Q Did you know anything of the preparation of these plans and specifications now under discussion? A Yes, sir.

20 Q Were you present at any of the interviews between Mr. Kitchell and Mr. Crossley? A Yes, sir.

Q Did you hear any of the discussions? A I was only present at the first interview where they made some sort of an arrangement to go ahead with the work. I was only familiar with the finished end of it.

Q Are you familiar with the plans and specifications of this job? A I am.

30 Q Did you ever see those plans and specifications in Mr. Crossley's possession? A I have.

Q When was that? A Shortly after he took them away; at the time that has been testified here.

Q Did you see him take them away? A No, I didn't see him take them away.

40 Q Where did you see them, in what office, do you remember, or what place? A No, I can't recall. I met Mr. Crossley at various times in connection with other business that

*Charles A. Winston, cross.*

he and I had together and I recall seeing the plans and specifications in his possession.

Q Did you have occasion to discuss those plans with him at any time? A Why, yes, in a general way.

Q You are sure that they are the plans referred to in this suit? A I am. 10

Q Were you compiling estimates for contractors at that time? A For this particular job, do you mean?

Q Yes. A I was.

Q You were actually working on that job?

A I was.

*Cross examination by Mr. Van Blarcom.*

Q What were you compiling? A Estimates I made estimates for the various contractors. I took off the quantities, made a list of the quantities required to do this building and I furnished them to various contractors who used them as a basis for their bids which were turned in to Mr. Kitchell. 20

Q You did that in one case and everybody was furnished with an original compilation? A Yes, I think I furnished four different contractors with what we term estimates on this job or figures by which they made their estimates. 30

Q Where was it you saw Mr. Crossley have these plans and specifications? A I can't tell you the particular place. I think I saw them in Harburger's cafe at one time, and I think I had them at another time in A. C. Windsor's office.

Q He made a bid? A Yes.

Q You saw them at—Mr. Crossley didn't have them? A Mr. Crossley had the plans in Windsor's office at that time.

Q Mr. Crossley was there in Windsor's office? A Yes. 40

*Charles A. Winston, cross.*

Q You saw him have the plans? A I saw him have the plans. He brought them with him and took them away with him.

Q Mr. Windsor is one of the bidders making the bids submitted by Mr. Kitchell? A He is, and he figured on the estimate which I prepared for him.

10 Q From the plans here? A I made those estimates right in Mr. Kitchell's office at that time. I was connected, in other words, I had my office with Mr. Kitchell at that time and I made these estimates. My business then, all my business at that time was furnishing estimates to various contractors on various work. In other words, I took architect's plans and made estimates and sold these estimates to other contractors.

20 Q Did you work together with Mr. Kitchell on this job? A No, I had nothing to do with the plans except in an advisory capacity.

Q How were you to be paid for this work? A I wasn't paid at all. I had nothing in common with Mr. Kitchell. When I furnished estimates to various contractors I was to be paid by those contractors.

Q That wasn't part of the architect's work?

A No, not at all.

30 Q Are you still with Mr. Kitchell? A I was not with Mr. Kitchell at all. We simply had our offices together. Our business had nothing to do with each other.

PLAINTIFF RESTS.

*James A. Crossley, direct.*

JAMES E. CROSSLEY, sworn in behalf of defendants.

*Direct examination by Mr. Van Blarcom.*

Q Mr. Crossley, you live in East Orange?

A Yes, sir.

Q You undertook to alter or build a new building at the southwest corner of Market and Halsey streets, in Newark? A Yes, sir. 10

Q That property, I believe, is owned by your wife and sister-in-law? A My wife and my sister-in-law.

Q You know Mr. Kitchell? A Yes.

Q Where did you first see Mr. Kitchell about any work to be done on this building? A I can't give the date.

Q In reference to this letter of July 8, 1914, how long before that had you talked with him about it? A What time before that? 20

Q What was to be done? A He was to build—he was to alter the old building or build a new one.

Q This letter of August 8, 1914, appears to have something scratched out. What do you say about that erasure? A That is the way I received it.

Q Do you know who did that? A I think Mr. Kitchell did it. 30

Q Why was there an erasure? A I can't tell you; probably some question brought up regarding that and he crossed it out.

Q Was there a price fixed in July, 1914, for an alteration or a new building, either one? A To alter the old building, or a new one, a four-story building.

Q Then this paper here was signed July 8, 1914? A Yes, sir. 40

*James A. Crossley, direct.*

Q After that were the plans for the alteration made? A He drew a sketch of what he was going to do for alteration.

Q I understand the price given was so high that you abandoned the alteration? A He drew a sketch and told me it would come to so  
10 much; I couldn't give the exact amount, but I thought it was too high for an old building.

Q Then what happened? A Then I said, "You agreed to build me a new one if I didn't want to alter it," and we had some dispute about that.

Q Tell the jury what all took place. A The fact was that the price was so high to alter the building that I could get a new one for  
20 nearly the same price and that was when the question came out.

Q Tell the jury what happened after that down to the time you signed this agreement in October for \$1,500? A Then, we had some dispute about that. One thing led on to another until I wrote him certain letters, which you have the letters there. I would like to read my letters. They will refresh my memory, if you will read the letters.

Q You received a bill from him, didn't you?  
30 A Well, first I got letters.

Q Did you receive a bill from him? A Yes, sir.

Q After you got that bill what did you do? A Until after I got the bill I seen Mr. Hall over to his office and told him to come to my office at the corner of Market and Halsey streets. I always had an office there until I tore it out.

Q Did Mr. Kitchell know that you had an office there? A Yes, he knew it and had been  
40 in it.

*James A. Crossley, direct.*

Q Did Mr. Kitchell come to see you? A No, he wrote me a letter. You have a copy of the letter. Read the letter.

Q Then, you went to see him? A Then I went to see him. Then we had a dispute about the amount he was going to charge and to save any trouble or lawsuit which he threatened lawsuit at that time, we compromised for a certain amount. 10

Q What was that amount? A That amount was in writing.

Q That is the letter here, \$1,500? A It is right there in writing.

Q Had he showed you plans at that time? A No, he showed me no plans at all. He had no plans.

Q What happened then? A He agreed to make plans and specifications and to superintend the work for so much money, which he never done. 20

Q You paid him \$750, November 27th? A Yes, I paid him \$700, but I paid him before that.

Q I mean of this \$750 alone, why did you make that payment at the time? A Because he thought he ought to have it. He was in such shape he needed money very bad. 30

Q What did he say about his finances? A He told me he was very hard up and that is why we compromised, that he was to build a new building and superintend the building, furnish plans and specifications for so much money, and I paid him \$750 that day.

Q What next occurred? A Next occurred, he got up some plans and he told me the price and it cost one hundred and some odd thousand dollars; it was over \$100,000, to erect a four-story 40

*James A. Crossley, direct.*

building, and I told him it was too much, I should abandon that erecting a building at that price.

Q Did you have any talk with him at the time of signing this agreement for \$1,500 or before that concerning the price of \$700 that was fixed in July? A Yes, it was understood he was to allow that \$700 that was paid on account.

Q You had paid him some part of that? A I had paid him \$300.

Q And then the balance was collected also? A The balance was collected.

Q He got the whole of that \$700 under the agreement of July? A Yes, sir.

Q And got \$750 besides? A And got \$750 besides.

Q After he told you it would be over \$100,000 what was the next thing that occurred? A I told him it was ridiculous. That is about all. I didn't go near him afterwards.

Q Did you hear anything from him? A He wrote me a few threatening letters.

