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New Jersey Supreme Court

Summons.

(Filed Dec. 29, 1926)

STATE OF NEW JERSEY, to Andrea Raio, Builder and Andrea Raio and Maria Raio, his wife, Owners, and Edwin C. Carffey, also known as Edwin C. Caffrey, Mortgagee, Defendants.

YOU ARE SUMMONED, to answer the annexed complaint of Daniel A. Palladino, in an action at law in the Union County Circuit Court, in and for the County of Union, in which said Daniel A. Palladino, claims a lien on certain buildings and lands of the said Andrea Raio and Maria Raio, his wife, described in said complaint and on which the said Edwin C. Carffey, also known as Edwin C. Caffrey holds a mortgage of record.

And take notice that unless you file your answer to said complaint with the Clerk of the Union County Circuit Court, at Elizabeth, N. J. within twenty days after service upon you of this writ, and the annexed complaint, the plaintiff may proceed in this suit and judgment may be entered against you.

WITNESS, Peter F. Daly, Esquire, Judge of said Court at Elizabeth, aforesaid the 29th day of December, 1926.

BM. B. MARTIN,
Clerk.

Eugene A. Liotta,
Attorney.

Complaint.

(Filed Dec. 29, 1926)

UNION COUNTY CIRCUIT COURT

DANIEL A. PALLADINO, Plaintiff, vs. ANDREA RAIO, Builder and ANDREA RAIO & MARIA RAIO, his wife, Owners and EDWIN C. CARFFEY, also known as EDWIN C. CAFFREY, Mortgagee-Defendants.	Action at Law On Lien Claim

Plaintiff, residing in the Township of Union, in the County of Union and State of New Jersey, complains and says:

COUNT ONE

1. At the time herein stated the defendants, Andrea Raio and Maria Raio, his wife, were the owners of a plot of land, which land is described as follows:

All that certain tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the Town of Vauxhall, in the County of Union and State of New Jersey.

Complaint

Beginning at a point formed by the intersection of the southerly line of Oswald Place with the Easterly line of Laurel Avenue, formerly known as Baker Road, distant westerly from said line of Laurel Avenue, formerly known as Baker Road 50 feet more or less, thence running southeasterly 43 feet more or less, thence running southwesterly 50 feet more or less, thence running northwesterly 43 feet more or less to Oswald Place, thence running northeasterly 50 feet more or less to the point or place of beginning.

Being the westerly one half of lots 86, 87 and 88 in Block 10 on map entitled "Newark on the Hill #4" and also being part of the premises conveyed from Michael D'Andrea and Carmela D'Andrea, his wife, by deed bearing date August 14, 1920 and recorded in book 877 of deeds for Union County page 185 etc.

2. On or about the 13th day of April, 1926 plaintiff and the defendant Andrea Raio entered into an agreement for the construction and erection of a new building on premises hereinabove more particularly described, a copy of which agreement is hereto annexed and made a part hereof, and marked schedule "A," the consideration for said agreement being $9,678.00.

3. The said building is a 3 story frame comprised of two stores and two apartments and an attic.

4. On or about the 15th day of November, 1926, the said plaintiff did well and sufficiently perform all the matters and things by him to be performed in accordance to the terms of the said contract.

5. The defendant has paid on account of the said contract the sum of $6500.00, leaving a balance due and owing of $3178.00 which sum of money is still due and unpaid.

6. Edwin C. Carffey, also known as Edwin C. Caffrey holds a mortgage on said premises in question for the sum of $10,000.00 dated June 1st, 1926 and the said Edwin C. Carffey, also known as Edwin C. Caffrey is made a party defendant because the lien of his said mortgage will be cut off by a sale in pursuance of a judgment recovered in a suit on said lien claim filed by the plaintiff.

7. Said debt is a lien on said building and land by virtue of the provisions of an act entitled, "An Act to secure to mechanics and others payment for their labor and materials in erecting and building," and the several supplements thereto and amendments thereof.

8. There is still due and owing on account of said contract the sum of $3178.00 which the plaintiff demanded of the defendant and the defendant refused to pay.

Plaintiff demands as damages the sum of $3178.00 with interest from November 15th, 1926, and costs of suit to be taxed.

COUNT TWO

1. Plaintiff repeats the first count.

2. During the construction of the said building and between the days of April 13th, 1926 and

November 15, 1926 the defendant demanded of the plaintiff that he do certain extra work, an itemized copy of which is hereto annexed and made part hereof, and marked schedule "B," upon the premises hereinabove mentioned and described, for which he agreed to pay a reasonable price.

3. The reasonable value of said extra work is the sum of $350.40.

4. Plaintiff has demanded of the defendant the said sum of $350.40 which the defendant has refused to pay.

Plaintiff demands as damages the sum of $350.40 with interest from November 15, 1926 and costs of suit to be taxed.

EUGENE A. LIOTTA,
Attorney for Plaintiff.

Schedule A.

Articles of Agreement, Made the Thirteenth day of April One Thousand Nine Hundred Twenty-Six

Between Andrea Raio of the Town of Vaux Hall, County of Union and State of New Jersey party of the first part;

And Daniel Palladino of the Township of Union, County of Union and State of New Jersey party of the second part:

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; his executors, administrators 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 1st day of August well and sufficiently erect and finish the new Building to be erected on premises at the corner of Oswald Place & Laurel Avenue, in the said Township of Union, agreeably to the Drawings and specifications made by the owner architect, and signed by the said parties within the time aforesaid, in a good, proper and sufficient materials of all kinds whatsoever, as shall proper and sufficient for the completing and finishing all the work and other works of the said Building mentioned in the specification for the sum of Nine thousand six hundred and seventy-eight ($9678.-00) Dollars,

AND the said party of the first part, does hereby, for himself, his heirs, executors and administrators, covenant, promise and agree, to and with the said party of the second part, his executors and administrators, that he the said party of the first part, his executors or administrators, 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 Nine Thousand

Six Hundred and Seventy-Eight ($9678.00) Dollars, lawful money of the United States of America, in manner following:

1st Payment:	When the excavation of the sellar is completed and all the frame up and beams of the roof on	$1500.00
2nd Payment:	When exterior part is completed, floors and partitions laid and the house ready for the laths	2000.00
3rd Payment:	When the brown and white coat of plaster is completed	3000.00
Last Payment:	When the house is completed and excepted by the owner	3178.00
		$9678.00

It is agreed that the owner, the party of the first part, shall do all the excavation work for the cellar and for the plumbing work.

PROVIDED, That in each of the said cases a certificate shall be produced, signed by the said Owner 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 draw-

ings and specifications either in execution or materials.

AND IT IS HEREBY FURTHER AGREED BY AND BETWEEN THE SAID PARTIES:

FIRST: The Architect shall furnish to the Contractor all drawings or explanations of drawings as may be necessary to illustrate the work to be done, and the Contractor shall conform to the same as part of this contract, so far as they may be consistent with the original drawings and specifications, and all plans must be furnished to the Contractor at the time of signing contract.

SECOND: The Contractor, at own proper costs and charges, to provide all manner of materials and labor, of every description, for the due performance of the work as per specifications herewith submitted.

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

FOURTH: Should the Contractor, at any time during the progress of said work, 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.

FIFTH: Should any dispute arise respecting the true construction or meaning of the drawings or specifications, the same shall be decided by the Owner and decision shall be final and conclusive; but should any dispute arise respecting the true value of the extra work, or of the work 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 work, 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.

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.

EIGHTH: The Owner will insure the building in the joint names and interest of 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 the policies to be made payable to Owner and Contractor, as their interests 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 work, whether actually incorporated therein or not, are to be considered the property of the Contractor until the same shall have been paid for, in accordance with the terms hereof; unless refused to proceed with the work in accordance with the terms of this contract. And the Contractor shall have free access at all reasonable times to the said material and to the said work until the same shall have been fully paid for as provided for by this contract. The Contractor shall remove all surplus material after the completion of the work.

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.

TWELFTH: That the said Contractor shall produce and deliver to the Owner the release of all persons who may then have furnished materials or done work on said building, who may have a lien on such building and the land where on the same is erected, releasing their lien on said building and the land whereon the same is erected, with an affidavit by said Contractor thereto annexed, that no person or persons other than those named in said release have any lien upon such building or land for work done or materials furnished for the erection thereof according to the statute in such case made and provided.

Words erased before signing.

IN WITNESS WHEREOF, the said parties to these present have set their hands and seals the day and year above written.

A. RAIO (LS)
DANIEL A. PALLADINO (LS)

Signed, Sealed and Delivered
in the presence of
E. W. Mascia

Schedule B.

1926		
July 8	Partition on second floor	$90.00
May 11	Difference between cement blocks and brick in constructing the chimney	30.00
Nov. 1	4 small windows in the cellar at $3.50	14.00
May 4	Cellar concreting work. Labor only	122.40
Nov. 18	2 extra doors on the first floor, leading to the side, entering rear of store in place of windows, additional cost $12.00 each	24.00
Sept. 25	Outside cellar wall plaster	30.00
Sept. 26	Tar same	40.00
		$350.40

Answer.

UNION COUNTY CIRCUIT COURT

DANIEL A. PALLADINO, Plaintiff, vs. ANDREA RAIO, Builder and ANDREA RAIO & MARIA RAIO, his wife, Owners and EDWIN C. CARFFEY, also known as EDWIN C. CAFFREY, Mortgagee-Defendants.	Action at law On Lien Claim

Edwin C. Caffrey, residing in the City of East Orange, County of Essex and State of New Jersey, answering the Complaint in the above action, says:

1. He admits Paragraph 1 of the Plaintiff's Complaint.

2. He has no knowledge or information as to the allegations in Paragraphs 2, 3, 4 and 5 of the Plaintiff's Complaint.

3. He admits that he is the holder of a mortgage of record dated June 1st, 1926, to secure the sum of Ten Thousand ($10,000.00) Dollars, but he denies that said mortgage will be cut off by sale

on the Plaintiff's claim because the lien of said mortgage is prior to the lien of the plaintiff's claim or any other claim.

4. That plaintiff on June 5th, 1926, executed a written Postponement of Lien in favor of this defendant.

NOTICE

The defendant, Edwin C. Caffrey gives notice that he reserves the right at or before the trial of the above stated cause to strike out the Plaintiff's Complaint on the ground that the same does not state a cause of action against the said defendant, Edwin C. Caffrey, together with costs to be taxed.

EGIDIO W. MASCIA,
Attorney of Defendant,
Edwin C. Caffrey.

Answer & Counterclaim.

UNION COUNTY CIRCUIT COURT

DANIEL A. PALLADINO, Plaintiff, vs. ANDREA RAIO, Builder and ANDREA RAIO & MARIO RAIO, his wife, Owners and EDWIN C. CARFFEY, also known as EDWIN C. CAFFREY, Mortgagee-Defendants.	Action at Law On Lien Claim

The defendants, Andrea Raio & Maria Raio, his wife, residing in the Township of Union, County of Union, and State of New Jersey, answering to the Complaint filed in the above matter, say:

COUNT ONE

1. They admit Paragraph 1, 2 and 3 of the Complaint.

2. They deny Paragraph 4 of the Complaint, and say that though on December 27th, 1926, these defendants served a three days written notice upon the plaintiff, a copy of which is hereto attached and made part hereof, the said plaintiff refused and still refuses to complete the work

according to the plans and specifications and the agreement.

3. They admit Paragraph 5 and that part of Paragraph 6 of the Complaint wherein it is stated that Edwin C. Caffrey, co-defendant, is holder of a mortgage for Ten Thousand ($10,000) Dollars, but they deny that the lien of the plaintiff is superior to the lien of said mortgagee.

4. They deny the contents of Paragraph 7 of the complaint.

5. They admit that the balance on contract is in the sum of three Thousand One Hundred and Seventy-eight ($3,178.00) Dollars, but they say that the plaintiff is not entitled to said amount because he has failed to comply with the conditions of the agreement and because the said plaintiff has not completed the building as follows:

1st: Building not built at right angles as shown on plans.

2nd: Interior layout of second floor not as shown on plans.

3rd: Plans show one step for store front, three steps have been erected.

4th: Cellar height 5 ft. 10 in. 7 ft. 0 in. (as shown).

5th: Store toilets not built as shown. Wall projections inside of toilets make toilet space too narrow and uncomfortable.

6th: Sinks in the two kitchens of first floor 2 ft. 6 in. Drain boards omitted.

7th: Interior trim in stores of very inferior and defective quality of wood and workmanship very poor.

8th: Interior walls all out of plumb.

9th: Cement floor in bath rooms cracked throughout. Bath tubs set on broken cement floor and not set at right angles with the walls.

10th: Cement floor at the store front and main entrance omitted.

11th: Exterior and interior painting not completed. By reason whereby the cost to complete the said work is over the amount of Three Thousand Two Hundred and Fifty ($3,-250.00) Dollars.

COUNT TWO

These defendants deny all the allegations in Paragraphs 1, 2, 3, 4, contained in Count Two of the Complaint.

COUNTERCLAIM

By way of counterclaim, these defendants say:

These defendants demand of the plaintiff, the sum of Three Thousand Two Hundred and Fifty ($3,250.00) Dollars for that the said plaintiff has failed to perform the work according to the plans and specifications made by the owner, to wit:

1st: Building not built at right angles as shown on plans.

2nd: Interior layout of second floor not as shown on plans.

3rd: Plans show one step for store front, three steps have been erected.

4th: Cellar height 5 ft. 10 in. instead of 7 ft. 0 in. (as shown).

5th: Store toilets not built as shown. Wall projections inside of toilets make toilet space too narrow and uncomfortable.

6th: Sinks in the two kitchens of first floor 2 ft. 6 in. instead of 3 ft. 6. Drain boards omitted.

7th: Interior trim in stores of very inferior and defective quality of wood and workmanship very poor.

8th: Interior walls all out of plumb.

9th: Cement floor in bath rooms cracked throughout. Bath tubs set on broken cement floor and not set at right angles with the walls.

10th: Cement floor at the stores front and main entrance omitted.

11th: Exterior and interior painting not completed.

That by reason of the negligence of the plaintiff, these defendants have suffered damages in the sum of Three Thousand Two Hundred and Fifty ($3,250.00) Dollars for which they claim judgment against the plaintiff.

FIRST SEPARATE DEFENSE

The plaintiff is not entitled to the balance of $3,178.00 because he did not perform the work as he agreed to according to the plans and specification of the owner, and that on December 27th, 1926 he was served with a three day notice, a copy of which is hereto attached and made a part thereof.

SECOND SEPARATE DEFENSE

The plaintiff is not entitled to recover the balance according to the agreement because the plaintiff has failed to complete the work as mentioned in the list in the counterclaim hereto attached and made a part hereof.

THIRD SEPARATE DEFENSE

These defendants have never ordered any extra work or any changing or alterations, and therefore, the plaintiff is not entitled to recover any amount for same.

FOURTH SEPARATE DEFENSE

That the amount to complete the work not done by the plaintiff according to the agreement and plans and specifications is the sum of Three Thousand Two Hundred and Fifty ($3,250.00) Dollars.

EGIDIO W. MASCIA,
Attorney of Defendants.

Owner's Notice to Contractor to Proceed with Work.

Mr. D. A. Palladino,
Vaux Hall, N. J.

Dear Sir:

You are hereby notified and requested to proceed in a diligent and workmanlike manner with the erection and completion of our stores and dwelling frame building at Oswald Place, Vaux Hall, N. J., in accordance with a certain contract made between us and you, for the erection of said building and stores, and to furnish all the required labor for the completion of the same, and upon your failure so to do within three days from the service of this notice, I shall sell the same, hire other contractors or journeymen, and supply all necessary material and charge same to you. All to be at your risk and expense.

Dated: December 27th, 1926.

A. RAIO
her
MARIA X RAIO
mark

Reply to Counterclaim.

UNION COUNTY CIRCUIT COURT

DANIEL A. PALLADINO, Plaintiff, vs. ANDREA RAIO, Builder and ANDREA RAIO and MARIA RAIO his wife, Owners and EDWIN C. CARFFEY, also known as Edwin C. Caffrey, Mortgagee-Defendants.	Action at Law On Lien Claim

Daniel A. Palladino, Plaintiff in the above entitled cause, by way of reply to the answer of the defendants, Andrea Raio and Maria Raio, his wife, joins issue with the said defendants in their said answer.

ANSWER TO COUNTER CLAIM

Daniel A. Palladino, plaintiff in the above entitled cause, by way of answer to the counter claim of the defendants Andrea Raio and Maria Raio, his wife, denies each and every material allegation contained in said counter claim.

EUGENE A. LIOTTA,
Attorney for Plaintiff.

Reply to Counterclaim.

UNION COUNTY CIRCUIT COURT

DANIEL A. PALLADINO, Plaintiff, vs. ANDREA RAIO, Builder and ANDREA RAIO and MARIA RAIO, his wife, Owners and EDWIN C. CARFFEY, also known as Edwin C. Caffrey, Mortgagee-Defendants.	Action at Law On Lien Claim

Plaintiff, Daniel A. Palladino, by way of reply to the answer of the defendant, Edwin C. Carffey, also known as Edwin C. Caffrey denies each and every material allegation contained in the said answer.

NOTICE

Plaintiff, Daniel A. Palladino gives notice that he reserves the right at or before the trial of the above stated cause to strike out the defendant's answer on the ground that the same is sham.

EUGENE A. LIOTTA,
Attorney for Plaintiff.

Notice of Appeal.

(Filed July 27, 1927)

UNION COUNTY CIRCUIT COURT

DANIEL A. PALLADINO, Plaintiff, vs. ANDREA RAIO, Builder and ANDREA RAIO & MARIA RAIO his wife, Owners, and EDWIN C. CARFFEY, also known as Edwin C. Caffrey, Mortgagee-Defendants.	Action at Law Notice of Appeal.

The defendants Andrea Raio and Maria Raio, his wife, hereby appeal to the New Jersey Supreme Court from the judgment entered in the above stated cause, in the Union County Circuit Court, June 17, 1927.

Dated: July 27, 1927.

Yours respectfully,

EGIDIO W. MASCIA,
Attorney for Defendants.

Grounds of Appeal.

(Filed Aug. 22, 1927)

NEW JERSEY SUPREME COURT

DANIEL A. PALLADINO, Appellee-Plaintiff, vs. ANDREA RAIO & MARIA RAIO, his wife, Appellants-Defendants.	On Appeal Grounds of Appeal.

The said Appellants hereby specify the following grounds of appeal:

1. There was error committed in the admission and rejection of evidence.

2. The Court committed err in refusing to direct a verdict in their favor.

3. The judgment is not supported by the proofs in the cause.

4. The jury disregarded the instructions of the Court in considering the proofs.

EGIDIO W. MASCIA,
Attorney for Appellants.

A true copy.
Edward J. Kelleher,
Clerk.

Judgment Record.

(Filed June 21, 1927)

UNION COUNTY CIRCUIT COURT

DANIEL A. PALLADINO, Plaintiff,

vs.

ANDREA RAIO, Builder

and

ANDREA RAIO & MARIA RAIO, his wife, Owners

and

EDWIN C. CARFFEY, also known as Edwin C. Caffrey,

Mortgagee-Defendants.

