

NEW JERSEY

Court of Errors and Appeals

IVER C. OSTERGAARD,

Defendant in error,

vs.

GREEK CATHOLIC CONGREGATION

OF ST. JOHN THE BAPTIST,

Plaintiff in error.

In Error.

This writ was to Middlesex Circuit Court, removing a judgment against the plaintiff in error for fourteen hundred and sixty-two dollars and seventy-five cents (Page 8). The suit is founded upon a written contract for building (p. 145) for a balance of..... \$1,200 00 and extra work—

p. 11.	Extra front steps, blue stone....	\$56 00	
p. 47.	Extra pannelling on pew ends...	25 00	
p. 48.	Extra leaded glass.....	78 65	
p. 48.	On circle sash.....	5 00	
p. 48.	Hanging bell	110 00	
			20
		274 65	
		\$1,474 65	

The contract contained these clauses:—

III. (on page 147) "Should the owner at any time during the progress of the said building request any alterations, deviations, additions, or omissions, from the said contract, it shall be at liberty to do so,

2 COURT OF ERRORS AND APPEALS.

and the same shall in no way affect or make void the contract, but will be added or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation."

VII. (on page 148) "No alteration or extra work shall be done without a written order from the owner, approved by the architect, and an express agreement in writing as to the cost."

10 X. (on page 148) "Neither the contractor nor the architect shall, without the written consent of the owner, have authority to vary, alter, amend, or change this contract, or any of the plans or specifications herein referred to."

The declaration was merely the common counts. Under this, the contract was offered in evidence (p. 10).

20 On pages 13 and 14 an exception was taken to the trial judge's refusal to strike out the testimony relating to certain extra work as to hanging of bells, which the *contractor* had testified he did not intend to charge for. The answer was: "They says (the committee) you have got to make it strong, they says, and that is about all they kept on saying every time they come, you have to make that strong for the bell." This witness (the plaintiff) had stated that this was done on his own risk (p. 13, l. 20), and hence the refusal to strike out as bearing on the question of extra compensation was error. It was
30 also error because the agreement to alter or change was not in writing, which was contrary to the provisions of the contract. On page 28, the Court again refused to eliminate the testimony concerning an extra step, on the ground that Mr. Ricci could not bind the builder for extra work.

It was clear that Ricci's powers were those of superintendent in charge of the work, and the arbi-

ter of the meaning of the drawings and specifications.

Viewed in the light of the provisions against alterations for extra work, without a written order from the owner, and also in the light of Clause X., page 148, that the architect has no power to vary or alter the contract, or any plan or specification, without the owner's written order, it was clearly illegal to permit such testimony.

On page 43, l. 30, the following question was asked, objected to and overruled: 10

"Did you do the work under the contract for Mr. Ostergaard, which was called for in the specifications, and also any extra work, which the church committee or the architect in charge ordered under your contract? A. I did."

For the reasons above stated, all testimony with regard to the ordering of extra work by the architect, or committee, without defendant's written order, was contrary to the terms of the contract and not binding upon the defendant. It was there stated (on page 44, l. 13) by the witness, there never was anything of the extras done in writing here. 20

Contracts are to be interpreted and enforced according to the fair import of their terms, without reference to the hardships that may fall on the parties. If persons voluntarily express themselves in writing, they must be bound. *Abbott v. Gatch*, 71 *Amer. Dec.*, 635. 30

No charge for extra work can be made where a party erects a building containing a clause that "no extra charges are to be made, unless a written agreement be made and attached to the contract," unless the charges are so reduced to writing, and this is so, although the claim is placed on the ground, that the defendant interfered with the work by

4 COURT OF ERRORS AND APPEALS.

directing and authorizing their departure from the original design.

Contracts are to be interpreted and enforced according to the fair import of their terms, without reference to the hardships that may fall on the parties.

10 If parties voluntarily express themselves in writing, they must be bound by the language employed; the law presumes that they understood the import of their own contracts, and have entered into them with knowledge of their mutual rights and obligations. No charge for extra work can be made where a party erects a mill under a contract containing a clause providing that "no extra charges are to be made unless a written agreement be made and attached to the contract," unless the charges are so reduced to writing; and this is so although the claim is placed on the ground that the defendant inter-
20 fered with the work by directing and authorizing these departures from the original design, and in some instances against the option of the plaintiff.

ASSUMPSIT for work done and materials furnished, brought in the Baltimore City Superior Court. The main facts appear in the opinion. The contract there referred to between the wardens and the defendant was to the effect that the former were to rent the mill when completed, upon terms by which they were to furnish a certain number of bushels of wheat each year for grinding, and pay defendant
30 so much a bushel; and also pay a certain amount per hundred bushels for the use of the elevator. The agreement with Millholland, also referred to, was that he was to be substituted in place of the plaintiff, in providing the iron-work for the mill. The instructions prayed, as far as they need be noticed, are as follows: On the part of the plaintiff: 2. That the defendant could not recoup damages sustained by him by failing to grind thirty-nine thousand six hun-

dred and seventy-five bushels of wheat, under the contract with the wardens, on account of non-completion of the mill at the stipulated time; 3. and 4. Substantially, that if the delay in the completion of the mill was caused by the contract between the defendant and Millholland, no recovery could be had for such delay; 5, 6, 7. That the plaintiff could recover for certain extra machinery and work erected under the direction and request of the defendant. The instructions prayed by the defendant were: 10
 1, 2, 3, 4, 7. Substantially, that no recovery for extra work could be had under the contract; 6. That the defendant may recoup in damages a fair and reasonable rent for the time the defendant was deprived of the use of the mill, if the delay was owing to the fault of the plaintiff. The Court granted the prayers of the plaintiff, and refused those of the defendant. Verdict for the plaintiff for four hundred dollars. Afterwards the defendant moved for a non pros. and for a rule upon the plaintiff to show 20
 cause why a non pros. should not be entered, and judgment, if any, be entered for costs alone, he insisting that no judgment for four hundred dollars could be rendered in the Superior Court. The Court overruled the motion. The defendant appealed from the motion and the order overruling the motion.

By Court, Tuck, J. The plaintiff, the present appellee, contracted to put up a mill, guaranteed to 30
 grind the best wheat flour, with the necessary bolters, elevator, and rubber, for the sum of five thousand dollars. In the contract there is this clause: "No extra charges to be made unless a written agreement be made and attached to the contract." In the progress of the work alterations were made and portions of the mill put in, as the plaintiff contends, not embraced by the terms of the contract,

6 COURT OF ERRORS AND APPEALS.

without the parties availing themselves of the above provision; and one of the questions in the clause is, Can the plaintiff demand additional compensation beyond the sum stipulated for the entire work? The claim is placed on the ground that the defendant interfered with the work, by directing or authorizing these departures from the original design, and in some instances, against the opinion of the plaintiff. Whether these circumstances can aid him must
10 depend on the object of the parties in inserting this clause, and the interpretation we are to put upon the entire agreement.

It is manifest that the object of such provisions in building contracts is certainty as to the terms on which the work is to be done, in order that the parties may know how much one is to pay, and the other to receive, for such changes and alterations as may be made. Neither has a right to change the plans without the other's consent; but as this may be
20 done by agreement, when alterations are specified in writing and attached to, they become parts of the original contract, and the builder may recover for such work according to the agreement in that behalf. The present plaintiff undertook to erect a mill, a work requiring practical knowledge and skill in that branch of the mechanic arts, on which, it is to be presumed, the defendant relied in giving him the contract. It was his right as well as duty, to determine what was necessary to complete such a
30 mill as he had contracted to put up; and as to all matters not mentioned in the agreement, or laid down on the plans, he was solely responsible. He was under no obligation to receive suggestions from Abbott; on the contrary, if he deemed them unsuitable or impracticable, or likely to cause increased expense, he should have resorted to the contract, as containing all that he was required to perform, and insisted on having the additional work brought

within its terms, as well for his own protection as to prevent misapprehension on the other side.

The words in question protected Abbott against extra charges. They cannot mean that no extra charge was to be made for what the contract required, because the very office of that was to define what was to be done, and to fix the price. We take the true construction to be, that there was to be no charge for extra work, that is, for any work beyond that stated in the contract, no matter what it might be, whether alterations in the plan or mode of doing the work, or additions or improvements in and about the completion of the mill, unless reduced to writing and attached. It makes no difference if the extra work was ordered by the owner, provided it was on the mill. As we have said, the builder need not accede to the owner's views; he may refuse or he may assent under the protection afforded by this clause. If extra work be done without it, the right to additional compensation is waived. Any other interpretation of such words would make them valueless to the parties. The appellee's view, if adopted, would deny to the owner the privilege of suggesting any, the most trivial, alteration of the work, without incurring the risk of opening the whole contract, then the written agreement would be substituted by a mere quantum meruit claim for work and labor, to be afterwards adjusted upon uncertain oral testimony. And in many cases, his mere presence on the premises might subject him to extra charges, on the ground of acquiescence in alterations made by the builder, when it might well be supposed there was to be no additional charge, because not previously attached to the contract. *Watchman v. Crook*, 5 *Gill & J.*, 263, 264; *Berry v. Thompson*, 6 *Har. & J.*, 89; *Miller v. McCaffrey*, 9 *Pa. St.*, 245.

We cannot distinguish this agreement from that

passed upon in the case of *Baltimore Cemetery Co. v. Coburn*, 7 Md., 202.

The same considerations apply to both. To hold a party liable in the face of such a stipulation would be to turn his plain words into something that he had not assented to. In *Miller v. McCaffrey*, 9 Pa. St., 245, extra work was not allowed for, though done with the owners' knowledge, and without objection, and afterwards accepted by them. There the contract did not require the agreement for extra work to be in writing, but the terms were very explicit, viz.: "At any time during the progress of the building, the committee reserves the right to direct any alteration or variation from the original plan, so as not to vary therefrom in any very essential manner, so as to cause any material extra expense to the building; but any alteration suggested by them shall be made, and the expense, if any, shall be agreed upon at the time; but no extras shall be allowed under any pretense whatever." Extra work was done, with the knowledge of the committee, who made no objection, and some of them approved of the plaintiff's acts. The Court held that in the face of such an agreement, affording ample protection to both parties, the action could be maintained only "by clear and satisfactory evidence of a new, distinct, and independent contract, authorizing the alterations, and expressly agreeing to pay for them a certain fixed price, or what they may be reasonably worth;" and that if the contract was to be thrown open because of the presence of the committee while the work was going on, without objection to the charges, though often conversing about them, and because of their acceptance of the work, it would be useless to put such agreements in writing. This may appear to be a harsh construction *where the owner has received the benefit of the work*; but the law is well settled that contracts are to be interpreted and

enforced according to the fair import of their terms, without reference to the hardships that may fall on the parties. *Wagner v. White*, 4 *Har. & J.*, 566; *Barney v. Ins. Co.*, 5 *Id.* 143; *Dorsey v. Smith*, 7 *Id.*, 345. If persons voluntarily express themselves in writing, they must be bound by the language employed. *McElderry v. Shipley*, 2 *Md.*, 25 (56 *Am. Dec.*, 703). The law presumes that they understand the import of their own contracts, and to have entered into them with knowledge of their mutual rights and obligation. And if, in a case like this, one party omits to have the changes reduced to writing, they must, in view of the rights of the other, be deemed to have been made with reference to the contract price, unless there be proof of an express waiver of that clause of the contract, or a promise to pay for the extra work. *Hort v. Norton*, 1 *McCord*, 22; *Wilmot v. Smith*, 3 *Car. & P.*, 453; *Dorsey v. Smith*, 7 *Har. & J.*, 345, 363; *Howard v. Wilmington, etc., R. R. Co.*, 1 *Gill*, 311; *Coates v. Sangston*, 5 *Md.*, 121; *Munroe v. Perkins*, 9 *Pick.* 298 (20 *Am. Dec.*, 475). 10 20

It follows, from these views of the agreement, that the Court below erred in disallowing the defendant's objection to the evidence of work claimed as extra or additional, and also in granting the plaintiff's fifth, sixth, and seventh prayers; and this ruling renders it unnecessary to pass upon the first, second, third, fourth, and seventh prayers of the defendant relating to the same points.

Ibid. This case contains a full discussion of the principles involved, which I quote. 30

Only such instructions to the jury should be given as are based upon legitimate evidence. *Coughlin v. People*, 68 *Am. Dec.*, p. 541. And instructions assuming hypotheses at variance with facts should not be given. *Wintz v. Morrison*, 67 *Amer. Dec.*, p. 658; *Melledge v. Boston Iron Co.*, 51 *Amer. Dec.*, p. 59.

10 COURT OF ERRORS AND APPEALS.

After the close of the plaintiff's case (p. 82) a motion was made to strike out from the claim all items ordered by Ricci, because he had no power to bind the defendant. The Court refused, and left it to the jury to determine whether Ricci was the agent of the church and whether he authorized the extras. There was not a particle of evidence to establish the agency, *except by the contract*, the interpretation of which was for the *Court* and *not the jury*, and as has
10 been heretofore stated, his powers as therein prescribed, did not extend to ordering extras, *but such powers were in terms denied* to him. This was, therefore, error. There was also error in allowing the witness to answer the questions under objection, as follows:

“Q. (l. 10) I call your attention to that tower there. Mr. Cladek, the witness produced by the defence, has stated that that tower could have been sheathed on either side, and the copper put on in a
20 good substantial way, and that there were other towers in the city of Perth Amboy that were constructed in that manner. Now, is that true?”

“Q. (on page 123, l. 30) Comparing that to the tower on this church, will you just explain to the jury how those towers on the Hebrew synagogue are constructed?”

The Court also erred in the Charge.

The Court charged the jury as follows:

(p. 132.)

30 “Now, gentlemen, I charge you as a matter of law, that under this contract as executed, Mr. Eloise Ricci was constituted the agent for the purpose of carrying out that contract with the Greek Church, but I further charge you that the limitations and scope of his agency are to be found and read in the contract and the specifications and there alone, unless you find that those specifications and plans and contracts were subsequently altered by the parties

either by an express agreement or by an implied agreement, or by a waiver on their part of any of the provisions of the contract.”

Also,

(p. 133.)

“Now, the extra work, you will observe, gentlemen, is work that is not referred to in the contract or in the specifications. The right of the plaintiff to recover for any extra work, if he has any right to recover at all, is not based on the contract, but is based on an understanding or agreement separate and independent from the written contract I have referred to. Therefore, if you find that the defendants did make a contract, either direct, express or implied, with the defendant, to do this extra work, you are not precluded by the fact that there was a written contract from finding in favor of the plaintiff for this extra work.”

And again,

(p. 135, l. 9.)

“Now, as to the extra work being done, I will say to you in other words what I said to you at the beginning of my charge, that the change made by Mr. Ricci as far as the contract itself is concerned, is limited by the terms of that contract, and you cannot hold the defendant for anything he did beyond the terms of that contract, unless you find that there has been a subsequent express or implied extension of power conferred upon him by the defendant in this case. Now, whether or not the fact that these various changes, some of which, it appears by the testimony on both sides, were made only on the authorization of Mr. Ricci, others made at the authorization of Mr. Ricci and the committee jointly, some perhaps by the committee alone—whether or not these facts are sufficient to authorize you to find that there was an implied further extension of authority and power on the part of the church to Mr. Ricci is a

12 COURT OF ERRORS AND APPEALS.

question of fact for you to determine. You may also consider in this connection, this fact, namely, that all this work was done under the view of the committee. It certainly appears in the case, that the committee must have known that this extra work was done, and it does not appear, as I remember the testimony, that there was at any time any remonstrance on their part against the performance of this extra work on the part of the contractor."

- 10 Where there is no conflict in the testimony and no room to doubt or hesitate as to a matter of fact in issue, the Judge in his charge ought not to assume that it is or may be doubtful. Such a course is calculated either to confound the jury by causing them to doubt the justice of their own clear convictions or to mislead by inducing them to suppose they may find the fact either way, when the evidence warrants but one conclusion; and to find otherwise would be to find manifestly against the evidence.
- 20 The rule which forbids the Judge to charge upon the weight of evidence does not require or authorize him to assume as doubtful that which is clear and indisputable, or to assume hypotheses at variance with the certain fact. Where the evidence to a fact is positive and not disputive or questioned, it is to be taken as an established fact; and the Charge of the Court should proceed upon that basis. It is only where there may be doubt that the jury are required to weigh the evidence, and it is then only that
- 30 the rule applies that the Court shall not charge upon the weight of evidence. It is not the meaning of the rule that the Judge shall ignore the indisputable facts of the case, or distrust the evidence of his senses, or that he shall assume that the Jury may doubt where there is no room for doubt or find contrary to the evidence and manifest truth and justice in the case. *Wintz v. Morrison*, 67 *Am. Dec.*, 663.

There was certainly no written alteration of the original contract, as appears from the evidence in the case. Mr. Ricci did not have any authority to vary, without the written authority from the owner. See contract, page 148, 10th clause.

There was no evidence of such written authority, so it was error so to charge. This is not parallel with a contract not providing how subsequent alterations shall be made. This contract has express provisions for a method of subsequent alterations. 10
The methods provided in the contract must be followed. What right had the committee to make any alteration or to give any direction concerning the work. The status of the committee is nowhere determined, nor its powers defined. The owner being a corporation, it must act by its trustees in the meeting, so that there would be no inference that the "committee" had power to alter the contract, even if such alterations were made in writing.

The Court also erred in charging relative to the 20
tower roof, p. 135, l. 3:

"In estimating that, however, you will estimate the cost of putting on that roof at the time of the construction of the building, and not the cost of putting it up now, when it would be necessary to erect scaffolding and undertake a far more difficult piece of work."

Such clearly is not the law. The question is, what allowance should be made? and the answer is, such sum as will compensate the person complaining of 30
the defective performance of the contract. The defendant has the right to a tower such as is specified in the contract. If the plaintiff does not build it, and takes away his appliances for doing the work, that is his fault. It was his duty to do the work at the time; to make the defendant whole, he must have such sum as the plaintiff will be compelled to pay to supply the defect and omission. That is compen-

14 COURT OF ERRORS AND APPEALS.

sation, and compensation is the measure of the damage.

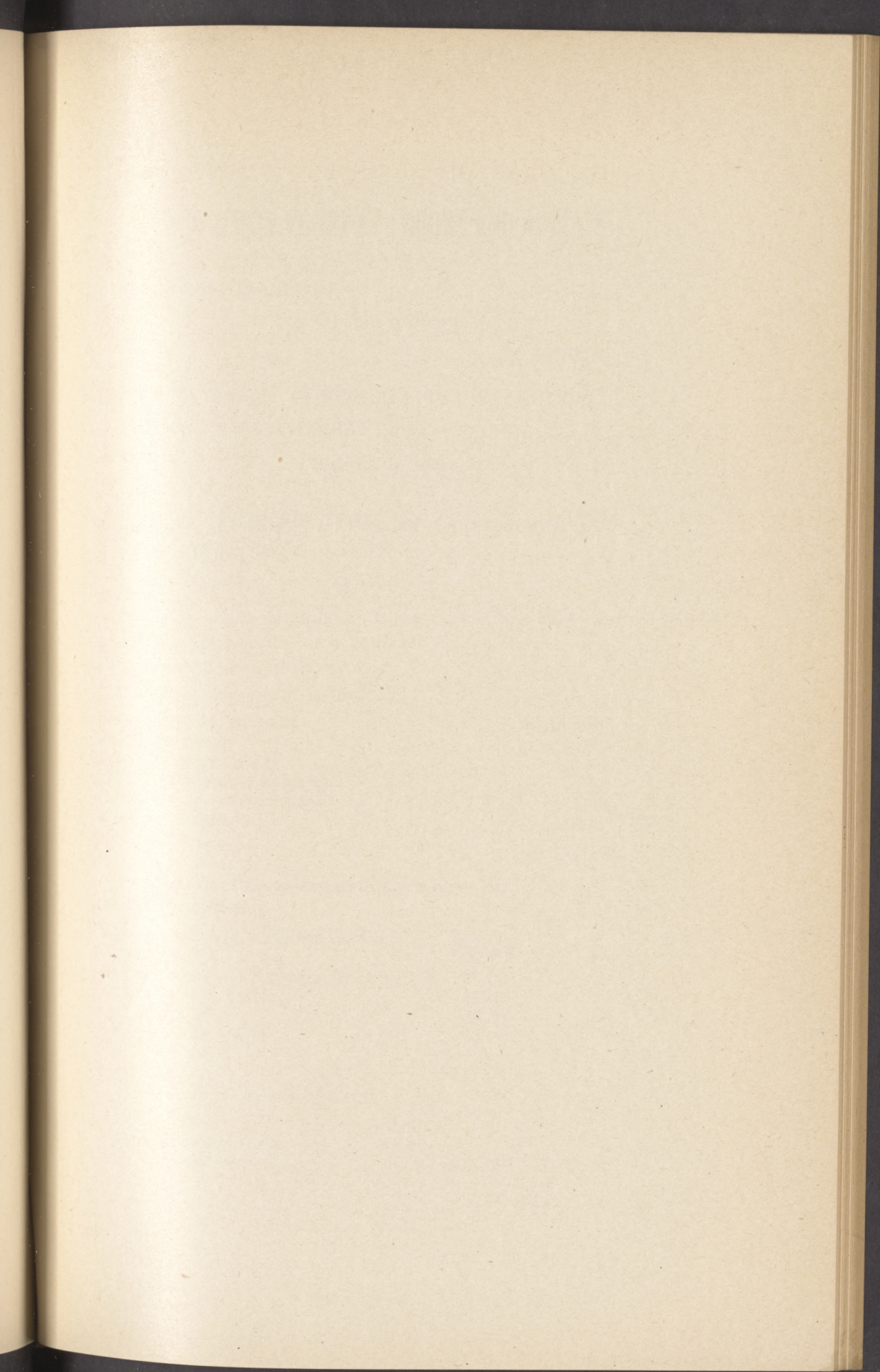
The Court will perceive that the case was prepared on the part of the plaintiff without regard to the rules of pleading, and the counsel of the defendant failed to take advantage of the almost innumerable grounds for reversible error by taking exceptions in the course of the trial to the admission of illegal, irrelevant and incompetent evidence ad-
10 duced on the part of the plaintiff.

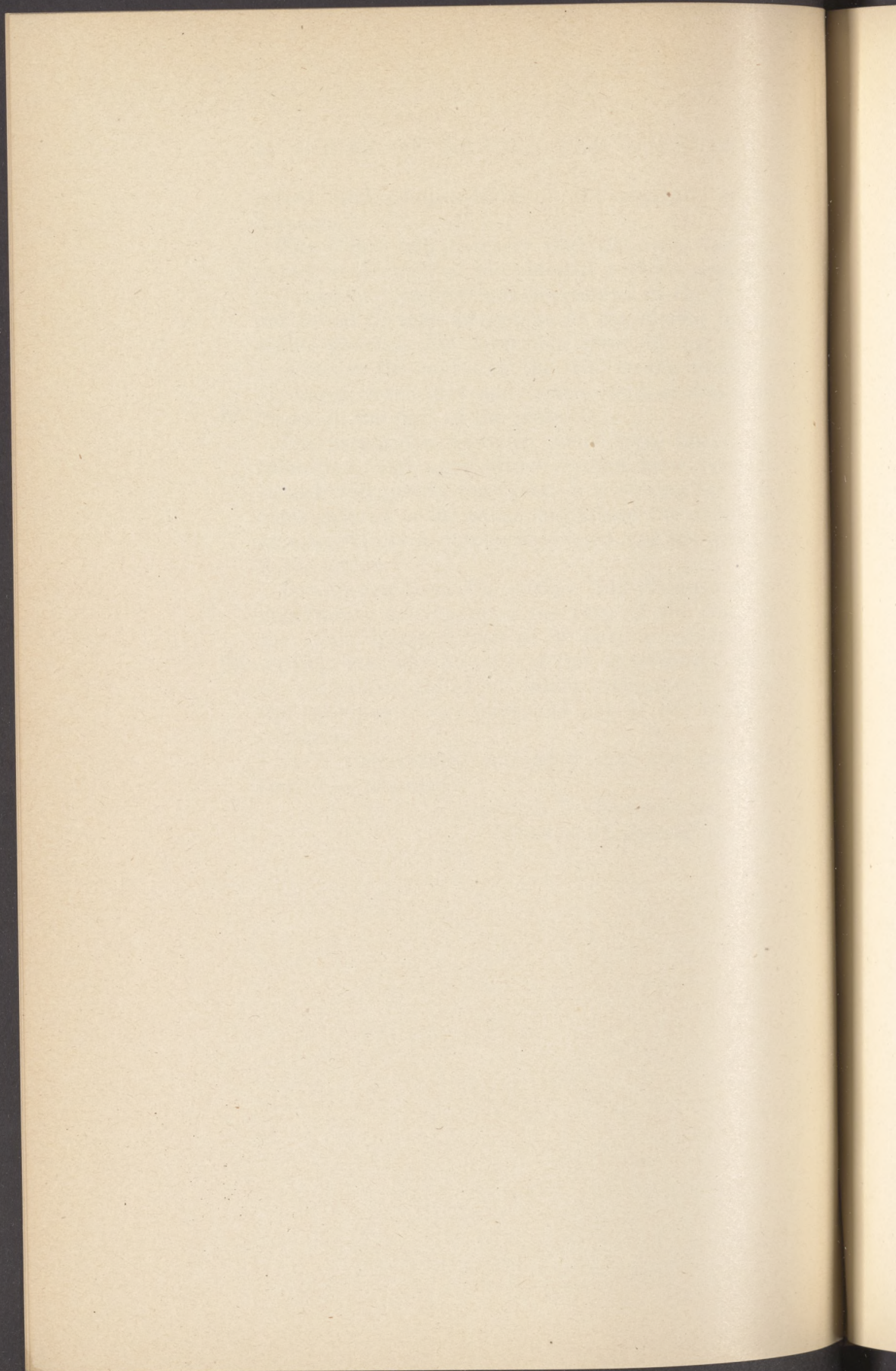
The exceptions, however, which were taken, it is submitted, and upon which errors have been assigned, will justify the Court in reversing the judgment entered in the cause and afford the defendant an opportunity to interpose a legal and just defence to the action.

It appears from the charge that because of an uncertainty arising upon the face of the contract, the Court divested itself of its duty to construe the
20 writing, and said because of this uncertainty, which it erroneously called "a latent ambiguity," it was the province of the jury and not of the Court to construe.

It is respectfully submitted that the judgment should be reversed.

CHARLES T. COWENHOVEN,
Counsel of plaintiff in error.





NEW JERSEY COURT OF ERRORS AND APPEALS.

IVER C. OSTERGAARD,

Defendant in Error,

vs.

GREEK CATHOLIC CONGREGATION
OF ST. JOHN THE BAPTIST,

Plaintiff in Error.

IN ERROR.

BRIEF.

BRIEF OF ADRIAN LYON, of Counsel with Defendant in Error.

I.

This is an action brought on a mechanics' lien claim to recover the balance due on a contract for the erection of a church for the plaintiff in error.

20

The bill of items is as follows :

Balance due on contract	\$1,200.00
Blue stone steps	56.00
Paneling on pew ends	25.00
Leaded glass and inscription	78.65
Circle sash for front gable	5.00
Hanging of bells	110.00
	\$1,474.65

An amendment to the declaration was made of the following items :

30

Making basement windows double	\$12.00
Plate on wall	60.00
Making front wall 8 inches thicker	75.00
Putting in two closets	25.00
Laying face brick	25.00
Rubbed window sills	20.00
	\$217.00

Credit on items in amendment :

Window butts	\$ 8.00		
Lightning rod omitted	47.00		
Altar platform omitted	20.00	\$75.00	\$142.00
			\$1,616.65

40

The jury brought in a verdict for the plaintiff of \$1,462.75 which included interest from June 25, 1905, to Sept. 14, 1906, 1 yr., 2 mo., 18 days . . . 99.25

Verdict less interest . . . \$1,363.50

The verdict, therefore, was for \$111.15 less than originally claimed, or \$253.15 less than claimed by the amendment.