Q In this letter you wrote to him of December 3d you say you will be out to see him soon. Did you ever go to see him? A I may have seen him.

Q Do you remember when he told you the cost of this would be in the neighborhood of \$100,000 or over? A Over \$100,000.

Q Do you remember about when that was? A I can't remember the date.

Q Did you have any talk with him about changing the plans he had prepared or changing his method of building or anything like that? A No, sir.

Q You did build another building there? A Yes, six-story building.

Q When did you start that? A Last summer, last fall.

*James A. Crossley, cross.*

Q 1915? A Yes.

*Cross examination by Mr. Roche.*

Q Mr. Crossley, when did you reach the conclusion that you would build a new building on the site at the corner of Market and Halsey streets? A I talked the matter over with Mr. Kitchell, if it cost too much to repair the old building that I would have a new one and he agreed with me that he would do it for \$700 and build a new one or an old one. 10

Q I ask you if you remember the date? A No, sir, I can't give you the date because it is a matter of memory.

Q Do you remember going frequently to Mr. Kitchell's office from August until October, 1914? A In August I think I was down to the beach and I may have been in Newark once a week to go over that. 20

Q During September were you there frequently? A I think I was down to the beach and some weeks I didn't come up at all.

Q When you did go to Mr. Kitchell's office what did you do there? A I don't know what I did do.

Q What made you go there at all? A It was regarding the alteration of the old building that was about that time. 30

Q Haven't you seen these plans and specifications here? A Never saw them only in his office.

Q These are the plans and specifications for the new building. Have you never seen those before? A No, sir, only in his office, I may have seen them in his office.

Q Didn't you receive a bill for \$2,520 from Mr. Kitchell? A If it is they are on the record right there. 40

*James A. Crossley, cross.*

Q You received such a bill? A I received bills.

Q In October? A I should not wonder but I don't remember.

10 Q Don't you remember that bill was sent after the arguments you had with Mr. Kitchell over these plans and specifications, don't you remember that it was as a result-- A All the bills is there and whatever plans he made is right there.

Q Don't you remember that the bill was received by you after the argument took place? A I never received but one bill.

Q And that was received after the argument took place? A I don't know what day it was. It will speak for itself.

20

## SECOND DAY.

Tuesday, October 17, 1916.

Met pursuant to adjournment.

Present, counsel as before stated.

JAMES E. CROSSLEY, resumes the stand.

*Cross examination* (continued) by Mr. Roche.

30 Q Mr. Crossley, you came to Mr. Kitchell's office from time to time during the months of August and September and October, 1914? A August and September once in a while, not very much.

Q Why did you go to Mr. Kitchell's office?

A In August?

Q Why did you go to see him at this office?

A I went to see him regarding the business transaction we had.

40 Q Did you discuss with him the preparation of the plans for the building at the corner of

*James A. Crossley, cross.*

Halsey and Market streets? A And alterations, yes.

Q Were not the plans being prepared at that time for a new building to be erected? A Not at that time, I don't think there was.

Q You have seen the plans produced in evidence in this case. These are the plans marked in evidence in this case. Will you kindly glance at them and see if those were the plans you looked over during the months of August, September and October, 1914? A I don't remember them. 10

Q You remember that a discussion occurred during the first part of October with Mr. Kitchell as to the amount which he should receive for his work preparing those plans? A Yes, sir.

Q Do you remember that? A I remember that we had an understanding what it should cost if he proceeded with the work. 20

Q Do you remember that upon that occasion the argument grew heated and Mr. Kitchell took his plans under his arm and left the office? A I don't know that he had plans or not. I know nothing about that.

Q You remember that Mr. Kitchell went out of the office and left you sitting in his office? A He has done that a number of times. 30

Q What did you do after Mr. Kitchell left? A We agreed on a price.

Q What did you do, did you remain in the office or did you leave the office? A I think I left the office.

Q Where did you meet Mr. Kitchell after leaving his office on that occasion? A In the hallway.

Q Did you and Mr. Kitchell then come back together? A Yes, sir. 40

*James A. Crossley, cross.*

Q Didn't you meet Mr. Kitchell on that occasion in the street in front of a cigar store after he had left his office? A It was in the hallway.

Q In the hallway of the building? A Yes, sir.

10 Q When you got back to the office you got together, did you, with Mr. Kitchell? A Yes, sir.

Q And the result of that was the agreement which is marked in evidence in this case? A Yes, sir.

Q You, of course, understand when you signed that agreement, do you, that you signed that agreement? A Yes, sir.

20 Q That Mr. Kitchell was to superintend the erection of the building, did you not? A He was to draw plans and specifications and to superintend the building, just what it says in the contract.

Q You further instructed Mr. Kitchell, did you not, to go ahead and get estimates from various contractors? A He may have done that.

Q Do you remember making up the list of contractors in Mr. Kitchell's office? A No, sir, I made up no list of no contractors.

30 Q I show you a yellow paper with the names of various contractors on it and ask you if you recognize that paper? A No, sir, I don't recognize it.

Q Did you instruct Mr. Kitchell to get the estimates? A I instructed him at the time to find out what it would cost to erect the building.

40 Q You received letters from Mr. Kitchell from time to time informing you that estimates would be received? A What letters that I ever received from Mr. Kitchell is in court today.

*James A. Crossley, cross.*

Q You wrote Mr. Kitchell on December 3rd this letter, which is marked Exhibit P. 4, did you not? A Yes, sir.

Q What does that letter of yours refer to?

A He wrote me a letter to come in and see him.

Q About estimates? A He didn't mention estimates. All the letters I have got is here in court today. 10

Q I show you carbon copy, marked Exhibit P. 8, of letter on November 30th, addressed to you at 128 Market street, and ask you if you received that letter from Mr. Kitchell? A If that letter is received I have got it here.

Q Do you remember receiving that letter? A I can't recall it.

Q You don't remember receiving that letter? A I can't recall it. I may have received it. If I did I have it here. 20

Q You knew that Mr. Kitchell was going ahead and getting estimates for this work? A I suppose so. I would not have paid him any money if I hadn't.

Q After the agreement between you and Mr. Kitchell was signed did you ever go into his office? A Yes, sir.

Q On what occasion? A I was there, I think, once or twice after that.

Q Did you see Mr. Kitchell there? A I think so. 30

Q What did you discuss with Mr. Kitchell on those occasions? A The principal thing, what it would cost to erect the building.

Q I show you letter of July 8, 1914, addressed to you by Mr. Kitchell? A Yes, sir.

Q Did you receive this letter? A This letter?

Q Yes. A He handed it to me that day when I paid him the money. 40

*James A. Crossley, cross.*

Q Was it handed to you or did you receive it by mail? A Handed to me.

Q On what day? A I think about that day.

Q July 8, 1914? A I think so.

Q You see the erasure on the second line of that letter? A Yes, sir.

10 Q Who made that erasure? A Mr. Kitchell.

Q I show you carbon copy of the letter which you have just identified, July 8th, and bearing both your signature and Mr. Kitchell's signature? A We had some question about the words and it was erased.

Q Why wasn't it erased in the copy you signed? A Mr. Kitchell can explain that, I can't.

20 Letters offered in evidence and admitted and marked Exhibit P. 9 and P. 10.

Exhibits P. 9 and P. 10 read to the jury.

Q Did you receive the plans and specifications which are offered in evidence by Mr. Kitchell? A Never received them.

Q You have heard the testimony of Mr. Kitchell and Mr. Smith and Mr. Winston to the effect that these plans were in your possession? A Never had them.

30 Q You say you never had them? A I had the plans with the atleration.

Q We are not speaking of the plans for the atleration, we are speaking of the plans for the new building which are here offered in evidence. A I never received them.