Action at Law On Lien Claim

This action was tried before Judge Peter F. Daly, with a jury at the Union County Circuit Court on May 17th, 1927.

The cause having been heard and submitted to the jury, they returned their verdict as follows: Judgment for the plaintiff, Daniel A. Palladino and against the defendant Andrea Raio, Builder in the sum of $3639.93 generally and specially to be made of the lands and buildings described in the complaint and owned by Andrea Raio and Maria Raio, his wife, Owners. Judgment of vol-

untary nonsuit against the defendant Edwin C. Carffey, also known as Edwin C. Caffrey, Mortgagee.

Whereupon it is adjudged that the plaintiff recover of the defendant Andrea Raio, Builder the sum of three thousand and six hundred thirty-nine dollars and ninety-three cents ($3639.93), and his costs, which are taxed the sum of Costs $77.08 generally and specially to be made of the lands and buildings described in the complaint and owned by Andrea Raio and Maria Raio, his wife.

Judgment entered: June 21st 1927

On Motion of Eugene A. Lotta
Atty. of Plaintiff.

Testimony.

UNION COUNTY CIRCUIT

MAY TERM 1927

DANIEL A. PALLADINO,

vs.

ANDREA RAIO, builder, and ANDREA RAIO and MARIO RAIO, his wife, owners, and EDWIN C. CARFFERY, also known as EDWIN C. CAFFREY, mortgagee.

Transcript of stenographer's notes of evidence in the above entitled cause, taken before Hon. Peter F. Daly, Circuit Court Judge, and a Jury, at the Union County Court House, in the City of Elizabeth, New Jersey, on the seventeenth day of June, A. D. 1927, at 10:00 a. m.

Appearances:

Eugene A. Liotta, Esq., Counsel for the Plaintiff.

Egidio W. Mascia, Esq., Counsel for the defendants.

(A jury being empaneled and found satisfactory, they were sworn.)

Mr. Liotta: If the Court please, at this time with the consent of the defendant, I move to amend the complaint to show that there was a

variation in the plans as originally made. I think there is no objection on the part of counsel for the defendants.

(Mr. Liotta opens the case for the plaintiff.)

(Mr. Mascia opens the case for the defendants.)

Mr. Liotta: I have the mechanic's lien here, if the Court please. I would like to offer it in evidence.

Mr. Mascia: We consent, if the Court please, that those are the original plans and specifications upon which the contract was made, and we also consent that these plans show the building in the present condition, the actual building of it.

Mr. Liotta: I am satisfied to have them go in evidence. Is there any objection to the lien going in evidence?

Mr. Mascia: No.

Mr. Liotta: I offer the lien claim in evidence.

The Court: This is all by agreement.

Mr. Mascia: By consent, your Honor.

(Lien entered in evidence and marked Exhibit P-1.)

(Original plans and specifications, two sheets, entered in evidence and marked Exhibit P-2.)

(Blueprint plans entered in evidence and marked Exhibit P-3.)

Mr. Liotta: I offer in evidence copy of the contract.

(Paper referred to entered in evidence and marked Exhibit P-4.)

Mr. Liotta: I offer the plans and specifications in evidence by consent.

(Papers referred to entered in evidence and marked Exhibit P-5.)

DANIEL A. PALLADINO, the plaintiff, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Liotta:

Q. Mr. Palladino, what is your business? A. Kindly speak a little loud so I can hear.

Q. What is your business? A. General contractor.

Q. You have been in the contracting business for how many years? A. Twenty-four years.

Q. Did you enter into a contract with Mr. Raio to build a house for him? A. Yes, sir.

Q. Under that contract, is this the building that you were supposed to build? A. Yes, sir.

Q. Pointing to which maps? Use the map. A. This is the cellar, first floor, second floor, front elevation, side elevation.

Q. Was that drawn by you, Mr. Palladino? A. Yes, sir.

Q. And after you began to stake the building, was any change made? After you began to stake the building was any change made? A. Yes, sir.

Q. What was the change? A. The owner came down on the job after me and he wanted me to stake out the cellar.

Mr. Mascia: I object, your Honor, to this question. There is a written contract that says if any changes or alteration, it should be in writing signed by the owner. That is one of the provisions of the written agreement.

(Argument.)

The Court: I am going to allow it. You may take an exception.

(Exception noted as ground for appeal.)

Q. Mr. Palladino, after you went down on the job, did the owner request you to make any changes? A. Yes, sir.

Q. What changes?

The Court: When and where and who were present?

Q. Who requested you to make those changes? A. The owner.

Q. When? A. At the time he came down after me to do my job and go out and stake out his cellar, which I didn't want to do. I wanted to get an engineer to do it.

Q. When was that? A. That was the beginning of the job.

Q. Was it around the month of April? A. Around April, I assume.

Q. How soon after you drew the contract? A. I assume about six weeks after I drew up the contract.

Q. About six weeks after you drew up the contract. Who was there with you or with him when he told you to make the change? A. Mr. Joseph Perella.

Q. Was he with you? A. Was with me when I staked out the cellar.

Q. Let me ask you, on this side of the house is there anything (indicating)? A. There is a well there.

Q. How big is the well? A. I assume about four feet in diameter.

Q. Did he tell you anything about the well? A. Why, the well came inside of the building when I staked out the building.

Q. What did he say to you then? A. Why, he started to raise up in the air in blazes, that he would have no yard in the rear of the other house, and would have the well inside the building, and he got awful wild.

Q. I see. Now, on the other side of the building does the land run straight or does it run at an angle? A. Run cater-corners.

Q. In order to make that house a square house did you have to— A. I did. That is the way I had the cellar laid out.

Q. In order to make the house square did you have to build over the well? A. Well, I would have had to build over the well, yes.

Q. And he objected? Did he object to that? A. Yes, sir.

Q. What did he tell you to do? A. Why, I told him, "What do you want to offer me? Get an engineer to stake out the property. I can't help it."

Q. That is what you told him? A. Yes, sir. I wanted to go away from the job, but he held me back. He held me back, took me off my running board. I wanted to go back and take care of my work. I says, "There is only one thing you can do, unless you face the house cater-corner." He says, "Let us see what it was." Then I told him. "Now your property line runs cater-corner. If you place the house cater-corner," I says, "Then it may be bad for me, it may be bad for you."

Q. What did he tell you? A. He made me stake it catercorner and then he had the well eliminated on that side of the building, I assume about two feet, and he had plenty of room as it was, perfectly satisfied.

Q. After you staked out the ground, who excavated the cellar? A. Why, he did. I had nothing to do with the digging.

Q. Was that work done by him and under his supervision? A. That was excluded from my contract.

Q. Did he excavate the cellar to run in the same position as the houses now are? A. Naturally. The lines are set there.

Q. Now, is this the plan of the house as it now is? A. That is the way it sets now.

Q. The house runs which way? A. That is the street. This is Oswell Place. It is parallel. It faces parallel with the street, but the property has a skew. The rear end shoots up more and does not go up square here. It shoots off about ten and a half feet, a skew on there.

Q. Who did all the foundation work? A. Why, I put up the foundations.

Q. You put up the foundations? A. Yes, sir.

Q. During the time that you constructed the house was Raio there every day? A. Not all the time, but most of the time. While the cellar was up he was there most of the time.

Q. After the cellar was up how often was he there? A. Why, he lives right on the same ground and he was there at night, after he came home from work, and early morning.

Q. Did he tell you what to do and what not to do each day? A. I didn't get you.

Q. Did he, at any time, supervise any of the work? A. Naturally. He was the boss of the job.

Q. Did you do any extra work? A. Why, the

extra work that he had was started on the cellar. Why, he told me when he drawed up the contract, the specifications, he says, "Eliminate the plaster on the outside of the walls." He says, "I am a cement finisher myself." He says, "I will put it on good. Go ahead myself." All right, I didn't put it in the specifications for him. Then he go ahead and forces me to put the plaster on there. I says, "Who is going to pay for it?" He says, "Well, I will pay for it." He says, "I will take care of that. Don't worry about that."

Q. Did he tell you how much he would pay you for that? A. No. He says, I told him, "I ain't going to charge you much, just cost of the material and labor that it costs me."

Q. How much did that cost you? A. Why, I haven't got my figures there.

Q. Where are your figures? A. I assume about thirty-five or forty dollars.

Q. How long did it take you to do that work? A. Well, being I had my material there and the mason, why the mason—I didn't do it. I had my mason to do it—

Q. Did you do any other extra work? A. Why, yes.

Q. What? A. Why, when I built the cellar there is supposed to be seven foot in height. I built now—he has the sewer line on the street. There is only five feet one-inch depth measured by me, and he only measures forty feet distance away from the building. Then he go clean across the house. So we took the measure from the sewer, and while he was excavating he sent me to help him. "It all right," he says, "All

right." So we leveled across to go down and make it seven feet, I couldn't go any further. In other words, he wouldn't get the plumbing permit by the township of Union because he had to keep his pipes underneath the cellar bottom and he kept that at five feet something in there, and the rest he raised up. So finally while he put up the cellar I put up nine courses, and I called his attention, nine courses, practically six-foot four, and while I had ten courses on the mason, he made me call it off because I called his attention that this here only shows when people couldn't go no farther, and they would be half of the stores, why, it came up three or four steps, and the higher you come up the more steps would be. I call his attention. He made me stop after nine courses, and my mason had to take the other course off.

Q. How much did you charge him for that? A. Well, I didn't charge him for that.

Q. You didn't charge him for that? A. No, sir, but the contract work, the steps, these steps in here that I put in there, I told him I had my concrete mixer there. I would put the forms in there and give him the material providing he done the work.

Q. Did you erect any new partitions anywhere? A. The chimney.

Q. Did you erect any new partitions anywhere? Did you build any new partitions? A. Yes, sir.

Q. Where? A. That was later. The chimney came first. The contract calls for cement block and he wanted brick. I says, "Well, man, that is going to cost you more, which my mason charged me more to put up cement block instead of brick."

And he says, "We are willing to pay for it." All right. I says, "You put in handwriting." He says, "Do you doubt my word?" I says, "All right, I know your word is good enough for me." And I put it up in brick for the cellar bottom.

Q. How much extra is that? A. I think that was thirty dollars, if I ain't mistaken.

Q. Did you erect any additional partitions? A. Yes, sir.

Q. Where? Show it on the map. A. This partition here I have on the second floor. There is the original plan I had laid out, which the architect can prove to you. I had this here just laid out, lath and everything else just the way it is here. I had lath and all on the partition right in here, this one, this one, and this one. He came there, the owner and his wife and mother, in the afternoon, on a Friday afternoon. There is an attic here. Then the condition, the color of it, door about here, put on a floor in here, in this attic here there is stairs cut through it. He says, "Here, how am I going to get to the attic if I rent the rooms"? I says, "My good man, you will be violating the law if you rent upstairs, you will be violating the tenement law." He says, "No, I will take care about the tenement." He says, "If they catch me I will take care of that." He says, "I want this partition here, this in here, right in there." So I had this wardrobe here, which was over there, and had to place it there. Got to take this here wardrobe here and place it here. I had to take this partition out, and all along in there, take this one out and place the door in there so he can go upstairs and go up in

the attic, and probably he would use that for living quarters.

Q. How much did you charge him for that? A. Ninety dollars.

Q. Did you make any change in the attic? A. Yes, sir.

Q. What did you do extra? A. According to the scale here that gives only a six-foot attic, and he came along and he says, "Here, I am making this addition." He says, "Now, what am I going to do? I can't get any room if I want to use that for living room." I says, "All right now what do you want me to do?" He says, "I want an eight-foot ceiling in there," so he can get room in there. He made me raise this ceiling up here two extra feet and all the way up in there so he would get quarters in there.

Q. Did you charge him anything extra for that? A. No, sir.

Q. Did you put any extra windows in the cellar? A. Yes, sir. The plan, the original plan calls for one, two, three, four, five windows. He came over to me and he started to holler. He says to me, "How am I going to get coal in there? I can't get coal in there, got to have windows in the front." He made me put two small windows in there and two small windows in here in the front.

Q. How much did you charge for that? A. At cost price. I haven't got my amount here.

Q. $3.50 for each window? A. Yes, sir.

Q. Your contract didn't provide for concrete work in the cellar, did it? A. Sir?

Q. Concrete work in the cellar? A. Yes, sir.

Q. Were you to do that under your contract? A. Sir?

Q. Were you to do that under your contract? A. No, sir.

Q. That was extra work? A. Yes.

Q. Did you do that? A. I done that.

Q. How much did you charge him for that? A. I think it was $150, because the difference was that I was to give him cinders, sand, and cement, and he was to do the work himself. He says that I was to eliminate from my contract all concrete work, and then he forced me to put in cracked stone, trap rock, sand and cement. Then he says he will pay me extra for that.

Q. Did you charge him for that? A. I believe it was $150.

Q. Was the outside wall to be plastered, cellar wall to be plastered? A. No, sir, not according to the specifications, no plaster, no tar, and he made me do both.

Q. How much did you charge him for that? A. I paid $40 to the tar man, and for the plaster plus the material I paid to my mason.

Q. Is the sum $350.40 a reasonable charge for all the extra work you did? A. I didn't get you.

Q. Is the sum of $350.40 a reasonable charge for all the extra work that you did? A. No, sir.

Q. Is it a reasonable charge? A. Yes. Why, it is over $500, but I didn't charge him all that. Here is something else I done. Here is the store here. He came over and started to holler to me. He says, "If I rent the stores to a family in the rear," because there is a little room there and a little room there and the store, "if I rent the

stores how can these people get out?" I says, "If you are willing to pay the difference, eight or nine dollars," I says, "You can put a door in the place of this window, one there, and one in the rear of this other store. Are you willing to pay the difference? I can do that while I am doing the construction of the job."

Q. You didn't charge for that? A. No, sir. I didn't charge him for that. I don't think I did. I might be mistaken. I ain't sure if I did or not.

Q. No, you didn't. Well, during the work on the building did the defendant ever interfere with any of your subcontractors? A. I didn't get that very well.

Q. While you were working on the building did the defendant Raio interfere with any of the subcontractors? A. Yes, sir.

Q. Which one? A. Mr. Michael Rajoppi, the plumber.

Q. Did he chase the plumber out of the job? A. No. He forced me to eliminate the plumber from the job. He forced me, in other words, he says he was going to cancel my contract.

Q. Was the plumber doing good work? A. Sir?

Q. Was the plumber doing good work? A. Yes, sir.

Mr. Liotta: Take the witness.

CROSS-EXAMINATION by Mr. Mascia:

Q. Who made the plans and specifications? A. Sir?

Mr. Liotta: It is admitted that he did.

Q. Who made the plans and specifications? A. I did, at his request.

Q. How long do you know Mr. and Mrs. Raio? How long do you know Mr. and Mrs. Raio, the defendants? A. How long do I know him? Since he lived in Vauv Hall.

Q. How long do you know the place there? A. Since he bought the place.

Q. Thirty years, twenty-four years? A. I am up there twenty-two years.

Q. You are up there twenty-two years? A. Yes.

Q. And do you know the place for twenty-two years? A. Yes, but I didn't know it run on an angle there.

Q. That is the answer. Don't make a speech every time.

The Court: One minute. If there are any instructions to be given to the witness they will be given by the Court. Counsel has no right to direct the witness or instruct the witness.

Q. Did you know before you made the plans and specifications that there was a well? A. Yes, there was a well there.

Q. You had made the plans and specifications that the excavation should be seven feet high? A. I didn't get that.

Q. You didn't get that. Were the specifications called for the height of the excavation five feet or seven feet? A. Seven feet.

Q. Seven feet. What is the present excavation that you made there? A. What is it now?

Q. Yes. A. It is not six feet in the building, on account he could make a seven-foot—

Q. That is all right.

Mr. Liotta: I think the witness has a right to explain why it is not seven feet.

The Court: You can bring that out.

Q. You say now that the present excavation is six feet? A. No, it is five feet four and a half inches at present, excavation which he dug himself.

Q. Now, when he dug the excavation were you supervising the excavation? A. No, sir, I had nothing to do. He has charge of that.

Q. He only had charge of the digging? A. Of the digging part. I had the construction part of the cellar only.

Q. You made the concrete in the cellar and you made the foundation? A. What?

Q. You say on direct-examination a conversation with Mr. and Mrs. Raio whereby you think that they give you instruction to change and make a lot of changes. Can you state to the Court when this conversation took place? A. During the construction of the work.

Q. During the construction of the work? A. Yes.

Q. Can you give the month or the day? A. Well, I couldn't exactly keep in memory the days that he came over there at night, I had to wait for him at night, to supervise and see that everything satisfied.

Q. What month was it? The month you should remember. A. During the month of May, June, July, August. During those months.

Q. At the time you had these conversations, was anybody present? A. Anybody present?

Q. Present. A. Why, at the different days, yes.

Q. Who was present? A. Well, at some my laborers most of the time were on the job, my carpenters.

Q. Was his nephew there, Raio's nephew? A. Yes, he was there at night.

Q. Is that the fellow there, the nephew of Mr. Raio? A. Yes, sir.

Q. He was there when Mr. and Mrs. Raio told you everything to change? A. Not all the time.

Q. Not all the time? A. Not all the time, but at times.

Q. You were served with three days' notice, were you not?

Mr. Liotta: That is admitted.

Mr. Mascia: That is admitted. I offer this in evidence, your Honor.

(Paper referred to entered in evidence and marked Exhibit D-1.)

Q. Did you go to finish the work after you received that paper? A. Never received no notice.

Q. You never received any notice? A. No, sir, personally.

Q. Did you receive a paper, or this notice? A. Personally, no.

Q. Who received it? A. Why, my daughter received it.

Q. Did you see that paper? Did you receive that paper? A. After about twenty-two days, yes, I happened to come in contact with it. After twenty-two days I saw it.

Q. Did you go there to finish the work? A. No, sir. By my attorney's office.

Q. Why didn't you complete the work? A. Work was all completed to the best of my knowledge and understanding.

Q. And is your work completed today? A. To the best of my knowledge and understanding, yes.

Q. You said that you made a change in the chimney, that instead of cement block you used brick, and you charged this man with thirty dollars or fifty dollars. Don't you know that the law was that all the chimney shall be brick and not cement block?

Mr. Liotta: I object to that, what the law was. It is what the contract and specifications provide for. The specifications provide for cement block chimney.

The Court: He drew the plans and specifications.

Q. Answer the question.

(Last question read by stenographer.)

A. Why, I have charged him nothing but actually cost.

Q. Did you ever make a chimney with cement block? A. Many of them.

Q. The original plan calls only for one step on the store. How many steps did you put there on the store? A. On account—

Mr. Mascia: Will you direct the witness to answer the question?

By the Court:

Q. How many steps did you put there? A. It required two just now.

By Mr. Mascia:

Q. Aren't there three steps now there? A. There is two there now plus the one that it calls for, this here, the entrance in there.

Q. You are under oath, Mr. Palladino? A. Yes, sir.

Q. Do you know that there are three steps and not two? A. This one, Mr. Attorney. I says there is two steps, just one or two steps. I have evidence in the Court to prove to Judge, his Honor.