10 These items are respectfully submitted to show that under the only disputed facts in the case, if there were any errors, they were practically harmless.

The disputes in the case were as to the items of all extra work, amounting, exclusive of hanging bells, to \$306.65. The hanging of the bells, \$110.00, was admitted to be due.

It was also claimed by plaintiff in error that the ceiling of basement or assembly hall should have been plastered and the dome should have been sheathed.

20 *Johnson v R.R. 36 VV 421.*
II.

The first exception is on page 14, and is to the refusal to strike out Mr. Ostergaard's claim for making the front wall 8 inches thicker. This is cured by the later testimony on page 36.

III.

30 The third exception is on page 33. It is to the refusal to strike out testimony in reference to work ordered from Mr. Koyen, the sub-contractor for the carpenter work. Counsel for plaintiff in error only asks "to reserve the right to strike out," and states no ground for the request. I respectfully submit that exception, therefore, cannot be considered.

But, if it can be considered, then I further submit it is cured by the later testimony in the case in reference to the same subject at pages 43, 44, 49, 52, and 53.

Handwritten notes:
Ld \$1200.
9 110.
6 5.
8 12.
7 25.
\$352.

IV.

The sixth exception is on page 118, and is to proper sheathing of tower. I respectfully submit it has no force as the ground of objection has no relation to the question, because it came too late, because the answer was harmless, and for the further reason that the question was proper as tending to contradict the witness of plaintiff in error as to proper workmanship on tower and as to fact of construction of other towers in Perth Amboy.

10

V.

The second, fourth and fifth exceptions are on pages 28, 43, and 82, respectively, and all go to the question of the authority of the architect, Eliseo Ricci, to direct the work and changes as he did in this case.

a.

In the first place it will be observed under the whole case that there was abundance of testimony that went to the jury that not one item of extra work or of change was done without the authority of the committee. This is shown on pages as follows :

20

Pew ends, 47, 54 ; glass and inscription, 47 ; circle sash, admitted, 96 ; hanging bells, admitted, 49 ; basement window, 61 ; plate on wall, 62 ; front wall, 13 ; two closets, 50 ; face brick, 14, 63 ; window sills, 63.

As to the other two items of dispute, the sheathing of tower was a question of proper construction, page 51, 52, 58, and 59, and the plastering of basement ceiling is a question of construction of the contract, *infra*.

30

It seems, therefore, that it was entirely proper to let this evidence go to the jury.

b.

Under the contract in this case there was no error in the ruling of the Judge who submitted the question of the agency of Mr. Ricci to the jury.

40

The agreement and specifications both provide that Mr. Ricci shall be the superintendent and have full charge of the work. Page 146, line 26 ; pages 147 and 150.

In such case the architect is the agent of the owner.

Gibson Co. v. Motherwell Iron Co., 123 Ind. 364.
 Guerin v. Rodwell, 8 Vr. 71.
 Seymour v. Long Dock Co., 5 C. E. Gr. 396 at 410,
 411.

10

But the judge did not even charge the jury that the architect was the agent of the owner. He simply submitted the question to the jury.

20

C.

The authority of the architect was only exercised in the solution of a clear problem in the construction. Every item of extra work, every change was under some expert direction. The most prominent function of an architect in the superintendence of the construction of any building was called into activity. It was for just such cases that Mr. Ricci was employed by the owner.

30

VI.

There were three exceptions to the Judge's charge found on page 139. The first two relate to the liability of the plaintiff in error for extra work ordered by it or by its agent. There was no error in these charges.

When extra work is done at the request of the owner the law will apply a promise on his part to compensate the contractor.

40

Guerin v. Rodwell, 8 Vr. 71.
 Seymour v. Long Dock Co., supra.

Copeland v. Hewitt, 53 at. Rep. 36 (7/10)

Where the necessity for extra work results from the errors and mistakes of the architect of the owner the loss should fall upon the owner, and the contractor may recover additional compensation.

Seymour v. Long Dock Co., supra.

So where the work cannot be constructed according to the plans and specifications, as required by the contract, but additional work must be done to render the work secure, additional compensation may be recovered for such extra work. 10

Dwyer v. New York, 77 N. Y. App. Div. 224.

Langley v. Rouss, 85 N. Y. App. Div. 27.

VII.

As to the third exception to the Judge's charge the whole paragraph should be read beginning at page 134, 20 line 23. The Judge was there charging the jury that if the work of the contractor was made less by the change so that he should give a credit therefor, the amount of that credit should be determined by the difference of the cost at that time, not at what it would now cost to do the work left undone. The question dealt with in this charge was as to changes made necessary or consented to. *There was no claim for recoupment of* 2
Manifestly there can be no error here.

VIII.

30

The fourth, sixth, seventh, eighth and ninth assignments of error are to parts of the Judge's charge to which no exceptions were taken, and, therefore, cannot be considered.

Wanamassa v. Clark; 32 Vr. 611.

Lopers v. Somers, 42 Vr. 657.

40

IX.

If the sixth assignment of error can be considered, then I submit that the charge of the Judge was favorable to the plaintiff in error.

10 Page 150 down to paragraph 6 was in the nature of an amendment to the specifications. It provided that paragraph 49 should be changed, that paragraph 99 should be omitted and added the two paragraphs in reference to the basement and Mr. Ricci. The parenthesis marks were made in ink. The words in red ink on page 151 should have been printed and then erased by running pen mark through them to make the book correct. It all shows, as does the testimony of the witnesses, that a change was made in the specifications for the purpose of leaving the basement unfinished.

20 The parenthesis ink marks were made identical on the copy given to the contractor with the copy on file in the clerk's office. The first and last marks are circular. The two middle marks are square, showing a clear intent how they should be coupled. Only one meaning can be taken from this careful marking, viz: that the two phrases before and after the words "using wire lath" should be taken together and to mean that the only part of the basement ceiling which should be plastered was that over the boiler for a space of 10 feet square.

30 It seems that that paragraph is capable of only one meaning and that favorable to the defendant in error. The Judge, however, left it to the jury to decide what the meaning was. Surely in such a charge there was nothing of which the plaintiff in error could complain.

Furthermore, it is not disputed that Mr. Ricci decided that the specifications meant that the ceiling of the basement should only be plastered for a space of ten feet square over the boiler. The contract provides, page 147, fifth, as follows: "Should any dispute arise respecting the true construction or meaning of the drawings or specifications, the same shall be decided by Eliseo Ricci, and his decision shall be final and conclusive." (page)

40

X.

In the charge on which the seventh assignment of error is based the Judge merely states a fact which is not controverted in the evidence.

XI.

There was no bill of exceptions returned with the writ of error.

10

Practice Act 1903, section 211.

XII.

There were no assignments of error on the exceptions to the evidence, and only on one of the exceptions to the charge.

The grounds of error should be definitely pointed out by the assignment, or they will not be considered.

20

Donnelly v. State, 2 Dutch. 463, 512.

State v. Lewis, 10 Vr. 501.

Lutlopp v. Heckman, 41 Vr. 272.

30

40

Respy submitted

Writ
Cert
Retu
Decr
Plea
Judg
Iver

Emil

Eloi

Moti
Defe
Mart
Will

Jona

Iver

Pete

Andr

Andr

REBU

Iver

Emil

Iver

Eloi

Spen

Char

Defe

Asst

Join

Exhi

Memc

I N D E X.

Writ of Error		3-4
Certificate of Judge Booream		4
Return		5-9
Declaration		5-7
Plea		7
Judgment		8
Iver C. Ostergaard	Direct Exam.	9
	Cross	16
	Redirect	40
Emil Koyen	Direct Exam.	43
	Cross	53
Eloise Ricci	Direct	56
	Cross	66
	Redirect	80
		82
Motion to Strike out		
Defendant's Testimony		83
Martin Hansen	Direct Exam.	85
William T. C. Cladek	Direct	88
	Cross	92
Jonas H. Coddington	Direct	
	No Cross	94
Iver C. Ostergaard	Direct	
	No Cross	94
Peter Kozub	Direct	99
	Cross	110
	Redirect	111
Andrew Zbojan	Direct	114
	Cross	116
Andrew Dillyman	Direct	
	No Cross	
REBUTTAL.		117
Iver C. Ostergaard	Direct	121
	Cross	123
Emil Koyen	Direct	126
	Cross	126
Iver C. Ostergaard	Direct	127
Eloise Ricci	Direct	127
	Cross	128
Spencer Dayton	Direct	129
	Cross	131-8
Charge to Jury		139
Defendant's Exceptions		140-3
Assignment of Errors		144
Joinder in Error		145-9
Exhibit Plaintiff		150-1
Memo. to Specifications for Church		

NEW JERSEY Court of Errors and Appeals

WRIT OF ERROR.

IVER C. OSTERGAARD,
Plaintiff-Def't in Error, }
vs. } *On Contract.*
GREEK CATHOLIC CONGREGATION OF }
ST. JOHN THE BAPTIST, }
Def't-Plaintiff in Error. }

10

NEW JERSEY, ss.:

The State of New Jersey to Theodore B. Booraem, Esq., Judge of Middlesex County Court of Common Pleas, to whom
[L. s.] the above case was referred from the Circuit Court by order, at New Brunswick, in and for the county of Middlesex, or such Justice of the Supreme Court as shall hold such Circuit Court,

GREETING:

20

Because in the record and proceedings, and also in the giving of judgment in a plaint, which was in our Circuit Court holden at New Brunswick, in and for the said county of Middlesex, between Iver C. Ostergaard, plaintiff, and Greek Catholic Congregation of St. John the Baptist, defendant, of an action upon contract,

manifest error hath intervened to the great damage of the said Greek Catholic Congregation of St. John the Baptist, as by its complaint we are informed, we being willing that speedy justice should be done to the parties aforesaid in this behalf, do command you distinctly and openly to send, under your seal, the record and proceedings aforesaid, with all things touching and concerning the same, to our Justices of our Court of Errors and Appeals of the State of New Jersey, on
 10 the 20th day of November, 1906, together with this writ, that the record and proceedings aforesaid being inspected we may further cause to be done thereupon what of right and according to the law ought to be done.

Witness, William J. Magie, our Presiding Justice at Trenton aforesaid, the first day of November, nineteen hundred and six.

CHAS. T. COWENHAVEN,
 20 Att'y.

S. D. DICKINSON,
 Clerk.

Filed November 19, 1906.

S. D. DICKINSON,
 Clerk.

The answer of Theo. B. Booraem within named.

The record and proceedings of the plea whereof
 30 mention is within named, with all things concerning the same, to the Court of Errors and Appeals in the last resort in all causes within specified at the day and place within contained, I certify in a certain schedule to this writ annexed, as I am within command.

THEO. B. BOORAEM,
 Judge.

Pleas before the Judge of the Circuit Court of the County of Middlesex of the seventeenth day of September, in the year of our Lord one thousand nine hundred and six.

IVER C. OSTERGAARD

vs.

GREEK CATHOLIC CONGREGATION OF
ST. JOHN THE BAPTIST, A CORPORATION,
BUILDER AND OWNER.

} *On Contract.*

10

Witness—Theo. B. Booraem, Judge; John H. Conger, Clerk.

MIDDLESEX COUNTY, ss.:

Greek Catholic Congregation of St. John the Baptist, a corporation, builder and owner, the defendant in this suit, was summoned by the Sheriff of the county of Middlesex, by serving a copy of the summons issued in this cause on John Baritzick, the President of said Greek Catholic Congregation of St. John the Baptist, to answer unto Iver C. Ostergaard, the plaintiff in this suit, in an action upon contract, whereupon the said plaintiff, by Adrian Lyon, his attorney, complains for that whereas the said defendant, Greek Catholic Congregation of St. John the Baptist, a corporation heretofore, to wit, on the tenth day of October, in the year of our Lord one thousand nine hundred and five, at the city of Perth Amboy, in the said county of Middlesex, was indebted to the said plaintiff in the sum of three thousand dollars for the work and labor, care and diligence of the said plaintiff, by the said plaintiff before that time done, performed and bestowed for the said defendant. and at its special instance and request, and also for divers materials and other necessary things by the said plaintiff before that time found, provided, used and applied in and about that work and labor for

20

30

the said defendants and at their special instance and request; and in the further sum of three thousand dollars for goods, wares and merchandise, sold and delivered to the said defendant at its request; and in the like sum of money for money lent by the plaintiff to the said defendant, at its request; and in the like sum of money for interest due from the defendant, to the plaintiff, the plaintiff having foreborne moneys due from the defendant, to the plaintiff at its request
 10 for a long time that elapsed; and in the like sum of money for money found to be due from the defendant, to the plaintiff, on an account then and there stated between them; and the defendant afterwards, to wit, on the day and year last aforesaid, in the county aforesaid, in consideration of the premises, promised to pay the said several last mentioned moneys respectively to the plaintiff on request; yet the defendant has disregarded its promises and has not paid any of the said moneys or any part thereof, to the plaintiff's damage
 20 three thousand dollars.

And therefore plaintiff brings his suit, etc.

And the said plaintiff avers, and in fact says, that the said debt is, by virtue of the provisions of an act of the Legislature entitled "An act to secure to mechanics and others payment for their labor and materials in erecting any building (Revision of one thousand eight hundred and ninety-eight)," approved June 14, 1898, and the supplements thereto, a lien on a certain building and lot or curtilage of said defendant.

30 The said building is a brick, stone and terra cotta church with a slate roof and copper tower, fifty-eight feet wide in front and rear and one hundred feet deep, erected on a lot or curtilage situate in the city of Perth Amboy, county of Middlesex and State of New Jersey, and more particularly described as follows:

Beginning at the southeasterly corner of Broad and Division streets in the city of Perth Amboy, and thence running easterly along Broad street eighty feet; thence

southerly parallel with Division street one hundred and ten and sixty-hundredths feet; thence westerly eighty feet to the easterly side of Division street; thence northerly one hundred and ten and fifty-five hundredths feet to the point or place of beginning. Being lots Nos. seventy-two (72), seventy-three (73) and seventy-four (74) on the amended map of the Barracks property, belonging to the estate of Leonard Appleby, deceased, made by C. C. Hommann, surveyor, and filed in the office of the Clerk of Middlesex county, 10
June 2, 1892.

And the said defendant, Greek Catholic Congregation of St. John the Baptist, a corporation, comes and defends the wrong and injury when, etc., and says that the said Congregation, builder and owner, did not undertake nor promise in manner and form as the said plaintiff hath above thereof complained against it, and of this it puts itself upon the country.

And for a further plea in this behalf, by leave of the Court herefor that purpose first had and obtained, 20
according to the form of the statute in such case made and provided, the said defendant says that the said plaintiff ought not further to have or maintain his aforesaid action thereof against it and against the said building and lands in the declaration above mentioned and described; because it says that said building and lands are not liable to the said supposed debt in manner and form as the plaintiff hath above thereof complained against it, and of this it puts itself upon the country.

And now, on this seventeenth day of September, 30
nineteen hundred and six, before Hon. Theodore B. Booraem, Judge of the Court of Common Pleas, appointed to hold the Circuit Court for the said county of Middlesex, according to the statute in such case made and provided, come as well the plaintiff, Iver C. Ostergaard, by his attorney, Adrian Lyon, as the defendant Greek Catholic Congregation of St. John the

Baptist, a corporation, by its attorney, Joseph E. Stricker, and the jurors of the jury being called likewise, come and being chosen, tried and sworn, upon their oaths say that they find for the plaintiff damages to the sum of fourteen hundred and sixty-two dollars and seventy-five cents.

And the Court doth order judgment final in favor of the plaintiff and against the defendant in the following form, that is to say: That judgment final for said
 10 sum of fourteen hundred and sixty-two dollars and seventy five cents, damages assessed by the said jury as aforesaid, with costs to be taxed, be entered in favor of the said plaintiff and against the said defendant, both builder and owner, and especially to be made of the lands and buildings in said declaration described.

Therefore, it is considered that the said plaintiff do recover against the said defendant, both builder and owner, the sum of fourteen hundred and sixty-two dollars and seventy-five cents damages by the jurors
 20 aforesaid in form aforesaid assessed, and also the sum of forty-four dollars and seventy cents for his said costs and charges by the said Court now here adjudged of increase to the said plaintiff and with his assent, which said damages, costs and charges in the whole amount to the sum of fifteen hundred and seven dollars and forty-five cents; and it is also considered that the sum of fifteen hundred and seven dollars and forty-five cents the whole of said damages, costs and charges, be made of the lands and buildings of the said
 30 defendant in said declaration described.

And the said defendant in mercy, etc.

STATE OF NEW JERSEY, COUNTY OF MIDDLESEX, SS.

I, John H. Conger, Clerk of the county of Middlesex, and also Clerk of the Circuit Court in and for said county, do hereby certify, That the foregoing is a true, full and correct copy of a certain Judgment as

the same is on record in my office in Book L of Judgments, on pages 385, etc.

In testimony whereof I have hereunto set my hand and affixed the seal of said county and court, this 14th day of November, A. D. 1906.

[L. S.]

JOHN H. CONGER,
Clerk.

MIDDLESEX CIRCUIT COURT.

10

IVER C. OSTERGAARD,

Plaintiff,

vs.

GREEK CATHOLIC CONGREGATION OF
ST. JOHN THE BAPTIST,

Defendant.

On Contract.

Transcript of shorthand notes of testimony taken on the fourteenth day of September, 1906, before Hon. Theodore B. Booraem, Judge, and a jury:

For plaintiff, Hon. Adrian Lyon; for defendant, Joseph E. Stricker, Esq.

IVER C. OSTERGARD, sworn.

Direct examination.

By Mr. Lyon.

Q. Mr. Ostergard, where do you live?

A. At Perth Amboy.

30

Q. How long have you lived there?

A. I lived there for 26 years.

Q. What is your business?

A. Mason contractor.

Q. How long have you been a mason contractor?

A. Twenty-three years last spring.

Q. All that time in the city of Perth Amboy?

A. Yes, sir.

Q. Did you enter into a contract with the Greek Catholic Congregation of Perth Amboy for the erection of a building?

A. Yes, sir.

Q. I show you the contract, which I have taken from the files of the county clerk's office, with a copy of the specifications annexed.

A. Yes, sir; that is my signature.

Q. That is the contract that you entered into with
10 that congregation?

A. Yes, sir.

The Court—Let me see that. I suppose the execution of the contract is conceded.

Mr. Stricker—Yes, sir. I think I wrote it myself.

Mr. Lyon—I offer this contract, with the specifications annexed, in evidence.

(Paper marked "Exhibit P 1.")

Q. The price named in the contract for the construc-
20 tion of this building was \$21,700. That is what you agreed to build the building for, was it?

A. Yes, sir.

Q. Now, Mr. Ostergard, did you build the building described in that contract?

A. Yes, sir.

Q. And when was it finished, about?

A. Well, the last finishing touch was done last year in June month.

Q. Were there any extra items of work done by you?

30 A. Well, I got some extra, but I didn't charge them up.

Q. Now, will you just name those that you did charge up in your bill?

A. Well, there is only one charge up there on this bill myself; the other is on the carpenter work. That is \$56 on the front step.

Q. You say that the other was on the carpenter work?

A.
Q.
A.
Q.
A.
Q.
buildi
A.
Q.
A.
Q.
the bu
work
the st
A.
glass
gable,
which
Q.
A.
Q.
Rice
he the
A.
Q.
A.
the h
Q.
A.
the h
selve
Q.
the v
A.
Q.
A.
Q.
A.

A. Yes, sir.

Q. Well, who did the carpenter work for you?

A. Mr. Emil Koyen did the work for me.

Q. Did he make a contract with you?

A. He made the contract with me.

Q. You have the contract then for building the whole building?

A. Yes, sir.

Q. And all the work was done under your contract?

A. Yes, sir.

10

Q. Well, now what other items of extra work on the building were done altogether, the items of extra work for which you charged? You have read one—the stone steps \$56.

A. Extra paneling on pew ends, \$25; extra leaded glass and inscription, \$78.65; one circle sash for front gable, \$5; hanging bell, as agreed by committee, \$110, which amounts to \$274.65.

Q. Were those items requested by the committee?

A. Yes, sir.

20

Q. The specifications and contract refer to Mr. E. Ricci of Perth Amboy as the architect in charge; was he there overseeing the work?

A. He was there almost every day.

Q. And did he direct those items to be done?

A. Yes, sir; except there is one he didn't; that was the hanging of the bell.

Q. Speak a little louder.

A. There is only one item, as far as I know; that is the hanging that bell; that was the committee themselves; they authorized Mr. Koyen to do that.

30

Q. Mr. Ostergard, what was done with reference to the windows in the basement?

A. Why, they were changed.

Q. How did you come to change them?

A. Why, we were asked to do that.

Q. By whom?

A. By the architect.

Q. Were they changed?

A. They were changed to double the sash pretty near, that is what they were.

Q. Did that make an extra?

A. Yes, sir.

Q. How much?

A. I guess that was \$12, as far as I remember.

Q. What about the plate on the wall?

A. Well, the wall plate is not called for in the plans
 10 and specifications, but when we put up the building I
 thought it was rather light. It was 17 feet high wall;
 an 8-inch wall from the floor beams up to the top, by
 placing the rafter on a wall instead of to have a wall
 plate with anchors. Why, I went down to the architect
 and talked with him about it and he went in and saw
 the architect in New York about it, and they talked
 about it; so we placed the wall plate, 4 x 12, all the
 way around the building, 2,600 foot long, with iron
 anchors in every 6 foot for steadying the wall, else I
 20 was afraid it was going to tumble down.

Q. Who asked you to do that?

A. Mr. Ricci; we agreed on to do that, and we took
 that and take the lightning rod off, which was agreed
 on, and put the wall plate in.

Q. How much did that wall plate cost?

The Court—Does the contract show that Mr.
 Ricci was the authorized architect?

Mr. Lyon—Yes, sir.

Mr. Stricker—I don't think it does.

30 Mr. Lyon—It does. Mr. E. Ricci, 339 State
 street, has been duly authorized to represent the
 architect and he will have the full charge of the
 work, and his name is also in the contract as the
 person who is to direct the work and decide dis-
 putes.

Mr. Stricker—No deciding disputes about it.
 The Court—Well, let us settle that. This is

a memorandum of the two specifications. Where does it appear in the contract?

(After argument.)

The Court—I will admit the testimony. There has been no formal objection made to it.

Mr. Stricker—I am going to make a motion to strike it out.

The Court—Yes.

Q. The next item, Mr. Ostergard, is with reference to the front wall. What did you with reference to that? 10

A. Why, there were Mr. Kozub and there is another man, they were coming around and says, "We are going to hang up tremendous big bell."

Q. Who were they, Mr. Kozub and the other man?

A. The board there.

Q. Officers of the church?

A. Yes, sir.

Q. Members of the committee?

A. Yes, sir.

Q. Go on. 20

A. And they says, "We are going to put up very big bells," and I says, "If you are going to put them up too big this wall is not really strong enough for them." On my own risk I will put them up without extra charge for extra work.

Q. What extra work did you do?

A. Eight inches more on the front wall. more than it calls for, to take those big bells.

Q. What did it cost?

A. \$75. That is the mason cost really. but I did not intend to charge any for them as long as they want them big bell. 30

By the Court

Q. You say you didn't have any direct conversation with this committee to make that wall bigger?

A. They says, "You have got to make it strong," they says, and that is about all they kept on saying

every time they come, "You have to make that strong for the bell."

Mr. Stricker—I move to strike that out, on the ground that no contract should be implied, especially when it is coupled with the statement of the witness that he had no intention of making them pay for it.

The Court—The objection will be overruled and you may have an exception.

10 (Whereupon the defendants by their counsel pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

THEO. B. BOORAEM, [L. s.]
Judge.

Q. The next item is putting in two closets; what have you to say about that?

A. Well, they asked my carpenter to do that.

20 By the Court.

Q. Who did?

A. I can't really testify who it was. Mr. Koyen is here himself.

The Court—That will be stricken out. It is hearsay.

By Mr. Lyon

Q. Do you know as a matter of fact whether two closets were put in?

30 A. Yes, sir.

Q. Were they called for in the plans?

A. No; they were not called for?

Q. The next item is laying face brick, \$25.

A. When I was going up to the top of the cellar beam they decided they would rather have glazed brick all the way around, and they said, "We will furnish you the glazed brick, but you will lay them up," and you all know it costs a great deal more to lay fine

glazed
mon
laid
called
I didn
Q.
A.
Ricci.
Q.
A.
with
Q.
A.
the g
mon
Q.
A.
said,
the ce
Q.
A.
Q.
on th
tions
A.
Q.
sill?
A.
can't
ured
Q.
you a
A.
A.
Q.
of th
A.

glazed front brick than it costs to buy a cheap common brick and lay them, and for every front brick I laid I used Portland cement mortar, which it only called for Rosedale cement, for, as it was a town job, I didn't like to see my work in bad shape.

Q. Did they ask you to lay the glazed face brick?

A. Yes, sir; the committee and the architect, Mr. Ricci.

Q. Was there any extra expense in laying them?

A. It cost me about \$25 more than if I run it up 10 with common brick.

Q. The next item is rubbed window sills.

A. It didn't call for any rubbing when we put in the glazed brick. We couldn't very well put in common window sills when we had glazed brick.

Q. Did any one ask you to them in?

A. No. Well, Mr. Ricci asked me. "Really," he said, "you ought to have them." So I sent them back, the common ones, and I put them in.

Q. At Mr. Ricci's direction.

20

A. Yes, sir.

Q. Now, Mr. Ostergard, was the work all completed on this church as called for in the plans and specifications?

A. As far as I know it was.

Q. What was the extra cost on that rubbed window sill?

A. That would be about \$10, something like that. I can't hardly remember all the bills, but I think I figured it out once, and Mr. Lyon ought to have it.

30

Q. Was it the item as you gave it to me? I will show you a memoranda?

A. I figured it out once, how much it was.

(Paper shown witness.)

A. Oh, \$20

Q. Now, Mr. Ostergard, what do you say the price of the rubbed window sills was extra?

A. \$20.

Q. Now, I will ask you again, was all the work called for in the plans and specifications completed as far as you know?

A. Yes, sir.

Cross-examination.

By Mr. Stricker.

Q. Now, Mr. Ostergard, can you state without looking at that contract whether a partition in the cellar
10 is called for?

A. No.

Q. You don't know?

A. No.

Mr. Lyon—Do you mean you don't know or it was not called for?

A. I don't think it was called for.

The Court—Is that one of the extras charged for?

Mr. Stricker—No, sir.

20 The Court—What relevancy has it?

Mr. Stricker—To show that all the work was not performed.

The Court—He says the partition was not called for in the contract.

A. I says it was not called for?

The Court—I understood you to say it was not.

A. No.

30 Q. You say this contract was entirely completed, Mr. Ostergard?

A. Yes, sir.

Q. Was the plastering in the basement finished?

A. Plaster in the basement all finished. What it was figured for and what was called for.

Q. Was the tower sheathed according to specifications?

A. No; but there is that much extra spent on the roof for to get a better job, for which it cost a good

deal more, and on that work I guess Mr. Koyen can explain better than I can. He is a carpenter, which I am a mason.

Q. But you didn't finish it according to the plans and specification?

A. Oh, it was agreed by the architect on the way it was finished, which it would give a fair, better job.

By the Court.

Q. It was agreed by the architect that you should do 10 what?

A. That I put a two-inch rib on the copper roof and leave off the sheathing, so they could lay all the joints on either side. If they put the sheathing on the inside they couldn't drive it; they had to nail the roof on, which is not half as good.

By Mr. Stricker.

Q. (Picture shown witness and he is asked) This is 20 the dome that you referred to?

A. Yes, sir.

Q. The plans and specifications called that the inside of that should be sheathed, that is, with strips?

A. Yes, sir.

Q. So as to strengthen it?

A. Yes, sir.

Q. You didn't do that?

A. No, I didn't do that, but we put all them ribs there; they are one inch larger than it calls for on the plans, to have the joints riveted from the inside, and 30 left off the sheathing of that, which was a great deal better and it would make a good deal better job.