Q Do you remember going to any of the contractors to get it from them for any part of the new building? A Not when Mr. Kitchell had charge of it.

40 Q Did you go to Mr. Winston's place? A No, sir.

*James A. Crossley, cross.*

Q You never went back to Mr. Kitchell's office after your letter of December 3rd saying that you would be able to come out soon and see him, you never went there? A I think I did.

Q Do you remember the occasion? A No, I can't remember it.

Q Did you ever go to Mr. Kitchell's office to open the estimates which he had received? A Never did. 10

Q Why didn't you do that? A Because the price was so high I thought it was unnecessary to figure on such a base.

Q How did you know what such a price was if you had not opened the estimates? A He told me the price whether he opened them or not.

Q What price did he tell you? A I can't recall the exact amount. 20

Q You don't recall the price? A No, I know it was so excessive for a four-story building I said it wouldn't do.

Q Didn't you testify yesterday that Mr. Kitchell said the building would cost \$100,000? A He made that remark, it would cost over that.

Q Then, you remember what Mr. Kitchell estimated? A I believe Mr. Kitchell made a verbal statement to me but he never showed me no estimates at all of what it would cost. 30

Q I understood you to testify a moment ago that you didn't know what figure Mr. Kitchell had put upon the building? A All I know is what he said.

Q That is what I asked you? A I think it was for a hundred thousand dollars.

Q Well, has a building been erected since? A Yes, sir.

Q At the corner of Market and Halsey streets? A Yes, sir. 40

*James A. Crossley, cross.*

Q Did Mr. Kitchell superintend the work of that building? A He did not.

*By Mr. Van Blarcom.*

10 Q There have been some questions asked you about the letters. Did you look over all the letters that you found from Mr. Kitchell? A Yes, sir.

Q And delivered them to me? A Yes, sir.

Q Are these the letters and bills, and so forth?

A Yes, sir.

*Mr. Van Blarcom.* I offer all these in evidence.

20 *Mr. Roche.* With the exception of these two we have no objection. These two relate to the alteration of the building, which is a different matter.

*Mr. Van Blarcom.* I offer in evidence bill of October 13, 1914, for \$2,520.

Admitted in evidence and marked Exhibit D. 1.

*Mr. Van Blarcom.* And letter of October 17, 1914, unsigned, but the plaintiff says he wrote it.

Admitted in evidence and marked Exhibit D. 2.

30 *Mr. Van Blarcom.* An unsigned letter, dated October 20, 1914, which the plaintiff says he wrote.

Admitted in evidence and marked Exhibit D. 3.

*Mr. Van Blarcom.* A letter of October 22, 1914.

Admitted in evidence and marked Exhibit D. 4.

*James A. Crossley, cross.*

*Mr. Van Blarcom.* A letter of November 1st, 1914.

Admitted in evidence and marked Exhibit D. 5.

*By the Court.*

Q Was that \$700 paid referred to in your letter that you have offered? A Yes, sir. 10

Q Has that anything to do with the \$750 that you paid afterwards? A The \$700 was for the alteration or a new building. Then, we made another contract for \$1,500 and I gave him \$750 then for the new building.

Q Then there were two payments, \$700 and \$750? A Yes, sir.

*By Mr. Roche.*

Q When did you pay that first \$700, on what date? A The \$750? 20

Q No, the first \$700? A The bills will show it. I paid the first \$700 in January.

Q When did you pay for the work on the alteration? A The alteration or the new building, the first that I paid was \$350, I think I gave \$350, then I paid the balance later on.

Q When did you pay that balance? A I think that balance was paid afterwards, some time afterwards; what time I can't tell you. 30

Q Did you make that payment voluntarily? A No, sir.

Q Suit was instituted against you and judgment recovered, is that correct? A Yes, sir.

Q And then you paid the balance of the bill for the alterations? A For the alterations or a new building.

DEFENDANTS REST.

*Bruce P. Kitchell, direct.*

BRUCE P. KITCHELL, recalled in his own behalf in rebuttal.

*Direct examination by Mr. Roche.*

10 Q Mr. Kitchell, I show you copy of these letters of July 8, 1914, relating to alterations on the building at the corner of Market and Halsey streets, Newark, and I ask you if you have ever made the erasure in the letter signed by you under date of July 8th, which Mr. Crossley produced in evidence? A I did not.

Q Did you see that erasure in the letter at the time you signed it? A It wasn't there when I handed it to Mr. Crossley.

Q You kept a copy of the letter signed by Mr. Crossley, did you? A Yes, sir.

20 Q And you have it there? A Yes, sir. It is made with a different kind of ink from what I have in my office. My signature is all one ink and that is of an entirely different kind of ink. This other one is signed by Mr. Crossley also. That is my copy.

Q When was the agreement as to what you should receive for drawing plans, and so forth, for alterations made on what date?

30 *Mr. Van Blarcom.* I object. It speaks for itself, October 27th.

*The Court.* The agreement speaks for itself.

*Mr. Roche.* I am referring to the alterations.

*Mr. Van Blarcom.* That is in writing, too, July 8th.

40 Q And the agreement relating to the work to be done on the new building was entered into when? A October 20th.

*Bruce P. Kitchell, direct.*

Q The date on the agreement itself? A The date on the agreement is correct. I forget just this minute what that date is, around the 20th or 23d—27th.

Q Those two jobs were started and finished, is that right? A Oh, yes, the alteration originally was merely to tear out the front of the old building and put a new stone front in. The reason it ran up to so much money was because Mr. Crossley decided to change the side and make that stone. 10

Q Was the agreement relating to the new building made before or after the plans had been completed? A After the plans for the new building had been completed and I found he had me tied up.

Q As you testified to yesterday? A Yesterday had no connection with this job whatever. 20

Q I show you these documents and ask you what they are. A They are the estimates received by an architect when he takes general figures and this other sheet is a calculation and these several estimates are received for two reasons.

Q Do they relate to the taking of bids for the work to be done on the new building, corner of Market and Halsey streets, Newark? A Absolutely. These estimates had to be gotten before a general figure could be compiled. 30

Q Did you obtain them in the course of your work for Mr. Crossley? A I did.

*Mr. Roche.* Is there any objection to having this marked in evidence?

*Mr. Van Blarcom.* The only objection is the objection that was made yesterday, that the written contract controls. 40

*Motion for Non-suit.*

*Mr. Roche.* I offer this in evidence.

(Admitted in evidence and marked Exhibit P. 11.)

Counsel for defendants prays an exception to this rule of the court.

(Exception noted as ground of appeal.)

10

*Cross examination by Mr. Van Blarcom.*

Q Nothing was done about alterations at all, was there; I mean as far as it is concerned?

A No, as the prices came in Mr. Crossley began to see that my original statement was such that he would be better off by building a new building.

Q Have you the plans for the alteration? A Yes; a complete set. Specifications and estimates were received on them just as complete as these other ones.

20

## PLAINTIFF RESTS.

*The Court.* I shall refuse to strike out the testimony as requested by Mr. Van Blarcom yesterday. (Page 9.) In this case it appears now that there is a question of fact depending upon whether or not the work for \$1,500 was as they contracted. It is a question of fact and I think it ought to go to the jury.

30

Counsel for defendants prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

*Mr. Van Blarcom.* I move for a non-suit and for a direction of verdict for the defendants on the following grounds:

40

*Charge to Jury.*

First, that the written contract shows that the plaintiff agreed to draw the plans for \$750 and he has been paid for that.

