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New Jersey Court of Errors and Appeals

SAVERIO RIZZOLO, trading under the name and style of RIZZOLO CONSTRUCTION COMPANY, *Appellant,* *vs.* CHARLES W. POYSHER, BUILDER, and ALFRED STAHL, Owner, *Respondents.*	*Action at Law.* *On Mechanic's Lien.* *Appeal from Supreme Court.*

Appellant's Brief.

Statement of Case.

This is a Mechanic's Lien suit instituted in the Essex County Circuit Court. The case was tried before the Honorable Frederic Adams, Circuit Court Judge, and a jury and resulted in a verdict in favor of the plaintiff against Charles W. Poysher generally for the sum of two thousand, ninety-three dollars and forty-three cents damages, to be made specially of the lands of the defendant Alfred Stahl, described by metes and bounds in the lien claim herein filed.

The following is a brief statement of the facts adduced by the plaintiff and found to be so by the jury, as is evidenced by their verdict.

On October 29th, 1912, the plaintiff entered into a written contract with the defendant Charles W. Poysher, who was then the owner of the lands and premises described in the lien claim, whereby the former, in consideration of the sum of forty-six hundred dollars agreed to erect and construct a building, to be used as a moving picture theatre,

at 653 Bergen street, in the City of Newark, agreeably to the plans and specifications prepared by, and under the supervision of, Hyman Rosensohn, an architect. By the terms of this agreement the defendant Poysher bound himself to pay Rizzolo the above stated consideration in four instalments. The last of these instalments amounting to fifteen hundred dollars was to be paid within three days after the completion and acceptance of the work. The contract provided that *"All payments shall be made upon written certificates of the architect to the effect that such payments have become due."* The contract further provided that the owner would cause no delay in the construction of said building and would do everything necessary to enable the contractor to go ahead as speedily as possible.

The contract further provided that *"No 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, and it shall then form part of this contract."*

It was further agreed upon that the work should be completed on or before the 20th of December, 1912. See Exhibit P. 1, Case p. 250, etc.

(Note: Other parts of the contract not deemed necessary for consideration of this appeal are not herein recited).

WHAT HAPPENED AFTER THE CONTRACT WAS SIGNED?

The plaintiff was ready to proceed with his work, but was instructed by the owner not to go ahead until notified by him so to do. This was not given until the latter part of November, 1912. (See Case, p. 35, fols. 37-40; p. 36, fols. 1-20). Thus a month was lost,—and when he was told to proceed, the plaintiff did so. In the month of February the theatre was nearly completed, so that on Washing-

ton's Birthday the owner took possession. The rest of the work was completed by April 26th, 1913. While the work was proceeding, payments that were earned were irregularly made. (Case, p. 38, fols. 20-30). During the course of the work the defendant Poysher requested the plaintiff to do certain extra work and agreed to pay certain prices for it, but no written order was given therefor. (See Case, p. 50, fol. 30, to p. 52 incl.; p. 55 to p. 57 incl.; p. 58, fol. 20 to p. 62; p. 63, fols. 20-30; p. 115, fol., 20 to p. 120 incl.). Certain changes were made in the plans and specifications by verbal agreement between the plaintiff, the architect, Poysher and Stahl, which changes were necessary because of the nature of the building or requirements of the building code that had been overlooked in the first place, but no charge was made for such alterations.

Upon the completion of the building, the plaintiff demanded of the architect his certificate, to enable him to receive payment for the last instalment then due and for the extra work which had been done. The architect suggested a meeting between the parties, the result of which was, that the defendants wanted the architect to procure an allowance of five hundred dollars on the amount due. This is what took place according to the architect (see Case, p. 131):

> Q Now as to the final certificate. What is the real reason that you did not issue that certificate? A That was the real reason. Mr. Poysher came to my office first and asked me to issue the final certificate to Rizzolo. At that time I asked him if he had the money. He said he was going to get it from Dr. Stahl, who happened to be up in the mountains. I said, "When will you get the money?" "In a couple of days," he said. I said, "All right, when you get the money come down to

the office, and I will settle up your claims." *The reason for my not issuing the certificate at that time was, first, that he did not have the money, and second, there were these sub-contractors on the job.* * * * I met them (meaning Stahl and Poysher) at the building, and after that meeting at the building they came to my office, and that was the time I told them that I could possibly get them one hundred and twenty-five dollars to one hundred and fifty as the loss, and that would be by the sub-contractors, and he thought at that time he wanted five hundred dollars or so, and I wouldn't stand for anything of that kind. That is all.

Q But the final result was— A That he went out of my office absolutely—I won't say what I said to him one way or the other, but it was very unpleasant; I said, "I won't stand for any work of that kind at all. Now, you can get out and do what you please. * * * Then I said to Rizzolo after that. * * * You get after them and get your money. *I hadn't heard from him then until the day before or the day after he started suit; then he came after his certificate, and I said I wouldn't give it to him then.*"

And on page 112 and page 114 of the case, the architect testified that although Rizzolo was entitled to the certificate and demanded it, he failed and later refused to issue it.

THE EXTRA WORK.

As to the extra work, Rizzolo is supported by the architect, and not contradicted by the defendants.

STAHL'S INTEREST IN THE CASE.

Stahl was made a defendant because at the time of the filing of the lien he was the owner.

It is of great importance to note at this point, that Stahl and Poysher are brothers-in-law; that on the date of the contract, Poysher was the sole owner of the property but on the 21st day of November, 1912, before the work was commenced, he took title to one moiety of the realty, and on April 25th, 1913, he became the sole owner.

See complaint and answer.

The contract was filed in the clerk's office of Essex County on November 22nd, 1912. Stahl furnished part of the money with which the building cost was defrayed.

See Stahl's admission. Case, page 225.

Stahl also took an active interest in directing the building operations.

See Case 228.

The importance of noting the above facts, will become apparent in dealing with this appeal.

THE FILING OF LIEN AND COMMENCEMENT OF THE ACTION.

On the 23d of June, 1913, the lien claim was filed.

Attached to the lien claim was the following bill of particulars:

Final payment under contract dated October 29, 1912	$1,500.00
Extra work performed and materials furnished at the request of the owner and architect as follows:	
Change from wood beams to reinforced concrete ceiling	80.00
Concrete between beams and booth floor in place of wood	50.00

One extra door covered with metal in booth completed	15.00
One double iron trap door above iron ladder	8.00
Six brass shore electric chandelier sets	72.00
One ½ shell with brass frame chandeliers	10.00
Extra work cellar drain from rear yard to cellar	68.00
To lower the two rear exists excavating, retaining wall as per submitted estimate	253.00
Total amount claimed	$2,056.00

On the 1st day of July, 1913, summons was issued and was served with the complaint thereto attached on the same date.

The complaint alleged general performance of the contract.

The answer, filed on July 21st, 1913, admitted some of the allegations in the complaint contained, and as to others, general and specific denials were entered.

Notice was given that on the 20th of September, 1913, a motion would be made for judgment of non-suit in the action because no reply had been filed by the plaintiff to the answer of the defendants. After argument the motion was denied. (See Case, pp. 14-15).

THE TRIAL.

The case came to trial on the 4th of January, 1915. Before the jury was impanelled the plaintiff's counsel moved that the plaintiff be permitted to file his reply alleging fraud on the part of the architect in withholding his certificate and waiver as to written orders to do the extra work on the part of the owner.

This motion was opposed not on the ground of lack of notice but *laches.*

See Case, p. 31.

The court granted the motion. Through inadvertence the reply, although a copy was then and there handed to the defendants, was not filed, but was ordered filed *nunc pro tunc* by the Supreme Court.

See Case, p. 17.

The plaintiff proved his case both as to the general contract work and the extra work.

At the close of the plaintiff's case a motion was made to non-suit the action. One of the grounds stated, (and we are now more concerned with this than any of the others) was that the bill of particulars did not specify or enumerate the kind or amount of labor performed or materials furnished and the prices at which and times when same were furnished. The motion was denied and amendments allowed.

See Case, p. 140-145.

The defense was built up largely of technical objections to the lien claim; the failure to produce the architect's certificate for payment; the failure to have an agreement in writing for the extra work; and failure to install the heating system according to the plans and specifications. Other objections to the quality of the work and to the plaintiff's right to charge for certain extra items, were also made.

During the trial certain rulings on the admissibility of evidence, as well as the order by the court permitting amendments and the refusal to non-suit, were excepted to by the defendants, and these matters formed 46 grounds of appeal, taken by them to the Supreme Court.

THE SUPREME COURT'S JUDGMENT.

The Supreme Court held that as to Poysher it found no error to reverse the judgment, but as to Stahl the owner, the non-suit should have been allowed on the ground that the bill of particulars attached to the Lien Claim, did not meet the requirements of the Mechanic's Lien Law.

THE APPEAL.

For convenience sake, we have divided this brief into two parts, the first dealing with the judgment of the Supreme Court relating to the bill of particulars, and the second with the points raised originally at the trial and which formed the basis of appeal by the respondents to that tribunal.

POINTS RELIED UPON BY APPELLANT.

These are the contentions relied upon by the appellant as grounds for reversal of the judgment of the Supreme Court:

First: The bill of particulars is divisible as to its items and is not an inseparable mass. If one item is properly stated, in satisfaction of statutory requirement, the lien is good as to that item and a motion to non-suit is improperly made. The proper motion is to strike out the items improperly stated or to direct the jury to disregard them. The Supreme Court erred in holding *"That the bill of particulars is a single bill and if it fails to comply with the statute, it cannot support a lien as to a portion only."*

Second: As the lien claim stood before amendment at trial, the bill of particulars was divided into two parts, the first part embraced one item, to wit: "Final payment under contract dated October 29, 1912, $1,500.00." *As to this item the bill satisfied the statutory requirement.* The sec-

ond part contained eight items of extra work, the first seven before amendment, apparently did not comply with the statute, the eighth "To lower the two rear exists, excavating, retaining wall as per submitted estimate, $253," was sufficient.

After amendment the entire bill was sufficient.

Third: The fourth division of section 16 of the mechanic's lien law, must be divided into two parts; one deals with the bill of particulars required when work is done or materials furnished *not under contract,* the other deals with work done or materials furnished *under contract. When a case falls within the former category, the statute requires great particularity.* The reason for this is plain. *But when a case falls under the latter division, the statute establishes a different standard, and by its own terms permits great liberality and generality.* And the reason for this is equally apparent. The Supreme Court, with all due respect to it, confused the two divisions and weighed the lien claim in the case at bar, by the standard of the first division.

Fourth: The Supreme Court failed to square the bill of particulars by the proof in the case. We refer to the facts:

a—That the contract was a matter of record,

b—That Stahl became the owner of one moiety after the contract was made by Poysher and filed with the county clerk, and the other moiety about the time when the work was about to be completed,

c—Stahl furnished part of the money for the erection of the building, in this manner, he deposited the money and in fact the $1,500 for the last payment—to Poysher's credit—the latter to pay Rizzolo,

d—Stahl directed the work, and was perfectly familiar with the claim of the plaintiff,

e—Stahl was not an innocent third party.

Fifth: The Supreme Court held that the bill of particulars was sufficient as to Poysher, but insufficient as to Stahl. This is illogical. If the bill was sufficient against Poysher who at the inception of the contract was builder and owner, it was sufficient as to Stahl, who in process of work became owner, and was not an innocent party but on the contrary had full notice of everything. We cannot distinguish between the two persons.

Sixth: If all our contentions regarding the sufficiency of the bill were founded in error, yet the entire case shows such particular merit in the plaintiff's claim, that the Supreme Court should have held the objections to be too technical to permit the plaintiff's defeat, and should have under the provisions and policy of the new practice act permitted proper amendments.

Seventh: On all the points raised by the respondent's appeal to the Supreme Court, there was no error to warrant reversal. With this view the Supreme Court concurred, excepting as regards the bill of particulars.

POINTS.

I.

The bill of particulars is divisible as to its items and is not an inseparable mass. If one item is properly stated, in satisfaction of statutory requirement, the lien is good as to that item and a motion to non-suit is improperly made. The proper motion is to strike out the items improperly stated or to direct the jury to disregard them. The Supreme Court erred in holding "That the bill of par-

ticulars is a single bill and if it fails to comply with the statute, it cannot support a lien as to a portion only.''

Now the Supreme Court said: ''The plaintiff does not defend this method of setting forth the particulars, but argues that the question was not properly raised by motion to nonsuit, since the lien might be good as to the other items as to which amendments were allowed. The difficulty with this argument is that the bill of particulars is a single bill and if it fails to comply with the statute, it cannot support a lien as to a portion only.'' See Case, p. 279. Earlier in the opinion the Court says: ''At the close of the plaintiff's case, a motion was made to non-suit as against the owner because of the insufficiency of the bill of particulars. Thereupon on application of the plaintiff the Circuit Court Judge allowed amendments specifying the items of $80, $50, $15, $8, $68 and $253 were furnished by agreement in the months of February or March, 1913. No amendment was made as to the items of $1,500, $72 or $10. Clearly the item of $1,500 is not set forth as the statute requires,'' etc.

Let us analyze the opinion of the Supreme Court. Clearly we must gather that the items as to which amendments were allowed complied with the statute, otherwise it would not have been necessary for the court to hold, that a ''bill of particulars is a single bill.'' If then we are right in contending that the court below was in error in holding that a bill of particulars is a single bill, then it follows that we are also right that a motion to non-suit was not proper.

The Supreme Court erred in holding that "the bill of particulars is a single bill, and if it fails to comply with the statute, it cannot support a lien as to a portion only," for the following reasons:

a—There is no statutory warrant for this declaration of law, and there is no precedent. On the contrary the 4th paragraph of section 16 of the Mechanics Lien Law speaks of itemizing the account and provides that if the bill contains any wilful or fraudulent mis-statement of the matters above directed to be inserted therein, the buildings or lands shall be free from all lien, etc., and the matters referred to include the items of account. The 22d section of the same act, provides for an apportionment of items amongst several buildings erected under one contract. Might not one apportionment be good and another bad? Yet the lien as to the good part would be valid.

Culber v. *Lieberman,* (E. & A., 1903), 40 Vroom, 341.

b—There is no legal warrant for holding that a bill of particulars is a single bill. It is not necessary to cite authorities, that in an ordinary action at law, a bill of particulars may be good as to some and bad as to others of its items.

c—The first paragraph of section 16 of the lien law provides that the lien claim contain an accurate description of the curtilage upon which the lien is claimed—suppose, then, more land is described than is proper, is the lien void? The case of *Edwards* v. *Derrickson,* 4 Dutcher 39, on p. 44, held to the contrary. This case was affirmed by this court in 5 Dutcher, 468.

The bill of particulars is less important than the description of the curtilage, and if one mis-state-

ment or improper item in the former invalidates a lien, so should it in the latter case.

In the case of *Edwards* v. *Derrickson, supra,* an objection was made to the lien because the bill of particulars contained an improper charge for building a flume. It was contended that this improper item invalidated the lien, but the Supreme Court, 4 Dutcher, on page 42, says:

> "But the claim was also objected to because it contained a claim for work and materals furnished for a flume. *If the charge for the flume were in the claim wrongly, it would not impair it as a legal evidence to prove the other matters contained in it, and it was therefore properly received.*"

Judge Vredenburgh, who also read an opinion in the same case, says on page 56:

> "It was objected, in the second place, to the lien being read in evidence that it contained a claim for the work and materials for a flume, the law giving no lien therefor. *Even if no lien could be sustained for a flume, yet it was no reason for excluding the whole lien. The court could only have overruled so much of the lien as referred to the flume.*"

The Court of Errors and Appeals affirmed this decision in 5 Dutcher, 468—see pages 473-474.

It has therefore been the adjudicated law of this State that one improper statement of claim in a bill of particulars does not invalidate the lien claim. the judgment of the Supreme Court on this point was in contravention of the law of this State and therefore erroneous. For this reason alone the judgment of the Supreme Court should be reversed. To hold, that because an item in a bill is not so worded as to comply with the directions of the statute, therefore, the entire lien as to the rest of

properly stated items, is void, establishes an unjust and dangerous rule of law.

The amended items of the lien claim, conform with the statute and the decisions.

See order permitting amendments: (Case, p. 16).

Edwards v. *Derrickson,* 4 Dutcher, 39; *affirmed,* 5 Dutcher, 468.

Williamson v. *Railway Co.,* 28 N. J. E., 277; *affirmed on this point,* 29 N. J. E., 311 on page 315.

II.

We now come to an examintion of the lien claim and the bill of particulars; the latter is divisible into two parts. The first item deals with the sum of $1,500 being the last payment under the contract of October 29, 1912, and the remaining eight items deal with extra work performed.

Before amendment was allowed, we admit that it is questionable whether the eight items of extra work, forming the second part, complied with the statute, *but we contend that the first item of $1,500 was sufficiently stated to satisfy the statute, and after amendment the items amended also satisfied the law.*

The fourth paragraph of section 16 of the Mechanics Lien Law, Compiled Statutes Vol. 3, page 3304, reads as follows:

> "A bill of particulars exhibiting the amount and kind of labor performed and of materials furnished and the price at which and times when the same was performed and furnished and giving credits for all the payments made thereupon, and deductions that ought to be made therefrom, and exhibiting the balance justly due to such claimant, which statement when the work or materials or both are furnished by contract, need not state the particu-

lars of such labor or materials further than by stating, generally that certain work therein stated was done by contract at a price mentioned; etc."

Now this paragraph was first enacted in the earliest general mechanics lien law and has been preserved in every subsequent revision.

See Introductory Chapter to Luce's Mechanic's Lien.

We construe the foregoing provision in the following manner:

When a lien is claimed for work done or materials furnished not by contract, then the bill of particulars must with great particularity set forth the following:

1st—Amount and kind of labor.
2d—Amount and kind of materials.
3d—The price for the labor.
4th—The price for the materials.
5th—The time when the labor was performed.
6th—The time when the materials were furnished.
7th—All credits for all payments.
8th—All deductions for all allowances.
9th—Net balance claimed.

But when the work is done by contract, the legislature says, "You need not state the particulars." What particulars? Why, the particulars,—that is the particulars above enumerated. The legislature says, "All you need to do is to attach a statement showing in a general way that certain work therein stated was done by contract at a price mentioned."

Associates v. *Davison,* 29 N. J. L., 415.

Edwards v. *Derrickson,* 4 Dutch, 39; 5 Dutch, 468.

Williamson v. *N. J. R. R. Co.,* 1 Stewart, 296.

"Expressio unius exclusio alterius."

When the legislature provided that it was only necessary to state in a *general* way that certain work in the lien stated was done by contract at a price mentioned, it excluded every other particular contained in the previous portion of the same paragraph.

Now to turn to the case at bar. The bill contains this item:

> "Final payment under contract dated October 29, 1912.....$1,500."

The Supreme Court in its opinion says:

> "The present bill of particulars does not set forth the amount and kind of labor performed and materials furnished, it does not state prices and times, as to the $1,500, even after amendment; it does not give credit for all payments made, and if it can be held to state that the work was done by contract, it does not mention the price."

Clearly, the Supreme Court, with all due respect to it, fell into grave error.

The statute does not require that when work is done or materials furnished under a contract, the bill of particulars should state, "the amount and kind of labor performed and materials furnished, nor the prices and times," neither is it necessary "to give credit."

The Supreme Court says "and if it can be held to state that the work was done by contract," can there be any question about it? Does not the first item refer to the contract? Do not all the other items after amendment state that they were done by agreement? Does not the evidence in the case show these things conclusively?

The defendants, although called as witnesses, failed to deny that the extra work was ordered and done; they failed to deny that the prices were

agreed upon. Stahl was absolutely silent and Poysher testified as follows: See case, p. 233.

Q Now as to the items which Mr. Rizzolo claimed as extra work. Did he see you every time he did these different items?

A Practically after he had started in onto them, sometimes he talked to me onto it different times.

Q Did you make an agreement for each particular item?

A No not for all, not a written agreement.

Q What? A No written agreement.

Q Did you make any verbal contract? A Not for all; some.

Here he stopped. Has not the extra work been admitted?

Did not the jury so find? The criticism that the price of the contract does not appear is correct as to the first item, but incorrect as to all the rest.

See Order of Amendment.

We then come to consider the question as to whether, with regard to the $1,500 item, the failure to state the amount of the contract invalidates it. We contend that it does not, upon the ground that all that is required is a substantial compliance with the act, and this was performed.

What purpose had the legislature in mind when it provided that the lien claim shall particularize the items upon which it is founded?

> "The doing of work or furnishing of materials gives merely an inchoate lien or the right to acquire a lien and the statutes prescribe the steps to be taken to perfect the lien. A compliance with the statutory requirements is necessary in order to acquire a valid and enforceable lien, but the same rule which makes this essential renders it unnecessary to take any other steps than is thus required. Some

> cases have laid down the rule that the statute must be strictly complied with, but the better opinion seems to be that as such requirements relate to the remedy rather than to the right, *a substantial compliance with the statute is sufficient.*" 227 Cyc., pp. 110-11, and the cases cited.

The case of *American Car and Foundry Co.* v. *Alexandria Water Co., et al.,* 64 Atl. Rep., 683, is a mechanics lien case decided by the Supreme Court of Pennsylvania. The Mechanics Lien Law of Pennsylvania requires that any sub-contractor intending to file a claim must give to the owner written notice to that effect, together with a sworn statement setting forth the contract under which he claims, the kind of labor or materials furnished and the date when the last work was done or materials furnished. The question before the court in this case was whether the lien claim filed therein was defective on the ground that the bill of particulars did not set forth the kind of materials furnished, wherefrom the claim, the bill of particulars and the notice filed, the kind of material furnished could not be misunderstood. The court held that the claim was valid and on this point it said, "it is difficult to say how a notice more strictly complying with the act could be drawn, although substantial compliance is all that is necessary. The object of the notice, it is said in *Thirsk* v. *Evans,* 211 Pa., 239, 60 Atl., 726, 'is to inform the owner of the demand and the act thereof,' in order that he may protect himself in the manner provided in the act. The notice given was amply sufficient for that purpose."

An examination of this Pennsylvania case will show how nearly alike to the case at bar it is.

In our own State, we have the Mechanics Lien case of *Williamson* v. *N. J. Southern Railway*

Co., 28 N. J. E., 277. Chancellor Runyon wrote the opinion. One of the questions raised in the case was that the bill of particulars attached to the lien claim did not comply with the statutory requirements. On this point, the Chancellor says:

> "The question of the validity of the lien claim is therefore to be adjudicated upon here. Various grounds of objection to the claim are urged. It is insisted that it is invalid because the bill of particulars does not state the time when the work was done or the materials provided. The amount demanded by the lien claim is $59,696.76, besides interest. Of this amount all but $395.53 is for work done and materials provided under the contract. The items of the claim are $396.53 are given with all the particulars required by the stature. As to the contract work and materials the claim states that they were done and furnished by contract (within a year last past), and the bill of particulars sufficiently particularizes the amount and kind of labor performed and materials furnished (stating the price) and declares that they were done and provided up to the 21st day of November, 1873, and in that connection states that the work was done and the materials furnished by contract at the prices mentioned in the bill of particulars. The statement thus made is a compliance with the requirements of the mechanics lien law, in a case where a lien is claimed for work done and materials furnished by contract. The act provides that in such case 'the bill of particulars need not state the particulars of the labor or materials, further than by stating generally

that certain work therein stated was done by contract at a price mentioned." In *Associates of the Jersey Company* v. *Davison,* 5 Dutch., 415, 421, the court recognizes the wide distinction in the respect under consideration between the requisites of a bill of particulars where the work was done or materials provided by contract, and its requisites in a case where there was no contract. Under the mechanics lien law of Pennsylvania (Act of June 16, 1836, p. 12), which required that one who filed a lien claim for materials or work should set forth in it the time of delivering the materials or doing the work, it was held that where the work was done or the materials furnished under an entire contract, the different times when the work was performed or the materials delivered need not be stated, but that one date was sufficient, and the claim would be good if the evidence proved that the completion of the contract was within six months from the time when the claim was filed. Fourth Baptist Church *v.* Trout, 28 Pa. St., 153. Certainty to a common intent is all that is required in such case. Besides, in this case, if more particularity were required, an amendment of the lien claim would be permitted, under the provisions of the fourteenth section of the act. Rev., p. 671. The complainant has had full knowledge, from the testimony in the cause, of the particulars of the claim, as fully as they can be furnished."

This part of the Chancellor's conclusions was particularly affirmed by the Court of Errors and Appeals in an opinion written by Judge Depue reported in 29 N. J. E., on page 315.

In the case of *Edwards* v. *Derrickson,* 4 Dutcher 40, this Court said:

> "The act under which these proceedings occur, as well as those of a similar kind which precede it, seem to have been favorites of the legislature, as is manifest from the repeated efforts made by them through supplements as well as new acts to obtain one that was perfect and available; and as it intends to make provision to aid a large class of industries and laborious claimants in the collection of their claims for most meritorious services and outlays, we are bound, I think, to give it a liberal construction, so as to enable it, as far as possible to carry out and accomplish the great object which the legislature had in view, and not to permit mere technical and unsubstantial objections or errors to annul the law and defeat that object."

The policy of the law has been of late years, to hold a party to *substantial* performance of the requirements of a statute. This is evidenced by the decision of this court in the case of *American Soda Fountain Company* v. *Stolzenbach,* 75 N. J. L., 721. In this case, one of the questions was whether the affidavit to a chattel mortgage stated the consideration. This court said on page 723, "In the absence of fraud, instruments so common in the course of commercial transactions by the laity should be sustained *whenever there is an honest and substantial compliance with the statute.*"

From the foregoing cases and argument we deduce the contention that the bill of particulars as amended substantially complies with the statute.

As Chancellor Runyon said in the Williamson case, *supra,*

> "Certainty to a common intent is all that is required in such case. * * * The complainant (the owner) has had full knowledge, from the testimony in the cause, of the particulars of the claim, as fully as they can be furnished."

From the testimony in the case at bar it appears, the defendant Stahl has had full notice of the claim and its items. The first charge is for $1,500, the final payment under the contract dated October 29, 1912, and earlier in the lien claim he and Poysher are charged with having contracted with the plaintiff. Does it make any material difference that the item does not refer to the amount of the contract? Does it not follow that if the final payment is claimed, the other payments are excluded? Is any further account necessary? When Stahl read the lien claim did he not know fully and particularly what it was all about? We submit, therefore, that the bill of particulars served the purpose required by the law, *especially under the circumstances of this case.* These circumstances are as follows:

a—That the contract was a matter of record.

b—That Stahl became the owner of one moiety after the contract was made by Poysher and filed with the County Clerk, and the other moiety about the time when the work was about to be completed.

c—Stahl furnished part of the money for the erection of the building, in this manner—he deposited the money and in fact the $1,500 for the last payment—to Poysher's credit—the latter to pay Rizzolo.

d—Stahl directed the work, and was perfectly familiar with the claim of the plaintiff.

e—Stahl was not an innocent third party.

III.

Next we contend that the decision of the Supreme Court in affirming the judgment against Poysher should have led to an affirmance of the judgment against Stahl. If the bill of particulars was sufficient in one case, it was sufficient in the other.

IV.

The Respondents made two other objections to the lien claim, to-wit:

1—It names Poysher and Stahl as builders.

2—It names Poysher and Stahl as owners.

The facts were as follows:

When the contract was made, Poysher was owner and builder; when the work was commenced Poysher and Stahl were owners and Stahl directed the work and paid for it. Under this confusion there seemed to be some justification in the designation of the parties as made. But when the evidence was in and Stahl was not connected with the contract, and the Court's attention to the erroneous designations was called, leave was asked and granted to amend. See Order to Amend Case, pp. 15-16. After amendment, the lien claim complied with the law declared in the following cases:

Edwards v. *Derrickson, supra.*
Robbins v. *Bunn,* 5 Vroom, 322.
Erdman v. *Moore,* 29 Vroom, 445.
Bates Co. v. *Trenton Co.,* 41 Vroom, 684.

Objection was made to permitting the amendments, and we will discuss the propriety and power of the court to allow these amendments.

The effect of the amendment under discussion was, that the name of Poysher was stricken out of the second paragraph, and the name of Stahl was stricken out of the third paragraph of the lien claim.

Surely, neither of the persons were harmed in the slightest degree by this process.

In the case of *Washburn* v. *Burns,* 5 Vroom, 18 (1869), an amendment to the pleadings in a lien claim suit wherein husband and wife were designated as owners, by striking out the name of the wife erroneously joined, was allowed. Chief Justice Beasley said on page 21:

> "The only question, therefore, is whether, by force of the act authorizing amendments of the pleadings, her name can be struck from the record. Upon reflection, I can perceive no objection to this. Such a course cannot injuriously affect the husband, who will thus be left the sole defendant." On page 22 the Chief Justice says: "But as a matter of correct practice, it seems to me that all questions as to title are to be excluded from these trials taking place under the directions of the lien law. The pleadings do not properly raise any such issue. A defendant who appears in the character of owner cannot set up that he has not such an interest in the land as is amenable to the lien. * * * So far as the owner is concerned the proceeding is *in rem,* and the issue as to his title must be immaterial, for, if he has none, the judgment against the property cannot affect any of his rights."

The lien claim in the Washburn suit was left unamended, because the lien law then in force gave to the courts no power of amendment.

The first power to amend lien claims was conferred upon a Justice of the Supreme Court by the Revision of 1874.

The last word on this subject in this State is the opinion of Mr. Justice Pitney speaking for the Court of Errors and Appeals in Vreeland Building Co. v. *Knickerbocker Sugar Co.,* 46 Vroom (1907) 551. In this case a history of the right to amend and the prior cases on the subject are shortly but effectively reviewed, and we contend that the law therein stated justifies the act of the court below in permitting the amendments to be made.

See also the following cases:

American Brick Co. v. *Drinkhouse,* 30 Vroom, 462 (E. & A.)

Doty v. *Auditorium Pier Co.,* 56 Atl. Rep. (N. J. Chan.) 720.

The case of *Bartley* v. *Smith,* 14 Vroom, 321, relied on by the respondents has no applicability to the case at bar.

Prior to the Revision of 1874 no court had power to amend the lien claim.

Then to eliminate this defect in the law, justices of the Supreme Court were empowered to order amendments. This continued to 1911, when by Chapter 30 of the laws of that year the legislature gave the same power to Circuit Court judges. The legislature had an object in doing this, and it is well illustrated by the case at bar. The object was to facilitate trials under the Mechanic's Lien Law, so that if it were necessary to amend the lien claim during trial, the Circuit Court judge presiding could hear and determine

the application. Otherwise, the trial would stop, go over, and in the interim application would have to be made before a Justice of the Supreme Court.

The respondents made the point that no notice of application to amend was given to Denburg. It will be remembered that Denburg purchased the property after the commencement of the suit. He was not interested at the time of the filing of the lien, and was therefore not entitled to notice. A lien suit, so far as the owner is concerned, is similar to a foreclosure suit. Would it be necessary to give notice of an application to amend the bill, to one who purchased the property after it had been filed? We think not.

Edwards v. *Derrickson,* 4 Dutcher, 39, on p. 61.

None of the amendments allowed, prejudiced the respondents, or altered the issue, or enlarged the claims, or harmed them in the slightest degree. To hold that the amendments could not have been made, would in effect mean, that the plaintiff would lose all his money.

V.

This Court has power to amend the matters under discussion on appeal.

See section 27 Practice Act, 1912.

VI.

One of the points made by the respondents in the motion for non-suit, was the failure to produce the architect's certificate.

The evidence in this case conclusively shows that the architect withheld the certificate without the slightest semblance of legal justification therefor.

He admitted this in court.

See Case, pp. 44, 45, 46, 49, 50, 52, 109, 110, 111, 112.

On page 112 the architect was asked:

Q Was he entitled to his final certificate?

A From all appearances with the owners, yes, sir.

See further, Case, pp. 113, 114, 127, 132, 133 and 134.

Now the law in this State is well settled, that after the architect withholds the issuance of his certificate without just cause, such withholding is fraudulent.

Byrne v. *Sisters of St. Elizabeth,* 16 Vroom 213.

Chisim v. *Schipper,* 22 Vroom, 1.

Bradner v. *Roffsel,* 28 Vroom, 412.

Landstra v. *Bunn,* 81 N. J. L., 680, on page 683.

The respondents contended below that it was necessary for the plaintiff to prove collusion between themselves and the architect. But this has been expressly held not to be the law in this State, in the case of *Chisim* v. *Schipper, supra,* which was approved by this court in *Landstra* v. *Bunn, supra.*

In the case of *Steelman* v. *Ludy,* 77 N. J. L., 446, it was held, that it was for the jury to determine whether the production of the certificate was not waived by the owner in view of the fact that the building was finished and occupied by the owner for a month, then a bill was presented and payment promised.

VII.

Another ground taken by the defendants in their motion for a non-suit was that the plaintiff had failed to produce a written order for the extra work in compliance with the contract.

The testimony relating to the extra work is to be found in the case on pp. 50 to 63 and 115 to 122.

We contend that this portion of the case is governed by the decision of the Court of Errors and Appeals in Headley v. *Cavilleer,* 82 N. J. L., 635.

And again the point raised by the defendants was not proper subject matter for a non-suit, but rather for a motion to strike out or a special request to charge.

VIII.

We now come to consider the question raised by the motion for a non-suit made on the pleadings, which was denied by the Circuit Court. The order appearing in the case on pages 14 and 15. The argument was advanced by the defendants that the non-suit ought to go, because no reply had been filed to the answer. We contend that the court's ruling was correct, because:

As the pleadings stood at the time of the motion, no reply was necessary, for the answer of the defendants simply took issue with the plaintiff's allegations. In effect the plaintiff said, "I entered into a written contract with the defendant, P, and I have performed every requirement demanded of me, and there is therefore due me the sum of so many dollars."

The plaintiff pleaded, as he had a right to, under section 118 of the Practice Act, Rev. 1903, Compiled Statutes, Vol. 3, p. 4089.

Such method of pleading throws upon the defendant the burden of specifying item by item the particulars, in which the plaintiff had failed to perform the contract. A mere general denial will not suffice.

Ottawa Tribe No. 15, etc., v. *Munter,* 31 Vroom (E. & A., 1897) 459.

Vail v. *Penn Fire Ins. Co.,* 38 Vroom (Supreme Court, 1902) 422.

McGlade v. *Home Ins. Co.,* 42 Vroom (Supreme Court, 1904) 40.

Stewart Contracting Co. v. *Trenton, etc., R. R. Co.,* 42 Vroom (E. & A., 1904), 568.