Q. Who was it that agreed?

A. That was agreed with Mr. Ricci and Mr. Holly.

Q. When did they agree to do that? The exact date they agreed that that should be done?

A. Before it was done.

Q. What is that?

A. Before it was done.

Q. Mr. Ostergard, don't you know as a matter of fact that you did that on your own responsibility without consulting anybody?

A. No, sir.

Q. The plans and specifications called for a lightning rod, did they not?

A. Yes, sir.

Q. Did you put it there?

10 A. No. That was agreed with Mr. Holly and Mr. Ricci to put the wall plate on instead of the lightning rod; to shut off the lightning rod.

Q. You charged them for the plate, haven't you?

A. Well, we didn't charge them if they had wanted to pay what I have got coming to me, so that the deduction will be made.

By the Court.

20 Q. You agreed to substitute what, the plate on the aisle?

A. Yes, sir.

By Mr. Stricker.

Q. You omitted an altar platform?

A. Yes, sir.

Q. Why did you do that?

A. Why, if they want us to put it up there, it would have been just in the way. They didn't have the altar. So there is a credit made for it.

30 Mr. Lyon—Credit is given for that.

Mr. Stricker—It is not given in the pleading.

Mr. Lyon—There are three items now in the bill—\$20, \$8 and \$47.

Q. Mr. Ostergard, when you built this church, did you get the grade line?

A. I had my grade line from the architect and the committee.

Q. I don't mean the boundary lines of the lot, but the grade line.

A. The boundary line, I had them from the surveyor.

Q. Will you kindly explain to us why that stair-case is up in the air?

A. Yes; I can explain that easy, very easy. I can explain this. Why, when I figured on this here, I was around asking for information from Mr. Kozub and the minister how it got to be put, and they said the first 10
time they got to be a terrace the same as the rectory, to run around. The terrace shows here by the rectory, which I figured on and give my contract out for the cellar digging, but when we come to square off the building the rectory was ten feet from the line which the carpenter built the first house. When we come to square it off, it was on the line and I didn't have room for the big church, and I went to Mr. Ricci, the architect, and I says, "We won't have room for the church." So after that I had to go and dig down more 20
in the cellar to lower it so we could get away from the terrace in front, so we had an additional step. That was the reason I had to put on two step more.

Q. Well, if you found the proper grade line, it would not have been necessary, would it?

A. Yes, sir. It couldn't be helped. The street is not on the level, and I had to dig down two feet.

Q. Your original plan called for five steps, did it not?

A. Four. This is the door sill. Now, this here level 30
line, that is about 18 inches out of level from there to there (indicating), to which you could never get them steps to come out right, and you couldn't lay them on a level. You had to have two steps more on this side than the other side. It shows here. There is one step off. There is a difficulty there on that street; it dips down about 18 inches. If them two streets was level and the church building there, the rectory being 10 feet

forward, for which they claim it was, then they would have had a nice church and they would have had everything in proportion, but the way it stands now they could never get it. This Mr. Stricker, he seen it, how much it dipped down.

Q. Mr. who?

A. Mr. Stricker; and you see how much it dips down from that part to here. It is about 18 inches. Take that street was level you would have had it the same
10 as it called for, but it can't be done now.

Q. You knew that when you estimated on the building, didn't you?

A. I know that, and that is the reason I have to talk to the architect about it.

Q. You make an extra charge there, do you not?

A. I am making an extra charge. That is what the stone cost; not to put them in.

Q. You knew before you attempted it that this would be the result, didn't you? You knew the street was
20 crooked there?

A. Oh. it is always the case. A man got no right to put in any extra before he got the job, and if any extra come up, got to be charged up. So I couldn't charge no extra, as I had no building.

Q. Although you knew it was necessary?

A. Why, certainly.

Q. That is to say, you wouldn't tell a man anything about it until he had his contract signed?

A. I couldn't. I didn't expect it. I expected the
30 rectory was 10 feet more south, so I would have had more room for the church. If he had taken off 10 feet of the church you wouldn't of had no trouble; you could have leveled them off with the front; you would not have been 10 feet inside the church fence line. You could have graded uplevel and had your steps going right. But I didn't know that. That we found out after we squared out the bui'ding. I had no right to square out the building until I had it.

Q. Now, Mr. Ostergard, doesn't your contract call for excavating there to the street level?

A. Yes; I am down to the street level.

Q. No, no; I mean to take around on the full lot?

A. Well, I take the longer section and grade this here. This is the street level. This is 3 feet high. I grade the lot off level here. Now, if I made about two feet six deeper would that be finished?

Q. I am asking you whether or not under that agreement and specification, you were not called upon to remove all the dirt around this lot to the street level? 10

A. It calls for—I got a level of the lot with the street there, with Wishing street. I take that with Wishing street, 100 feet deep.

Q. Doesn't it read "excavate the entire lot to the curb level?"

A. Yes.

Q. Have you done it?

A. Which way should I do?

Q. I am not on the witness stand. I ask you whether this is not part of this agreement? 20

A. Yes, it is.

Q. Excavate the entire lot to the curb level?

A. Yes; so I done.

Q. Did you?

A. Yes, sir. On the Wishing street I take my level on the longer side. If I take it from the short side, how would it look on the other side?

Q. I don't know. I am asking you whether you excavated the entire lot according to the specifications? 30

A. Yes, I did.

Q. Isn't this part of the lot?

A. That is part of the lot

Q. Is that excavated?

A. Yes; but now when I come to excavate level with the street I can't be level. It wasn't called for to be level then. I got to be one corner 2 feet 6 inches deeper than the other.

Q. There is a survey on Division street isn't there?

A. Yes.

Q. And there is a curb level on Broad street, isn't there where the church fronts?

A. There is now, but there wasn't at that time.

Q. Didn't you get a curb line?

A. I had the curb line, but it wasn't there then.

Q. What is that?

A. I leveled the whole thing off from Wishing street,
10 from the 100 foot long front.

Q. When you went to the city engineer, didn't he give you the curb line?

A. He didn't give me anything.

Q. Did you ask to get it?

A. We have the surveyor's stake. I had the lot staked, that is all I had.

Q. Well, is that down to the curb level now?

A. Why, no; on the other side it is not. It would never come to the curb level.

20 Q. Why not?

A. I consider when I give a lot to grade—now here is my grade on one street—if I have got to go to the grade I have got to grade the lot that way. Is that level? Now, that is just the shape that lot called for. I have got to grade it. This is the curb line on one street and this is the curb level on the other (illustrating).

30 Q. Mr. Ostergard, don't you know that if that is the curb on that side that all the property would run the other way towards State street?

A. Certainly.

Q. Wouldn't it?

A. Does it say so?

Q. No; it doesn't say so, because it is not dug out, is it?

A. I got plenty of fall.

Q. Is it dug out to the curb level?

A. It is now; but there is the same level here. If

you dig down there there is only 15 foot, I guess, at least there, and there is a bank of 3 foot above that. Now, if you dig a ditch down there, of course the church will be pretty bad off.

Q. Then, the reason you didn't do that digging out there was because in your judgment it would not have been beneficial to the church; is that so?

A. No, sir; I dig it off level with Division street, graded the lot from Division street level with the curb.

The Court—What is the name of the other 10 street?

A. Broad street.

Q. Do you mean to tell us that you have dug that out entirely on the Division street side?

A. Yes, sir.

Q. Don't you know, Mr. Ostergard, that there is about a foot or 18 inches of ground above the curb line now?

A. Where?

Q. On Division street. 20

A. Well, the street was just graded a half year before we started and it was down to the grade and we went just even with the street, and if the street is graded the half year before and we went down with the grade, I can't see how we can miss anything.

Q. How long has Broad street been graded?

A. Oh, that has been graded I don't know how many years.

Q. It was graded when you began this work, wasn't it?

A. Yes, sir. 30

Q. So you oughtn't to have had any difficulty in digging out to the grade line there, ought you?

A. Why, I didn't have anything to do with the curb.

Q. I know, but you had to do with the excavating of the entire line to the curb level?

A. Yes, sir. Do the specifications say I had to go

from the Broad street curbing? It didn't say which curb I had to go from, and I took the longest curb.

Q. The specification says "excavate the entire line to the curb level." Did you do it?

A. I did.

Q. Do you mean to tell me this was thrown in, that bank, the dirt that exists on the east side of that church? Has that been filled in since?

A. No.

10 Q. Was it put there by anybody?

A. No.

Q. Then you didn't take it out?

A. Didn't take that off. I dig the long side, this 100 foot side, in here, in that way, and I took the whole lot level, took the whole lot level.

The Court—Which street is this?

Mr. Stricker—That is Broad street and this is Division, the other side.

20 The Court—This is the corner of Division and Broad?

Mr. Stricker—Yes, sir.

The Court—And this bank is not on Broad street?

Mr. Stricker—No. You better mark the street there.

Mr. Stricker—We offer these photographs in evidence.

(Photographs marked Exhibits D1 and D2.)

30 Q. I take it, Mr. Ostergard, it would not have looked artistic; it would not have looked nice?

A. Yes; it would have put the church in bad condition, and I guess the church itself would have compelled me to cart all the dirt back.

Mr. Stricker—I object and ask that what the witness guesses be stricken out.

The Court—Yes, strike it out. It is not responsive.

Q. As a matter of fact, the ceiling in the basement is not plastered, is it?

A. No, sir.

Q. And weren't you obliged to do that under your contract?

A. No, sir.

Q. Let me read you a paragraph, this paragraph here.

Mr. Lyon—Now, when it is read, I desire that counsel state the parentheses just as they are. 10

Mr. Stricker—This is in evidence.

Mr. Lyon—That is my copy.

Q. I call your attention to the second paragraph on the first page of this agreement, which reads: "The basement will be left unfinished except the two toilet rooms, vestibule and stairs to main floor and the plastering of ceiling, using wire lath over the boiler for a space of ten feet square, which will be finished as specified."

A. Yes, sir. 20

Q. Do you say that does not mean that—

A. That the cellar floor over the boiler is finished with iron lath and plaster and the two toilet rooms and the vestibule. That is finished. We did there all they were figured for, which the architect was there.

The Court—What is the significance of that?

Mr. Lyon—I have a very clear opinion as to the significance of those parentheses. Of course, subsequent developments might throw a little light on what is intended. 30

The Court—I thought possibly you might agree as to what was meant.

Mr. Stricker—We contend that that meant that the ceiling should be plastered with the exception of ten feet.

Mr. Lyon—The very fact that the parentheses were made with ink shows the reason why they were made.

The Court—I won't pass on that now.

Q. Well, I call your attention to paragraph 129 and will read to you from that: "plaster all the walls and ceilings, toilets, vestibules, soffits of stairs and so forth, and the ceiling of the boiler room and basement and all walls and ceilings of the remainder of the church and sacristies."

10 Mr. Lyon—I object on the ground that it is in the main part of the specification and is modified in the memorandum afterward annexed; that wherever there is a difference between this memorandum and the main part of the specifications, this additional memorandum must govern.

The Court—I overrule the objection.

Q. What have you to say about that?

A. Well, I should say?

Q. Yes.

A. Well, I didn't figure on that at all.

20 Q. You didn't figure on it?

A. No, sir.

Q. And your idea is that because you did not figure on it these people are not entitled to it?

A. Sure, that is right. If I give them a figure on it I was entitled to give them it, but I had the information from the architect that finishing all the ceilings was cut off except the vestibules and the two toilet rooms and over the heater, that should remain.

Q. I ask you if you read English?

30 A. I can read a little.

Q. You are familiar with specifications?

A. Yes, sir.

Q. You read a great many of them?

A. I read quite some.

Q. Figure on a good many jobs?

A. Yes.

Q. And I take it that you read this?

A. Yes, sir.

Q. And when the modification was made and attached to this contract, you read that also?

A. Yes, sir.

Q. And yet you say that your idea or your construction of this contract is such that they are not entitled to this work?

A. No, sir.

Q. And you didn't figure on it?

A. No, sir.

Q. And not having figured on it, although it may be stipulated in here, you are not obliged to furnish it?

A. No, sir.

Q. That is your idea about it?

A. Yes, sir.

Q. In your experience as a contractor, did you ever omit to figure on something?

A. Yes; but then I stand the loss myself.

Q. You stood the loss yourself, didn't you?

A. Yes, sir.

Q. Didn't ask the builder to stand it, did you? 20

A. Why, not very well.

Q. Now, we are coming to the items of extra work that you have charged for. You say there is an extra front step of blue stone there. Who ordered that?

A. The architect. He gave us a plan to cut the steps according. The steps is cut according to the plan Mr. Ricci give us for the front, so I did not go outside of what Mr. Ricci ordered.

Q. Who ordered the step?

A. I ordered the step for my man. 30

Q. What is that?

A. According to the plan. Mr. furnished the step.

Q. Who did you have any conversation with concerning that?

A. About the step?

Q. Yes; about furnishing an extra step of blue stone for \$56.

A. Well, Ricci, he says, "They have got to get in." They couldn't have a higher step.

10 Mr. Stricker—I move that that item be stricken out on the ground that the architect cannot bind a corporation or a builder without his knowledge for any extra work, even though the contract might specify that work is to be done under an architect's supervision or direction, and whilst he may be the one to pass on whether the work is performed properly or im-

20 The Court—The contract expressly provides that Mr. Ricci shall be in effect the architect in charge of the building. The profession of architect is a well-known profession and has well defined duties, one of them being to superintend the erection of a building as the agent of the owner, and he is supposed to control the mechanics constructing the building and to see that they do the work in accordance with the original agreement. Having such a general agency as that, I think it ought to go before the jury for them to determine whether or not when he ordered extra work to be done, not specified in the contract, he was acting lawfully in his capacity as agent and in effect lawfully bound his principal. I will deny your motion.

30 (Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed according.)

THEO. B. BOORAEM, [L. s.]
Judge.

Q. Did you agree upon a price with Ricci?

A. No, I didn't have the prices, but he made the

plan and I did not charge any more than just what the stone cost.

Q. Did you agree with him what that would cost?

A. No; there was no price.

Q. Did you notify the congregation or any of them?

A. No.

Q. What you were going to do?

A. No. It was not my place. As soon as the architect ordered me to go ahead and set a front step according to his plan, I had to do it.

10

Q. Was that a modification of this plan here?

A. Yes, sir. That is for to reach the ground, as the street is out of that level.

Q. Something different from what is in here?

A. Yes, sir.

Q. How about the charge of extra panelling on the pew ends as agreed by committee? Did you have an understanding with anybody concerning that?

A. Oh, my carpenter, he going to order—

Q. You.

20

A. I guess he had.

Q. You; not the carpenter. Did you ever see anybody with authority there regarding the extra panelling?

A. I didn't have it. I didn't speak to him about it. The committee went underhanded all the time when they told Mr. Koyen. They told him what to do. If the committee had come to me any time they wanted something done I would know about it. I didn't know. I knew there was work done, quite a little, but they went to Mr. Koyen and told him to do so and so. They ordered also the leaded glass in the windows, and they told Mr. Koyen to do that. They didn't come to me and tell me. They told Mr. Koyen to do so and so. Mr. Koyen was my contractor.

30

Q. You were responsible for Mr. Koyen?

A. Certainly.

Q. He was a partner of yours?

A. Well, we worked together on jobs.

Q. You worked together on this job?

A. Yes, sir.

Q. And you had no objection to this committee talking to Koyen regarding the carpenter work?

A. No.

Q. You don't know anything about carpenter work do you?

A. No.

10 Q. You leave that to Koyen?

A. Yes, that is the reason I can't answer.

Q. What I am trying to get out is this: did anybody say anything to you?

A. No, sir.

Q. Regarding the \$25 for extra paneling on pew ends?

A. No; they didn't say anything to me about it.

Q. And you don't know anything about it?

A. I knew it was done.

20 Q. That is about all you do know?

A. Yes, sir.

Q. Now, you have a charge here of extra leaded glass, \$78.65.

A. I know that.

Q. How was that contracted?

30 A. That was a rear window in the sacristy. They wanted that leaded. It didn't call for leaded glass, and we had the window ordered and they were on the premises and they were put in, and Mr. Kozub come around and seen it and he says, "We have to have those glass changed there. We have to have leaded glass." I said, "It would look terribly to have one ordinary window and the leaded glass in the rest of it." So I told Mr. Koyen there was a change.

Q. Did you agree on any price?

A. No; I didn't agree on any price. If they had any price from Mr. Koyen that I can't answer.

Q. You claimed payment for it?

A. Yes, that is through Mr. Koyen, but this is his bill I owe him.

Q. This is something you have nothing to do with?

A. I have something to do, but it is an extra in Mr. Koyen's bill which is coming through me.

Q. You mean that Mr. Koyen, I suppose, is charging you with this bill?

A. Yes, sir.

Q. And then you are liable to Mr. Koyen for it? 10

A. Yes, sir.

Q. But what I want to get at is this, did anybody for this congregation order this work from you and agree upon the price of \$78.65?

A. No.

By the Court:

Q. Who was it told you to do it?

A. Mr. Kozub.

Q. Who is he? 20

A. I guess Mr. Kozub remembers.

Q. Mr. Kozub is a member of the committee?

A. Yes, sir.

Mr. Lyon—He was one of the men that signed this contract.

By Mr. Stricker:

Q. Well, I suppose that this was a sort of a go-as-you-please job, wasn't it?

A. We rather not to have them extra charges 30

Q. But what I mean to say is, this was a sort of a go-as-you-please job, where anybody could come and order anything that you like, and would be put in?

A. No.

Q. What suspicion did you have about it?

A. There was that much about it, if you didn't put it in, you knew it was wrong; it wasn't in the specifications; the specifications didn't call for it, and we

didn't start to put in everything that we see was wrong.

Q. Anybody could give orders to Koyen and Koyen would do the work?

A. No.

Q. Didn't you insist on everything having your sanction?

A. No, not entirely. Of course, Mr. Koyen knew the committee just as well as I did, and he knew the committee wouldn't come around and order something I didn't want.

Q. And you permitted Koyen to make agreements for you?

A. He didn't make any agreement. He didn't know what it cost him until he got it.

Q. Then this arrangement about the \$78.65, do you claim that wasn't done with you at all?

A. No.

Q. That was Koyen done that?

20 A. Yes, sir.

Q. And you have accepted his figures and you say you owed him for that?

A. Yes, sir; at least I didn't add anything to that.

Q. You didn't add anything to that?

A. No, sir.

Q. You did not apply the 10 per cent. rule?

A. No, sir.

Q. You have one circle sash for front gable, \$5?

A. Yes, sir.

30 Q. How did that come about?

A. I guess that was on account of terra cotta. There is a terra cotta ring around there, and the first one we made didn't fit the terra cotta and so there were a new one ordered, which was larger or smaller. I can't remember.

Q. Who furnished the terra cotta?

A. The congregation themselves.

Q. Well, you say it didn't fit. How didn't it fit? What was wrong with it?

A. That is a little more than I can tell, but I know it was either too small or too big.

Q. And it cost \$5 to fix that?

A. Yes, the window cost \$5.

Q. Did you make any agreement with them?

A. No.

Q. Anybody order it?

A. Mr. Koyen must have ordered it. 10

Q. I mean of the congregation?

A. The congregation had to do it so long as they furnished their own stuff and the size of the plan and the specifications did not fit.

Q. Was that agreed with you. Have you any recollection that they came to you and told you to install this circle sash?

A. I remember Mr. Kozub—one day we were speaking about it, and that is all I remember; but Mr. Koyen is the man who can give you the information. 20

Q. Now you have an item here, "hanging bell as agreed by committee, \$110." Who did you agree with?

A. That is agreed to Mr. Koyen, not to me.

Q. Then I understand that the hanging of the bell, \$110; one circle sash for front gable, \$5; extra leaded glass, \$78.65; panelling of pew ends, \$25; those items were agreed upon by Mr. Koyen?

A. Yes, sir.

Mr. Stricker—I would like to reserve the right to strike that out. 30

The Court—It is a question for the jury. If the whole case rested on that, I might sustain your motion. At the present time I will not strike it out.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

THEO. B. BOORAEM, Judge. [L.S.]

Q. Now, Mr. Ostergard, don't you know that this wall plate business that you have in here, for which you make a charge of \$60, that you had some conversation with Mr. Kozub concerning it?

A. Yes, sir.

Q. And do you swear now that \$60 was the price agreed upon?

A. It is not the price.

Q. What is that?

10 A. It wasn't agreed on anything.

Q. Didn't he ask you how much that work would cost and didn't you tell him \$25?

A. No; I didn't give him no price.

Q. And you swear that is not so?

A. Certainly. He didn't ask me about the price. I am not a carpenter. If he should ask anybody, he should ask Mr. Koyen to give the price.

Q. Well, you were the contractor?

20 A. I was the contractor, but this was out of my line, and when we are both on a job, why does he not call us together, both of us, and get the full information, but he never asked me about it.

Q. You are the contractor, aren't you?

A. Yes, sir.

Q. You are the man suing for these sums?

A. Yes, sir.

Q. You are responsible for the completion of this work?

A. That is the reason the wall plate was go on

30 Q. Weren't you the proper man to see concerning this?

A. Yes; they ought to have seen me, but they didn't do it.

Q. And you deny that Mr. Koyen made any agreement with you that that should be installed for \$25?

A. Yes, sir.

Q. Did you have any agreement with any one con-

cerning the making of the basement windows double, \$12?

A. No; that was through Mr. Ricci and Mr. Koyen.

Q. And you have the charge here of making front wall, six inches thicker, \$75?

A. Yes, sir.

Q. How many times did you take that front wall down?

A. Take it down?

Q. Yes.

10

A. I didn't take it down any.

Q. Didn't you take it down several times?

A. Well, I didn't take anything down. Is it shown that there is anything coming down?

Q. No; I simply want to know how many times you had it up and down before you got it up to its proper height. How many times did you take it down before it was finished?

A. I didn't take it down any.

Q. Do you remember when the terra cotta was in- stalled over there?

20

A. Yes.

Q. You had a little difficulty with it?

A. Yes.

Q. And the reason why you had to make it thicker was on account of the terra cotta; isn't that so?

A. No; the terra cotta was 14 inches, and that was all it called for.

Q. And you couldn't make it fit, could you?

A. Yes, sir.

30

Q. Did you have any difficulty with that?

A. Yes, sir. I didn't have any difficulty only when I sent for a fitter. The fitter was coming up there and that was all the difficulty there was.

Q. You had a little difficulty in getting the wall to fit the terra cotta, didn't you?

A. No; terra cotta is always a little crooked, and

when there is only 8 inches of wall there is not much play.

Q. You have charged here, making front wall 6 inches thicker, \$75?

A. Eight inches.

Q. Who ordered that?

A. I don't know how many ordered it, but everybody that comes on the church they told me I had to make it strong; they had to put in big bells.

10 Q. What do you mean by that "everybody?"

A. Everybody that was on the committee.

Q. Who told you to make it 8 inches thicker?

A. They didn't say how much I should make it, except Mr. Ricci. We agreed on 8 inches.

Q. Who did?

A. Mr. Ricci—to give a good bearing for them heavy bells. I know very well the tower was not strong enough to carry them bells.

Q. Who agreed with you regarding the \$25 item?

20 A. What \$25 item?

Q. For putting in two closets.

A. Nobody. They were put in cost price.

Q. Who asked you to put them in?

A. We were asked to put them in.

Q. Who asked you?

A. That is Mr. Koyen; he can explain who asked.

Q. But you can't explain?

A. I can't explain. I don't want to explain anything more than I can.

30 Q. Now, you have a charge here of laying face brick extra, \$25?

A. Yes, sir.

Q. What became of the red brick on that job?

A. They didn't come there. I had to cart them away, what was left.

Q. And did you give them any credit for the red brick?

A. No, sir.

Q. Weren't they worth anything?

A. Not the way they wanted them put up.

Q. They furnished the face brick?

A. Yes, sir.

Q. And you were to furnish the red brick?

A. Yes; and I would have been willing to do it.

Q. And you charged them \$25 for laying the face brick?

A. Yes, sir.

Q. Did you allow them any credit for the red brick? 10

A. No, sir.

Q. Did you have any agreement with anybody as to what it would cost?

A. No, sir. I put a steel union bond on that wall, where there is an 8-inch wall and you are going to have face brick, and that costs pretty near as much as the red brick.

Q. Here is a charge of rubbing window sills, extra, \$20. By whose order was that?

A. That is Mr. Ricci's.

20

Q. Did you agree on prices with him?

A. No; they were put in at cost price, just what I agreed to do it for.

Q. Now, Mr. Ostergard, when all this business was done you rendered this society a bill, didn't you?

A. Yes, sir.

Q. And you rendered them a bill for a balance of \$1,474.65, didn't you?

A. Yes, sir.

Q. And that was all that was due to you at that 30 time?

A. Yes, sir.

Q. And afterwards, when you put your claim in Judge Lyon's hands and it came to your knowledge that they were going to resist it for some reason or other, it was then that you made up this bill of extras of \$217, didn't you?

A. Yes, sir.

Q. Why didn't you put that in in the first place?

A. I thought the people would act decent to me and pay me as soon as I fulfilled my job, but they kept me dilly-dallying so long. I had been out of that money now for a year and a half almost, and I know I gave them a good deal more in that plan and specifications than what they could have got. Everything was put up with Portland cement instead of Rosedale, and I never charged anything for it; but it was a town job
10 and I didn't want anybody to come around and say that this is one of Ostergard's jobs; they aren't no good—

Q. Why didn't you include this \$217 in the first place if it was due you?

A. I tried to be honest with everybody, but if they aren't honest to me—

Q. Why make up a bill of \$217 if you wanted to make them an allowance. Why didn't you allow them an even sum?

20 A. Oh, no; you can't figure even all the time.

Q. Why did you figure uneven and put in this bill after you had already presented one? Why didn't you include this in the first place?

A. I meant to give them that and be good to them, but they wouldn't recognize me.

Q. This was going to be a little present for them?

A. I am going to charge what is coming to me.

By the Court:

30 Q. Was this extra work all done and complete at the time you rendered your first bill?

A. Yes, it was; oh yes.

Q. Mr. Ostergard, you say you contracted for red brick?

A. Yes, sir.

Q. And you had the red brick on the ground?

A. Had the red brick on the ground, yes, sir.

Q. How much red brick did you have there?

A. Well, I guess there were about ten thousand.

Mr. Stricker—Your Honor means the brick that was substituted by the face brick?

The Court—Yes, sir.

Q. What became of the red brick that were substituted?

A. Carted away.

Q. How many did you cart away?

A. I don't know; I didn't keep track.

Q. You didn't keep any credit for the red brick? 10

A. No; the mason can't lay twice as big a wall and all them iron ties I had to put in.

Q. Just repeat that?

A. The wall where the glazed brick is put up, it requires a great deal more skilled mechanic and it takes a great deal longer to lay up that wall than it do with common brick. Where there is no header put in, it has to have a bond; you have to have a union joint for every two or three courses, and take a lot of union bond to bond every brick in a wall what had 20 to be 17 foot high, where they were running it 8 inches thick, and I had to cart them away again, and I wouldn't give them any credit for red brick on that wall. They would insist upon having the glazed brick which they furnished themselves, and I agreed to do it for nothing, for no extra cost.

Q. But you charged \$25?

A. Yes, but I didn't have in my original bill; that is the time.

Q. You consider, then, that the extra work and extra 30 bonding involved in laying faced brick equalled the value of the red brick that you did not furnish?

A. Yes, sir.

By Mr. Stricker:

Q. And although you agreed to do it for nothing; you make a charge?

A. I didn't say I was going to do it for nothing, but

I said I didn't expect to. I didn't mean to charge anything for it.

Q. You changed your mind since?

A. Yes, for the way they treated me.

Re-direct examination:

By Mr. Lyon:

Q. Mr. Ostergard, in reference to this bill of \$217 which you rendered subsequent to the original bill of
10 \$1,474—this was quite a large building. I take it?

A. Yes, sir.

Q. Now, in the erection of any building of this size, where there is so much detail and so much work to be done, is it ever possible to carry out the letter of the plans and the specifications in all their details?

(Objected to as irrelevant.)