Second, that the action was wrongfully brought because it was brought not on the contract, not on the written contract, but on a *quantum meruit*. 10

Third, that no legal damages have been proved; I mean by legal damages that he has not proved the proportion of value of the work done.

Motion refused.

Counsel for defendants prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Counsel summed up. 20

**Charge to Jury.**

The Court charges the jury as follows:

CUTLER, *J.*

Gentlemen of the Jury: Mrs. Crossley and her sister were the owners of a lot in Newark on which there was a building. This building was not satisfactory and it was under discussion as to whether the building should be altered or a new building erected in its place. Mr. Crossley, the husband, was acting for these two ladies, and acting for them he saw the plaintiff in this case and some conversation took place in reference to what was to be done to the building. There is some dispute as to whether the first engagement of the architect was to prepare plans for an alteration or whether it was 30 40

*Charge to Jury.*

to prepare plans for an alteration and a new building, if the alteration cost too much. That is immaterial in this case because it appears that the arrangement which was entered into in July, 1914, in which the alterations were considered, was to be paid for by the payment to  
10 the architect of \$700 and that that payment of \$700 has at last been made so that all the services, rendered under the agreement of July 8th, which you have seen whether it is under the agreement signed by both the parties or the  
20 agreement signed by one of them where there is an alteration, and have no bearing in the present instance; neither can it have any bearing that part of the \$700 was not paid over until suit was brought. It has been paid over and  
settled, and the question now for you to determine is in reference to services rendered by the architect, the plaintiff in this case. After the fulfillment of his first agreement and employment it appears, that after the plans and specifications of the alterations had been furnished, Mr. Crossley agreed with the architect that the amount required to make such alterations was excessive and that it would be wiser to erect  
30 a new building and that the architect started to prepare plans for a new building. So far as I recollect there was no conversation as to what compensation the architect should receive or whether he was to do anything more than complete the plans of the building. Nothing was said so far as I recall in the testimony up to that time as to whether he should superintend the erection of the building if the plans which he was to draw were accepted. Things went on in that manner until some time in the late  
40 fall when growing out of some remarks made

*Charge to Jury.*

by Mr. Crossley in a conversation the architect took up the question of compensation, and about that time of this conversation, in which there was a disagreement as to the amount of the money that he was to receive for his services, he sent Mr. Crossley a bill for \$2,500 or thereabouts. During that trouble either before or after the sending of the bill Mr. Crossley offered to pay \$1,000. So far as I recollect nothing was said as to what that \$1,000 was to represent or pay for or whether it was to pay for work done up to that time or to pay the architect for his services at the completion of the building. 10

You gentlemen in all these questions of evidence are to be the sole judges and are to determine just exactly what the evidence is in this case and not rely on any statement that the Court may make because that is a question for you. You are to be the judge of the evidence. 20

Some time in October, about the 27th of October, the parties entered into an agreement and this agreement has been offered in evidence and you will have it before you. It reads like this:

“I propose to make the plans, specifications and supervise the work of the new four-story and basement building on the corner of Market and Halsey streets, Newark, New Jersey, for the Peddie estate, for the sum of \$1,500; \$750 on completion of plans, \$375 when building is half erected; balance as work progresses,” and signed by Mr. Crossley and by the plaintiff in this case. 30

Now, gentlemen, the first question for you to determine is whether that was a settlement of the work that had been really done by the architect up to that time; whether when they signed 40

*Charge to Jury.*

that agreement it was an understanding between the architect and Mr. Crossley that what work that had been done up to that time was included in the sum of \$1,500 which he was to receive, as well as to include the services which were afterwards to be performed by him as the architect in the construction of this building. Now, if it was, a certain rule of law applies to this case, and settlement of the parties you may take into consideration whether any part of this agreement that was then entered into was carried out. You will note that the contract calls for the payment of \$750 on the completion of the plan and it is admitted in this case, as I understand it, that \$750 was actually paid by Mr. Crossley, representing the defendants in this case, to the architect at that time. If, gentlemen, this contract was a settlement of their differences up to that time then in that case the plaintiff is entitled to recover on that contract and only under that contract. Now, the rule of law is that where a contract has been partly performed and the plaintiff is prevented from performing the balance of the contract by the act of the other party he should receive compensation for his services, but that shall be determined in the following manner:

The legal measure of damages is generally for the work done, such a proportion of the entire price as the fair cost of that work bears to the fair cost of the whole work in respect to work not done such profit as would have been realized by doing it.

Now, this suit is brought for the plans. It does not appear that any work was ever done by the architect in the erection of a building and if you determine that the matter was set-

*Charge to Jury.*

tled between them by the signing of this contract the architect will then be entitled to such proportion of the \$1,500 as the plans would bear to this sum of \$1,500. Now, the only evidence that we have in this case on that subject is the evidence of one or more of the architects who say that under the general rule governing architects' fees, the plans are considered to be worth three-fifths of the total sum so that in that view of the case the architect would be entitled to three-fifths of \$1,500 as the amount of money that should be given to him; and there is in this case no claim as I understand it made for profit on the work still to be done and no evidence of what those profits would amount to. 10

Now, gentlemen, on the other view of the case, if you should find that the agreement of October 27th was not in settlement of all the work that had been done prior to that time, that it was obtained by fraud—but I understand that there is no proof of the contract having been obtained by any fraud on the part of either party, both parties appear to have been acting in good faith—then the architect, Mr. Kitchell, would be entitled to recover for his services, whatever they were worth up to that time less the \$750 which he received at that time. 20 30

Now, what those services would be worth will be a matter for you to determine from the evidence that has been offered in this case. The defendant, however, makes another claim and that you have to take into consideration. Mr. Crossley says that Mr. Kitchell never performed the services, that he started to make the plans but he never completed them and gave him a copy of the plans which he did have which 40

*Charge to Jury.*

were the plans for the alteration, and that so far as the plans of the new building are concerned, that when something was said about the price, that it was too much, nothing was done and the plans were never completed. Of course, if the architect never completed the plans, did  
 10 some work on them and never finished them so that they were of no value to the defendants in this case and he received the \$750 the defendants would be entitled to recover back the \$750, but the architect in this case says that he actually did prepare the plans and they are offered here in evidence before you.

Now, gentlemen, this is a case entirely to be governed by the evidence of which you are to be the sole judges. Take the case. If you find  
 20 that the contract of October 27th governs then the rule of law which I have laid down fixing the price the architect should receive for his services should govern your determination and your verdict should be accordingly. If, on the contrary, you find that the contract of October 27th did not settle the matter then your verdict should be for the such services that the architect had rendered up to that time less the \$750 which he had received on account.

30 There are several requests to charge which I shall dispose of at this time.

“1. When under a valid contract to perform a specified work for a specified price, the plaintiff has done part and has been prevented from performing completely through the fault of the defendant, the legal measure of the plaintiff’s damages is generally for the work done such a proportion of the entire price as the fair cost of that work bears to the fair cost of the whole  
 40 work.”

*Exceptions to Charge.*

That, gentlemen, is the law provided you find the contract of October 27th governs.

"2. If the jury find that the plaintiff has been paid for the work which he has already done under the written contract, the verdict should be for the defendants." I so charge you.

"3. If the jury find that the plaintiff was prevented from performing completely through the fault of the defendant, he may recover for the work done such a proportion of the entire price as the fair cost of that work bears to the fair cost of the whole work." 10

That is true if the contract of October 27th applies.