Q. I show you this paper and ask you is that your signature? A. Yes, sir.

Mr. Mascia: I offer this in evidence, your Honor.

Mr. Liotta: No objection.

(Paper referred to entered in evidence and marked Exhibit D-2.)

Q. I show you another paper now and I ask you is this your signature? A. Yes, sir.

Mr. Mascia: I offer this in evidence.

Mr. Liotta: No objection.

(Paper referred to entered in evidence and marked Exhibit D-3.)

Mr. Mascia: The affidavit, gentlemen, one of these papers I offer in evidence is an affidavit this man took on oath—

(Argument.)

Mr. Mascia: This is an affidavit taken by this plaintiff on June 5, 1926, in which he said: "State of New Jersey, County of Essex. Daniel Palladino, of full age, being duly sworn according to law, on his oath, deposes and says: I am the builder and the general contractor for Mr. and Mrs. Andrea Raio for the construction of the new building on the premises in Vaux Hall, and as such I say that all the materials now furnished for construction of said building and all the laborers employed by me for same, have been paid in cash, that the building is in course of construction and the roof is on, and pursuant to the written agreement between myself and Mr. and Mrs. Raio the first payment in the sum of $1,500 is due. I further say that there is no person or persons, company or companies, that has any claim or right of lien claim against the said building, that there are no judgments against said building by reason of labor or materials, and I have no judgment against me in any courts of the State of New Jersey or the United States for the district of New Jersey, and I state that I am making this affidavit to induce Mr. Masica, attorney of Edwin C. Caffrey, holder of a mortgage for $10,000 on said premises, to disburse the sum of $1,500 as first payment due to me as aforesaid. Sworn to and subscribed before me this fifth day of June, 1926, Daniel A. Palladino, Egidio W. Mascia." The other paper, gentlemen, is what we call a postponement of lien claim. Judge Caffrey at the time had a mortgage for $10,000, and to be a first lien we were compelled to have a

postponement signed by the contractor, and the contractor duly signed the postponement of his lien claim to the lien of the mortgage of Mr. Caffrey.

Q. Mr. Palladino, when did you complete this building, as you said that you completed the building? When did you leave the work there? A. When was I through?

Q. Yes. A. Beginning of November.

Q. Do you know that the building should be completed in August? A. On what?

Q. Do you know that the building should have been completed in the month of August? A. It wasn't my fault.

Mr. Liotta: I object to the question on the ground that there is no counterclaim for loss.

The Court: Oh, well, I allow it. He said it wasn't his fault.

Q. The building wasn't built according to the plans and specifications, is that so? Is that true? A. Not according to the changes.

Q. The interior layout on the second floor is not as shown in the plans and specifications. A. No, sir.

Q. Why? A. Because the owner forced me to change to his taste.

Q. Plans to show one step for the store front. Three steps have been erected. A. There is two steps plus the one as I previously stated, as it shows now, makes it the third step.

Q. Why did you deny first? A. I didn't deny.

I said that to you first, two steps plus the one was in there made it a third step.

Q. Then that is the truth? There are three steps in front of the store? A. I said, yes.

Q. Instead of one as shown in the plans and specifications? A. As I stated, yes.

Q. To make now that store only one step, what shall be done? A. On account it wasn't dug deep enough to make it.

Q. To make that store, that one step, what shall be done? You have been a contractor for twenty-four years. What should be done? A. The owner should go down below the walk level to be down to make it the one step.

Q. And what should be done? Can you tell the jury here what should be done to take that floor down, the floor of the store, to say that the store will have only one step. A. The foundation should go still farther from where the owner give it to me, the excavation.

Q. What else should be done? A. What else should be done?

Q. Yes. A. Well, naturally if I have the foundation way below the line that he wouldn't be able to get a sewer in there, I would comply with my level.

Q. You go below the floor of the store for the length of the two steps? A. No. This step here which the plan calls for is above the sidewalk line. Well, now, there is these other two steps, and the excavation wasn't dug deep enough.

Mr. Mascia: That is not the answer to the question, your Honor. This gentleman doesn't want to answer my question.

The Court: He wants to explain why he makes the changes, as he goes along.

Mr. Mascia: The changes I am not asking him. I am asking what work shall be done to lower that floor down to one step. He can answer that question. He has been a contractor for twenty-four years.

(Last question read by stenographer.)

The Court: He is asked what could be done in order to make it a one-step entrance instead of a three-step entrance.

By Mr. Liotta:

Q. Did you hear that, Mr. Palladino? What could be done to make that a one-step entrance instead of a three-step entrance? A. There can't be nothing done now. If I have to come seven feet ground level I naturally have to go up the seven feet deep. If I only got five feet, how could I make a seven-foot cellar? I had to come up above.

By Mr. Mascia:

Q. The cellar height is five-foot ten instead of seven feet as called by the plans and specifications?

Mr. Liotta: That is all admitted.

A. Naturally from where the cellar, from where the owner gave me the cellar I had to start my work from.

Q. Store toilets aren't built as is shown in the plans and specifications, is that true? A. I didn't get that very well, attorney.

Q. I can't holler any more. A. I am a little deaf. Kindly, please.

Q. Store toilets aren't built as is shown in the specifications and the plans? A. It is according to the specification but not according to the plan, Mr. Attorney.

Q. Sinks in the two kitchens are two, six, instead of three, six, as called for by the plans and specifications, is that true? A. The owner picked them out of the book from the plumber. That is the quality he wanted and that is what he got.

Mr. Mascia: I think the Court can direct this witness to answer my question.

(Argument.)

Q. Are the sinks in the two kitchens two feet and six inches instead of three feet and six inches, as called by the plans and specifications? Yes or no. A. Over all they are both that, but not according to what it calls for in the plans because he selected himself out of the book the number of the quality.

Q. Interior of the store is not the quality and the workmanship as called for; is that true? A. According to the specification every word I put in there what it calls for.

Q. The interior walls are all out of plumb; is that true? A. No, sir.

Q. The cement floor in the bath room are all broken; is that true? A. The concrete that I put down in there has just shown a crack, and concrete will crack anywhere.

Q. All bath tubs are set on broken cement floor and not set according to the plans and specifications; is that true? A. It is not broken cement, just a little crack, but that was put down on solid concrete and the cement joining to the tub.

Q. Exterior and interior painting not completed; is that true? A. It is fully completed according to the plans and specifications.

Q. You said that the concrete in the cellar was extra work and you charged $150, although the first time you said $122. Today you said $150. Which one is it, $150 or $122? A. $150, because I had to do extra what he wanted done.

Q. So when you spoke to your attorney you say $150, but you say here $122? A. Because he added extra to it on account of underneath the piping.

Q. Isn't it a fact the concrete called by the plans you shall have made according to the plans and specifications? A. I should have put no concrete in the cellar at all, not according to the contract and specifications.

Q. Does it show in the plans and specifications? A. It shows that I was to furnish cinders and not cracked stone, and the owner was to do it himself.

Mr. Mascia: That is all.

RE-DIRECT-EXAMINATION by Mr. Liotta:

Q. Mr. Palladino, how much is due you on account of the contract?

Mr. Mascia: I object to that, your Honor. What is this? This is not cross-examination.

Mr. Liotta: It is not cross-examination. It is something that I ask your Honor's permission to allow me to prove my case as to what is due on the contract.

The Court: Why didn't you bring that out before?

Mr. Liotta: On account of the yelling, if the Court please, and the witness being a little deaf, it slipped by.

Q. How much is due you on account of the contract? A. $3,178.

Mr. Mascia: Will you allow me an exception?

The Court: It is an omitted question which I am allowing.

Q. $3,178? A. Yes, sir.

Q. Kindly explain to the Court and jury why your cellar is six feet four instead of seven feet. A. On account it wasn't dug deep enough.

Q. Who did the digging? A. The owner himself.

Q. Why did you have three steps instead of one? A. Why did I have three steps? Well, naturally the foundation wasn't dug enough and it brought my cellar up higher, and I had to go into the store to the building, main building, I had to put in these steps here.

Q. Did the owner consent to the three steps? A. Yes, sir.

Q. As a matter of fact, didn't the owner say that he would—

The Court: Now, you are leading.

Mr. Liotta: I withdraw that question.

Q. Did the owner tell you that he would do some work as to the three steps? A. I was to furnish the material and he was to do the work because

he says he was a cement finisher and he would do the finishing himself.

Q. On the three steps? A. On the three steps, yes, sir.

Q. By whom were the fixtures, the plumbing fixtures, selected, by you or by the owner? A. By the owner.

Q. You say that the cement, the concrete in the bath rooms was cracked. Did you say that the concrete in the bath rooms was cracked? A. Yes, sir.

Q. Who laid the concrete there? A. I laid the concrete there; that is, my men did.

Q. Why did the concrete crack? A. Concrete will crack anywhere no matter where it is. Often when the house is settling, probably might have been the cause of it.

Q. Does the fact that the concrete cracked in a job say that the job is not done in a good, workmanlike manner?

(Last question read by stenographer.)

The Court: He doesn't understand your question.

Q. If the concrete cracks in parts of the building, or if the plaster cracks in parts of the building after the building is erected for a period of a year, does that in itself mean that the work was not done right? A. No, no.

Q. Does that happen in many instances? A. Oh state roads, state work, let alone buildings.

Mr. Liotta: That is all.

Mr. Mascia: That is all.

By the Court:

Q. You drew the plans and specifications? A. I did.

Q. They provided for a seven-foot cellar? A. Yes, sir.

Q. Who was to do the digging? A. The owner.

Q. What work were you to do? A. Build from the foundation up.

Q. Then the owner was to do all the excavation? A. Yes, sir.

Q. When you say "the foundation up," who was to put in the foundation? A. I just put the foundation and then the walls from there on.

Q. Who was to put in the foundation? A. I was to put in the foundation.

Q. And when you put in the foundation you found the cellar dug by the owner was only five feet and how many inches? A. Yes, sir.

Q. How many inches? A. About, I assume it is about five foot four, your Honor.

Q. You knew then that if the owner didn't go down to the seven feet that the entrance to the store would have three steps instead of one, didn't you? A. Yes. I had to show it to the owner, prove it to him.

Q. You knew that that would be a big disadvantage to the building here? Did you know that? A. If he didn't do that, couldn't get the plumbing permit, your Honor, on account of it connecting to the sewer.

Q. Then the reason why he couldn't go down seven feet with his digging was because of the sewer? A. Was higher than the cellar bottom. Then it would be higher than the cellar bottom.

Q. The sewer would? A. Yes.

Q. When you drew the plans and specifications for a seven-foot cellar did you make a previous investigation as to where the sewer was? A. No, I didn't, your Honor. I didn't go and measure out the sewer.

Q. So you provided for a building that would have a cellar of seven feet? A. I was going to build seven feet.

Q. And when the owner got down to five feet and some inches he found that he had reached the level of the sewer, is that right? A. Yes, sir, on four feet and one and a half floor.

Q. What was said by you and by him together? A. Yes, sir.

Q. What was said then? A. They couldn't go any deeepr. In other words, you couldn't get his sewer line and enough flow to run into the sewer. If he wanted it deeper he would have to keep his pipes way up, and the building department wouldn't take it. The pipes have to be kept underneath the cellar bottom.

Q. Then the situation was such physically that he couldn't have a seven-foot cellar and have a sewer connection? A. They could have seven-foot cellar provided it extended above the elevation.

Q. He couldn't have a seven-foot cellar with only a one-step entrance and get a sewer connection, is that right? A. No, he couldn't your Honor.

The Court: That is all I have.

By Mr. Mascia:

Q. When the owner was excavating, digging, were you there to supervise? A. Why, no, I wasn't there. What charge I had? Took care of my own gang.

Q. After he was through that digging did you measure the depth of the cellar or excavation? A. Together, I and the owner together.

Q. Did you measure? A. Yes, sir, we measured, and that is how we found out, after we went over and measured the depth of the sewer and found out it extended over the cellar.

Q. Did you measure it? A. Together, I and the owner.

Q. You and the owner? A. Yes, sir.

Q. Was anybody else there present? A. Why, yes, there was four or five other people there. His nephew was there.

Q. Are they here in Court? A. The nephew is in Court here.

Q. The nephew? A. Yes, sir.

DOMINICK VALVARO, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Liotta:

Q. Mr. Valvaro, what is your business? A. Architect.

Q. You have been an architect for how many years? A. For seven years.

Q. In business for yourself or for somebody else? A. Somebody else.

Q. How many people have you worked for since you were in business? A. Five or six.

Q. Have you worked for anyone in Elizabeth? A. Mr. Poggi.

Mr. Liotta: Are you satisfied with the qualifications of the architect?

Mr. Mascia: Yes, sure.

Q. Mr. Valvaro, at my request did you go to the job in Union, Raio's job? A. Why, I was over there to inspect this job by request from Palladino.

Q. When did you go there? A. Yesterday.

Q. Did you go through the entire building? A. Yes, sir; except the cellar.

Q. As to what you saw, Mr. Valvaro, was the work done in a good workmanlike manner, or was it not? A. Yes, sir.

Q. Some question has arisen as to the cracks in the concrete. Is the fact that a concrete bottom is cracked in itself evidence that the work was not done in good, workmanlike manner? A. Why, the work was done in first class manner only that is due to the settlement of the building.

Q. Concrete will crack when there is a settlement of the building? A. Yes, ninety-nine out of a hundred.

Q. And good work will crack, won't it? A. Certainly.

Q. How about the plaster on the walls? Will that crack? A. Some.

Q. As to the extra work, do you say that a charge to add a partition as shown on the map,

would you say that ninety dollars is an unreasonable charge? A. Yes, sir.

Q. Is it unreasonable or reasonable? A. That is reasonable.

Q. A reasonable charge. Would you say that thirty dollars is a reasonable charge for erecting a brick chimney instead of cement? A. Yes, sir.

Q. Would you say a charge of fourteen dollars is a reasonable charge to install four new windows? A. Yes, sir.

Q. To a concrete cellar, for labor only, $122.40; is that reasonable? A. Yes, sir.

Q. To build two extra doorways, is a charge of $24 reasonable? A. Depends. What doorways are those?

Q. Doors. A. Oh, doors.

Q. Doors in the rooms. For instance, it has been testified to that there was an extra door installed here and an extra door installed here. Is $24 a reasonable charge? A. Yes, sir.

Q. To plaster the wall of the cellar and to tar the same, is seventy dollars reasonable? A. Yes, sir.

Mr. Liotta: Take the witness.

CROSS-EXAMINATION by Mr. Mascia:

Q. Are you a registered architect? A. Yes, sir.

Q. How long? A. Why, since January.

Q. What year? A. 1926—I mean 1927, rather.

Q. I thought that on direct-examination you said that you have been an architect seven years? A. Architectural practice, yes.

Q. So that wasn't so? A. I was practicing with somebody else.

Q. You said that the cement or the plaster broken was caused by the settling of the building? A. Yes, sir.

Q. Suppose you had seen that cement or concrete a year ago at the time it was made and you found the cement in the same condition, what will you say was the cause of it, the work, poor material, or the settling of the building? A. It is also due to the settlement of the building.

Q. You mean to say to this jury and to the Court that the building settled when it is built? It won't take time to settle the building? A. It does after two weeks' time sometimes.

Q. That is what I said. My question is, during the construction if the cement or the concrete is broken, what would you say is the cause? A. Also due to the settlement.

Q. Also due to settling of the house? A. Yes, sir.

Mr. Mascia: That is all.

Mr. Liotta: That is our case, if the Court please.

MOTION FOR NONSUIT

Mr. Mascia: I move first, your Honor, to nonsuit on behalf of Edwin C. Caffrey, the mortgagee.

Mr. Liotta: There is no answer filed by the mortgagee in this issue if the Court please.

The Court: I think there is.

Mr. Mascia: There is. No reply filed by you.

Mr. Liotta: I am willing to consent to dismiss it against Edwin Caffrey.

Mr. Mascia: And I move to nonsuit as in behalf of Mr. and Mrs. Raio.

(Argument.)

(Mr. Mascia cites case of Denoth v. Carter, 85 New Jersey Law, page 95.)

The Court: The motion for a nonsuit is denied.

Mr. Mascia: I take an exception, your Honor.

DEFENDANTS' CASE

DANIEL J. SCROCCO, a witness produced on behalf of the defendants, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Mascia:

Q. Mr. Scrocco, are you an architect of the state of New Jersey? A. Yes, sir.

Q. Where is your office? A. Military Park Building, Newark.

Q. How long have you been an architect? A. Eleven years.

Mr. Liotta: I would like to examine this witness as to his qualifications.

Mr. Mascia: All right.

By Mr. Liotta:

Q. Mr. Scrocco, you have been an architect for eleven years? A. Yes, sir.

Q. Licensed? A. Licensed.

Q. In business for yourself? A. Yes, sir.

Q. What kind of houses have you been constructing as an architect? A. What kind?

Q. Yes. A. Why, all kinds. Office buildings, apartment houses, factory buildings, garage, stores.

Q. And in practically every case that you have supervised you have had trouble, have you not? A. What is that?

(Last question read by stenographer.)

A. This is the first time I hear that.

Mr. Mascia: I object to that, your Honor.

The Court: Sustained.

The Witness: As a matter of fact I am not the architect in this case.

The Court: It is only fair to say so, that he never had any trouble before.

By Mr. Mascia:

Q. Mr. Scrocco, did you inspect this building in the month of November, December, 1926, at the request of Mr. and Mrs. Raio? A. December 14, 1926.

Q. At the time that you were requested to inspect the building were you given a set of plans and specifications? A. Yes, sir.

Q. Are those the plans and specifications, copy of the plans and specifications now in evidence?

Mr. Liotta: That is all admitted.

Mr. Mascia: It is admitted?

A. Yes.

Q. With those plans and specifications you

examined the building. What did you find not completed in the building according to these plans and specifications? A. I find that the cellar height is only five feet ten inches instead of seven feet.

Q. What else? A. Three steps for use for the store front instead of one step as shown on plans. Kitchen sink is in two kitchens in rear of store, two feet six instead of three feet six. Drain boards were omitted. Cement floor in bath rooms cracked throughout. Cement floor in the store front entrance omitted. One coat of paint needed for the house; that is, one coat of paint only shows on the house instead of two.

Q. Instead of two coats of paint? A. Yes. Beaver boards used on both sides of the stairway instead of plaster boards, and as we saw, plaster is all down, all cracked.

Q. Was the building built according to the plans and specifications? A. No, sir.

Q. Mr. Scrocco, now going over these items, are you able to give us the value of each one? A. Yes, I have it figured out here.

Q. Now, you said that the building is not built according to plans and specifications. What will it cost today to build the building according to the plans and specifications, if that can be done?

Mr. Liotta: I object to that, if your Honor please, what it will cost today.

Q. Last year I mean, 1926. What will it cost? A. You mean to put this building according to the plans and specifications?

Q. Yes. A. Why, it is almost impossible because this building is about five and a half

feet out of square. From that plan, why, every room in the house, every corner is out of square, and the only way to do would be if you shift the building—it wouldn't make any difference there. You would have to practically take that whole building down and rebuild it.