The Court—I don't say your line of examination is improper, but I will overrule the question in its present form and sustain Mr. Stricker's objection.
20

Q. What other extra work, Mr. Ostergard, did you do there that was not charged for?

(Objected to as not within the issues of this case.)

The Court—The question is overruled as irrelevant to the issues embraced in this suit. I still say I am not to be understood as passing upon the relevancy of your proof showing a valid reason for not presenting this bill.

(Exception noted to plaintiff.)
30

Q. Did you ever meet Mr. Holly, the architect?

A. Yes; twice.

Q. Named in this plan?

A. Yes, sir.

Q. Did you ever get a letter from Mr. Holly, a copy of a letter?

A. I received one from Mr. Ricci.

Q. I show you a letter written on the letterhead of

Henry H. Holly, dated September 11, 1905, written by Henry H. Holly to John Barrylees.

Mr. Lyon—Do you admit that that is Mr. Holly's letter?

Mr. Stricker—Where is the original?

Mr. Lyon—You have it.

Mr. Stricker—I don't mind admitting this portion, but I don't admit this end of it.

The Court—You admit that is in the handwriting of Mr. Holly and signed by him? You may make any other objection to the relevancy of the letter when it is introduced. 10

Mr. Stricker—I am perfectly willing to admit certain portions of it. This is a copy.

The Court—I am not asking you that. I am asking you whether this letter is in the handwriting and signed by Mr. Holly.

Mr. Stricker—I don't agree to admit that.

The Court—You will have to prove it.

Mr. Stricker—Unless Judge Lyon will agree with me that that front page of the letter will go. 20

The Court—He is simply proving the accuracy.

Q. Mr. Ostergard, do you know where you got this letter?

A. Yes, sir.

Q. Where?

A. That came from Mr. Barrylees, and I gave it to Mr. Ricci.

The Court—You will have to prove his familiarity with Mr. Holly's writing. 30

Mr. Lyon—I will prove it by some other witness.

Mr. Lyon—I call on the other side to produce the letter which he has already read from in the handwriting of Mr. Holly.

Mr. Stricker—I have a letter here from Mr. Holly, which I cheerfully hand to you.

The Court—Now you will have to put that in evidence.

Mr. Lyon—This is another letter. You offer that.

The Court—Judge Lyon, you called for that letter. Now, the rule is you must offer it in evidence.

Mr. Lyon—I do offer it.

Mr. Stricker—I did not object.

10

(Letter marked Exhibit P2.)

(Mr. Lyon reads letter dated Nov. 6, 1905, to jury.)

Mr. Lyon—Now, I make this offer, if Your Honor please, of the letter just referred to by a comparison of the handwritings. It is the letter I just read, and this is the letter I offered.

Mr. Stricker—I object on the ground that it is a copy. It is not an original. It is marked a copy.

20

Mr. Lyon—It seems to me, if Your Honor please, in a case of this sort, where the thing is apparent on its face, where it is written on the letterhead of Henry H. Holly, in apparently the handwriting of another letter by the same man, the Court would concede it.

30

The Court—You have called for a letter purporting to be signed by Henry H. Holly, which letter was in the custody of the defendant. Upon that call such letter was produced and you offered it. The fact that the letter was produced on such call, it does not necessarily follow that that letter was written by Henry H. Holly.

Mr. Lyon—No, sir; but it is addressed to the attorney of the other side, by whom it was handed to me.

The Court—It is not sufficiently proven to make it the basis of a comparison. Can't you prove the letter in some other way?

Mr. Lyon—I can prove it by another witness.
The Court—As to the objection of its being a copy, I will meet that when the letter is offered after proof.

EMIL KOYEN, sworn.

Direct examination.

By Mr. Lyon:

Q. Mr. Koyen, where do you reside?

A. Perth Amboy.

10

Q. What is your business?

A. Carpenter and builder.

Q. How long have you been there in that business?

A. Seventeen years.

Q. Do you frequently work in connection with Mr. Ostergard?

A. I do.

Q. What connection did you have with the building of this church?

A. Sub-contractor.

20

Q. What part of the work did you do?

A. Everything except the mason work.

Q. You took that under contract with Mr. Ostergard?

A. Yes, sir.

Q. And did you do the work as called for in the plans and specifications, a copy of which have been offered here this morning?

A. Yes, with the exceptions that was ordered by the architect.

30

Q. Did you do the work under the contract for Mr. Ostergard which was called for in the specifications, and also any extra work which the church committee or the architect in charge ordered under your contract?

A. I did.

(Objected to on the ground that any testimony as to anything ordered by the architect is irrelevant. Objection overruled.)

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

THEO. B. BOORAEM, [L. s.]
Judge.

Q. What was the course observed in this particular work with reference to the ordering by the committee and the architect of extra work within the scope of
10 your contract?

(Objected to on the grounds heretofore stated. Objection overruled.)

A. Why, although I am well aware that the specifications called for everything to be done in writing, there never was anything of the extras done in writing here.

Q. I don't mean that. I mean with reference to the dealing with you or Mr. Ostergard as to the ordering of these items?

A. Why, either the committee got together and or
20 dered them directly from me, told me about certain things had to be done, and I went ahead and done it.

Q. Why did they go to you instead of going to Mr. Ostergard?

A. Well, I suppose because I handled all the work outside the mason work; I had everything outside of that; and consequently, if there was anything wanted in different lines outside of the mason work, I suppose they got in the habit of coming to me for it because I had to have it done.

30 Q. If they had gone to Mr. Ostergard he would have simply to have come to you?

A. He would have to refer them to me or come to me himself.

Q. Now, Mr. Koyen, what do you know of anything about the location of the church on the lot?

A. I know this: they planned, as near as I understood it, to have that church set back from the street, and when they come to locate the church they found out

they had not room enough to do that, but they would have gone out on the sidewalk with their steps, consequently they lowered the church from the first position they intended to have it. They intended to have it terraced on Division street the same as in front of the rectory. That was their intention.

Q. I show you one of the photographs. Is that the terrace that you refer to?

A. Yes, sir.

Q. That is the rectory, I take it?

10

A. Yes, sir.

Q. Connected with the church?

A. Yes, sir.

Q. And they intended to have a terrace around the church level with that around the rectory?

A. Yes, sir; that is their intention.

Q. Why didn't they have that terrace around the church?

A. Because the church and the steps of the church would have covered the whole sidewalk and blocked 20 the street.

Q. You mean if the church was up higher on the terrace the terrace and the steps would have thrown it down on the sidewalk?

A. Would have covered the whole sidewalk.

Q. What did they find?

A. They found they didn't have room enough, and consequently they had to drop down to the street level, taking the Division street level of course.

Q. Had the church been built on a terrace as originally intended and had set on that terrace, how many 30 steps would have been required? Would they have been as shown on the plans?

A. Why, the terrace would require about four more steps.

Q. I am not speaking of the terrace steps; I am speaking of the steps connected with the church. speaking of the steps connected with the church.

A. I only say if that is the case the height of the terrace would require four steps, and that the drop in the grade on Broad street would have evidently taken two more than what shows on this plan, which would be six steps more than what is on there.

Q. That is not what I mean. The church, now that has six steps connected with the church; had the church been built as originally intended on top of the terrace, how many steps would there have been connected with
10 the church only, not terraced steps?

A. If they were all in one step, the whole thing?

Q. No, I don't say that. I don't mean that.

A. The height of the terrace would require four more steps.

Q. I didn't ask you about the steps connected with the terrace. The steps connected with the church, would they have been as on this plan or not?

A. No, sir; it would not. It would require four more steps to it than what is there.

20

By the Court.

Q. That is, to the church itself?

A. Yes.

By Mr. Lyon.

Q. No.

A. They couldn't carry the terrace on Broad street; that would have been impossible in any way. They couldn't have done that.

30 Q. That is not what I am asking you. Suppose this church had been built upon a terrace all the way around, on a bank?

A. Yes.

Q. Now, I am not speaking about terrace steps, steps to go up on the terrace, up to the church. How many steps would have been connected with the church?

A. What is that on the plan there? I didn't catch your meaning.

Q. Well, now, what was the result of the digging of the terrace away?

A. The result was that the church was put that much lower on the ground.

Q. So that it became necessary, as I take it, to build other steps to connect from the church steps down to the grade?

A. Yes.

Q. You observed that, did you?

A. Certainly.

10

Q. Mr. Koyen, was any extra work done on the pew ends?

A. Yes, sir.

Q. What?

A. Why, I had a salesman from the American School Furniture Company meet me and three of the committee and the dominie in the parsonage, and he was there with samples; he showed them samples called for in the specifications by number and catalogue. He had one more sample which showed a panel end 20 which the committee thought they would rather have than the one called for in the specifications. He said, "Gentlemen, they will cost you more money." "Well," they say, "how much more?" Well, I gave it to them there, \$25 extra for them panel ends on the pew ends. for there was over 100 of them, and that was accepted by the committee. They decided to have those panel ends and not the one called for in the specification.

Q. And you told them there that it would cost \$25 30 more?

A. Yes, \$25.

Q. The next one is leaded glass and the inscription; what about that?

A. Well, the committee and the pastor ordered me to have the inscription of several members put on each window in the church. I was handed a list of names by the pastor of the inscription to go on each window,

with the exception of three windows which they didn't have any names for. I suppose it was a donation from the members and they wanted to have their own names, and the three windows, they didn't have any names, and there was also a double window in the sacristy, that is on the Division street elevation.

By the Court.

Q. Did they agree on any particular sum to be paid
10 for that leaded glass?

A. No; I couldn't give it; I didn't know it.

Q. What did it cost, as a matter of fact?

A. Well, there is an itemized bill there for it.

Q. Better prove it.

A. \$78.65; that is, the leaded glass and inscription. That is one double hung window in the sacristy, one transom light over the front entrance door and all the inscriptions.

20 By Mr. Lyon.

Q. Is that what those items cost?

A. Yes, sir.

Q. And you charged them just what they cost?

A. Yes, sir.

Q. The next is a circle sash on a front gable, \$5?

A. That was ordered by the committee because they wanted that to correspond with the rest of the glass, and the sash had to be discarded.

Q. Have you charged them just what it cost?

30 A. Yes, sir.

Q. The next item, hanging the bells as agreed, \$110?

A. I don't think the committee will dispute that, because that was an agreement made straight out with the committee that they were to pay \$110 for the hanging of bell.

Q. Agreed with you?

A. Yes, sir.

Q. Who were on the committee that agreed?

A. There was Kozub and I think Andrew Dillyman; I don't know whether Mr. Zbojan was there, but I know Kozub and Dillyman and I think the janitor of the church was present.

Q. How many bells were there?

Mr. Stricker—We won't dispute the item of the bells.

Q. With reference to making the basement window double, what about them?

A. The specification called for it to be in one sash 10 and be hung at the top and swing up, and I called his attention to it that they were too big for that purpose; I called the architect's attention to it.

Q. Which architect?

A. Mr. Ricci. And he said, "What do you suggest?" I said, "I suggest that you cut them in the middle and swing them on the side," and he said, "All right; we will do that way."

Q. And you did it?

A. Yes, sir. 20

Q. Is that what it cost, \$12?

A. Yes, sir.

Q. The next item is plate on aisle in rear walls, \$60?

A. Plate on walls?

Q. Yes.

A. That is on the whole building, all around.

Q. Well, did you put them on?

A. Yes, sir.

Q. Was that called for in the plans and specifications?

A. No, sir. 30

Q. Who asked you to do that?

A. Mr. Ricci gave me authority to put that on.

Q. What did that cost?

A. About \$60, but there was a special understanding about that at that time.

Mr. Stricker—I suppose my objection to what Mr. Ricci ordered is still existing.

The Court—Yes.

Q. Do you know anything about making the front wall eight inches thicker than called for?

A. I know it was done; that is all I know about it.

Q. That was mason work?

A. Yes, sir.

Q. Didn't come under your department?

A. No, sir.

Q. Putting in two closets, \$25?

10 A. Mr. Zbojan and the rector were the ones that asked me to put two closets in there, and they gave me the sizes.

Q. Who were the men?

A. Zbojan.

Q. One of the committee?

A. Yes, sir.

Q. Is that what it cost?

A. Yes, sir.

Q. You charged them just what it cost, \$25?

20 A. Yes, sir.

Q. Do you know anything about laying face brick?

A. No; I only know the specifications called for common brick on the east side.

Q. Do you know any thing about the rubbed window sills?

A. Only they were put in, that is all.

Q. Now, Mr. Koyen, you have been a contractor and builder for a good many years in Perth Amboy, have you?

30 A. Yes; seventeen years.

Q. You have also taken contracts for the erection of buildings other than sub-contracts?

A. Yes, sir.

Q. A good many of them?

A. Yes, sir.

Q. Will you say whether or not this church was completed according to the plans and specifications?

A. Yes, sir.

Q. Was it so completed?

A. Yes, sir.

Q. With the exceptions, of course, that were agreed upon?

A. With the few exceptions that were agreed upon.

Q. That have been stated?

A. Yes, sir.

Adjourned till 2:30 P. M.

10

AFTERNOON SESSION, 2 P. M.

EMIL KOYEN, resumed.

By Mr. Lyon.

Q. Mr. Koyen, with reference to the tower, there has been some controversy about that. Will you please state what about that?

A. Yes, sir. I think I could do it more readily if you will let me have the set of plans. (Plans produced 20 and handed witness.) At the time of the framing of that tower, which I superintended myself, I called the architect, Mr. Ricci, as we termed him, the architect—he is in the architect's place—and called his attention to one fact, and that is a tower of that shape, which actually, we say in our carpenter language, we say it looks like a turnip placed top down—that is, the shape of the tower; it is a kind of shape, I suppose, which belongs with a denomination of the church. Now, the specifications calls for sheathing to the tower, with 30 one-inch boards. Now, every carpenter knows you can't sheath a tower of that shape with one-inch boards; it is an utter impossibility; and I called his attention to another thing in there, and that was it only calls for one-inch ribs on which to fit that sheathing; that is another impossibility, because one-inch ribs cannot support a tower of that kind; it can't do it. To make the ribs of a tower of that kind you have got to

take two thicknesses of stuff, cut them in the shape of a tower, and lap them so you get two thicknesses and get a right splice on it. So I suggested to Mr. Ricci that the tower be made with two-inch ribs placed close together and on that form the copper directly without the sheathing. That would give them enough additional covering in the ribs to support the copper, and it would give them another advantage, which I did not know before that, that my attention was called by the
 10 metal man; that is, going to put the copper on. He says to me—

(Objected to.)

The Court—No.

A. At any rate, copper put on a tower of that kind has got to be riveted, not nailed; if you put sheathing on a tower of that kind you can't get to work on the inside and put the rivet through and put a washer through and clinch that rivet. I told Mr. Ricci that,
 20 and he said he would see the architect about it, and he did, and he brought word to me, or instructed me, to frame the way I suggested, with two-inch ribs, omitting the sheathing on the dome and riveting the copper. You can put copper on a straight surface and nail it down, but you can't put it on a crooked surface and make the nail hold; they won't hold; but when you get a rivet through, get a head on one side and the washer on the other, it can't get away; it is there to stay, and that is the way all works of that kind is put up, and
 30 it is put up by most of the well-known firms around this section—Thorn, of Philadelphia; and that is the whole history of that tower.

Q. Mr. Koyen, you had no direct contract with the church yourself, did you?

A. No, sir.

Q. Your contract was with Mr. Ostergard?

A. Yes, sir.

Q. And the committee knew that fact?

A. Yes, sir.

Q. And the architect?

A. Yes, sir.

Q. These extra things they asked you to do, you were to do them and charge Mr. Ostergard in the regular way?

A. Certainly.

Cross-examination.

By Mr. Stricker.

Q. Now, Mr. Koyen, did the plans show a partition 10
in the cellar there?

A. Yes, sir.

Q. Was it put in?

A. No, sir.

Q. Did you have any conversation with Mr. Zbojan
in reference to that tower?

A. Not that I remember.

Q. Didn't he insist that that tower should be con-
structed in the manner specified; that is, to be support- 20
by boards inside?

A. I don't recall of having any conversation with
Mr. Zbojan about that tower.

Q. And didn't you tell him that in order to carry out
the drawings and specifications it would be necessary
for you to boil the wood, to steam it, so that you could
get it in that shape?

A. No, sir; because I would not be fool enough to
do that.

Q. You deny that you ever had such a conversation?

A. Yes; I certainly do.

Q. Then you don't know whether you spoke to him
about it or not? 30

A. I am positive.

Q. Didn't you just tell us that you wouldn't say you
didn't have some conversation with him in regard to
that tower?

A. Well, this committee. He may, with other mem-
bers of the committee, have seen me.

Q. Either alone or with the committee?

A. That I am not positive of.

Q. Now, as to this extra paneling on the pew ends; who agreed to pay you \$25 for them?

A. The committee that was present in the rectory with the rector the night the agent was there.

Q. Who do you mean?

A. Mr. Kozub was one, and Mr. Dillyman was there and Zbojan was there for one, that I know.

10 Q. They gave you the order for that?

A. Yes; told me to proceed.

Q. Who made the agreement with you regarding the extra leaded glass for \$78.65?

A. There was no agreement; I was ordered to do it.

Q. By whom?

A. By the committee and the pastor present, and I was furnished with a list by the pastor of the inscriptions to go on the windows.

20 Q. What extra lettered glass was there required there?

A. One pair of sash in the sacristy, one transom over the front door, five or six feet wide, and one circular window in the gable.

Q. What became of the glass was in there that that replaced?

A. That is in my shop at the present time.

Q. Make any allowance for it?

30 A. No, sir; I told them at the time I wouldn't make them a five cent allowance for it; I would be glad if they would take it.

Q. Who instructed you to make the basement windows double?

A. Mr. Ricci.

Q. Did you have any conversation with any one with reference to the plate on the aisle in the rear walls?

A. Yes; Mr. Ricci and Mr. Holly.

Q. The committee had nothing to do with that, did they?

A. No; that is, not to my knowledge. They might have had conversations with Mr. Ricci.

Q. No, I mean with you?

A. No.

Q. Why do you say that that partition was not put in the cellar?

A. Because the specifications state particularly on the first page or addendum to the specifications, that all finished work to be omitted in the basement with certain exceptions. 10

Q. What were those exceptions?

A. The two vestibules and the toilets. That is all finished.

Q. Did you have anything to do with the filing of this contract?

A. No, sir.

Q. The window butts in the cellar were to be bronzed, weren't they?

A. According to the specifications, not as changed, no. 20

Q. Who changed them?

A. The addendum there on the front page says everything should be unfinished, consequently that cuts out the bronzed butts.

Q. Was the lightning rod to be omitted?

A. Yes by special agreement.

Q. Who made the agreement?

A. Mr. Holly and Mr. Ricci. That was to be offset with the wall plate.

Q. Who ordered the altar platform omitted? 30

A. Why, I had a conversation with Mr. Ricci and in that we concluded that that really belonged to the altar, consequently it would be put in. However, I said afterwards that if they decided that that belonged in my contract I would be willing to put that in or allow them for it.

Q. Was it ever decided?

A. No, sir.

Q. Did you put it in?

A. No, sir.

Q. Make any allowance for it?

A. No, sir.

Mr. Lyon—That is what we allowed for this morning.

A. I told Mr. Lyon, our counsel, what it was worth.

The Court—There was a statement that there was an allowance of certain things—\$20, \$88 and \$47.

10

Mr. Lyon—This is the \$20 item.

ELOIZE RICCI, sworn.

Direct examination.

By Mr. Lyon.

Q. Mr. Ricci, where do you live?

A. Perth Amboy.

Q. How long have you lived there?

A. About 17 or 18 years.

20 Q. What is your business?

A. Foreman of modeling department at Perth Amboy Terra Cotta Company, or superintendent of the modeling department of the Perth Amboy Terra Cotta Company.

Q. Are you an architect by profession?

A. Well, I am not exactly an architect, but I could practice if I wanted to. I do once in awhile some building.

30 Q. Are you the person named in this agreement and specification as the superintendent of the work on this church?

A. I am.

Q. Did you actually superintend the work?

A. I did; yes, sir.

Q. How often were you there while the work was going on?

A. At least three times a day.

Q. Mr. Ricci, what about the situation of the church

on the lot. Can you tell? When you go up to the church on the lot, what did you find with reference to the size of the lot and to whether the church would go on?

A. When we asked the size of the lot we found they only had a little over 100 feet and the building itself is 100 feet against the rectory, and when we went to set the foundation we found the building is 8 feet over, putting the platform and steps into the street.

Q. Do you remember drawing the plans and specifications? 10

A. Yes, sir.

Q. What part did you do?

A. Well, I done first the sketching, and then when these plans were made I carried off both sides of detail as to completion of the church.

Q. How was it intended at the time these plans were drawn and at the time the contract was signed, with reference to a terrace around the church?

A. Well, it was an understanding with the committee to have the terrace in front of the church level with the rectory. 20

Q. What caused you to abandon that idea?

A. On account we didn't have enough ground, and we had to raise the church or else not go on the sidewalk; we had no more than 102 feet and the church was 100 feet.

Q. What would have been the result if you had built the church on the terrace as originally agreed in reference to the front steps? 30

A. Well, it would have had a good many more steps than go in the street.

Q. It would have been necessary according to the terrace, would it?

A. According to the terrace and the plan.

Q. How many steps, then, would there have been in front of the church connected with the church down to the top of the terrace?

A. Two steps.

Q. Well, now I show you the plans. How many does that show?

A. Four steps.

Q. Well, then, how many would it have been necessary in connection with the church, down to the top of the terrace?

A. There wouldn't be any necessary then. It would be right as it then called for.

10 Q. How many is it?

A. Four, as it is.

Q. I show you a photograph which shows the terrace a little plainer than the other one's. Is that the terrace around the rectory?

A. Yes, sir.

Q. That was intended to be continued?

A. Yes, sir.

(Photograph offered in evidence and marked Exhibit P3.)

20 Q. Mr. Ricci, what about the construction of the tower. I understand the plans and specifications called for sheathing. That I believed was changed, was it not?

A. Yes, sir.

Q. At whose direction was it changed?

A. Well, it was at my direction.

Q. How did you come to direct it?

30 A. Well, I was superintending the church and I was to build the church proper, and it was necessary to build as it is built, to put two-inch rib, and to leave out the sheathing, else it could not be done. It could not be done for the benefit of the copper man, as I spoke to him.

Q. Why could not the sheathing be put over the tower?

A. Impossible, because of the circumference of that tower; you couldn't do it; no builder could do it; nobody could do it.

Q. Why not?

A. Because it is quite impossible to do it. There is no carpenter or builder could do it.

Q. How was the copper fastened?

A. Well, it fitted the sheathing around the tower. The copper men had to nail their copper there. This way it was done we give this church a double rib, which is twice as good as that, and then the copper man had the chance to rivet his metal to make the job proper.

10

Q. Could he have done that—could he have riveted the copper if there had been the other?

A. Couldn't do so. It had to be torn out by the copper man. The copper men had no chance to rivet or nail inside. They would have a chance for the water to work on the nail. That was the proper way to do. That is simply a mistake of the architect that drew the plans for me, and it is done the proper way. Any mechanic will tell you so.

Q. Do you know who directed the two extra steps to be placed in front of the church? 20

A. Yes, sir.

Q. Who did?

A. When we come to the first step as the plan called for, the committee has raised the church and they have no room for it, but required two other steps. So I talked with the mason and also talked, I believed, with the stone men, and they agreed to have two more steps put on and pay the expense. That was the agreement. I was there myself. I guess there is nothing to contradict that. 30

Q. Is \$56 a reasonable price for these two additional steps?

A. Well, I think it is. I think it is the cost price from the stone man that is present here now.

Q. Were you present at the conference in the rectory when the committee directed Mr. Koyen to change the pew ends—the panel?

A. I was.

Q. What was done there?

A. When the furniture man came he brought in a sample, a full-sized sample of a pew, and the specification called for a plain one. They didn't like that, and they liked the panel better and they changed, paying the difference to Mr. Koyen as sub-contractor.

Q. What about the leaded glass on inscription; do you know about that?

10 A. I do; yes, sir. The front entrance door, the chancel, has a window about four feet by seven, I believe, and it calls for plain glass; that is right in the drawings. That is a plain glass. Leaded glass would look very bad. That was ordered by the committee and approved by me and asked Mr. Koyen to build it, to give leaded glass in that chancel, they liked it better, and also put the window.

Q. How about the inscription; do you know anything about those?

20 A. The inscription called for leaded glass, colored; I was not called for the name of the committee or each family, but the committee themselves—each family that give the window they agreed to pay the difference to Mr. Koyen, whatever the leaded glass man's price is. He didn't give no price, because he couldn't do it.

Q. Was that put in?

A. It was put in; yes, sir.

Q. One circle sash for front gable?

30 A. That is just one up here. That is also called for plain glass, the specification and drawing. The committee didn't like—four of them wanted the leaded glass, and they agreed to pay the difference. I think \$5 is very cheap for the leaded glass like that.

Q. How about making the basement window double?

A. There is some window in the sacristy, also leaded glass.

Q. That is included in the \$78.65? What about that?

A. All in the sacristy calls for plain glass and the specifications and drawing. Also they changed and to pay the difference of leaded glass. That is in the contract.

Q. Was \$78.65 a reasonable price for the changing of that and the window in the sacristy and leaded glass and the inscription?

A. Yes; very.

Q. What about the changing of the windows in the basement?

10

A. The basement called for, the plan called for three feet by two, something like that, and we made the window in the cellar four feet six. It is on the plan in lead pencil already changed. The committee wanted to have more light in the cellar. They put on another window.

Q. Was that directed by the committee?

A. That was directed by the committee to have more light, because I was present and I agreed that it was better. The carpenter also agreed to make the change.

20

Q. Now, there was a place put on the wall that wasn't called for in the plans and specification. Was that put on?

A. At the time we got to the top of the building, the wall was bare, 8-inch wall at the height of 70 feet or more, and you couldn't fasten a roof or beam on top of the brick wall. How could you fasten it? I talked to the committee and I went to the architect myself and I told him that he forgot about the plate on the top of the wall and it is necessary, and he said to me, "Well, these people wanted it very cheap; I couldn't put everything in without money, but if the builder agrees to do it and pay for it, it would be a good thing to do;" and I said to him we leave off the lightning rod and put around the church this double plate. I went to New York purposely for this plate, and we thought it was a good thing to have it instead of a

30

lightning rod, and this committee agreed with me to leave the lightning rod off and put this plate on, because I think the doubling of that is worth as much as the lightning rod, and that was agreed by them and also myself and not otherwise.

By the Court:

Q. In that case, do you claim the \$60?

A. Yes.

10 Mr. Lyon—We gave credit for the lightning rod.

The Court—You gave credit for \$47?

Mr. Lyon—Yes, sir.

By Mr. Lyon:

Q. Do you know whether or not the front wall was made 8 inches thicker than called for in the plan?

A. Yes, sir; the front wall under the tower is made thicker because at that time there was no talk about
20 bells up there, as the expense was too high and they didn't want to go too high with the price; but at the time it was built they wanted to put the heavy bell, and the wall was not heavy enough, and Mr. Ostergard, as a man that would do what is right, he simply put this 8 inches and 10 inches, in some places a foot thicker than it should be, and he put it on. That was simply to make a substantial job.

Q. Now, were there closets put in this basement?

A. That is something the committee—I was not
30 there to direct Mr. Koyen or the carpenter. There was something dropped to put the two closets. I had nothing to do with it, but they are there now.

Q. You know they are there?

A. Yes, sir.

Q. And they were not called for in the plans?

A. No, sir.

Q. How about the face brick that was not called for?

A. The church called for front on Braod street and Division of face brick furnished by the owner; the back and the easterly elevation called for rough brick, the regular common bric. When they come to build the church they thought it too bad to have two sides of common brick and two of glazed brick, and they agreed to get the glazed brick and have the whole church look the same. Mr. Ostergard agreed to do the same and was willing to set them brick. That is all about it.

10

Q. I understand that rubbed window sills were put in in place of rough ones?

A. Two sides called for rough brick and the plan called for rough stone. When they come to put the face brick the committee like to have this same stone and they changed it.