The fourth request to charge also applies in case you find the agreement of October 27th is binding upon the parties. 20

"4. If the jury find that the plaintiff was prevented from performing completely through the fault of the defendant, he may recover for the work done such a proportion of the entire price as the fair cost of that work bears to the fair cost of the whole work, but the plaintiff cannot recover more than the contract price for the work already done."

(The jury retires.) 30

*Mr. Van Blarcom.* I take the following exceptions to your Honor's charge; that the plaintiff is entitled to further compensation than \$750 if there was a settlement.

(Exception noted as ground of appeal.)

*Mr. Van Blarcom.* That if the written contract was a settlement in which your Honor left it to the jury to determine whether the contract was a settlement or 40

*Exceptions to Charge.*

not. I think it was a contract entered into for the work which included not only work done but work to be done on which a part payment was made and a part payment having been made that made that contract effective.

10 (Exception noted as ground of appeal.)

*Mr. Van Blarcom.* And also to that part of your Honor's charge in which you stated that the plaintiff would be entitled to receive the value of his services, without reference to the contract. This payment of \$750 if the contract is entitled here in good faith or whatever your Honor said to that effect, my contention being he is limited to the contract price and what the services were reasonably worth should not figure in the damages.

20

(Exception noted as ground of appeal.)

*Mr. Van Blarcom.* And also I would like to take exception to your Honor's refusal to charge as requested having added to the requests to charge the words, "If the contract governs." I think in relation to two requests you added those words.

30

(Exception noted as ground of appeal.)

40

*Defendants' Requests to Charge.***Defendants Requests to Charge.**

Defendants' counsel requests the Court to charge the jury as follows:

(1) When under a valid contract to perform a specified work for a specified price, the plaintiff has done part and has been prevented from performing completely through the fault of the defendant, the legal measure of the plaintiff's damages is generally for the work done such a proportion of the entire price as the fair cost of that work bears to the fair cost of the whole work.

10

(2) If the jury find that the plaintiff has been paid for the work which he has already done under the written contract, the verdict should be for the defendants.

(3) If the jury find that the plaintiff was prevented from performing completely through the fault of the defendant, he may recover for the work done such a proportion of the entire price as the fair cost of that work bears to the fair cost of the whole work.

20

(4) If the jury find that the plaintiff was prevented from performing completely through the fault of the defendant, he may recover for the work done such a proportion of the entire price as the fair cost of that work bears to the fair cost of the whole work, but the plaintiff cannot recover more than the contract price for the work already done.

30

The jury returned a verdict for the plaintiff for two thousand seven hundred fifty-seven dollars and twenty-six cents (\$2,757.26) damages.

40

*Stipulation.*

**Stipulation.**

**New Jersey Court of Errors and Appeals**

10	BRUCE P. KITCHELL, <i>Plaintiff-Respondent,</i>  <i>vs.</i> JAMES E. CROSSLEY, RENA P. CROSSLEY and CORNELIA V. PEDDIE, <i>Defendants-Appellants.</i>	} <i>On Appeal          from Essex          County          Circuit Court.</i>
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20 In the matter of the exhibits marked in evidence at the time of the trial of the above entitled case, it is hereby stipulated as follows:

1. That Exhibit P. 1, being original sketches and finished tracings made by the plaintiff, need not be printed and included in the state of the case on appeal.
2. That Exhibit P. 2, being the specifications used in figuring estimates, need not be printed and included in the state of the case on appeal.
- 30 3. That Exhibit P. 3, being copies or blue prints of original drawings, need not be printed and included in the state of the case on appeal.
4. That Exhibit P. 6, being a number of estimates submitted by various contractors for the erection of defendants' building, need not all be printed, but that the lowest estimate only, to wit, the estimate of A. C. Windsor, Esq., is the only part of this Exhibit which need be printed and included in the state of the case on appeal.
- 40 5. That Exhibit P. 11, being about fifty estimates received from various sub-contractors as to the cost of performing certain portions of

*Exhibits.*

the work of construction defendants' building, need not be printed or included in the state of the case on appeal.

6. That there is no Exhibit P. 7, the numbering of the Exhibits having been erroneously made by the Court Stenographer, and Number P. 7 inadvertently omitted. 10

CHURCH & HARRISON,  
*Attorneys of Plaintiff-Respondent.*

RAYMOND, MOUNTAIN,  
VAN BLARCOM & MARSH,  
*Attorneys of Defendants-Appellants.*

## EXHIBIT P. 9.

BRUCE PAXTON KITCHELL 20  
Architect

Newark, N. J.

July 8th, 1914.

Mr. J. A. Crossley,  
Newark, N. J.

Dear Sir:

I propose to make the plans, specifications and supervise the work on the alterations to building located on the corner of Market and Halsey Streets, Newark, N. J., Peddie Estate Owners, for the sum of SEVEN HUNDRED DOLLARS (\$700.00) 30

Yours truly,

BRUCE P. KITCHELL,  
J. E. CROSSLEY.

*Exhibits.*

EXHIBIT P. 10.

BRUCE PAXTON KITCHELL

Architect  
Newark, N. J.

July 8th, 1914.

10 Mr. J. A. Crossley,  
Newark, N. J.

Dear Sir:

I propose to make the plans, specifications and supervise the work building located on the corner of Market and Halsey streets, Newark, N. J., Peddie Estate Owners, for the sum of SEVEN HUNDRED DOLLARS (\$700.00).

Yours truly,

20 BRUCE P. KITCHELL.

EXHIBIT D. 1.

BRUCE PAXTON KITCHELL

Architect  
Newark, N. J.

October 13, 1914.

Mr. J. E. Crossley,  
Newark, N. J.

30 TO BRUCE P. KITCHELL, ARCHITECT, DR.

To professional services rendered in preparing plans and specifications for Store and Loft Buildings at Market and Halsey Streets, Newark, N. J. T. B. Peddie, Estate, Owners, at 6% commission on estimated cost. \$2,520.00

RECEIVED PAYMENT,

*Exhibits.*

## EXHIBIT D. 2.

BRUCE PAXTON KITCHELL  
Architect  
Newark, N. J.

October 17, 1914.

Mr. J. E. Crossley, 10  
Newark, N. J.

Dear Sir:

Enclosed find bill for professional services rendered to date on plans and specifications for new building for the Peddie Estate, corner of Market and Halsey Streets, Newark, N. J.

If you give this matter your immediate attention it will be to your advantage.

Yours truly,

20

## EXHIBIT D. 3.

BRUCE PAXTON KITCHELL  
Architect  
Newark, N. J.

October 20, 1914.

Mr. J. E. Crossley,  
128 Market Street,  
Newark, N. J. 30

Dear Sir:

This is to inform you that I will wait until Wednesday, October 21, 1914, for you to make known your intentions in regard to the building operations for the Peddie Estate.

If I do not hear from you by that time, I shall place the entire matter in the hands of my counsel for settlement.

Yours truly,

40

*Exhibits.*

EXHIBIT D. 4.

BRUCE PAXTON KITCHELL  
Architect  
Newark, N. J.

October 22, 1914.

10 Mr. J. E. Crossley,  
#128 Market Street,  
Newark, N. J.

Dear Sir:

Your message sent by Mr. Hill received and noted, if you wish to come to a settlement with me you can see me in my office from 10 to 11 A. M. Thursday morning.

Yours truly,

BRUCE P. KITCHELL.

20

EXHIBIT P. 5.

BRUCE PAXTON KITCHELL  
Architect  
Newark, N. J.

October 27, 1914.

30 Mr. J. E. Crossley,  
Newark, N. J.

Dear Sir:

I propose to make the plans, specifications and supervise the works on the new four-story and basement building on the corner of Market and Halsey Streets, Newark, N. J., for the Peddie Estate for the sum of ONE THOUSAND FIVE HUNDRED (\$1,500.00) DOLLARS. Seven Hundred and Fifty, \$750.00, on completion of plans.