Q. The building as it is now, from the building supposed to be built according to the plans and specifications, is there any difference in value? A. Well, it is, because it is very inconvenient to set the furniture in the building because every corner comes to a very close corner, and being at the corner, why, it looks very odd when you go to the building.

Q. What is the difference, in your opinion, as to any value between the building supposed to be built and the present building?

Mr. Liotta: I object to that, if your Honor please. The land ought to be taken into consideration, the labor ought to be taken into consideration, and everything else in connection with the building.

The Court: You don't have to argue that. Objection sustained.

Q. Taking into consideration the location, taking into consideration the time in which this building was put up, taking into consideration all the other circumstances, what will you say is the difference between the value put up and the value which it should have been put up according to the plans and specifications?

Mr. Liotta: I object to that.

The Court: Sustained. He is not qualified as a realty expert. You may ask him what it would cost at the time the building should have been completed, what it would cost to make the building such as the original plans and specifications called for.

Q. Will you answer that question as the Court put it?

The Court: He said, however, he has already said that it could not be done.

Q. It cannot be done? A. No, it couldn't be done. What I can say about it as to the value is where the application was made to the office of the building and loan, I happened to be one of the directors—

The Court: You cannot say that.

Q. When you say it cannot be done, what do you mean? A. The only way you can do is to take it down and rebuild it.

Q. How much will that cost? A. The full amount of the contract.

Q. What is the full amount of the contract? A. I think about nine or ten thousand dollars.

Q. Now, you said that the cellar height is only five feet instead of seven feet. What will it cost, or what has the contractor saved by not building a foundation seven feet high? A. I had the cost figured out here, making building comply with plans, to make the building comply with plans as to the making one step instead of three steps, to lower down as far as to square, you can't do it.

By the Court:

Q. You can't do it? A. The building is on a square now. The only thing you could do is to bring it down in order to bring it according to the plans as to one step instead of having three steps.

Q. Could you have a seven foot cellar in? A. Yes, sir.

Q. How could you have a seven foot cellar and have sewer connections? A. The sewer connections—we have many cases. I have one case on Highland Avenue today, one for a party by the name of Barclay where the bath room about the same condition as this. Sewer happened to be high and we carried the waste part, the sewer pipes, we carried them alongside the walls, and from them to the sewer. That didn't interfere with the digging of the cellar at all. Instead of bringing down to the cellar level, bring them about two feet below the cellar and the cellar ceiling, and then slope them down alongside the walls.

Q. I don't understand that at all. If the cellar is higher than the sewer, how are you going to get sewerage away? A. That is what I was trying to explain, your Honor. May I show it on a piece of paper here?

Q. In other words, water won't run up hill. How are you going to do it if the sewer is only five feet deep? A. Take this as the cellar ceiling and this is the cellar floor. We will say the sewer happened to be here. If we take this soil pipe all the way down to the cellar floor, of course you can't connect it with the sewer. It will be lower. But instead of to do that you take this, the plumbing connections, and bring them down, just bend

them on a bend two feet below or a foot and a half below the cellar ceiling; then you can carry alongside the wall, pitch them down to meet the sewer connection.

Q. Yes, but you can't pitch them down because the sewer connection is up, not down? A. Yes, but we will have plenty of height. If the sewer is five feet below the street level we will have five feet we can pitch it down.

Q. If the bottom of the cellar is seven feet? A. We don't have to bring the soil pipe down to the bottom of the cellar.

Q. I know, but suppose there is water that comes through? A. What water?

Q. Water comes through on the floor of the cellar, and that is seven feet deep, how are you going to reach a sewer five feet deep? A. You can't connect that way to the sewer anyway. There is very few places where we have storm sewers and you can use the storm water to go to the sewer. This floor can't have the plumbing connections for the sewer.

Q. Suppose there is water put upon the floor, for example, of a cellar seven feet deep, and the sewer is only five feet deep, how are you going to bring the water from the floor of that cellar to the five feet? A. You aren't supposed to bring that water.

Q. We aren't asking you that. How can you do it? Can you? A. You cannot.

Q. What? A. You cannot.

Q. All right. This outside drainage that you talk about, and this plumbing you talk about, that would have to be added to the plans, wouldn't it?

A. I don't believe on this street there is any storm sewer you can connect to anyway.

Q. If you wanted a sewerage from a seven foot depth, you say that you could make it so that through tile drainage on the outside and plumbing around there specially to meet such a situation, you could drain that sewerage? A. You could drain it, and you can't drain it today under the present conditions, under the plumbing as they left it.

Q. I am not asking you that. Mr. Palladino says the reason why he didn't have a seven-foot cellar was because the sewer was only five feet deep. A. Yes.

Q. What was he to do? A. If the sewer was only five feet under the present conditions he has got the cellar five feet down below, so he can't use that drainage anyway because the sewer is above the cellar level.

Q. What did you say he could do? A. In order to—

Q. To get drainage if he has a seven foot cellar and the sewer is only five feet below the surface. A. Your Honor, you mean to drain the water that comes in the cellar or to drain the sewerage?

Q. To drain the cellar. A. To drain the cellar.

Q. Yes, anything that would go in that cellar. A. No, there is not. Cellars aren't connected to sewers. In order to drain them, why, you would have to use suction pumps.

Q. Yes, I see. But you said something that even though there was a seven foot cellar and the sewer is only five feet deep, that you get sewerage by putting certain kinds of tile piping on the outside,

arranging your plumbing specially to meet such a situation. A. It is not a special arrangement. That is used every day. You can bend the plumbing connections and run them alongside the walls, the cellar walls, to meet the sewer connection.

By Mr. Mascia:

Q. Will you explain to the jury, Mr. Scrocco, the same that you explained to the Court? Will you repeat? A. Why, what I said was that we have many cases today where the sewer happens to be above the cellar level if the cellar is seven feet or five feet. In those cases, why, we simply bring the plumbing work, instead of running down to the cellar floor we bend them to about a foot or a foot and a half below the cellar ceiling and carry those pipes alongside of the cellar walls to a proper pitch required by the plumbing department to meet the sewer, sewer connection; so as I say, this case could be easily done.

Q. Can you tell now what will be the cost to make that excavation and the foundation according to the plans and specifications, to lower down the floor of the store so as to have one step instead of three steps? A. First would be required to underpin the walls. To underpin the walls in order to dig under the other walls, and add additional masonry, put in concrete or cement blocks. That would cost about $150, the excavation as I figure here—

Q. Did you figure the cubic yards and the material and the labor? A. Yes. On the excavation is thirty-six by thirty-four. Would be about forty yards of excavation, and cost about $2.50 a yard under those conditions to excavate that

because it will be—to work on the building about a hundred dollars.

Q. What else? A. Footing courses and footings on the columns, $180.

Q. What else? A. Cement floor, 1200 square feet at twenty-five cents, would be $300. Replacing new lolly columns in store because the stairway will be short, $150. Disconnecting plumbing, heating work, and electric work, and reinstalling, about $400. Cost of lowering the building to proper grade, $200. Replacing plaster on stairway where beaver boards had been used instead of plaster boards, $90. For another coat of paint in and out the house, about $150. To replace cement floor in bath room, $100. Cement floor at the entrance of stairs and main entrance, $40. Difference in kitchen sinks, $30.

Q. Anything else? A. That is about all I have.

Q. What do you make your total? A. About $2,090.

Q. Mr. Scrocco, could the building have been built square on the lot?

Mr. Liotta: I object to that, if the Court please.

The Court: Why?

Mr. Liotta: The witness himself testified to the fact that it could have been built square on the lot if you take the other end. That is admitted.

The Court: I will let him answer it.

A. Yes, sir.

Q. In your examination of the premises did you see any well there around this building? A. No, sir.

Q. You didn't? And had there been a well would you have seen that well? A. Well, not unless it was covered.

Q. Will that well be affected by putting up a square building and not an angle building as it is now? A. It depends on the location of the well whether it happened to be right in the foundation or the depth of the well, how deep it was. The building could be placed in such a way as to have that well to be located about the center instead of having it on the foundation.

Q. If that well is located ten or fifteen feet away from the building, then that is no cause why the building cannot be built in square instead of angle? A. No, sir.

Q. In this $2,090 did you include the depreciation to present building instead of the building which should have been built? A. No, sir.

Q. Can you figure now what will be the depreciation on the present building and the building which should have been built?

Mr. Liotta: I object to that on the same grounds as heretofore stated.

The Court: I am going to allow it.

A. Well, the possibilities may be that in underpinning the building, in lowering the building down and disconnecting plumbing and electric wires, why, the plaster is liable to be affected and be damaged, and it is possible that there might be a depreciation of three or four hundred dollars or more in the building.

Q. Three or four hundred dollars or more? A. Yes.

Q. You think, in your opinion, in the way this present building will be affected for the collection of rents, for the renting of the place, for the monthly rents of the store and the rooms?

Mr. Liotta: I object to that unless this witness qualifies.

(Last question read by stenographer.)

The Court: Objection sustained. That is too general.

Q. You have been building for yourself, Mr. Scrocco, at any time? A. Yes, sir.

Q. Where? A. 1925 and 1927 and prior to that time.

Q. Did you have any buildings put up in 1926? A. Yes.

Q. How many buildings? A. Ten two-family houses.

Q. How many? A. Ten.

Q. Is there any difference between square rooms and the rooms on an angle, or difference in stores in which you have got to go three steps instead of one step—is there any difference in the renting? A. Oh, yes, there is a lot of difference.

Q. You know that of your own knowledge? A. Why, yes. He is liable to lose a lot of business. People that have to go up three steps each eight inches high; the same way with the angles, the building, which are very narrow angles, corners.

Mr. Mascia: That is all. Take the witness.

CROSS-EXAMINATION by Mr. Liotta:

Q. Mr. Scrocco, of course you don't know if any changes have been authorized by the owner, do you? A. I don't know.

Q. You say it will cost $350 to put in a cellar bottom, concrete cellar bottom? A. $350?

Q. That is what you said. A. $300.

Q. And of course you read the specifications, did you not, in this case? A. Yes.

Q. Show me in the specifications where Mr. Palladino is to put in a cellar bottom, concrete cellar bottom. A. It shows on the plan.

Q. Show me in the specifications. A. Don't have to show on the specifications as long as it shows on the plan.

Q. Did you read the specifications? A. Yes.

Q. What do the specifications say as to the cellar bottom? A. Well, the rule is usually—

Q. Tell me what the specifications say. A. I don't remember what the specifications say. I am taking it right off the plans, which says concrete throughout the entire floor.

Q. What does it say in the specifications in reference to concrete work? A. Well, it is a question to find out which is right, whether this whole concrete work, footing courses and cellar bottoms shall be included in this concrete and same shall be done by owner.

Q. Of course you have been paid to testify today, haven't you?

Mr. Mascia: I object to that question, your Honor.

The Court: He has a right to answer that.

A. Yes.

Q. Paid by the owner? A. By the owner.

Q. In reference to cracking of walls, in your experience it is a fact that the walls after the building is erected crack—does that in itself say that the work wasn't done in good, workmanlike manner? A. No.

Q. The work may be done in a good workmanlike manner, may it not, and crack? A. Yes. There is small cracks usually.

Q. As a matter of fact, in all new buildings after the building has been erected for a year or so, they have to be pointed up somewhat, don't they? A. Well, some of them.

Q. In mostly all of them? A. They point it up after a year or so?

Q. Yes. A. Not mostly. Maybe a few of them.

Q. After two years in nearly all of the buildings they have to be pointed up, don't they? A. After two years?

Q. Yes. A. No, sir.

Q. In how many instances do buildings stay without the plaster cracking? In how many cases out of a hundred? A. Well, these cases where the plaster was applied on beaver boards, you never put plaster on beaver boards. Naturally it had to come down.

Q. Are beaver boards throughout the entire building? A. That is the only place I examined I could say there were beaver boards.

Q. You don't know whether the owner suggested putting in the beaver boards, do you? A. That I don't know.

Q. Did you examine the entire building thoroughly? A. Quite thoroughly.

Q. You examined it thoroughly. Do you mean to tell me that you didn't see a well on this side of the building? A. Can't see it.

Q. You didn't see it. You didn't examine the land, did you, to find out whether or not there was a well there? A. There is no sign of any wells there unless it is covered.

Q. You went there for the purpose of testifying in this case and finding out what was wrong with that building, didn't you? A. To find out what the difference was between the plans and specifications and the actual building.

Q. You didn't take into consideration the fact that there may have been wells on this side of the building, did you? A. No.

Q. Didn't you make a survey as to this property? A. Survey doesn't show any well there.

Q. Do you mean to tell me that you, an architect, when you make a survey you don't show wells that are on property? A. I didn't make the survey. They made the survey that you have in your hands now.

Q. Look at this survey. Was that made by you under your request? A. Yes, I called the surveyor, but I didn't make the survey.

Q. But your instructions are, when you make a survey, to show everything that is in the land or in the place? A. Everything that is there.

Q. And the evidence that the well is not shown there, if there is one, shows that this survey is not an accurate survey? A. I never saw any well there. It must have been covered if there was one.

Q.. You never looked for one? A. I never looked for one.

Q. How does the land run, belonging to Mr. Scrocco, as to his property line? A. Belonging to who?

Q. Mr. Raio, on this side of the house. Does the land run this way? A. The land runs parallel with the building.

Q. Now, in reference to the height of the cellar, the contractor can only build for the same height as the cellar is dug, can he not? If the cellar that is dug is a five foot cellar, the contractor can't put in a seven foot cellar? A. In other words, if he had a one foot cellar he had to make one foot cellar; is that the idea?

Q. You had to use steps, did you not, if the cellar was only one foot? A. That is between the owner and the contractor if they had any understanding of changing the height of the cellar.

Q. I show you the contract. You read the contract too, didn't you? And the contract was drawn by Mr. Mascia, Mr. Raio's attorney. A. I didn't see the contract.

Q. Read that. What does that say? A. It is agreed that the owner shall do all the excavation work for the cellar and for the plumbing work. I haven't seen the contract.

Q. Mr. Mascia is this gentleman here trying the case for Mr. Raio, is he not? A. Yes.

Q. And he is the man that witnessed this contract? A. I believe so.

Q. Now, if the cellar that was dug was only five feet, he couldn't very well erect a seven-foot cellar without putting stairs there, could he? A. Why, he has got steps for five feet now.

Q. Answer the question yes or no. A. Yes, sir, he would have to have steps.

Q. In order to make a seven-foot cellar he would have to have three steps or more? A. He should have to have about five.

Q. About five, yes. Now, when you measured the height of the cellar—you say the cellar should be a seven-foot cellar? A. Yes.

Q. When you measured the height of the cellar what did you measure from, from the bottom of the cellar to the ceiling or where? A. It is usually the ceiling height, from the cellar ceiling to the cellar floor.

Q. And when you measured the cellar did you take into consideration the beams that were underneath the flooring on the first floor? A. Yes, I took into consideration the beams.

Q. How did you arrive at the figure of five feet height of the cellar, five feet six? A. Five feet ten was the height that I found there as the height between the floor, cellar floor level and the ceiling level.

Q. Didn't you take into consideration the beams also? A. Well, the beams—I am giving you the height, the real height of the cellar; five feet ten.

Q. Now, if the cellar wasn't dug by the owner at a sufficient depth, then the most of the money that you state that the owner would have to spend to put the building in the condition that it should have been would evaporate, would it not? A. Well, it is a question whether the owner knew, who gave him the instructions to go down so deep, because the contract usually—

Q. Answer the question yes or no. What would

be the difference, then, if the owner requested the cellar floor to be five feet six or five feet ten or six feet or whatever the case is, and if the owner consented to three steps? What would be the difference between that $2,000 figure and the figure that he would actually have to expend? A. Well, the $2,000 figure does not fully apply to this particular place. I have other items.

Q. As a matter of fact, Mr. Scrocco, you were told by the owner in this case, were you not, to make the cost of repairing the building in the same condition as provided for in the contract and as it is now for more than the balance due the owner? A. No, sir.

Q. Didn't you tell me that yesterday? A. Did I tell you that yesterday?

Q. Yes. What did you tell me yesterday? A. If you mean to say that I told you that yesterday—

Mr. Mascia: I object to that.

Q. What did you tell me yesterday? A. Yesterday I told you that I was very busy.

Mr. Mascia: I object to that.

Mr. Liotta: I withdraw the question.

The Witness: That is something new to me.

Q. Now, Mr. Scrocco, you say that the building is not plumb? A. Interior walls.

Q. Interior walls aren't plumb. Does settling cause that, settling of the building? A. No, not necessarily.

Q. In frame buildings? A. If there is settlement of the building, it carries the building right down.

Q. After a frame building has been built and has been constructed for a year or more, there is some settlement, is there not? A. That wouldn't affect the walls.

Q. Is there or is there not some settlement? A. I haven't seen any settlement in this building.

Q. You haven't seen any settlement in this building? A. No.

Q. How big is this building? A. Thirty-four by thirty-six.

Q. There are two stores there? A. Yes.

Q. There are two floors above the stores? A. Yes.

Q. This building has not settled any at all? A. I haven't seen any settlement.

RE-DIRECT EXAMINATION by Mr. Mascia:

Q. You read the agreement that the excavation work, the digging for the plumber, for the building, was to be done by the owner? A. Yes, sir.

Q. Who had to see the depth of that cellar, the height of that cellar, the contractor or the owner, if you know?

Mr. Liotta: I object to that on the ground that the contract speaks for itself.

(Last question read by stenographer.)

The Court: Oh, well, you cannot interpret the contract for him.

Q. In a building contract where there is a general contractor, up to whom is to see the condition

of the plans and specifications, up to the contractor or up to the owner?

Mr. Liotta: I object to that.

The Court: Sustained. The contract speaks for itself, and if there is any interpretation to be made of the contract, why, the Court will make it.

Mr. Mascia: That is all.

RE-CROSS EXAMINATION by Mr. Liotta:

Q. Mr. Scrocco, if the cellar was not dug square could the building be square? A. No, sir.

Mr. Liotta: That is all.

FRED MANUEL, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Mascia:

Q. Mr. Manuel, where do you reside? Where do you live? A. 111 South Essex Avenue, Orange.

Q. What is your occupation? A. Contractor.

Q. How long have you been in the contracting business? A. Twenty years.

Mr. Liotta: Qualifications admitted.

Q. Mr. Manuel, did you inspect this building at the request of the owner, Mr. Raio? A. Yes, sir.

Q. What did you find, if anything? A. I find

the building out of square and the cellar five foot ten and three steps in front of the building, and the plaster boards under the stairway, plaster peeling off. I examined the wooden plaster board. They were beaver board instead of plaster boards. Also went through the building into the bath rooms and find the concrete all cracked, and looked over the cellar bottom, was the cellar all wet with about a half inch water down the cellar bottom, and I didn't see no well around the place. I wasn't told to.

Q. Before you examined the building were you given a set of plans and specifications? Did you see the plans and specifications? Did you see the plans and specifications? A. I didn't see no plans and specifications.

Mr. Liotta: To save time that is all admitted, that the building is not as provided for in the plans.

Q. Is the building complete today? A. The building is not complete today.

Q. Can it be occupied by tenants?

Mr. Liotta: I object to that, if the Court please.