Q. Now, Mr. Ricci, you were the superintendent or architect of this building. Was this building constructed according to the plans and specifications?

A. Yes, sir.

20

Q. And do you consider the building finished?

A. Yes, sir.

Q. How long have you known Mr. Holly, the architect?

A. Well, probably ten years—a good many years; I don't remember.

Q. Ever do work for him?

A. Yes, I have done work for him.

Q. Ever had any correspondence with him?

A. Well, five or six years ago I done all the work for the Central Ordained Church in New York, a larger church, for him.

30

Q. Have you ever seen him write?

A. Himself?

Q. Yes.

A. Been with him probably a hundred times.

Q. Do you know his handwriting?

A. Very well; yes.

Q. I show you a letter on the letterhead of Henry H. Holly, architect, dated September 11, 1905, addressed to Mr. John Barrylees. Is that in Henry H. Holly's copy. Have you ever seen that before?

A. That letter was addressed to me.

Q. Where did you get it?

A. By mail from him; sent by him to me.

Q. Is that Mr. Holly's handwriting?

A. Yes, sir.

10 Q. Who is Mr. John Barrylees right down there, now?

A. He is president.

Q. What connection with the church?

A. He was head of the committee of the church, right down there (indicating).

Mr. Lyon—I offer the letter.

(Objected to as being a copy, and no foundation having been laid for secondary evidence, it is inadmissible, and that it is irrelevant. Objection sustained. Exception to plaintiff.)

20 Q. Well, I will ask you this further question, Why was this letter sent to you?

(Objected to, on the ground that the letter having been overruled, this question cannot be asked. Question admitted.)

Q. Why was this letter sent?

A. This letter was sent from Mr. Holly the day after Mr. Holly was at the church with the committee, also with Mr. Barrylees, as he is the president of the
30 congregation; he was also one of the committee of the congregation present, I think.

Mr. Stricker—I object to what he thinks.

The Court—Yes; that will go out.

A. Mr. Holly was a good deal doing with Mr. Barrylees because he was one of the committee, and next day I received this letter sent Mr. Barrylees, as was his approval, as he visited the church that Saturday with

the committee. He was passing all the work except a few different things which the committee would agree.

By Mr. Stricker :

Q. Were you there?

A. Yes, I was there.

Q. At the meeting?

A. Yes. No, not the meeting. Mr. Holly was called in Perth Amboy that Saturday afternoon.

Q. You were there?

A. Yes, I was there.

10

By Mr. Lyon :

Q. What was done at that meeting at the church with the committee and Mr. Holly and you on that Saturday afternoon?

A. Mr. Holly came there to see the final finish of the church with the committee. and they brought out about ten points that was not quite right according to the committee, and the committee with Mr. Holly and Mr. Barrylees agreed with Mr. Holly that if Mr. Ostergard would finish those few points they would call the job complete. Mr. Ostergard and Mr. Koyen went and completed those few different things. If you want I will mention what they are.

The Court—You may do so.

A. I will; yes, sir.

Q. I understand Mr. Ostergard and Mr. Koyen were there?

A. One of the two were there, I don't know which one. I think Mr. Koyen was not there. Then Mr. Ostergard was there as one of the contractors with the committee and Mr. Barrylees. They went around and they found some iron work up in the tower not painted. They said if that would be painted, and Mr. Ostergard and the architect and I agreed to paint it. We went also down in the basement and they found a piece of wood was rotten or something, very poor, and Mr.

20
30

Ostergard agreed and changed that piece. They went on over the heater, and they found the pipe was not iron, or what they call softer steel—it was galvanized iron—and they said if he agreed to change that they would call it square, and he had the plumber to come in and change that; and there was some more things. Also of the closet, that was the door not swinging good on that, so that was changed and that was finished, and they said they would call that complete. That was
 10 in the presence of myself and Mr. Barrylees and Mr. Holly, and that letter was sent the following week.

Q. Now, were all those things done?

A. All those things were done. I don't think the committee will deny that.

The Court—You offer the letter, of course, Mr. Lyon. It still remains overruled.

Mr. Lyon—I have not offered the letter. This later examination was not for this purpose.

20 Cross-examination.

By Mr. Stricker:

Q. Now, Mr. Ricci, do you consider that building finished?

A. I do; yes, sir.

Q. And do you agree or disagree with Mr. Holly as to his ideas?

A. Well, in some things I probably disagree.

Q. Now, if Mr. Holly says that the ceiling ought to be plastered, you disagree with him?

30 A. I do; yes, sir.

Q. And if he says the tower, the sheathing in the dome is omitted, why, I suppose you disagree with him?

A. I do; yes, sir.

Q. And if the committee says that this grading should have been done on the entire lot to the curb levels, you disagree with them, too, don't you?

A. Well, yes; the grading was done according to the building that was put up.

Q. Was it done according to specifications?

A. Yes, sir.

Q. Are you sure about it?

A. Well, that was changed—the building was changed for it.

Q. Who changed it?

A. The committee.

Q. Who said anything about the grading?

10

A. The committee.

Q. Who to?

A. To me.

Q. When?

A. At the time of the digging, I suppose.

Q. How came they to tell you?

A. Well, by going over to start the work, found out the arrangement of the lot was insufficient, but you have to do something.

Q. You are familiar with the neighborhood?

20

A. Yes; very familiar.

Q. And the bank is highest there on the Broad street side about three and a half feet from the sidewalk?

A. Yes, sir.

Q. And that extends back about one hundred feet?

A. Yes, sir.

Q. Do you know anything about the price of excavating?

A. No; I guess not.

Q. Now, then, when that thing was changed and that excavation was not made, no matter for what reason, did you ask for any allowance?

30

A. I don't say that called for to be excavated.

Q. Now, let's see. Do you know how to read English?

A. A little bit; yes, sir.

Q. Understand it?

A. Yes, sir.

- Q. This says, "Excavate the entire lot to the curb level?"
- A. Exactly.
- Q. What does it mean in English?
- A. Mean the curb.
- Q. Was that excavated?
- A. Now, I will explain—
- Q. No, you won't. Was it excavated?
- A. Yes, sir.
- 10 Q. It was excavated to the curb level?
- A. Exactly.
- Q. It is excavated now?
- A. Yes, sir.
- Q. Will you show me where the curb is on this picture?
- A. Well, the picture does not give enough curb to find the curb there.
- Q. Doesn't it?
- A. No, sir.
- 20 Q. That doesn't show the curb there?
- A. No, sir.
- Q. Can you tell where the street stops and sidewalk begins?
- A. No; that wasn't at that time—
- Q. No, now. Isn't that the curb there?
- A. No; the curb is in the other picture. I will show you how it is.
- Q. All right; take the other picture. Is there a curb there?
- 30 A. Here is curb right in this elevation. I work by this and I know by this.
- Q. Do you see any curb there, Mr. Ricci?
- A. Well, there was one right there. I don't know whether it don't show us.
- Q. Do you see a bank of dirt up here?
- A. If you go down here you will find level with the curb.
- Q. Do you see this bank of dirt here?

A. Yes, sir.

Q. Is that on the level with the curb?

A. Not very plain.

Q. Let's get this other view. Assume now that I am giving you the proper hypothesis, that this is the curb there, right there?

A. No.

Q. Isn't this the curb here?

A. The curb is up here.

Q. Doesn't it continue down here?

10

A. Yes, sir.

Q. Is this bank of dirt on the level with the curb?

A. This is soil, or what you call it, was grade.

Q. I am not speaking about any soil.

A. I don't know anything about the curb.

Q. Then you can't answer my question.

Mr. Lyon—I think the witness ought to be allowed to explain.

The Court—You can give him an opportunity on re direct examination.

20

Q. Did you as the architect of this Congregation, ask for any allowances in this thing?

A. Because there ain't any allowances.

Q. There isn't any allowance?

A. No, sir.

Q. Did you have any understanding with them as to the substitution of this rib work instead of the sheathing?

A. No, sir. All this thing came up really not at the time?

30

Q. You didn't do it at the time, did you; that is, you did not ask—you did not think to ask for any allowance?

A. Not at that time. The contractor set a double rib for the sheathing—that has been some time ago—and there ought to be an allowance when a man do one thing for another better than the job.

Q. Let me ask you another thing; do you mean to

tell me that it would have been impossible to build a frame work in that shape inside there?

A. Impossible.

Q. Impossible to do it?

A. Impossible.

Q. By the way, when you were engaged by these people—

A. Not by the people, but by the architect.

10 Q. When you were employed by the architect, you were employed to superintend the construction of this building, weren't you?

A. Yes, sir.

Q. And that was all?

A. The specifications tells.

Q. Your duties under your contract of employ or whatever it was, specified that Mr. Holly was to superintend this work according to the plans and specifications, isn't it?

A. Well, exactly.

20 Q. And nobody ever came around there from the committee and asked you to do any more or less than Mr. Holly did, did they?

A. Everything what I do there was first with the permission of the committee.

Q. But I mean beyond what Mr. Holly told you that you were to do, the committee did not impose you with any more duties or detract from them?

A. Mr. Holly didn't tell me to do anything. The contract and specifications told me all.

30 Q. Your understanding, then, was that you were to represent Mr. Holly in the superintending of the work according to those specifications and plans?

A. Correct.

Q. That is correct, isn't it?

A. Yes, sir.

Q. Did you, as the superintending architect there, make any effort to ascertain the grade there?

A. As superintendent of the building. As I under-

stand the specifications and drawings, grade and meet their demands to grade around the church the same as the rectory now; it don't call anything else, but it is done now. If it call for any grading I would have compelled the contractor to do so.

Q. Who said anything about raising the church there?

A. The committee.

Q. Who did they say it to?

A. Well, they was talking to Mr. Martin Lamson, 10
the man who started digging, I believe, and Mr. Ostergard.

Q. Did you alter the plans and specifications then, making any changes in writing?

A. No.

Q. This extra work that you say was done here, did you make any agreement with the contractor on behalf of these people specifying the price?

A. Depend which contractor now.

Q. I don't know which one you refer to.

20

A. I mean which part of the contract.

Q. Any part of it. Here are two bills of items here, as, for instance, the extra front steps of bluestone.

A. This was ordered, as I explained a while ago, by the committee.

Q. The committee ordered them?

A. The committee with me and the mason, yes.

Q. And the leaded glass and inscriptions, you say that there is different people that had given these windows. I take it that they are memorial windows, aren't 30
they?

A. I suppose so.

Q. When that charge for \$78.65 was made, you say an agreement was made to this effect with the different families who had given these windows that they pay that?

A. No.

Q. Didn't you testify so?

A. I did not. I will say the same thing again. The committee, I am talking about, one of the committee, not the family, because I only know this committee here. They report that those windows are plain leaded glass, and they like to have each family with their name. I also was present when the pastor gave to the builder, Mr. Koyen, ten names, and I think there was fourteen windows, and on each window shall be placed such a name, and gives the name. I don't know who
 10 paid for it, either the congregation or the committee.

Q. Didn't you say that the understanding was that each family whose name was represented on these windows were going to pay for it?

A. They may pay it.

Q. Didn't you testify before that that was the agreement the committee made with Mr. Koyen?

A. No, sir.

Q. You say you did not so testify?

A. No.

20 Q. Now, that entire wall was not made 8 inches thicker, was it?

A. The rear wall inside, yes.

Q. You testified before that part of the front wall?

A. I said the side and the rear. The front is made in some places I think two feet—one foot six, and in some places two feet four.

Q. Was it made any thicker than the plans and specifications called for?

A. Yes, sir.

30 Q. Where?

A. They came down and measured the building. I think the committee itself measured it.

Q. Where?

A. The plans shows right here (indicating).

Q. Can't you show on the photograph?

A. The entire front.

Q. The entire front 8 inches thicker?

A. Yes; from there to there (indicating).

Q. Are you the man who designed the terra cotta?

A. I have; yes, sir.

Q. And did the terra cotta come out all right?

A. First rate; yes, sir.

Q. First rate?

A. I think so.

Q. They were made at the works of the Perth Am-
boy Terra Cotta Works?

A. Yes, sir.

Q. Where you are employed as the superintendent 10
of the modeling room?

A. Yes, sir.

Q. And you took more or less pride that that should
be a nice job?

A. I did; yes, sir.

Q. So that the terra cotta fitted perfectly?

A. Well, I think it is a nice-looking job.

Q. Did Mr. Ostergard have any trouble in placing
that terra cotta?

A. Well, that is a kind of a funny question, because 20
when a building goes up and has fancy architectural
work like this, I don't expect a mechanic or a mason is
an artist and he does his very best. Of course, he isn't
there every day and I look to see that the work was
done right. I suppose I superintended that part, to
do that fancy work, that is all.

Q. Well, isn't it a fact that whatever change in that
wall was made was from the fact that the terra cotta
was not properly set by him?

A. I don't know where this kind of talk come from. 30
It is something new to me.

Q. It is new to you?

A. Very new to me.

Q. And you don't know anything about it?

A. Certainly not.

Q. Why was it necessary to make those walls 8
inches thicker?

A. Well, men with common sense know that to put

up a 37-foot wall—I think that front there is—and a tower on top and three bells the size that went up there, require a little heavier wall, and as a builder, as a good manager, he give a little more wall. The committee know about that, how it come to get that.

Q. Then let's see. When the question of that wall came up, and Mr. Ostergard, in order to save his reputation as a builder, having discovered that the architect's plan was not a sufficient one; that is, it was not
10 strong enough, had a consultation with him, and as the result thereof he concluded to give them a wall 8 inches thicker; is that right?

A. Yes, sir.

Q. And you, as the supervising architect there, agreed to receive it?

A. Yes, sir.

Q. Did the committee say anything about it?

A. Everything was done in that job there—nothing was done only in the presence of the committee.

20 Q. Now, when this conversation between you and Ostergard took place, in which he agreed to give them a wall 8 inches bigger, which of the committee was present?

A. Well, three of them is here in front, right there (indicating).

Q. They were all there, eh;

A. Yes; probably some man there—Mr. Barrylees.

Q. Did you have anything to do with the preparation of these plans?

30 A. I made the first sketch; yes, sir.

Q. And did you have anything to do with the thicknesses of the walls?

A. No, sir.

Q. You knew there was some bells going up in that belfry, didn't you?

A. Well, I would like to explain.

Q. Did you or didn't you?

A. I must explain.

Q. No. You knew or you didn't know if there was some bells to go up there.

A. We wanted to give a thicker wall and tower, but the committee asked the price must not exceed sixteen thousand dollars—eighteen thousand dollars, and you can give the whole building for sixteen thousand dollars, and to keep the expenses down, and the building was approved by them according to the plans.

Q. Well, what bearing has that upon the 8-inch wall. Do you mean to say that because of the limit they put upon the price, that you could not give them a thicker wall? 10

A. Well, you know, you can build a 7-foot wall cheaper than you can a 8-foot wall.

Q. You know what the contract price was?

A. I know; certainly.

Q. How much?

A. It was called twenty thousand.

Q. Twenty-one thousand two hundred?

A. I suppose that is it. 20

Q. That is considerably more than sixteen, isn't it?

A. Well, that was at the time. They wouldn't go over.

Q. And therefore the thickness of that wall was not increased because of the lack of funds or the lack of amount that these people wanted to spend for the job, wasn't it?

A. That wall was increased by the demand of the people to put up such a bell, and the strain was too heavy for that wall. 30

Q. Isn't it a fact that Mr. Ostergard had his doubts as to whether or not that wall would stand the bells? Now that is so, isn't it?

A. Well, I suppose it was, but Mr. Ostergard is not an engineer.

Q. You are, aren't you?

A. No; I don't say I am.

Q. You know how heavy a wall ought to be built in order to carry certain weight, don't you?

A. This specification was made by an engineer in New York, good enough for Perth Amboy.

Q. Maybe?

A. It is a sure thing, and it was made the best way they could with no bell there, but when they come to put the bell up there they had a thicker wall.

10 Q. And Mr. Ostergard did that, of course, in order to save his reputation as a builder?

A. No; he did that because the weight of the bell would probably endanger the whole thing, and he done it.

Q. Because the bell would probably endanger that wall he made it 8 inches thicker?

A. I suppose so.

Q. Did you hear it?

A. Naturally. I repeat the same as I said a little while ago, and the committee.

20 Q. What committee?

A. Present here in the front, right here (indicating), Mr. Zbojan and Mr. Dillyman and Mr. Kozub.

Q. What was the agreement they made?

A. No agreement. They just made him do it.

Q. Did they say make it 8 inches thicker?

A. Make it heavy enough so as to stay up.

Q. How did Ostergard come to say he would give that to them?

30 A. Well, if he make a two feet eight inch wall, and he make it 12 or 18 inches, I suppose he said give it to them.

Q. Don't you know what he said?

A. No.

Q. Didn't you testify that he said he would give it to them?

A. I suppose he said himself he would give it to them.

Q. Did he say so?

A. He certainly say so.

By the Court:

Q. Were those bells that you speak of referred to in the original specifications?

A. No, sir.

Q. Do you know whether it was intended to put those bells in the tower when the specifications originally were drawn?

A. They came after.

10

By Mr. Stricker:

Q. Do you mean to tell us, Mr. Ricci, that there was to be a bell in that belfry?

A. I don't know whether the bell was supposed to be used or not. I am not a man belonging to the congregation. There was to be some kind of a bell. I believe you will find some letter the architect wrote that they wasn't to go over so many thousand pounds. I don't know how many it is, the weight should be not so much. At the time there was no such bell. That was the time the building was going up, because the family giving the bell—you know what happens when a building is going up—and that is what he would suggest himself, to make this wall thicker, so he told them that bell was too big at the present for that tower, now. The architect himself told this committee that that bell was too heavy now for that building.

20

Q. Did you have anything to do with the installation of the bells?

A. No; all outside of myself. They even didn't tell me.

30

Q. When you prepared the sketch, Mr. Ricci, you knew that that tower there, that a bell was going in, didn't you, of some kind?

A. Different sized bell.

Q. You figured on some kind of a bell?

A. On no bell.

Q. Did you ever make any sketches or drawings for a Greek Catholic church before?

A. No.

Q. Do you know anything about Greek Catholic churches?

A. I suppose I know a little.

Q. Did you ever hear of a Greek Catholic church without bells?

A. Well, you can put a bell a thousand pounds or 10 ten thousand pounds.

Q. So, when you figured on making your sketch or prepared your sketch, you knew that some kind of a bell was going to be there?

A. The bell was to be put up there according to the size of the building.

Q. Who told you that?

A. Common sense tells.

Q. How heavy is the bell that is in there?

A. Well, I didn't order the bell. I didn't know any- 20 thing about it.

Q. How much of a bell or what weight bell did you figure on when you made the sketch?

A. The engineer in New York figured that.

Q. I thought you consulted your common sense and that told you?

A. Well, that is another question now.

Q. That is the question now.

A. An architect as big as I am ought not to tell you something.

30 Q. When you prepared the sketch, how much of a bell did you figure on?

A. No bell.

Q. No bell at all?

A. No, sir.

Q. How large was the beil that arrived on the ground to be put in there?

A. I couldn't tell, because the committee done that thing on their own hook.

Q. When did the bells come on the ground there?

A. I don't know anything about it. I don't know anything about the bell.

Q. Was the bell on the ground when the wall was made 8 inches thicker?

A. Well, the bell wasn't on the ground, but the bell was getting ordered.

Q. Who ordered it?

A. The committee.

Q. It was going to be ordered?

10

A. Yes, sir.

Q. Was the weight given to you?

A. Well, yes.

Q. Who gave you the weight?

A. The bell company.

Q. How much did they tell you?

A. I have forgotten now

By the Court:

Q. When was this weight given you?

20

A. Just at the time the building was going on.

Q. After the building had been begun?

A. Yes; I don't remember now.

By Mr. Stricker:

Q. Did you have the weight of the bell when the building was begun?

A. I haven't anything to do with the bell.

Q. Did you have the weight of the bell when the building was begun?

30

A. Well, I suppose it was. I don't remember, because I can't remember everything.

Q. You don't know?

A. I don't remember.

Q. You say the building is done, do you?

A. As far as I know.

Q. Do you think it is done without this plastering in the cellar?

A. Yes, sir

Q. What is that?

A. Yes, sir.

Q. Then you don't agree with Mr. Holly on that?

A. No, sir; I don't.

Re-direct examination.

By Mr. Lyon:

Q. I show you the specifications in this case, the sec-
10 ond paragraph on the first page, which is the page
entitled "Memorandum to specifications for the
Church of St. John the Baptist," which reads: "The
basement will be left unfinished except the two toilet
rooms, vestibule and stairs to main floor, (and the
plastering of the ceiling) using wire lath) over the
boiler for a space of ten feet square) which will be
first finished as specified," and ask you what that
means?

A. That means that the plaster should not be in the
20 ceiling in the basement only 10 feet square over the
boiler. Also this at the time of the figuring, if I am
allowed to say—

Mr. Stricker—Did you do the figuring?

A. I was present with the people that did, these con-
tractors; I was present with the committee, and I in-
structed, myself with the committee, that the basement
should not be finished, because I had something to do
with the specifications.

Q. Now, in the changing of the tower, leaving out
30 the sheathing and putting in 2-inch ribs instead, or 1-
inch ribs, was that a more or less expensive job—
would it be more expensive to change it as it is now
or as the plans and specifications called for?

A. Well, when this thing come up, the double rib-
bing—one board—you couldn't cut the board in this
shape. any man will tell you that no man could cut the
board in this shape, an inch board. You can't brace it.

You must put two boards, and that would be a very poor job.

Q. Is it a better job than it was as the plans called for?

A. It is a substantial job now, otherwise it would be no good. It is what I call a good job.

Q. How often did Mr. Holly come down to see this work?

A. He came down three or four times.

Q. During the whole progress of the work? 10

A. About three times, I think something like that.
Plaintiff rests.

MOTION TO STRIKE OUT.

10 Mr. Stricker—If Your Honor please, I think we are entitled at this time to have stricken out from this claim *any* and *all items* which Mr. Ricci ordered where it does not appear that the committee assented to it or had anything to do with it. because, according to his own testimony he certainly had no agency, he had no powers, even those conferred upon him by the architect, to bind this corporation or this congregation for any extra work or to make any contracts for any alterations.

20 The Court—There is evidence tending to show that all these extra things were done, placed in the building, with the knowledge of the committee. There is also the testimony of Mr. Ricci that nothing was done by him ordering extra work excepting with the concurrence of the committee. I do not see that I can exclude any items of the claim at the present time. As a matter of law I shall have to refer it to the jury to determine unless something unforeseen develops in the case, whether Mr. Ricci was the agent of the church, and if so, whether he authorized the doing of this extra work and making these changes. I will deny your motion.
30 Exception.

THEO. B. BOCRAEM, [L. s.]
Judge.

DEFENDANT'S TESTIMONY.

MARTIN HANSON, sworn.

Direct examination.

By Mr. Stricker.

Q. Mr. Hanson, you are a contractor?

A. Yes, sir.

Q. You do excavating, do you?

A. I do; yes, occasionally.

10

Q. Sometime in June of this year were you called to the premises of the Greek Catholic Church in Perth Amboy?

A. I was; yes, sir.

Q. Are those premises excavated to the curb line there?

A. According to the curb, not now; no, sir.

Q. Did you make an estimate as to what it would cost out to the curb line?

A. I think I did.

Q. Well, you gave them an estimate and figured it out, didn't you, Mr. Hanson? 20

A. I kind of think I did; yes, sir.

Q. And you say this is your handwriting?

A. Yes; it is.

Q. And in this you say \$165 would excavate that, do you?

A. Well, three or four times over again.

Q. What's that?

A. Three or four times over again.

Q. What do you mean?

A. I could do it for about 25 per cent. of that amount stipulated there. 30

Q. Well, how much would it cost, Mr. Hanson?

A. Well, I can't say, because I didn't go out—I didn't waste any time on it, because I said before I arrived I didn't do it—

Q. Well, I don't quite understand you?

A. Because I don't care to do any work for that class of people. This is a free country and there is no Poland about it.

Mr. Stricker—Your Honor will perceive that there is a little diversity. I offer this anyhow.

Mr. Lyon—I object.

The Court—The offer is overruled. Let me see that? No, that is not admissible. You may ask the witness, of course, how much it would cost to do that work.

10 Mr. Stricker—Under the circumstances, I think that the witness borders on what is sometimes called a hostile witness. He was not so on the day when we had the inspection made and I didn't understand he was, but from his comments here this afternoon, I should judge that he doesn't come up to the usual standard. I will have to ask Your Honor—

The Court—I will allow you to treat this witness as a hostile witness and apply the same rules that are applied to a cross-examination, and of course I will require of Judge Lyon the usual restrictions in the examination in chief.

20 Q. Now, Mr. Hanson, you went to this place on June 12th, didn't you?

A. I went by there; yes.

Q. Didn't these gentlemen send for you?

A. Yes; one—I don't know who it was. I don't believe it was any of you. Was it any of you gentlemen up here when was in bed? There was one gentleman up there; I don't know who it was.

30 Q. What did you go up there for?

A. When I go by the next morning I went to look at it.

Q. You were asked to go and look?

A. Yes; I was; but not for the curb grade.

Q. What were you asked to do?

A. I was asked to grade on the east side of the church, the slope from the curb line to the bank.

Q. That is this bank here (indicating)?

A. That is the bank.

Q. And you gave them a figure, didn't you?

A. I did.

Q. And that figure was \$165, wasn't it?

A. Yes, sir.

Q. Was that a correct figure?

A. That is what satisfied me.

Q. How long have you been in business?

A. Well, about ten years. 10

Q. And when you give a man a figure in writing, why you mean what you say, don't you?

A. I do.

A. And you did then?

A. Certainly.

Cross-examination.

By Mr. Lyon.

Q. What did you mean, Mr. Hanson, when you said you could do the work for 25 per cent. of that? 20

A. It could be done for 25 per cent. of that if I didn't have much to do; but at the time I gave them this figure I couldn't do the work in any form. I didn't want the job at all.

Q. And 25 per cent. of that would be about \$40?

A. That is the extreme end of it. I tell you what I did. I figured at \$2 a yard and that is about 76 or 78 yards of dirt.

Q. You figured it at \$2?

A. Yes, sir. 30

Q. What is the ordinary price?

A. For general excavation I get 35 cents a yard.

Q. You figured about six times as much as the ordinary price?

A. Well, when I done excavating for Mr. Ostergard I could go right ahead with my horses and wagons at that time. Of course if I have to wheel it out on the street it

cost at least from 15 to 20 cents more a yard than what it would at that time.

Q. Well, granting it would cost 15 cents more, that would make 50 cents a yard; then 68 yards—call it 70—would be \$35. Fifty cents for 75 yards would be a fair price?

A. Would be about a nice price; yes.

Mr. Stricker—I renew the offer of this paper. It is fully identified.

10 The Court—He said he had made an offer of \$165.

WILLIAM T. C. CLADEK, sworn.

Direct examination.

By. Mr. Stricker.

Q. Mr. Cladek, what is your business?

A. Carpenter.

Q. Sometime this spring were you called to the premises at the Greek Catholic congregation?

A. Yes, sir.

20 Q. Did you examine the plans and specifications for that building?

A. I did; yes, sir.

Q. You say you examined the premises?

A. Yes, sir.

Q. Did you find any deviations or omissions from these plans and specifications?

A. Well, there was several little things there. Before I came to make any figure or give any estimate I went and seen the architect, Mr. Holly, in New York.

30 Q. And as a result of your interview with him, did you make an estimate?

A. Yes, sir. That estimate is up to the present time, if we had to do the work now.

Q. I hand you a little memorandum to refresh your memory. Will you kindly tell us what you found omitted from that job according to the plans and specifications?

Let me ask you how long you have been a carpenter and builder?

A. Well, I carried on business for ten years in Rahway before I came to Perth Amboy. I had been about fifteen years at the business.