40

*Exhibits.*

Three Hundred and Seventy-Five, \$375.00, when building is half erected. Balance as work progresses.

Yours truly,  
BRUCE P. KITCHELL.  
J. E. CROSSLEY.

10

## EXHIBIT D. 5.

BRUCE PAXTON KITCHELL  
Architect  
Newark, N. J.

November 1, 1914.

Mr. J. E. Crossley,  
Market and Halsey Streets,  
Newark, N. J.

Dear Sir:

20

A check for the amount of this bill by November 11, 1914, will be appreciated.

Yours truly,  
BRUCE P. KITCHELL.

## EXHIBIT P. 8.

November 30, 1914.

Mr. J. E. Crossley,  
128 Market Street,  
Newark, N. J.

30

Dear Sir:

The estimates for the new building for the Peddie Estate will be received by me at 10 A. M., December 3, 1914.

If you are receiving any estimates kindly have them presented to you by that time, so that we can arrange a time for the opening of same.

Yours truly,  
Signed [BRUCE P. KITCHELL.] 40

*Exhibits.*

## EXHIBIT P. 4.

Mr. Bruce P. Kitchell, yours received.

I have been in Boston for some time. On my return home I have a very bad cold and was obliged to remain at home. I am some better and I think I will be able to be out and see you soon.

10

Yours truly,  
J. E. CROSSLEY.

## EXHIBIT P. 6.

Decb. 3—1914.

Stucco                      A. C. WINDSOR      Boiler Setting  
Cement Work BUILDING CONTRACTOR Furnace Work  
362 Sanford Avenue  
L. D. 'Phone 1811-M Market

20

Newark, N. J., Dec. 5, 1914.

Mr. Bruce P. Kitchell, Arch't.,  
Ordway Building,  
City.

Dear Sir:

We propose to furnish all labor, scaffolding and material for the erection and completion of the proposed new Mercantile building, located 128-130 Market St., Newark, N. J., T. B. Petty Estate, Owners, as per plans and specifications prepared at your offices, all for the sum of Eighty-nine Thousand Nine Hundred and Eighty-nine (\$89,989.00) Dollars.

30

Respectfully submitted,

A. C. WINDSOR.

Diet. ACW.

40

## New Jersey Court of Errors and Appeals

BRUCE P. KITCHELL,  
*Plaintiff-Respondent,*

*vs.*

JAMES E. CROSSLEY, RENA P.  
CROSSLEY and CORNELIA V.  
PEDDIE,  
*Defendants-Appellants.*

*On Appeal.*

### **Brief of Appellants.**

The appeal in this case seeks to reverse the judgment of the Essex County Circuit Court, entered on October 12th, 1916, in favor of the respondent, and against the appellants Rena P. Crossley and Cornelia V. Peddie, for \$2,826.62, damages and costs.

There was a judgment of non-suit in favor of James E. Crossley (p. 15, l. 30), and he is not a party to this appeal.

The cause was tried before the Honorable Willard W. Cutler, Circuit Judge, and a jury.

### **Facts.**

Respondent, an architect doing business in the City of Newark, sued for services rendered in forming and drawing plans and specifications, and receiving bids for the erection of a certain office building to be erected at the southwest corner of Market street and Halsey street in said City of Newark (p. 7, l. 30).

The defense was, that on the 27th day of October, 1914, the respondent made an agreement in writing, relating to the work. This agree-

ment was offered in evidence by the plaintiff and marked "Exhibit P. 5" (p. 26, l. 25). The Exhibit is printed at p. 82 and is as follows:

EXHIBIT P. 5.

BRUCE PAXTON KITCHELL.  
Architect.

Newark, N. J.

October 27, 1914.

Mr. J. E. Crossley,  
Newark, N. J.

Dear Sir:

I propose to make the plans, specifications and supervise the works on the new four-story and basement building on the corner of Market and Halsey Streets, Newark, N. J., for the Peddie Estate, for the sum of ONE THOUSAND FIVE HUNDRED (\$1,500.00) DOLLARS. Seven hundred and fifty, \$750.00, on completion of plans. Three Hundred and Seventy-five, \$375.00, when building is half erected. Balance as work progresses.

Yours truly,

BRUCE P. KITCHELL.  
J. E. CROSSLEY.

It was admitted at the trial (p. 30, l. 10, and l. 25), that James E. Crossley, who signed the "Exhibit P. 5," was acting as the agent of Rena P. Crossley and Cornelia V. Peddie, and that the two appellants were the parties in interest.

It was testified, by the respondent, that the work for which he brought suit, and that provided for by the written contract, were the same (p. 22, l. 15 to p. 26, l. 25).

The respondent was paid, on account of the written contract, and on the day it was signed, \$750 (p. 36, l. 25), although it was quite clearly established upon the cross examination of the respondent that the plans were not fully complete (p. 37, ll. 20 to 30; p. 39, ll. 10 to 20).

The respondent testified that after delivering the plans and specifications to Mr. Crossley, that was as far as work under the contract progressed, except the procuring of bids (p. 26, l. 30). The respondent testified (p. 24, l. 15), that he finished the plans and specifications early in October, 1914, and about that time he and Mr. Crossley had a dispute about the compensation of the respondent. There were negotiations between the parties, and finally the respondent sent a bill to Mr. Crossley for \$2,520 (p. 25, l. 30), in order to bring the matter to a head. That thereafter Mr. Crossley called to see the respondent, and the parties shortly thereafter reached an agreement resulting in the execution of "Exhibit P. 5."

It will be noticed that the agreement, "Exhibit P. 5," covers not only the work already done at the time of the making of the agreement, but the work to be performed in the future.

The respondent testified (p. 29, l. 30), that the drawing of the plans and specifications entitled him to three-fifths of the total compensation. It may therefore be assumed that this constituted three-fifths of the work. He said (p. 40, l. 15), that the making of the plans constituted the major portion of the work.

Incredible as it may seem, the respondent received, for doing three-fifths of the work, or the major portion thereof, more than twice what he would have received if he had done the whole work in accordance with the written contract.

He was paid \$750 in cash, and received, at the hands of the jury, a verdict for \$2,757.26, exclusive of costs. He received for the drawing of the plans, nearly five times the amount he was entitled to under the written contract.

### Argument of Law.

The appellants have specified nine grounds of appeal. These grounds all refer to the damages, except one of the grounds for the motion to nonsuit and direct a verdict.

#### (a.)

The question of the measure of damages first came to the trial judge's attention upon this question, asked of the respondent:

“Q How are the fees of the architect governed—how are they based—on what percentage?” (p. 27, l. 34).

After argument, in which the trial judge's attention was called to the written contract theretofore offered in evidence by the respondent, and to the authorities governing the measure of damages as contended for by the appellants, the Court ruled that the testimony would be received.

This particular question was held to be objectionable but the examination proceeded, as outlined in the first ground of appeal.

The trial judge refused to strike out this testimony (p. 68, l. 25), third ground of appeal.

#### (b.)

The second ground of appeal refers to the estimates received by the respondent from bidders. The admission of the estimates was ob-

jected to on the ground that the written contract controlled (p. 67, l. 35, to p. 68, l. 1).

(c.)

The fourth ground for reversal is directed to refusal of a motion for non-suit and direction of a verdict (c. 69). The grounds of the motion were that the respondent had agreed to draw the plans for \$750 and had been paid therefor, that the action was brought on a *quantum meruit*, and not on the written contract, and that no legal damages had been proved.