The defendants in the case at bar, complied with the foregoing rules of law and did nothing more than specify the points on which they would rely showing that the plaintiff failed to perform the conditions precedent to entitle him to maintain his suit. In effect the defendants said to the plaintiff: "You have complained that you have performed everything required of you by the contract, but this we deny; in the following particulars, to-wit: You have not procured the architect's certificate; again, you have not an order in writing, etc., regarding the claim you make for extra work, etc."

Under the cases above cited, this special defense simply raised an issue of fact, and no reply was necessary. The plaintiff said, "I have procured the certificate, and I have a written agreement for extra work," and the defendants said, "No, you have not." This was the view taken by the learned judge at Circuit.

The mistake that the defendants made, is that they believed that these two defenses are affirmative and contain new matter. But it is easily seen that this is not so.

Again. As the case stood, at the time of the motion, *it nowhere appeared either from the complaint or from the answer, that the plaintiff was required to obtain the architect's certificate before he could commence an action or that he was required to have a written memorandum for extra work.*

IX.

Another objection made by the defendants and which was made the subject of appeal to the Supreme Court, was the fact that the trial court permitted the filing of a reply to the answer at the commencement of the trial.

This question is properly divided into two parts, but before proceeding with argument on them, let us shortly review the facts that led to the request to file a reply. In the point immediately preceding this, we dealt with the pleadings as they stood when the motion to non-suit was made in December, 1914. At the trial, counsel for the plaintiff discovered that his pleadings were not in proper shape to conform with the evidence he was about to produce. He found that the plaintiff had not procured the architect's certificate, because there was a fraudulent withholding of it. He found further that the plaintiff had not obtained written orders for the extra work as required by the contract, because these requirements were waived by the parties to it. So he resorted to what counsel frequently find themselves called upon to do, to-wit: asked leave to amend the pleadings to fit the case. In the case at bar this amendment could be effected in two ways, that is, either amend the complaint or file a reply to the answer. To do the latter was the simpler and he asked leave of the court to that effect before a jury was called.

No objection was made to the filing of the reply on the ground that the defendants were surprised, but the point was made that the plaintiff was in *laches*. See case, p. 31.

In examining page 31 of the printed case we find that the stenographic report reads as follows:

> "Plaintiff's counsel moves that plaintiff be allowed to add to his reply allegations of fraud, etc.;" and the defendants in their grounds for

appeal to the Supreme Court made the specious point that "no reply was filed, so there was none to amend." It is self-evident that the stenographer made a slight mistake; instead of writing that plaintiff be allowed to add to his reply he should have written "that plaintiff be allowed to file his reply, etc."

We now come to consider the second part of this point. The respondents claimed that the court below ought not to have permitted the filing of the reply because we were in *laches*. This contention is fully answered by the following laws:

Section 126 of the Practice Act of 1903.

Sections 23 and 27 of the Practice Act of 1912.

And because this is a mechanics lien action, it does not follow that there ought to be any different rule to do justice.

We submit that the contention of the respondents that because of *laches,* the court was in error in permitting the filing of the reply, is without force.

We conceive that most of the amendments made to pleadings are necessitated by someone's neglect or mistake.

The definition of *laches* is negligence or omission to assert a right. The rule of *laches* is never enforced in questions of amending pleadings, because if it were, then the express statutory injunction and the strong tendency of the courts, to disregard form and promote and facilitate the meeting out of justice would be defeated.

X.

The respondents in their appeal to the Supreme Court contended that the $80 and $50 items mentioned in the lien claim were required by law and therefore could not be recovered by the plaintiff.

Our answer to this contention is that all the questions of fact in the case were fairly submitted by the court to the jury and that the respondents never proved what the building ordinances of the City of Newark demanded relating to the building in question. Therefore, how could the trial court decide as a matter of law whether or not the items charged were required to be performed by the plaintiff under that provision of the contract whereby he agreed to do all things required by law.

XI.

The defendants contended at the trial and also argued in their appeal to the Supreme Court that there was no evidence or at least not sufficient evidence to show the dates when the work was finished and counsel for the defendants argued from this point that, therefore, the lien claim was not filed within four months after the last work was done. The complete answer to this contention is found in the plaintiff's testimony that he finished the work on April 26, 1913. See case, pp. 37 and 38. This was not denied by the defendants.

XII.

One of the grounds of appeal by the respondents to the Supreme Court was that the lien claim was void because of wilful and fraudulent mis-statements. This claim is unfounded, in fact, and was properly rejected by the trial court.

Williamson v. *N. J. Southern Railway Co.*,
1 Stewart, p. 277.

XIII.

The contention of the defendants that the lien claim was discharged by failure to issue summons in the suit within four months from the date of the

last work done or materials furnished is not borne out by the testimony as pointed out above.

XIV.

A large number of objections were made to the rulings by the trial court on questions of admissibility of evidence and these are embraced in the respondents' grounds of appeal to the Supreme Court numbered 18 to 39 inclusive, but these objections are easily solved by the applicability of the elementary rules of evidence. We contend that the trial court committed no errors in any of the aforesaid rulings.

XV.

The respondents also contend in their appeal to the Supreme Court that the verdict of the jury was excessive. Even if this were so, it would not be the proper subject matter of an appeal. The right course to pursue is a rule to reduce the verdict, but an examination of all the facts is a complete answer to this contention. The verdict of the jury was not excessive.

XVI.

Another point contended for by the respondents in their appeal to the Supreme Court was that time was of the essence of the contract, and it provided that the work should be finished on the 30th day of December, 1912. It will be remembered, however, that the testimony shows that about a month elapsed before the work was started and the reason for this delay is testified to by the plaintiff, and not explicitly denied by the defendants. The plaintiff says that he was told by Poysher not to start work until the end of November. He lost the full month of November. It was properly left to the jury to say whether this delay was chargeable

to the plaintiff or not. No damages were claimed by the defendants. They accepted the work when it was finished.

XVII.

Defendants further excepted to the order of the court amending the judgment record dated and filed January 9th, 1915. See case, p. 19. The judgment entered by the clerk on the 6th day of January, 1915, was substantially in conformity with the statute, but in order to follow the language of the statute explicitly, the plaintiff called the court's attention to the judgment roll and an order was made amending the record. No notice was required for this. The court has control over its judgments and we fail to see what error the trial court committed in amending its record.

Conclusion.

A good part of this brief has been devoted to the construction of matters raised by the respondents in their appeal to the Supreme Court, all of which matters, no doubt, had been considered by the Supreme Court and in its judgment it found no error in the entire cause excepting with regard to the sufficiency of the bill of particulars, and as to this so far as it affected Stahl. We were of opinion that this court has before it the entire cause and so we advance the same argument as to these matters that were placed before the Supreme Court. On the whole case we submit that the judgment of the Supreme Court so far as it directed a non-suit to be entered as against Stahl is erroneous, and should be reversed. We respectfully submit that the defendant Stahl had a fair trial and that the bill of particulars as amended was a substantial compliance with the statutory requirement and served the purpose and reason of the law. There

can be no doubt but what Stahl had all notice of the particulars of the demand.

It is therefore respectfully submitted that the judgment of the Supreme Court be reversed and the judgment entered in the Circuit Court as against Stahl be affirmed.

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New Jersey Court of Errors and Appeals

SAVERIO RIZZOLO, trading under the name and style of Rizzolo Construction Company, *Appellant,*	*Action at Law*
vs.	*On Mechanic's Lien.*
CHARLES W. POYSHER, Builder, and ALFRED STAHL, Owner, *Respondents.*	*Appeal from Supreme Court.*

Supplement to Appellant's Brief.

I.

After printing the main brief we made a further investigation of authorities on the first point and submit the following result of such examination.

In the case of *Davis* v. *Gordon,* 36 N. J. L. J. 310, Circuit Court Judge Speer at the Hudson Circuit, says:

> "I take it to be well settled in New Jersey that a claim is not necessarily bad, for including illegitimate as well as legitimate claims; for it may stand *quo ad* the good items; but if the good items and the bad are *inseparably* blended the claim will be bad."

We also take the liberty to refer the Court to the following cases in other jurisdictions bearing upon the same subject:

Bank of Charleston v. *Curtiss,* 18 Conn. 342.
Soule v. *Borrelli,* 68 Atl. Rep. 979 (Conn.).
Bolster v. *Stocks,* 43 Pac. Rep. 534 (Wash.).
Culver v. *Schroth,* 39 N. E. 115 (Ill.).
Dennis v. *Smith,* 38 N. W. 695 (Minn.).

Nancolas v. *Haffer,* 112 N. W. 382 (Iowa).

Barnes v. *Colorado R. R. Co.,* 94 Pac. Rep. 570 (Colo.).

Baker v. *Fessenden,* 71 Me. 292.

Ewing v. *Stockwell,* 75 N. W. 657 (Iowa).

Cornelius v. *Washington Steam Laundry,* 100 Pac. Rep. 727 (Wash.).

Ecceles Lumber Co. v. Martin, 87 Pac. 714.

Barret v. *Glass,* 111 Pac. 760.

II.

The respondent contends in his brief that the lien is void because the extra work lumped the charges. By this he means that the labor and materials are combined in one charge. This is permissible by the statute where the work is done under contract.

The respondent says that the time in which the work was done is not properly stated and relies upon the case of *Associates* v. *Davidson* in support of his contention. This point, however, is not well taken because it was expressly held that in a case where work is done under contract it is not necessary to state the time in which the work was done with any greater particularity than already stated in the lien claim.

Edwards v. *Derrickson, supra.*

Williamson v. *N. J. Southern Railway Co., supra.*

III.

In the second point of the respondent's brief, the case of *Buchanon etc. Co.* v. *Dougherty,* 96 Atl. 663, recently decided by this court, is relied upon in support of the contention advanced in said point. We have examined this case and fail to understand

what applicability it has to the case at bar inasmuch as no motion was made to discharge the lien for failure to reduce it within one year after issuing summons.

Respectfully submitted,

SAMUEL F. LEBER.

The Baker Printing Co., Law Case Printers, 251 Market St., Newark, N. J.

Court of Errors and Appeals

OF THE STATE OF NEW JERSEY.

SAVERIO RIZZOLO, trading under the name and style of RIZZOLO CONSTRUCTION COMPANY, *Plaintiff-Appellant,* *vs.* CHARLES W. POYSHER, Builder, and ALFRED STAHL, Owner, *Defendants-Appellee.*	*Action at Law.* *On Mechanics' Lien.* *On Appeal.*

Brief of Appellee, Alfred Stahl.

Statement of Facts.

This is an action upon a sealed building contract, made between Saverio Rizzolo, trading as the Rizzolo Construction Co., the plaintiff and appellant, and Charles W. Poysher, one of the defendants, for the erection and construction of a one-story moving picture theatre building to be located at No. 635 Bergen street, Newark, N. J. The contract bears date October 29, 1912, and was filed, with the specifications, in the Essex County Clerk's office, November 22, 1912.

The appellant claimed he had performed his contract and that the last payment of said contract, amounting to fifteen hundred dollars was due, together with extra work amounting to the sum of five hundred and fifty-six dollars, and that those sums, to wit, the sum of two thousand and fifty-six dollars, was a lien on the premises described in the lien claim and complaint under the Mechanics' Lien Law of this State.

The appellee and the defendant, Charles W. Poy-

sher, denied that the contract had been performed, they also set up the failure to produce the architect's certificate and the written orders for extra work as provided for in said contract, they denied that anything was due for the balance of the contract price or extra work or that any extra work had been performed and denied that the appellant had any right of lien on said lands under the Mechanics' Lien Law.

The Mechanics' Lien was filed on June 23, 1913, and named said Charles W. Poysher and Alfred Stahl as builders and owners, describing the curtilage as 75 x 100 ft. and set up a bill of particulars in which only the last payment is set up and the extra work was set up without separating the labor and materials and without any dates. The contract work was set up as being performed between certain dates only. The issuing of the summons was endorsed on the lien claim on July 1, 1913.

A motion of non-suit on the pleading was made prior to the trial by the appellee and defendant, Charles W. Poysher, because of the failure of the appellant to file a reply to the answer of the appellee and the defendant, Charles W. Poysher. This motion was denied by order of the Court below bearing date December 20, 1913.

At the trial appellant moved to amend his "reply" by setting up that architect's certificate was fraudulently witheld and that the written order required by the contract was waived. This motion was granted over the objection of the appellee and the defendant, Charles W. Poysher.

No reply was ever filed by the appellant to the answer of the appellee and the defendant, Charles W. Poysher, until ordered filed *nunc pro tunc* by the Supreme Court, June 1, 1915.

At the conclusion of the appellant's case the appellee and the defendant, Charles W. Poysher, made a motion for non-suit, which was denied.

After the making of this motion the appellant moved to amend the lien claim by inserting dates between which it was claimed the extra work was done and by amending the dates alleged in the declaration as the date of the last work done. The lien claim alleged the date of the last work as April 26, 1913, and the declaration alleged same as December 30, 1912.

At the conclusion of the evidence the appellee and the defendant, Charles W. Poysher, moved for the direction of a verdict which was also denied.

At the trial the Court allowed the architect to testify what he told the contractor and refused to allow the appellee and the defendant, Charles W. Poysher, to testify as to what they told the architect and what the architect told them. The Court also refused to allow the expert of the appellee and the defendant, Charles W. Poysher, to testify as to what was required by the building laws covering the construction of such moving-picture theatres without the production and proof of such laws. The contract required compliance with all such laws. The Court also allowed testimony to show that the appellee, Stahl, conveyed said property to one Harry Denberg without making known the defects in the building.

The contract required the finishing of the building by December 30, 1912, and it was not finished until February 26, or April 26, 1913. Time was of the essence of such contract.

The jury gave judgment for the full amount claimed by the plaintiff even including items waived by the appellant and ordered omitted by the Court, with interest.

The judgment record was amended by the Court without notice to this defendant.

The judgment was appealed from the Essex Circuit Court to the Supreme Court by the two defendants, Alfred Stahl and Charles W. Poysher, and the

judgment was sustained as to Charles W. Poysher and reversed as to Alfred Stahl and so far as the same was a lien under the Mechanics' Lien Law.

I have divided this brief into two parts. Part I being in support of the decision of the Supreme Court. Part II being a discussion of the other points presented to the Supreme Court by this appellee. Part II is set out on the theory that if this Court should find that it cannot support the decision of the Supreme Court on the ground presented, it may be able to support it on one of the other points presented to the Court below.

The grounds of appeal presented to the Supreme Court are attached hereto.

Part I.

The Supreme Court held that the appellee, owner, was entitled to a non-suit and that so far as said judgment is special it must be reversed.

The Court says: "Clearly the item of $1,500 is not set forth as the statute requires Sec. 16, IV (C. S., 3304)."

> "The present bill of particulars does not set forth the amount and kind of labor performed and materials furnished, it does not state prices and times, as to the $1,500 even after amendment; and if it can be held to state that the work was done by contract, it does not mention the price."

As to the amount and kind of labor performed and of materials furnished.

See Sec. 16 of the Mechanics' Lien Law.

Associates of Jersey City vs. *Davidson,* 29 N. J. L., 415.

Edwards vs. *Derrickson,* 28 N. J. L., 39.

As to extra work being a "lumping" charge. See

Associates, &c. vs. *Davidson & Sec.,* 16 Mechanics' Lien Law above cited.

As to the time. To say that the work was done between certain dates is not sufficient.

Associates, &c. vs. *Davidson, supra.*

American Buick Co vs Dinkhouse, 54 N.J.L. 465

The above arguments seem to have been conceded by the Circuit Court and by counsel of the appellant as a motion was made and granted attempting to correct these two items.

As to invalidity of order of amendment, especially because it is an order "made in the cause and therefore void." See Point 3, Part II.

The bill of particulars is still defective, even after amendment as to time.

It is not sufficient to say that work was done in February *or* March and not stating dates.

See *Associates, &c.* vs. *Davidson, supra.*

Part II.

Point 1.

Motion for Non-Suit on the Pleadings.

The complaint set up performance of the conditions of the contract generally, the answer of the defendants set up specifically the failure to produce the architect's certificate and the written order required in case of extra work. No reply was filed to said answer at the time of the motion. Appellants served notice of motion for non-suit which was argued and denied by the Court below by order dated December 20, 1913 (Case, p 17).

Every material allegation of fact in a pleading, which is not denied by the adverse party, is deemed to be admitted. Rules of Court, Sec. 20.

Judgment of non-suit may be entered against plaintiff on failure to plead according to the rules. Practice Act. (1912) Sec. 14.

The motion should have been granted.

Point 2.

No Reply Filed.

The ~~respondent~~ appellant in order to meet the situation set forth in Point 1 attempted to correct same by moving at the outset of the trial below to "amend" his "reply" by setting up fraudulent withholding of the architect's certificate and waiver of the written order as to extra work which motion was granted.

1. No reply was filed so there was none to "amend."

2. The ~~respondent~~ appellant had been guilty of laches. The answer was filed July 21, 1913, the motion for nonsuit on the pleading made December 20, 1913. No attempt was made to file a reply until the trial, January, 1915.

Laches of course is a question for the Court upon the facts in each case and the dates set out speak for themselves.

I can only add that this being a suit under the Mechanics' Lien Law that Sec. 18 of that law requires diligent prosecution within one year from the issuing of summons. *Buchanon, &c. Co.* vs. *Dougherty,* 96 At., 663.

These appellants believe they should have the benefit of Points 1 and 2 notwithstanding the ordering of the filing of a reply *nunc pro tunc* by this Court on June 1, 1915, to which these appellants made no objection. The granting of the said order did not affect the situation created prior to that time.

Point 3.[a]

Lein Claim Defective.

The lien claim in this case is fatally defective, in that,

1. In that it names Charles W. Poysher and Alfred Stahl as builders.

The plaintiff's contract was under seal with said Charles W. Poysher and nothing appears anywhere in the record justifying the addition of Alfred Stahl as builder.

Even if Poysher were the agent of Stahl the latter could not be held because an undisclosed principal could not be held on a contract under seal executed by an agent in his own name. *Borcherling* vs. *Katz,* 37 N. J. Eq., 150.

2. In that it names Charles W. Poysher and Alfred Stahl as owners.

The complaint shows that Alfred Stahl alone was the owner at the time the lien claim was filed. There is nothing in the case justifying the addition of Charles W. Poysher, as owner.

Point 3.[b]

Order Amending Lien Claim.

To overcome some of the defects in the above lien claim, the ~~respondent~~ appellant, after the motion for non-suit, moved to amend and the said amendments were granted and the order made over the objection of the appellants.

The appellants claim the said amendment and order should not have been made and that the order is of no validity.

1. The order is an order "made in the cause and therefore void." It is entitled and made in the suit

in the Circuit Court of whose record the lien claims form no part.

American Brick Co. vs. *Drinkhouse,* 59 N. J. L., 462, at p. 466.

Vreeland vs. *Boyle,* 37 N. J. L., 346.

Mechanics' Lien Law, Sec. 20, as amended Pamphlet Laws, 1911, p. 47.

2. It was not made on "reasonable notice to all parties interested," as required by statute Pamp. L., 1911, 47.

No notice at all was given to these appellees of the proposed amendments, let alone any question of reasonable notice. The motion was made at the trial after motion of non-suit and granted.

Furthermore no notice was given to Harry Denberg to whom the property had been sold as appears in the plaintiff's case. Certainly he was one of the interested parties.

3. The appellees also alleged "surprise" stating that they were not prepared to prove dates as none was alleged in the pleadings.

4. The amendments could not "justly" be made as required by statute Pamp. Laws, 1911, 47.

See *Bartly* vs. *Smith,* 43 N. J. L., 321.

It is true that in that case the plaintiff had made his contract with W and he named S as builder—did not name both W and S as in our case, but it seems to me that the reasons of the Court apply to the case before us and I would like, by reference, to incorporate the whole of the opinion in this brief. The Court points out the difference between a mere mistake and a known misstatement and the Court states it would be an "unjust exercise of the discretion given to the Court" to permit the amendment.

The Court says the case presents the question "whether a party to an action may commit any and every error in practice, whether in form or substance,

and make any misstatement of his cause of action, under oath or otherwise, charge whomsoever he will to be his debtor, and claim the right to amend under the statute."

It will be recalled that of the four statutory requirements directed to be inserted in the lien claim in our case, three were erroneous and two at least with full knowledge of the true facts.

I am confident that it will be found that this is the only case in which a lien claim was amended at the trial.

Even as amended the bill of particulars in the lien claim is still defective both as to the contract work and also as to the extra work.

It is not sufficient to say that work was done in February *or* March in a certain year.

See citations under Point 3.

Point 4.

Failure to Produce Architect's Certificate.

No certificate of the architect was produced showing that the fourth or final payment and the extra work—had become due as provided for in said contract. It was contended that the same was fraudulently withheld.

The law in this state is well settled that no action can be maintained on a contract containing a stipulation of this character without the production of a certificate or production of proof that the certificate was waived or proof that the certificate was fraudulently withheld.

Shyers vs. *Pinkerton,* 59 Atl. Rep., 462.

The appellants contends that the rule of law is that the refusal of the architect to furnish the certifi-

cate must be the result of a fraudulent collusion between the architect and the owner.

Thaler vs. *Wilhelm Greisser &c. Co.,* 79 Atl. Rep., 147.

The case of *Chisim* vs. *Schipper,* 51 N. J. L., 1, decided by the Supreme Court, in 1881, holds the contrary view. Magie, *J.,* in that case wrote the dissenting opinion stating the law to be as claimed by these appellants.

In *Bradner* vs. *Roffseil,* 31 Atl., 387, 57 N. J. L., 412, Magie, *J.,* wrote the opinion in the Court of Errors and Appeals reversing the judgment below and he was exceedingly careful not to adopt the rule laid down in *Chisim & Schipper.* He said the case was tried on the doctrine laid down by the majority of the Supreme Court in *Chisim* vs. *Schipper* and that the argument and briefs of counsel had not assailed that doctrine and "for the purpose of this case" it may be deemed not to be in question. So that these appellants believes that this question has not been finally settled in this state.

The case of *Thaler* vs. *Wilhelm Greisser Const. Co., supra,* decided in the Supreme Court of Pennsylvania in 1911, says that in Pennsylvania two classes of cases involving satisfactory performance have given rise to two lines of decisions, the first where the work or material is to be satisfactory to the party acquiring it and there the question for determination is not as to whether or not the one complaining ought to be satisfied, but solely as to good faith of the dissatisfaction alleged. The second rule is where the work or material must be satisfactory to the third party designated as arbiter—and there in order to maintain the action of the claimant must show that the expressions of dissatisfaction were the result of fraudulent collusion between the arbiter and owner.

There is no question raised of fraudulent collusion between the architect and owner or builder in the case

before us and if the rule of law contended for by these appellees is correct the judgment below is erroneous.

Even taking the rule laid down in *Chisim* vs. *Schipper, supra,* these appellees still contend that it was not shown in this case that the architect's certificate was fraudulently withheld.

The only rule that I have been able to find defining fraud is that by Garrison, *J.,* in *Bradner* vs. *Roffseil,* 57 N. J. L., 32, in this Court. He says that one of the ways in which the fraudulent conduct of the architect might be made to appear is:

1. By proving that he stated that the builder was entitled to his certificate.

Later Judge Garrison puts it in these words:

> "And the architect be shown to have EXPRESSLY STATED that the certificate was earned."

There is not proof in the case showing that the architect, Hyman Rosensohn, had expressly stated that the respondent was entitled to his certificate or that he had earned it. He was asked on direct examination, (Case, p. 110) "Was he (the ~~respondent~~ appellant) entitled to his final certificate?" A "From all appearance WITH THE OWNERS; yes, sir." This certainly is not a statement that the work was completed in accordance with the contract, plans and specifications.

It is difficult to see how the architect could make an expression of opinion because he testifies:

> "That for the final certificate I merely go to the job and ask what complaints he has got to register; see if I can remedy it and then settle up the affairs between the owner and contractor" (Case, p. 128).

"I only look at things complained of." Case 125. Asked on re-direct examination whether he didn't examine the rest of the building at all he said, "No, just casually looked around that is all" (Case, p. 128).

The architect also admitted that there were some adjustments to be made between the owner and contractor (Case, p. 110).

2. Following the expression of approval by proof of an arbitrary refusal to furnish the certificate itself.

In this line of proof, he says, one element would be evidence of the completion of the building "in strict accordance with the terms of the contract."

> "If the proof showed there was at this time a substantial defect in the work done or a substantial failure in its full completion, the subsequent withholding of his certificate by the architect could not be deemed fraudulent."

There does not seem to have been a refusal by the architect to furnish the certificate. It seems from a reading of his testimony that he would not issue and still he did not refuse to issue it.

There was no evidence of the completion of the building "in strict accordance with the terms of the contract" but the contrary was in fact the case, and that there was a substantial defect in the work done and a substantial failure in full completion. The following are some of the particulars complained of:

Water meter omitted.

Front elevation, plaster ornamental design omitted.

Drain from court to sewer omitted.

The chimney is not of brick, is not lined, is not laid up in red mortar and has no cap. It is built of cement blocks. It is also cracked for a distance of ten feet.

The doors in the building are not five-cross panel birch veneer doors but white pine was used instead; the water closet door which should have been cypress is also white pine.

There is no cross-bridging between the roof beams to support the ceiling. They were merely nailed to the roof.

Brass faucets were used instead of nickel plated ones.

A wash-down closet was put in instead of a syphon jet closet as required.

The water pipes are not of the size called for.

The above items are admitted by the ~~respondent~~ appellant.

The steam heating plant is worthless. The specification says. "Steam Heating: Building to be heated to seventy degrees Fahrenheit in zero weather."

There is no proof in the case that the boiler would heat the building to the above temperature in zero weather. There is some testimony that the place was warm in cold weather but not that it was heated to seventy degrees in zero weather.

Heating is a science, and an exact science to such an extent that there are courses in heating and engineering in such colleges as Cornell with eminent professors teaching those subjects.

The heater installed by the ~~respondent~~ appellant through a sub-contractor, Florian Hable, is an Abenroth boiler with a rated capacity of 425 feet radiation. Mr. Hable says its capacity is from 350 to 400 feet (Case, p. 97).

The amount of (square) feet of radiation required to heat this building is given by Nathan Meyers, an expert of the defendant, as 1,063 feet by what is known as Pierce's table; on cross examination he also figured according to Carpenter's table in the presence of the Court and jury, 860 feet of radiation. Theodore Geiser, another expert of the appellants, using Mill's tables figured 902 feet of radiation.

Mr. Hable says his rule is to figure the cubic feet of the building and divide it by eight and he makes the square feet of radiation required 415, but he only figures the auditorium of the building and figures only 16 feet in height. If we figure the average height as 20 feet 3 inches, the front being 18 feet 6 inches and the rear 23 feet, and the lobby 15 x 22 x 20 feet 3 inches I would make the square feet of radiation required as 628 square feet.

So that no matter how we figure the radiation the boiler cannot heat the building; even the rule of thumb used by counsel of the ~~respondent~~ appellant requires 468 square feet and that rule as testified by the witness cross examined is not a proper or scientific method of measuring heating plants.

The appellee ~~claims~~ also claims and it has been testified that the steam heating plant is improperly and poorly installed.

The plans show a court on the side which was admittedly omitted and by reason of this the appellee ~~claims~~ is obliged to use the adjoining lands which they own for exit purposes instead of using only the lot upon which the theatre is erected. It is but fair to state, however, that the ~~respondent~~ appellant claims that this change was made with the consent of the appellee.

Appellee also claims that the plumbing work was installed in a very poor and unworkmanlike manner.

It is admitted that the painting inside was spotted, and the appellee ~~claims~~ claimed it ought to have been damp-proofed so it would not spot.

We also claim the cement floor and cement work was defective and that the whole work was done in a poor and unworkmanlike manner.

Point 5.

Failure to Produce Written Order as to Extra Work.

No written order was procured from the owner approved by the architect and an express agreement in writing as to cost of the extra work claimed nor was any waiver shown.

Where a building contract provides, in substance, that no additions or alterations made during the progress of the work shall be regarded as extra work unless agreed to in writing, and signed by the parties before such work is begun, the mere performance of extra work without such written agreement will not

give rise to an implied waiver of the provisions of the contract in that respect.

Landstra vs. *Bunn,* 81 N. J. L., 680.

Headley vs. *Cavilee,* 82 N. J. L., 635.

In the latter case the Court of Errors says that the clause above referred to is not a limitation upon freedom of contract and that the parties to the contract are at liberty subsequently to contract differently in variation of the original contract, "either orally or by writing," and that the question as to whether there has been such a variation, which would be a waiver of the said clause, is a question of evidence.

Such a provision in a written contract as that now before us may be modified or waived by the acts or subsequent agreements of the parties, or both.

> "And to the question 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 work, and would justify a recovery therefore, regardless of the restrictive clause.
>
> "The ordering of the extra work by the defendant 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."
>
> *Langstra* vs. *Bunn, supra.*

The fact that extra work "was to be done and charged for" not regarded as specific agreement.

Headley vs. *Caville* cites *Langstra* vs. *Bunn* as hold-

ing that waiver may *not* be implied from the doing of the extra work without objection and its tacit acceptance.

> "It is true that some of the extra work claimed was done by the mere request of the owner and without any specific agreement that it was to be paid for extra. Such items the trial should have excluded."
>
> *Headley* vs. *Caville, supra.*

The appellee claims that the evidence does not satisfactorily show that the parties "distinctly" agreed that the items claimed as extra work should be deemed extra work and that the owner definitely agreed to pay extra for them. It may be contended that a definite price was fixed and a contract demanded for the items but there certainly is an entire absence of any specific and definite agreement that they should be paid for extra.

Point 6.

Extra Work Required by Contract and Caused by Defendant's Fault.

Item: Change from wood beams to re-inforced concrete ceiling ..... $80.
Required by City Laws. See Case. pp. 52, 70.

Item: Concrete between beams and booth floor in place of wood 50.00
Required by Law, Case, pp. 58, 54 and 70.

Item: One double iron-trap door above iron-ladder.
Required by Law, Case, pp. 51, 190, 191 and 192.

The appellant in his contract had obligated himself to comply with all city laws or state or corpora-

tion laws relative to the erection and construction of buildings.

The item of extra work for lowering rear exits excavating, retaining wall as per submitted estimate $235.

The testimony of George Gardner, a surveyor, shows that the exits as now existing comply within an inch or two with the plans and we contend that his evidence based on the science of surveying is controlling and cannot be overcome by the bald denial of the respondent. The surveyor is also corroborated by the testimony of Nathan Myers.

The appellant having originally built the runways higher than called for, he cannot claim extra compensation for lowering them so as to comply with his contract.

We also claim the present level is required by city laws. See Case, pp. 57 and 58.

Point 7.

Date Performance.

There is no evidence or at least not sufficient evidence to show the dates when the work was finished.

He testifies on page 82 that he kept no books of account and the only way he knows the dates when the work was finished is "to get the record to see when he ordered the lumber."

There is no proof at all of the dates on which or between which the various items of extra work were performed or furnished.

There is also a variance the Lien Claim states the last work done April 26, 1913, the complaint states it as December 20, 1912, and the proof February 26, 1913, and April 26, 1913.

Point 8.

Summons Not Endorsed in Time.

The lien claim was discharged by failure to issue summons in the suit within four months from the date of the last work done or materials furnished in such claim and by failure to have the time of issuing such summons endorsed on the lien claim by the clerk within four months of such last date.

The appellant testifies on pages 37 and 38, 82 and 83 of Case, that the work was finished on Washington's Birthday, with the exception of the railing which was put in the end of February, 1913. Summons were issued and endorsed on the Lien Claim until June 1, 1913, one day over the four months period.

It is also fair to say that he also says he did work in March and April and also says he finished April 26, 1913. But having set several dates which are in contradiction to each other he surely cannot accept the one most in his favor.

In any event if we eliminate the extra work the lien claim is discharged because he testified that the general or contract work was finished in February, 1913.

Point 9.

Questions Admitted and Overruled.

The Court refused to allow Nathan Myers, an expert, produced by the appellants, to answer questions Nos. 27, 28, 29, 34 in the grounds of appeal, which sought to bring out the requirements of the building laws or codes of the city and state covering work in controversy in this suit, without production and proper proof of such laws or codes and this in view of the fact that such code and laws were used and referred to by Hyman Rosensohn, an expert produced by the ~~respondent~~ appellants.

These appellees contend that an expert does not

have to produce the books upon which he bases his opinion.

The Court refused to allow the same witness to answer questions 30, 31, 32, 34 and 35 in said grounds. These questions sought to bring out Mr. Myer's opinion on whether certain items were extra work under the contract, also what certain work in the specification named meant and whether the architect would have been justified in issuing a final certificate.

Lawson on Expert & Opinion Evidence, 2nd Ed., p. 85, Ill. A. A suit is brought on a written contract for making certain excavations. An engineer is asked whether or not there has been any excavations executed by the plaintiff, within the meaning of that term as applied to the work in the contract, held competent, citing *Reed* vs. *Hobbs,* 3 Ill., 297.

Questions Nos. 18, 19, 36 and 37 in the said grounds, two of which were allowed to be answered over objections and the other two were overruled. The Court allowed testimony as to conversations between the ~~respondent~~ appellant and the architect but refused to admit testimony as to conversation between the appellants and the architect. We claim that the action of Court was erroneous in both cases and that certainly if the appellant is to be allowed to state what the architect told him and the appellee is not allowed to overcome this either by showing what the architect told them, or what instructions they gave him, such testimony would amount to an estoppel.

Question No. 20 was objected to as leading and No. 23 as not proper cross examination.

Questions Nos. 21, 22, 24 and 25 were objected to as irrelevant, immaterial, incompetent and unfair. They were not only legally not admissible but were asked with the idea of unjustly prejudicing the mind of the jury against the appellants, especially the two questions relating to the sale by the owner to a third person as to whether he sold it with a defective heating plant and whether he informed the purchaser that the plumbing was loose and out of order.

Point 10.

Verdict Excessive, &c.

The jury verdict of the jury was excessive in that no deductions or allowances were made for work and materials admittedly not finished or not in accordance with the contract hereinbefore referred to, nor for failure to finish the work within the time designated in the contract.

The jury gave a judgment for the full amount claimed, with interest, and did not even exclude two items which the Court ordered them to omit in its charge (Case p248, line 16).

Point 11.

Time of Essence.

Time was of the essence of the contract and this especially in view of Article 7 of the Contract, Case, page 253, which provides for the extension of time through any causes not those of the contractor. Article 5 same page requires completion on December 30, 1912, and again on the same page, lines 18 and 19, we again have a requirement that the contractor is to proceed with the work so as not to cause any delay.