Q. Tell us what you found there?

A. The first thing I run across was the tower was not sheathed, and I called Mr. Holly's attention to it, and I told him I didn't want to go into this thing to make any trouble with any one, but these people had called me in and would like to have a just estimate of work that was not completed, so I says, "How about this tower not being sheathed?" "Well," he says, "I didn't know that wasn't sheathed," just like that. 10

The Court—That is not competent.

Q. Never mind what Mr. Holly told you. Just tell what it would cost to sheath it?

A. At the present time it would cost double, to go up there and take that copper off. There is a tower in Perth Amboy that is covered with copper, not with one-inch stuff, but with one-half-inch stuff. 20

Q. What do you say it would cost to sheath that tower?

A. That could be sheathed at the time the building was put up for about \$50.

Q. Now?

A. About in the neighborhood of \$400, as near as I could come at it—about \$400, by the time the scaffolding was built and the copper removed.

Q. What else did you find omitted there?

A. Well, there was the altar platform, and as near as I can recollect about that, it was 12 by 14 feet—I don't know exactly what it was; the plan was not there, but they said it 14 feet one way and 12 feet another. And there was also a post down in the cellar—two posts were in bad shape. 30

Q. Give us the items.

A. I have that at \$19. And the partition to be built in the basement which the architect told me to figure on.

Q. Was it on the plan?

A. Yes. This studding and that partition and the door just made \$30—the door included in the partition. Then there was hinges on these basement windows to be taken off and put on—bronze hinges—and time for taking them off and putting them on, and I figured \$9, and I think that was a just estimate.

10 Q. How about the lightning conductor?

A. Well, lightning conductor. I got a figure on a lightning conductor at \$68 and some odd cents, and then the time of putting that conductor up and the scaffold would have to be built or else pay a steeple Jack, and a man isn't doing that for fun.

Q. How much do you say it would cost?

A. I wouldn't do it for less than \$155.

Cross-examination.

20 By Mr. Lyon.

Q. Where are you in business now?

A. I am employed now at the Standard Underground Cable Company.

Q. What do you do?

A. Carpenter and millwright.

Q. What kind of work?

A. Carpenter work.

Q. Building houses?

30 A. Oh, no; it is heavy timber work—placing timbers here and there and putting up machinery.

Q. You are not a contractor?

A. Not at the present time; no, sir.

Q. Ever been a contractor at Perth Amboy?

A. Yes, sir.

Q. In Perth Amboy?

A. Yes, sir.

Q. When?

A. Why, about a year ago; just before I went to the church.

Q. How long were you a contractor in Perth Amboy?

A. I only took it for a little while. I built a couple of buildings there.

Q. Where?

A. On Division street.

Q. More than two buildings?

A. That is about all. I done a little repairing work around.

10

Q. What did you do before that?

A. Why, I worked at the Works down there.

Q. How long?

A. About seven months.

Q. What did you do before that?

A. I was on the railroad here, sir.

Q. How long were you on the railroad?

A. About five years.

Q. What did you do before that?

A. I was a contractor in Rahway.

20

Q. How long were you a contractor there?

A. Ten years.

Q. You say you inspected this tower. What size ribs were in the tower?

A. They looked, as near as I could say, to be about two-inch.

Q. What did the plans call for?

A. Plan for one-inch.

Q. Is there just as good a job as if it had been sheathed?

A. I don't think so.

Q. Why not?

30

A. Well, I will tell you. More or less on the inside of a tower like that the heat will draw the copper together, while if there is something under that the copper will lay solid and will make a solid job.

Q. How is this copper fastened together?

A. It is riveted together.

Q. Could that have been riveted if it had been sheathed?

A. It could have been put on just the same as the one that was put on the Hebrew Synagogue.

Q. I am not asking that question. Could that have been riveted if it had been sheathed?

A. No, sir.

Q. Now, you refer to the Hebrew Synagogue in Perth Amboy—you mean that on Madison avenue?

A. Yes, sir.

10 Q. You know the shape of that tower and have seen that shape?

A. Well, that runs up square on the side and the other is round.

Q. One is square and the other is round?

A. It has the same shape in one way, except it is square instead of round.

Q. Doesn't that make all the difference in the world?

A. No; not a great deal. Copper can be soldered. These copper domes are all soldered.

20 Q. Don't it make a great deal of difference in view of the fact that the tower of the synagogue is put on square and there is not the same tension on that and it can be nailed, when it cannot be on a round tower where it has to be twisted?

A. Why not?

Q. I ask you.

A. That is not twisted. That is run down from the straight plate and this rib is twisted all around it. Those first plates are put down straight.

30 Q. The plates of copper on the synagogue that you refer to are put on straight, you say?

A. No, sir; on the Greek Catholic Church they are straight.

Q. Are those put on straight?

A. Most certainly. They come right down in strips, but those other pieces that you see twisted there, that is put

on there afterwards over the top of the copper. That is not the copper sheets.

Q. Isn't it a great deal harder to put on copper on a round tower like that than on a square tower like that you refer to?

A. Why, certainly; yes, sir.

Q. That copper on the synagogue tower is nailed, isn't it?

A. Yes, sir.

Q. And this is riveted?

10

A. I guess it is; yes. That is nailed and soldered over it.

Q. You are familiar, I presume, since you have been a contractor, as you say, with specifications?

A. Quite a little. I draw them up myself once in awhile.

Q. You inspected the plans in this case?

A. Yes, sir.

Q. Did you see the specifications also?

A. Yes, sir.

Q. Did you read the specifications which referred to the leaving of the basement unfinished?

20

A. Well, the way I look at those specifications, I think it says all but the basement, ceiling, and the architect also said that the basement ceiling should be finished. (Examines paper.) Well, this is the way I would read this: The basement will be left unfinished except the two toilet rooms, vestibule and stairs to main floor and the plaster to the ceiling.

Q. Go on.

A. Using wire lath over the boiler. There is a space there. Using wire lath over the boiler for a space of 10 feet.

30

Q. Now, talking about the partitions in the basement, this clause I call your attention to says that the basement shall be left unfinished. Wouldn't that cut out the partition?

A. No. The architect claimed that is a part of the build-

ing. He is the man that drew these plans and specifications.

Q. If, after the plans were drawn and the specifications, a memorandum was annexed to the specifications which said that the basement should be left unfinished, wouldn't that in your opinion cut out the partition?

A. Oh, you could leave out the windows and everything else if you take that in one way—leave it unfinished. I think a partition is a part of the building.

10 Q. And when the specifications say that the basement should be left unfinished, wouldn't that cut out the partition?

A. Why, I don't think so. If that partition was finished, then it would be all right, but it don't say cut the partition out; it says leave unfinished.

Q. What does it mean?

A. I should judge it means the trimming and hanging of doors and putting the posts down, et cetera; but partition, I don't think that is finished work.

20 Q. How about bronzed butts?

A. Well, they are supposed to be in the basement—you take a basement window, they are supposed to be hung in some shape, form or manner, but ordinarily we put iron in the basement; but this pair is liable to raise out, and that is the reason it calls for bronzed butts.

Q. If that was drawn in providing for a partition, so that the basement should be left unfinished, wouldn't that do away with the bronzed butts?

A. You could leave the windows and all out, as I said
30 before.

JONAS H. CODDINGTON, sworn.

Direct examination.

By Mr. Stricker.

Q. Mr. Coddington, what is your business?

A. Mason and builder.

Q. How long have you been a mason and builder?

A. So far back I can hardly remember—thirty-five years.

Q. Did you go to the premises of the Greek Catholic Church in Perth Amboy in January of this year?

A. I think it was before that.

Q. Here is a memorandum which you made. Did you examine the basement there?

A. Yes, sir.

Q. And did you figure as to what it would cost to place the ceiling there?

A. I was requested by some of the committee to go and measure up the place and to give them an estimate as to what I would complete the plastering of the basement, including the ceiling, side walls and the partition, which I did, and made up an estimate. 10

Q. What would it cost to plaster that ceiling?

A. Well, really, I put the whole business altogether when I estimated on it. I couldn't tell now. I have no memorandum to refresh my memorandum on.

Q. Here is your memorandum, right here. Take a look at it and read it and see. 20

Mr. Lyon—I object to his reading it.

The Court—He cannot read it to the jury. He may examine it, and if he says it refreshes his memory, Judge Lyon has the privilege of cross-examination.

By the Court.

Q. Does that refresh your memory, Mr. Coddington?

A. No, sir; not in regard to the ceiling, because that was included with the sides. 30

By Mr. Stricker.

Q. Does this refresh your memory or doesn't it?

A. His Honor asked me that question, and then I said no, sir, from the fact that it was all included with the side walls and partitions.

Q. Then you can't say what it would cost to plaster the ceiling?

A. No, sir; I can't—only an approximate way.

No cross-examination.

Adjourned till Monday, September 17th, 1906, 10 A. M

New Brunswick, N. J., September 17th, 1906.

Trial of the Cause resumed at 10 A. M.

IVER C. OSTERGARD, recalled.

10 Direct examination.

By Mr. Stricker.

Q. Mr. Ostergard, you have been in the mason business how long?

A. Twenty-three years, in the contracting business.

Q. That is, mason and bricklayer and plasterer?

A. Yes, sir.

Q. Will you kindly tell us what it would cost to plaster a square yard of surface according to the plans and specifications submitted in this case?

20 A. Yes, sir.

(Objected to as irrelevant. Question permitted.)

A. Why, it always depends on how the surface has got to be plastered, as if there is many cornices it costs more. If it is straight ceiling and straight wall it costs less.

Q. Well, take a straight ceiling.

A. A straight ceiling, that will cost about 30 cents a yard.

No cross-examination.

30 PETER KOZUB, sworn.

Direct examination.

By Mr. Stricker.

Q. Mr. Korzub, you were one of the building committee on this job, weren't you?

A. Yes; I was.

Q. Did you give any order for a front step of blue stone in connection with this job?

A. No, sir.

Q. Fifty-six dollars?

A. No, sir.

Q. Did you authorize Mr. Ricci or anybody else to give such an order?

A. No.

Q. Did you or any of your committee, so far as you know, authorize Mr. Ricci to make any contracts or otherwise or give any orders for any extra work?

A. No, sir.

10

Q. Did you or any of your committee or anybody authorized by you order any extra paneling on pew ends for \$25?

A. I don't know what you mean by the pew.

Q. Well, here are the pew ends right here. This is the pew and this is the end (indicating on benches), and this is a panel, I take it?

A. Well, I tell you, gentlemen and Mr. Stricker, that that was not the contract from the first start.

Q. Well, did you make any agreement to pay \$25 extra?

A. No, sir.

20

Q. Mr. Ostergard has you charged with \$78.65 for extra leaded glass and inscriptions. Did you order that work?

A. Well, I want to tell you—

Q. Did you order that work or did the committee order that work or was anybody authorized, so far as you know, to order it for the committee?

A. Well, Mr. Koyen, he asks us if we want to have the name before it comes from the factory. Well, if that comes from the factory out, he said then you have to put your pane yourself. Well, that was then sent up to the factory to get the names in and that was nothing mentioned about the extra charge on it.

30

By the Court.

Q. Did you know that leaded glass and the inscriptions were being put in the church by Mr. Koyen?

A. By Mr. Koyen?

Q. Did he tell you he was going to put it in?

A. That is what he asks us and we told him yes, we want to have some inscription, some name in, and the name was put in, and there was nothing mentioned about the extra charge.

Q. Then, he put the glass in?

A. Yes.

Q. To your knowledge, but nothing was said about extra charge?

10 A. Only one extra wanted; that is in the back, 8 feet square, and one window, round, that is 3 feet.

By Mr. Stricker.

Q. What's that?

A. Three feet.

Q. What about that?

A. That we have to pay extra.

Q. He has charged you with a circle sash for front gable; that is round, \$5. That is right?

20 A. That is not quite, because the specifications says square feet of glass for it.

Q. He charges you \$5. You say that is all right?

A. Yes, sir.

Q. Now, did you or your committee or anybody for you—that is, anybody in authority—make any agreement with Mr. Ostergard or Mr. Koyen whereby he was to make the basement windows double, and for which you were to pay him \$12?

A. No, sir.

30 Q. What have you to say about the plate on aisle and rear walls, \$60; did you order that?

A. Well, that plate, that was called for, not plate, only we said if that is better, and Mr. Ostergard told me that that will not cost over \$25. That is what Mr. Ostergard told me.

Q. This is on the back wall, Mr. Kozub?

A. I know what it is.

By the Court.

Q. Then you knew about it and you understood it was to cost \$25?

A. Twenty-five dollars. That is what I understood; not over \$25.

By Mr. Stricker.

Q. He has charged you with making front wall 8 inches thicker, \$75. Did you order that wall made 8 inches thicker and agree to pay \$75 for it?

A. No, sir.

10

Q. Did the committee or anybody for the committee?

A. No, sir; they made the mistake on his part.

Q. Who made the mistake?

A. The contractor, when he puts the wall up. The wall is from the bottom—the terra cotta don't fit them right on top of the brick wall on the bottom, so he had to make thicker walls.

Q. Can you say how much out it was?

A. About so much outside the terra cotta; that is, not on the solid bottom; it is outside.

Q. And the terra cotta don't fit?

A. Don't fit.

By the Court.

Q. Was that the reason the walls had to be made extra, to fit?

A. Yes, sir.

By Mr. Stricker.

Q. Did you agree to pay him \$25 for two closets?

30

A. Well, I tell you about the closets too. The closets have what they call—what goes up to what turns the steam connection was put all in one direction, and they say that is not right. Well, if the boards was altogether—that was sometimes all apart—if that was connected in different direction—well, it is loose here—you understand

that that is connected only in one direction, that don't part, and we said, "Mr. Koyen, that is not right." He said then, "Well, I fixed you the shelf for nothing, I make that for a present." Now they charged for the shelf. Well, we willing to pay him for the shelves; if he charged for it we are willing to pay for it.

Q. Do you mean you are willing to pay for the closets?

A. For the closets, yes, what he put up.

Q. What's that?

10 A. Yes.

Q. Did you agree to pay him \$25?

A. Not \$25. That is not worth \$25.

Q. What is it worth?

A. It is worth about \$12.

Q. Now, he has a charge against you for laying faced brick extra, \$25. Did you make any agreement with him to pay \$25 for laying the faced brick?

20 A. No, sir; we don't have no agreements made on that, only we want to have the agreement made what Mr. Ostergard allows us on the red brick what he took and don't put them in.

Q. How many red bricks did Mr. Ostergard take away?

A. I believe it is about 10,000 bricks.

Q. What are they worth?

A. Well, you know what they are worth.

Q. No; I don't. What do you know?

A. Well, I don't know how they sell. I can buy them.

It is agreed between counsel that the red brick were worth \$6 a thousand.

30 Mr. Stricker—I want it understood that when I asked the witness whether it was agreed or whether he agreed, that I mean to include the committee or somebody in authority for it.

The Court—To his knowledge.

Mr. Stricker—To his knowledge.

Mr. Lyon—That is a matter that the witness must understand.

Q. Now, Mr. Østergard has made a charge of \$20 for rubbed window sills, extra; did you or did the committee or anybody in authority agree there that you would pay him \$20 extra for that?

A. No, sir.

Q. Now, all these questions that I have put to you I have asked you whether you agreed. Now I ask you whether the committee agreed, so far as you know, or whether, as far as you know, anybody authorized—that is, permitted Mr. Ricci or anybody else to make an agreement for these extra charges. 10

The Court—That is, limited to your personal knowledge—not anything you heard.

A. Well, nobody give no orders. Of course, if the orders were given out we have to let know Mr. Ostergard or Ricci that he have to alter it that way, only we didn't give no orders at all. We say this church come after the plans and specifications.

Q. Mr. Kozub, is there any sheeting; that is, wooden lining or sheeting, in this part of the tower (showing witness photograph)? 20

A. No, sir.

Q. The plans and specifications called for it?

A. Yes, sir.

Cross-examination.

By Mr. Lyon.

Q. What is your connection with the church, Mr. Kozub?

A. Well, I am on the committee.

Q. What committee?

A. I was on the church committee. 30

Q. The building committee?

A. Yes, sir.

Q. How many others were there on that committee with you?

A. There was two besides me.

Q. Who were they?

A. Andrew Dillyman and Andrew Zbojan.

Q. Are they here in court?

A. One fellow is in court and the other fellow missed the car.

Q. When did you start to build this church?

A. Well, that was in 1894.

Q. When was it completed?

Mr. Stricker—You mean 1904.

The Witness—1904.

10 A. That is not completed yet.

Q. When did you take possession of it?

A. We take possession of it in 1904, Christmas time—first Christmas evening.

Q. Then you have been using this church for nearly two years; is that right?

A. Yes, sir.

Q. And have had the full use of it for that time?

A. Yes, sir.

20 Q. These little things that you claim are not done do not hinder your full use of the church, do they?

(Objected to as not proper cross-examination and as calling for a conclusion. Question excluded.)

Q. Mr. Kozub, when you first decided to build this church, how did you expect to build it with reference to grade; was there to be a terrace like the terrace around the rectory?

A. Well, that was to be graded with the street level.

Q. Well, I ask you if there was not to be a terrace around the church like the terrace around the rectory?

30 A. No; that was just to be level with the street and that house had to be moved in a short time.

By the Court.

Q. There was to be no terrace around the church?

A. No; after the contract was signed.

By Mr. Lyon.

Q. Were you present when the architect and the committee asked Mr. Ostergard to bid on the church?

A. Yes, sir.

Q. Didn't the committee tell him that there was to be a uniform terrace around the church like around the rectory?

A. No, sir; they didn't.

The Court—Didn't that appear in the plans and specifications?

Mr. Stricker—Yes; it does, according to the curb level. 10

Q. Mr. Kozub, wasn't it found after the contract was awarded to Mr. Ostergard and he started to build the church that there was not room enough on the lot for the church as intended to be built?

A. Well, Mr. Lyon, I tell you the truth what it is: Mr. Ostergard was figuring for the church and that was 110 feet, the lot deep, and we have 5 feet off, and he said, well, he can make that building to put up there and be right in the place. 20

Q. Well, didn't you think that your parsonage stood 10 feet further south than it really does, when you gave the contract?

A. Yes.

Q. Mr. Kozub, didn't you think that your rectory stood farther south by 10 feet than you actually found it to be?

A. Well, that is what I just told you before.

Q. Now, answer that question if you can.

A. Well, we found out it is a little too far, and Mr. Ostergard, he said he could build it so that it be all right. 30

Q. Didn't you find it 10 feet too deep?

A. No, sir; that is not 10 feet.

Q. Didn't you find it necessary to lower the church 3 feet when you come to build it?

A. No, sir.

Q. Sure about that?

A. Yes, sir.

Q. Wasn't there a lot of extra digging?

A. No, sir.

Q. Now, don't you know that Mr. Martin Hanson, who had the contract for digging that foundation, had to remove 370 yards of dirt extra beyond his contract to lower the church?

A. It wasn't our fault.

Q. I didn't ask you that, Mr. Kozub. Don't you know that Mr. Martin Hanson, who had the contract to dig that
10 cellar had to remove 370 extra yards of dirt in order to let the church down 3 feet?

(Objected to as not cross-examination.)

Q. When I asked you the question, Mr. Kozub, I intended to mean the cellar. Wasn't the cellar dug 3 feet deeper by Mr. Martin Hanson than originally intended?

The Court—I will permit the question.

A. Why they dig the cellar deeper?

Q. Yes.

Mr. Stricker—Not why. Didn't he?

20 A. I was not there that I should see how deep should go the cellar. I was not the contractor. The contractor shall know better how he had to go deep and how much dirt he had to take out.

The Court—The question was whether you knew that the cellar was dug 3 feet deeper.

A. I don't know.

Q. Didn't the committee have a conversation with Mr. Ostergard about lowering the church?

A. No, sir.

30 Q. No conversation whatever?

A. No, sir.

Q. Were you present at a meeting at the rectory when the pew ends were discussed with the furniture man and your rector and Mr. Koyen and Mr. Ricci were present at that meeting?

A. Yes, sir.

Q. And the furniture man was there with samples, wasn't he?

A. Yes, sir.

Q. And the committee decided that they wanted a certain kind of pew ends, didn't they?

A. Yes, sir.

Q. And Mr. Koyen said it would cost \$25 extra, didn't he?

A. No, sir; that went in the contract.

Q. What was in the contract?

10

A. The pews, just what they pick out.

Q. Now, won't you show me whereabouts it is in the contract (handing witness contract)?

A. The pews is in the contract—or, I mean in the specifications—what they pick out.

Q. Now I show you the specifications and ask you if you will not show me where it provides that the pew ends shall be as were put in by Mr. Koyen. Whereabouts is it?

A. It must be in.

Q. Whereabouts? I handed you the interior trimmings.

20

A. Wait, Mr. Lyon. (Examines paper.) Well, Mr. Lyon, I hardly can look for that specification, where it is. That is in with the pews have to be done, how the committee picked them out. It is not in here. I don't know where it is.

Mr. Stricker—Perhaps I can help you to find it.

Right there (indicating) under "Pews."

Q. Did you find it?

The Court—Mr. Stricker pointed it out.

Q. Is this the paragraph, 199 in the specifications, which says, "allow one thousand dollars for pews arranged about as shown on plan." Is that the only thing you find in there about how the pew ends shall be made?

30

A. That is made.

Q. Is that the only thing you find in the plans as how the pew ends shall be made?

A. Yes, sir.

Q. Mr. Kozub, do you claim that your committee with Mr. Ostergard should have built this church according to the plans?

A. Yes.

Q. I show you the plans and specifications. Are these the plans according to which Mr. Ostergard figured?

A. Yes, sir.

Q. Here is the side elevation which shows the front steps?

10 A. Yes.

Q. How many steps are shown there?

A. There is three steps and one platform.

Q. How many were actually built?

A. Well, that is not our business.

Q. I didn't ask you that.

A. Well, that is built seven.

Q. What did the plans and specifications call for as to the windows in the back of the sacristies and over the front door here; what kind of windows were they to be?

20 (Objected to. Question withdrawn.)

Q. I show you the plan, which shows over the front door a plain glass window. What kind of a window was put in there?

A. Leaded glass put in.

Q. It was changed, wasn't it?

A. No; that was put right with the other windows; only that window we changed and that is 3 feet square.

Mr. Stricker—Round, you mean?

A. Yes; round, in a circle. That only was changed.

30 Q. Wasn't this one changed over the door?

A. No, sir; these windows came in just the same like the rest.

Q. Will you say a leaded glass window was put in?

A. Put in with the rest of the windows.

The Court—Was a leaded glass window indicated in that plan?

Mr. Lyon—No; a plain window was indicated.

A. They put in leaded glass window. There is only two windows changed.

Mr. Stricker—There is nothing indicated on there to distinguish leaded glass from the plain glass.

The Court—The plans are in evidence and of course the jury can examine them.

Q. Mr. Kozub, there was a change made, was there not, in the specifications, leaving the basement unfinished?

A. Yes, that was not made specifications by the committee. That was made, the changed specifications, by Mr. Ricci. Mr. Ricci, he changed their specifications. He came one Monday night and he said, "Well, I have to something alter in the specifications," and he put that memorandum in. That is the memorandum put after we had signed the contract. 10

By the Court.

Q. You mean the first page?

A. After the contract was signed in your place (indicating Mr. Stricker). 20

Q. Was that done by the authority of the committee?

A. No, sir; he changed it after the contract was signed.

By Mr. Lyon.

Q. Is this the contract that you signed in Mr. Stricker's place?

A. Yes, sir.

Q. And are these the specifications which were annexed?

A. Yes, sir. The only thing, the front part, that was put in Monday after that. 30

Q. This is a contract from the County Clerk's office?

A. Yes, sir; I was the man. I brought it to the County Clerk's office, and it was fixed up the Monday after the contract was signed.

Q. When you filed this contract in the County Clerk's office, was that sheet attached to it?

A. Yes, sir.

Q. Who took this contract to the County Clerk's office?

A. I took it.

Q. And you took it with this?

A. I don't know that was put on it. I thought that was the specifications what we was figuring on.

Q. Then you didn't intend anything on this first sheet to have any effect?

A. No; not at all.

Q. Well, did this contract and specifications provide for
10 the removing of the frame building on the lot?

A. Yes, sir.

Q. Whereabouts?

A. That was figured on it.

Q. Whereabouts was that provided for?

A. That was figured on it.

Q. Well, in what part of the specifications was that provided for?

A. Well, I don't know on what part these other specifications calls for.

20 Q. Well, now I show you that that is on the first part, first sheet, that you say was not annexed by your authority?

A. To remove the old church and the old back ground where we have, and that is not on the first, I don't know that was.

Q. This is the sheet that you say was not annexed by your authority, put on by the architect without your authority. The first paragraph says, "Remove the present frame building to the southeast corner of the premises,
30 building a suitable foundation for the same, and leave the building in good condition for use as at present." Wasn't that in the contract at the time you signed it?

A. That wasn't in the contract, only that wasn't in, what is put in here and what is crossed out, after the contract was signed. I want to show you that there is lots of things that is crossed out.

Q. Now, you show me.

A. First the memorandum, this was put after the contract was signed. That was put in afterwards. That was put in after the Monday. That was put in. That was put in. I show you lots of things what they put in after that was signed. That was put in. That was put in, marked out (indicating).

Mr. Lyon—The witness is referring to the specifications and referring to marks made therein.

The Court—Hadn't you better designate the sections? 10

Mr. Lyon—No, sir; I can't; some of them were lead pencil marks made evidently by somebody else.

Q. Then do you claim that Mr. Ostergard under this contract should have finished the basement entirely, absolutely?

A. He should have put a partition in and plastered the ceiling.

Q. I didn't ask you that, Mr. Kozub. Now, you know English well enough to answer my questions, and I want you to do it? 20

Mr. Stricker—I think that is responsive.

The Court—It is not responsive.

(Question repeated.)

A. Yes, sir.

Q. He was?

A. Yes; calls in the specification.

Q. Whereabouts in that tower is the sheathing left out?

A. The whole from here up to here.

Q. Are you sure about that?

A. Yes, sir; I was there, not once and not twice. 30

Q. Isn't the sheathing in there?

A. Nothing at all.

Q. You are sure about that?

A. Yes; I am sure there is no sheathing at all here.

Q. When was this church started, did you say?

A. It was started in April.

Q. What year?

A. Well, 1904, and should be finished in September, the last part of September.

Q. Mr. Ricci was chosen as the architect or superintendent, wasn't he, of this building?

(Objected to as already set out in the contract.

Question permitted.)

Q. Mr. Ricci was chosen as the architect, wasn't he; as superintendent?

10 A. He was protecting the architect from New York.

Q. And in the contract which you signed, Mr. Ricci was named as the supervising architect, wasn't he?

A. Well, he was in one way—to protect the architect.

Q. You mean represent?

A. Represent. We have an architect here three or four times.

Q. Mr. Holly came down from New York three or four times?

A. Yes.

20 Q. How often was Mr. Ricci there at the building?

A. Well, I can't tell you. Mr. Ricci just came when he pleased in the evening, and then was everything done.

Q. Was he there every day?

A. No, sir; no, sir.

Q. What is your business?

A. I am a tailor.

Q. How near do you live to this church?

A. Well, I live 225 feet.

Q. How near does Mr. Ricci live?

30 A. Mr. Ricci lives—well, I hardly can tell you. It is a block away.

Q. Isn't it a fact that Mr. Ricci was there two or three times every day?

A. No.

Q. And didn't he frequently consult your committee as to what you wanted done on that church?

A. Our committee?

Q. Yes?

A. No.

Q. And didn't he have any talk with you?

A. No; he was mad against us because we told him something as didn't suit him right, that is all.

Q. Didn't you have any talk with Mr. Ricci about the work on that church?

A. No.

Q. You didn't?

A. I never saw Mr. Ricci. I went there and the bell was 10
in from New York and Mr. Ricci told me.

Q. After the contract was given to Mr. Ostergard?

A. Yes, sir.

Q. And Mr. Ricci was there every day looking after the work?

A. No.

Q. He was not?

A. No; not every day.

Q. How often was he there?

A. Well, maybe once or twice a week.

20

Q. Didn't you talk with him frequently about the work—
Mr. Ricci?

A. I never talked about the work. I talked with Mr.
Ostergard.

Q. And didn't you tell Mr. Ricci that you wanted some
things done there—extra work?

A. No, sir.

Q. Nothing at all?

A. No, sir.

Q. Where do you work?

30

A. I work for McCullough.

Q. When do you work?

A. I go to work about half-past eight or nine o'clock.

Q. When do you get through at night?

A. I get through about five o'clock.

Q. Between 8 and 5 were you around the church while it
was being built?

A. I was there every morning.

Q. Well, I said between 8 and 5.

A. Yes; I was.

Q. When?

A. One o'clock, afternoon.

Q. At these times when you were at work at Mr. McCullough's do you know whether or not Mr. Ricci was around the church?

A. He hadn't the chance.

10 Q. What?

A. No; he hadn't a chance; he have to be in the factory.

Q. How do you know?

A. Of course I know it.

Q. Were you there?

A. Well, sure. I waited until I found out from him and he was all the time busy.

Re-direct examination.