(d.)

The fifth, sixth and seventh grounds for reversal refer to the refusal of the trial judge to charge as requested. The requests to charge are found at p. 77, and are contained in the grounds of appeal (c. 4-c. 5), and are as follows:

(5) (1) When under a valid contract to perform a specified work for a specified price, the plaintiff has done part and has been prevented from performing completely through the fault of the defendant, the legal measure of the plaintiff's damages is generally for the work done such a proportion of the entire price as the fair cost of that work bears to the fair cost of the whole work.

(6) (3) If the jury find that the plaintiff was prevented from performing completely through the fault of the defendant, he may recover for the work done such a proportion of the entire price as the fair cost of that work bears to the fair cost of the whole work.

(7) (4) If the jury find that the plaintiff was prevented from performing completely through

the fault of the defendant, he may recover for the work done such a proportion of the entire price as the fair cost of that work bears to the fair cost of the whole work, but the plaintiff can not recover more than the contract price for the work already done.

To each of the requests to charge, the trial judge added that such was the law if the contract of October 27th applied (c. 74-75). This refers to the written contract between the parties, "Exhibit P. 5."

(e.)

The eighth and ninth grounds of appeal refer to the judge's charge. The exceptions to those parts of the charge complained of are found at c. 75-c.76, and are specified as grounds of appeal at c. 5-c. 6.

These grounds of appeal are as follows:

"8. The Court charged the jury as follows:

'Now, gentlemen, on the other view of the case, if you should find that the agreement of October 27th was not in settlement of all the work that had been done prior to that time, that it was obtained by fraud—but I understand that there is no proof of the contract having been obtained by any fraud on the part of either party, both parties appear to have been acting in good faith—then the architect, Mr. Kitchell, would be entitled to recover for his services, whatever they were worth up to that time, less the \$750 which he received at that time.' "

Exception was noted as a ground of appeal to this part of the judge's charge.

"9. The Court charged the jury as follows:

'Now, gentlemen, this is a case entirely to be governed by the evidence of which you are to be

the sole judges. Take the case. If you find that the contract of October 27th governs then the rule of law which I have laid down fixing the price the architect should receive for his services should govern your determination and your verdict should be accordingly. If, on the contrary, you find that the contract of October 27th did not settle the matter then your verdict should be for such services that the architect had rendered up to that time, less the \$750 which he had received on account.' ”

Exception was noted to this part of the judge's charge as a ground of appeal.

#### Point I.

The measure of damages was called to the trial Court's attention on the admission of evidence, on the motion for non-suit and direction of a verdict, by the requests to charge and by the exceptions to the charge itself.

The theory of the appellants in reference to the measure of damages was called to the Court's attention first at page 27, and the cases of *Kehoe v. Rutherford* and *Wilson v. Borden* were cited in support thereof.

As long ago as 1893, in the Supreme Court of this State, the theory of the appellants, concerning the measure of damages in a case of this kind, was stated in the case of *Kehoe v. Rutherford*, 27 Vr., p. 23. The principle of this case has been followed in *Wilson v. Borden*, Court of Errors and Appeals, 39 Vr., p. 627, and other cases.

Bearing in mind that the respondent received, for doing three-fifths of the work, or the major portion thereof, more than twice what he would have received if he had done the whole work in

accordance with the written contract, what Judge Dixon said, in *Kehoe v. Rutherford*, is very much to the point. The following is quoted from his opinion at page 26:

“But the contention of the plaintiff was and is that as he was prevented from completing the contract without fault on his part, he is entitled to the reasonable value of the work done, without reference to the contract price, and if this be the correct rule, undoubtedly the case should have gone to the jury. But at the very threshold we are confronted with this possible result of the application of the rule contended for, that the plaintiff might recover \$3,153 for doing about three-fifths of the work, while if he had done it all, he could have recovered only \$2,743. The absurdity of the result condemns the application of such a rule.

“Circumstances may exist in which, for work done under a special contract, the plaintiff will recover its fair value. Thus, if the contract be within the prohibition of the statute of frauds (*McElroy v. Ludlum*, 5 Stew. Eq. 828), or if, the work being only partly done, that which is done or that which is left undone cannot be measured so as to ascertain its price at the rate specified in the contract (*Derby v. Johnson*, 21 Vt. 17), or, in the absence of evidence to the contrary, it may be assumed that the rate specified is a reasonable one. *United States v. Behan*, 110 U. S. 338.

“But generally, when it can be determined what, according to the contract, the plaintiff would receive for that which he has done and what profit he would have realized by doing that which, without fault, he has been

prevented from doing, then these sums become the legal, as they are the just, measure of his damages. He is to lose nothing, but on the other hand, he is to gain nothing, by the breach of the contract, except as the abrogation of a losing bargain may save him from additional loss."

In *Wilson v. Borden*, 39 Vr. 627, the plaintiff was permitted, at the trial, to recover the cost of the work done and materials furnished, and in the opinion of the Court, written by Justice VanSyckle, the rule in *Kehoe v. Rutherford* was approved, and Justice VanSyckle said, in that case, at page 630:

"If the plaintiff had completed one-quarter of the whole work contracted for, he would have been entitled to one-quarter of the contract price; if he had completed one-half, to one-half of the contract price."

There was a direction of a verdict in *Wilson v. Borden*, for the cost of the work done and materials furnished. This was one of the grounds of reversal.

In *Westlecraft v. Barry*, 54 Vr. 53, the judgment was reversed in the Supreme Court because the referee, while recognizing the rule of damages in *Kehoe v. Rutherford* and *Wilson v. Borden*, found that the evidence did not enable him to apply it. The following is quoted from the opinion of Justice Swayze in that case, at page 55:

"The suit was upon a building contract by the contractor against the owner. The latter had prevented the contractor from going on with the buildings, and had completed them himself, claiming the right to do so under the contract. Assuming that the

defendant's action was wrongful, the rule of damages applicable was the rule in *Kehoe v. Rutherford*, 27 Vr. 23, which was applied to a building contract in *Wilson v. Borden*, 39 *Id.* 627. The referee recognized this rule, but found that the evidence did not enable him to apply it. He therefore adopted as the basis of his calculation a schedule which had been agreed upon as a guide to the amount of payments to be made at different stages of the work. It is not claimed that the payments in this schedule were in proportion to the cost incurred up to the several stages of progress in the work. The earlier payments may have been less or more than the cost, dependent upon whether the parties contemplated that the owner should hold back money in order to secure performance by the contractor, or should advance more than had been earned in order to enable the contractor to proceed. The fact that these prices were agreed upon as representing the value of the work does not help; they were mere arbitrary figures. The referee himself finds that the plaintiff failed to prove that any profit would have accrued to him if he had been permitted to complete the work, and since the plaintiff testified that on the whole work he would have made a profit of \$1,804 it is quite probable that the figures for the early part of the work were large enough to make that profit possible, and that the figures for the later part of the work were the bare cost, or even less. These considerations suffice to show that the rule adopted by the referee did not correspond with the legal rule as settled by the cases already cited."

At the trial, counsel for the respondent relied, to sustain his theory of the damages, on the case of *Stephen v. Camden and Philadelphia Soap Company*, 46 Vr. 648, Court of Errors and Appeals.