The work was not finished until February 22, 26 or April 26, 1913, all of which dates were testified to by respondent.

The motion for non-suit and for the direction of a verdict are discussed under the various points of this brief to which they relate.

Respectfully submitted June Term, 1916.

HUGO WOERNER,
Attorney of Appellee, Dr. Alfred Stahl.

Grounds of Appeal.

Filed by Appellee in the

NEW JERSEY SUPREME COURT.

SAVERIO RIZZOLO, trading under the name and style of RIZZOLO CONSTRUCTION COMPANY, *Plaintiff and Respondent,* *vs.* CHARLES W. POYSHER, Builder, and ALFRED STAHL, Owner, *Defendants and Appellants.*	*Action at Law.* *On Mechanics' Lien.* *On Appeal.*

The appellants state the following grounds of appeal:

1. The Court denied the motion of the appellants for a judgment of non-suit which motion was based on the fact that the respondent had filed no reply to their answer. The order denying said motion is dated December 20, 1913, and was filed January 7, 1915.

2. The court on the trial of the case granted the motion of the respondent to "add to his reply" allegations of fraud on the part of the architect and waiver as to written authority on the part of the owner, over the objections of appellants on the ground of laches.

3. No reply was filed by the respondent to the answer of the appellants.

4. The Court at the trial allowed the motion of the respondent to amend the lien claim so that Charles W. Poysher be designated as builder and Alfred Stahl as owner in such places as it may be necessary, the first item of extra work, for Eighty Dollars, done in

the month of February or March, 1913, by agreement between the builder and the contractor, the claimant; the same date and the same words to be prefixed to the other items of the extra work; changing the date of the last work done in the complaint from December 30th to April 26, 1913, and the Court signed an order allowing such amendments.

5. The order of the Court which is not dated and is filed January 7, 1915, allowing amendments to the lien claim is an order made in the cause and therefore void. It does not amend the lien claim.

6. The Court denied the motion of the appellants for a non-suit at the close of the respondent's case made on the following grounds:

a. There was no testimony to connect Alfred Stahl as builder.

b. So far as Alfred Stahl, builder, was concerned, because of the general rule that an undisclosed principal cannot be held on a contract under seal executed by an agent in his own name.

c. So far as Charles Poysher, owner, was concerned, because the pleadings showed that he was not the owner at the time the lien claim was filed.

d. So far as the lien claim is concerned, because the bill of particulars annexed to the lien claim is radically erroneous, in not specifying or exhibiting the amount and kind of labor performed and of materials furnished, and the prices at which and times when the same were performed and furnished, and exhibiting the balance due to respondent, both as to the extra work and the statement as to the work and materials furnished work under the contract. Also because of the by contract did not state generally that certain work therein stated was done by contract at a price mentioned.

e. The testimony of respondent showed he could

not fix the dates of performance except by his bills for delivery of materials, which is not evidence.

f. If the extra work was eliminated there was no evidence to show the date of the last work done under the contract, or if there was competent testimony, it showed that it was done the latter part of February and the summons were not endorsed in time.

g. The lien claim was void because of wilful and fraudulent misstatements of the matters directed by statute to be inserted therein in that it names Charles W. Poysher and Alfred Stahl as builders.

h. Failure to produce a written certificate of the architect to the effect that the fourth or final payment of Fifteen Hundred Dollars, and the extra work had become due as provided for in said contract, or to show that the same was fraudulently withheld.

i. Failure to procure a written order from the owner approved by the architect and an express agreement in writing as to the cost as provided in said contract or to show a waiver thereof.

j. Variance, the declaration states last item of contract work as December, 1912, proof, if any, February, 1913.

k. Even under the amendment made at the trial, the bill of particulars is not sufficient in stating the dates in February and March.

l. The Court denied the motion of the appellants for the direction of a verdict made on the grounds that there was no evidence to go to the jury to show the completion of the contract in accordance with its terms, to show a fraudulent withholding of the final certificate of the architect or to show a waiver of the written agreement as to extra work, and that there is no evidence to show the date of performance of the contract and extra work.

8. The lien claim is void because it does not contain a bill of particulars exhibiting the amount and

kind of labor performed and materials furnished, and the prices at which and the times when the same were performed and furnished and exhibiting the balance justly due to such claimant, both as to work done under the contract and as to the alleged extra work, neither does the statement as to the work and materials furnished by contract state generally that certain work was done by contract at a price mentioned. This is true of the lien claim before as well as after the attempted amendments.

9. It, the lien claim is void because of wilful and fraudulent misstatements of the matters directed by statute to be inserted therein in that Charles W. Poysher and Alfred Stahl are named as builders and owners.

10. The lien claim was discharged by failure to issue summons in the suit on such lien claim within four months from the date of the last work done or materials furnished in such claim and by failure to have the time of issuing such summons endorsed on the said lien claim by the clerk within four months from such last date.

11. There was a variance as to the date of the last work done the complaint stating the last work done December 30, 1912, the evidence February, 1913.

12. The respondent did not perform the contract between himself and appellant, Charles W. Poysher, on which the judgment is based, in accordance with the term of said contract.

13. The respondent did not produce the written certificate of the architect to the effect that the fourth or final payment of fifteen hundred dollars, and the extra work—had become due as provided for in said contract nor was it shown that the same was fraudulently withheld. Nor in case of such waiver was it shown that there had been a performance of the contract sufficient to entitle respondent to recover.

14. No written order was procured from the owner approved by the architect and an express agreement in writing as to the cost as provided in said contract nor was a waiver thereof shown.

15. There is no evidence, or at least not sufficient evidence, to show the dates when the work and materials were furnished under the contract nor of the dates when the extra labor was performed and materials furnished.

16. The items charged for as extra work are all required by state or city laws; or state or corporation laws relative to the erection and construction of buildings, with which laws the plaintiff below had obligated himself in the contract to comply with, and they are therefore part of the contract work and not extra work. In addition the item of two hundred and fifty-three dollars charged for lowering the two rear exits, excavating and retaining wall to the rear of the theatre wall was caused by the plaintiff's own error in erecting the exits several feet above where the plans required it to be placed.

17. The order of the Court amending the judgment record dated and filed January 9, 1915, was made without notice to appellants.

The following questions were admitted.

18. To the witness Saverio Rizzolo.

"What did he (Rosensohn, the architect) say to you?"

19. To the same witness, "What did you say?"

20. To the witness Florian Hable, "Did you install it (heating system) according to specifications?"

21. To the witness Alfred Stahl, "Were you interested in running that theatre?"

22. To the same witness, "And you sold him (Denberg) that property with a defective heating plant?"

23. To the witness Charles W. Poysher, "Do you know when Rizzolo stopped work on that building?"

24. To the witness Harry Danberg, "Did he (Dr. Stahl) tell you that the plumbing was loose and out of order?"

The following answers were admitted.

25. By the witness Saverio Rizzolo, "I went in two or three days to the architect, and I hear they want to pay so many per cent." "Ten per cent."

The following questions were overruled.

26. To the witness Nathan Myers, "What is the capacity of the boiler?"

27. To the same witness, "Will you turn to that section and read it?"

28. To the same witness, "When was that building code put in force?"

29. To the same witness, "As to the concrete between the beams and the booth floor in place of wood, is there any law or ordinance covering that, requiring concrete between the beams and the booth floors?"

30. To the same witness, "In your opinion, Mr. Myers, the drain from the rear yard to the cellar, which is charged for as extra work, under the plans and specifications, is that extra work?"

31. To the same witness, "In your opinion, then, this means a drain from the rear court, or yard, to the front?"

32. To the same witness, "In your opinion, examining the plans and specifications, what do the words in the specification mean: 'Drain the court to sewer'?"

33. To the same witness, "In your opinion, then the exit door used as an exit would not be extra work under the specifications?"

34. To the same witness, "And can you tell us whether or not there is any provision in the building code requiring reinforced concrete ceiling in a building similar to this?"

35. To the same witness, "How, in your opinion, would the architect in this case, considering the plans and specifications and the building, from your examination, be justified in issuing a final certificate under the contract?"

36. To the witness Alfred Stahl, "What was said at that time (when he and Poysher were at Rosensohn's office)?"

37. To the same witness, "Was that conversation in relation to the contract on this building?"

38. To the same witness, "What about the purchase price?"

39. To the same witness, "You said a minute ago that you had no interest in that building. What did you mean by that?"

40. The verdict of the jury was excessive in that they made no deductions from the claim of the respondent for work not done and materials not furnished nor for work and materials not done or furnished in accordance with the contract, nor for loss caused by failure to finish the work within the time designated by the contract nor for items stricken out at the trial.

41. Time was of the essence of the contract.

42. There is no evidence to support verdict of the jury and the judgment.

43. The verdict of the jury and the judgment are contrary to the evidence.

44. The verdict of the jury is contrary to the charge of the Court.

45. The judgment should have been in favor of the appellants and against the respondent.

46. The charge of the Court is erroneous.

HUGO WOERNER,
Attorney of Appellants.

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TESTIMONY

Plaintiff's:

EXHIBITS

Plaintiff's:

Defendants':

New Jersey Court of Errors and Appeals

Notice of Appeal to New Jersey Supreme Court

(Filed January 20, 1915)

ESSEX COUNTY CIRCUIT COURT

SAVERIO RIZZOLO, trading under the name and style of Rizzolo Construction Company, Plaintiff, vs. CHARLES W. POYSHER, Builder and ALFRED STAHL, Owner, Defendants.	Action at Law. On Mechanic's Lien.

To Samuel F. Leber, Esq., Attorney of Plaintiff:

Take notice that the defendants appeal to the New Jersey Supreme Court from the whole of the judgment entered in this cause; also from the order of the Court denying the motion of the defendants for a non-suit, which order bears date December 20, 1913, and was filed January 7, 1915;

also from the order of the Court allowing amendments to the lien claim and amending the complaint in this cause which order is not dated and is filed January 7, 1915, and also from the order of the Court amending the judgment record bearing date and filed January 9, 1915.

HUGO WOERNER,
Attorney of Appellants.

Affidavit of Charles Pfeifer

State of New Jersey, }
Essex County. } ss:

Charles Pfeifer, special deputy sheriff of the county aforesaid, being duly sworn, on his oath deposes and says that on the 1 day of July, A. D., 1913, he delivered personally to the said defendants Charles W. Poysher and Alfred Stahl, a true copy of the within summons and complaint, with a ten days' notice endorsed thereon.

CHARLES PFEIFER,
Special Deputy Sheriff.

Subscribed and sworn to, this
2d day of July, A. D., 1915.
John P. Manning,
Master in Chancery of
New Jersey.

Summons

(Filed, July 3, 1913)

The State of New Jersey to Charles W. Posher and Alfred Stahl. You,
(Seal) Charles W. Poysher and Alfred Stahl, builders and owners are summoned to answer the annexed complaint of Saverio Rizzolo, trading under the name and style of Rizzolo Construction Company, in an action at law, in the Circuit Court in and for the County of Essex, in which the said Saverio Rizzolo claims a building lien on certain buildings and lands belonging to you, described in said complaint. And take notice that unless you file your answer to said complaint with the Clerk of said Court, at Newark, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit, and judgment may be entered against you.

WITNESS, Frederick Adams, Esq., Judge of our said Court, at Newark aforesaid, the First day of July in the year one thousand nine hundred and thirteen.

JOSEPH McDONOUGH,
Clerk.

LOWY, LOWENSTEIN & LEBER,
Attorneys.

Complaint

(Filed, July 3, 1913)

ESSEX COUNTY CIRCUIT COURT

SAVERIO RIZZOLO, trading under the name and style of Rizzolo Construction Company, Plaintiff, vs. CHARLES W. POYSHER and ALFRED STAHL, Builders and Owners, Defendants.	Action at Law On Mechanic's Lien Complaint

Saverio Rizzolo, trading under the name and style of Rizzolo Construction Company, having his office at #148 Mount Prospect Avenue, in the City of Newark, County of Essex and State of New Jersey, says that he demands of the defendants, Charles W. Poysher and Alfred Stahl, the sum of two thousand fifty-six dollars, together with interest and costs of suit, by reason of the following:

1. On the twenty-ninth day of October, nineteen hundred and twelve, the defendant, Charles W. Poysher, was the owner of a plot of land, situate in the City of Newark, County of Essex and State of New Jersey, upon which he was then about to construct a certain moving picture theater, which land is described as follows:

BEGINNING at a point in the westerly line of Bergen Street, distant therein northerly three

hundred and five feet and thirty-one one hundredths of a foot from the corner of the same and Clinton Avenue; thence (1) northerly along Bergen Street seventy-five feet; thence (2) westerly at right angles to Bergen Street one hundred and five feet and six one hundredths of a foot; thence (3) southerly parallel with Bergen Street seventy-five feet; and thence (4) easterly one hundred and five feet and six one hundredths of a foot to Bergen Street and place of BEGINNING.

2. On the said last mentioned date, the defendant, Charles W. Poysher, entered into a written agreement with the plaintiff for the erection and construction of said moving picture theater, which agreement is on file in the Essex County clerk's office as Building Contract #3625, under the provisions of which agreement, the plaintiff undertook to erect and construct the aforesaid building, in a certain manner in said agreement specifically set forth, and the said Charles W. Poysher agreed to pay unto the said plaintiff as consideration for such performance, the sum of forty-six hundred dollars, in four certain payments, the fourth and final payment of fifteen hundred dollars to be made when the said building would be completed.

3. On the twenty-first day of November, nineteen hundred and twelve, while the said work of erecting the said building was still in progress, and before its full completion by the plaintiff, the defendant, Charles W. Poysher, together with his wife, by warranty deed, conveyed unto the defendant, Alfred Stahl, the equal undivided one-half part of the land hereinabove described, with

all its buildings and appurtenances, which deed of conveyance was accepted by the said Alfred Stahl with full notice and knowledge of the contract entered into as aforesaid for the erection of a moving picture theater upon said land, and with full knowledge of the fact that upon the completion of said building, there would become due and payable unto the plaintiff the final payment of fifteen hundred dollars.

4. On or about the thirtieth day of December, nineteen hundred and twelve, the plaintiff finished the construction of said building, and by the terms of said contract, the final payment of fifteen hundred dollars then became due from the defendants to the plaintiff.

5. At the instance and request of the defendants, Charles W. Poysher and Alfred Stahl, the plaintiff performed extra work and furnished extra materials in the erection and construction of said building, which extra work and materials amount to the sum of five hundred and fifty-six dollars, as shown on the bill of particulars to this complaint annexed.

6. On April twenty-fifth, nineteen hundred and thirteen, the defendant, Charles W. Poysher, together with his wife, conveyed by deed, to the defendant, Alfred Stahl, the remaining undivided one-half interest in said land, with its buildings and appurtenances, which deed of conveyance was accepted by the said Alfred Stahl, with full knowledge of the fact that the plaintiff had completed the erection of the said moving picture theatre upon said premises, and had done all other things necessary to entitle himself to the

final payment of the fifteen hundred dollars in the aforementioned contract stated, and that he had also performed extra work and furnished extra materials of the value of five hundred and fifty-six dollars.

7. The defendants, Charles W. Poysher and Alfred Stahl, have not, nor has either of them paid the sums in paragraphs four and five mentioned, or any part thereof.

8. The plaintiff has performed all the terms and conditions of the said contract on his part.

9. The said debt is a lien upon said building and land, by virtue of the provisions of the act entitled,

> "An act to secure to mechanics and others payment for their labor and materials in erecting any building."

The plaintiff demands as damages the sum of two thousand fifty-six dollars with interest and costs of suit.

LOWY, LOWENSTEIN & LEBER,
Attorneys for Plaintiff.

The following is a bill of particulars of the extra work, labor and materials furnished by the said Saverio Rizzolo, trading as Rizzolo Construction Company, the amount and the kind of labor performed, the materials furnished, and the prices at which the same were performed and furnished.

Change from wood beams to reinforced concrete ceiling $80.00
Concrete between beams and booth floor in

place of wood	50.00
One extra door covered with metal in booth completed	15.00
One double iron-trap door above iron ladder	8.00
Six brass shore electric chandelier sets	72.00
One ½ shell with brass frame chandelier	10.00
Extra work cellar drain from rear yard to cellar	68.00
To lower the two rear exits excavating retaining wall as per submitted estimate	253.00
Total	$556.00

Affidavit of Merits

(Filed, July 8, 1913)

ESSEX COUNTY CIRCUIT COURT

SAVERIO RIZZOLO, trading under the name and style of Rizzolo Construction Company, Plaintiff, vs. CHARLES W. POYSHER and ALFRED STAHL, Builders and Owners, Defendants.	Action at Law On Mechanic's Lien.

State of New Jersey, County of Essex. } ss:

Charles W. Poysher and Alfred Stahl, being duly sworn, on their oaths say, that they are the

defendants in the above stated cause, and that they believe that they have a just and legal defense to said action on the merits of the case.

CHARLES W. POYSHER,
ALFRED STAHL.

Sworn and subscribed to before me this
7 day of July, A. D., 1913, at Newark, N. J.
Edward F. Schwartz,
Notary Public,
of New Jersey.

Answer

(Filed, July 21, 1913)

ESSEX COUNTY CIRCUIT COURT

SAVERIO RIZZOLO, trading under the name and style of Rizzolo Construction Company, Plaintiff, vs. CHARLES W. POYSHER and ALFRED STAHL, Builders and Owners, Defendants.	Action at Law On Mechanic's Lien.

Defendants Charles W. Poysher and Alfred Stahl residing in Newark, say that:

FIRST DEFENSE:

1. Defendants admit the first paragraph.

2. Defendants admit the second paragraph, except that the payments under said contract including the fourth and final payment, were only to be made when all the conditions and covenants of said contract had been performed and complied with by the plaintiff and that fourth or final payment was not to be made until the building was completed and accepted.

3. Defendants admit the conveyance set forth in paragraph three but deny that the same was accepted with the knowledge and notice set forth in said paragraph.

4. Defendants deny the fourth paragraph.

5. Defendants deny the fifth paragraph.

6. Defendants admit the conveyance set forth in paragraph six but deny that the same was accepted with the knowledge of the facts set out in said paragraph.

7. Defendants admit the seventh paragraph.

8. Defendants deny the eighth paragraph.

9. Defendants deny the ninth paragraph.

SECOND DEFENSE:

The defendant Charles W. Poysher denies that he is the owner of the building and lands set forth and described in said complaint and the defendant, Alfred Stahl, denies that he is the builder of the building referred to in said complaint.

THIRD DEFENSE:

The defendants say that the plaintiff did not provide all the materials and perform all the work mentioned in the specification and shown

on the drawings prepared by Hyman Rosensohn, architect, for the proper erection and completion of all the general works required for the one-story moving picture theatre building to be located at No. 635 Bergen Street, in the City of New ark, County of Essex, State of New Jersey, which specifications are identified by the signature of the parties and annexed to said contract as provided for in article one of said contract.

FOURTH DEFENSE:

The defendants say that the contractor did not complete the several portions and the whole of the work comprehended in the said contract on or before the Thirtieth day of December, A. D., Nineteen Hundred and Twelve.

FIFTH DEFENSE:

The defendants deny that the plaintiff is entitled to any sum for any extra work because he did not procure a written order from the owner approved by the architect and an express agreement in writing as to the cost of such alleged extra work as provided for in Article III of said contract.

SIXTH DEFENSE:

The defendants say that the plaintiff did not procure a written certificate of the architect to the effect that the fourth or final payment of Fifteen Hundred Dollars had become due, as provided in Article IX of said contract.

HUGO WOERNER,
Attorney for Defendants.

Notice of Motion for Judgment of Nonsuit

(Filed,)

ESSEX COUNTY CIRCUIT COURT

SAVERIO RIZZOLO, trading under the name and style of Rizzolo Construction Company, Plaintiff, vs. CHARLES W. POYSHER and ALFRED STAHL, Defendants.	Action at Law On Mechanic's Lien.

SIRS:

Take Notice that I shall apply to his Honor, Frederic Adams, a Circuit Court Judge, at the Court House, in the City of Newark, on Saturday, the Twentieth day of September, Nineteen hundred and thirteen, at 10 o'clock in the forenoon, for a judgment of nonsuit in the above stated cause, because no reply has been filed by the plaintiff to the answer of the defendants, filed in the above stated cause.

Dated, September 15, 1913.

HUGO WOERNER,
Attorney for Defendants.

To:
Lowy, Lowenstein & Leber, Esqs.,
Attorneys of Plaintiff.

Subpoena

(Filed,)

Subpoena *ad Testificandum*

The State of New Jersey to Harry Denberg, Greeting, ss:
(L. S.)

We Command You, that laying aside all and singular business and excess, you be and appear in your proper person, before the Essex County Circuit Court to be held at Newark, in and for the County of Essex on Monday the fourth day of January at 10 o'clock in the forenoon of the same day to testify all and singular what you know in a certain cause now depending and undetermined in our Court, between Saverio Rizzolo, plaintiff and Charles W. Poysher, *et al.*, defendants, of a plea of contract on the part of the plaintiff; and this you are in no wise to omit, under the penalty of One Hundred Dollars.

Witness, Frederick Adams, Esquire, Judge of our said Circuit Court at Newark, the second day of January, One Thousand nine hundred and fifteen.

JOSEPH McDONOUGH,
Clerk.

SAMUEL F. LEBER,
Attorney.

State of New Jersey, }
County of Essex. } ss:

Meyer E. Ruback being duly sworn according to law deposes and says that on January 2, 1914, he served a true copy of the within subpoena upon

Harry Denberg therein named by handing the same to him personally together with the sum of Fifty Cents.

MEYER E. RUBACK.

Sworn and subscribed to before me this
4th day of January, 1914.
Harold W. Headley,
Master in Chancery of New Jersey.

Order

(Filed, January 7, 1915)

ESSEX COUNTY CIRCUIT COURT

SAVERIO RIZZOLO, trading under the name and style of Rizzolo Construction Company, Plaintiff, vs. CHARLES W. POYSHER and ALFRED STAHL, Builders and Owners, Defendants.	Action At Law On Mechanic's Lien.

This matter coming on to be heard on a motion to strike out the complaint, and non-suit the plaintiff, and the Court having heard argument thereon, and having duly considered the matter, it is, on this twentieth day of December, nineteen hundred and thirteen, ordered, that the said motion be, and the same is hereby denied, and that

the defendants pay unto the plaintiff the sum of five dollars as and for the costs of the said motion.

Let the foregoing order be entered.

FREDERIC ADAMS,
Circuit Court Judge.

Order Permitting Amendments

(Filed, January 7, 1915)

ESSEX COUNTY CIRCUIT COURT

SAVERIO RIZZOLO, trading under the name and style of Rizzolo Construction Company, Plaintiff, vs. CHARLES W. POYSHER and ALFRED STAHL, Builders and Owners, Defendants.	On Lien Claim

On application of Samuel F. Leber, attorney for the plaintiff, it is ordered that the following amendments to the lien claim herein filed are hereby allowed:

1. Cross out the words "builders and owners."

2. Add after the name Charles W. Poysher

the word "builder," and add after the name Alfred Stahl the word "owner."

3. Let the foregoing designation apply to every part of the lien claim so that wherever Alfred Stahl is designated as "builder," it snall be changed to "owner," and wherever Charles W. Poysner is designated as "owner," it shall be cnanged to "builder."

4. Add to the first item of extra work in the bill of particulars, the date "in the month of February and March, 1913"; and the words "under contract between the builder and claimant" add same dates and the same words to the second item of the extra work; add the same dates and words to the third, fourth, last and next to the last items in the bill of particulars, after extra work.

On further motion for the plaintiff, it is Ordered that the complaint herein filed be, and the same is hereby amended so as to read that the work was completed on or about the 26th day of April, 1913, in place of the 30th of December, 1912.

By order of

FREDERIC ADAMS,
Circuit Court Judge.

Reply

(Filed, June 1, 1915 Nunc pro tunc by order of the Supreme Court)

ESSEX COUNTY CIRCUIT COURT

SAVERIO RIZZOLO, trading under the name and style of Rizzolo Construction Company, Plaintiff, vs. CHARLES W. POYSHER and ALFRED STAHL, Builders and Owners, Defendants.	Action at Law. On Mechanic's Lien.

1. The plaintiff denies every allegation contained in the first defence of the defendants' answer, inconsistent with the allegations of his complaint.

2. The plaintiff denies every allegation contained in the second defence of the defendants' answer, inconsistent with the allegations of his complaint.

3. The plaintiff denies the allegations contained in the third defence of the defendants' answer.

4. The plaintiff denies the allegations contained in the fourth defence of the defendants' answer.

5. The plaintiff admits that he did not procure the written order for extra work from the owner, approved by the architect, and an express agreement in writing, as to the cost of such extra work,

as provided for in article 3 of the contract between the plaintiff and defendants, but the plaintiff says that he did not procure the said order and agreement, because the provisions of said article 3 requiring same, had been waived by the parties to said contract.

6. The plaintiff, in reply to the sixth defence, admits that he did not procure a written certificate of the architect, to the effect that the fourth or final payment of fifteen hundred dollars had become due, as provided in article 9 of said contract, but the plaintiff states that he has failed to procure such certificate because the architect has wilfully and fraudulently, and without good and sufficient cause, withheld his certificate, although the plaintiff has become fully entitled to same.

LOWY, LOWENSTEIN & LEBER,
Attorneys for Plaintiff.

Order

(Filed, January 9, 1915).

ESSEX COUNTY CIRCUIT COURT

SAVERIO RIZZOLO, trading as Rizzolo Construction Company, Plaintiff, vs. CHARLES W. POYSHER and ALFRED STAHL, Builders and Owners, Defendants.	Action At Law. On Mechanic's Lien.

It appearing to the Court that the judgment heretofore entered in the above cause was general against Charles W. Poysher, builder, and especially to be made of the lands described in the plaintiff's lien claim, and it also appearing that said judgment should be made especially of the building and lands described in the plaintiff's complaint.

It is therefore, on this ninth day of January, nineteen hundred and fifteen, ORDERED, that the aforementioned judgment and the record thereof be amended and the same is hereby amended to read that said judgment is to be made "especially of the building and lands described in the plaintiff's complaint."

Let this order be entered upon the minutes.

FREDERIC ADAMS,
Circuit Court Judge.

On motion of
Samuel F. Leber,
Attorney for Plaintiff.

Judgment

ESSEX COUNTY CIRCUIT COURT

25019. SAVERIO RIZZOLO, trading under the name and style of Rizzolo Construction Company, Plaintiff, vs. CHARLES W. POYSHER and ALFRED STAHL, Defendants.	Action At Law. On Lien Claim After Verdict Judgment entered January 6, A. D. 1915, Damage $2,-093.43 Costs: Total:

LOWY, LOWENSTEIN & LEBER,
Attorneys for Plaintiff.

Judgment after verdict in the above entitled action at law on lien claim was rendered on the sixth day of January, A. D. Nineteen Hundred and fifteen, in favor of the said plaintiff Saverio Rizzolo, trading under the name and style of Rizzolo Construction Company and against the defendant Charles W. Poysher generally for the sum of Two Thousand Ninety-three Dollars and Forty-three cents, damage to be specially made of the lands of the defendant Alfred Stahl, owner. BEGINNING at a point in the westerly line of Bergen Street distant therein northerly three hundred and five feet and thirty-one one-hundredths of a foot from the corner of the same and Clinton

Avenue; thence (1) northerly along Bergen Street seventy-five feet; thence (2) westerly at right angles to Bergen Street one hundred and five feet and six one-hundredths of a foot; thence (3) southerly parallel with Bergen Street seventy-five feet; and thence (4) easterly one hundred and five feet and six one-hundredths of a foot to Bergen Street and place of BEGINNING, and the sum of costs of suit.

Judgment entered and signed January 6, A. D. 1915.

WM. S. GUMMERE,
Judge.

Clerk's Certificate

ESSEX COUNTY CLERK'S OFFICE

State of New Jersey, }
County of Essex. } ss:

I, Joseph McDonough, Clerk of the Circuit Court, in and for the County of Essex in the State of New Jersey. Do HEREBY CERTIFY that the foregoing is a true and correct copy of the notice of appeal and transcript of the proceedings and judgment record in the case of Saverio Rizzolo, trading as Rizzolo Construction Company vs. Charles W. Poysher and Alfred Stahl, and the same is taken from and compared with the original papers and record and as the same now remains on the files of said office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court and County at Newark, N. J., this 23d day of January, A. D. 1915.

JOSEPH McDONOUGH,
Clerk.

(L. S.)

Ten cent Document Stamp attached across the face of which reads as follows:

Joseph McDonough, County Clerk.
January 25, 1915,
Essex County.

Grounds on Appeal

(Filed, February 18, 1915)

NEW JERSEY SUPREME COURT

Saverio Rizzolo, trading under the name and style of Rizzolo Construction Company, Plaintiff and Respondent, vs. Charles W. Poysher, Builder and Alfred Stahl, Owner, Defendants and Appellants.	Action At Law. On Mechanic's Lien. On Appeal.

The appellants state the following grounds of appeal:

1. The Court denied the motion of the appellants for a judgment of non-suit which motion

was based on the fact that the respondent had filed no reply to their answer. The order denying said motion is dated December 20, 1913, and was filed January 7, 1915.

2. The Court on the trial of the case granted the motion of the respondent to "add to his reply" allegations of fraud on the part of the architect and waiver as to written authority on the part of the owner, over the objections of appellants on the ground of laches.

3. No reply was filed by the respondent to the answer of the appellants.

4. The Court at the trial allowed the motion of the respondent to amend the lien claim so that Charles W. Poysher be designated as builder and Alfred Stahl as owner in such places as it may be necessary, the first item of extra work, for Eighty Dollars, done in the month of February or March, 1913, by agreement between the builder and the contractor, the claimant; the same date and the same words to be prefixed to the other items of the extra work: changing the date of the last work done in the complaint from December 30th to April 26, 1913, and the Court signed an order allowing such amendments.

5. The order of the Court which is not dated and is filed January 7, 1915, allowing amendments to the lien claim is an order made in the cause and therefore void. It does not amend the lien claim.

6. The Court denied the motion of the appellants for a non-suit at the close of the respondent's case made on the following grounds:

Grounds on Appeal

a. There was no testimony to connect Alfred Stahl as builder.

b. So far as Alfred Stahl, builder was concerned, because of the general rule that an undisclosed principal cannot be held on a contract under seal executed by an agent in his own name.

c. So far as Charles Poysher, owner, was concerned, because the pleadings showed that he was not the owner at the time the lien claim was filed.

d. So far as the lien claim is concerned, because the bill of particulars annexed to the lien claim is radically erroneous, in not specifying or exhibiting the amount and kind of labor performed and of materials furnished, and the prices at which and times when the same were performed and furnished, and exhibiting the balance due to respondent, both as to the extra work and the work under the contract. Also because of the statement as to the work and materials furnished by contract did not state generally that certain work therein stated was done by contract at a price mentioned.

e. The testimony of respondent showed he could not fix the dates of performance except by his bills for delivery of materials, which is not evidence.

f. If the extra work was eliminated there was no evidence to show the date of the last work done under the contract, or if there was competent testimony, it showed that it was done the latter part of February and the summons were not endorsed in time.

g. The lien claim was void because of wilful

and fraudulent misstatements of the matters directed by statute to be inserted therein in that it names Charles W. Poysher and Alfred Stahl as builders.

h. Failure to produce a written certificate of the architect to the effect that the fourth or final payment of Fifteen Hundred Dollars, and the extra work had become due as provided for in said contract, or to show that the same was fraudulently withheld.

i. Failure to procure a written order from the owner approved by the architect and an express agreement in writing as to the cost as provided in said contract or to show a waiver thereof.

j. Variance, the declaration state last item of contract work as December, 1912, proof, if any, February, 1913.

k. Even under the amendment made at the trial, the bill of particulars is not sufficient in stating the dates in February and March.

7. The Court denied the motion of the appellants for the direction of a verdict made on the grounds that there was no evidence to go to the jury to show the completion of the contract in accordance with its terms, to show a fraudulent withholding of the final certificate of the architect or to show a waiver of the written agreement as to extra work, and that there is no evidence to show the date of performance of the contract and extra work.

8. The lien claim is void because it does not contain a bill of particulars exhibiting the amount and kind of labor performed and materials fur-

nished, and the prices at which and the times when the same were performed and furnished and exhibiting the balance justly due to such claimant, both as to work done under the contract and as to the alleged extra work, neither does the statement as to the work and materials furnished by contract state generally that certain work was done by contract at a price mentioned.

This is true of the lien claim before as well as after the attempted amendments.

9. It, the lien claim, is void because of wilful and fraudulent misstatements of the matters directed by statute to be inserted therein in that Charles W. Poysher and Alfred Stahl are named as builders and owners.

10. The lien claim was discharged by failure to issue summons in the suit on such lien claim within four months from the date of the last work done or materials furnished in such claim and by failure to have the time of issuing such summons endorsed on the said lien claim by the clerk within four months from such last date.

11. There was a variance as to the date of the last work done the complaint stating the last work done December 30, 1912, the evidence February, 1913.

12. The respondent did not perform the contract between himself and appellant, Charles W. Poysher, on which the judgment is based, in accordance with the term of said contract.

13. The respondent did not produce the written certificate of the architect to the effect that the fourth or final payment of Fifteen Hundred

Dollars, and the extra work—had become due as provided for in said contract nor was it shown that the same was fraudulently withheld. Nor in case of such waiver was it shown that there had been a performance of the contract sufficient to entitle respondent to recover.

14. No written order was procured from the owner approved by the architect and an express agreement in writing as to the cost as provided in said contract nor was a waiver thereof shown.

15. There is no evidence, or at least not sufficient evidence, to show the dates when the work and materials were furnished under the contract nor of the dates when the extra labor was performed and materials furnished.

16. The items charged for as extra work are all required by state or city laws; or state or corporation laws relative to the erection and construction of buildings, with which laws the plaintiff below had obligated himself in the contract to comply with, and they are therefore part of the contract work and not extra work. In addition the item of Two hundred and Fifty-three Dollars charged for lowering the two rear exits, excavating and retaining wall to the rear of the theatre wall was caused by the plaintiff's own error in erecting the exits several feet above where the plans required it to be placed.

17. The order of the Court amending the judgment record dated and filed January 9, 1915, was made without notice to appellants.

The following questions were admitted.

18. To the witness Saverio Rizzolo.

"What did he (Rosensohn, the architect) say to you?"