By Mr. Stricker.

20 Q. One more question about this ceiling in the basement. Did or did not Mr. Ostergard promise to finish that?

A. Yes, sir.

Q. And when was it that he refused to do it?

A. After I refused to sign the check for \$1400.

Q. It was then he refused to plaster the ceiling?

A. Yes, sir.

Q. How near was the church done then?

A. So far as it is now.

Q. That is the last payment you mean?

30 A. The last payment he want and it was not finished.

Q. You refused to pay him because he had not finished the job?

A. Yes, sir.

Q. And it was then he refused to finish the ceiling?

A. Yes, sir.

Q. Did you make any objection to other work beside the ceiling?

A. The ceiling, the partition, and the dome is not sheathed and the lightning conductor is not put on it.

Q. Mr. Kozub, do you remember a Saturday afternoon when Mr. Holly came down and went over the work with the committee and Mr. Ostergard and Mr. Ricci?

(Objected to as not cross-examination. Question allowed.)

Q. Do you remember such a meeting with Mr. Holly on Saturday afternoon?

A. Yes. I heard that he was—

10

Q. Just answer my question. And do you remember that Mr. Holly put down on a piece of paper or directed these contractors to do some little things that he wanted done to finish the church; do you remember that he mentioned those things?

A. I wasn't there.

Q. You weren't there?

A. I was not.

Mr. Stricker—I want to say in justice to Mr. Kozub, that there was one Saturday afternoon that Mr. Holly was down, that Mr. Kozub was not present. You referred to the time in 1905; that is some other time. This occurred in 1906.

20

Q. I didn't mean a recent Saturday afternoon. I mean about the time that the church was being finished, more than a year ago, in 1904, one Saturday afternoon; were you there?

A. I was not, because I am working Saturday afternoon.

ANDREW ZBOJAN, sworn.

30

Direct examination.

By Mr. Stricker. (Examined partly through interpreter.)

Q. Mr. Zbojan, you were one of the building committee?

A. Yes.

Q. And you know Mr. Ricci?

A. Yes.

Q. Did you as a member of that committee, or the com-

mittee within your knowledge, or anybody by their authority, make an agreement with Mr. Ostergard or anybody for him whereby you agreed to pay him \$56 for extra front steps of blue stone?

A. No.

Q. Did you or any one connected with the committee, within your knowledge, or anybody in authority for that committee, agree to pay Mr. Ostergard or any one for him \$25 for extra paneling on pew ends?

10 A. No.

Q. Did you or anybody of your committee, within your knowledge, or anybody under your authority or the committee's authority, agree to pay Mr. Ostergard \$78.65 for extra leaded glass and inscription—that is, something written there?

A. No, sir.

Q. Did the committee so far as you know?

A. I don't know whether they agreed; I did not.

Q. And when you say they, you mean Kozub and Dilly-
20 man?

A. Kozub and Dillyman.

Q. Now, did you agree with Mr. Ostergard or anybody for him or did your committee agree, so far as you know, to pay him \$12 for making the basement windows double?

A. No.

Q. Did you or your committee agree, or anybody for them in authority, that you should pay \$75 for the making of the front wall 8 inches thicker?

A. No.

30 Q. Did you or your committee or anybody in authority for them agree to pay Mr. Ostergard \$25 for laying face brick extra?

A. No.

Q. And did you or anybody for you or your committee or anybody in authority for them agree to pay Mr. Ostergard \$20 extra for rubbed window sills? You know what window sills are?

A. Stone; yes.

Q. That is right.

A. I was one time up there and he say he want to put the rough stuff, but I tell him I like better he put the straight stone. He say you pay me to-day I put that inside straight stone.

Q. What did you say?

A. Nothing.

Q. You made no agreement with him?

A. No.

Q. (Photograph shown witness and he is asked) Is there any sheathing inside here in this part of the tower?

A. Inside?

Q. Yes.

A. It got some in there inside, he put afterwards.

Q. Has this any sheathing?

A. No.

Q. Yes or no.

A. No.

Q. What have you to say about the ceiling in the basement?

A. Ceiling in basement, he say he won't plaster. That was the 19th of June this year, and Mr. Ricci come up there in that old church and he say, "Gentlemen, give me that plan and that contract for that church," and I want to know what kind of plaster I got to pay, and pay him \$1500. I got that check here and that is paid.

Q. When did he first refuse to plaster that ceiling? When did he say he wouldn't do it?

A. In September last year.

Q. Now, state whether or not 10 feet are plastered over the heater down in the cellar?

A. Yes, sir; there is 10 feet.

Q. Over the heater?

A. Yes, sir; and the water closet is plastered.

Q. Now, do you know why it was that the front wall was 8 inches thicker?

A. Yes, sir.

Q. Why?

A. Why, that terra cotta not fit him. That wall 8 inches he no put in the ground, he only put on top of the ground. After he come high, you know, like that, if they want to put stone on that stone, he put terra cotta, it no fit; that terra cotta 8 inches. After he put the terra cotta in that 8 inches here, like that (through interpreter) the terra cotta stuck out so much farther that they had to add 8 inches of wall to it.

10 Q. How many times did he have that wall down before he finally got it up?

(Objected to as immaterial. Question permitted.)

A. Well, the front was about three times down. The first time he put the church no square.

Q. Just limit this to the front wall; when that was made 8 inches thicker. Never mind the side walls?

A. The front wall he had down about three times. One time he took it down it was no square. Another time he put down the piers were no good, and another time the terra cotta no fit.

20

Q. Now, what is your business?

A. My business is carpenter.

Q. Do you know anything about the price of plaster?

A. Yes, sir.

Q. How much is a square yard of plastering; that is, such as was specified in this plan and specification?

A. Fifty cents.

Q. Fifty cents a square yard?

30 A. Yes, sir.

Q. How many square yards are there in that ceiling that are unfinished?

A. Four hundred and sixteen.

Cross-examination.

By Mr. Lyon.

Q. Did you say you were a carpenter?

A. Yes, sir.

Q. Do you work at it now?

A. Yes; I work at it.

Q. Now?

A. Yes, sir.

Q. Are you engaged in the business now of carpentering?

A. Yes.

Q. Didn't you keep a saloon?

A. Yes; I have kept a saloon.

Q. How long have you kept a saloon?

10

A. Five years.

Q. What did you do before that?

A. I was carpenter.

Q. Did you work for somebody else or were you a boss carpenter?

A. I worked for ten years for Charlie Obell.

Q. You were a journeyman carpenter?

A. Yes, sir.

Q. Did you ever do mason work?

A. No; I ain't make mason work.

20

Q. Aren't you engaged now every day in keeping your saloon?

A. Well, a poor man must work. I have got no good business; I am at work.

Q. Do you actually work at carpenter work now?

A. Yes.

Q. Who do you work for?

A. For myself.

Q. What are you doing now?

A. I work on houses.

Q. What houses?

30

A. On Broad street.

Q. Who?

A. My house.

Q. Your own house?

A. Yes, sir.

Q. You are doing carpenter work on your own house now?

A. Yes, sir.

Q. How long since you done work for somebody else?

A. Seven years.

Q. Seven years since you done work for anybody else?

A. Yes, sir.

Q. Kept saloon since that time?

10 A. Ten years I worked for Charlie Obell, I worked for carpenter labor; and seven year I contractor and I work for myself and I build house. I take contract myself.

ANDREW DILLYMAN, sworn.

Direct examination.

By Mr. Stricker.

Q. Mr. Dillyman, you were one of the building committee on the job?

A. Yes, sir.

Q. Was Mr. Zbojan and Mr. Kozub?

20 A. Yes, sir.

Q. Now, Mr. Dillyman, I am going to read to you some items here, and if you don't understand just say so. This is a bill for extra work by Mr. Ostergard against the society. "Extra on front steps for blue stone, \$56—"

A. No.

30 Q. Wait. "Extra paneling on pew ends, \$25; extra leaded glass and inscription, \$78.65; making basement windows double, \$12; plate on aisle and rear wall, \$25; making front wall 8 inches thicker, \$75; filling in two closets, \$25; laying face brick extra, \$25; rubbed window sills, \$20." Now, did you as a member of that committee or anybody for the committee in authority order this work done?

A. No.

Q. Did you order it yourself?

A. No.

Q. Did you hear Mr. Kozub order it?

A. No.

Q. Or Mr. Zbojan?

A. No. Gentlemen, I was with the building every day—

Q. Never mind about that. When did Mr. Ostergard first refuse to plaster the ceiling in the basement?

A. Yes.

Q. When?

A. It was in the year 1905, in November.

Q. Now, state whether or not 10 square feet or thereabouts is plastered over here in the basement?

A. Yes, sir. 10

Q. And before September or November, as you say, of 1905, did Mr. Ostergard refuse to plaster that ceiling?

A. Yes; he says—

Q. Wait. If you don't understand the question, don't answer. (Question put through an interpreter) Yes or no? We don't want to hear anything what you said. What I want to know is whether Ostergard had promised you right along that he would plaster that ceiling?

(Objected to as leading. Question withdrawn.)

Q. State whether or not— 20

A. Yes.

Q. Ask this witness, Mr. Interpreter, please, and tell him to give me an opportunity to put it, to state whether or not during the erection of this building and before its completion Mr. Ostergard promised or agreed to plaster that ceiling.

A. Yes.

No cross-examination.

Defendant rests. 30

PLAINTIFF'S TESTIMONY IN REBUTTAL.

IVER C. OSTERGARD, recalled.

Direct examination.

By Mr. Lyon.

Q. Mr. Ostergard, you have heard these three witnesses who have just testified say that you had no authority from them to do any extra work whatever; they have denied

these items, the three of them. Now, what have you to say about that?

(Objected to as not rebuttal. Objection sustained.)

Q. Mr. Ostergard, I show you a photograph of the church which shows the extra stone steps. Is it true as stated by the witnesses that you were not ordered to put those steps there?

(Objected to as not proper rebuttal. Objection sustained.)

10 Q. I call your attention to that tower there. Mr. Cladek, the witness produced by the defense, has stated that that tower could have been sheathed on either side and the copper put on in a good substantial way and that there were other towers in the city of Perth Amboy that were constructed in that manner. Now, is that true?

(Objected to. Question allowed.)

A. No, sir; there is no tower in Amboy like that.

(Grounds of previous objection stated to be that the plainff is bound by his contract, and the tower could not be changed without the consent of the committee. Objection over-ruled. Exception.)

20

THEO. B. BOORAEM. [L. s.]
Judge.

Q. Do you know the Hebrew Synagogue on Madison avenue to which Mr. Cladek referred?

A. Yes, sir.

Q. What kind of towers are they?

A. That is a square tower.

30 Q. What is the difference between the construction of this tower and the square tower?

A. Why, there is a good deal of difference in the construction, and another thing, the tower in the synagogue that is only nailed on; it is not riveted. This here is riveted on from the inside, and that is the reason the sheathing could not be put on and it was agreed by the architect.

Q. Mr. Ostergard, did you ever promise to plaster this ceiling?

A. No; I didn't consider it was in my specifications, and I didn't figure it and I never promised no ceiling.

Q. You have heard what the last witness or two said?

A. I have.

Q. And do you deny that you ever promised?

A. Yes, sir.

Q. I show you the specification here; is that the specification that was given to you by the committee and the architect at the time you figured on the job? 10

A. Yes, sir.

Q. I call your attention to the black marks in the second paragraph of the second page; were they there at the time this specification was delivered to you?

A. Certainly.

Q. Has there been any change in these specifications whatever after it was delivered to you by the committee at the time you signed the contract?

A. The specifications— 20

Q. Can't you answer the question? Has there been any change?

A. No; not one. The specification is just exactly the same as it was the day it was delivered to me before I figured on it.

The Court—Judge Lyon, in looking over my notes I find I was in error in the ruling I made, and under the circumstances I will permit you to ask in rebuttal questions to meet the answers given by the committee that the particular items of extra work were not ordered by them. 20

Mr. Stricker—That is, either by them or Mr. Ricci.

The Court—Yes; all three have denied that they ordered the work, and I inferred that Mr. Ostergard had sworn that they had. I see he has not clearly so said.

Q. Well, I repeat the question with reference to the blue stone steps, Mr. Ostergard. The witnesses have testified that they did not order this work done. Will you state whether or not they did?

A. They did not order that done from me, but I had a plan of the stone steps which I had to go by.

Q. Who gave you that?

A. Mr. Ricci, the architect. He made the plan, and I sent the plan to the stone man and he got out his steps according to the plan, so I had to use that.

10 Q. By whom were the detailed drawings of this church given to you?

A. Why, this was for the steps; it was a different plan made.

Q. During the progress of the work were there detailed drawings submitted to you from time to time?

A. No; all the detail was in the plan when I had it except the last one for the steps. That is the only detail there.

20 (Objected to as not rebuttal.)

Q. And that detail was given you by whom?

(Objected to as not rebuttal.)

A. By Mr. Ricci, the architect.

(Objected to as not rebuttal.)

Mr. Lyon—I don't think it is important. I will not press the matter.

Q. Mr. Ostergard, one of the witnesses said that you told him it would cost about \$25 to put the plate around on the walls.

30 A. Never asked me about it. That work was in Mr. Koyen's hands and if you ask anybody they must ask him about carpenter work. They generally not come to me.

Q. Did you tell anybody?

A. No; not a soul.

Q. That it would cost about \$25?

A. No, sir.

Cross-examination.

By Mr. Stricker.

Q. Mr. Ostergard, Mr. Koyen did the carpenter work there, of course?

A. Yes, sir.

Q. And you did not interfere with anything he done there, did you?

A. No.

Q. If there was anything concerning the lumber work, he was authorized to make agreements, wasn't he?

A. Yes; I didn't object to it. 10

Q. As a matter of fact, is 10 square feet of that ceiling plastered in the cellar?

A. Why, certainly; more than that.

Q. How much more?

A. Well, that I couldn't tell, but it is just the space.

Q. Around the heater?

A. Yes.

Q. Let me read this to you: "The basement will be left unfinished except the two toilet rooms, vestibules and stairs to main floor and the plastering of the ceiling using wire lath over the boiler for a space of 10 feet square, which will be finished as specified." 20

A. Yes.

Q. Isn't it a fact that you had in mind the plastering of the entire building.

A. No, sir.

Q. What's that?

A. No, sir.

Q. And isn't it a fact that you promised right along? 30

A. No, sir.

Q. And isn't it a fact that it was not until they refused to make you the last payment because of the fact that you did not complete your contract, that you refused to plaster the ceiling in the cellar?

A. No, sir; I never offered to plaster it. I didn't start on it. I didn't consider it was in my contract.

Q. Did you at any time tell them that if they would give you this check—

A. No, sir.

Q. That you would plaster the ceiling for them?

A. No, sir; I considered the check was mine without plastering anything.

Q. Who made these interlineations here?

A. That is more than I can tell you. They were there before I had the specifications and the plan.

10 Q. You had the plans and specifications, when you had this, didn't you?

A. Yes, sir.

Q. And then you got this afterwards, didn't you?

A. That one?

Q. Yes.

A. No; that was on the specifications when I had it.

Q. Then you figured?

A. Yes, sir.

20 Q. Do you mean to tell us that this parenthesis business was on there when you got it?

A. Yes; it was.

Q. You are quite sure about that?

A. Yes, sir.

Mr. Lyon—It is on the filed copy exactly the same.

A. Whatever is there was there when I had the specifications. There is no mark made on it by anyone. I didn't make any mark at all.

Q. The one that you got didn't have this, did it?

A. Yes; certainly, that was on.

30 Q. What do you mean when you say they didn't have a mark?

A. I say I didn't make any mark.

Q. You didn't make it yourself?

A. No, sir; all the mark that was there was made before I had it.

Q. You testified in answer to Judge Lyon's question, that

the tower on the synagogue in Perth Amboy was square?

A. Yes, sir.

Q. Isn't this about the shape of it?

A. Yes, sir; but it has got four square corners. That don't make any difference, those lines.

Q. The general outline is like that, only it appears like that from four sides?

A. Yes, but it comes square from the four points.

Q. This way?

A. Yes.

Q. Right here. But for all practical purposes this is the true shape of it any more than it comes out at four sides?

A. It goes straight and then it comes out to four corners.

Q. That is, four ends of it?

A. Yes; I don't call that round; it is a circle.

Q. It is not as square as this was?

A. No; but if you take a piece of paper and put it over that way, that don't say that is round. It might curve.

Q. This is got a curve in the shape of this on the sides?

A. It is square right up to the peak.

Q. Yes; but isn't this the shape of it?

A. It is this shape, but it is a square tower.

10

20

EMIL KOYEN, recalled.

Direct examination.

By Mr. Lyon.

Q. Mr. Koyen, you heard the testimony of Mr. Cladek on Friday about the tower on the Hebrew Synagogue?

A. Yes, sir.

Q. Comparing that to the tower on this church?

A. Yes, sir.

Q. Will you just explain to the jury how those towers on the Hebrew Synagogue are constructed?

(Objected to as not rebuttal. Question admitted.)

(Whereupon the defendant by his counsel prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

30

A. The point is this: On the synagogue tower you can take the tower at any point horizontally and it is square; any point in that tower is square on a horizontal line. That is the deviation from the tower we constructed on the Greek church—that is a circle on any point horizontal. That is the difference. This diagram ain't right, but I will change that and I will say there is four corners or four hits on that tower at any point and you take and put a board on all four sides.

10 Q. Is there any corner on the Greek church at all?

A. No, sir; not a one; everything is circled.

Q. What is the difference, then, Mr. Koyen, in putting copper on the two towers?

A. The difference is this, that on the synagogue you have got a flat surface to put the copper on; you can nail it anywheres you want to and the copper will lay flat on it, and that is the way the copper was put on. By the way, it was put on by the same people that put this Greek tower on—the same people, and the copper was put—I think it was
20 nailed and lock joints, and it was not soldered a darned stitch—begging your pardon; I stretched myself a little bit there—but there was not a bit of solder used on that tower; I knew it. You can nail this the same as on this flat board. You can put a piece of copper on there and it will lay flat any time, but on a round circle like the tower of the Greek church you can't do it—it is another impossibility.

Q. What do you have to do then?

A. We would have to put—this was not suggested to the architect—put enough more ribs in the tower and make
30 them heavy enough to support the tower to put the copper on and rivet the copper from the inside. It is the only way, and it was done on the recommendation of the man that put the copper on. He was the one that suggested it to me. I am not an expert on that kind of a tower, and I have never erected a tower of that kind before—never built for the Greek denomination before in my life.

Q. The witnesses have said that this tower is not sheathed down here. Is that so or isn't it?

A. It is not. It don't call for it.

Q. Did you tell any of the committee that the plate around on the walls would cost about \$25?

A. No, sir.

Q. Or the architect or anybody?

A. Never told anybody about it. I offered that as an improvement of the church, that they should get a plate on there, and I made the offer to offset the lightning rod, although the plate would cost considerable more than the lightning rod. 10

Q. What witness has testified that the charge of \$25 for the two closets is too much and that it would cost about \$12; is that true?

A. To that I will say that I would not duplicate those two closets for no \$25, or no other living man in the business can do it and come out square on it.

Q. Do you know when the question of plastering the ceiling came up, in the basement? 20

A. It came up quite sometime after the other was finished.

Q. Did you hear any conversation about the matter with the committee and Mr. Ostergard or the architect?

A. No; I didn't hear any conversation between them. The first I heard about that was quite some time after that; they made a dispute about the plastering should go in.

Q. Who did you hear it from?

A. From Mr. Ostergard. I want to take back one answer. When you asked about the sheathing—if you will show me the plan there, that picture—where did you mean about the sheathing there? 30

Q. Here (indicating).

A. That is all sheathed from here down.

By Mr. Stricker.

Q. Sheathed up here (indicating)?

A. No, sir.

By the Court.

Q. It is sheathed from here—

A. It is sheathed from that point to that point.

The Court—It is sheathed from the bottom of the window to the top of the peak?

By Mr. Lyon.

Q. Was that tower, with the exception of the sheathing of the dome, built exactly according to the plans and specifications?

10 A. Exactly, and the plans and specifications carried the tower out exactly to—something that is not always the case.

Cross-examination.

By Mr. Stricker.

Q. Now, Mr. Koyen, when that plan and specification was deviated from, and you abandoned the sheathing inside of it and substituted the ribs, was any of the committee present?

A. No, sir.

20 Q. Who ordered that?

A. Not that I remember.

Q. Who ordered it?

A. Mr. Ricci.

IVER C. OSTERGARD, recalled.

Direct examination.

By Mr. Lyon.

Q. Mr. Ostergard, you heard the witnesses testify that you took down the front wall?

30 A. Yes, sir.

Q. One of them said three times?

A. Yes, sir.

Q. Because of some defective workmanship, what have you to say to that?

A. I will say to that that there was a little piece of the wall—I had a mason one day that was drunk and he put up a little that I was not satisfied with, and we took down

there about 75 brick or a hundred brick—I wouldn't say if there was so many that was took down, and that was all.

Q. The witnesses have testified also that this wall was made eight inches thicker because there was a mistake in the terra cotta, is that so?

A. No; simply made heavier for the bell, and that is all. That don't interfere with the terra cotta. That took that much room out of the church in front, but the terra cotta had nothing to do with it.

No cross-examination.

10

ELOISE RICCI, recalled.

Direct examination.

By Mr. Lyon.

Q. Mr. Ricci, one of the witnesses has testified there was a mistake in the terra cotta, and the terra cotta didn't fit, and therefore the front wall had to be made thicker on that account; is that so?

A. No, sir.

Q. Was there any mistake in the terra cotta?

20

A. There was not.

Q. Was the wall made thicker for any other reason than that stated, to make the tower stronger for the bells?

A. Yes. The terra cotta had nothing to do with the thickening of the wall.

Q. My question was, was the wall made thicker for any other purpose than to strengthen it on account of the bells?

(Objected to. Question withdrawn.)

Cross-examination.

By Mr. Stricker.

Q. Mr. Ricci, you sold them that terra cotta?

30

A. No; the Perth Amboy Terra Cotta Company.

Q. You designed it?

A. Well, yes, I did.

Q. And it was ordered through you, wasn't it?

A. No; through the committee.

Q. No; but the committee ordered it through you, didn't they?

A. No; through themselves to the company.

Q. Didn't they order it through you?

A. No.

Q. Didn't you take the order for it?

A. No, sir; they sent to the company.

Q. Didn't you inspect it as it was being made?

A. No; it is not my business for that purpose.

10 Q. I didn't ask you for that purpose. Did you or didn't you?

A. No.

Q. Being connected with the Perth Amboy Terra Cotta Company as the head modeler, and the terra cotta being made on their premises, weren't you somewhat interested in it?

A. I took interest to make a good job; that is all.

Q. You took interest to make a good job and to see that the terra cotta fit?

20 A. Yes.

SPENCER DAYTON, sworn.

Direct examination.

By Mr. Lyon.

Q. What is your business?

A. Carpenter and builder.

Q. In Perth Amboy?

A. Yes, sir.

30 Q. How long have you been a carpenter and builder in Perth Amboy?

A. Thirty-two years.

Q. You are a master carpenter and builder, I presume?

A. Yes, sir.

Q. And been in that business continuously for thirty-two years?

A. Yes, sir.

Q. Are you acquainted with the towers of the Hebrew Synagogue on Madison avenue, Perth Amboy?

A. Not particularly acquainted with it; I saw it.

Q. You know the shape of them?

A. Yes, sir.

Q. I show you a photograph of the tower on the Greek Catholic Church in Perth Amboy. Will you tell us how those towers differ in shape?

A. Well, I don't know exactly what you mean, differ in shape.

Q. Well, is the tower on the Greek Church the same shape as the tower on the Madison Avenue Synagogue?

A. No.

Q. What is the difference?

A. Well, one is practically round and the other is four-square.

Q. What would be the difference as to the putting of copper on the two towers?

A. Be considerable.

Q. In the method of constructing it?

A. It would be more work in putting it on this here.

Q. That is on the Greek Church?

A. On the Greek Church.

Q. Why?

A. It is very difficult to get the copper on.

Q. How would the copper have to be put on?

A. Should be riveted.

Q. In case of its being riveted, could that be done if the tower was sheathed?

A. No, sir; couldn't; had to be nailed.

Q. If it were nailed, would it be a good job?

A. No, sir; not as good as riveting. Nails won't stay as well.

Cross-examination.

By Mr. Stricker.

Q. Mr. Dayton, are you a member of the Master Builders' Association of Perth Amboy?

10

20

30

A. I was.

Q. You are?

A. Yes.

Q. Is Mr. Ostergard?

A. I think he is.

Q. And Mr. Koyen?

A. I think they are.

By Mr. Lyon.

Q. Mr. Cladek?

IO A. I don't think he is.

Q. Do you know Mr. Cladek?

A. Well, not intimately.

Both sides rest.

COURT'S CHARGE TO JURY.

Gentlemen of the Jury:

On the thirteenth day of April, 1904, a contract in writing was entered into between the Greek Congregation of St. John the Baptist, on the one part, and Iver C. Ostergard, on the other part, in and by which Mr. Ostergard, the plaintiff in this suit, agreed to construct, according to the plans and specifications attached to the contract, a church for the Congregation of St. John the Baptist, party of the other part. For the erection and construction of that church the contractor was to receive the sum of twenty-one thousand and seven hundred dollars. In the body of the contract Eloise Ricci is referred to as being the architect to whom was submitted the construction of the clauses of the contract and the various parts of the plans and specifications. To these specifications and to this contract appear to have been added, at least at the time when the contract was filed in the office of the County Clerk of this county, and before the beginning of the work, according to the testimony of the plaintiff, a memorandum which further provided as follows: "Mr. E. Ricci, 399 States street, Perth Amboy, New Jersey, has been duly authorized to represent the architect and he will have full charge of the work." In the body of the contract a Mr. Holly is also mentioned as the architect who drew the plans and specifications. So you see Mr. Holly is mentioned in this contract as being the man who had performed the work of preparing the specifications and drafting the plans, while Mr. Ricci is distinctly named, both in the contract itself and in the supplemental page attached to the specifications, as the supervising architect. I want you to keep that clearly in your mind: there were two men; one man drew the plans and specifications, and the other man was to supervise the

work, and he was recognized in that contract as being the supervising architect.

I will also call your attention to another clause, the seventh clause in this contract, which provides "that no alterations or extra work shall be done without a written order from the owner approved by the architect, and an express agreement in writing to that effect."

Now, gentlemen, I charge you, as a matter of law, that under this contract as executed Mr. Eloise Ricci was con-
10 stituted the agent, for the purpose of carrying out that contract, of the Greek Church; but I further charge you that the limitations and scope of his agency are to be found and read in the contract and the specifications and there alone, unless you find that those specifications and plans and contract were subsequently altered by the parties, either by an express agreement or by an implied agree-
20 men or by a waiver on their part of any of the provisions of the contract. In other words, the situation as a legal matter is this: here is a contract which the parties have committed to writing, meaning that that contract shall be the final expression of their meaning. Now, you cannot alter that contract by injecting into it something else, but you can, in the language of the Court of Errors and Ap-
peals, find that the parties had subsequently made an agreement which would alter or affect the efficacy of the contract which they had made. I recall the statement that I have just made, "in the language of the Court of Errors and Appeals," because I desire to quote it in another form. Justice Collins says: "Speaking for myself, I can see no
30 reason why a valid contract of whatever nature should be denied efficacy because the parties had previously made a different contract, however solemn in form."