It is true that in this case the plaintiff was permitted to recover the reasonable value of the work done, but the case apparently was tried upon the theory that that was the measure of damages. In fact, Judge Vredenburgh, who wrote the opinion of the Court of Errors and Appeals, stated at the close of his opinion, at page 654:

“Under the assignments of error in this case it is unnecessary to consider (as none of them are directed to the point) the distinctions drawn in the cases decided in this state relating to recovery for work done under special contracts where the declaration is based upon the common counts alone. The most prominent of these are *Ryan v. Remmey*, 28 Vr. 474, and *Kehoe v. Rutherford*, 27 *Id.* 23.”

It may be quite possible that counsel for the defendant in the Stephen case thought it more advantageous to him not to invoke the rule of damages laid down in the Kehoe case. At all events, for whatever reason, counsel did not see fit to have the damages measured in accordance with the rule in the Kehoe case.

Cases are frequently tried upon a theory, which takes them out of the general rule. A fair example of this is the case of *Coppola v. Grande*, 96 Atl. 67, where the parties to the litigation tried the case upon the theory that the plaintiff was entitled to recover the contract price, less payments made, and less the cost of completion, and it thereby became of no conse-

quence whether the plaintiff was rightfully or wrongfully excluded from finishing the work. This case involved a building contract.

It could not have been the intention of the Court of Errors and Appeals, in the Stephen case, to overrule *Kehoe v. Rutherford* and *Wilson v. Borden*, as Judge Vredenburg recognized the Kehoe case, but stated that none of the assignments of error was directed to the distinctions drawn in the cases decided in this State relating to recovery for work done under special contracts, where the declaration is based upon the common counts alone. Five years after the Stephen case, in *Westlecraft v. Barry*, Justice Swayze recognized and enforced the rule of damages laid down in the Kehoe case, and the Wilson case.

It may be argued by the respondent that as part of the work had been done at the time the written contract was entered into, this alters the situation. But why should this make any difference? The real point involved, which resulted in the rule enunciated by Justice Dixon in the Kehoe case, was that the plaintiff would have recovered under his theory of that case, more, for doing three-fifths of the work, than if he had done it all. But the respondent did work after the contract was signed. At the time the agreement "Exhibit P. 5" was signed, the plans only had been drawn. Thereafter, the respondent testified (p. 26, l. 40), he was authorized to receive bids, and thereafter (p. 27, ll. 1 to 10), he attended to the getting of bids from the various contractors. Besides this, the respondent, upon the signing of the contract, was paid \$750 (p. 36, l. 25).

The respondent in the present case had done part of the work without any specified agree-

ment as to the amount of his compensation, and after a dispute with the agent of the appellants, the contract was entered into providing for the work already done and for future work in connection with the same job. Can it be doubted that Mr. Kitchell would have gladly received from Mr. Crossley \$1,500 when the contract was signed to have been released from further work under it? He would have been only too pleased to have done so.

The non-suit in the Kehoe case was sustained upon the theory that the recovery would have exceeded the contract price.

Judge Vredenburgh, in the Stephen case, seems to have laid a good deal of stress upon the fact that the building of the structures was completely abandoned, and the authorities he cites are to the same effect. He says, at page 653:

“The plaintiff certainly could not perform further services, by way of supervision, unless a building was constructed, and such was the implied condition of his contract.”

Such was not the condition in the case now before the Court. Mr. Crossley testified (p. 63, l. 35), on cross examination, that a building was erected at the corner of Market and Halsey streets, and (p. 64, l. 1), that Mr. Kitchell did not superintend the work.

There are a class of cases where damages for trespass are computed on the basis of the restoration of the land to its original condition, but the restoration must not exceed the diminution in value.

*Orange v. Manda*, 48 Vr. 285.

The trial judge, in his charge to the jury, stated the rule of damages as contended for by

the appellants, and as requested by them to be charged, but he modified his charge and the requests to charge, limiting the jury in its application thereof by stating that such was not the measure of damages unless the contract of October 27th "Exhibit P. 5" applied.

The judge charged the jury (p. 73, l. 20):

"Now, gentlemen, on the other view of the case, if you should find that the agreement of October 27th was not in settlement of all the work that had been done prior to that time, that it was obtained by fraud—but I understand that there is no proof of the contract having been obtained by any fraud on the part of either party, both parties appear to have been acting in good faith—then the architect, Mr. Kitchell, would be entitled to recover for his services, whatever they were worth up to that time, less the \$750 which he received at that time."

This part of the charge comprises the eighth ground of appeal.

There had been no suggestion of fraud in the case, and therefore the reference by the trial Court to fraud does not have any bearing, but he told the jury that the respondent would be entitled to recover whatever his services were worth, if they found the agreement of October 27th was not in settlement of all the work that had been done prior to that time.

To the same effect, the jury was charged (at p. 74, l. 25), that if the contract of October 27th, did not settle the matter, then the respondent was entitled to be paid for such services rendered by him, up to that time. This is the subject of the ninth ground for reversal.

It was not contended by the respondent that the agreement of October 27th did not refer to

all the work which he had done or that there was other work outside of this contract, for which he was entitled to other compensation.

A reference to the state of the case, from p. 22 to p. 26, will disclose that such was the situation.

The only work done by the respondent, involved in this suit, was in reference to the proposed building at the corner of Market and Halsey streets, covered by the written agreement.

But, as above mentioned, the case was barren of any contention on the part of the respondent that he performed other services than those finally referred to in the written agreement of October 27th, "Exhibit P. 5."

That the contract, "Exhibit P. 5," included not only the work done, but the work to be done, was called to the Court's attention (p. 76), in taking exception to the judge's charge.

Exception was taken (p. 76), to the refusal of the trial judge to charge as requested. Although there is but one exception to the Court's refusal to charge as requested, this should be sufficient under the case of *Consolidated Traction Company v. Chenowith*, 32 Vr. Court of Errors and Appeals, at 561. Although in the exception to the refusal to charge in the Chenowith case, the exception was taken to the refusal to charge specifically as requested, in the present case, the Court's attention was directed to the words he used in qualifying the requests to charge.

### Point II.

The motion for a non-suit or direction of a verdict should have been granted upon the ground that the action was not brought on the written contract but on a *quantum meruit*.

The written contract was introduced in evidence by the respondent. The terms of the contract were plain. The respondent made no claim that his loss could not be estimated in accordance with the rule of damages laid down in the Kehoe case. In fact, he testified (p. 29, l. 30) that he was entitled to receive three-fifths of the six per cent. for making the plans and specifications, and again (p. 40, l. 10), that the major portion of the work was done when the plans were made.

*Ryan v. Remmey*, 28 Vr. 474:

#### Syllabus.

1. "Where a person agrees to take clay from beds, to be paid for at a certain rate, according to the quantity and quality of the clay so to be raised, and has stripped off the surface earth, but before he has raised any clay is stopped in his work by the owner of the beds, with whom he has contracted, a suit will not lie on the common counts for the cost of such stripping.

2. "If such contract has been illegally terminated, the remedy of the injured party is to sue on the contract, laying his damage for the loss of such profits as he would have made by the completion of the contract."

It is respectfully submitted:

1st. That the testimony of the respondent in reference to reasonable value of work was improperly admitted.

2nd. That the estimates were improperly admitted.

3rd. That the motion for non-suit or direction of verdict should have been granted.

4th. That the requests to charge should have been charged as requested, without qualification.

5th. That the trial judge erroneously charged the jury.

How can a judgment be defended or justified, which gives the respondent, in addition to \$750 in cash already received, \$2,757.26 more, for doing three-fifths or a major portion of the work, when he was willing to do it all for \$1,500?

It is respectfully submitted that the judgment should be reversed.

RAYMOND, MOUNTAIN, VAN BLARCOM & MARSH,  
*Of Counsel for Appellants.*

March Term, 1917.