19. To the same witness "What did you say?"

20. To the witness Florian Hable "Did you install it (heating system) according to specifications?"

21. To the witness Alfred Stahl "Were you interested in running that theatre?"

22. To the same witness "And you sold him (Denberg) that property with a defective heating plant?"

23. To the witness Charles W. Poysher "Do you know when Rizzolo stopped work on that building?"

24. To the witness Harry Danberg "Did he (Dr. Stahl) tell you that the plumbing was loose and out of order?"

The following answers were admitted.

25. By the witness Saverio Rizzolo "I went in two or three days to the architect, and I hear they want to pay so many per cent—." "Ten per cent."

The following questions were overruled.

26. To the witness Nathan Myers "What is the capacity of the boiler?"

27. To the same witness "Will you turn to that section and read it?"

28. To the same witness "When was that building code put in force?"

29. To the same witness "As to the concrete

between the beams and the booth floor in place of wood, is there any law or ordinance covering that, requiring concrete between the beams and the booth floors?''

30. To the same witness ''In your opinion Mr. Myers, the drain from the rear yard to the cellar, which is charged for as extra work, under the plans and specifications is that extra work?''

31. To the same witness ''In your opinion, then, this means a drain from the rear court, or yard, to the front?''

32. To the same witness ''In your opinion, examining the plans and specifications, what do the words in the specification mean: 'Drain the court to sewer.' ''

33. To the same witness ''In your opinion, then the exit door used as an exit would not be extra work under the specifications?''

34. To the same witness ''And can you tell us whether or not there is any provision in the building code requiring reinforced concrete ceiling in a building similar to this?''

35. To the same witness ''How, in your opinion, would the architect in this case, considering the plans and specifications and the building, from your examination, be justified in issuing a final certificate under the contract?''

36. To the witness Alfred Stahl ''What was said at that time (when he and Poysher were at Rosensohn's office.)''

37. To the same witness ''Was that conversation in relation to the contract on this building?''

38. To the same witness "What about the purchase price?"

39. To the same witness "You said a minute ago that you had no interest in that building. What did you mean by that?"

40. The verdict of the jury was excessive in that they made no deductions from the claim of the respondent for work not done and materials not furnished nor for work and materials not done or furnished in accordance with the contract, nor for loss caused by a failure to finish the work within the time designated by the contract nor for items stricken out at the trial.

41. Time was of the essence of the contract.

42. There is no evidence to support verdict of the jury and the judgment.

43. The verdict of the jury and the judgment are contrary to the evidence.

44. The verdict of the jury is contrary to the charge of the Court.

45. The judgment should have been in favor of the appellants and against the respondent.

46. The charge of the Court is erroneous.

HUGO WOERNER,
Attorney of Appellants.

Testimony

ESSEX CIRCUIT COURT

SAVERIO RIZZOLO, trading under the name and style of Rizzolo Construction Company, Plaintiff, vs. CHARLES W. POYSHER and ALFRED STAHL.	Action at Law.

Monday, January 4, 1915.

Before HON. FREDERIC ADAMS, J., and a jury.

Appearances:
Messrs. Lowy, Lowenstein & Leber for plaintiff, by Samuel F. Leber, Esq.
Hugo Woerner, Esq., appeared for defendants.

Plaintiff's counsel moves that plaintiff be allowed to add to his reply allegations of fraud on the part of the architect and waiver as to written authority on the part of the owner.

Defendants' counsel objects on the ground of laches.

Motion granted.

A jury is called and sworn.

Mr. Leber opens for plaintiff.

Mr. Woerner open for defendants.

SAVERIO RIZZOLO, plaintiff, sworn in his own behalf:

Direct-examination by Mr. Leber:

Q. Mr. Rizzolo, you reside here in this city? A. Yes, sir.

Q. What is your business? A. Contractor, builder.

Q. How long have you been in this business? A. Twenty-five years.

Q. Do you trade under any— A. Under the name of Rizzolo Construction Company.

Q. How long have you traded under this name? A. About six or seven years or five; I am not sure about it; it is over five.

Q. Do you know Charles W. Poysher? A. Yes, sir.

Q. Have you had any business transactions with him? A. The first time I met him was some time in August, 1912; I estimated for a moving picture.

Q. Where was that moving picture theatre to be located? A. Five hundred thirty-five Bergen Street.

The Court: You have a written contract, have you not?

Mr. Leber: Yes. I offer in evidence the written contract between the parties—this is the filed copy—bearing date the 29th day of October, 1912, and filed on the 28th day of November, 1912, in the office of the clerk of this county. I think it is the 28th of November.

Exhibit P-1 marked.

The Court: Are the plans on file?

Mr. Leber: No, sir.

The Witness: They are on file in the city department.

The Court: I meant on file with the County Clerk.

Q. Mr. Rizzolo, I show you Exhibit P-1 (paper shown to witness). Is this the contract and specifications referring to this moving picture place? A. Yes, sir.

Q. Mr. Rizzolo, I show you a set of plans (blueprints shown to witness). Are these the plans handed to you referring to this theatre? A. Yes, sir.

By the Court: Q. How many papers are there, Mr. Rizzolo? A. Four.

Q. Those are the plans by which you worked? A. Yes, sir—well, a copy of them.

By Mr. Leber: Q. Have you the copy which was furnished you for working purposes? A. I ain't got it, except a portion that I gave to you last time.

Q. You have not got the complete set? A. No.

By the Court: Q. How many were there in the complete set? A. Four, just—

Q. Like that? A. The same amount.

By Mr. Leber: Q. Just like this? A. Exactly alike.

Mr. Leber: This copy was taken from the city files, if your Honor please, and I offer it in evidence.

(The blueprints referred to are shown to defendants' counsel.)

By Mr. Woerner: Q. Do you know who filed these plans?

Objected to.

A. I do not.

Mr. Leber: I do not think Mr. Woerner is entitled to any cross-examination now, at this time.

Mr. Woerner: You are offering these in evidence, are you not?

Mr. Leber: Yes.

Mr. Woerner: You say these are the filed plans?

The Court: This is cross-examination on your offer.

Q. Do you know who filed these plans? A. It must be the architect or Mr. Poysher.

Q. You do not know of your own knowledge? A. No.

Q. Did you get the permit? A. The permit was given by Mr. Rosensohn.

Mr. Leber: I object to that.

The Court: Confine yourself to the offer.

Mr. Woerner: No objection.

Exhibit P-2 marked.

By Mr. Leber: Q. Mr. Rizzolo, I call your attention to the second sheet of P-2. Did the copy furnished you for working purposes contain the red notations, or the notations in red pencil mark that you find on this sheet (shown to witness)?

Objected to.

A. No.

Mr. Woerner: I think you either ought to use these plans or the one that he had. If counsel introduces these plans and claims that they are not the proper plans, I do not see where we come out. I want a set of plans that were used. If those were not the set, I think we ought to get others.

The Court: This raises the question whether the witness did in fact work to the plans which were on file officially in the City Hall.

Objection withdrawn.

The Court: What do you say to that question?

Q. (Question read.) A. On the plans that I

done the work, it was facsimile of these same plans, except there was no mark of any red pencil or any other mark at all, except the blueprint.

The Court: All you are asked is whether on sheet 2—

The Witness: There was no mark on my plans.

Q. I call your attention to sheet 3. There seem to be some notations upon it in red pencil. Now, mark the copy that was furnished you for working purposes, did that contain the red pencil marks (indicating)? A. No, no mark at all.

Q. I call your attention to the fourth sheet. There seem to be some red marks, or marks in red pencil, on this. Did the plans you received contain the red pencil marks (indicating)? A. No, sir.

Q. Now, in all other respects were the plans furnished you similar to these? A. Yes, sir.

The Court: Are these red notations important to your case?

Mr. Leber: I do not know; I simply saw them for the first time this morning.

The Court: Well, so far as you know, they are not important?

Mr. Leber: So far as I know, they may not be important. I wanted to identify the exact copy.

Q. From whom did you get the plans and specifications for this job? A. From the architect.

Q. Who was he? A. Hyman Rosensohn, 800 Broad Street.

Q. When did you commence to erect this building, Mr. Rizzolo? A. That was in the latter part of November, 1912, we started the excavation.

Q. The contract bears date the 29th day of Oc-

tober, 1912. What was the reason of the delay between the date of the contract and the date of the commencement of this work? A. After the contract was signed at the office of Mr. Rosensohn, he came to me with Mr.—after the contract was signed at the office of Mr. Rosensohn he requested me not to start until the contract will be put on file.

By the Court: Q. He told you not to start until the contract was on file? A. Yes, sir.

Q. Who told you that, the architect? A. The architect and Mr. Poysher—that they had to do some other thing, which he didn't explain to me, but only told me not to start in until I would be notified.

By Mr. Leber: Q. Well, who notified you to go ahead? A. Mr. Rosensohn.

Q. And did you go ahead? A. Yes, sir.

The Court: What does the contract say as to when the work shall begin and when it shall be finished?

Mr. Leber: There is nothing stated as to when the work shall commence, but the contract states that it shall be finished on or before the 30th day of December, 1912.

Q. Did you erect that building, Mr. Rizzolo? A. Yes, sir.

Q. Did you erect it as provided for in your contract? A. Yes, sir. I done more than what it called for. Some places in the foundation I had to go deeper, and I don't charge nothing for it.

Q. When did you finish the work? A. Mr. Poysher took possession on Washington's Birthday, they opened up.

Q. What year? A. Nineteen hundred thirteen.

Q. Well, you say he took possession on Washington's Birthday. Was your work finished at that time? A. It was all finished with the exception of some railing which the architect come afterwards and make me do.

By the Court: Q. Who was it that took possession? A. He takes possession and runs the place.

Q. Who? A. Mr. Poysher.

Q. Anyone else? A. Well, all his men.

Q. Did Dr. Stahl take possession? A. Well, Dr. Stahl wasn't there that time, but he come before that time, and he wants to know why I don't go ahead with the work.

The Court: Q. Never mind. I did not ask you that.

By Mr. Leber: Q. When did you put that railing in and when did you finally finish all the work required of you? A. The railing was put in during the month of February, the end of February.

Q. The end of February? A. Yes, 1913.

Q. Did you do any work in March? A. Yes.

Q. And did you do any work in April? A. Yes, sir.

Q. When were you through with all your work there? A. About the 26th day of April. This was 'most all extra work.

Q. Now, Mr. Rizzolo, you do not speak English very plainly, and it would help us all if you speak slowly and as distinctly as you possibly can. A. All right.

Q. I did not understand that last answer at all, and I am sure that the jury did not. A. The general work was complete on April 26th.

By the Court: Q. The general work? A. Yes, sir. I call it general on account there was a lot of extra work.

Q. Aside from the extra work? A. Including the extra work and all.

Q. The extra work and all? A. The regular contract with all extra work, on April 26th, it was complete.

By Mr. Leber: Q. After April 26th, 1913, did you do any more work upon this building? A. No more.

Q. Now, during the time that you were constructure this building did you see Dr. Stahl on the job? A. Yes, sir.

Q. What was he doing there? A. He came around and see how the work was getting along, why can't we rush it any more, and I told him it was lack of money, and he told me that—

Q. It was what? A. Short of money, and Mr. Poysher wasn't able to pay me according to the contract, and he said that day, "I just put in the Clinton Trust Company about $2,400 cash in my name and Poysher's name. You go ahead with the work," and give me some money, give to Wittel $500, check signed by Poysher and Stahl.

Q. Who was Wittel? You said he gave $500 to Wittel. Did you not say that just now? A. Yes, sir.

Q. Who was Wittel? A. Wittel was the man that furnished cement blocks.

Q. A material man? A. A material man.

Q. When was this conversation that you had with Stahl? A. Sometime in December.

Q. How far had you gone on with your work? A. We had the roof on.

Q Was that the first time that you saw Dr. Stahl there? A. I saw him before.

Q. And did you see him after that day? A. Yes, several occasions.

Q. What did he do there on the job? A. Used to look around, like any owner have a right to look.

Q. Did you know that he was an owner? A. Well, Poysher told me that he was the owner—part owner.

The Court: I understand there is no point made about that if I understood Mr. Woerner. If I understood you, there was no point about the liability on the part of either of these defendants, except such questions as might arise out of the character of the work that was done.

Mr. Woerner: Well, not as to ownership.

The Court: I noticed in your pleadings something about the ownership as bearing on the question of liability. I asked a question which was intended to get your idea on the subject, and I understood you to say that you did not rely for a defense on anything in this case except on the fact that the work was not properly done, that no architect's certificate was obtained and that the requirements of the contract as to extra work were not performed.

Mr. Woerner: I misunderstood your Honor. I claim that Dr. Stahl was not liable as a builder. As to the fact of ownership, I do not care, because it is not material, but as to liability under the contract, I will show that under the contract Dr. Stahl is not liable.

The Court: Very well. I wanted to understand you.

Q. Did you get the first payment? A. I got the first payment from Mr. Poysher.

Q. How did you get it, by cash or check? A. Sometimes, part in cash—

Q. No, I am talking about the first payment? A. I got the first payment in five different times, part in cash and part in check.

Q. Did you get it when you were entitled to it? A. Well, he gave me part before and part afterwards I was entitled; he didn't have it and I had to wait for it.

Q. The contract provides that you were entitled to the first payment when you were ready for the ceiling beams. Now, do I understand that you got some of this $1,000 before you were ready for the ceiling beams? A. Yes, sir.

Q. How much did you get before you were ready for the ceiling beams? A. About $500.

Q. And the balance after that? A. The balance after that I had pretty near the roof on.

Q. Then you had the roof on? A. I had pretty near the roof on when he gave me the balance.

Q. Well, when you got the first money from Mr. Poysher you did not have an architect's certificate, did you? A. No.

Q. Did you get the architect's certificate for that first payment? A. Well, I got it after I had about $500 or $600; then I got the certificate, and I gave it to Mr. Poysher and he gave me the balance, and still it left about $100 short, which he gave me a week later.

By the Court: Q. Well, did you ever get an architect's certificate for the full amount of your first payment? A. I did.

Q. That was $1,000, was it not? A. Yes.

Q. You got an architect's certificate for $1,000? A. I don't get it direct myself; Mr. Rosensohn he

gave it to Mr. Poysher, and Mr. Poysher brought—

Q. Well, you got an architect's certificate for $1,000? A. Yes, sir.

Q. That was your first payment? A. Yes, sir.

By Mr. Leber: Q. You did not get that certificate from Mr. Rosensohn? A. No, sir.

Q. Who handed you that certificate? A. Mr. Poysher.

Q. For what purpose did he hand you that certificate? A. Well, he went down there and got it. I went to Mr. Rosensohn; I wanted he shall give it to me. He says he sends it to Mr. Poysher, and then Mr. Poysher brought me the certificate, and I sign it, and he gave me the balance of the money.

Q. Now, did you get your second payment of $900? A. I got it in the same way, partly on account.

Q. You mean in part payments? A. Yes.

Q. From whom did you get the $900? A. Well, I get about $500 or $600 from Mr. Poysher in two different payments.

Q. And from whom did you get the payments? A. Well, when I reached two payments—I had two certificates all at once. Mr. Stahl was away, and Mr. Poysher wasn't able to pay any more money, and in fact Mr. Stahl come and wanted to know what was going on, and at that time he placed the money in the trust company, the Clinton Trust Company, and that time I handed him both certificates; in fact, even the certificate was given to Mr. Poysher again by Mr. Rosensohn.

Q. You say you handed both certificates? A. I signed both certificates.

By the Court: Q. Did you get an architect's

certificate for your second $900 payment? A. I did.

By Mr. Leber: Q. When you refer to both certificates do you refer to the certificate for the first and second payments or the second and third? A. I mean the second and third, $900 and $1,200.

Q. And that was the time when Stahl told you about the money that he deposited in the Clinton Trust Company? A. Yes.

Q. And did you get your money then? A. Well, not all together, but he holds $500—he gave up $500 to Wittel, cement blocks, and he told him he gives him the balance; he agreed to give him the balance a little later; but I had to sign the certificate and give it up to Mr. Stahl and Mr. Poysher.

Q. Did you ever get any money from Dr. Stahl? A. Yes, sir.

Q. How much money did you get from him? A. There was a check—I don't remember—$250 of that money.

Q. $250? A. Something like that; I don't remember. Anyway, some check he gave to me.

Q. Can you tell us when it was that you got the $250 from Dr. Stahl? A. Well, I can't tell exactly, but it was some time in January.

Q. What year? A. 1913. He must have the check.

Q. Now, you say that you finished this work about the 26th of April, 1913? A. Yes.

Q. Now, did you ever get the $1,500 payment provided for as the last payment on this job? A. No, Mr. Stahl refused to pay.

Q. Did you see him about it? A. Yes.

Q. When did you see Mr. Stahl? A. When the performance was on in that place, right on.

Q. What performance? A. Well, this moving picture theatre.

Q. Well, they were running performances there? A. Yes, sir.

Q. Did you ever get an architect's certificate for this last payment? A. How can I get it when—

Q. Never mind that. Did you get it? A. No.

Q. Did you ask for it? A. I asked half a dozen times from Mr. Rosensohn.

Q. What did he say to you?

Mr. Woerner: I object to that question. I do not think we ought to be bound by what Rosensohn said.

The Court: He was your agent, was he not?

Mr. Woerner: Yes. I do not think he can bind us by declarations which we can not deny.

The Court: (After further argument.) I will overrule the objection.

Defendants' counsel objects to this ruling of the Court.

Objection noted as ground of appeal.

Q. What did Rosensohn tell you? A. Mr. Rosensohn told me that Mr. Poysher told him not to issue a certificate, because he didn't have the money; if he would issue the certificate it would put him in trouble, and he has got to wait until Mr. Stahl sends the money; and several times when I went to Mr. Poysher, and one day I was kind of a little nervous and anxious, that he came down with me to Rosensohn—

Objected to.

The Court: You are not asked about that; you

are asked about what the architect said to you.

Q. You say that you went down to see the architect a number of times is that right? A. Yes, sir.

Q. Now, the first time you went down to see him, you have given us the conversation haven't you? A. I did already, yes.

Q. Now, did you see the architect again after that? A. I went to see Mr. Poysher—

Q. I did not ask you that. Did you see the architect after that? A. Yes, I see him four or five times more.

Q. Did you ever see Mr. Poysher about this last payment? A. I did.

Q. Did you have any conversation with him about it? A. Yes.

Q. What did you say to him? A. I told Mr. Poysher that I wouldn't go on any more with that extra work unless he makes the final payment, because I didn't have no money and I had bills to pay, but he told me, "Rizzolo," he says, "look here; I can't get money from Mr. Stahl until all the work is complete, even this other extra and if you don't do that I can't help it; the money I got no more; it is lost"; because he loaned money outside. And then he says he got to sell half interest to Mr. Stahl to get enough money to complete this building. "Now," he said, "when I have the money myself I give to you, but this time I can't help it." Then I says "Tell Mr. Rosensohn to give me the certificate"—

By the Court: Q. Are you telling what Poysher said to you or what the architect said to you? A. Mr. Poysher told me—me and Mr. Poysher, we went to the corner of Clinton Avenue, and he tele-

phoned Mr. Rosensohn, and he told Rosesohn—

By Mr. Leber: Q. Well you do not know whether he had Rosensohn on the other end of the wire, do you? A. Well, Poysher called me inside and made me hear what Rosensohn would say.

Q. Well, did you hear what Rosensohn said? A. I did.

Q. What did he say? A. Well, Mr. Rosensohn said, "I am ready to give a certificate," Of course, my idea was this—

Q. Never mind what your idea was. What did Rosensohn say? A. Rosensohn said, "Have you got the money to pay Rizzolo?" He said, "Yes." "All right, bring the money down, and the certificate I can issue any time in your presence." "Well," Mr. Poysher said, "I ain't got no money with me, but I got to wire Mr. Stahl to send me a check, and later one will be up; in two or three days I will have it." When you get the check bring it down, and I will issue the certificate."

Q. Did you go down to Rosensohn's two or three days after that? A. I went every two or three days.

Q. Did you ask for your certificate? A. Well, he said, "Bring Mr. Poysher in."

Q. Did you bring Poysher down? A. He wouldn't come with me.

Q. Did you ask him to go down? A. Certainly, several times.

Q. Well, at this time, while you were going down to the architect's for your certificates, did you see Stahl? A. I did not.

Q. Well, did you ever get your certificate? A. No.

Q. When was it that you made your last re-

quest for a certificate? A. That was about sometime May 10, 1913.

Q. Of whom did you make your request? A. To Mr. Rosensohn.

Q. Was that the last request that you made? A. I believe so.

Q. What did he say to you? A. Well, he said he can't issue a certificate, because Mr. Poysher told him not to give me a certificate; he said, "If I give it to you, he don't pay you anyway."

Q. Did Mr. Rosensohn ever say to you that you were not entitled to your certificate?

Objected to as leading.

Question withdrawn.

Q. What did you do after you made your last request on Rosensohn for your certificate? A. Well, we met on 535 Bergen Street myself, Mr. Poysher and Mr. Stahl, and I wanted to know why—

By the Court: Q. When was this? A. That was some time in May.

Q. Yourself and the architect and Mr. Stahl? A. Yes, sir.

By Mr. Leber: Q. Was the architect here? A. I think it was a meeting with all four there.

Q. Who made that meeting up? A. Mr. Stahl, Mr. Poysher and the architect.

Q. Did they ask you to be there? A. Yes, they notified me to come up there.

Q. Did you go? A. I did.

Q. What took place? A. Well, they looked around, and they claimed that the painting in this moving picture wasn't satisfactory to Mr. Stahl, especially on the cement block.

Q. What was the matter with the painting,

Rizzolo? A. We painted on the cement block. These cement blocks are porous; there was no—with plaster on top of the cement block; that is what the specifications call for; and the cement blocks are porous. When the outside weather is damp the cement block absorbs the moisture, and no doubt they make a change in the color inside.

Q. Did it change the color of the painting? A. Yes.

The Court: What do the specifications say about painting the cement blocks?

Witness: The specifications call for one coat of waterproof—

Objected to.

The Court: Wait a minute.

Mr. Leber (reading): "All painting to be done in a first-class, workmanlike manner. Materials to be of the very best description. Cover all sap knots etc., of the woodwork smoothly before priming with a strong coat of shellac. Putty up all woodwork smoothly before priming. All tin to have two coats of Prince's metallic paint. Exterior: To be painted two coats in color selected. Casings and cornices on front to have three coats. Interior: Use Flood & Conklin Company's crystal finish varnish. All other woodwork to be stained and to receive two coats of hard oil finish. Metal ceiling to be painted two coats in color as selected by owner. Do all necessary painting and staining to make a complete job."

The Court: What portion is to be constructed of cement blocks?

Witness: It comes now.

Mr. Leber: The walls of the building were to be of cement blocks.

The Court: Then do you understand that the specifications call for the painting of the cement block?

Mr. Leber: No, sir; I think it refers to the interior.

Witness: The interior.

Q. The theatre was built of cement blocks? A. Cement blocks.

Q. And plaster on the blocks? A. Before I plastered, I think the specifications calls for one coat of liquid filler, what we call waterproof.

Q. Did you do that? A. The man done it.

Q. It was done? A. The O. K. Roofing Company did it.

Q. And you did that work? A. It was done.

By the Court: Q. And that was put on what? A. On the cement block.

Q. You had your cement blocks first, and then you put on a coat of shellac? A. One coat of R. I. W. waterproof.

Q. And then you put it on that? A. Yes.

Q. Well, did they complain of that? A. They say it shows some spot on the plaster. The work was done in the wintertime and it wasn't perfectly dry and those cement blocks always changing the face of uniform color. They call for two coats and I put on about five coats.

Q. Did it change— A. Always was some spot.

Q. Did it chage a uniform color? A. Not always; there was always some spots show.

Q. There were always some spots? A. Yes, sir.

Q. You plastered on the shellac? A. Yes, sir.

Q. Then did you paint the plaster? A. Yes, sir.

Q. And was this called for by the specification? A. Two more coats than the specifications called for.

By Mr. Leber: Q. Well, I believe you were telling the Court and jury of this meeting which took place between you and Poysher and Stahl, and I believe you said the architect was there, and they made these complaints about the painting? A. Yes.

Q. What was said? Go on and tell us the conversation. A. Well, they were talking between the three; I was standing a little ways. He says, "Rizzolo, I will ask you some allowance"—

Q. Who said that? A. Mr. Stahl. He was willing to pay, talking about $250, or a couple of hundred dollars, and Mr.—the architect says, "Well, I ain't got nothing to say about that. I seems to me, even if this block has got to be painted, it don't cost more than $30 or $40, but if Rizzolo wants to allow you $1,000, it is up to him." And then the thing was stuck, and they told me to let them know. I went in two or three days to the architect, and I hear they want to pay so many per cent—

Objected to.

Q. How many per cent? A. Ten per cent.

By the Court: Q. You say you heard it. Who told? A. The architect.

Q. What did he say? A. "Those people make you an offer of ten per cent."

By Mr. Leber: Q. Ten per cent of your claim? A. Yes, sir.

Q. What did you say? A. Well, I laughed. I says, "What do you mean?" to the architect. "Anybody come to me, if I done the job for $4,-600 and pay all the bills myself, not a dollar, and then I lose $400 or $500 on the job, I can't pay at all"—

Objected to.

By the Court: Q. Just tell us what the architect said to you on this occasion. You say they offered you ten percent and you laughed? A. Well the architect told me, "Nothing to do; I wouldn't have nothing of that kind in my office." "What shall I do? Give me the certificate." He says, "It is too late now. If I give you the certificate, I can't date on my books the certificate I give back. You better sue these people. They don't have even no intentions to pay." And then I went to my lawyer and brought suit later on.

Mr. Leber: I offer in evidence the lien claim filed in this case.

Exhibit P-3 marked.

By Mr. Leber: Q. Mr. Rizzolo, did you do any work besides the contract work? A. Yes.

Q. What work did you do? A. I done a cellar drain. The first time, it was in the wintertime when we do the work, and the moving picture slopes in the rear. There was no sewer provided in the plans.

Q. Can you hold this plan up so that the Court and jury may see what you are talking about (handing blueprint to witness)? Will this blueprint show it? A. Yes, sir.

Mr. Leber: Suppose we put that on here, and point out to us what you mean.

(Blueprint placed upon the wall.)

Q. Now, take this pointer and point out to the Court and jury what you mean by this cellar drain. A. (Indicating on blueprint) This cellar is about seven feet below the sidewalk, running from here to here, and the rest of the cellar only slopes in the rear, about four feet six from this point.

The Court: Where is that item on your bill of extra work?

Mr. Woerner: Next to the sewer.

The Court: Extra work, cellar drain, $68?

Mr. Leber: Yes, sir.

Witness: The rain comes before I had the roof on, and I had this place so that there was about three or four feet of water in this place, and Poysher came around and says, "What are you doing, excavating?" I says, "What can I do? I can't drain this water;" and the only way was to make a drain from this cellar to this place (indicating).

By the Court: Q. Who said this? A. I said to Mr. Poysher. "Well," he said to me, "don't the plans and specifications provide for any sewer from this place to this place"? I says, "No." He looked at the plan, and he didn't find any. Then he went down to Rosensohn and talked the matter over with him.

By Mr. Leber: Q. Did you go with him? A. I did not. Mr. Poysher went down and explained it—

Q. Well, you were not there, were you? A. No.

Q. Then you do not know whether he explained it or not. A. Well, he must have explained it because when we came back—

Q. Never mind that. What did he tell you to do? A. He said, "Go ahead and make a drain,

and make it as cheap as possible." And I figured it out the best to do was excavating, because I had to go around four feet, then back five feet. I estimated it costs about $62.

Q. $62? A. $62 or $65.

The Court: How much have you charged for it?

Witness: Well, about $65; I don't remember exactly.

Mr. Leber: Have you got any memorandum of that?

By the Court: Q. What did you say to him at that time, if anything about what it would cost? A. I said about $65.

By Mr. Leber: Q. You charge in your lien claim $68. Have you made a mistake? A. I don't remember exactly. I charge whatever I put on the bill.

Q. Did you ever give him a bill? A. No, only I told him about it, and then asked him to give me a contract for this $68. Then he says, "Rizzolo, what is the use of making a contract? Don't you trust me?" He says, "I will pay you." "Well," I says, "You better make a contract." "Well," he says, "my word is just as good. Didn't I tell you to go ahead?" Well, I didn't think anything about it, so my men went ahead and done the excavating, open up the trench, and after the trench was done all the water run to the front of the cellar, and then I laid a pipe from this to the front sewer (indicating on blueprint).

Q. And for that you charged $68? A. Yes.

Q. For the excavating and the pipe? A. For the excavating and the pipe.

Q. Now, you say the plan does not show any sewer there? A. No.

Q. Was this the first extra work that you did there?

By the Court: Q. (Interposing) Before you answer that question, tell us where you took this water to. Where did the water go after you got your pipe laid? A. It goes in the front cellar.

Q. What? A. They went all in the front cellar. The front cellar at that time was built and it was seven feet deep.

Q. How did the water get away? A. I made a drain—

Q. No, I did not make my question clear to you. After you had made your drain and laid your pipe where did the water go? A. All around in the front of the cellar.

Q. You do not mean that it went into the cellar? A. Yes.

By Mr. Leber: Q. Did it get out of the cellar? A. Well, after we put the sewer. The sewer wasn't in on the front part of the cellar at that time, but I took this rear part, and all the water ran in the front cellar.

By the Court: Q. Well, who dug the sewer? A. The contractor.

Q. Was that in your contract? A. Yes, but I gave a sub-contract, the plumbing work.

Q. Well, this water first ran inside of the building or out side of the building? A. (Indicating on blueprint.) Here, there was so much water here, and to get that water out I had to make an excavation from the lower part of this front part. This cellar was seven feet deep and this part was only four feet, six deep.

Q. How much water was there there? A. There was about two feet.

By Mr. Leber: Q. And then that water that went into the front cellar was carried out by a sewer that was there? A. After when the sewer was put in it drains out.

Q. That sewer was in your contract? A. No, the outside sewer—

Q. I mean the outside sewer. A. Up to the front was in my contract, but from here to here was not in any contract at all (indicating).

Q. Now, I believe I asked you whether this was the first extra work that you did there on this job? A. Yes, that was first.

Q. Did you do any other work besides this? A. Yes.

Q. What was that? A. The second item was that the inspection of the city came around, and they wasn't allowed to have any wood floor beams on the cellar, but they wanted reenforced concrete.

Q. Under the specifications what kind of beams were you obliged to lay there? A. Called for wooden beams and plaster underneath, plaster board and plaster the ceiling, and above that it calls for tile.

Q. And then what did you do? A. Well, I had to make re-enforced concrete, and I used iron beams under the partition and then a rod, and then all re-enforced concrete.

Q. At whose request did you do that? A. That was at the request of Mr. Poysher and the architect.

Q. Did you have any conversation with these two men about it? A. Yes, sir.

Q. Where was the conversation, if you remember it? A. On the job.

Q. And what was said about it? A. Well, he

said, "There is no use of laying any beams," and I bought the beams—

Q. You had the beams bought? A. Yes, sir. He said, "Those beams can't be there, because it is against the law."

Q. Who said that? A. Mr. Rosensohn. Then we talked the matter over with Mr. Poysher, and he said, "This work can't go ahead; it has got to be made according to what the city wants."

By the Court: Q. What was the objection to the wooden beams? A. The specification was drawn for wooden beams, and the city ordinance wouldn't allow us to use any wooden beams.

Q. The city ordinance? A. Yes.

Q. That is the way you understood it? A. That is the way they told me.

By Mr. Leber: Q. Who told you that? A. Mr. Poysher and the architect.

Q. Well, go back and tell me what they said about changing the work from wooden beams to concrete and iron beams. A. Well, they asked me what it costs. I told them the difference. Of course, I would allow him for wooden beams and plaster, and the difference will be about $80.

Q. To whom did you say that? A. To Mr. Poysher and the architect.

Q. And what did they say about it? A. Well, Mr. Poysher said it was too much, but I told him it wasn't too much, and he said, "Will you allow me for the beams?" I said, "Already I allowed it, because that job costs about $150 if I had to do it re-enforced concrete, but this way I only charge $80;" and he said, "All right, go ahead."

Q. Did he say anything about paying you for that? A. Certainly, he says, "Go ahead; I will

pay you." Then I asked him, I says, "Make a contract;" and he says, "Oh, what do you bother, a little argument like that? Are you afraid I won't pay you?" Then I looked at Rosensohn, and Rosensohn said, "Go ahead, it will be all right."

Q. Now, did you do any other work after that which was extra the contract? A. When I made the ceiling beams above the lobby, and I laid the floor according to the specifications, and some of the city inspection came around and stopped the job.

By the Court: Q. What is the inspector's name? A. I don't remember. They stopped the job, not to go ahead.

Q. What job was it that he stopped? A. Altogether.

Q. What were you doing that he objected to? A. I was laying the floor on the second floor, above the tiling work, the front part, where the machine goes. The specification calls for a wooden floor, and I had the wooden floor laid, and they said unless I took out that job they don't let me go ahead.

By Mr. Leber: Q. Was Poysher there when this happened? A. He wasn't there, but he came afterwards.

Q. Did you tell him anything about it? A. He said, "Why don't you follow the work"? I said "Somebody come around and stop the work." He says, "For what"? I says, "They want re-enforced concrete above; they wanted concrete between the beams, a concrete floor on, which was wood floor, to be fireproof, where the machine for the upstaris, moving picture, got to be set." I said, "My specification calls for wooden beams and wooden floor; that is all I done, and I can't do

any other thing. If you want it done, I will do it." And he sent for Rosensohn, and Rosensohn's clerk came and told him how to do the job, and I said, "If I will do it, I am going to be paid for it." He says, "How much will it cost"—

Q. Who asked you how much it would cost? A. Mr. Poysher.

Q. Was he there? A. He was present.

Q. What was said about that? A. I said it cost $50. I had to rip up the floor, because I had it laid already, and I had the ceiling on.

By Mr. Woerner: Q. What memorandum are you looking at, Mr. Rizzolo? A. I got a memorandum, a copy of the bill.

Q. Have you any recollection outside of that memorandum?

Objected to.

Mr. Woerner: The witness is testifying from a paper, and I desire to examine as to that paper.

The Court: Lay the paper aside, Mr. Rizzolo.

Witness: All right.

By Mr. Leber: Q. You say you told him it would cost $50 to do the work? A. Yes, sir.

Q. What did he say about it? A. Well, he got a little mad. He says, "By and by I cut this from this building, from $5,600 to $4,600. Now we go up again. I don't know where I come in." "Well," he says, "I have got to pay you. You had better do that; go ahead."