Now, it is claimed by the defendant that this contract was not fully completed, that the work was not done according to contract and there also were certain alterations. It is also claimed by the plaintiff that in addition to performing the work called for in the contract itself he did

certain extra work, for which he would be entitled to extra pay. The defendants deny that he had any authority to perform this extra work.

Now, the extra work, you will observe, gentlemen, is work that is not referred to in the contract or in the specifications. The right of the plaintiff, therefore, to recover for any extra work, if he has any right to recover at all, is not based on the contract, but is based upon an understanding or an agreement separate and independent from the written contract I have referred to. Therefore, if you find that the defendants did make a contract, either direct, express or implied, with the defendant to do this extra work, you are not precluded by the fact that there was a written contract from finding in favor of the plaintiff for this extra work. 10

On the question of the alterations that were made, which consisted, first, of changing the original plan of the terrace, of substituting an aisle plate for the lightning rod, and leaving the sheathing off of the tower, you will perceive that all of these are direct divergencies from the provisions contained in the contract and the specifications. Now, before you can consider whether you are justified in finding that the plaintiff was authorized to make any of these changes, you must consider whether or not the defendant, by its conduct, in any way had authorized these alterations; for, if the defendant, although this seventh clause remains in the contract, which provides no changes should be made except by writing, expressly or impliedly waived this provision, that is, either positively agreed to waive, subsequently to the execution of the contract, the seventh clause, or by its non-action or conduct may be considered to have led the plaintiff to believe that it was waived, why, you can then find for the plaintiff as to these alterations with certain limitations which I shall explain shortly. 20 30

I will take up the question of the alteration of the tower first. The specifications called for sheathing the tower. The tower, as it appears by the testimony in the case, was

a tower of a peculiar shape; it was not a tower composed of straight sides with corners, but it was entirely circular in its nature. The specifications called for placing on the sheathing of this tower a copper plating or roof. It appears from the testimony—or, I won't say it appears from the testimony—there is testimony tending to show that a copper sheathing or roofing of the material called for in the specifications could not be put on a wooden sheathing in a tower shaped like this tower, so as to make mechanically a perfect job; that if the copper were nailed fast to the sheathing, the very fact of nailing copper, driving the nails through the copper into the wood, would create a leak, which in time would cause a great deal of trouble and injury to the entire structure; and it appears that after this fact became known to the contractor, he and the architect, Mr. Ricci, together changed the original plan of construction and provided for placing thicker ribs, two-inch ribs instead of one-inch ribs, to form the skeleton of the tower, and agreed to omit the sheathing of the tower and instead of fastening the copper roof to the sheathing by means of nails, that the copper itself, the metal itself should be rivetted, thus claiming it was a better job.

Now, gentlemen, it is purely a question of fact for you to determine whether that is so or not. But you must remember one thing, that if there were any error in the plans which prevented a successful mechanical construction of the tower, that is an error made by the agent of the church, of the defendant in this case, he had drawn the plans, and I do not think that where the error is made on the part of the defendant's agent, which is in effect the error of the defendant itself, that the law would impose upon the contractor the burden of making the change, if such a change were necessary and were really authorized to be made, but if the work of construction cost less by reason of this change, having put the roof on, of course the plaintiff should give credit for whatever amount he gained over and

above the amount it would have cost him if the contract had been completed according to the provisions of the specifications. In estimating that, however, you will estimate the cost of putting on that roof at the time of the construction of the building, and not the cost of putting it up now, when it would be necessary to erect scaffolding and undertake a far more difficult and complicated piece of work.

Now, as to the extra work being done, I will say to you, in other words what I said to you at the beginning of my charge, that the change by Mr. Ricci, as far as the contract itself is concerned, is limited by the terms of that contract and you cannot hold the defendant for anything he did beyond the terms of that contract, unless you find that there has been a subsequent express or implied extension of power conferred upon him by the defendant in this case. 10

Now, whether or not the fact that these various changes, some of which it appears by the testimony on both sides were made only on the authorization of Mr. Ricci, others made at the authorization of the committee and Mr. Ricci jointly, some perhaps by the committee alone—whether or not these facts are facts sufficient to authorize you to find that there was an implied further extension of authority and power on the part of the church to Mr. Ricci, is a question of fact for you to determine. You may also consider in this connection this fact, namely, that all this work was done under the view of the committee. It certainly appears in the case that the committee must have known that this extra work was done, and it does not appear, as I remember the testimony, that there was at any time any remonstrance on their part against the performance of this extra work on the part of the contractor. 20 30

All these things, which I have simply outlined to you, are questions of fact for you to determine. I will explain the law to you as well as I can, and as to the facts, whether you believe one side or the other, that is the function which is exclusively the function of the jury.

You may also consider, in connection with the problem as to whether under the contract and specifications the building was really completed at the time this suit was brought, the fact, if you find it to be a fact, that there was on one Saturday afternoon a meeting of Mr. Holly, Mr. Ostergard and the committee, wherein the committee said that, according to some of the testimony—you are to determine whether you believe that testimony, of course—that the work of the church and on the church and the church itself was complete and that they were willing to pay for it.

The intention of Mr. Ostergard which he has expressed here to waive the bill for extras, which intention he entertained at one time before bringing this suit, I charge you does not itself constitute anything in the nature of a waiver of a claim, because it is based upon no consideration to him moving. You may consider, however, the fact of his failing to present his claim at the time he did as a factor tending to show whether or not in his own mind he was conscious of having completed his work according to contract.

Mr. Lyons—I have some requests to charge.

The Court—I am requested to charge as follows:

"1. That the plain meaning of the second paragraph on the first page is that the ceiling of the basement should be left unfinished except over the boiler for 10 feet square."

I will say on that subject this. The clause referred to reads as follows:

"The basement will be left unfinished excepting the two toilet rooms, vestibule and stairs to main floor and the plastering of the ceiling using wire lath over the boiler for a space of 10 feet square which will be finished as specified."

It is claimed that this clause is capable of two different constructions; one construction that the counsel for the plaintiff has put upon it in his request to charge, and the other the construction which the counsel for the defendant has claimed in his summing up and is apparent in the con-

duct of the case. Now, if that clause in your mind is capable of two constructions, and I think in the minds of fair men it may be capable of two constructions, there arises in the words so used a latent ambiguity, and you may determine from the testimony given in the case what was the true meaning of those words. You cannot supply anything to the language of the contract or the specifications, but by such testimony you may ascertain the hidden meaning of the language; and there is testimony to show, if you believe it, that the church was desirous of having the work completed as economically as possible and so intended to leave the basement unfinished, with this exception, and there is testimony, if you believe it, to the contrary. It is for you to determine as a question of fact which one of those meanings should be taken. 10

The second request is as follows:

"2. If the defendant stood by and saw work done which it had reason to believe would involve extra cost without objecting they are liable."

I have in effect charged that already.

I will say that it appears in the case that of the twenty-one thousand and seven hundred dollars agreed to be paid under the contract, all but twelve hundred dollars has been paid. The balance, making up the sum of \$1,616.65, after making an allowance of \$75 for the lightning rod, and after certain other of omitted items which you know the plaintiff has allowed, amounts to a total sum of \$1,616.65. Upon that there would be interest from the 25th of June, 1905. If you find for the plaintiff you may find for this entire amount. You must, of course, find some amount for the plaintiff, as it is conceded there is something due, namely, \$395.65. So, in that event, what you will consider, if you reduce the total amount claimed by the plaintiff, is how much you are to allow the defendants for failure to fully perform the work and for unauthorized work done, which is as follows: Grading, \$165. Well, that item, you will remember the witness who testified regarding that said that he had made 20 30

a very liberal allowance for his work, so the work for other people would have been very much smaller. He said 35 cents a yard is the price he had charged Mr. Ostergard and this work was probably worth 50 cents. The lightning rod I have already explained to you. I think the cost of that has been allowed already by Mr. Ostergard, namely, the sum of \$47. The church is entitled, gentlemen, to that allowance and has received it. They would not be entitled, under the circumstances, to such an allowance as
 10 claimed by the defendants, namely, the cost of putting up a lightning rod now for reasons I have stated. Then the partitions in the basement, \$30, and the altar platform, \$19.

Mr. Lyon—We have allowed for the platform.

The Court—Twenty dollars has been allowed for that. Hinges in the basement and the sheathing of the tower. If you consider, gentlemen, that there is any allowance to be made to the defendant by reason of the fact that the cost of laying the copper roofing was less than the cost of laying the copper roof with the sheathing you may
 20 ascertain that amount from the testimony in the case; but you cannot allow the claim that the defendant makes, for the reasons I have already stated, namely, the claim that he is entitled to \$425, which represents the cost of making the very expensive changes necessary at the present time to change the roof from the method adopted to the method provided in the original specifications. The ceiling of the basement, if you find that the construction of the defendant is the true construction of that additional clause on the first page of the specifications, you will allow according to
 30 the testimony as you have heard it. It has been testified to that there are 416 square yards of ceiling in the basement, and one witness testifies that that ceiling would cost 35 cents a square yard, another 50 cents a square yard. I think that is all that I have to say.

DEFENDANT'S EXCEPTIONS.

Mr. Stricker—The defendant excepts to so much of His Honor's charge wherein he says the defendant may be held for any alterations or extra work which was ordered by an agreement either express or implied.

(Which exception is hereby allowed and sealed accordingly.)

THEO. B. BOORAEM, [L. S.]

Judge.

10

The defendant excepts to so much of His Honor's charge which says that the defendant may be held liable if its agent authorized any of these alterations.

(Which exception is hereby allowed and sealed accordingly.)

THEO. B. BOORAEM, [L. S.]

Judge.

The defendant excepts to so much of His Honor's charge 20 wherein he said that the defendant cannot recover for the cost of the lightning rod and the sheathing of the tower at what it would now cost, but such allowance, if any, should be based upon what the cost would have been then, at the time the building was under construction.

(Which exception is hereby allowed and sealed accordingly.)

THEO. B. BOORAEM, [L. S.]

Judge.

New Jersey Court of Errors and Appeals.

<p>IVER C. OSTERGAARD, <i>Defendant in error.</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>GREEK CATHOLIC CONGREGATION OF ST. JOHN THE BAPTIST, <i>Plaintiff in error.</i></p>	}	<p><i>On Writ of Error.</i></p>
---	---	--

10

ASSIGNMENTS OF ERROR.

Afterwards, to wit, on the fifteenth day of December, in the year nineteen hundred and six, before the judges of the said Court of Errors and Appeals, in the last resort in all causes, at Trenton, comes the said Greek Catholic Congregation of St. John the Baptist, plaintiff in error, by Charles T. Cowenhoven, their attorney, and says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error, to wit:

20

First. That the said Judge of the Middlesex County Court of Common Pleas, to whom this cause was duly referred by order of the Circuit Court of said county, and before whom the said cause was tried, at and upon the aforesaid trial of the said issue so joined between the parties aforesaid, rejected legal evidence offered in behalf of the said Greek Catholic Congregation of St. John the Baptist.

30

Second. That the said Judge before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid, admitted against the objection of the said Greek Catholic Congregation of St. John the Baptist, illegal evidence offered in behalf of the said Iver C. Ostergard.

Third. That the said Judge before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid, refused to charge the jury as re-

quested by the said Greek Catholic Congregation of St. John the Baptist, defendant.

Fourth. That the said Judge before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid, charged the jury as follows:

"Now, the extra work, you will observe, gentlemen, is work that is not referred to in the contract or in the specifications. The right of the plaintiff, therefore, to recover for any extra work, if he has any right to recover at all, is not based on the contract, but is based upon an understand- 10
ing or an agreement separate and independent from the written contract I have referred to. Therefore, if you find that the defendants did make a contract, either direct, express or implied, with the defendant to do this extra work, you are not precluded by the fact that there was a written contract from finding in favor of the plaintiff for this extra work."

Fifth. That the said Judge before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid, charged the jury as follows: 20

..... "you will estimate the cost of putting on that roof at the time of the construction of the building and not the cost of putting it up now, when it would be necessary to erect scaffolding and undertake a far more difficult and complicated piece of work."

Sixth. That the said Judge before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid, charged the jury as follows:

"I will say on that subject this. The clause referred to reads as follows: 30

"The basement will be left unfinished excepting the two toilet rooms, vestibule and stairs to main floor and the plastering of the ceiling using wire lath over the boiler for a space of 10 feet square which will be finished as specified."

..... "Now, if that clause in your mind is capable of two constructions, and I think in the minds of fair men it may

be capable of two constructions, there arises in the words so used a latent ambiguity, and you may determine from the testimony given in the case what was the true meaning of those words."

Seventh. That the said Judge before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid, charged the jury as follows:

....."Mr. Ricci is distinctly named, both in the contract itself and in the supplemental page attached to the
10 specifications, as the supervising architect."

Eighth. That the said Judge before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid, charged the jury as follows:

"In other words, the situation as a legal matter is this: here is a contract which the parties have committed to writing, meaning that that contract shall be the final expression of their meaning. Now, you cannot alter that contract by injecting into it something else, but you can, in the language of the Court of Errors and Appeals, find that the
20 parties had subsequently made an agreement which would alter or affect the efficacy of the contract which they had made."

Ninth. That the said Judge before whom, etc., at and upon the trial of the said issue between the parties aforesaid, charged the jury as follows:

"Now the extra work, you will observe, gentlemen, is work that is not referred to in the contract or in the specifications. The right of the plaintiff, therefore, to recover for any extra work, if he has any right to recover at all, is
30 not based on the contract, but is based upon an understanding or an agreement separate and independent from the written contract I have referred to. Therefore, if you find that the defendants did make a contract, either direct, express or implied, with the defendant to do this extra work, you are not precluded by the fact that there was a written contract from finding in favor of the plaintiff for this extra work."

Tenth. That the said Judge before whom, etc., at and upon the trial of the said issue between the parties aforesaid charged the jury as follows:

.....“That the defendant cannot recover for the cost of the lightning rod and the sheathing of the tower at what it would now cost, but such allowance, if any, should be based upon what the cost would have been then, at the time the building was under construction.”

Therefore, the said Greek Catholic Congregation of St. John the Baptist prays that the judgment aforesaid, by reason of the aforesaid errors, and other errors appearing in the record and proceedings aforesaid, be reversed, annulled and held for nothing, and that the said Greek Catholic Congregation of St. John the Baptist may be restored to all things they have lost on account of said judgment. 10

CHAS. T. COWENHOVEN,
Attorney of Plaintiff in Error.

Filed December 18, 1906.

S. D. DICKINSON, Clerk. 20

New Jersey Court of Errors and Appeals.

IVER C. OSTERGAARD,

Defendant in error.

vs.

GREEK CATHOLIC CONGREGATION OF

ST. JOHN THE BAPTIST,

Plaintiff in error.

In Error.

10

JOINDER IN ERROR.

And, hereupon, afterwards, to wit, on the third Tuesday of November, A. D. nineteen hundred and six, the said Iver C. Ostergard, by Adrian Lyon, his attorney, comes into court and says that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and he prays here that the court here may proceed to examine as well the record and proceedings aforesaid as the maters aforesaid assigned for error, and that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed, etc.

ADRIAN LYON,

Attorney for and of Counsel with Defendant in Error.

Filed January 2, 1907.

S. D. DICKINSON, Clerk.

EXHIBIT P—1.

Articles of Agreement, Made the thirteenth day of April, one thousand nine hundred and four, between Greek Catholic Congregation St. John the Baptist of the city of Perth Amboy, county of Middlesex, and State of New Jersey, of the First Part; and Iver C. Ostergard of the city of Perth Amboy, county of Middlesex, and State of New Jersey, of the Second Part: 10

Witnesseth, First—The said party of the second part, does hereby for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said party of the first part, its successors or assigns, that he, said party of the second part, his executors or administrators shall and will for the consideration hereinafter mentioned, on or before the 29th day of November, 1904, well and sufficiently erect and finish the new building, 20 being a certain church, upon the property of said party of the first part on the southeast corner of Broad and Division streets in said city of Perth Amboy, agreeably to the drawings and specifications made by Henry H. Holly, architect, and signed by the said parties and hereunto annexed, within the time aforesaid, in a good workmanlike and substantial manner, under the direction of the said architect, to be testified by a writing, or certificate, under the hand of the said architect, as hereinafter mentioned, and, also, shall and will find and provide such good, proper and sufficient 30 materials of all kinds whatsoever, as shall be proper and sufficient for the completing and finishing of all the works of the said building mentioned in the plans and specification for the sum of twenty-one thousand and seven hundred dollars (\$21700).

And the said party of the first part does hereby, for its successors or assigns, covenant, promise and agree, to and

with the said party of the second part, his executors and administrators, that it, the said party of the first part, its successors, shall and will, in consideration of the covenants and agreements being strictly performed and kept by the said party of the second part as specified, well and truly pay or cause to be paid unto the said party of the second part, his executors, administrators or assigns, the sum of twenty-one thousand and seven hundred dollars, lawful money of the United States of America, in manner following:

10

\$3000—Three thousand dollars when the first tier of beams shall have been laid.

\$3000—Three thousand dollars when the walls are erected and ready to receive the roof.

\$4000—Four thousand dollars when the building is enclosed.

\$2000—Two thousand dollars when the building shall have received its first coat of plaster.

20

\$2000—Two thousand dollars when all the floors are laid and the said building is ready for trim.

\$1700—Seventeen hundred dollars when the painters' work is completed.

\$6000—Six thousand dollars when the said building is entirely completed and accepted by the owner.

The work on said building shall be superintended by Eliseo Ricci and Andrew Zlojau.

30

It is agreed that the said party of the second part shall not be liable for any delay in the erection of said building caused by a general strike in this city of any of the workmen engaged in the work thereon.

Provided, that in each of the said cases, a certificate shall be produced, signed by the said architect, to the effect that the work is done in accordance with said drawings and specifications, said certificate, however, in no way lessening the total and final responsibility of the contractor; neither shall it exempt the contractor from liability to replace work, if it be afterwards discovered to have been

done ill, or not according to the drawings and specifications either in execution or material.

And it is hereby further agreed by and between the said parties:

First. The specifications and drawings are intended to co-operate, so that any works exhibited in the drawings, and not mentioned in the specifications, or vice versa, are to be executed the same as if they were mentioned in the specifications and set forth in the drawings to the true meaning and intentions of the said drawings and specifications, without any extra charge whatsoever. Copies thereof certified by the architect to be true copies shall be furnished to the contractor. 10

Second. The contractor, at his own proper costs and charges, is to provide all manner of materials and labor, scaffolding, implements, moulds, models and cartage, of every description for the due performance of the several erections.

Third. Should the owner at any time during the progress of the said building request any alterations, deviations, additions or omissions, from the said contract, it shall be at liberty to do so, and the same shall in no way effect or make void the contract, but will be added or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation. 20

Fourth. Should the contractor, at any time during the progress of said works, refuse or neglect to supply a sufficiency of materials or workmen, the owner shall have power to provide materials and workmen, after three days' notice in writing being given, to finish the said works, and the expense shall be deducted from the amount of the contract. 30

Fifth. Should any dispute arise respecting the true construction or meaning of the drawings or specifications, the same shall be decided by Elisio Ricci, and his decision shall be final and conclusive; but should any dispute arise respecting the true value of the extra work, or of the works

omitted, the same shall be valued by two competent persons—one employed by the owner, and the other by the contractor—and those two shall have power to name an umpire, whose decision shall be binding on all parties.

Sixth. The owner shall not, in any manner, be answerable or accountable for any loss or damage that shall or may happen to the said works, or any part or parts thereof respectively, or for any of the materials or other things used and employed in finishing and completing the same.

10 Seventh. No alterations or extra work shall be done without a written order from the owner, approved by the architect, and an express agreement in writing as to the cost.

2 Eighth. The owner will insure the building in the joint names and interest of himself and the contractor against loss or damage by fire, in such sums as may from time to time be agreed upon with the contractor to cover work and materials used in the building and around the premises, and the policies to be made payable to owner and contractor, as their interest may appear. The contractor shall see to it that this insurance is satisfactorily effected.

Ninth. All work and materials, delivered on the premises to form part of the works, are to be considered the property of the owner, and are not to be removed without his consent; but the contractor shall have the right to remove all surplus materials after the completion of the works.

3 Tenth. Neither the contractor nor the architect shall, without the written consent of the owner, have authority to vary, alter, amend or change this contract, or any of the plans or specifications herein referred to.

Eleventh. Whenever building permits shall be required by any municipality, or be necessary under any law, ordinance or other regulation, to the erection, alteration or repair of any building, the same shall be procured by the owner.

COURT OF ERRORS AND APPEALS. 149

In witness whereof the said parties have executed the foregoing agreement according to the day and aforesaid.

I. C. OSTERGAARD.

Greek Catholic Congregation St. John the Baptist by

ANDRO ZBOJAU, Presd.

PETER KUZUL, Secretar.

JOHN. HOSPO, as Treasurer.

[Greek Cath. Congregation of St. John Baptist. Corporated 1901. * Perth Amboy, N. J.]

The Basement will be left unfinished, except the two toilet rooms, vestibule and stairs to main floor, (and the plastering of the ceiling, [using wire lath] over the boiler for a space of 10 ft. square,) which will be finished as specified.

April 25, 1903.

MEMORANDUM TO SPECIFICATIONS FOR THE
CHURCH OF ST. JOHN THE BAPTIST,
AT PERTH AMBOY, N. J.

Paragraph 49. Remove the present frame building to the southeast corner of the premises, building a suitable foundation for the same, and leaving the building in good condition for use as at present.

Paragraph 99. To be omitted.
The basement will be left unfinished, except the two toilet rooms, vestibule and stairs to main floor (and the plastering of the ceiling, (using wire lath), over the boiler for a space of 10 feet square,) which will be finished as specified.

Paragraph 21. Mr. E. Ricci, number 399 State street, Perth Amboy, N. J., has been duly authorized to represent the architect and he will have full charge of the work.

Drawings will be furnished. 6. The architect will furnish drawings, exhibiting the work to be performed by the contractor, also detailed drawings, for all molded carved and ornamental work, as may be required from time to time during the progress of the work, and any work not made in strict accordance with said drawings and details, and these specifications, will be rejected, and must be replaced by work strictly conforming to the drawings and these specifications and all work injured or destroyed thereby must be made good at the contractor's expense.

Architect to control. 20. The owners, architect, or their duly authorized representatives shall at all times have access to the work, which shall be wholly under their control. They shall have the right to cause to be dismissed forthwith such workmen as in their judgment are careless or incompetent. They shall also have authority to reject and order removed from the premises defective material and all material not in strict accordance with these specifications.

21. Where the term architect is used, the same is meant to apply to his duly authorized representative who is to have charge of the work. See memorandum—(In ink, not typewritten.)

122. The dome of the tower, including the cross, will be of sixteen oz. cold rolled copper,—the dome will be of stamped tile. All copper to be set so as to allow for expansion and contraction—all joints to be tinned back 1 inch before soldering.

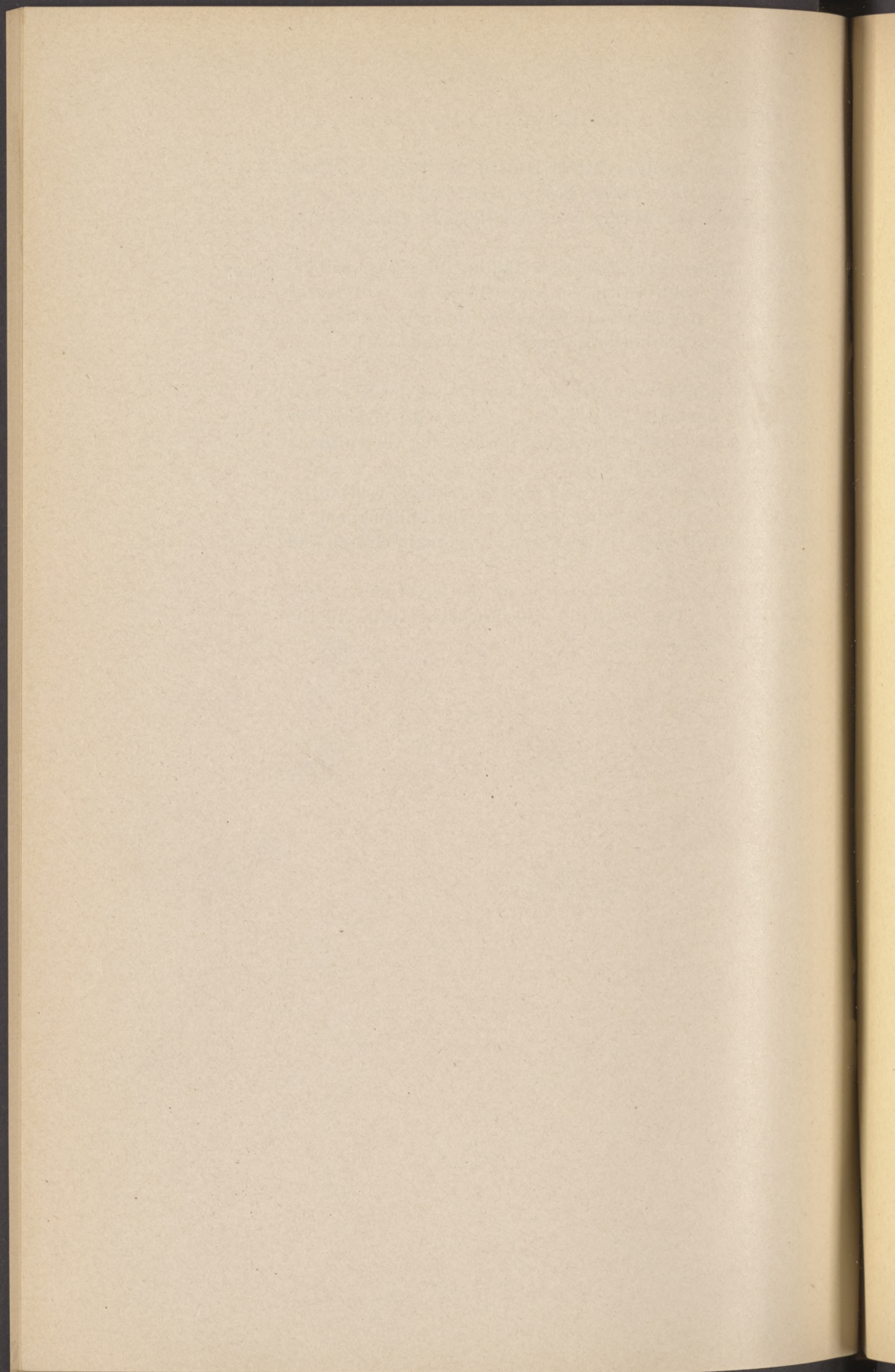
Copper.

125. To be dipped wire lath with solid steel ribbed woven in seven and one-half (7½ inch O. C. Use wire lathing for the ceiling of the boiler room, and for forming the columns of the nave on the main floor.

129. Plaster all the walls and ceilings, toilets, vestibules, soffits of stairs, etc., and the ceiling of the boiler room, in basement, and all walls and ceilings of the main church and sacristies.

192. Wainscot main church except the sanctuary, 3 feet high as above. The vestibule and down the stairs to the basement to be the same.

of the Assembly Hall
~~of the Assembly~~
Hall in the basement of the
Wainscoted 3 ft high as above.



Faint text at the top of the page, possibly a title or header.

Faint Section Header

Faint Sub-Header

First block of faint text, possibly a list or a paragraph.

Faint Section Header

Text block following the third header.

Second block of faint text, possibly a list or a paragraph.

Faint Section Header

Third block of faint text, possibly a list or a paragraph.

T

K

M

B

Ce

fo

cl

di

ce

we

Th

th

ar

Ov

da

da

ve

fus

pa

an

po