The Court: He can tell what condition it is in and then the jury will conclude whether it is tenantable or not.

A. Well, the building is complete, but there is a lot of little things missing. The front steps, they are not finished. They got the boards in front of the steps yet. Only rough concrete is in there, no finishing on top of it. And going up the

stairs the plaster is peeling off of the beaver boards. Was only coat of white finishing. Bath rooms, concrete is cracked, and the cellar bottom, there is water in the cellar.

Q. As a result of your examination can you state what will be the amount to complete that building? A. I looked up according to the plans, and bring down the store to a place where it belongs according to the original plans, why, the mason work would run up to $1,525; and the carpenter work—that would include trimming, taking off the doors and bring down the front, move the whole front, using the same material that was there—that runs to $485; and the painting work, as what I seen there is not finished, put another coat of paint, would run to $150; and the plumbing work and electric work, disconnect and bring it down to the wires where it belongs, it would run to $200 more; and I got twenty per cent for who takes the contract and place the job where it belongs, which runs $305. The whole amount of the job I figure is $2,665.35.

Q. Does that amount include labor and material? A. Everything.

Q. You said the mason work of $1,500. Can you itemize that bill, what it would be for material and what it would be for labor? A. I got excavation in this, which is one hundred twenty yards, thirteen dollars per yard, is $360. A footing course is 280 some cubic feet at seventy-five cents a cubic foot, is $216. Foundation, connect up with blocks to the old foundation, is 432 blocks, labor and material, including eighty cents apiece, is $345.60. The cellar bottom is thirty-five by

thirty-five, four inch thick, that is 1225 square feet at thirty-five cents a foot, is $428.75. Store front steps is twenty-five dollars, and plaster patching in the building and bring down, when you bring down the store, patch up all the plaster, is $150. That runs to $1525.35. I got twenty-five per cent for the contractor who does the job, that is $305. Total is $1,803.35.

Q. The carpenter work? A. The carpenter work, got 1,550 square feet of flooring, one by one and a half cone grain floor, $120 per thousand is $180. Labor work on this floor is five cents a square foot, is $75. Trim labor for the four rooms and two stores at thirty dollars per room. That is in the back of the store to bring that down you got to take the trim all out again. That is $180. The front of the windows, labor to bring down where it belongs, $50. Take it down and put it in place, that is $485. Painting work $150, plumbing work and electric work of $200. That is $2,660.35.

Q. You heard the plaintiff testify that he put up a partition on the second floor. Look at this plan here. He claims that he put a partition on the second floor and he charges $90? A. He has got posts. He has got an extra hall. He has got extra hall posts, and the rooms they are smaller now; didn't have to put them in, but I don't know how it got there.

Q. But do you think the price of $90 is a reasonable price? A. Oh, yes. Partition and plastering and all that, it is a reasonable price.

Q. Was that partition necessary or called for by the present plans and specifications?

Mr. Liotta: I object to that, if the Court please.

(Argument.)

Mr. Liotta: I withdraw my objection.

By the Court:

Q. Do the plans and specifications call for it? A. The first original plan I didn't see it. I see the building there and I seen that partition, that hallway, go through the front rooms.

Q. Oh, we don't want to know that. You say that you didn't see the plans? A. Didn't see the original plans. Seen the building over there.

Q. Did you see the original specifications? A. Didn't see the original specifications.

Q. What do you testify from? On what basis? A. Testified what I seen over there where the place is now.

Q. You simply testify as to the difference between this building and the kind of a building you would put up if you were the boss, is that right? Is that what you are doing? A. If it was me I would put it up according to the original plans.

Q. Yes, but you say you never saw the original plans? A. I never saw the original plans.

Q. How do you know, then, whether it is put up according to the plans and specifications? A. I was told.

Mr. Liotta: I ask that all his testimony be stricken out.

The Court: It is stricken out, every bit of it.

By Mr. Mascia:

Q. You say that you were told. By whom? A. Told by the owner.

Q. By the owners? A. The owner told me.

Mr. Liotta: I object to that.

The Court: That will be hearsay.

By the Court:

Q. Why didn't you get the plans and specifications instead of relying on mere hearsay, if you wanted to qualify as a competent witness? A. Never produced them.

The Court: Why didn't you ask for it? I don't understand this line of questioning anyhow. I do not see how the jury is being helped.

(Argument.)

Adjourned until 1:30 p. m.

Afternoon session 1:30 p. m.

Mr. Mascia: May I have an exception to that, your Honor?

DIRECT-EXAMINATION (resumed) by Mr. Mascia:

Q. Mr. Manuel, did you look on the plans and specifications during the interval of the court? A. Yes.

Q. Are the existing conditions described by you the same as called in the plans and specifications that you have seen? A. No, sir.

Mr. Liotta: I object to that on the grounds it calls for a conclusion.

The Court: I thought I had stricken out his testimony because he said he based his comparisons on something which was told him, which was mere hearsay. You will have to start over again now that he has seen the plans and specifications.

Mr. Mascia: Your Honor, that is why I made that question, because I didn't want to take the time of the Court and the jury.

The Court: Yes, that is what ought to be done.

Mr. Liotta: I will consent to that.

Q. You said no? A. No.

Q. So to put the building in the condition in which it shall have been according to the plans and specifications, you say that there is required the sum of $2,665.35? A. Yes, sir.

Mr. Mascia: That is all. Take the witness.

CROSS-EXAMINATION by Mr. Liotta:

Q. Mr. Manuel, you say you looked at the plans and specifications? A. Yes, sir.

Q. What copy did you look at? A. We keep a copy out there.

Q. The one in evidence? A. One of them there, yes.

Q. You are getting paid to testify, aren't you? A. Here?

Q. Yes. A. Sure.

Mr. Liotta: That is all.

(Argument.)

By the Court:

Q. You say that the building is not built in the same proportions as the original plans and specifications? A. Yes, sir.

Q. Now, if you know, what would have been the difference in cost between building it according to the plans and specifications and building it the way it was built? A. Why, it wouldn't be no difference.

Q. No difference? A. No difference.

Q. In other words, it cost this builder just as much to build it the way he did as though he built it according to the plans and specifications? A. Yes.

Q. You mean so far as the proportions are concerned? A. The proportions, yes, sir.

Q. Now, then, take the cellar. That cellar is five feet and how many inches high? A. Five feet ten.

Q. Five feet ten? A. Five feet ten.

Q. And according to the plans and specifications, it was seven feet, wasn't it? A. Seven feet.

Q. Seven feet? A. Yes.

Q. How much more would it have cost to have built that seven feet instead of five feet ten? A Well, it runs different on the foundation walls the cellar bottom is in. It would be just the same for the contractor and it would only be raising it another course of blocks.

Q. A foot and two inches? A. Yes, would be a difference of a foot and two inches.

Q. The difference between five foot ten and seven feet? A. Yes, would run about $150.

Q. About $150. That is, it would have cost the builder about $150 more? A. Yes, sir.

Q. That is, that would have been a fair contract price for that as between an owner and the builder? A. Yes, sir.

Q. Is that right? A. Yes, sir.

The Court: Now, what other changes are there?

By Mr. Mascia:

Q. What will it cost to bring that excavation to seven feet high instead of five feet and ten inches?

Mr. Liotta: He has testified to that.

Mr. Mascia: No, he has not testified to that item.

The Court: That is a different proposition altogether. That means a transformation by practically tearing out the work that is there, and the only way he could do that would be to put up a practically new building, wouldn't it?

The Witness: Yes.

The Court: If the jury belief that, and the only reason that the Court has allowed evidence along that line is to go to the question that is in dispute between these men as to whether or not it was reasonable to believe that the owner requested such changes as these, reasonable to believe because of the difference that was going to result in the character of the building, for example. I have allowed that and it is perfectly competent evidence along that line.

Q. You say the foundation alone costs $345.60? A. I was asked what difference would it cost if he had put it up in the right way. It is only $150 difference. If you have got to come and tear it up and bring it to the place where it was, it would come to the figures I give you this morning.

Q. Can you repair now for $150? A. No, you can't do enough.

The Court: No, he says he can't. Of course not. It is just like changing the proportions and location of the building. You practically have to tear it down. You don't have to be a carpenter to know that.

Q. And then when he built the store with three steps high instead of one step, what will it have cost the contractor if he had built according to the plans and specifications, more or less? A. Would have cost the same as it would cost him now because he started his walls from down the bottom up. The house would be lower. Well, the house is higher. There is no difference.

Q. What would it cost the contractor if he had painted the house according to the plans and specifications? A. To put another coat of paint would cost $150 easy.

By the Court:

Q. In other words, the plans and specifications call for two coats of paint or three? A. Three coats of paint.

Q. And it got but two? A. It got but two coats.

Q. Then you claim if this contractor had given another coat of paint— A. $150.

Q. It would have cost, according to the contract prices between an owner and builder, $150 difference in the contract price? A. Yes.

By Mr. Mascia:

Q. You said that the contractor used beaver boards instead of plaster boards. What is the difference in value? A. Well, I figure beaver boards taking up and putting plaster boards what is supposed to be put in, it would run about $125, patching up all the plaster what is cracking in the building and what has got to be done under the stairway on the sides on the stairway.

Q. You say that you found water in the cellar. To remove the water from the cellar what must be done? How much will it cost? A. To remove the water. It can't be removed unless it be water proof all around the cellar and cellar bottom.

Q. How much would it cost for that?

Mr. Liotta: I object to that on the ground that the contract does not provide for water proofing cellar bottom, nor walls of cellar.

By the Court:

Q. If the cellar had reached the actual sewer —that is, was as low as the sewer—would you need this water proofing then? A. The water would be running in the cellar. This would have to be done to collect around the foundation and let the water run to where the sewer is, and if it is not done the water would be running to the center of the cellar, would be running over the concrete all the time.

Q. Is there anything in the contract or original

contract or specifications that provides for waterproofing? A. No, it has no waterproof.

Q. No waterproof? A. No, not in the sepcifications.

By Mr. Mascia:

Q. What will that cost? I don't mean to say waterproof, because it is not provided by the contract, but to remove the water from the cellar? You say that it could have been done. A. To remove the water in the cellar, supposed to take the concrete all out again and make the floor to where the sewer is connected, run it to the sewer and let it run out.

Q. How much will that cost? A. Three or four hundred dollars.

Q. The sink in the kitchen, they are two feet and six inches instead of three feet and six inches. What has the contractor saved by using those sinks instead of sinks as called for by the plans and specifications? A. The plumber, he could save there about ten dollars a sink.

By the Court:

Q. How many sinks are there? A. Two. There are two sinks. Three foot, ain't they? They ought to be three foot six.

By Mr. Mascia:

Q. You said that any contractor taking that work will charge so much percentage? Ten per cent? A. Twenty per cent.

Q. Twenty per cent? A. To supervise the work the contractor taking hold of the job like that.

Q. You looked at the trim there in the place.

Is the trimming of a good material and work done in a good, workmanlike manner?

Mr. Liotta: I object to that, if the Court please.

Mr. Mascia: I will change that question.

Q. Is the trimming in the same condition, that same quality of material, same quality of labor as provided for in the plans and specifications? A. The frame door is the same as the plans and specifications calls for it. Only thing is the painting work, have not put on three coats.

Q. Did you find the cement floor on the store front? A. There are steps there. They aren't finished.

Q. Not finished? A. No.

Q. How much will that cost to finish? A. $25.

Mr. Mascia: That is all.

CROSS-EXAMINATION by Mr. Liotta:

Q. You say you read the specifications? A. Me?

Q. Yes. A. Read the one the architect got, the one he showed me.

Q. You read that over thoroughly? A. Read it over, the one he showed me.

Q. You read the specifications in this case very thoroughly? A. Yes.

Q. You are sure the specifications provide for three coats of paint? A. Three coats of paint.

Q. Read these specifications and tell me how many coats of paint the specifications provide for. A. This specification don't mention how many coats of paint.

Q. Are you sure of that? You can read pretty well, can you? Does it take you as long as that to read? A. Got to read it all yourself. You can't jump it.

Q. What does it say? A. It tells you the stuff that has got to be put on.

Q. What else does it say? A. Tells you about varnish the floor.

Q. What does it say about the exterior painting and the woodwork painting? A. Should use sand paper on the inside work.

Q. What does it say there about coats of paint to put on that building? You can read English, can't you? A. Not so well.

Q. You say you read the specifications over very thoroughly? A. The mason line very thoroughly.

Mr. Mascia: I will admit whatever it was.

Mr. Liotta: I think I have the right now to find out whether or not this witness is telling the truth.

Q. You said you read the specifications over very thoroughly? A. Of the mason specifications.

Q. You testified to the fact before. A. Testified the painter showed there two coats instead of three coats.

Q. You testified to the fact that the specifications show three coats of paint instead of two? A. Supposed to be three coats of paint.

Q. Let us see if you understand this. "Painting work. All work shall be properly done before finishing is begun. If the painter finds that the woodwork is not smoothly sandpapered, he shall

notify the owner of the fact previous to priming such work. The painter shall smoothly sandpaper away any roughness which may appear after the priming has been done. All exterior woodwork except pully stiles and rough shingles, and all interior woodwork of the second story. The floors shall receive in addition to the priming coat where specified, two good coats of paint of color to match samples subject to the approval of the owner.'' Does the specification say two good coats of paint? A. The paint, I didn't really read it out, but the mason specifications I did.

Q. Now, how long did it take you to read the specifications while you were out to lunch? A. Well, I just seen the mason specification.

Q. Just the mason specification. How long did it take you to read the mason specifications? A. I was an hour outside.

Q. And you had lunch across the street, didn't you, the Italian-American Restaurant? A. Sure.

Q. How long did you stay there while you were taking lunch?

Mr. Mascia: I object to that, your Honor.

The Court: He is trying to show that he didn't have an opportunity to read the specifications, undoubtedly.

Q. How long did it take you to have lunch? A. I took fifteen or twenty minutes. You want to read the whole specifications it will take you about an hour.

Q. You testified as to the kind of trim that was used. You didn't read the carpenter's specifications, did you? A. I didn't pass no remark about the trim.

Q. You said just now that you read over the mason specifications. What kind of trim was to be used in that building? A. I didn't say what kind of trim had to be used.

The Court: He said about the trim that he found the trim all right excepting the painting of the trim.

Q. You didn't read the painting specifications at all? A. No, I just look at the building, there was only two coats of paint there.

Q. Did you go down to the house? A. Yes, sir.

Q. Did you see the well that was covered? A. No, sir.

Q. Did you look for a well? A. No, sir.

Q. You say that there was a well within a foot of the building and this well had been covered up, without making allowance for the water to be drained out in any other way. Would the water in that well go in the cellar? A. It would go in the cellar if it is not waterproof, sure.

Q. If it was waterproof would it go in the cellar? A. No, sir.

Q. It would not? A. No, sir.

Q. Did you read the specifications? Do the specifications say anything in reference to waterproof? A. Calls for no waterproof.

Q. What? A. Didn't read nothing about waterproof.

Q. Did you look at the ground? Did you go down there and look at the building? A. Yes.

Q. Did you see how the lot ran? A. Yes.

Q. Did the lot run the same way that the house runs? A. Yes.

Q. Does Mr. Raio own property on this side of the house? A. Yes.

Mr. Liotta: That is all.

RE-DIRECT EXAMINATION by Mr. Mascia:

Q. The house could have been built square?

Mr. Liotta: I object to that, if the Court please. That has been gone through a number of times.

The Court: Well, put your question.

Q. Could that building have been built square? A. Sure it could have been square, yes.

By the Court:

Q. Even though there was a well there? A. I don't know.

Q. Even though there was a well there it could have been built square? A. Yes.

By Mr. Liotta:

Q. Even though the well was there and even though the owner wanted to save as much space as he possibly could on this side, he could have built the house square? A. Yes, sir.

Q. How many feet is there from this side of the house to this side of the house? A. It is about three feet.

Q. So the well is about five or six feet wide or more. Could this house have been built in the same plot without covering the well? A. Yes, sir.

Q. It could have? A. Yes, sir.

Mr. Liotta: That is all.

ANDREA RAIO, one of the defendants, being duly sworn according to law, on his oath, saith:

(The testimony of this witness was taken through an interpreter, Peter A. Sena, who was first duly sworn.)

Direct-examination by Mr. Mascia:

Q. Mr. Raio, where do you live? A. At Maplewood.

Q. What is your occupation? A. Laborer.

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

Q. How long have you known him? A. Twelve or thirteen years.

Q. Did Mr. Palladino speak to you in April, 1926, about a construction of a building? A. Yes, sir.

Q. Did you say to him what kind of building you wanted? A. I told him what I wanted and he says, "I will make the plan for you and don't let any architect make it, because as I make the plans for you, that is the way I will make the house."

Q. Did he make the plans and specifications for you?

Mr. Liotta: That is admitted.

Q. You agreed to do the excavation work, isn't that true? A. Yes.

Q. Who took out the land for the excavation and who gave you the measure? A. Mr. Palladino.

Q. How many feet did you do of the excavation? A. I could have done even eight feet, but

he stopped me and would not permit me to dig any farther.

Q. Did you ever say to Palladino that you wanted the cellar excavated only five feet and ten inches instead of seven feet? A. No, because what the plans called for, that was what he was to do with all of it.

Q. Did you ever authorize Mr. Palladino to change the plans and specifications in any way?

Mr. Liotta: I think the best thing we ought to do is come to conversations and not to ask questions that call for conclusions.

The Court: That is very general. I will allow him to answer that, but what does it amount to unless he gives times and places? Let him answer it.

A. Never. No, never, because I didn't get home until six or seven o'clock in the evening and I didn't know where to look for him. I would see Mr. Palladino when he had a payment coming.

Q. Mr. Palladino testified that he had a conversation with you and with your wife and your nephew at the different times, and you authorized him to make different changes in the plans and specifications. If so, state when and where the conversation you had with him. A. No, I didn't. I wanted the house the way the plans called for, and he said to me that when we are finished, if you don't like it you can call the architect.

Q. Did you call an architect? A. Yes, I called Mr. Scrocco to inspect the house.

Q. Why did you call the architect?

Mr. Liotta: I object to that, why. He called. That is all; that is sufficient.

The Court: I will allow it.

A. I see that the house wasn't constructed correctly and the time was coming for a final payment, and the house not being square, then I called the architect to look it over, and the house is not yet finished.

Q. First you had three days' notice served upon Palladino, is that true? A. Yes.

Q. Did Palladino come back to finish the work? A. No. He didn't even come near the place. He just wanted payment without finishing the work.

Q. Was there at any time during April, 1926, and November, 1926, any conversation between you and the contractor to the end that some changes should be made in the plans and specifications? A. No, never.

CROSS-EXAMINATION by Mr. Liotta:

Q. You never did anything toward the supervision of this job, did you?

The Interpreter: I do not know just now what word to use for "supervision."

The Court: Looking over the job.

A. I didn't look at it at all. He was to give me the house at the end according to the plans.

Q. You never had anything to do with the construction of this house? A. Never.

Q. You know Mr. Rajoppi, the plumber? A. I saw him only once.

Q. Do you remember Rajoppi starting to work in your building and you chased him away? A. I didn't send him away. He came there and says that he didn't want Rajoppi or any of his family to do any more work on any of the houses that he was building.