Q. Did you do any other work besides this? A. Yes.

Q. What was that? A. The sidewalk.

Q. What work? A. The sidewalk.

Q. What did you do about the sidewalk? A. Well, I laid the sidewalk.

Q. Well, you were paid for that, were you not? A. Yes, he paid me.

Q. Well, I am not talking about anything that was paid for; I am talking about the items not paid for. You have given us three items of extra work, of the drain in the rear to the cellar, $68; changing the beams to re-enforced concrete in the cellar, $80, and then you have testified to a $50 item of laying concrete between the beams and booth floor in place of wood. Now, besides these items, are there any other items that you did? A. I put on a fire-proof door.

Q. Where? A. Upstairs, on the second floor. I told Mr. Poysher it would cost $15.

Q. And what did he say about that? A. Well, he says, "All right; we don't kick about a small item."

Q. Did he ask you to do it? A. Yes.

Q. And did you do it? A. I done it.

Q. Were you paid for it? A. No.

Q. Was this door called for by the plans and specifications? A. No. He wants the door because he wants to come in the gate from the outside work during the summer.

By the Court: Q. Where was this door?

Mr. Leber: Where was the door placed?

A. On the second floor.

By Mr. Leber: Q. Will you point it out? A. (Indicating on blueprint.) Right about this section. This was the second floor. The door was on the south side of this—

By the Court: Q. What was said between you and Mr. Poysher as to the price of that door, if

anything? A. Well, I told him before it would cost him $15, and he says, "How it cost so much?" I says, "It has got to be made of fireproof; it has got to be covered with metal on both sides, and the jambs has got to be covered with metal on both sides." He says, "All right, go ahead," and he will pay for it.

By Mr. Leber: Q. Well, you say you furnished that complete door? A. I did.

Q. Now, is there any other work that you did there not called for by the plans and specifications? A. Well, when the inspector came around and examined the place he told Mr. Poysher he would't give him a permit until he puts an iron trap-door on the top of the stairway going from the first floor to the second floor, and Poysher told me to see how it has got to be done and made. I told him I don't know what the door cost; I can't give him any price, but I will charge him what the iron man would charge me. The iron man charged me eight dollars, and that is what I charged him.

Q. Did you charge him that? A. Yes, sir.

Q. Was it paid? A. No.

Q. Did Mr. Poysher agree to pay you for it? A. He says, "Whatever it will cost, I will pay you for it."

Q. Did you do any work in the rear regarding excavating? A. When he got the first permit to run this moving picture, they gave it to him on condition that he must lower the rear exit.

Q. The rear exit? A. Yes, they claim—

Q. Point that out to us on the plan. A. (Indicating.) There is a door in the rear, and then taking from the low part of the elevation to go

up the level to the yard, and it was very deep, and the inspector says, "I will give you a permit provided in a month's time you will lower these at least two feet more;" and Poysher told me to give him an estimate what it will cost to lower those exits; in other words, rip it all out inside and lower the door and build the wall in the rear and make excavation and the connections with some cellar drains from the rear to the low part of the cellar drain, where it has been put in before in the other building. Now, to do this kind of work I had to excavate about three feet in the rear, and then build the retaining wall in the rear on the northerly side and the westerly side, and then I had to take down the fence and rebuild the fence.

By the Court: Q. When was this done, Mr. Rizzolo? A. During the month of April.

Q. After you had the building up? A. Yes, he was running the business.

By Mr. Leber: Q. You say you were asked for an estimate for that work? A. Yes.

Q. Who asked you for an estimate? A. Mr. Poysher.

Q. Did you furnish the estimate? A. I brought an estimate. He told me to make an estimate, and I took it to Rosensohn.

Q. Did you do that? A. I made the estimate and brought it to Rosensohn, and after one week he told me to go ahead, and I did not want to go ahead until he paid me—

Q. Was that estimate in writing? A. In writing.

Q. And did you hand that paper to Mr. Rosensohn? A. Mr. Rosensohn.

Q. And what happened after you handed that estimate to Rosensohn? A. Well, he said, "I will let you know."

Q. Did he let you know? A. After four or five days they sent for me, and they said "Rizzolo, you go ahead"—

Q. Who sent for you? A. Rosensohn.

Q. Who was there? A. Rosensohn. And he said, "Mr. Rizzolo, it is agreed to pay you $253 for extra."

Q. For that work? A. For the estimate, yes.

Q. And was that the amount of your estimate? A. Yes.

Q. Now, then, what was done next, and what was said? A. I didn't want to go ahead until they paid me some money on the extra I done before, or make a payment, so that I can pay my bills and get material.

By the Court: Q. Did you ever have any conversation with Mr. Poysher about this excavating business? A. Mr. Poysher came to me and insisted that I would help him out to do this extra work, and I told him I wasn't in a position to proceed with any more work on this job unless he pays me some money, which was overdue to me.

Q. Did you ever show him the estimate? A. Well, he brought the estimate himself.

Q. Who did? A. From Rosensohn. Mr. Rosensohn told me to give it to Mr. Poysher, and he says, "Rizzolo, can you do it any cheaper?" I says, "That is impossible." I show him what work has got to be done, and he said, "You had better do it. If you don't do it they won't renew my license in the City Hall"; and I says I can't do it until he pays me some money, and he told

me he didn't have any money; he couldn't get any money from Mr. Stahl until all the work is completed satisfactory, and then he will get all the money required.

By Mr. Leber: Q. Well, what did you do? A. Well, after chewing the rag a couple of days, Rosensohn told me, he says, "Rizzolo, I don't see any way out. The best way to complete that job—they ain't got any money; he has got to get money from Mr. Stahl"—Mr. Stahl was away in New York State; he was sick—

By the Court: Q. Who said this to you? A. Mr. Poysher.

Q. Well, what did he say to you about doing this extra work? A. Well, Mr. Poysher came to me one day, and he says, "Mr. Rosensohn sent you word to go ahead with that, Rizzolo." "Well," I says, "what I need is word? Make a contract. I want some money." And Mr. Poysher said, "I ain't got no money, but I will tell you what I will do; I will give you $30 today and I will give you a little more next week, and I will pay you to finish the sidewalk, and that little money, you can pay your bills." So I ordered the material to work. That was some time about February 16th, something like that, or March—from Wolf.

Q. February— A. February or March I ordered the material from Wolf.

The Court: We have been talking about a job you did after that.

Mr. Leber: Yes, in April.

The Court: In April.

By Mr. Leber: Q. You say you bought material from Wolf that he furnished in February or March? A. I mean after that time, when Mr.

Poysher told me to go ahead with the job, he would give me some cash to pay me for the extra work that I done, then I went ahead with the work, and then I ordered the material from Mr. Wolf.

By the Court: Q. The material for this extra work, for the excavating and the lowering of the rear parts, the two exits? A. Yes, sir.

By Mr. Leber: Q. Did Mr. Poysher tell you to go ahead with that work? A. He told me to go ahead, I would be paid everything when it would be completed.

Q. Did he say anything about paying the amount of your estimate for this work? A. He accepted the estimate; he agreed to pay the $253 when it is all complete, but he says he has got to get the money from Stahl.

Q. And did you finish that work? A. Then I went ahead; I finished the work.

Q. Did you render a bill to Mr. Poysher or to Mr. Stahl for this work? A. Well—

Q. I mean for the extra work? A. I brought this bill to Mr. Rosensohn and Mr. Rosensohn gave it to Poysher.

Q. How do you know that? A. Well, Mr. Poysher came to me and told me that he don't think he owes me so much.

Q. Did you ever get paid these items of extra work that you have testified to? A. Not a cent.

Q. So that there is due to you at the present time the $1500 fourth payment under the contract? A. Plus extra work.

Q. And the amounts for the extra work that you have testified to? A. Yes, sir.

CROSS-EXAMINATION by Mr. Woerner:

Q. Mr. Rizzolo, did you put a water meter in this building? A. I don't know; it depends on the plumbing. I sublet the contract for the plumbing.

Mr. Woerner: Just answer the question.

(Answer read.)

Q. You say you do not know whether it was put in or not? A. I don't know.

Q. Well, don't you know what work you did there? A. Yes, we built a sewer, we started from the street, a connection for the toilet and supply with the cold water, a connection with the water—the plumbing work.

Q. You had the whole contract, did you not? A. I did.

Q. And your plans and specifications call for a meter, do they not? A. I don't know if they call or not, only I gave the contract—

Mr. Woerner: Just answer the question.

Mr. Leber: I think he is entitled to answer the question.

Witness: I did answer. I don't know if it calls for a meter or not.

The Court: If you do not know, say so.

Witness: I don't know.

Q. And did you put any front ornamental plaster piece on the building? A. Yes, sir.

Q. Do you know whether it is on there now or not? A. What?

Q. (Question read.) A. Yes, I know they are on.

Q. I refer to the plaster piece shown on the first page of Exhibit P-2, and ask you whether you put up that ornamental plaster piece (indicating)? A. I don't know if those are ornamental or they are

just alike, because some changing has been done on the front. The plan called for some square windows and we put round windows—

Q. Just answer the question? A. Well, there are some, but I don't know if they are ornamental like this.

Q. How did you support the ceiling in that building, did you put up bridging? A. (No response.)

Q. Can't you hear me?

(Question read.)

A. Certainly.

Q. You did put up bridging? A. Yes.

Q. You did not nail the ceiling to the supports of the roof? A. I did.

Q. You did? A. Yes.

Q. Well, do you know the difference between bridging and nailing the ceiling to the supports of the roof? A. I know the difference, certainly.

Q. Then why do you say that you put in bridging when you nailed it to the roof? A. We put bridging on the front, wooden beams.

Q. The front of what? A. On the lobby, cross-bridging, 2 by 2.

Q. But not the rest of the building? A. The rest of the building, when I found there was a longer rafter and the ceiling fell down by itself—it was 24 feet broad—I went to Rosensohn and asked him, "How can we eliminate it"—

Q. Please leave out what you asked. Tell us what you did.

Mr. Leber: I think he was right to answer the question that way, if your Honor please.

The Court: Tell us what you did. The question relates to his acts.

Q. You say you put a bridging on in the lobby? A. I did.

Q. Did you put any bridging anywhere else? A. I didn't put a bridge on the theatre ceiling, because I agreed with Mr. Rosensohn in place of the bridge I put supports from the roof beams to the ceiling beams to hold them up on the level, because the ceiling, 2 by 6, was too light; it was all sink; so I had to support it, to raise it, and then bridge it to make it level, the ceiling, and with that cross-bridge, we took it out and we used it for supporting from the roof to the ceiling, and each beam has got three or four braces. It can be seen even now.

Q. Did you use bridging in the theatre part of that building or not? A. I did.

The Court: He said he did in the lobby.

Q. (Question read.) A. I did.

By the Court: Q. Did you or did you not? A. I did in the front part.

Q. Well, that is what I say, in the lobby. A. He says, "Did you put any bridge in the building?"

Q. No, in the theatre part? A. No.

The Court: That is what he asked you. Pay attention to the question.

By Mr. Woerner: Q. Do you know whether or not you bridged the cross-bridge or rafters in the building? A. There is no rafter.

By the Court: Q. Do you understand the question? A. I do.

Q. What do you say to it? A. There is no rafter.

By Mr. Woerner: Q. How about the roof beams, did you cross-bridge the roof beams? A.

I did say that in place of putting a cross-bridge we used boards about 9 or 10 inches wide to support from the roof to the ceiling to bind roofing and ceiling together.

Q. That is, up and down? A. Yes.

Q. Now, I am talking about the beams going across, supporting them by cross-bridging, whether you call that rafters or— A. Well, cross-bridges means a stick, 2 by 4, to put in that way between beams, put in place, put that way, put a brace about 4 or 5 feet long, some put on slanting to reverse the roof beams and the ceiling beams.

By the Court: Q. Then you did not put any rafters— A. I didn't put any cross-bridge.

By Mr. Woerner: Q. Were the plumbing fixtures that you put in that building new? A. Certainly, you can see the bill from the house—

Q. You have answered the question; that is sufficient. Now, will you tell us whether or not your wall footings are above or below the surface of the floor at its lowest point (indicating on blueprint)? A. I must be below.

Q. Do you know whether it is or not? A. I know it is below.

Q. Then why do you say it must be? A. Well, of course, it can't be any other way.

Q. Did you put in five-panel birch veneer doors throughout the building? A. I don't remember if it was five-panel or six-panel.

Q. Don't you know that you put in cypress instead of birch veneer doors in that building? A. (No response.)

By the Court: Q. What about that? A. I know.

Q. You did? A. Yes.

By Mr. Leber: Q. What kind of doors were they? A. They were inside doors, what we call two toilet doors. They call for birch veneer here, but on account of the dampness that was in that place, I went to Mr. Rosensohn, and I told him that I had bought birch veneer doors, but before I put them on the face of this birch veneer was gone already, and I told him it was impossible to hold this veneer on, and he said, "All right, put on different kind of doors, solid."

By Mr. Woerner: Q. What kind of a door did you put on the rear of the building? A. I think white pine or fir door, some kind of wood like that.

Q. Did not the plans and specifications call for birch veneer? A. Outside birch veneer wouldn't—

Q. Just answer the question. A. I don't remember exactly if they call or not, but when you come to that birch veneer question—

The Court: Perhaps the fair way to ask that question would be to show the witness the specifications and draw his attention to it. You are practically examining him on a written instrument, and he is relying on his memory.

(Defendant's counsel hands paper to witness.)

The Court: When you find it, read what it is.

Witness: "All doors to be five cross panel doors of birch veneered, except water-closet compartment doors to be of cypress."

The Court: That answers your question. You asked him what the specifications called for.

Q. What kind of a door did you put in the rear?

A. I said I don't remember if it is white pine or fir door.

Q. It is not a birch door, is it? A. No. I told you the reason why I didn't put birch veneer; because birch veneer wouldn't stand the outside weather, or any place where it is damp, and on account this building was built in the winter it was too much damp, and those doors were brought over there and all the veneer fell off of the doors before I had a chance to use it, so the architect told me to use white pine or fir door. There is no difference on the price; in other words, the white pine door costs more than the birch veneer.

Q. What kind of a door did you use on the toilet? A. I don't know if it is a fir door or cypress door.

Q. The specifications call for a cypress door, do they not? A. Yes.

Q. The specifications call for the building to be heated at seventy degrees Farhenheit in zero weather?

The Court: Do you remember that?

Witness: I do remember, yes.

The Court: They call for that?

Witness: Yes.

Q. Will the boiler and radiation that you put in that building heat the building to that degree of temperature? A. They heat so good that the heating only starts about four o'clock, and the performance will begin about six or seven, only two hours and a half, and during the night they stop the heat.

The Court: Well, can't you say yes or no to that question?

Witness: Yes.

Q. And this apparatus that you put in will heat to that temperature? A. Yes.

Q. The explanation that you give us is that the reason it does not is the fact that they shut it off after the performance and only start it at four o'clock? A. I say even with that they will do the work all right.

Q. Did you figure out the radiation in that building? A. Yes.

Q. How many feet of radiation were there? A. Well, the man who I gave the contract to, he figured it.

Q. But you did not, did you? A. I did not.

Q. Then why do you tell me that you did? A. I didn't figure it. I know the heat was seventy degrees, because several times I was in that place, and it will do now.

Q. You say you sub-contracted the heating work? A. Yes.

Q. And I think you testified that you did not figure the radiation, didn't you? A. I didn't; I am not a steam-fitter; I am a general contractor. I know my business. Sometimes you have to take an expert and a good mechanic for these heating purposes, which I gave the contract out for; he did all the work the way the specifications call for, and it was satisfactory to everybody.

Q. Can you say of your own knowledge whether that heater and the radiation will heat that building? A. Certainly.

Q. What capacity of radiation is the boiler? A. I didn't figure out.

Q. Then how do you know it will heat? A. I know when I went in that place on a cold night it was too much heat, that the operator had to open the window.

Q. Before you put up this building did you bother at all about figuring the radiation or the size of the boiler? A. Well, I gave it out to somebody for an estimate; I didn't figure myself the—

Q. That is all I wanted to know. A. —the amount of radiation.

Mr. Leber: He has answered that several times.

Q. Well, you did not figure the heating specification? A. I gave it out to other people to estimate what it costs according to the plans and specifications, and then I submit my bid to the architect, and then I gave the gentleman the job.

Q. What kind of a heater did you tell this other contractor to put in? A. I didn't tell him anything.

Q. You simply handed him the specifications? A. I told him that the place has got to be heated seventy degrees and make good job, and he says he will guarantee for it.

Q. And you left that to him? A. Yes, and I think, the way I see the work was done, it was done just the way they wanted it.

Mr. Leber: Never mind that.

The Court: You have answered the question.

Mr. Leber: Yes, you have answered the question.

Q. And did I understand you that you claimed that you furnished this building as called for by the plans and specifications? A. Yes, sir.

Q. And that implies that it was a good, workmanlike job?

Mr. Leber: I object to that question. I do not think that is a fair question; that is a conclusion.

The Court: That seems to be a conclusion.

Q. Do you say that the building was done in a good, workmanlike manner? A. Yes, sir.

Q. And you claim that $1500, the final payment, is due? A. Of course it is.

Q. Now, as to this extra work, the change from wood beams to reenforced concrete ceilings. You testified, I believe, that the building department required that change; is that true? A. Well, after I done the contract they called me and told me to take off the wood beams, it has got to be reenforced concrete, between the architect and the city and Mr. Poysher.

Q. That is the reason you changed it? A. Certainly.

Q. And that is also true of the concrete between the beams and the booth floor in place of wood? A. Yes, sir.

Q. Now, the extra door that you covered with metal, that was in the booth, was it not, that extra door? A. Yes, it was from the booth through outside.

Q. Isn't that required by the city ordinance or state law? A. No; it was required by Mr. Poysher. Mr. Poysher, he was outside in the summertime, and he needs a door from that building through outside of the booth, which he had, and the city required it to be covered with metal, that door.

Q. Now, this double iron trap-door above the iron ladder, wasn't that required by city ordinance or state law?

Mr. Leber: I object. The question is what the plans required, not what the city

ordinance required, or any other kind of law. We were not supposed to do anything except what the plans and specifications required.

Mr. Woerner: That is all we ask; that is what the specifications say: "The contractor is to comply with all state and city laws and to erect a building according to permit, plans and specification. The contractor is to be responsible for all violations of the laws and to obtain all necessary permits at his own cost and charges, and is to comply with all state and corporation laws relative to the erection and completion of the building."

The Court: That seems to put the responsibility on the builder.

Mr. Woerner: That is our contention.

The Court: Now you ask the witness whether he knows what the requirement of the law on this particular subject is. He has not answered that question.

(Question read.)

The Court: Do you know? A. Mr. Poysher told me that he can't get a permit until a trap-door will be put in that place. The trap-door was not called for, and I didn't estimate for any such thing.

By the Court: Q. The question is whether you know whether that was required by the city ordinance or the state law? A. I don't know; I didn't look.

Q. You do not know? A. No.

Q. Who asked you to put it in? A. Mr. Poysher.

By Mr. Woerner: Q. And your attention was not called to it by any inspector of any kind? A. No, Mr. Poysher, because when the inspector went on the place I wasn't there, and he told—

The Court: Never mind that. You have answered the question.

Q. Now, this extra cellar drain that you claim for, where does that run from? A. From this point here (indicating on blueprint).

Q. Inside or outside the building? A. That is inside of the building—to this point (indicating).

By the Court: Q. Tell us, if you can, in words that will describe the place. Was it from one corner of the building that it ran? A. From the middle of the theatre, at the low part in the rear, abou 10 feet away from the rear wall, to the front part of the theatre, or, in other words, to the end of the cellar. The cellar is only about 10 feet in the front.

Q. It ran from the rear of the cellar to the front of the cellar? A. Yes.

By Mr. Woerner: Q. Do you know why in your bill you say from the rear yard? A. Well, that is another thing. When I made an extra estimate it was from here and from the rear to the middle part (indicating).

Q. It says, "Extra work, cellar drain from rear yard to cellar, $68." A. Yes.

Q. That is the one you were testifying about when you pointed from the lowest point of this cellar to the front cellar, was it not? A. Yes.

Q. Do you know why in your bill for extra work you say it runs from the rear yard? A. Because I did connect it from the rear yard.

By the Court: Q. Well, your item says, "from

the rear yard to the cellar." To the front cellar.

Q. It seems to begin in the rear yard and end at the cellar, according to the item? A. Well, they do like that, just exactly.

Q. Well, I understood you just now to say that it ran from the rear of the cellar to the front of the cellar. That would seem to be a different thing. A. Well, there is two connections; I have got one connection from here running to the front and the other running from the rear of the cellar to make connection on this; I made a kind of a cesspool in the center so that it will drain that water (indicating).

By Mr. Woerner: Q. Which one did you make first? A. I made first the center one, but this point to that point (indicating); then I connected the rear afterwards.

Q. You made the rear last? A. Yes, but now the drain runs from the rear of the yard to the rear part of the front cellar.

Q. What made that drain necessary? A. To take the water away from the building, and when they are washing the water runs out.

Q. After the building was finished was there any necessity for a drain like that? A. Well, suppose they washed the floor, the water would accumulate in a hole; you can't get it out any more. Of course, for me it was necessary to dry the cellar by leaving the drains open.

Q. Could you not pump it out? A. Well, I pumped it out in the front part, not in the rear; in the rear I drained it out. It went all on the front.

Q. Will you tell me whether you built that drain

for your own convenience, so as to get the water out, or whether it was made necessary by the construction of the building? A. It was made necessary by the construction of the building. It was agreed by the owner and architect that the cellar was eliminated before, or, in other words, they claimed before it was the sewer; but the theatre was supposed to cost about $6000, and then Mr. Poysher told them to eliminate the plans and make it cost only $4600, and they cut out a lot of stuff from that theatre, so they made it cheap, and they compel me to put it in and they agree to pay for it.

Q. Is it not true that under the plans and specifications you were to build a drain from the rear yard to the front cellar? A. You can see the plans, that don't show.

Mr. Woerner: Well, I am not an architect. You put up this building.

The Court: Let the witness see the plans.

Mr. Leber: What page are you referring to, Mr. Woerner?

Mr. Woerner: Page 9, the last line, "Drain the court to sewer."

Q. Did you see that (paper shown to witness)? A. There is no court provided in this contract, and this is only shown in the front of the cellar, not in the rear. There is nothing shown on the plans of any kind.

Q. Well, this does say, "Drain the court to sewer," does it not? A. There was no court.

Mr. Woerner: I move to strike out the answer.

The Court: The mere question is what it shows.

Mr. Leber: It speaks for itself.

The Court: Yes, but this is one way of getting it on the record. Strike out the other answer.

Q. Does it not say in this specification, "Drain the court to sewer"? A. Yes.

Q. Underlined with lead pencil, and I put my finger on it, and he says— A. "From a point 6 feet outside of cellar wall connect with earthern drain a four-inch cast-iron pipe, continue up through roof two inches above the highest point of roof."

The Court: Is that two inches or two feet? A. "Two feet above the highest point of roof, place a cleanout on main soil pipe inside of cellar wall were it can easily be gotten at to clean out."

The Court: Now comes what counsel was asking you about.

Witness: "Drain the court to sewer." But there was never any court there.

Q. You would not understand the rear of the building by "court," would you? A. I mean there was no court there.

Q. There was no court at all? A. No.

Q. Then you would say that you would not have to put in the sewer under these specifications; is that it? A. Nothing at all, because at that time the rear part was pitched outside.

Q. And it has no meaning in these specifications?

The Court: Well, this presupposes a sewer, but it calls for a drain leading from the court to the sewer.

Mr. Woerner: Yes. Now, what I am trying to find out is this: The witness under these specifications supposed that he did not have to put in any sewer or any drain.

Of course, our contention is that the court means the rear of the building, the yard, the open space.

By the Court: Q. You had a sewer in your contract? A. Yes, sir.

Q. Leading from the front of the cellar— A. Yes, sir.

Q. —to the sewer, I suppose? A. Yes, sir.

Q. That was in your contract? A. Yes, sir.

By Mr. Woerner: Q. Now, the lowering of the rear exits, excavating retaining walls, as per submitted estimate? Have you got that estimate? A. I gave it to Mr. Rosensohn and Mr. Poysher.

Q. Have you got a copy of it? A. I got it home; I ain't got it with me now.

Q. What necessitated the lowering of the rear exits?

The Court: Before you answer that question, Mr. Rizzolo, can you bring that estimate with you this afternoon or tomorrow morning?

Witness: I think so; yes, I will do it.

The Court: Look it up.

Witness: Yes, sir.

Q. What necessitated the lowering of the rear exits? A. It was in this condition, that Mr. Poysher told me that those exits, they are too steep, and the building, or the fire underwriter, or the law there, compels him to go down two feet.

Q. You did have the runway higher before, did you not? A. I did not; I had it according to plans and specifications.

Mr. Woerner: I move to strike out that answer.

Mr. Leber: Why?

Mr. Woerner: I asked him whether he did not have the runway higher before.

(Question and answer read.)

The Court: He said he did not. Strike out the rest.

Q. Do you claim that your runway now is lower than it is shown on that plan and specification? A. Yes, sir.

Q. And the way you originally built it was according to plan and specification? A. According to plans and specifications.

Q. How high was it in the rear, how many feet? A. I don't remember exactly; I only know that I lower it 2 feet from the original height.

Q. Do you know how high the runway is now? A. I don't know.

Q. You do not know whether it is 2½ feet or more or less? A. About 2½ or less.

Q. And originally you had it 5 feet? A. About 4½.

Q. Four and one-half? A. That is what it measures now. If you take a level from this point here and measure it to here, you find it is 4½ feet (indicating).

Q. You say it is 4½? A. About that, about 4 feet, I guess.

Q. Do you know whether the rules of the license department require 4½ feet? A. I ain't got nothing to do with making the plans; they give me the plans and I figure the plans.

Mr. Woerner: I move to strike out the answer.

The Court: The question is whether you know.

Witness: I don't know nothing about the rule.

At 1 o'clock, p. m., the Court takes a recess of one hour.

After recess.

SAVERIO RIZZOLO, plaintiff, resumes the stand in his own behalf:

Cross-examination (continued) by Mr. Woerner:

Q. Mr. Rizzolo, the last item for extra work, lowering the two rear exits, excavating retaining wall, as per submitted estimate—that was caused by the lowering of this runway in the rear of the building, was it not? A. To lower the two exits in the rear of the building.

Q. And that made this work necessary, did it not? A. They asked me to do it and I done it, and by lowering the exit I had to excavate in the rear and then build a retaining wall, supporting the bank on the westerly side of the property and also on the northerly side, and I had to bring it down quite deep to hold that wall.

Q. But can't you tell me whether or not that was caused by the lowering of the two exits? A. Well, by lowering the two exits I had to do all that work.

Q. All the extra work? A. Yes.

Q. Now, you say that before you did any of these items of extra work you always saw Mr. Poysher? A. Yes.

Q. Did he order all of it? A. Yes.

Q And you say you always made an agreement as to the price? A. Always I told him the price before I started.

Q. And in every case you asked for a writing? A. I did right along, but they refused; he said it isn't necessary.

Q. You did get one writing for extra work, did you not? A. Yes.

Q. I show you a paper— A. There was one writing, when I put the cornice.

By Mr. Leber: Q. The cornice, did you say? A. Yes, sir.

By Mr. Woerner: Q. Dated January 3, 1913? A. We done that without the knowledge of the architect.

Q. Is that an item of extra work (paper shown to witness)?

The Court: You may answer the question.

(Question read.)

A. Yes, sir.

Paper marked D-1 for identification.

By the Court: Q. Has that been paid for? A. They did.

By Mr. Woerner: Q. Do you keep any books of account? A. No book.

Q. Have you got this account of Mr. Poysher or the other defendant in any book? A. No.

Q. Did you ever render a bill? A. It was made on a loose leaf, like this one, an estimate. This is a regular estimate I made for one item.

Q. Did you ever render a bill? A. I did give the bill to Mr. Poysher and Rosensohn the last time, and Mr. Poysher came back to me and told me he never thought it would go so high.

Q. Have you got a copy of that bill? A. I must have a copy, but I don't got it by me. I will try to bring it tomorrow morning.

Q. You did not have a copy in Court this morning, did you? A. No.

Q. Now, the contract— A. You mean the bill?

Q. Yes. A. I got a bill here; I got a copy of the bill, but I thought the judge asked me for estimate, which I am going to produce tomorrow.

The Court: Yes, I asked you for the estimate, but Mr. Woerner is now asking you if you ever made out a bill.

Witness: I made a bill; I made three or four bills; I gave one to Mr. Poysher and one to Mr. Rosensohn, and I got a copy here, too.

By the Court: Q. Have you got a copy of the bill that you gave him? A. Yes.

By Mr. Woerner: Q. Will you produce it? A. The lawyer has got it.

(Plaintiff's counsel hands paper to defendants' counsel.)

Q. I show you a bill to Poysher and Dr. Stahl; Hyman Rosensohn, architect; dated May 1, 1913, and ask you whether that is a copy of the bill (paper shown to witness)? A. Yes.

Paper marked D-2 for identification.

Q. Now, the last work on the contract was done about Washington's Birthday, 1913? A. No, it was done after that.

Q. Well, all except the railing, was it not? A. Yes.

Q. And you finished the railing in February? A. Well, it was in February and March.

Q. Well, can't you tell me? A. Well, it was in the end of February; it might be between February and the 10th of March. If I can look at the bill I can tell you exactly the time. I didn't know it was so particular.

Q. But you have not any record as to the dates? A. No; I can get the record to see when I ordered that lumber; just after; I presume March 1st, something like that.

Q. That is the only way you can estimate the dates? A. Yes.

Q. And the same thing is true of the extra work, as to the dates of performance? A. No, I remember the date when I finished the job.

Q. When did you finish it? A. On February 26th.

Q. How did you find that out? A. I find out some witness; I asked if there is anything else that he wants, and he says no. After we done the rear retaining wall, he says, he can get his new license, and then when I went for my money, then the trouble came.

Q. Now, the paint on the cement blocks, or the cementing inside of the building, did spot, did it not? A. Yes.

Q. It peeled off too did it not? A. No, no peel off.

Q. Did you cover the cement blocks with a waterproof substance? A. I did not cover them, but the man I gave the contract to did cover them.

Q. Did you see him do them? A. I seen them, and Mr. Poysher himself saw them and the architect saw them; he told me not to lay on plaster until he came down to examine them and see that the plaster was on.

Q. Then the plaster was put on and the paint? A. Yes, then the plaster was put on.

Q. The payment that you testified to of $250, was that by Dr. Stahl personally? A. By check, I think, made between Dr. Stahl and Poysher.

Q. Both of them? A. I think both names was on the check, after they placed money in the trust company, the Clinton Trust Company.

Q. Now, when you were at the building, the conversation that you testified to, in May, was Mr. Rosensohn there or not? A. He made an appoint-

ment to meet Mr. Rosensohn and Mr. Poysher and I to go all over, but I can't remember exactly if Mr. Rosensohn was or was not in it, but I distinctly remember that Mr. Poysher and Mr. Stahl was there.

Q. Now, just what did Mr. Rosenshon say when he refused to give you the certificate? A. He never refused to give me the certificate, except he says, "Come down to Mr. Poysher, because Mr. Poysher told me not to give you a certificate"; I was entitled to the certificate, but he said, "If I gave it to you he wouldn't pay me."

Q. Well, did he tell you that he would not give you a certificate because Mr. Poysher did not have the money or because Mr. Poysher told him not to give it to you, or both? A. Well, both ways; he said he didn't have any money, and he wanted even to hold the certificate back; he didn't have any money; wait until Mr. Stahl came; and then when Mr. Stahl came and commenced to find fault about the painting, it wasn't much good.

Q. When you asked him for a certificate for how much of a certificate did you ask him? A. I asked him for $2056 certificate.

Q. Covering the contract and the extra work? A. And the extra work. And he says he can give me a certificate for the contract price, but the rest of it he couldn't give me a certificate, because it was agreed by verbal agreement between me and Mr. Poysher, with his own knowledge, and he says he can't give no certificate on that—extra work.

Q. You received the first three certificates, did you not, for the first three payments? A. Yes.

Q. I show you a certificate dated December 17,

1912, for $1000, and asked you whether you received that certificate (paper shown to witness)? A. I did receive it.

Q. And was it paid? A. It was paid.

Paper marked D-3 for identification.

Q. I also show you a certificate dated January 17, 1913, for $900, and ask you whether you received that certificate (paper shown to witness)? A. This certificate has been paid in full, but not directly to me. Part of this money was paid to material people and some excavating people. I don't want those people to bring any other bill.

Q. But you did receive the amount of the certificate? A. The amount of the certificate was paid, but part to other people.

Paper marked D-4 for identification.

Q. I also show you a certificate dated January 17, 1913, for $1200, and ask you whether you received that and whether it was paid directly to you or (paper shown to witness)—

The Court: January 17th?

Mr. Woerner: Yes.

The Court: The same date as the other?

Witness: Yes, sir.

Mr. Woerner: It seems to be, yes.

The Court: What amount, $1200?

Mr. Woerner: $1200 and $900.

Q. Did you receive that? A. Part of this money, when I received it he—

The Court: Never mind what became of the money. You received that?

Witness: Yes, sir.

The Court: And was the money paid either to you or your materialmen or laborers?

Witness: Yes, part of that money was paid to Wittel, cement block man, $950.

Paper marked D-5 for identification.

Mr. Woerner: That is all except the estimate that was to be produced.

RE-DIRECT-EXAMINATION by Mr. Leber:

Q. Mr. Rizzolo, I want to ask you a few questions. Was there a cellar underneath that part of the building which we call the theatre part? A. No, it was only cellar, only the front part, what we call between the front door and the vestibule door, where the heating part is now.

By the Court: Q. Can you give us about the size of the cellar, the size of the excavation? A. Well, the plans call for about 12 by 24, or 11 by 24.

Q. And can you give us the figures of the building? A. The full length of the building?

Q. Yes. A. (Measuring on blueprint). 100 by 25.

Q. Then only a very small part of the building had a cellar under it? A. Yes, sir, only the front part, about 10 feet, and the full width of the theater has a cellar

By Mr. Leber: Q. Can you tell us how much of a yard there is in the rear? A. About 3 feet 6 or 3 feet 10.

The Court: What?

Witness: About 3 feet and 10 inches or 3 feet 4.

The Court: You were asked about a yard.

Witness: A little over a yard.

The Court: The ground in the rear of the building.

Q. How much space is there between the rear of the building and the end of the lot? A. Well, I

say 3 feet and about 8 or 9 inches, 3 feet 9. You mean one yard and one-third of a yard or one-fifth of a yard? About that much (indicating).

Q. How much yard space? A. Yes, from the building to the rear part of the fence.

By the Court: Q. How wide? A. The full width of the building, 25 feet, and I had to excavate more, about 4 or 5 feet more, in the next lot to give it an exit to come up; I would say 30 feet.

By Mr. Leber: Q. You were asked on cross-examination whether you bridged the rafters, or cross-bridged the rafters—I think that is the expression used in the specification—and you said that you did not do it. Why did you not do it? A. Those rafters, what we call the roof beams, wasn't bridged because Mr. Poysher doesn't want to go to any expense to brace the top to the bottom to support the ceiling. Then I asked the architect if eliminating that cross-bridging, and that same amount of money I will do and spending in support from the roof to the ceiling, to brace the ceiling up. Well, he said it was a good idea because that ceiling, on account it was long, put boards underneath, and the metal ceiling, it sagged down like that, and nothing was provided; so I braced from the top of the beams to the bottom of the ceiling and made plenty of brace, so that it looks uniform and level, the ceiling.

Q. Was that a better or worse job than called for? A. It is better as it is, not to put any more expense on the owner and at the same time to do the same thing or better.

Q. You were asked on cross-examination whether the ornamental plaster called for by the

plan was supplied by you. Was it supplied by you? A. Yes.

Q. Exactly this design or another design (indicating on blueprint)? A. I can't remember exactly; it might be some variation, but no variation on the price, because any ornamental plaster man can tell you—

Q. Did you furnish as much ornamental plaster as is shown on this plan? A. I furnished more, because we made the ornament on the window. In place of square it is circular, and in place of those ornamental pieces on the windows we placed it on the top where they mark it.

Q. Right here (indicating)? A. Yes. Sometimes, you know, you can't put ornament as large as is shown on the plans.

Q. Were the windows changed in any way? A. There was a change from square to round windows.

Q. Who asked you to do that? A. That was agreed between Mr. Poysher and me, and in place of window-frame I made a galvanized frame to cover the outside.

Q. Did you charge for that extra? A. Nothing, nothing.

Q. You were examined on the question of the heating system that was installed in this place. Have you visited this place in the winter time? A. I did many a time.

Q. When? A. Many an evening I look at the show.

Q. Have you been there recently? A. Yes.

Q. How recently? A. About the 15th of December.

Q. Was it cold? A. It was nice and warm there.

Q. I mean outside, was the weather cold or warm? A. Oh, cold weather, yes.

Q. Well, was it warm in the theatre? A. Very warm.

Q. And on the other occasions of your visits to the place during cold weather did you find the place well or poorly heated? A. Very well heated, and sometimes they had to keep the door open a little bit to give a little fresh air, because there is too much heat in.

Q. I show you certificates marked D-4 for identification and D-5 for identification. I notice that they both bear the same date. Did you get both these certificates at one time (paper shown to witness)? A. Yes.

Q. I call your attention to the receipt part of D-5. In whose handwriting is this receipt? A. This is my handwriting.

Q. In whose handwriting are the figures on the side of the receipt? A. That is my own handwriting. This was including the two receipts, the two certificates.

Q. So that the receipt on the back of D-5 for identification includes— A. The other certificate.

Q. —the $900 certificate? A. The reason why there was two certificates issued at one time, because Mr. Poysher didn't have any money, as I told you before, and when the Doctor come he got the money, and he ordered the architect to get the certificate, and I think those figures shows here what money has been paid; $950 goes to Wittel, cement block, and $100, I think, goes for Moses Rosenstein for metal ceilings, and another $130 was to pay the man who done the excavating, $130, making $1,180, and $20 he gave to me to make $1,200.

RE-CROSS-EXAMINATION by Mr. Woerner:

Q. This round window—is it not a fact that you had the round window on hand and put it in without asking Mr. Poysher, and after it was in you asked him how he liked it? A. No, I made it and put it in with the consent of Mr. Poysher, and even a young fellow, the clerk of the architect—before I changed that I went down there to see if he was pleased to make those changes, use the round window in place of square window.

Q. Did you ask to have that change made? A. Yes, I did ask, and he asked Mr. Poysher, and Mr. Poysher was satisfied, and then we went on and put them on.

Further DIRECT-EXAMINATION by Mr. Leber:

Q. Why did you ask to change the window from a square window to a round one? A. I had this window and frames covered with galvanized cornice, and I told him if he is pleased to use those instead of the square, I put the round one on. I put it without extra charge, and before Mr. Poysher told me to go ahead he asked the architect, and he found no objection, and then he said, "All right, go ahead."

FLORIAN HABELE, sworn in behalf of plaintiff:

Direct-examination by Mr. Leber:

Q. Mr. Habele, where do you live? A. 279 Norfolk Street, corner of Thirteenth Avenue.

Q. What is your business? A. Steam-fitting.

Q. How long have you been in this business? A. I served my time in there; with the exception of eight years that I was out working for the Sprague Electric Company on electric motors, all the other time I was working in that line.

Q. All the rest of that time? A. Yes, sir.

Q. How many years all together have you been in this business? A. Well, I went in in 1885, and then I served my time, and then 1892 until 1899 I had a business in New York, and from—about five years I was in business in Newark.

Q. Are you acquainted with the moving picture theatre located at 535 Bergen Street, in this city? A. I am, yes.

Q. Is that the theatre concerning which we are talking about? A. Well what I heard here, that is all I know.

Q. You have been in Court this morning? A. I was here this morning, yes.

Q. Did you do any work in that theatre? A. Yes.

Q. What work did you do there? A. I put in the heating system there.

Q. At whose request did you put in the heating system? A. I put it in on Mr. Rizzolo's request.

Q. Did he ask you to figure on the job? A. I figured on Mr. Rizzolo's plans and specifications.

Q. You say you figured on those plans and specifications? A. Yes.

Q. I am showing witness Exhibit P-1. Will you examine the specification regarding the steam-heating plant (paper shown to witness)? A. (Examining paper.) Yes.

Q. Are those the specifications that you figured

on? A. Well, that is what I figured on, yes. I can't remember no more that I have seen any other specification or any more in details.

Q. Well, do you recognize the details? A. I can't recognize it after two years passed. I got jobs, working every day on different jobs. I didn't have it in my mind, over two years ago.

Q. Well, did you install the heating system there? A. Yes, sir.

Q. Did you install it according to the specifications?

Objected to as leading.

A. Yes, I did.

The Court: The question is allowed.

Q. Now, did you ever test that heating plant? A. I did, yes .

Q. When did you test it? A. I tested it when we got through with it.

Q. Well, when did you get through with it? A. I think it was in February or—January or February, I think; I don't know; I think it was January.

Q. Well, it was pretty cold then, was it not?

Objected to.

A. Yes, it was cold.

Q. These specifications provide that the heating plant should stand the test of seventy degrees Fahrenheit in zero weather? A. Yes.

Q. Did that heating plant stand the test? A. That will stand the test, yes.

Q. Did it stand the test when you tested it? A. It did stand the test; it was all right, according to the way it worked. I don't know how much degrees we just had; I know it was very warm.

Q. It was very warm? A. Yes.

Q. Have you been there in this place since you made the test? A. Yes, I was there about—more than a dozen times, because I done a job right across the street several weeks after, and I was there and I found that the—in the first place, they didn't attend to the heating right. That boiler was made for pea coal, and they used very big stove coal. That is one point. The second point was that I was there several times that I found the return valves closed. They are supposed to be open all the time. That made a condensation of the water in the coils, and probably put the steam heat on the bum that way. I called the attention at that time to—a colored man was at that time attending the boiler, and I asked what he is doing that for, and he says he doesn't know that; he didn't close it, he says. I watched it for several days, and I found it two or three times closed, where the supply valve was open and the return valve was closed. That condenses the water in the coils, and by high pressure it will make the pipes leak that way and spoil the system.

Q. If that plant is properly taken care of will it work right? A. If it was worked right, it is one of the best laid out boilers that could be.

CROSS-EXAMINATION by Mr. Woerner:

Q. Did you have any contract with Mr. Rizzolo as to what kind of a boiler— A. Just a verbal contract; we didn't have no paper.

Q. Just wait until I finish the question. Did you have any contract as to what kind of a boiler you should put in? A. No, not at all.

Q. That was left to you? A. Yes, just to go and went over the radiation.

Q. And the same thing is true of the radiation? A. Yes, just look over the radiation.

Q. Did you figure out how many feet of radiation were in that building? A. Sure, I have figured it. I can't remember now how much the radiation is. I got it in the book, but I wasn't prepared for it, but I am pretty sure it was pretty near a surplus of a hundred radiation, the boiler is; the boiler was either 350 or 400, something like that; I can't remember any more what it was.

Q. Do you know what capacity of radiation the boiler is? A. What?

Q. What capacity of radiation the boiler is? A. I don't know is it 350 or—it is between 350 and 400; that is all I know.

Q. And you do not know how much radiation you figured for the building? A. Well, if you give me the dimensions I can figure it out; I can figure it out and give you what you want.

(Defendants' counsel hands blueprint to witness.)

Witness: (After figuring on paper.) 430.

Q. What is that? A. 430.

By the Court: Q. What is that? A. Radiation.

Q. Square feet of radiation? A. Yes, sir.

By Mr. Woerner: Q. Now, will you tell us how you figure that? A. What?

Q. Can you tell us how you figure that? A. Well, I figure the height and the width. I can give it to you in—

By the Court: Q. What is this the boiler? A. The building.

Mr. Woerner: No, the building.

Witness: (After figuring on paper.) I make it 139 feet.

The Court: What is it that you are trying to get?

Mr. Woerner: The radiation.

The Court: What do you mean by the radiation of a building?

Witness: I want to get the radiation for the auditorium and for the room.

By the Court: Q. What do you mean by the radiation? A. By the radiation I mean, in the first place, the air space, and then the heating capacity to heat the air space to that degree.

Q. You want to find first the number of cubic feet of air in the building? A. Yes, the cubic feet of room in the auditorium.

Q. What do you find the number of cubic feet of air? A. Multiply the width with the length and with the height.

Q. And what is the result? A. The length is—

Q. I thought you had done it. Have you made the figures? A. Yes, I got—I got that wrong.

The Court: You had better do that tomorrow.

Mr. Leber: Will you do that after Court and have the figures for us tomorrow morning?

Witness: Yes, I can do that.

(By consent of counsel, the jury is sent to view the premises in question, accompanied by counsel on both sides and in charge of an officer of the Court.)

Adjourned until tomorrow, Tuesday, January 5, 1915, at 10 o'clock, a. m.

SECOND DAY

Tuesday, January 5, 1915.

Met pursuant to adjournment.
Present: Counsel as before stated.

FLORIAN HABELE, resumes the stand in behalf of plaintiff:

Cross-examination (continued) by Mr. Woerner:

Q. Did you figure out the radiation in the building? A. I figured it out just as good as I could.

Q. How many feet do you make it? A. We have got 437 feet, about 437 feet of radiation, and the boiler is 475.

By the Court: Q. What do you mean by 437 feet of radiation? A. That is the supply.

Q. You mean cubic feet of air or square feet of— A. No, that is the air to be heated, about 29,620.

Q. Cubic feet? A. Yes. That means about 374 feet of radiation required to heat it continually.

Q. Now, go back to your figures for radiation. What do you find? A. 29,920.

Q. Is that 29,920 or 29,620? A. 29,920—well, it is pretty near—and that requires a heating radiation of 374.

Q. 374 what? A. Feet of radiation.

Q. Square feet? A. Yes, sir.

Q. Square feet of heating surface? A. Yes, sir.

Q. Is that what you mean? A. Yes, sir.

Q. How do you know it does? A. Well, we figure that on account of the building being poorly ventilated and closed up, and if the heat is con-

tinuously supplied it will always keep on seventy degrees.

Q. Now, how many square feet of that heating surface did you have? A. I have all together 437, about.

Q. Now, what is it that tells you that 374 square feet will heat that air up to 0 in zero weather, if you know—a formula, or a rule, or something? How do you know it? A. You see, for instance, you wanted to heat this building here; we have to figure on the space and the square feet of space; then we figure on the windows, if there is many windows, or if there is a frame building or a stone building or a brick building, and then accordingly we divide that. If it is a frame building with many windows, we divide it into four—the air space, you know, so many square feet of air to be heated, divide that with four—a frame building with many windows or doors. If the building is made out of stone, or anything like that, with less windows and no ventilation, we make our own adjustment.

Q. Yes, I understand that all that can make a difference, but how do you get at the square feet of heating surface that will bring that amount of air up to a certain temperature? How do you know it is 374 and not 375 or 250 or 500? A. We calculate on experience; that is what we—

Q. Have you got a book that gives you any rule about it? A. They have books on that line, yes.

Q. What did you go by, any book, or your own experience? A. My own judgment.

Q. You never saw any experiment on this building in zero weather? A. No, sir.

Q. You never were up there when it was zero

outside? A. I never was there when it was zero, no.

By Mr. Woerner: Q. Now, how did you arrive at 29,920 cubic feet? A. That is about. Well, I figured on the auditorium, about 85 feet by 22 feet wide and 16 feet high.

Q. What did you figure the building itself, without your wall space and windows, what did you figure that at? A. What do you mean?

Q. Don't you take the length of the building and the width and the height?

The Court: Eighty-five by twenty-two by sixteen, he said.

A. Yes, I took 16, the height; I took the average from the center. One part is lower; on the front it is lower and on the rear it is higher.

Q. Did you figure the height of the building at 16 feet? A. Yes, sir.

Q. How do you make that out? The front of the building is 18 feet 6 inches and the rear 23 feet. A. This is the figure I got when I made my estimate on it. At that time there was no floor in yet. I was over there this morning, and I couldn't get in to measure the height; it was closed up.

Q. And what did you figure the length, 100 feet? A. I figured on 85 feet for the auditorium.

Q. And what is the width? A. The width is 22 feet.

Q. If my figures are right, I make that 30,800 feet? A. 30,800?

The Court: Well, that is arithmetic. Go on.

Q. How much did you allow for windows and doors and loss of heat? A. Well, the way I fig-

ured out was, I divide it in eight; that is on account of the doors always closed and the windows always closed, everything closed up. There is only windows on one side.

Q. In that building you have got all the coils on the south side, have you not? A. Yes, on the south side all the coils, yes; that is, with one exception. There is one coil in the toilet on the north side, too, a small one.

Q. That is the only coil on the north side, in the toilet? A. Yes. That is a 16-foot radiator.

Q. On your direct-examination you testified that pea coal ought to be used for that boiler? A. Yes, that is what the boiler is made for; the grates are made for that purpose.

HARRY DENBERG, sworn in behalf of plaintiff:

Direct-examination by Mr. Leber:

Q. Mr. Denberg, where do you live? A. 629 Bergen Street.

Q. Is that right next door to a moving picture place? A. Yes, sir.

Q. What is your business? A. Tailor business.

Q. How long have you lived at 628 Bergen Street? A. Since 1910.

Q. Do you know who owns the moving picture theatre right next door to where you live? A. I own it.

Q. You own it? A. Yes.

Q. When did you buy it? A. I bought it on the last—I bought it in August, 1913.

Q. And have you owned it since then? A. I own it yet.

Q. From whom did you buy it? A. Dr. Stahl.

Q. Did you know of Mr. Rizzolo's lien claim against this property?

Objected to.

A. Yes.

The Court: Do not answer a question when an objection is made. Where is the materiality of this?

Question withdrawn.

Q. Who runs the business there?

Objected to.

The Court: You mean at the present time?

Mr. Lieber: Yes, at the present time.

The Court: How is that material?

Mr. Leber: Well, I want to lead up to proving the different questions that are raised about this building; for instance, the heating plant. I am laying the foundation for further testimony, that is all.

The Court: Go on.

Q. Who runs the business there now? A. A fellow by the name of George H. Clancy runs it.

Q. Did you ever run the business there? A. I ran it about six months.

Q. Have you ever found any trouble with the heating plant? A. No, sir.

Q. Does the heating plant sufficiently heat up the building in cold weather? A. Well, it heats up when they put the steam up in time, but the trouble is they don't put it up in time; they put it up when the people are supposed to come in, and then they start up the heat, and they expect to get

heat that same minute. It takes a little time; they have got to start it up a little earlier and heat it up a little.

Q. If it starts up a little earlier does it heat up the building properly? A. Yes.

By the Court: Q. What kind of a heating apparatus is this? Hot air or steam or hot water? A. Steam and hot water.

Q. Steam? A. Steam.

Q. Radiating coils? A. Yes, sir. When they put the steam a little earlier—they put it up the last minute, when the people is expected to come in—

The Court: You were not asked about that, and besides you have already told us that.

Witness: Of course, when I ran it I had the steam going in time.

CROSS-EXAMINATION by Mr. Woerner:

Q. Mr. Denberg, do you know whether it will heat 70 degrees in zero weather—that boiler? A. Yes, it heats all right.

Q. Listen to the question. Do you know whether it will heat to 70 degrees Fahrenheit in zero weather? A. It will heat 70 degrees; if you put enough coal in the boiler, it will heat it. Of course, they don't put so much coal in; that is the trouble they can't heat it.

Q. When did you try it and get it to 70 degrees? A. Well, I didn't need so much heat; if I got too much heat, when the people comes in they can't stand it. I get just as much heat as I want. You don't need the boiler to go up as high as 70 degrees; there will be too much heat.

Q. Do you have to close the ventilators when

you get up too much heat? A. Ventilators—what?

Q. To ventilate your theater? A. Well, of course, in the winter time I wouldn't open up them ventilators; if I got too much heat I would open the door in the cellar, and the heat goes down a little.

Q. Can you heat that building comfortably with the proper ventilation, with the ventilators open? A. Yes; I will prove it to you.

Q. Did you have any talk with Mr. Rizzolo about this case? A. No.

Q. You did not have any conversation with him? A. No.

Q. Did you have any conversation with anybody representing him? A. No.

RE-DIRECT-EXAMINATION by Mr. Leber:

Q. You are here under subpoena, are you not? A. Yes, I am under subpoena.

Q. I forgot to ask you about the walls. Have those walls been repainted since you bought the building? A. I painted it, put on two coats of paint.

By the Court: Q. When did you do that? A. I done it on the last of July, the last July, 1913.

By Mr. Leber: Q. I thought you bought the property in August? A. I bought it in August. I didn't paint it right away; I waited.

Q. If you bought the property in August, how could you have painted it in July of that year? A. I bought it in August.

The Court: He says he bought it in 1913.

Mr. Leber: Yes, and he says he painted it in July, 1913.

Witness: 1914.

The Court: A year later?

Witness: Yes. I made a mistake. Last July, I said.

Q. Did the walls require new painting? A. Well, it did require it. Of course, they have been dried in; they was painted new, but the paint dried in, and I had them put on two coats of paint, blue paint.

JOSEPH RIZZOLO, sworn in behalf of plaintiff:

Direct-examination by Mr. Leber:

Q. Mr. Rizzolo, where do you live? A. Ninety-seven Pine Street, Montclair.

Q. And what is your business? A. Plumber.

Q. How long have you been a plumber? A. About nine years.

Q. Are you related to Mr. Saverio Rizzolo? A. No, sir.

Q. Did you do the plumbing work on the moving picture theater located at 635—I think it is 635—Bergen Street? A. Yes, sir.

Q. Did you see the plans and specifications? A. Yes, sir.

Q. For that job? A. Yes, sir.

Q. What kind of plumbing fixtures did you put into the place? A. According to specifications.

Q. Were they new or old? A. Of course, they were new.

Q. Something has been said on cross-examination of Mr. Rizzolo that there were old plumbing

fixtures put in the toilets; is that so? A. No, sir.

Q. Did you do your plumbing work according to the specifications? A. Yes, sir.

Q. Was that plumbing work all right when you got through with it? A. Yes, sir.

CROSS-EXAMINATION by Mr. Woerner:

Q. What kind of faucets did you put in the toilets, brass or nickel? A. I don't remember if they were brass or nickel now; it is two years ago.

JULIUS RAMIG, sworn in behalf of plaintiff:

Direct-examination by Mr. Leber:

Q. Mr. Ramig, where do you live? A. 610 and 612 South Thirteenth Street.

Q. What is your business? A. Roofing.

Q. Just roofing? A. Yes, sir.

Q. Do you do waterproofing? A. Well, that is all included—waterproofing and dampproofing.

Q. And are you the owner of the business? A. Yes, sir.

Q. Do you trade under the name of the O. K.—

A. O. K. Roofing Company; yes, sir.

Q. How long have you been in this business? A. Five years.

Q. Did you do any work on the moving picture place at 635 Bergen Street? A. Yes, sir.

Q. Who asked you to do the work? A. Mr. Rizzolo.

Q. You were the subcontractor for what part of that work? A. For roofing and dampproofing—

dampproofing inside.

Q. Did you figure on the plans and specifications? A. Yes, sir.

Q. I show you the specifications attached to Exhibit P-1 and ask you to refresh your memory by looking at them (paper shown to witness). Now, did you dampproof the walls of that building according to the specifications? A. (After examining paper.) Yes, sir.

Q. Was it a good job? A. Yes, sir.

Q. Did you also build the roof? A. Yes, sir.

Q. Was the roof a good job? A. Yes, sir.

Q. That is all the work you did on that building? Yes, sir.

Cross-examination waived.

HYMAN ROSENSOHN, sworn in behalf of plaintiff:

Direct-examination by Mr. Leber:

Q. Mr. Rosensohn, you are an architect? A. Yes, sir.

Q. Where do you practice your profession? A. In the City of Newark, 800 Broad Street.

Q. How long have you been an architect? A. Nineteen years, going on twenty.

Q. Are you licensed by the State of New Jersey? A. Yes, sir.

Q. Do you know Mr. Poysher, Charles W. Poysher? A. Yes, sir.

Q. Did you prepare the plans and specifications relating to the construction of a moving picture theater at 635 Bergen Street, this city? A. They were prepared in my office; yes, sir.

Q. At whose request were they prepared? A. Mr. Poysher, and a gentleman by the name of Mr. Stevenson, I think, were present.

Q. Stevenson? A. I think so; I think that was his name.

Q. Mr. Rosensohn, will you please look at the plans on the wall and tell us whether these are the plans prepared in your office relating to this theater? A. (After examining blueprint.) Yes, sir.

Q. I show you Exhibit P-1 (paper shown to witness). Was this contract and the specifications prepared in your office? A. Yes, sir.

Q. The date of that contract is October 29, 1912, is it not? A. Yes, sir.

Q. Do you know when the work was commenced? A. Yes, I have got an idea that the work hadn't started for possibly three or four weeks—I don't exactly remember, but we will say about three weeks after the contract had been signed.

Q. Do you know what caused the delay in starting the work? A. I don't think I exactly remember it.

Q. I call your attention to the date of the filing of the contract. Was there anything said between Poysher and Rizzolo after the contract was signed as to when the work was to commence?

The Court: Anything said in your presence?

Mr. Leber: Yes, I mean that; in your presence.

The Court: In your hearing.

A. No, I don't really remember it.

Q. Can you tell us who filed that agreement? A. Yes, my office filed it.

Q. Why was the agreement filed nearly a month after it was signed? A. That must have been held off on account of them not being ready to go to work.

Q. Who was not ready to go to work? A. Between the contractor and the owner; I can't tell.

By the Court: Q. You say it must have been? A. Yes, sir.

Mr. Leber: Well, do you know?

Q. Do you remember? You just told us that you did not remember the cause of the delay in the beginning of the work. Now, do you remember the cause of the delay in filing the contract? A. No, I don't remember it; I don't remember at the present moment.

By Mr. Leber: Q. Well, was the work to be started before the contract was filed?

Mr. Woerner: I object to that. The witness has testified that he does not remember.

By the Court: Q. If you remember anything that was said on that subject you may state it. A. Oh, I told the owner not to allow Mr. Rizzolo to go on and work until the contracts are filed. I tell that to every client of mine.

By Mr. Leber: Q. Well, what kept that contract off file for a month?

Objected to.

The Court: He just said that he did not remember.

Q. Do you remember anything about that, Mr. Rosensohn? A. No, I can't recall anything at the present moment.

Q. Were you to supervise this job? A. No, sir; I was to issue certificates.

By the Court: Q. What is that? A. I was to issue certificates.

By Mr. Leber: Q. Well, how would you determine when to issue certificates? A. By either going down to the job and seeing whether he is entitled to the certificate or the owner coming and telling me to issue the certificate.

Q. How many times were you on this job, if you remember? A. Oh, I happened to be about a dozen times.

Q. How many certificates have you issued on this job? A. Three.

Q. I show you certificates D-3, D-4 and D-5 for identification, and ask you whether these are the three certificates you refer to (paper shown to witness)? A. Yes, sir.

Q. I observe that two of the certificates bear date the 17th day of January, 1913. Were they issued together? A. Yes, sir.

Q. Isn't that unusual, to issue two certificates at one time? A. There is nothing very unusual when the owner hasn't got the money at one payment to hold off and let it go for the next payment.

Q. Was that true in this case? A. Yes, sir.

Q. Do you mean to tell us, then, that one of these two certificates should have been issued before the 17th day of January, 1913? A. Yes, sir.

By the Court: Q. That would be the second— A. The second certificate.

By Mr. Leber: Q. The one representing the second payment? A. Yes, sir.

Q. Well, why did you not issue the certificate for the second payment when it was due? A. I think it was the owner that came down to me; Mr. Poysher came down and told me—

The Court: I do not hear you. Speak louder.

Witness: I think it was Mr. Poysher that came down to me and told me that he was a little short of money, and we might just as well hold off this contractor from his certificate until he was ready for the next one, and then he might be in position to get some money.

Q. And did you follow his instructions? A. Yes, sir.

Q. Mr. Rosensohn, Mr. Rizzolo finished that work, did he not? A. Yes, sir.

Q. Did he erect that moving picture theater according to the plans and specifications prepared by you? A. For all appearances, yes.

Q. Well, did you examine that building? A. I examined that building at the final examination, when I had both owners—

Q. Who were they? You say "both owners." A. Mr. Poysher and Mr. Stahl, and I think Mr. Rizzolo was there. We had made an appointment—in other words, they made an appointment to come down to the building and look it over to see what claims they had against Mr. Rizzolo. I came down and looked it all over, and asked them what kicks they had to register, and they told me at that time.

The Court: Told you what?

Q. What did they tell you? A. They told me that they didn't like the decorating inside; in other words, the painting; that some of the spots showed through. I said that that wasn't such an awful great thing, as I absolutely and distinctly remember warning Mr. Poysher about the cement block business; that that would never make a good job. I also told him that this cold water

paint, naturally, any damp would come through; that the damp-proofing on the wall doesn't necessarily keep it out, so that it would show up on the decorating, on the cold water paint.

By the Court: Q. I do not understand you exactly. You mean if the painting was done according to the specifications, it would still become spotty under dampness? A. Yes, sir. He said he didn't think he had enough heat in the place, and I said that that was easily remedied as the steam-fitting man hadn't gotten his money, and if there was any trouble with it, that man stood ready to make good. As far as the painting was concerned, I asked him whether if I could get an allowance from the contractor at that time, to allow him enough money to repaint the place—that is, the side walls—then he thought that would be satisfactory.

Q. Who was that Mr. Poysher? A. Poysher and Dr. Stahl, both.

Q. Did both of them say that? A. Yes, sir.

By Mr. Leber: Q. Well, was there an adjustment arrived at these points? A. Yes, sir.

Q. What was the adjustment? A. That I was to get the contract to allow him for painting those walls, and that the steam-fitting man was to come back and fix up the steam heating plant in shape.

Q. Was that done, was the steam heating plant fixed up? A. Yes, sir.

Q. Well, how much was to be allowed for redecorating the place? A. He was to come down to my office and I was to set the prices for him.

Q. Did you ever set the prices? A. I did.

Q. How much? A. I told him that the redecorating there would certainly not cost over $75.

By the Court: Q. You mean the painter? A. No, sir; I told the owners, Dr. Stahl and Mr. Poysher, when they came to my office.

By Mr. Leber: Q. Well, were they satisfied with that? A. No, sir.

Q. What did they want? A. They thought they wanted about $500 or $600.

By the Court: Q. Are you speaking now of the painting alone? A. That is all I understood was the matter with the building until they came to my office, when I told them that was all it was worth, the painting, $75, and they said, "Oh, no, we want $500."

Q. Did they say what they wanted the $500 for? A. Yes, sir.

Q. What was it? A. They claimed a certain amount of delay in time; they said that the work wasn't extraordinary good; as a matter of fact they said it was botchy. I told them that I didn't think it was.

By Mr. Leber: Q. You say you were up there with the owners and that you looked the building over. Was that building erected according to the plans and specifications? A. It was erected according to plans and specifications, and also with some understandings that we had before we entered into the agreement.

Q. Some understanding that who had? A. Poysher and Mr. Rizzolo and myself.

Q. Regarding this work? A. Regarding some of the mechanical work on it, yes.

Q. Well, now, have you ever been asked by Mr. Rizzolo to issue a certificate—I mean a final certificate? A. Yes, sir.

Q. Have you been requested by Rizzolo to issue

the final certificate more than once? A. Yes, sir.

Q. How many times has he asked you for the final certificate? A. Possibly four or five times.

Q. Was he entitled to his final certificate? A. From all appearances with the owners; yes, sir.

Q. Why did you not issue it to him? A. Well, at one certain time Mr. Poysher came with Mr. Rizzolo to my office and asked me to issue the final certificate to him. I says, "Mr.—"

Q. Who asked you to issue the final certificate? A. Mr. Poysher. I said, "Mr. Poysher, have you got the money?" He says, "No, I have got to get it from Dr. Stahl, and he is up in the mountains." "Well," I says, "get the money." Mr. Rizzolo happened to be at that time in my office, and he didn't know what I was driving at. Mr. Poysher after that—I think it was that I called him up on the telephone, or he called me up and asked me the reason I didn't issue the certificate. I said I had a certain amount of contractors that came to the office and asked if I owed Mr. Rizzolo some money; they asked me to take care of them when the final payment was made. I told Mr. Poysher if he had the money to come down to my office, and I would settle it in my office; I then would be in a position to settle up with the other contractors that Mr. Rizzolo owed to.

Q. You mean subcontractors? A. Yes, sir.

Q. Did you ever after that see either Poysher or Stahl regarding this last certificate? A. Yes, sir.

Q. How many times? A. I think it was once.

Q. What took place? A. Why, Mr. Stahl, or Dr. Stahl, and Mr. Poysher came to my office and asked me, or told me, that I should try and get them a settlement from the contractor, allowing

them about $500. I said there wasn't enough money to pay off the contractors at that time. At that time there was a certain remark made about money owing to certain people anyway, and that Mr. Rizzolo wasn't extraordinary responsible; that I could very well do it, on account of the sub-contractors running after their money, anyway, and they would be satisfied to lose a certain amount of money. I told Dr. Stahl and Mr. Poysher both that I didn't intend to do anything of that kind; that I could possibly get them an allowance from $125 to $150, but any money over that I certainly wouldn't stand for.

Q. What was said about the certificate, if anything? A. I told him at that time that if he—

Q. Told whom? A. Told Dr. Stahl and Mr. Poysher, both; I am talking about both of them as one. I told them that if they insisted upon a settlement of that kind that I would issue a certificate just the same. He said, "You can issue it if you want to. We won't pay it anyway. You will have to sue for the money."

Q. Do you know when possession was taken of this place? A. I think it was around Washington's birthday.

Q. Do you know who took possession? A. Mr. Poysher and Mr. Stevenson—a big, tall fellow. I don't remember his name exactly, but I think Stevenson was his name; I don't remember the name.

Q. Did they run a theater there? A. So I understood.

Q. Were you ever there? A. Only once.

Q. When was that? A. Some time in the winter, between February and April, I suppose.

Q. Well, you say you were there once. Were they running a show at that time? A. Yes, sir.

Q. Well, now, Mr. Rosensohn, you said a moment ago that you told Dr. Stahl and Mr. Poysher that you would issue a certificate to Rizzolo? A. Yes, sir.

Q. And that they said you could if you wanted to, or words to that effect, but that they would not pay it, and so on. Why did you not issue the certificate to Mr. Rizzolo? A. Well, it seems Mr. Rizzolo came to me a little after that and asked me about the certificate, and I told him to go down—I told him exactly what Dr. Stahl had said, and told him he had better go down and see the owners and see whether he can't make arrangements with them. He went away. I haven't seen him for about a month or two after that, and then he came to my office and asked me for the certificate, and says he is going to start suit. I told him I wouldn't issue a certificate under those conditions; I didn't want it to appear that I was issuing a certificate on the day he was going to start suit.

Q. Was that the only reason you withheld this certificate? A. At that time, yes.

Q. Mr. Rosensohn, I call your attention to the first page of Exhibit P-1. The agreement provides for the erection of a one-story moving picture theatre. There seems to be the word "brick" typewritten there and then crossed out. Was this ever to have been a brick structure?

Objected to.

Q. Well, why was this word inserted and stricken out?

Objected to as immaterial.

The Court: I think the only question is, Mr. Leber, what the contract was.

By the Court: Q. Can you tell us whether that

erasure was made before the contract was signed? A. Yes, sir; that erasure was made before the contract was signed.

By Mr. Leber: Q. Who made that erasure?

The Court: Isn't that immaterial?

Mr. Leber: Well, I don't know.

The Court: The specifications will show what the material was to be.

Question withdrawn.

Q. Mr. Rosensohn, was there any extra work performed by Rizzolo on this job? A. Yes, sir.

Q. Do you remember anything regarding the change of the wood beams to reinforced concrete ceiling? A. Yes, sir.

Q. Will you tell us what that all is about? A. The building department in approving the plan approved the plan for less than 300 seats without being fireproof. When they had started to work and they were ready for the lobby, at that time the inspector of buildings stopped Mr. Rizzolo from work. Rizzolo and Poysher both came to my office at that time and said they had been stopped by the building department wanting to know why they were stopped. I went over to find out in the building department. Mr. O'Rourke, at that time the superintendent of building department, told me that he wanted the lobby fireproof. I asked him at that time whether it was not a hardship on the part of the contractor, because he had approved the plans the other way. He said it didn't make any difference he wouldn't let the work go on any other way; he wanted the lobby fireproof, reinforced concrete and iron beams, steel beams. To settle the affair, so as not to wait too long a time, I agreed with Mr. William P. O'Rourke, the super-

intendent of buildings, that I would make the lower floor, the floor of the lobby, fireproof; the upper floor, we will allow the wooden beams to remain, the beams of the roof, and put concrete, fill between the beams with concrete, and cover it over with cement; so that he agreed to that and allowed it. I then saw Mr. Rizzolo and Mr. Poysher, both; I told them about it; I went to the job and told them about what I had done. He asked me at that time whether he couldn't fight him in Court. I said he could, because there was no law that compelled us to do anything, but I told him that there wouldn't be enough money in it and the delay would be worth more than this. Mr. Rizzolo at that time agreed to do the work fairly cheap.