Q. Did you have an argument with Rajoppi? A. No, never.

Q. You are sure of that? A. Yes.

Q. Is there a well on this side of the building? A. Five feet away.

Q. It is five feet away. And you have a house adjoining this house? A. The house is on the Maplewood side and there is twenty feet of space. There was more room yet if he wanted it.

Q. You say you are a laborer? A. Yes.

Q. And you dig cellars, don't you? A. Cellars and ditches.

Q. You had been doing that for how many years? A. Since I came from Italy.

Q. How long is that? A. Twenty-one or twenty-two years ago.

Q. And some of these cellars have irregular houses? A. Yes, certainly.

Q. When you excavated that cellar, why didn't you excavate it square? A. It was dug square by the contractor. He stopped it.

Q. Did you excavate that yourself? A. No. I called the contractor and he brought his own horses to dig the cellar.

Q. You mean to tell me that although you are in that business yourself you called another contractor? A. I work under a contractor.

Q. And you worked on that job yourself, didn't you? A. No. I didn't work on this job at all.

Q. Didn't you dig on this job? A. Nothing.

Q. How about the plumbing materials. Did you at any time select any plumbing materials? A. I chose nothing because he was to give me the house complete.

Mr. Mascia: May it please the Court to direct the interpreter to mention the name? The witness is pointing. I would suggest that the names be given.

Q. When the contract was drawn you went to your lawyer, didn't you? A. Yes, sir.

Q. And your lawyer went over the plans and specifications with you? A. Yes. I took him to his office and he looked them over.

Q. Is the attic smaller than what the plans and specifications provide for, or is it bigger? A. Yes, it is, because there is a roof up there.

Q. Do the plans and specifications provide for a two-story building? There is a three-story building there, is there not? A. There is stores downstairs and families upstairs where there is six rooms.

Q. There is a family in the attic, isn't there? A. No. That is open. There is no one there.

Q. There is no family in the attic? A. No.

Q. Isn't the place to rent? A. No.

Q. How many rooms are there in the attic? A. What rooms? Where is there any rooms up there?

Q. Do you remember with Mr. Palladino calling upon the township committee to allow you to

dig farther in the cellar, and the plumber? A. No. He went all alone.

The Interpreter: Pointing to Mr. Palladino.

Q. When you made the first payment the frame of the building had already been constructed this way, wasn't it? A. The frame was built, but what do I know about plans? I don't understand plans.

Q. You mean to tell me that you didn't realize that the building wasn't square when you made the first payment? A. No, because I didn't understand anything about it. I am not a carpenter. I don't know anything about it.

Q. Does the building show now whether or not it is square? A. No, the building is on.

The Interpreter: And he makes a motion as an angle.

Q. Is the building the same way now as it was when the frame was up? A. I think that that is the way it is, because I don't know.

Q. You could see now very plainly that it is not square, couldn't you? A. Yes, certainly you can see.

Q. And you couldn't see when you made the first payment? A. Yes, I don't know about that, but he said to me he would make the house for me in accordance with the plan, the way the plan is.

Q. How many radiators have you got in your rooms now? A. Ten or eleven, including what is in the store.

Q. There are fourteen radiators altogether, are there not? A. I don't know.

Q. You don't know how to read and write, do you? A. No.

Q. You had these plans and specifications for a couple of days before you, did you not? A. Yes, for a couple of days.

Q. Now, kindly read this for me and see if you know how to read it. A. I can't read.

Q. Look at it. Do you know what this says here? A. I don't know.

Q. You went to school in Europe, didn't you? A. No.

Q. You are in America twenty-one years? A. Yes.

Q. And you don't know how to speak English? A. Because I have always worked amongst Italians.

Q. Now your lot runs this way, doesn't it? A. The lot is a little on an angle, but if he wanted to he could have built the house square.

Q. Did you ever bring any people to the house while it was being erected? A. There was never anyone came to the house. He took care of everything.

Q. How many feet away from your house that he built do you live? What is the distance between the house that Palladino built and the house that you live in? A. Almost twenty or twenty-five feet of dirt.

Q. And is the house that you live in, is there a place to hang your clothes? Does that have stakes between one house and the other? A. Yes, there is.

Q. And isn't it a fact that you wanted more space with a yard between both buildings, and isn't that what caused you to change the plans to the house? A. No, I wasn't looking for more space. If he wanted to fix the house he could have done so.

Q. And Mr. Palladino and Mr. Valvaro, the architect, called at your house last night, didn't they? A. Yes.

Q. And you became very enraged about an architect being brought there, didn't you? A. No, I didn't. I said to them if they waited till I got home and asked my permission to inspect the house—

The Court: Oh, you can't tell that.

Mr. Liotta: I withdraw that question.

Q. Now, who instructed Mr. Palladino to put this wall in? A. No, one.

Q. Nobody told him to put the wall there? A. No, sir.

Q. You are sure of that? A. Sure.

Q. Who instructed Mr. Palladino to put the four extra windows in the basement? A. I talked about nothing.

Q. You didn't order him to put the four extra windows in the cellar? A. No.

Q. Who ordered Palladino to put the concrete cellar bottom in the cellar? A. When he put the concrete in I wasn't even there. I was working.

Q. You didn't tell him to put the concrete there, did you? A. No, sir. No, because the way the plans read, that is what he was supposed to do.

Q. When the second payment of $2,000 was made was the house in the same condition as it is

now? A. When I came home at night he told me, "Tomorrow I want the payment," and I would go to the lawyer and he would get his money.

Q. Was the house this way at that time? A. I don't know because I don't understand those.

Q. Yes, but you can see it very plain now, can't you? A. Yes.

Q. And there have been no changes made in so far as the building is concerned from the time you made the two thousand dollar payment and now, has there? A. No.

Q. And when you made the payment of $3,000 could you see that the house was this way? A. Could see that they were like that. Could see that it was like that, and then I called the architect to see the house.

Q. You were there every day in the week? A. Where?

Q. At the house. A. No.

Q. You live twenty-five feet away from there? A. I get home late at night.

Q. How about Sundays. What time do you go to work on Sundays? A. On Sundays I don't work.

Q. And you never looked at the house on Sundays, did you? A. I looked at it, but what could I understand about it?

Q. Did you or did you not authorize or tell Palladino to put the beaver boards between the stairways? A. No, sir.

Q. You say you never were on the job? A. Sometimes when it rained I would go to see, but what would I understand about it, or what the carpenters were doing?

Q. There are outlets in the cellar, aren't there? A. There isn't anything there. There is water there.

Q. Wash tub in the cellar? A. There are two wash tubs there.

Q. And since the house was constructed you covered this well up that was there? A. I filled it up when we were doing the excavating in the evening.

Q. You filled that up yourself? A. Yes, a little each night.

Q. I thought you said you were never anywhere near the building. You were near the building then, weren't you? A. I wasn't near the excavation, but I did fill in the well as I got time in the evenings.

Mr. Liotta: That is all.

Mr. Mascia: That is all.

JOSEPH SAMO, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Mascia:

Q. Where do you live? A. 29 Laurel Avenue, Maplewood.

Q. You are a nephew of Mr. Raio? A. My wife is a nephew, wife.

Q. Have you ever been present at any conversation between Mr. Raio and Mr. Palladino? A. Yes, sir.

Q. You have. When? A. When is Mr. Palladino is come in the house and show the plans and specifications. He says, "I make a house like specifications and plans, and if you are no satisfied, call anybody, architect, to see the job, and I give guaranteed work too."

Q. When did this conversation take place? Try to remember. A. Before he started building the house.

Q. Do you remember the year? A. I think it is April, 1926.

Q. April, 1926. After that time, after April, have you ever been present at any other conversation between Palladino and Raio? A. I was all the time when he is talk for Mr. Raio, but in the house to talk—

Q. Did you ever hear Mr. Raio say to Palladino to not make the building square? A. No, no.

Q. Did you ever hear to Mr. Raio say to Palladino to not make the cellar seven feet high? A. No, sir.

Q. Did you ever hear Mr. Raio say to Palladino that instead of that, to put partitions there on the second floor? A. Yes, sir.

Mr. Liotta: If the Court please, I have allowed enough of these leading questions, and I think counsel should ask him conversations and not lead the witness.

Mr. Mascia: All right. I will put it another way. I will put it in a general way.

Q. Was there ever at any time at any one of these conversations given to Mr. Palladino by Mr. Raio any authorization to change the plans and specifications? A. No, sir.

Mr. Liotta: I object to that on the grounds it calls for a conclusion.

The Court: Well, it does.

Q. You heard Mr. Palladino say that you had been present when Mr. Raio told him to make change on the plans and specifications. Is that true? A. No, sir. Mr. Palladino, he going on there when he dig the cellar, he says that is enough, no dig any more.

Q. Was anything said about the five feet or seven feet, if you remember? A. No, sir. No, sir; nothing.

Q. When Palladino said to stop the excavation, do you know if there was seven feet or five feet of the excavation? A. He measured, Palladino, that the cellar, he says that is enough.

Q. Palladino measured the cellar and said that is enough? A. That is enough.

Q. What did Raio say, if anything? A. Raio nothing about, because he no understand nothing.

CROSS-EXAMINATION by Mr. Liotta:

Q. Mr. Samo, do you remember when Mr. Palladino first staked the cellar and you and your father-in-law, or your brother-in-law— A. No, my father-in-law. He is nothing.

Q. Mr. Raio? A. Yes.

Q. He was there when Mr. Palladino began to stake the cellar, was he not? A. I was with Palladino in the morning—

Q. Answer my question. A. I was myself in the house, Mr. Palladino in the house, come on, he says, guaranteed cellar. Because I got to go

to New York. All right, he says, I send him over right away. Me and Mr. Raio going down New York when I be back.

Q. Answer my questions and don't tell us about your story in New York. When Mr. Palladino began to stake out the cellar was Mr. Parella there? A. Never saw Mr. Parella myself.

Q. Were you there? A. Me? No, sir.

Q. You weren't there when Palladino began to stake out the cellar? A. Just I call him in the morning.

Q. When he was staking out the cellar with Parella, were you or were you not there? A. No.

Q. Do you remember Palladino staking out a square cellar? A. Yes.

Q. And your brother-in-law objecting because he would cover up the well? A. It is not my brother-in-law.

Q. He objected because he would cover the well, isn't that so? A. That is a well that is about five or six feet from the building.

Q. The well that is five or six feet from the building? A. Yes.

Q. And he wanted to conserve that well? A. No, sir, nothing.

Q. He didn't say anything at all about the well? A. No, sir.

Q. He didn't say anything about the space there which he wanted to use? A. Nothing.

Q. Didn't say anything about that at all? Do you remember Palladino staking the cellar out twice instead of once? A. It was only one time. I saw when I be back from New York. I saw they was digging.

Q. What is that? A. I saw when I be back from New York, I saw the contractor, he was digging there.

Q. You saw the contractor digging there. As a matter of fact you were there in the first instance, weren't you? A. The first what? The morning I go with Palladino.

Q. Look at me when you talk. A. Yes, sir.

Q. When Palladino went there to stake out the cellar, you were there, weren't you? A. No, sir.

Q. Are you afraid to look at me when you say no? A. What do you mean? I no afraid of nobody.

Q. When Palladino went there to stake out the cellar you were there, weren't you? A. No, sir.

Q. You weren't there? And didn't Palladino stake that cellar out twice? A. Stake the cellar, but nobody except him, the man he got for him.

Q. Who was that? Parella? A. I don't know.

Q. You say he was there and the man who was with him? A. Yes.

Q. You weren't there? A. No, sir.

Q. And you saw a man with him? A. He told me in the night when I shall be back in New York.

Q. Who dug the cellar there? A. The contractor.

Q. Who? A. Juliano.

Q. Who hired the contractor? A. Who hired? What do you mean?

Q. Who employed him? A. Who pay that?

Q. Yes. A. Mr. Raio.

Q. Palladino didn't have anything to do with Juliano, did he? A. He give him measure.

Q. He gave him the measure. You were in the building every night, were you not, while it was being constructed? Did you ever see Palladino while he was working on the building? A. I see, but no my business.

Q. You saw him every day? A. No, sir, in the day I go to work.

Q. You saw him at night? A. At night, when I be late.

Q. You were there and you told Palladino what to do and what not to do. A. No, sir.

Q. Do you remember the time this wall was placed there? Didn't you hear Raio tell Palladino to make a hall leading to the attic? A. No, sir.

Mr. Liotta: That is all.

MARY RAIO, one of the defendants, being duly sworn according to law, on her oath, saith:

(The testimony of this witness was taken through an interpreter, Peter Sena, who was first duly sworn.)

Direct-examination by Mr. Mascia:

Q. You are the wife of Mr. Raio? A. Yes, sir.

Q. You live together with your husband in Maplewood? A. Yes.

Q. Do you know Mr. Palladino here? A. Surely.

Q. How long have you known him? A. About twelve or thirteen years that we lived up there we know Mr. Palladino.

Q. Because he built the house he was a very good friend of yours, was he not? A. Surely.

Q. Were you present when he showed you the plans and specifications to your husband? A. (Speaking in English) Mr. Palladino show these plans for me.

Q. He showed the plans to you? A. Yes, this one.

Q. What did he say to you? A. (Speaking through the interpreter) I said Mr. Palladino, he showed me the plans and told me he would build me a house according to the plans and then I would be entirely satisfied, but I am not because the house is not built according to the plans.

Q. Did you ever say to Palladino to put a partition here on the second floor, up here? Did you say to him to make the partition here on the second floor? A. No. Mr. Palladino told me he was going to make such a nice house that everybody was going to come and admire it, and he hasn't done it.

Q. Did you have any conversation with Palladino at the time that the cellar was excavated? A. No. He talked with my husband that the cellar should be seven feet deep, and my husband could have dug deeper yet if it was necessary.

Q. Was the cellar excavated seven feet, if you know? A. I don't know. I don't know anything about that.

Mr. Mascia: Take the witness.

CROSS-EXAMINATION by Mr. Liotta:

Q. Your husband never talked to Palladino, did he, while the house was being constructed? A. He came up to my house and said he was going to make me a house that everyone was to admire.

Mr. Liotta: Kindly tell her to answer my question.

(Last question read by stenographer.)

A. When would he get time to talk to him? He gets home between six and seven in the evening from his work.

Q. And your husband never looked at the house while it was being built? A. (Speaking in English.) He come too late in the night.

Q. Did he ever look at the house at night? A. No, sir.

Q. And he never watched it on Saturday or Sunday, did he? A. (Speaking through the interpreter.) On Saturday he works, and on Sunday we go out.

Q. You never watched Palladino on Sunday? A. No.

Mr. Liotta: That is all.

MARIA LEONE, a witness produced on behalf of the defendants, being duly sworn according to law, on her oath, saith:

(The testimony of this witness was taken through an interpreter, Peter Sena, who was first duly sworn.)

Direct-examination by Mr. Mascia:

Q. Mrs. Leone, are you one of the tenants in this house in Maplewood? A. Yes.

Q. How many rooms do you occupy there? A. Three rooms and a very small room.

Q. Did you notice anything wrong with the rooms?

Mr. Liotta: Does she know? Is she qualified?

The Court: I don't know. Let her answer.

A. While I was working in one of the rooms there one day the plaster burst out with a loud report.

Q. Did you notice anything else down the cellar? A. When I go in the cellar I have to put rubbers on.

Q. Why? A. Because there is water there. I walk along the hall and the plaster comes down.

Mr. Mascia: Take the witness.

Mr. Liotta: No questions.

Mr. Mascia: Defendant rests, your Honor.

PLAINTIFF'S REBUTTAL TESTIMONY

JOSEPH PARELLA, a witness produced on behalf of the plaintiff, in rebuttal, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Liotta:

Q. Mr. Parella, were you at the Raio property when Palladino staked it? A. I was.

Q. Was Mr. Raio there? A. Yes, sir.

Q. Was Mr. Raio's brother-in-law? A. I don't recall. I think he was, I am not sure.

Q. How many times did you stake that property? A. Twice.

Q. Why did you stake it twice? A. First time we squared it and a well came inside of the foundation. In order to save the well, which he valued, why, he had us to change the foundation on an angle.

Mr. Liotta: Take the witness.

Mr. Mascia: No questions.

MICHAEL RAJOPPI, a witness produced on behalf of the plaintiff, in rebuttal, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Liotta:

Q. Mr. Rajoppi, you are a plumber? A. Yes, sir.

Q. Did you have the first contract for the plumbing work on this job? A. I did.

Q. Who selected the fixtures, the plumbing fixtures for this job? A. Why, before, during the contract?

Q. Yes, before and after? A. I was talking to Mr. Palladino and Mr. Raio, the owner.

Q. You were talking. Speak out loud so I can hear you over here. A. Well, I wanted to know exactly what to do.

By the Court:

Q. Who picked out the fixtures? A. That I couldn't exactly say. I don't know.

Q. Where did you get them? A. In the catalogue.

Q. Who told you? A. Standard catalogue.

Q. Who told you what to pick out from the catalogue? A. Well, I don't exactly remember who told me, but I know I picked them out over there, to the best of my knowledge.

By Mr. Liotta:

Q. Was Mr. Raio there when the fixtures were selected? A. I don't know exactly.

Q. You don't remember? A. I don't know.

Mr. Liotta: That is all.

Mr. Mascia: That is all. No questions.

THOMAS DORAN, a witness produced on behalf of the plaintiff, in rebuttal, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Liotta:

Q. Mr. Doran, who requested you or Mr. Palladino to put the beaver boards underneath the stairway? A. I was told by Mr. Palladino to place them there.

Q. You never talked to Mr. Raio? A. No, sir.

Q. Did you ever see him on the job? A. I have seen him on the job, yes, sir.

Q. How often? A. Well, mostly on a rainy day is the only time I saw the man there.

Mr. Liotta: That is all.

Mr. Mascia: That is all.

DANIEL A. PALLADINO, re-called in rebuttal:

Direct-examination by Mr. Liotta:

Q. Mr. Palladino, who selected the plumbing fixtures on the job?

Mr. Mascia: I object to that, your Honor.

The Court: Why?

Mr. Mascia: It is not the issue, it is not material in the case who selected the plumbing material. Even if the owner selected, what has that to do with this case?

(Argument.)

The Court: Well, it is competent.

Q. Who selected the fixtures? A. Why, Mr. Rajoppi was the original plumber that I had engaged.

Q. Who selected the fixtures? A. Why, Mr. Raio.

Q. Who instructed you to put the beaver boards in the staircase? A. Mr. Raio, on account of—

Mr. Mascia: I object to that.

The Court: Has he not already testified to that?

Mr. Mascia: He has already testified.

Mr. Liotta: That is all.

Mr. Mascia: That is all. No questions.

Mr. Liotta: That is our case, if the Court please.

MOTION FOR DIRECTION OF A VERDICT

Mr. Mascia: I make a motion, your Honor, for a direction of verdict in favor of this defendant on the same grounds that I made my motion of nonsuit, and I say to the Court at this time that the evidence clearly shows that never at any time did the owner authorize the contractor to make any change whatsoever.