Q. Do you remember the price? A. I don't exactly remember, but it was somewheres this side of a hundred dollars; that I can remember.

By the Court: Q. You are now speaking of that whole job, the re-enforced concrete for the floor and the concrete between the beams above? A. Yes, sir.

Q. That is, all together ,you think, about a hundred dollars? A. Yes, sir.

Mr. Leber: I am referring to the first item in the lien claim, if your Honor please.

The Court: Well, the witness has spoken of both; therefore I asked him what he meant.

By Mr. Leber: Q. Well, was the work done, was it changed? A. Yes.

Q. Was that change made with your approval? A. Yes, sir; and Mr. Poysher and myself and Mr. Rizzolo were there, and I think the big, tall fellow was there, too, at the same time.

Q. You have said that Mr. Rizzolo offered to do that work fairly cheap. Was there ever any order given to Mr. Rizzolo to do that work? A. Well, that was the morning Mr. Rizzolo demanded a certain writing. Mr. Poysher said, "All right, I will give it to you when I get down to Mr. Rosensohn's office." Mr. Poysher said to me, "You can tell him to go ahead with the work; I will give him the writing when I get down to your office."

Q. Was that writing ever given? A. I don't know.

Q. Well, was it given at your office? A. No, sir.

By the Court: Q. Within your hearing was any definite price named? A. Yes; I can't remember, though; I can't remember the price that was named at that time.

Q. There was a price, but you do not remember what it was? A. Yes, there was a price, but I positively remember it was this side of a hundred dollars.

By Mr. Leber: Q. Was there any other work done not required by your plans and specifications? A. Yes, sir.

Q. What was it? A. At the time when they were ready to get the license for running the house—the license was granted to them, and I had seen Captain Gasser at that time, so that he should approve it, that within thirty days he was to change the run that started from the rear part of the auditorium out to the rear exit. The run was too steep, he claimed; Captain Gasser claimed that it was too steep, so that people might slip and fall on it.

By the Court: Q. What do you mean by "the run"? A. The lower part of the auditorium was

about 4 feet, something in that neighborhood, lower than the outside level of the yard. The exits were on a level with the yard, because the fire department—the building department—doesn't allow steps up from an auditorium.

Q. It has to be an inclined plane? A. An inclined plane.

Q. That is what you mean by "the run"? A. Yes, sir.

Q. He thought it was too steep? A. He thought it was too steep, and that would have to be fixed. So that I really guaranteed Captain Gasser myself that that would be done within thirty days' time, and he granted them a permit so that they could go on and get their license.

The Court: Well, you haven't any extra item for that, have you?

Mr. Leber: Yes, sir; that is the last item.

The Court: Yes, I see.

By Mr. Leber: Q. Well, who did that work? A. Mr. Rizzolo.

Q. How did it happen that he did the work? A. Well, he was ordered to do it. Mr. Rizzolo went over those items with me on the job, and Mr. Poysher was there; I think Dr. Stahl was there. I told them what they would have to do; they would have to retain the yard from the Chadwick Avenue side; they would have to retain the yard alongside—

By the Court: Q. You mean build a retaining wall? A. Yes, sir—dig out the yard, to protect the yard, and connect the yard to the sewer. Then he would have to dig out so as to allow for the yard, which was going to be much lower than the yard adjoining, and come around with the wall on

the other side, towards Clinton Avenue, and steps up, or a run up, just the same, an incline up, and take the inside, the entire piece out, a distance of about 10 or 12 feet, cut that all out, drop the doorways, the exits to the rear, two of them, and form new runways.

By Mr. Leber: Q. Those were your specifications, were they? A. Those were my verbal specifications of what would have to be done, what Mr. Rizzolo would have to do to lower those inclines.

By the Court: Q. What do the specifications attached to the contract show? A. That shows the way they were there.

Q. And that shows what was thought to be too steep? A. Because the rear of the ground—

Q. The slope as shown on the specifications attached to the contract is the slope that was objected to as too steep; is that it? A. No, I don't think that was it. The ground in the rear was slightly higher than in the front, or, in other words—a little bit higher than the front, so that when you come to put the exit on the rear, he had to keep the exit above the ground, so as not to have any water running down, running inside.

Q. Well, you ought to know whether this particular job that you have been talking about was a job which was in accordance with the specifications filed with the contract or whether it was a new feature. A. No, it was a new feature from what was filed. I suppose there would be no objection to the way it was filed, but they demanded it; they said it was too steep the way it was.

Q. Who made that objection? A. Captain Gasser.

By Mr. Leber: Q. Well, did Rizzolo figure on

this job? A. Yes, sir; he brought me in a written figure, and I gave that to Mr. Poysher.

Q. Do you remember what that amounted to? A. I remember, because I have heard it. It was something in the neighborhood of $263, but I personally don't remember. I remember that I handed the paper to Mr. Poysher.

Q. Well, Rizzolo did that work, did he not? A. Yes, sir.

Q. Who requested him to do it? A. I wasn't there when he was requested to do it.

Q. So you do not remember? A. No, sir.

Q. Was there ever any trouble regarding the gathering of water in the building? A. Oh, yes, they had quite an amount of water. The boys used to skate in there, or float in there, at certain times. I think it was once covered with ice, if I remember right.

Q. Now, Mr. Rizzolo has testified that he built a drain from the rear of the yard, or the rear of the building, running towards the front of the building, and connecting that drain with the sewer which was built in the front cellar—well, across the front of the building anyway. Do you know anything about that? A. Why, yes, I generally have a drain put into a moving picture place so that they can wash—when they wash the floors the water would drain off to the sewer, but in this case I don't know whether I put it in or not.

Q. Will you examine your plans and tell us whether you had provided for a drain? A. (Examining blueprint.) No, sir; no drain is provided for.

Q. Well, was a drain put in? A. Yes, sir.

Q. Who put it in? A. Mr. Rizzolo.

Q. Who requested him to put it in? A. Well, I can't remember that now; I can't remember that.

Q. You do not remember that? A. No; it wasn't ordered in my presence.

Q. The specifications provide for the bridging of the rafters. Was that done? A. No, sir; but he had—

Q. Why was it not done? A. Because I had decided at that time to support the ceiling instead. The roof beams were made of two-by-twelves, and the ceiling beams were made two-by-eight, and the span was a little bit too long, so that I asked him to cut the bridging out and use supports from the roof beams, hanging the ceiling; so that he put in just as much work in the one as he would in the other.

Q. Then that was a change in the plans and specifications, was it? A. Yes.

Q. Was Mr. Poysher consulted about this? A. Oh, yes, I gave Mr. Poysher to understand that he was getting more money's worth than he was paying for.

Q. What did Mr. Poysher say about that? A. Nothing— "Go ahead."

Q. "Go ahead"? A. Yes, sir.

Q. Was it gone ahead with according to your directions? A. Yes, sir.

By the Court: Q. Would it cost more or less to do it that way than to bridge it? A. Well, it really cost more.

By Mr. Leber: Q. Was there anything allowed Mr. Rizzolo for that? A. No, sir.

Q. I call your attention to the last page of the specifications. Will you examine it (paper shown to witness)? No, I do not know whether I

want the last page exactly. It is next to the last page, under the head of "Cast iron soil and waste pipes." A. (Examining paper.) Yes, sir.

Q. I call your particular attention to the last sentence in that paragraph, which reads, "Drain the court to sewer." Was there a court in that building or on the premises? A. Originally there was supposed to be one on the side, but Mr. Poysher and Mr. Stevenson, or that other gentleman, the one that was there, did away with it, on account of them having open air alongside of this theatre; and I think that these plans show that court where it had to be filed for the building department, so that they would have a court on the side of it. (Examining blueprint.) There is your red line running along; that shows the court; that is for the exit—this red line showing along there (indicating).

By the Court: Q. A passageway? A. A passageway, an alley for the side exits.

Q. Ten feet wide? A. No, sir, 3 feet wide.

Q. They did not have that? A. He owned the whole lot alongside of that, so that instead of cementing this alley at all he used the whole yard for means of exit, so that there was no court at that time.

By Mr. Leber: Q. Well, was the rear yard a court referred to in your specifications? A. No, sir; a yard is yard, a court is court.

Q. Well, Mr. Rosensohn, you heard Rizzolo testify that he built a drain on the rear of the building and thereafter connected it with the rear of the yard out towards the front of the building, and that that was done at the time when the building was filled with water, and done for the purpose

of carrying off the water. Does that work that he did in the building of this drain come within that or any other provision of your specification? A. No, sir.

Q. Mr. Rosensohn, did you see the plumbing fixtures when they were put in? A. I can't say that I noticed anything particular about them.

Q. Well, if they were old fixtures would you have noticed the difference? A. Yes, sir.

Q. Well, were they old fixtures that were put in there? A. Not that I remember.

Q. Your plan shows some ornamental plaster work. I have got this all upside down, or somebody did, but that does not make any difference. Instead of the ornamental plaster going at the bottom, we will imagine that it is on top. These artistic designs appearing at the top of this building—that is supposed to stand for ornamental plaster work, is it not? A. Yes, sir.

Q. That did not go on there, did it? A. No, I don't think it did.

Q. These windows are rectangular. We called them square yesterday, but I think we forgot our geometry. They are rectangular, and the windows on the building, as we saw them yesterday, are round. Will you please explain to the Court and jury the omission of this plaster work and why the round windows in place of rectangular ones? A. I don't exactly remember now. I think it was that I was asked a question whether he should allow the contractor—whether the owner, Mr. Poysher, should allow the contractor to use other kind of windows—in other words, oval windows—and I said it didn't make any difference.

Q. Who asked you that? A. Mr. Poysher, on

the job, with Mr. Rizzolo being there. I said it didn't really make any material difference at all, as long as he got his windows in. As far as the ornamental plaster is concerned, I didn't think it was so pretty as all that. I am glad it is not on.

The Court: I do not understand you.

Witness: I say I am glad that the ornamental plaster is not on, because it does not look so extraordinary nice.

Q. Well, is there a difference in value? A. No. I think he used some little ornamental plaster around the windows—that is, around the window frames, on the front, the trim around the window frames; but all this ornamental plaster, really, if he left them out—I don't remember now, I ain't been near this place in two years; but if he left them out, it is only $10 worth of ornamental plaster in there, and I never heard any kick against it, anyway.

Q. Nobody complained about that? A. No, sir.

Q. Something has been said about the doors. Your specifications provide that the doors, excepting those for the toilets, I believe, or the rear part of the building, one of the two, should be of birch veneered. What doors were put into this building? A. Well, I can't say that I remember what kind of doors were put in, but I do remember saying to the owner that he had better not put in any birch veneer doors; that I had too much trouble with them; and it was about that time that I had gotten quite a number of complaints about birch veneer doors in moving picture places, because it was so damp in there that the veneer would come off.

Q. Is that all you remember about the doors? A. Yes, sir.

Q. Well, when you examined this building on that occasion that you have already testified to, when Stahl and Poysher were there, did you look at the doors? A. I looked at—I really only looked at the things that Mr. Poysher and Dr. Stahl complained of.

Q. Was there any complaint made as to the doors? A. Nothing, with the exception of the painting and the steam heating.

By the Court: Q. Can you give us any information as to the difference in the price between the birch veneer that was to be put in and the doors that were put in? A. There is really no difference; they are about the same price. As a matter of fact, some of the cypress doors would cost a little more money, because the birch veneer—

Q. What is that? A. Because the birch veneer is continually being used—

Q. That is, at that time? A. Just about the same.

CROSS-EXAMINATION by Mr. Woerner:

Q. Do you remember my coming to your office on September 15th of last year? A. You?

Q. Yes. A. Yes, sir.

Q. Do you remember telling me at that time that the reason you did not issue the certificate was because certain deductions were to be made? A. I might have said to you that the owner wanted certain deductions; I might have given you the entire statement of the whole case, the way I have explained it here. I don't remember giving you any other statement than that.

Q. Do you remember telling me that the reason you did not issue the certificate was because cer-

tain deductions were to be made between the parties? A. Certain adjustments were to be made; I might have said that.

Q. Do you remember whether you said that or not? A. I might have said that, Mr. Woerner.

Q. And do you remember saying to me at that time that the building was substantially finished? A. No, I don't think I remember that.

Q. I beg your pardon. A. I don't think I remember that.

Q. The red pencil marks on that plan were made by the building department? A. Yes, sir.

Q. Do you know whether that was before or after the work started? A. It must have been before, because he can't start to work until he gets his permit.

Q. Do you remember of your own knowledge that you told Mr. Poysher not to start with the work before the contract was filed? A. Yes, sir.

Q. When did you tell him that? A. As a matter of fact, I told him more than that before he gave Mr. Rizzolo the job; I told him certain things about Rizzolo; I have had Mr. Rizzolo on two jobs before that; but I distinctly warned him not to allow him to dig a shovel full of dirt until I had the contract on record.

Q. What did you tell him about Rizzolo? A. I told him about certain things that I thought and certain things that actually occurred, so that if he wants to be safe from any liens that he had better not allow Mr. Rizzolo to go on with the work until the contracts were filed.

Q. Won't you just state what you did tell him? You say you told him certain things. A. I don't know. That was in strict confidence that I told

him these things. I merely told him it would be better for him, so as not to allow any other contractor or any other subcontractor to file a lien on his building, if he didn't allow the contractor to start to work until he had filed the contract.

Q. What I want to know is what you told him about Rizzolo. A. Well, if I must answer it, I will answer it.

Q. I beg your pardon! A. I say if I must answer it—Must I answer that?

The Court: If it relates to this job.

The Witness: No, it does not relate to this job.

The Court: We do not want anything that does not relate to this job, I suppose, directly or indirectly.

Mr. Woerner: No.

Q. Was it as to Mr. Rizzolo's financial standing? A. Yes.

Q. And was it with relation to the entering into the contract between Rizzolo and Mr. Poysher? A. No, sir.

Q. Now, on this job when did you issue the certificates, when the work was done or when the owner requested you to issue it? A. The owner requested me to issue those.

Q. Would you withhold the architect's certificate if he was entitled to it simply because the owner told you? A. Sometimes it is the best policy to do.

Q. Did you do it in this case? A. I did.

Q. With that second certificate? A. Yes, sir. It was not really withholding it. I merely told Rizzolo that he wouldn't get any money; what was the use of issuing a certificate?

Q. That is on the second certificate that you are

talking about? A. That is on the second certificate; yes, sir.

Q. You do not know whether he was paid in advance on some of those certificates, do you? A. Oh, yes, I do.

Q. Was he? A. Yes, sir; I know he got his money in little sums, and I know that I warned the owner against that, too.

Q. And the reason you did not issue that certificate earlier, even though Mr. Rizzolo was entitled to it, was because Mr. Poysher did not have any money? A. Well, there was something else to it, too, besides not having the money. He had to pay, I think it was, the cement man a certain amount of money, and he didn't have the entire amount and he said if I had issued the certificate the cement man would be entitled to get his money, and as it was he could string him along for another week or two, until he is entitled to the third payment, and then they can straighten all things out.

Q. You say you did not supervise the work? A. No.

Q. You merely went there when certificates were wanted? A. Yes, or when any trouble arose.

Q. You did not figure out the radiation of the boiler or the— A. No, sir. In cases of this kind all I do is when the owner—for the final certificate I merely go to the job and ask him what complaints he has got to register, see if I can remedy it for him, and then settle up the affairs between the owner and the contractor.

Q. Will you say that a cement building cannot be made so that the paint will not spot?

Mr. Leber: I object to that. I suppose

the question is whether under these specifications that result would be forthcoming.

The Court (After argument): It is too broad.

Q. Under the specifications prepared by you for this building, was the paint liable to spot in the building if the work was properly done? A. Without a question of doubt it would spot. One coat of dampproofing is not enough for brick, let alone cement block.

Q. I will ask that question again that I asked before. Can a building be made waterproof so that the spots will not show on the paint?

Objected to.

Mr. Woerner: This comes under the painting specifications. The specification calls for "Damp proof all back walls with R. I. W. damp proofing." Now, it does not say so many coats, and I think if two coats were necessary he would have to put on two, and if ten were necessary he would have to put on ten. If those blocks can be made damp proof, I think it was the duty of the builder to do it.

By the Court: Q. Do you understand that there is any provision in the contract as to the number of coats? A. Yes, sir.

Q. Where is it? A. Well, we specify when it is necessary, one or two coats.

Q. Where does it say that? A. it says, "Damp proof the walls." That would mean merely one coat.

Q. One coat of what? A. Damp proof.

Q. "Damp proof all walls with dehydrogen damp proofing." What is that, a kind of paint? A. Yes, sir.

The Court: Then it goes on, "All walls and partitions to be plastered one coat of Adamant plaster in the regular manner." Well, the question is whether that means one coat or as many coats as are necessary to keep out the damp. What do counsel say about that?

Mr. Woerner: Does not your Honor think that this means to make the walls damp proof?

The Court: That is your view. What does Mr. Leber think?

Mr. Leber: If there is any ambiguity about the meaning of this specification, I suppose the man who drew the specification is the proper witness to testify as to what it means. Now, I think that there can be several constructions placed upon this sentence. It strikes me as if it might be ambiguous. I have no objection to Mr. Rosensohn testifying to what that means.

The Court: Is it not a question for the jury? Ambiguities go to the jury.

Mr. Leber: They do, but I do not think it is improper to call a witness to explain the ambiguity.

The Court: I think it is a question for the jury. The Court construes written instruments, but the Court does not assume any responsibility about ambiguities where they arise from the use of language. It is a question for the jury.

Mr. Woerner: What is the ruling of the Court on the question asked?

Mr. Leber: Whether it is possible to make a building waterproof.

The Court: Well, that is rather broad. What you want to know is whether the method of keeping out damp as specified under the head of damp proofing can be so employed as to keep out damp, and what is necessary to do in order to reach that result. That is what you want to know, is it not?

Mr. Woerner: Yes, I will try to reach that.

By Mr. Woerner: Q. Do you know how many coats of R. I. W. damp proofing there were on the wall? A. I don't think there is over one.

Q. Did you see that one put on? A. I saw it on before it was plastered, yes.

Q. Would two or three coats prevent the walls from becoming damp? A. Not on the inside.

Q. What would be necessary to be done? A. Coat the outside with two coats and one coat inside; that would cover it.

Q. Now, as to the final certificate. What is the real reason that you did not issue that certificate? A. That was the real reason; Dr. Stahl and Mr. Poysher—in other words, Mr. Poysher came to my office first and asked me to issue the final certificate to Rizzolo. At that time I asked him if he had the money. He said he was going to get it from Dr. Stahl, who happened to be up in the mountains. I said, "When will you get the money"? "In a couple of days," he said. I said, "All right, when you get the money come down to the office, and I will settle up your claims." The reason for my not issuing the certificate at that time was, first that he did not have the money, and, second, there were these subcontractors on the job. The next

reason—I think Mr. Poysher came to my office after that, and I asked him about the money, whether Dr. Stahl—or I went over to his place myself, I think it was; I went down there on that afternoon and saw—I asked him why he didn't come around with the money, because the subcontractors had been coming down to my office pretty near every other day, asking for their money. He said he had not heard from Dr. Stahl. The next thing I heard was Dr. Stahl and Mr. Poysher coming around and putting in a complaint to me about a certain settlement—no, I met them at the building, and after that meeting at the building they came to my office, and that was the time that I told them that I could possibly get them $125 to $150 as the loss, and that would be by the subcontractors, and he thought at that time he wanted $500 or so, and I wouldn't stand for anything of that kind. That is all.

Q. But the final result was— A. That he went out of my office absolutely—I won't say that I said to him one way or the other, but it was very unpleasant; I said, "I won't stand for any work of that kind at all. Now, you can get out and do what you please." I said I would issue the certificate—

By the Court: Q. You said you would? A. Yes, sir—and he said to me, "If you issue the certificate, I won't pay it. I am going to take that to Court, anyhow." Then I said to Rizzolo after that—I said to Dr. Stahl and Poysher—I said to Rizzolo, "You get after them and get your money." I hadn't heard from him then until the day before or the day after he started suit; then he came after his certificate, and I said I wouldn't give it to him then.

By Mr. Werner: Q. But finally after this unpleasant interview Dr. Stahl and Mr. Poysher told you you could issue the certificate if you liked; is that right? A. Right at that meeting, yes—"You can issue the certificate; we will never pay it."

Q. And the reason you did not issue it was because of stop notices? A. No, sir.

Q. Did you not testify to that on direct-examination? A. No.

The Court: No, he did not say anything about stop notices.

Q. Or claims of subcontractors? A. I had promised the subcontractors that I would see that they got their money, and I wanted to see that settlement take place in my office; that was the reason.

Q. And after they told you to issue the certificate, the reason you did not issue it was because you wanted to see these people get their money? A. No, at the time Dr. Stahl and Poysher said, "You can issue the certificate"; that was not the time, no. The time when Poysher was down to my office and Dr. Stahl was up in the mountains, that was the time I didn't issue the certificate, and Mr. Poysher told me to issue it to Mr. Rizzolo, and I said, "Have you got the money"? And he said, "No, I have got to get it from Dr. Stahl." And I said, "Get the money and come to my office, and then I will settle you up."

Q. After the last time when they told you to issue the certificate and you would not do it, what was the reason you did not issue it then? A. I told Rizzolo a couple of days after that to go over and see Dr. Stahl and Poysher, and see if he can't get along without a law suit, and he went away. He

stayed away possibly a month or a month and a half or two months, and I haven't heard from him and I thought really he had settled up, until he came to me and said, "I have given the case over to Mr. Leber; I want the certificate"; and I said, "I can't issue no certificate now."

Q. What was the reason you could not issue it? A. Because I didn't want it to appear that I was issuing a certificate for a case, that was all.

By the Court: Q. Well, do you not think that you assumed responsibilities which did not belong to your duties as architect? Do you not think that all you had to do as architect was to satisfy yourself whether the payments were due and give certificates? It was very obliging to you to look after these other men. A. I always do.

Q. Do you think that was a good reason for not issuing the certificate? A. Well, Mr. Poysher said he didn't have the money, and I wanted to see those people get their money. As a matter of fact, I felt sorry for them.

Q. Well, really, do you not think that was not any of your business? A. No, I don't. I have been trying to arbitrate all these affairs; I very seldom let them go to Court.

By Mr. Woerner: Q. For how much of a certificate did Mr. Rizzolo ask you, what amount? A. Final certificate and extra work.

Q. What did the extra work cover? A. Oh, he had a bill at that time.

Q. You do not recollect the amount? A. No.

Q. Now, the change from the wood beams to reenforced concrete ceiling. Was that required by the building code of the City of Newark? A. No, sir.

Q. Who ordered that change? A. Mr. Poysher and myself— Originally?

Q. Yes. A. Mr. Poysher.

Q. Who is he? A. The building superintendent.

Q. Does not the building code require courts for moving picture theatres? A. Yes.

Mr. Leber: I do not suppose that is the proper way to prove what the building code shows, if your Honor please.

The Court: The best way to show that is to put the code in.

Mr. Woerner: I will offer this for identification (producing pamphlet).

Q. Can you tell me whether that is the building code of the City of Newark (pamphlet shown to witness)?

Mr. Leber: I object to that. The witnes is not competent to prove that.

The Court: The witness may answer whether he knows.

A. Yes, sir; this is the building code.

Q. Will you see whether that provides for courts for moving picture theatres? A. I don't think they had a code at that time for moving pictures, only for theatres, under "Theatres." You must have looked that thing up before, haven't you?

The Court: Well, you can have stricter proof on that subject, if necessary.

Q. Did not the clause in the specifications "Drain the court to the sewer"—did not that mean drain the rear and sides of the building? A. No, that merely means the side of a building; that means the court of a building; that does not mean the yard. If I wanted to drain the yard, I would call for draining the yard.

Q. Is not the court the means of exit from the rear? A. No, the court is the means of egress as well as means of light for the side. There are different kinds of courts.

By the Court: Q. That is the little three-foot passageway along the side (indicating on blueprint)? A. Yes, sir.

By Mr. Woerner: Q. Now, there is no method of getting from the rear to this court that is shown on the plan except through this back door, is there, or these two runways? A. Through the back door, yes.

Q. And if the court is a method of egress and ingress, would it not cover the rear? A. No, it would not; the yard would cover the rear, while the court would be covered on the side.

Q. And you would limit the definition of a court to means of egress on the side? A. Yes, I would limit the definition of the word "yard" from the rear line of the building to the rear of the lot. The court means on the side of the building. It may be a court all the way through, or it may be a street court, or another court; but a yard is entirely different from a court.

Q. Well, even at that, would not this "Drain the court" mean to drain the side of the building? A. Yes, the side of the building, but they decided to change that detail by having the open air. They owned the whole lot alongside of it. I only showed the court for the benefit of the building department, to show that I had means of egress on that side. They decided to throw out the three-foot alley, not to do anything with that alley at all, but occupy the whole lot as the means of egress.

Q. Did you not subsequently have a court, anyway? A. No, sir.

By the Court: Q. What was the value of that court there? A. Only to show the means of egress.

Q. That is the value of that red line, then? A. Yes, sir.

Q. What was under foot in the court? A. There wasn't anything, no provision there.

Q. Just the dirt? A. Just the cinders that was there.

By Mr. Woerner: Q. Do not the rules of the building department provide that where you eliminate the north court that the court is to be put in the rear? A. No, it does not do anything of that kind; it merely gives me a chance to do away with a court on the other side, if I give egress on the other side. In other words, if I can show them enough exits from the front, side and rear, I can do away with the alley on the other side, that is all.

Q. There are some of the veneered birch doors on there now, are there not? A. Birch veneered?

Q. Yes. A. I don't know.

Q. When you inspected this building for the final payment, you say, you only looked at the things complained of? A. That is all.

Q. Now, this bridging. Do you say that it was not necessary or that there was a change in the rules of the building department? A. I didn't say anything of the kind. I merely said, as far as the bridging was concerned, that he did more by holding up the ceiling beams from the roof beams; instead of putting the bridging in through the tier on the roof, he supported the ceiling beams from the roof by means of the hangers.

Q. And did Mr. Poysher consent to that? A. Why, sure.

Q. Why do you say, "Why, sure"? A. Because he was the one that came around about it?

Q. Did he ask you to have that change made? A. Yes.

RE-DIRECT-EXAMINATION by Mr. Leber:

Q. Mr. Rosensohn, just one question. You say that when you went up there on the occasion when Stahl and Poysher and Rizzolo were present that you simply examined the things that were complained of. Did you not examine the rest of the building at all? A. No; just casually looked around, that is all.

The Foreman: Your Honor, one of the jurors would like to ask the witness a question.

The Court: You may do so.

By Juror No. 2: Q. I noticed on your visitation to the premises spoken of, at 635 Bergen Street, that the ornamentation of plaster work was left off. The question that I want to ask is this: The change in the windows—the windows, as I noticed were metal, or metal cases. How about the cost? Would the change in the windows offset the elimination of the plaster work? A. Yes, without a question of a doubt the metal windows would cost more than the wood, and that would offset the ornamental plaster; but I do not know whether that was done for that purpose, to offset the ornamental plaster.

PHILIP SCHILL, sworn in behalf of plaintiff:

Direct-examination by Mr. Leber:

Q. Mr. Schill, what is your business? A. Glass, sash and doors.

Q. Do you manufacture that? A. No, sir.

Q. You mean that you supply these commodities to buildings? A. Yes, sir.

Q. Did you supply the sash, doors and glass on the theater building at 635 Bergen Street? A. Yes, sir.

Q. What kind of doors were supplied there? A. First I took all birch veneer doors there on the job, and then I was told to leave the inside doors, the birch, that was delivered there, and all the doors that lead outside I should take it back and bring pine instead of them.

Q. Who told you to do that? A. Mr. Rizzolo.

Q. Were any persons there besides Mr. Rizzolo? A. Mr. Poysher was there at that time.

By the Court: Q. I did not get everything that you said. What kind of outside doors did you put in? A. Pine.

By Mr. Leber: Q. You say Mr. Poysher was there? A. At that time; yes, sir.

Q. Did he have anything to say about that? A. No, sir.

Q. Did he object to it? A. No, sir.

Q. Did you put pine doors on in the front? A. Yes, sir.

Q. What is the difference between a pine door and a birch veneer door so far as the cost is concerned? A. Pine costs more than birch.

Q. Which is more serviceable for an outside door? A. You can't use no birch veneer door

outside, because the veneer will come off as soon as it will get wet.

Q. So that you say for the inside of the theatre you used birch veneer doors? A. Yes, sir.

CROSS-EXAMINATION by Mr. Woerner:

Q. What kind of pine doors did you furnish for outside? A. White pine.

Plaintiff rests.

Mr. Woerner: If your Honor please, I desire to move for a non-suit in this case so far as Dr. Stahl, builder, is concerned, first, because there is no testimony to connect him as being responsible for the work. There is some testimony that he was around there and he asked Rizzolo why he was not working faster, but it does not seem to me that there is sufficient testimony to bind him.

Second, because of the general rule that an undisclosed principal cannot be held on a contract under seal executed by an agent in his own name. It is the firmly established common law doctrine that action can be had on a sealed contract only against those whose names appear on it.

So far as Charles Poysher, owner, is concerned, while I do not think that is material under the Mechanics' Lien Law, there is no question but what under the pleadings and proofs in the case he was not an owner at the time the lien claim was filed, and I think for that reason he ought

to be stricken out, in order to clean up the record.

Third, that no lien claim action can be maintained in this case, because the bill of particulars is radically erroneous in not specifying or enumerating the kind or amount of labor performed or the materials furnished and the prices at which and the times when the same were performed and furnished. Now, I claim an inspection of this lien claim does not show what was done, or does it show the time it was executed. As to the extra work, it does not state the amount of the labor performed, nor how many days' work was done, nor what the labor was for, nor what materials were furnished. It does not separate the material from the labor, nor does it state the time of performance. That not appearing in the lien claim, there is nothing on the face of the lien claim to show that it was filed within four months after the last work was done or that the summons was indorsed at that time.

Fourth, I claim that the lien is void because of wilful and fraudulent misstatements in inserting the names of Poysher and Stahl as builders.

As to the time. If we eliminate the extra work, the lien claim was not filed within the proper time. The last work under the contract was done the last of February.

Mr. Leber: Let me correct you. The rail was put in in April.

Mr. Woerner: I do not accept the correc-

tion, because he testified positively that it was the last part of February.

The Court: There was something said about the railing being put in in April, I think.

Mr. Woerner: Fifth. The fifth ground is failure to produce the written certificate of the architect to the effect that the fourth, or final payment of $1500, and the extra work, had become due, as provided for in said contract, or to show that the same was fraudulently withheld. I think it distinctly appears that the final ground taken by the architect for not issuing the certificate was the fact that he did not want it to appear as though he was interested in the case. I do not think that is fraud. That was the final and last statement that he made for his refusal to issue the certificate.

Now, as to the two certificates. I would call attention to the fact, as to the certificate required for the extra work, that the reason set up in the reply is waiver, not fraud. Fraud is set up as to the certificate of the architect for the contract work and waiver as to the certificate for extra work.

(Counsel argue.)

Plaintiff's counsel asks leave to amend the lien claim and the complaint in so far as it is necessary to call Poysher the builder and Alfred Stahl the owner.

(Counsel argue further.)

Mr. Leber: I ask that I be permitted to amend the lien claim so as to insert oppo-

site the last item of $253 the date April, 1913.

Mr. Woerner: I would object to any amendment at this time, first, on the ground of notice, and, second, on the ground that the property has been sold. There is a different owner, who is undoubtedly entitled to notice, and there may be different mortgages, for all we know; so that I do not think we can amend a lien claim affecting property of other persons without notice.

Mr. Leber: There are no other persons before this Court.

Mr. Woerner: The evidence shows it.

Mr. Leber: The evidence shows that the drain was erected in February or March, 1913, and I would ask leave to say February or March, 1913—to insert that in the lien claim; and the testimony further shows that in February or March the other extra work was done, and I should ask leave and do ask leave, to insert those dates in the lien claim. Certainly no surprise can be claimed at this time.

Mr. Woerner: I would like to say one thing on the amendment. I am not prepared to prove the time or the dates of these different items, and as to that I would plead surprise, if an item is to be put in front of each article furnished. There is no proof of it, in the first place. I think we would be entitled to an opportunity to find out what dates they were furnished. So that I do not think there ought to be

any amendment at this time. Also for the other reasons that I stated.

At 12:50 o'clock p. m., the Court takes a recess until 2 o'clock, p. m.

After recess.

The Court: Now, tell me what your motion is.

Mr. Leber: Under the statute, it is necessary that I reduce this into writing and that your Honor subscribe it, which I will do before the case is ended. That is the provision of the act of 1911.

In the first place I desire to amend the lien claim so that Charles W. Poysher be designated the builder and Alfred Stahl as the owner, in such places as may be necessary. I think your Honor passed on the $1500 payment, so that we do not have to amend anything there. The first item of extra work, for $80, done in the month of February or March, 1913, by agreement between the builder and the contractor, the claimant. The same dates and the same words to be prefixed to the item of $50, being the second item of the extra work. The same dates and words to be prefixed to the third item, of $15. The same dates and the same words to be prefixed to the fourth item. The same amendment to be made to the item called, "Extra work for cellar drain from rear yard to cellar, $68." The same words and date to be prefixed

or added to the last item in the bill of particulars.

I do want to call your Honor's attention that Mr. Woerner called our attention to the fact that there was a variance between the date stated in the complaint as to the date of the finishing of the work and the evidence. We have said in our complaint that we finished the work on or before the 30th of December, although the lien claim says that we did the work on the 26th of April. In order to have the record as perfect as we possibly can make it, I ask leave that we change the date in the complaint from the 30th of December to the 26th of April, 1913.

The Court: Mr. Woerner, I deny your motion to non-suit.

Defendant's counsel objects to this ruling of the Court.

Objection noted as ground of appeal.

The Court: I also grant the application to amend made by Mr. Leber.