The Court: Where is the evidence to show that? The owner says that, doesn't he?

Mr. Mascia: The owner?

The Court: The owner says that, but the contractor says he did. Therefore it is a question of fact for the jury to pass upon.

Mr. Mascia: Your Honor, but I want to submit to the Court this point, that although it appears

to be a prima facie case for the plaintiff, from all the circumstances and the evidence it appears that he has not sustained the burden of proof even of a prima facie case, and there should be a direction of a verdict in favor of the defendants.

The Court: How can I say which side the jury are going to believe in this case?

Mr. Mascia: Your Honor will rule against me; I take an exception.

The Court: Yes, of course.

(Mr. Mascia sums up the case for the defendants.)

(Mr. Liotta sums up the case for the plaintiff.)

Charge.

Court's Charge to the jury by Honorable Peter F. Daly, Circuit Court Judge, as follows:

Gentlemen of the Jury: There is hardly a more fertile field of litigation than disputes arising from building contracts. In order to avoid disputes as far as is possible they get up forms of contracts which effect in language, as far as language can do it, an agreement between the parties that practically anything to change the contract or specifications must be in writing. Those provisions carry a great deal of weight, and yet no matter what language they may employ in that direction, at times such provisions are puny.

You know, after all is said and done, the law endeavors to typify, our law endeavors to express

common sense in rules, which are known as law, based upon the experience of mankind. It is known that notwithstanding these written contracts, and particularly among people who are not acquainted with our laws and customs, it is the most normal and natural thing for people of that type that after a building is started they suggest changes one way or the other.

Therefore I think it is for that reason that—or whatever the reason may be, our law holds that notwithstanding these original contracts, the parties may enter into subsequent or supplemental contracts as to that building that was originally covered by the written contract, and that they may even do that orally—that is, by word of mouth. But once a party claims that there were changes in the original contract effected through a subsequent oral contract, he has the duty of proving that and the jury must be satisfied through clear and convincing evidence that there was a supplemental oral contract, that it was definite, that there was no reasonable doubt of it, that there was no doubt about the contract, that it was specific not only as to the agreement of the meeting of the minds of the builder and the owner that there should be a change, but also that there was a price definite and fixed. In other words, a contractor cannot come along on his own motion and change a building and get paid for it. He may even go to the extent of producing a better building at more cost and less profit to him, yet the owner must have entered into a definite agreement not only as to the doing of that

as extra work, not only as to the doing of that as a matter of change from the original contract, but also that he was to pay definitely for it—oh, not necessarily a fixed price, but that he was to pay what it was worth if a definite and fixed price is not made.

Now, what is this case? It is admitted in this case that the building produced by this builder is not substantially the same kind of building as the original plans and specifications called for. There were changes. There were changes, for example, in a cellar as to the depth of the cellar. The cellar according to the original plans and specifications was to be seven feet in height. It is only five feet ten inches. That is a substantial variance from the original contract.

Now, if one of you gentlemen enter into a contract with a builder to put up a building for $9,000 or $10,000 or whatever the amount, unless he gives you substantially what he contracted to give you, you are not obliged to pay him a single cent no matter what the extent of the work he has done or the material he has furnished. And isn't that common sense? If a man does not substantially live up to his contract, why, he has fallen down and you do not owe him anything.

Now, when I say, "substantially lived up to his contract," that means just what the language says in substance, because you can readily conceive and you know that no matter how expert the contractor or the builder may be, there are always some slight changes. We know that from

human experience. They are only slight changes and moderate variations if the substance is there.

Then the only question is whether the changes are such that they should be considered in determining whether or not the original contract should be added to or taken away from. You cannot add to the original contract price even though there has been extra work or changes that meant more cost to the builder, unless, as I said before, the owner has agreed to it, has requested it, has agreed to pay for it as well as asking for the change itself.

Why was not this building built substantially according to the original plans and specifications? The plaintiff the builder admits that it is a different building. In a substantial way it is different, but he says that any change that is in that building is the result of the specific request of the owner; so far as the cellar is concerned, coming back to the cellar, that the excavation of this cellar was to be done by the owner himself—that is, the digging of it—and when the owner dug down to a depth of five feet and ten inches below the surface of the ground he found the sewer, and he did not want his cellar bottom to be below the sewer and he said to the builder, "Let it go at five feet and ten inches so that the bottom will be on a level with the sewer." That is not the plaintiff's language, but that is substantially what he says.

Now, if that is so and you find the evidence clear and convincing that that is so, then in regard to that particular it would simply be a question of whether or not there was an agreement further than asking for the change, an agreement upon the part of the owner that that should be deducted, because I will refer to the contract along that line later on and I think I have given you already an explanation just about what his test is.

If these changes were not made at the request of the owner of this building and you find that there was not such a building given as was substantially required according to the original plans and specifications, then this man is not entitled to a cent of the balance of the contract price, if you find as a result of a consideration of the evidence that the changes were never authorized or requested by the owner.

Now, if you find that those changes were made, for example there was a well there and they wanted to keep away from the well and that changed slightly the location and also the proportions of the building, and that the substantial changes were all the result of the request of the owner, then what question would you have? Would he be entitled to the total of the balance of the contract price?

Now, the contract provides that the owner has the right to make such changes, whether it be in increase or decrease of work and materials, during the progress of the work as he may like to have—he reserves that right—and that in case such changes are made by the owner and at the owner's request, then there shall be an account-

ing. If it is worth more than the original contract price called for, if it is something that costs the builder more, then the builder is to get an extra for that. If it is a diminution of the work and materials, then the owner should get an allowance for that.

It is true that the contract further provides that no such changes shall be made as to cost that the owner be responsible for it unless it is put in black and white, and yet notwithstanding that as I have heretofore explained, because of human experience along that line the law says that notwithstanding that restriction if the jury is satisfied through clear and convincing evidence that there was an oral agreement to do the work, then the jury have the duty of considering whether that work should be credited to the owner or should be credited to the builder, if the oral agreement was definite as to the doing of the work and definite that the work was to be paid for by the owner.

In this case there is also a charge for $350.48 extras that was beyond the building contemplated, and that you are to pass upon, and since those agreements were not in writing the burden of proving that they were extras, that those extras were requested by the owner, and that he also specifically promised to pay for them, is upon the builder. In other words, gentlemen, take this contract. The burden of proving that any change of the contract was the result of the request of the owner and done for his benefit at his request, and that under his promise express or implied it

was to be definitely paid for, and so getting away from these restrictions, is upon the builder.

Has this builder turned over a building that substantially complies with the requests made by the owner? If he has then he is entitled to the balance of his contract price excepting so far as it may be changed by you from the preponderance of the evidence in the case as to more or less because of the changes.

As to the extras the same rule applies. Did the owner request the extras and did he agree, expressly or impliedly to pay for those extras? If he did, then what were they reasonably worth?

What is sufficient evidence to justify a jury in finding that the contract was changed, or its provisions waived in this regard? Our answer is that if the evidence satisfactorily shows that the parties distinctly agreed that the alteration should be deemed extra work and that the owner definitely agreed to pay extra for it, and especially if a definite price was fixed in that agreement, this would be sufficient to establish an express contract for such extra work outside of the original contract, or a modification of the contract to the extent of such agreed extra work, and would justify a recovery therefor regardless of the restrictive clause.

The contract can be changed by assent of the parties and may be changed even though the change is made orally, and if the owner assents to alterations or extra work different from that originally specified, if it is definite in its terms

and founded on a proper consideration, the jury will consider it and see that it is compensated for accordingly. If the evidence satisfactorily shows that the parties distinctly agreed that the alteration should be deemed extra work and that the owner definitely agreed to pay extra for it, then the builder is entitled to be compensated for whatever it is worth.

You may take the case.

NOTICE & GROUNDS OF APPEAL.

(Filed April 17th, 1928)

NEW JERSEY SUPREME COURT

DANIEL A. PALLADINO, Plaintiff-Appellee, vs. ANDREA RAIO, Builder, & ANDREA RAIO & MARIO RAIO, his wife, Owners, Defendants-Appellants.	On Appeal from Union Circuit Court.

The said defendants-appellants, Andrea Raio and Maria Raio, his wife, hereby appeal from the judgment of affirmance entered in the above stated cause, to the New Jersey Court of Errors and Appeals upon the following ground:

The Supreme Court erred in giving judgment for the plaintiff-appellee, instead of for the defendants-appellants.

EGIDIO W. MASCIA,
Attorney for Defendants-Appellants.

To:
Eugene A. Liotta,
Atty. for Plaintiff-Appellee,
207 Broad Street,
Elizabeth, New Jersey.
Acknowledged April 10th, 1928.

OPINION SUPREME COURT.

(Filed Mch. 29, 1928)

NEW JERSEY SUPREME COURT

#74 October Term, 1927

DANIEL A. PALLADINO,
Respondent,

vs.

ANDREA RAIO, Builder, and ANDREA RAIO and MARIA RAIO, his wife, Owners, and EDWIN C. CAFFREY, Mortgagee,
Appellants.

Submitted October Term, 1927. Decided March , 1928.

On appeal from Union County Circuit Court.

For Appellants: Egidio W. Mascia.

For Respondent: Eugene A. Liotta.

Before Gummere, Chief Justice, and Justices Black and Lloyd.

Per CURIAM:

This is an appeal from a judgment obtained against the defendants at the Union County Circuit in a building contract case, the plaintiff being the contractor, and the defendants, the owners. The grounds of appeal are:

1. Error in the admission and rejection of evidence.

2. That the Court erred in refusing to direct a verdict in favor of the appellants.

3. That the judgment is not supported by the proofs in the case.

4. That the jury disregarded the instructions of the Court.

Of these grounds the second alone adequately brings before us any ruling of the Trial Court. The ground upon which this motion was based was that the evidence failed to show that any change in the contract (the claim being in part for extra work) was authorized. The motion to direct a verdict which was overruled could not have been granted in view of the proofs produced by the plaintiff. These tended to show that moneys were due both on the principal contract and for extra work and materials ordered by the defendants and for which they agreed to pay.

The judgment is affirmed.

New Jersey
Court of Errors and Appeals

DANIEL A. PALLADINO, Plaintiff-Appellee, vs. ANDREA RAIO, builder; and ANDREA RAIO & MARIO RAIO, his wife, owners, Defendants-Appellants.	On Appeal from Supreme Court.

BRIEF FOR APPELLANTS.

This case was tried at the Union County Circuit and carried on appeal to the Supreme Court. All the grounds of appeal were rejected. The appeal was decided upon the single ground that there was no error in refusing to direct a verdict. The *per curiam* opinion reads: "The grounds of appeal are":

1. Error in the admission and rejection of evidence.

2. That the Court erred in refusing to direct a verdict in favor of the appellants.

3. That the judgment is not supported by the proofs in the case.

4. That the jury disregarded the instructions of the Court.

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SPECIFICATION OF ERRORS.

The first ground of appeal, namely: Error in Admission and Rejection of Evidence, and which point was elaborated in the court below, we contended that without proof of alteration in the contract, or express proof of waiver of its terms, the appellee, in order to recover, was bound to produce the writing stipulated in the seventh section of the contract (state of case, p. 9), where is found the provision that no alteration or extra work should be done without a written order from the owner * * * and for an express agreement in writing as to the costs. The appellee and an architect were the only witnesses called to support his (the plaintiff's) claim it was error to admit in evidence proof of the variations from the written contract. At page 28 of the state of the case the following appears:

> Question: "What was the change?"
> Answer: "The owner came down on the job after me and he wanted me to stake out the cellar."
> Mr. Mascia: "I object, your Honor, to this question. There is a written contract that says that any changes or alterations should be in writing signed by the owner. That is one of the provisions of the written agreement."
> The Court: "I am going to allow it. You may take an exception. Exception noted as ground for appeal."

The foregoing ruling of the Trial Court, refusing to limit the proofs to the matters stated in the contract in writing, and regarded as untenable by the Supreme Court, is answered by the appellee in contending that no matter how stringently the clause (the seventh section) providing for a writing in order to support the claim for extra compensation may be worded, it is always permissible for the owner and the builder to agree orally upon another arrangement so as not to impair the right of contract.

The Supreme Court held, in reviewing this case, that the extra work having been verbally ordered and actually done, the cost was properly chargeable against both owners (husband and wife), who, in order to escape payment, would have been required to establish to the satisfaction of the jury that the work had not been done on their specific order, and that they, the owners, had not waived the requirements of the contract. We contend that while the acceptance of a benefit usually raises an implied promise to pay for it, yet there are instances where such infer-

ences will not arise. So in the case in hand, the order of the extra work by one of the appellants (the husband) without written order must not be construed as evincing an intention to alter or vary the contract, but rather, that such action was to be taken in conformity with its terms.

And we contend further that while it is true that where there is a substantial dispute as to the fact or the inference to be drawn therefrom, it is not the province of the Court to determine with whom the preponderance of evidence lies; and that it is for the jury to determine. Yet, it is also a fundamental doctrine that only those questions which are within the issues raised by the pleadings should be submitted for the consideration of the jury.

And that no specific exception, other than the general one to the denial of the motion to nonsuit and also to direct the verdict, was entered at the trial, does not deprive the appellants from having the point considered on the present appeal when it is demonstrated that the proofs do not sustain the particular claim set forth in the pleading, because, for instance, the fourth section of the first count of the complaint sets forth a particular issue of fact specifically denied by the answer, namely:

> "That the said plaintiff did well and sufficiently perform all the matters and things by him to be performed in accordance with the terms of the contract."

The jury certainly disregarded the instruction of the learned Trial Court because the record in this case, as disclosed by the charge to the jury, page 118, shows that the building was not substantially erected according to the original plans and specifications; and the jury were told in plain words in the succeeding paragraph of the charge, page 119, line 10, "That if the changes were not made at the request of the owners, there should be no recovery." Therefore, because of the explicit provisions of the contract, it was error to admit testimony and the oral arrangement testified to by the builder, particularly because there was no price specified and no price implied and no terms made to pay; and also because the new contract was not made the specific subject-matter of the suit presented in the pleadings; and further, because the question not being raised in the pleadings could not have been legally submitted to the jury; and in addition, because the building erected is not the building substantially described in the plans and specifications; and because, further, that the jury clearly disregarded the explicit instructions of the Trial Court when damages were awarded based upon the written contract, when, as a matter of fact, the contract had not been in terms complied with, and there was no proof of value of the work done, entitles these appellants to say that statements in the pleadings were not supported by the testimony of the witnesses; or, in other words, as stated in the grounds of appeal: "The judgment is not supported by the proofs."

POINT ONE.

Without proof of alteration in the contract by the parties or express proof of waiver of its terms, the contractor, in order to recover, was bound to produce the writing stipulated in the agreement, and it was error to admit oral testimony of changes.

The seventh section of the contract (Case 9) provides that no alteration of extra work shall be done without a written order from the owner * * * and for an express agreement in writing as to the cost.

The contractor and an architect were the only witnesses called to support the plaintiff's claim, and objection was made to the testimony concerning the variations and claim for extra work (Case 28) and an exception noted.

The contractor testified that the owner (there were two owners) requested him to make changes at the beginning of the job at the time, consisting of staking out the cellar. Although the contractor mentioned a Mr. Joseph Perella as being present (Case 29) this person was not called and the contractor went on to say that because of the existence of a well, the house was not erected in conformity and on the location shown on the plans. The contractor testified he wanted to go away from the job; that he was held back, and that he told one of the owners, who made him stake the building cater-cornered, and then he had the well eliminated on that side of the building, and that one of the owners excavated the cellar and that the contractor had nothing to do with it; and that at the time the contract was drawn, one of the owners said (Case p. 32) "Eliminate

the plaster on the outside of the walls." He says, "I am a cement finisher myself." He says, "I will put it on good. Go ahead myself." All right, I didn't put it in the specifications for him. Then he go ahead and forces me to put the plaster on there. I says, "Who is going to pay for it?" He says, "Well, I will pay for it." He says, "I will take care of that. Don't worry about that."

It appears (Case, p. 51) that the contractor himself drew the plans and specifications, and that a 7-foot high cellar was called for, and that the owner only excavated 5-foot, and that the contractor knew that if the owner did not go down to 7 feet level, the entrance to the stores would have three steps instead of one, and that he also knew that it would be a big disadvantage to the building (Case, p. 51) and that when the contractor drew the plans and specifications for a 7-foot cellar, he did not make a previous investigation as to where the sewer was; and that when the owner reached the level of 4 feet, the contractor and one of the owners (the husband) the situation was such physically that in order to have a sewer connection, a 7-foot cellar could not be had (Case, p. 52); the contractor then confines his testimony to the item for a more expensive chimney (Case, p. 33) from cement to brick; that a charge of $150 would be made; then he passes on to the subject of plastering walls in the cellar and applying tar on the outside of the foundations in order to make up the extra items of $350.40, which he said was a reasonable charge.

And this was the whole of the testimony of the contractor's case, but he was re-called (Case, p. 48) and testified that there was due to him on ac-

count of the contract ($3,178), and except also for a Mr. Valvaro, an architect, who answered a few questions, confined to the workmanship of the job; he said that he had inspected the work the day before the trial and that he had gone through the entire building except the cellar, and that the work was done in a good workmanlike manner; that the cracks in the concrete were caused by the building settling, ninety-nine times out of a hundred, and that as to the extra work, Ninety dollars was a reasonable charge for adding a partition, as shown on the map, and that Thirty dollars was a reasonable amount for erecting a chimney of brick, instead of cement; that Fourteen dollars was reasonable to install four windows; that the charge for labor to concrete the cellar was also reasonable.

Therefore, the motion for nonsuit (p. 56) supported by the motion for direction of the verdict (p. 114) should have been granted, particularly in view of the summation of the testimony made by the learned Trial Court in its charge to the jury, for it clearly appears that the building produced by the contractor is not substantially the same kind of building as the original plans and specifications called for (Case, p. 117) and at least, the jury should have followed the instruction of the Court.

Disputes regarding changes on building contracts are as old as the practice of contracting for such work, and are a fertile cause of litigation. For years the effort has been to limit or prevent them by putting the main contract in writing, and stipulating that changes must be agreed on in writing in order to support a claim for extra compensation. In the case at bar there

was no architect, but we conceive that this makes no difference in the principle to be applied. The Courts, early recognizing the beneficial character of such stipulation as tending to prevent trumped-up claims for extras and acrimonious disputes between owner and contractor resulting in litigation and loose testimony often running into perjury, endeavored as far as they could, to give effect to such provisions, and occasionally succeeded.

The rule of procedure enunciated in *Valenti* v. *Blessington,* 96 N. J. Law 498, quoted in the respondent's brief, is an application of the doctrine that an appellant court must not search through the record to find the alleged trial errors. But where, as in this instant appeal, the line and the page is pointed out. Here is the excerpt from the brief in the Supreme Court:

> "The contractor and an architect were the only witnesses called to support the plaintiff's claim, and objection was made to the testimony concerning the variations and claim for extra work (Case 28), and an exception noted as ground for appeal."

The reason for enforcing the rule fails. What before was a blanket ground for appeal, was detailed and advanced as a trial error and should have been considered.

Appellant's attorney objected to the evidence of variations of the written contract and the Court replied that he was going to allow the testimony. Therefore, the point was made at the trial, raised in the brief, and should have been considered on appeal, for, while this rule has a substantial office in appellate procedure, where it

operates as a practical estoppel, there is nothing either in the reason upon which the rule is based or in the office which subserves, which makes it in anywise a limitation upon judicial appellate authority.

POINT TWO.

It is a cardinal rule for the guidance of Trial Courts that only those questions which are within the issues raised by the pleadings should be submitted to the jury, and that a failure to observe this rule is legal error.

The pleadings as aforesaid in the first count formulated issue of fact and the Trial Court states the question in this wise (p. 118):

> "Why was not this building built substantially according to the original plans and specifications? The plaintiff, the builder, admits that it is a different building in a substantial way, but he (the contractor) says that any change that is in that building is the result of the specified request of the owner."

The owners (husband and wife) contend that the judgment was not supported by the proofs in the case, and *Jordan* v. *Reed,* 77 New Jersey Law, 584, is controlling, for usually when a substantial variance appears in the course of the trial between the pleadings and the proof, or because of failure of proof, the plaintiff should be nonsuited.

The Articles of Agreement between the parties are embodied in Schedule A of the complaint (Case 5, 6, 7, 8, 9 and 10).

The owners filed an answer, admitting the agreement and contesting the suit upon the ground (Case 15) that the building was not completed because: (a) Not built at right angles, as shown on plans. (b) Interior layout of second floor not as shown on plans. (c) Where one step is shown, three steps have been erected. (d) Cellar height 5′ 7″ instead of 7′. (e) Store toilets not built as shown. (f) Sinks inferior and defective. (g) Interior walls out of plumb. (h) Cement floors cracked throughout the building. (i) Exterior and interior painting not completed; and that by reason of the said neglect by the contractor, the building described is inferior in quality, and that as a result the owners caused a notice to be served on the contractor to proceed (Case 19). The contractor filed a reply denying each and every allegation of the Answer and Counterclaim.

The Court committed error in refusing to direct a verdict in favor of the appellants.

The appellee claims here that at the opening of the case the complaint was amended so to show that there was a variation in the plans as originally made. Appellee was unable to recover the reasonable value of the work performed without reference to the price mentioned in the written contract. We think the true rule to be applied is that declared in *Boyd* v. *Meighan,* 48 N. J. Law 404; 4 Atlantic Reporter, 778, which accords with the fundamental doctrine laid down by Mr. Sedgwick (1 Sedg. dam. $200.-432) to the effect: First, that the plaintiff must show himself to have sustained damage; or, in other words, that actual compensation will only be given for actual loss; and, second, that the contract itself furnished the

measure of damages. Sometimes in our state the rule is that he shall recover the cash value of what he was to receive (*Hinchmen* v. *Rutan,* 31 N. J. Law 496), thus maintaining the standard fixed by the contract. The jury in this cause had no guide to assist them in determining what was the fair value of the work done. There was no evidence to assist the jury in determining what, according to the main contract, the appellee would receive for that which he had done, and what profit he would have realized by doing that which he was prevented from doing so as to fix his just measure of damages. He is to lose nothing, but, on the other hand, he is to gain nothing by the breach of the main contract, except as the abrogation of a losing bargain may save him from additional loss. And this contention is also supported by the next point, namely:

POINT THREE.

That judgment is not supported by the proofs in the case.

At the conclusion of taking testimony counsel moved for a direction of a verdict and had an exception noted to the refusal of such a ruling. The Supreme Court refrained from dealing with the meritorious question involved upon this appeal and practically dismissed the matter without reading the record. We urge this because on this branch of the case the Trial Court instructed the jury that as it was undisputed that the plaintiff had not substantially performed the contract, stating at page 117,

> "It is admitted in this case that the building put up by this builder is not substantially the kind of building as the original.
>
> "There were changes, for example, as to the depth of the cellar. The cellar, according to the original plans and specifications, was to be seven feet in height; it is only five feet 10 inches. That is a substantial variation from the original contract.
>
> "If a man does not substantially live up to his contract, why, he has fallen down and you do not owe him anything."

And this principle is correct because the rule applicable to a contract such as is involved in this litigation has been held, *Kitchell* v. *Crossley,* 90 N. J. Law 574, 101 Atlantic Reporter 179, where the action was brought by an architect on a contract to make the plans, specifications and supervise the works "for a building to be erected by the defendant," which plaintiff was prevented from completing by the act of the defendant. The opinion of Mr. Justice Parker, speaking for this court, clearly demonstrates that the rule of *Kehoe* v. *Rutherford,* 56 N. J. Law 23, is applicable to the present controversy and, therefore, in the case under review the Trial Court, in order to permit recovery for partial performance of the contract, should have required satisfactory proof of the value of the work done, as one of the factors necessary to establish the proportion such work would bear to the contract price. And as there was no legal evidence of the value of the work done by the appellee, the jury had no basis on which to ascertain the proportion of the work contracted with the part performed.

In the light of the Trial Court's own theory of the case it would have been error, under the proofs, to direct a verdict even for nominal damages, for, usually, when a substantial variance appears in the proofs at the trial the plaintiff should be nonsuited, whether it be a case of variance or failure of proof. (*Folsom* v. *Squire,* 72 N. J. Law 430.)

Therefore, the judgment not having been supported by the proofs in the cause, in such a situation the appellee could lawfully have been nonsuited at the trial particularly because such a motion was made. No citation of cases to support the point that through a substantial variance between the allegation and proof, the appellee proved, if anything, a cause of action different from that made in his complaint, is needed. It is such a clear proposition. And if it be contended on the other side, that no formal exception appears on the record, we say:

Error in law on the record is not the subject of exception at the trial.

The learned Trial Judge charged,

> "If these changes were not made at the request of the owner of this building and you find that there was not such a building given as was substantially required according to the original plans and specifications, then this man is not entitled to a cent of the balance of the contract price, if you find as a result of a consideration of the evidence, that the changes were never authorized or requested by the owner."

And if there were no proofs to support the judgment, the appeal should be sustained, because the matter appears on the face of the record which shows the judgment to be erroneous. The error is in the record and no exception could be taken at the trial.

There was no proof of the value of the work done, as one of the factors necessary to establish the proposition such work would bear to the contract price.

POINT FOUR.

The error is manifest in the record and in such a situation, it may be reviewed on appeal.

The distinction between errors on the record and errors in the record, which is distinct from error assigned on exception taken at the trial is elaborated by Chancellor Walker, in the Court of Errors, in the case of *Goekel* v. *Erie Railroad Company,* 110 N. J. L., page 279. Therefore, the third ground of appeal, based upon the absence of proof to support the judgment, ought to be considered and decided, because the owners (husband and wife) have never had their day in court and their rights could not have been waived because the error resides in the record.

CONCLUSION.

There should be a reversal, first, because of failure of proof; and also because, without proof of alteration in the contract by the parties (this would include the third party to the contract, Mrs. Raio) or express proof of waiver of its terms. The contractor, in order to recover, should have proved that he was fraudulently lured into doing the work he did, without either receiving a promise to pay a definite price or obtaining an implied assent. A Court of review, finding a ground of appeal based upon a disregard by the trial jury of the Court's instruction for considering the proofs ought to reverse the judgment, when the matters appearing on the face of the charge delivered indicate the judgment to be erroneous, by an inspection of the pleadings, showing a variance between the proofs and the pleadings; and where, as here, there is no proof to support the statements in the pleadings, there is nothing to amend. In other words, a Court of review might order the pleadings changed when they vary from the proof, but the proofs are never changed.

For these reasons, it is respectfully submitted that the judgment should be reversed.

Dated, May 15, 1928.

EGIDIO W. MASCIA,
Attorney of Defendants.

ANTHONY R. FINELLI.
Of Counsel with Appellant.

GEORGE R. ILES, Printer, Elizabeth, N. J.

New Jersey Court of Errors and Appeals

DANIEL A. PALLADINO,
Plaintiff-Appellee,

vs.

ANDREA RAIO, Builder, and ANDREA RAIO and MARIA RAIO, his wife, Owners, and EDWIN C. CAFFREY, also known as Edwin C. Caffrey, Mortgagee,
Defendants-Appellants.

On Appeal from Supreme Court.

BRIEF OF PLAINTIFF-APPELLEE.

This is an appeal from a judgment obtained against the defendants, Andrea Raio, builder, and Andrea Raio, and Maria Raio, his wife, owners, in the Union County Circuit Court in a building contract case wherein plaintiff was the contractor and defendant Andrea Raio was the builder, and Andrea Raio and Maria Raio, his wife, were the owners. The grounds of appeal are:

1. Error in the admission and rejection of evidence.

2. That the Court erred in refusing to direct a verdict in favor of the appellants.

3. That the judgment is not supported by the proofs in the case.

4. That the jury disregarded the instructions of the Court.

The judgment was affirmed by the Supreme Court and in a *Per Curiam* opinion the Court held that:

Of these grounds the second alone adequately brings before us any ruling of the trial court. The ground upon which this motion was based was that the evidence failed to show that any change in the contract (the claim being in part for extra work) was authorized. The motion to direct a verdict which was overruled could not have been granted in view of the proofs produced by the plaintiff. These tended to show that moneys were due both on the principal contract and for extra work and materials ordered by the defendants and for which they agreed to pay.

The judgment is affirmed.

As to the first point, that there was error committed in the admission and rejection of evidence: There was nothing mentioned in the grounds of appeal specifically to show where the error was made in the admission and exclusion of the evidence. It has been held in *Valenti* v. *Blessington,* XI Gummere 498, in an opinion rendered by Justice Parker that blanket grounds of appeal are inadequate to raise any ruling for review. Assignments of error must be specific and definitely point out a ground of error or they will not be considered. Citing *Lutlopp* v. *Heckmann,* 70 New Jersey Law 272, and *Benz* v. *Central Railroad Co. of New Jersey,* 82 New Jersey Law, page 197; affirmed 83 New Jersey Law 780. This ground of appeal is not specific and does not show in any way where there was error made by the Court in the admission or exclusion of evidence.

As to the second point, that the judgment is not supported by the proofs in the cause: The proof of the plaintiff in his testimony, case, pages 27 to 52 inclusive, is that there was a contract entered into between the parties for the erection of a new

building on premises owned by the defendants, Andrea Raio and Maria Raio, his wife; that prior to the commencement of the construction of the building, and subsequent to the drawing of the written contract, the defendant Andrea Raio the person with whom the plaintiff made the contract did instruct and authorize the plaintiff to vary the plans of the building because he desired to save as much ground as he possibly could in order that he may have a garden and also because he desired to save a well located on the premises; that he, the said defendant, agreed to pay the plaintiff the contract price for the construction of the building in accordance to the specifications and variations of the premises; that instead of the building being square, the building was to be somewhat on an angle; that the defendant Andrea Raio authorized the plaintiff to do certain extra work and that he agreed to pay for the same. Case, page 33, line 36. Q Where? A That was later. The chimney came first. The contract calls for cement block and he wanted brick. I says, "Well, man, that is going to cost you more, which my mason charged me more to put up cement block instead of brick." And he says, "We are willing to pay for it." All right. I says, "You put in handwriting." He says, "Do you doubt my word?" I says, "All right, I know your word is good enough for me." And I put it up in brick for the cellar bottom.

Q How much extra is that? A I think that was thirty dollars, if I ain't mistaken.

Q Did you erect any additional partitions? A Yes, sir.

Q Where? Show it on the map. A This partition here I have on the second floor. There is the original plan I had laid out, which the architect can prove to you. I had this here just laid

out, lath and everything else just the way it is here. I had lath and all on the partition right in here, this one, this one, and this one. He came there, the owner and his wife and mother, in the afternoon, on a Friday afternoon. There is an attic here. Then the condition, the color of it, door about here, put on a floor here, in this attic here there is stairs cut through it. He says, "Here, how am I going to get to the attic if I rent the rooms?" I says, "My good man, you will be violating the law if you rent upstairs, you will be violating the tenement law." He says, "No, I will take care of the tenement." He says, "If they catch me I will take care of that." He says, "I want this partition here, this in here, right in there." So I had this wardrobe here, which was over there, and had to place it there. Got to take this here wardrobe here and place it here. I had to take this partition out, and all along in there, take this one out and place the door in there so he can go upstairs and go up in the attic, and probably he would use that for living quarters.

Q How much did you charge him for that? A Ninety dollars.

Q Did you make any change in the attic? A Yes, sir.

Q What did you do extra? A According to the scale here that gives only a six-foot attic, and he came along and he says, "Here, I am making this addition." He says, "Now, what am I going to do? I can't get any room if I want to use that for living-room." I says, "All right now what do you want me to do?" He says, "I want an eight-foot ceiling in there," so he can get room in there. He made me raise this ceiling up here two extra feet and all the way up in there so he would get quarters in there.

Q Did you charge him anything extra for that? A No, sir.

Q Did you put any extra windows in the cellar? A Yes, sir. The plan, the original plan calls for one, two, three, four, five windows. He came over to me and he started to holler. He says to me, "How am I going to get coal in there? I can't get coal in there, got to have windows in the front." He made me put two small windows in there and two small windows in here in the front.

Q How much did you charge for that? A At cost price. I haven't got my amount here.

Q $3.50 for each window? A Yes, sir.

Q Your contract didn't provide for concrete work in the cellar, did it? A Sir?

Q Concrete work in the cellar? A Yes, sir.

Q Were you to do that under your contract? A Sir?

Q Were you to do that under your contract? A No, sir.

Q That was extra work? A Yes.

Q Did you do that? A I done that.

Q How much did you charge for that? A I think it was $150, because the difference was that I was to give him cinders, sand, and cement, and he was to do the work himself. He says that I was to eliminate from my contract all concrete work, and then he forced me to put in cracked stone, trap rock, sand and cement. Then he says he will pay me extra for that.

Q Did you charge him for that? A I believe it was $150.

Q Was the outside wall to be plastered, cellar wall to be plastered? A No, sir, not according to the specifications, no plaster, no tar, and he made me do both.

Q How much did you charge him for that? A I paid $40 to the tar man, and for the plaster plus the material I paid to my mason.

Q Is the sum of $350.40 a reasonable charge for all the extra work you did? A I didn't get you.

Q Is the sum $350.40 a reasonable charge for all the extra work you did? A No, sir.

Q Is it a reasonable charge? A Yes, why, it is over $500, but I didn't charge him all that. Here is something else I done. Here is the store here. He came over and started to holler to me. He says, "If I rent the stores to a family in the rear," because there is a little room there and a little room there and the store, "If I rent the stores how can these people get out?" I says, "If you are willing to pay the difference, eight or nine dollars," I says, "You can put a door in the place of this window, one there, and one in the rear of this other store. Are you willing to pay the difference? I can do that while I am doing the construction of the job."

Q You didn't charge for that? A No, sir. I didn't charge him for that. I don't think I did. I might be mistaken. I ain't sure if I did or not.

The testimony is that the reasonable cost of the performance of the work in the manner in which it was done was the same as the cost in accordance to the plans and specifications in the contract (Case, p. 83, ll. 1 to 21 inclusive):

By the Court:

Q You say that the building is not built in the same proportions as the original plans and specifications? A Yes, sir.

Q Now, if you know, what would have been the difference in cost between building it according to the plans and specifications and building it the way it was built? A Why, it wouldn't be no difference.

Q No difference? A No difference.

Q In other words, it cost this builder just as much to build it the way he did as though he built it according to the plans and specifications? A Yes.

Q You mean so far as the proportions are concerned? A The proportions, yes, sir.

It is shown that there is due upon the contract the sum of $3,178 with interest (Case, p. 49, ll. 11 to 18 inclusive).

Q How much is due you on account of the contract? A $3,178.

Mr. Mascia: Will you allow me an exception?

The Court: It is an omitted question which I am allowing.

Q $3,178? A Yes, sir.

In the opinion written by Justice Parker in *Headley* v. *Cavileer*, LIII Vroom at page 637, he stated:

> "Disputes between contractors and owner as to extra work and changes on building or working contracts are as old as the practice of contracting for such work and are a fertile cause of litigation. For very many years the effort has been to limit or prevent them by putting the main contract in writing and stipulating in effect that changes and alterations must be agreed on in writing in order to support a claim for extra compensation. When there is an architect or engineer, he is usually brought into such a stipulation as arbiter or agent of one or both parties. In the case at bar there was no architect, but we conceive that this makes no difference in the principle to be applied. The court early recognizing the beneficial character of such stipulation as tending to prevent trumped up claims for extras and acrimonious disputes between owner and contractor resulting in litigation and loose testimony often running

into perjury, endeavored as far as they could to give effect to such provisions, and occasionally succeeded. Miller *v.* McCaffrey, (1848), 9 Pa. St. 245. The fundamental difficulty, however, with which owners and courts had to contend and which in the absence of legislation is insuperable, was and is that there is no statute requiring such contracts as the present one to be in writing, that parties who have contracted together have a right to cancel their contract, or alter it in any way not prohibited by law, or to supplement it by another and additional contract, and in cases of this kind, may do so orally in the absence of any statute requiring such contracts to be in writing. Consequently no legal force could or can be given to stipulations of the character now under consideration as constituting a prohibition against the parties altering the main contract by mutual agreement. No matter how stringently such clauses may be worded, it is always open for the parties to agree orally or otherwise, upon proper consideration, that they shall be partially or entirely disregarded and another arrangement substituted. Were any different rule adopted, the right of contract would be to that extent impaired. So that until the legislature sees fit to enact some statute of frauds covering this point, building contracts solemnly entered into in writing and under seal must be subject to radical change by the mere conversation of the parties if such conversation answers the test of a contract at common law.''

Where there is a substantial dispute as to the facts or the inferences to be drawn therefrom, it is not the province of the court to determine with whom the preponderance of evidence lies; that is for the jury to determine. Carroll *v.* Central R. R. Co. of New Jersey, 81 New Jersey Law 567.
Jersey, 81 New Jersey Law 567. * * *''

As to the Third Point.

Neither the brief of the appellants nor the grounds of appeal in any way show why the judgment was not supported by the proofs in the cause.

As to the fourth point, that the jury disregarded the instructions of the Court in considering the proofs: As for this contention counsel for the appellants refers to case, page 118, line 19, wherein the Court says: ''Why was not this building built substantially according to the original plans and specifications? The plaintiff, the builder, admits that it is a different building. In a substantial way it is different, but he says that any change that is in that building is the result of the specific request of the owner; so far as the cellar is concerned, coming back to the cellar, that the excavation of this cellar was to be done by the owner himself—that is, the digging of it—and when the owner dug down to a depth of five feet and ten inches below the surface of the ground he found the sewer.''

Under the instruction of the Court the jury had a right to find in favor of the plaintiff and against the defendants in the sum of $3,639.93.

Conclusions.

In conclusion it is apparent that there was a change made in the original agreement at the request of the defendant, Andrea Raio; that the said Andrea Raio did order certain extra work which he agreed to pay for; and that the jury had a right to find upon hearing the testimony of the witness in the case either in favor of the plaintiff or in favor of the defendant, and having found in favor of the plaintiff on a proper

consideration of the facts, that this judgment should be affirmed.

Respectfully submitted,

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