Defendant's counsel objects to the ruling of the Court.

Objection noted as ground of appeal.

Mr. Woerner: I would like to add one more ground for non-suit under the amendment made, and that is, even as amended, the bill of particulars is not sufficient in not stating the dates in February and March.

The Court: Certainly. I will note your objection to that.

Defendants' Counsel objects to this ruling of the Court.

Objection noted as ground of appeal.

HARRY GEISER, sworn in behalf of defendants:

Direct-examination by Mr. Woerner:

Q. Mr. Geiser, what is your business? A. Plumbing and heating contractor and engineer.

Q. How long have you been in that business? A. A little over twenty years.

Q. In the City of Newark? A. In the City of Newark.

Q. And where did you learn your trade? A. In the employ of the same concern that I am with now, Theodore Geiser & Sons.

Q. Did you examine the heating plant and plumbing work at 635 Bergen Street, the moving picture theatre in question in this suit? A. I did.

Q. With the plans and specifications? A. I looked at the plans and specifications prior to visiting the building to make myself acquainted with conditions.

Q. And did you find the plumbing and heating work in accordance with the plans and specifications? A. Not at all, in my opinion.

Q. What did you find? A. So far as the plumbing went, in the first place, the specifications, as all specifications, called for a workmanlike job. I should say the job was far from workmanlike in a great many respects. I should say particularly the case where the specifications called for a syphon jet closet in the toilet rooms, an inferior grade of toilet, or pattern, I should say.

By the Court: Q. Wherein does the inferiority consist? A. In the pattern, in the bowl. The specifications called for a syphon jet closet and a wash-down closet had been installed.

Q. You had better have the specifications before you, and then you will not make a mistake. Just find that particular item (paper shown to witness). A. "Furnish and put up in toilet compartment a syphon jet porcelain closet with hardwood seat, tank, chain and pull complete."

Q. Now, you say they put in some other kind of closet? A. Yes, your Honor.

Q. What other kind was that? A. What we term a wash-down closet.

Q. What is the difference? A. The difference is that the wash-down closet has a smaller bowl. The construction of the closet is that the outlet is to the back of the closet, instead of in the center, as in the syphon jet. The motion of the closet—the flushing of the closet is controlled by the force of the water rather than by the action of a jet of water through a syphon jet. One closet is a syphon closet; the other closet is simply a forced wash—that is, an improved washout closet.

Mr. Woerner: What else did you find, Mr. Geiser.

Q. While you are on that, just tell us something about the relative prices of the two articles, if you know them. A. Well, so far as the specifications go, it leaves the question of price to a large extent out, and I should say the question of price, that the specifications call for between the syphon jet and the wash-down closet, the design that was placed in here, would perhaps amount to twenty-five per cent or thirty per cent.

Q. Which way? A. The syphon jet would be more expensive.

By Mr. Woerner: Q. What else did you find, Mr. Geiser? A. I didn't seem to find a water

meter located in the cellar, that it calls for in the specification. It calls in the specification, "At the foot of the water supply furnish and put in a water meter as required."

Q. Is there one in or not? A. A water meter should be placed at such a location that the—

Mr. Leber: I object to that. I think the witness ought to answer the question.

Witness: I couldn't find a water meter.

By the Court: Q. That is, in the cellar? A. In the cellar; I couldn't find a water meter in the cellar, your Honor.

By Mr. Woerner: Q. Did you look in the place where it is usually placed? A. I looked for the water meter at the point where it would be required by the water department to have a meter placed.

Q. What else did you find? A. Also "Furnish and put up in each toilet compartment an iron enamel sink on brackets, with necessary nickel-plated faucets, etc., complete. Furnish and put up urinal Standard lipped-shaped, with necessary slate partitions." I find in the case of the sinks it says, "Furnish and put up in each toilet compartment an iron enamel sink on brackets, with necessary nickel-plated faucets, etc., complete. Furnish and put up," and so forth; but whether it would be construed, in my estimation and my practice, I would not consider it as complete because the sinks were hanging from the wall; they had not been properly supported to the wall. The faucets—I don't know whether those faucets were nickel-plated or not, but I wouldn't pass on them for good nickel-plated faucets.

By the Court: Q. In what room was this? A.

In the toilet room. In the matter of the urinal, it called for a Standard lipped pattern urinal in a slate stall. I find that the contractor had installed what we call a porcelain stall urinal.

Q. What is the difference? A. The porcelain stall urinal is a one piece urinal, cast in porcelain, with the outlet at the floor. The urinal called for was a lipped urinal, suspended from a slate partition, with sides and with trap connections to the wall.

By Mr. Woerner: Q. Anything else as to the plumbing work? A. The specifications—I have not looked over them— I noticed in going over the building, in the rear of the building, what I should term the court, on which the two rear exit doors open, a grating, a small grating, that was intended perhaps as a bell trap to drain the rear court. This simple improvised grating placed over the opening of the pipe, having no bell trap or no means of obstructing or keeping back the sediment and dust and dirt that would settle around and gradually fill up that pipe, to me was incomplete.

By the Court: Q. What do you find called for in the specifications? You see, we want to know what was furnished and what was called for. A. Simply drain the court sewer; that is the specifications.

Q. "Drain court to sewer," is it not? A. "Drain court to sewer."

Q. It does not call for a grating? A. No. We would in the plumbing business assume—I should, and I believe that any man who was versed in the art of plumbing—in order to drain a certain place

to a sewer, should assume it would necessitate all the fittings required to properly do so.

Q. You say this was a poor grating? A. Simply a little strainer. I also noticed in front of the moving picture screen a similar small grating.

By Mr. Woerner: Q. Now, as to the heating work, did you examine that? A. Yes.

Q. What have you to say as to whether that complied with the plans and specifications? A. (Referring to paper.) It seems to be a very small paragraph, your Honor. "Steam Heating: Building to be heated to 70 degrees Fahrenheit in zero weather." No, I didn't find the conditions that would warrant the fulfilling of the contract.

Q. Will you explain to the Court and jury why it does not comply with the specifications? A. I found on my visit to the building that on the south wall of the auditorium, part of the perpendicular wall, suspended a coil 75 or 80 feet long of pipes. When these pipes are filled with steam, one foot of pipe is equal to approximately one-half foot of radiator surface; the ten pipes would be equal to about 350 to 400 feet of radiator surface in the auditorium. I found in each of the toilet rooms—I know I found in the ladies' toilet room—I doubt whether there is any in the gents' toilet room—in the ladies' toilet room I found one section, two-column steam cast-iron radiator containing 16 feet, and in the booth, I think, one three column—however, in the entire building not more than 450 square feet of radiating surface, and then downstairs a steam boiler with a rated capacity—the rated capacity is what the manufacturers of the boiler claim the boiler will do

under certain conditions, with allowances made—a boiler rated in the catalogue at 425 feet—

Mr. Leber: I object to that. I do not think the witness can tell what that boiler is rated at in a catalogue. He is telling us what it is rated in a catalogue.

The Court: Perhaps not from memory. The catalogue might be produced.

Witness: Your Honor, to my best knowledge, and gentlemen of the jury, I was going to proceed, to my best knowledge and practice in the past twenty odd years—

Mr. Leber: Well, now—

The Court: That is all right. You may go on in that way.

Witness: I do not believe the boiler—because boilers of such construction in the past have not performed the duty—and I don't believe that the boiler placed there is equal to a capacity of 425 pounds, because they have not upheld themselves— a boiler with a firepot of the size and construction on such work of that character.

By the Court: Q. Do you remember the make of this? A. The make of boiler?

Q. Yes. A. Yes, this is an Abendroth boiler, a round Abendroth boiler. I made some rough calculations as to what would be required to heat the building. From my experience, I could see at once that the building was not adequately taken care of for a building of that type.

Q. Did you calculate the— A. The amount of heating surface required, radiation, and also size of boiler.

Q. The amount of air to be heated? A. Yes, your Honor.

Q. The cubic feet? A. Yes, your Honor.

Q. What did you make that? A. I made the cubic feet in the building 45,596 cubic feet. The method which I used to figure—there are various methods—in proportion the amount of radiation required for a room—we have handbooks that will give us data, and from experience and tests that will give us numerous tables from which to work, but I have selected a table called the Mills table, which is very simple and it is very readily understood. The contents in this table are as follows: That a foot of radiation in a building will heat, when all of the heat losses are taken care of, 200 cubic feet of contents. To take care of the heat losses through the walls, ceiling—that is, the roof, the glass, skylights, and so forth—we have figured, for instance, through glass there is an actual loss of one foot of radiation for every two square feet of glass surface; for instance, there is a loss through a good constructed 12-inch thick wall a foot of radiation for every square foot of wall; through a wooden roof with slag covering a loss, as near as we can estimate, of one foot of radiation to 15 square feet of roof. After that has all been figured and tabulated, we are then to take into consideration the general construction of the building and the usages of the building. A moving picture house, where the occupants are moving in and out more or less, opening the doors and leaving out a great deal of hot air and leaving in the cold air in its place, will require more heat than a room that is open at a certain period and the doors are closed for a long period. I proportioned that up, and it would be 902 feet as a minimum.

By Mr. Woerner: Q. That is, that would be required? A. That would be required to heat this building 70 degrees in zero weather.

Q. Do you construct all your heating plants on these formulas? A. More or less so. I use this formula on seventy-five per cent of my work, because it is quick, and I found it was accurate. I use the other formulas, but it checks up very closely with other formulas.

Q. What is meant is, when you get a job that is the only way you have of estimating, is it not? A. Yes, sir.

Q. Now, as to the workmanship. Did you find anything with regard to the size of pipes—were they sufficient? A. The job seemed to me to be very poor; the distribution of the radiation seemed to be left out of the question; it seemed to me as though it was put in the easiest possible way to install a heating plant, without any consideration as to the drafts or the cold corners of the building. The radiation was placed on the south side of the building, running from east to west, with conections on the eastern side. The supports were, to my mind, rather scanty. It seemed as though the pipes were likely to sag and become pocketed, hold the water and air, preventing the entire coil from heating the lobby, which, in my estimation is one of the principal parts to be taken care of—simply without radiation altogether. My reason for loading up the lobby—you will notice in a theatre they always have considerable heat in the lobby, the doors opening and closing so as to blow in the air, so that when anybody goes in and out with the doors open there will be warm air instead of cold air. They seem to be left out of there altogether.

Q. Are there pipes of sufficient size leading from and to the boiler? A. The pipes to the radiators are of insufficient size and they are not drained; they are improperly drained. The pipe leading to the one in the toilet room, and, I think, to the ticket booth, rises from the boiler up to the radiator, and no return to it; it is of insufficient size to properly feed the radiator with steam, let alone take off the water. The result should be, and has been, in my practice, that when a little pressure was exerted on the end of the pipe that it would form what we call a syphon, and fill the radiators with water.

Q. What kind of coal is the proper kind of coal to use in the boiler that is in that building? A. It is very wide—there are very wide opinions on that question. I personally should say that either stove coal, nut coal or pea coal. The only coal that I would bar for a small furnace of that kind would be furnace coal. It is very seldom used in a steam boiler.

Q. Either one can be used, do you think? A. Either one can be used. It is a question of the matter of firing, the time. The pea coal they would have to fire much more often than they would with the nut coal or the stove coal.

Q. What would be necessary in order to put the heating in condition with the specifications in that building? A. It would be necessary to take out the entire plant.

Q. What would you do then? A. Then we would make what we call a layout of the building, and figure out the points of our greatest heat losses, and load those points where the greatest heat losses occur with radiation. We would take

and heat the entrance—the lobby, you might call it—placing two radiators in there, one on each side of the doors, and heat the toilet rooms. It would be necessary to run a main either down each side or around the building in order to take care of the heating of the building property and draining it off, or it would be necessary to take the boiler out entirely, and it would be necessary to put in a flue larger than it has now to accommodate the boiler.

Q. That is, you would have to put in a larger boiler? A. Yes, sir.

Q. Would the chimney carry a larger boiler? A. No.

CROSS-EXAMINATION by Mr. Leber:

Q. When were you up there, Mr. Geiser? A. I visited the building in April, 1913, to the best of my knowledge at this time, the first visit I went to it.

Q. How many visits have you made there? A. Made a visit there last week.

Q. You say you examined this heating plant in April, 1913? A. I did.

Q. Can you tell us the exact day? A. I cannot.

Q. And at whose request did you make the examination in April, 1913? A. I believe it was Dr. Stahl's.

Q. Did he tell you that he wanted your expert opinion as to this heating plant? A. He wanted me to let him know why the plant would not take care of the building.

Q. And did you let him know? A. I told him the plant wasn't adequate to take care of the building.

Q. I did not ask you that. A. Yes.

Q. Did you let him know? A. Yes.

Q. At whose request did you go there last week? A. I went there at my own convenience; I was called—

Q. I did not ask you at whose convenience you did it. At whose request did you go there? A. I wasn't requested.

Q. You went there voluntarily? A. Voluntarily.

Q. And you had not been there since April, 1913? A. No.

Q. Had you seen Dr. Stahl since April, 1913? A. About two weeks ago, I guess, when this trial first started.

Q. How did you know that this trial started two weeks ago? A. Dr. Stahl came and saw me before the trial would start and engaged me to give expert testimony.

Q. Did he agree to pay you for your expert testimony? A. Yes.

Q. So you are being paid for this evidence, are you? A. I am.

Q. Did you have a conference with Mr. Myers, the architect sitting at this counsel's table? A. Nothing particular.

Q. I did not ask you whether you had any particular conference with him; I asked you whether you had any conference with him? A. No.

Q. You did not? A. No conference.

Q. The specification as to the heating system is very meagre, is it not? A. It is, very.

Q. You would not figure on specifications of that kind, would you? A. Why, yes, we have figured on specifications of that kind.

Q. You have? A. Yes.

Q. In how many cases have you figured on specifications such as these? A. Well, that is a pretty hard question to answer; after twenty-odd years experience I could not tell you that.

Q. There is not anything in these specifications as to the size of the boiler to be used, is there? A. No.

Q. There is not anything in the specifications as to where the pipes should go, is there? A. No.

Q. Is there anything in the plans to indicate it? A. No.

Q. Is there anything in these specifications to show the width of the pipes to be used? A. No.

Q. So that all that is required by these specifications is that a heating plant should be instituted sufficient to heat up to 70 degrees Fahrenheit? A. Correct.

Q. As an expert, would you not say that that largely leaves to the discretion of the contractor as to where to place the boiler and where to put the pipes? A. Yes.

Q. And it would not make any difference whether the pipes were put on the south side or on the north side of the building, would it? A. No, if you could heat it.

Q. And it would not make any difference whether he had a large boiler or small boiler as long as he could heat that building to 70 degrees in zero weather? A. Correct.

Q. Now, you say you were there twice? A. Yes.

Q. What time were you there last week? A. About 2 o'clock I should judge, in the afternoon.

Q. Was the boiler heated? A. No.

Q. Was there a fire in the boiler? A. No.

Q. Did you ever test this boiler yourself? A. I have used boilers of that kind—

Q. I did not ask you that; I asked you whether you ever tested in this particular boiler? A. You mean put a fire in it?

Q. Yes. A. No.

Q. Did you ever test it so as to ascertain to a certainty whether or not this heating plant could produce 70 degrees in zero weather? A. No, it was not necessary.

Q. So that you are giving us your theoretical knowledge gathered from experience; is that it? A. Practical and theoretical experience, yes.

Q. And, in your opinion, you think this heating plant is not sufficient to produce a 70 degree temperature at zero weather? A. I don't think; I know.

Q. You know that to be a fact? A. I know that to be a fact.

Q. Do you recollect that we had some quite cold days last winter? A. I realize that.

Q. Do you recollect that we had quite a spell of zero or close to zero weather last winter? A. I realize that.

Q. And when the owner of that building gets on this stand and says that he knows that that heating plant is sufficient and that it heats at 70 degrees in zero weather, would you say that was correct or incorrect? A. I should say that he didn't know what 70 degrees in zero weather was.

Q. That is what you would say? A. Yes, sir.

By the Court: Q. Can you tell us Mr. Geiser, what the seating capacity of this room is? A.

I didn't enter that, I didn't enter that question at all, your Honor.

Q. Were there seats there? A. Yes, sir.

Q. Well, two or three hundred people? A. I suppose two hundred people.

By Mr. Leber: Q. You said that the toilet was not a syphon jet toilet? A. Yes, sir.

Q. Did you find a hardwood seat there? A. Yes, sir.

Q. Was there a hardwood seat there? A. Yes, I guess they would call it a hardwood seat.

Q. Well, was it a hardwood seat? A. Yes, I would say that.

Q. Did you examine it? A. Yes.

Q. Did you find a tank there? A. There was a tank there.

Q. Did you find a chain and a pull complete there? A. No chain, no.

Q. No chain? A. No.

Q. Well, that works with one of these brass buttons? A. Yes, with a button.

Q. Well, it is just as good to work this thing with a button as with a chain, is it not? A. Yes; a chain is simply a misinterpretation or misreading in the specification, so far as the chain part.

Q. You think that is a misreading? A. Yes, as far as the chain part.

Q. You think he meant— A. He meant a pull.

Q. Did you test that toilet? A. I flushed it.

Q. Did the water flow out? A. Yes, sir.

Q. Well, the water flows just as well as from a syphon jet, does it not? A. No.

Q. Why not? A. Because it gives a gurgling noise in this closet so that you can hear it outside; anyone outside of the door can hear it.

With a syphon jet it goes off with a suction, with less noise.

Q. So that it is a question of noise? A. Not altogether; it is a question of the closet.

Q. And you estimate that the jet closet costs twenty-five per cent more than the closet that was put in there? A. Yes, sir.

Q. But the same volume of water goes through that closet? A. Not the wash-down as goes through the syphon jet, no.

Q. Well, is there a sufficient supply of water there? A. To work the present closet?

Q. Yes. A. Yes.

RE-DIRECT-EXAMINATION by Mr. Woerner:

Q. What about the seat in the toilet? A. Well, to me, I don't know—it looked to me—it was a hardwood seat, and so far as the fulfilling the requirements of the specification, it is a very poor quality of hardwood seat. I don't know what stage it is in now. At my last visit I went to that building to look over the heating stuff and to refresh my memory, but at the time I remember noticing particularly that, looking at the hardwood seat. They were in a very poor condition, and it seemed to us as if the varnish was about all gone; it was in very poor condition.

RE-CROSS-EXAMINATION by Mr. Leber:

Q. There is no question as to the cost of a hardwood seat, is there? A. No.

Q. And would you in reading the specification on that point think that there ought to be a carved mahogany seat on this toilet? You would not

supply a carved mahogany seat on this toilet, would you? A. (After referring to paper.) No,

Q. You would put on there just an ordinary hardwood seat, would you not? A. Well, I would put on a hardwood seat—

Q. Well, why don't you say yes or no? A. Well, yes.

By the foreman of the jury: Q. In stating the difference between the two closets, you stated that the difference amounted to twenty-five per cent. I would like to know what you mean by twenty-five per cent, twenty-five per cent of what? A. The cost of one and the other.

Q. In other words, what in dollars is the difference? A. Well, I suppose I would have to say that the closet that is in there and the closet that is really called for, and everything in the specification called for first-class manner—a first-class syphon jet closet would cost about from $8 to $12 additional over the cost of the present closet that is in there.

SAMUEL JOSEPH DURANT, sworn in behalf of defendants:

Direct-examination by Mr. Woerner:

Q. Mr. Durant, you are employed by Nathan Myers, the architect and engineer? A. I am.

Q. In what capacity? A. Architectural draftsman.

Q. Did you examine the plans shown in back of you and the specifications? A. The plans I did.

Q. Do you need the specifications to figure out

the heating? A. No, I didn't see the specifications at all.

Q. Will you examine the specifications and tell us whether you figured out the heating capacity of this building? I think it is at the very end. A. (Witness examines paper.)

Q. Did you figure the heating? A. Yes, sir.

Q. And what are your figures? A. Why, I figured there ought to be 1063 feet of radiation in the building.

Q. And how do you arrive at that? A. Why, by a rule which is called Pierce's rule.

Q. Just tell us what your figures are. A. I figure by the British thermal units needed to heat the volume of air, the wall surface exposed, the glass surface exposed and the ceiling exposed. I get the square feet of those surfaces and the cubic contents of the air. The air I multiply, say, by 2.5, which is constant. When you want to figure say, 70 degrees inside of zero weather, the wall surface I figure by 20, which is a constant of the same; the glass by 76 and the ceiling by 22, which gives me 233,815 B. t. u. s., British thermal units, and I divide that by 220, which is a constant divisor for steam with two pounds pressure at the boiler, which gives 1063 feet of radiation.

Q. And what capacity boiler would that require? A. Why, I didn't see the building myself.

Q. No, I mean to— A. Oh, if the job is a perfect job, not figuring any loss by poor construction, you would have to add about ten or twenty per cent to that.

Q. What in round figures would that be? A. I haven't figured it here, the size of the boiler.

By the Court: Q. I do not quite understand

you. Did you see the boiler that is installed in this place? A. No, I did not.

Q. You have not been there at all? A. No.

CROSS-EXAMINATION by Mr. Leber:

Q. At whose request did you make these figures, Mr. Durant? A. Mr. Myers'.

Q. When did he ask you to make this calculation? A. Yesterday, I believe.

Q. Did you have the plans before you when you made it? A. Yes, sir.

Q. Why did you use Pierce's table? A. Because I am most familiar with it.

Q. Have you ever heard of Mills' tables? A. Yes, sir.

Q. Do you ever use Mills' tables? A. No, sir.

Q. Well, under Pierce's table the result you reached is greater than the result that Mr. Geiser testified to? A. Yes, sir.

Q. You have heard his testimony, have you not? A. Yes, sir.

Q. How do you estimate that you would require a greater heating surface on the Pierce table than Mr. Geiser gives us on the Mills' table? A. Well, my table is different from his; I haven't figured it by his table. I really don't know how to figure it by his table as accurate as I do by this table.

Q. Well, is yours the accurate one? A. Well, I don't know.

Q. Then you could not tell when you used those tables whether you would hit the thing right in constructing a building? A. Yes, I could.

Q. When you hit it right? A. Yes, I would.

Q. Do you always use Pierce's table in Myer's office? A. Yes, I do.

Q. You do? A. Yes.

Q. How long have you been in the office? A. Going on ten years.

Q. Have you ever had any complaints on any heating plants constructed on your tables? A. Complaints don't come to me.

Q. Have you heard of any complaints being made? A. No.

Q. You would get those complaints? A. I presume Mr. Myers would.

Q. Well, as an expert, it is possible in using these tables, constructing a heating plant according to these plans, that you would get some kicks on the heating plant, would you not? A. Not as far as the radiation goes, no.

Q. You mean not as far as the theory goes, do you not? A. This is not a theory.

Q. Is not this theoretical? A. This is from experiments.

Q. But is not that theoretical knowledge that you have been testifying to? A. My knowledge of it may be theoretical, yes.

Q. And there is quite a good deal of difference between theoretical knowledge and the practical workings of the thing, is there not? You have found that as an architect, have you not? A. Not in heating.

Q. Not in heating? A. No.

Q. Well, does not every steam-fitter use his practical experience more than the tables? A. Yes; that is why he goes wrong.

Q. That is why he goes wrong? A. Yes.

Q. Is not his experience worth more than the theoretical tables? A. No, not in this.

Q. You do not think so? A. No.

Q. Well do you refer to Pierce's tables or Mills' tables? A. Pierce's tables.

Q. You do not know anything about Mill's tables, do you? A. Very little.

Q. So that if Mills' tables were used, you cannot tell us if the same results would be reached? A. I haven't studied Mills' tables.

RE-DIRECT-EXAMINATION by Mr. Woerner:

Q. Are these the tables that you use in figuring your different jobs, your different steam-heating jobs? A. Yes, sir.

Q. They are built according to those tables? A. Yes, sir.

Q. Are there different kinds of tables? A. Are there different kinds?

Q. Yes. A. Yes, there is a great many kinds.

GEORGE H. GARDNER sworn in behalf of defendants:

Direct-examination by Mr. Woerner:

Q. Mr. Gardner, what is your business? A. Civil engineer and surveyor.

Q. In this city? A. Yes, sir.

Q. How long have you been in that business? A. For the past twenty-seven years.

Q. Have you examined the exits at this moving picture place, 635 Bergen Street? A. Yes, sir.

Q. At my request? A. Yes, sir.

Q. Do you know whether or not the present exits comply with the plans as shown on that board (indicating)? A. Yes sir.

Q. You had a copy of the plans? A. Yes, sir.

Q. What is the height of the exit next toward the wall? A. Well, it is level from the street in, practically level, and then it pitches down to where the moving picture is thrown on the screen, and that agrees within 2 1/2 inches of what the plan calls for; it is 2 1/2 inches higher than the plan calls for.

Q. Could you see the line where the exits were originally built on the wall? A. No, it was too dark. I had to use pocket electric lights in order to establish the grade. The place wasn't lit up.

Q. And you have your field-book with you showing your measurements? A. Yes, sir.

CROSS-EXAMINATION by Mr. Leber:

Q. Did you make the measurements? A. I did, with a surveyor's instrument and a levelling rod.

Q. Did you do that alone? A. I read it alone. I had my target 12 feet high, and I levelled my instrument up and read it myself, and he held an electric light so I could see where the cross hairs cut.

Q. When were you there to make those measurements? A. Saturday.

Q. What time? A. In the morning, in the neighborhood of about eleven o'clock.

Q. You say it was dark? A. Yes. The proprietor of the show objected to our using his electric lights.

Mr. Leber: Oh, never mind that.

Witness: Well, that is the reason we didn't have electric lights.

Mr. Leber: I did not ask you for the reason, Mr. Gardner.

JACOB STUVEN sworn in behalf of defendants:

Direct-examination by Mr. Woerner:

Q. Mr. Stuvens, what is your business? A. Concrete work.

Q. How long have you been in that business? A. About twenty-five years.

Q. Did you examine the concrete and cement work at the building 635 Bergen Street? A. I did.

Q. At whose request? A. Mr. Stahl's.

Q. And did you have the plans and specifications? A. I did; yes, sir.

Q. In your opinion, does the work comply with the plans and specifications? A. It was very poor work.

Q. Have you some samples of the work here? A. Why, I took some samples, yes, sir.

Q. Will you explain to the Court and jury why the cement work and concrete work does not comply with the plans and specifications? A. (Witness produces and opens a package.) First of all, it is very poor workmanship, and I suppose they didn't use enough cement.

Q. From your samples there can you show the Court and jury where the defects are? A. (Indicating.) Well, there is a piece that came out without a hammer and shovel, just took them out with our hands and fingers, had a knife and took them out.

Q. Is that between the cement blocks? A. That is in the retaining wall in the back yard.

Q. And what did you find in the rest of the building? A. It was all cracked up.

Q. What was that? A. The auditorium floor and the sidewalk and the back yard.

By the Court: Q. What do you say about that? A. All cracked up.

By Mr. Woerner: Q. Have you got any samples of that? A. No, I have not now.

Q. What about the construction of the side wall, did you see that? A. You couldn't see much; it was all covered over with plaster, only from the outside.

Q. Did you notice anything about the chimney? A. There was a big crack on each side, about an inch or an inch and a half wide.

Q. How long is that crack? A. I suppose pretty near all the way down.

Q. Did you examine the cement coping? A. Only from the bottom down, what I could see: I didn't go up on top.

Q. Did you go in the booth? A. I did, yes, sir.

Q. What condition did you find there? A. That is all cracked up, too.

The Court: What is this?

Mr. Woerner: The booth where they show the pictures.

Q. What would you say as to the workmanship in laying the cement blocks? A. Well, I don't know much about cement blocks, because that is not my business.

Q. Laying them is not your business? A. No, sir.

Q. You are simply in the concrete line? A. Concrete, yes, sir.

Q. And what would you say as to the workmanship of the concrete? A. Well, it looks very poor at the joints; a whole lot of them is open.

CROSS-EXAMINATION by Mr. Leber:

Q. When were you up there, Mr. Stuven? A. About two weeks ago.

Q. At whose request? A. Dr. Stahl's.

Q. Are you being paid for your time? A. I am not, no, sir.

Q. You are doing that as a favor to Mr. Stahl? A. Yes, sir.

Q. How long have you known him? A. I guess about four or five years or more.

Q. Have you ever done any work for him? A. I did, yes.

Q. You say that you took this stuff from the retaining wall? A. Yes, sir.

Q. When did you take that? A. About two weeks ago.

Q. Did you see the specifications for this retaining wall? A. I did not, no.

Q. Well, then, how do you know that this was not done according to the specifications? A. I only know it is done poorly; that is all I know.

Q. Well, it might have been done according to the specifications, might it not? A. Well, I don't know that.

Q. You have not seen any, have you? A. No, sir.

Q. You say that the floor of the auditorium is all cracked up? A. Yes, sir.

Q. Is that a bad job? A. In my opinion it is, yes, sir.

Q. Are the cracks noticeable? A. Well, if you have enough light you can notice them; anybody can.

Q. Is that true of the entire floor? A. Well, kind of irregular all the way through, I guess.

Q. All the way through? A. As far as I could see.

Q. Is it cracked all the way down? A. It is cracked nearly all the way through there.

Q. Do you mean to say that the entire floor of the auditorium is all cracked up? A. As far as you can see, yes.

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

Q. And you were there two weeks ago? A. I was there two weeks ago, yes.

ALFRED STAHL sworn in behalf of defendants:

Direct-examination by Mr. Woerner:

Q. Dr. Stahl, you are a practicing physician in this city? A. I am.

Q. And were you the owner of this moving picture place at one time? A. I was.

Q. 635 Bergen Street? A. I was.

Q. That is the building that you sold to Jacob Denberg? A. Harry Denberg.

Q. Have you examined the building since you sold it? A. Yes, I have been over there.

Q. Have any changes or improvements been made? A. Yes.

Q. Will you just tell us what they were? A. Well, the interior wall has been redecorated; the wall of the vestibule, or of the lobby, has been redecorated; the plastering has been done up in the booth, and plastering or cement work has been done on the floor of the auditorium; some hardware has been put in.

Q. Was anything done to the exterior of the building? A. Yes, the outside was painted, the front.

Q. And that was done by Mr. Denberg? A. Yes.

Q. There has been some testimony that you and Mr. Poysher, Mr. Rizzolo and Mr. Rosensohn were at this building in the month of April or May? A. In April, I believe.

Q. Did you go over the building? A. Yes.

Q. Will you tell us what was said and done at that meeting? A. Well, he came up; we wanted to have him go over, and we were dissatisfied—

Q. Who? A. Rosensohn. We wanted him to go up and go over it. We had been after him a number of times to go over the thing, as we were not satisfied, and we point out to him numerous things that we thought should be remedied, and he said he would get after Rizzolo.

Q. What things were those? A. Well, the painting; that is, the walls leaked; that is, water came into the auditorium; and the heating system wouldn't heat during the winter adequately to give afternoon shows; and the plumbing we objected to, to the drains and to the plumbing in general, and to the cement work. We claimed that the outside had not been pointed up properly; otherwise it would help to take some of the dampness away from that wall.

Q. When did you make these objections? A. At that time; that is the first time I seen Mr. Rosensohn.

Q. And did you go down to his office? A. I went down once, yes.

Q. Who was there? A. Mr. Rosensohn, Mr. Poysher and myself.

Q. Was Rizzolo there? A. No, he was not.

Q. How did you come to go there? A. Well, we had this—I had a number of stop notices brought to me from different men, and he had some, and I went down with them, gave it to him and asked him what—

Mr. Leber: Never mind what you said to him.

Q. What was said at that meeting?

Mr. Leber: I object to that. Mr. Rizzolo was not there.

By the Court: Q. Who was present? A. Poysher, Rosensohn and myself.

Mr. Woerner: There has been some testimony as to what Mr. Rizzolo said or what the architect said at these different times to Mr. Poysher and to others. I think we ought to be able to show what conversation Rizzolo had with us.

Mr. Leber: There is no objection to showing what conversation Rizzolo had with you.

Witness: Rizzolo was not there.

The Court: The architect was a witness for the plaintiff, and testified to what he had said on certain occasions. Now, do you want to contradict Mr. Rosensohn?

Mr. Woerner: Yes.

The Court: As to the statements on particular occasions?

Mr. Woerner: I do.

The Court: Then the regular way would be to lay a foundation by asking him whether on certain occasions he made certain statements. I do not remember whether you did that or not. If you adopted that

method, you may now inquire of this witness whether Mr. Rosensohn on those occasions said certain things; but that is the extent of it.

Mr. Woerner: I would like a ruling on the broad question as to whether we can introduce conversations with the architect as to payments, giving certificates on this work. Mr. Rizzolo testified and the architect has testified that the reason certificates were not issued was because—

The Court: I will rule on any question that you may ask. I cannot make a broad ruling, because I do not know what it would include. Ask a definite question, and I will examine it.

By Mr. Woerner: Q. When you went to Mr. Rosensohn's office what was said as to issuing certificates?

Objected to.

The Court: This gentleman is one of the defendants, one of your own clients.

Mr. Woerner: He was.

The Court: Mr. Rosensohn is not a party to the case, although he was the architect on the job, and presumably the agent of the owner. I do not see by what rule of evidence you are entitled to his statements in this way.

Mr. Woerner: Well, it seemed to me that Mr. Rizzolo told him one thing, and I think we ought to be just as much at liberty to show what he told us. Of course, it is hearsay, I presume, in a sense, but I think it is permissible. I cannot see how else we could show what the architect really did say.

The Court: Mr. Rizzolo is the contractor, and testified as to statements made by Mr. Rosensohn, as the agent of the owner, to him as to matters within the scope of the agency. That would be just like testifying to what was said to him by the defendants themselves, because it may be assumed that an architect is authorized to make statements with respect to the certificates to a man who went to get them. Now, you are asking your client what his own agent said to him.

Mr. Woerner: Well, that is not the situation just now, is it, under the pleadings as amended? The architect was the agent of Mr. Poysher.

The Court: (After argument.) Suppose Mr. Rosensohn is on the stand. You say, "Mr. Rosensohn, did you state to Mr. Poysher and Dr. Stahl on a certain occasion at a certain place so and so, and so and so?" If he denies it, you can contradict him, and the way to contradict him is to call the witness to whom he is said to have said it, and to ask him if he did say it. This is what is called laying a foundation. That rule does not apply, of course, to a party. A party's admissions are always evidence. The rule does apply to third persons, and Mr. Rosensohn is a third person.

Mr. Woerner: I would like to examine the doctor in the morning. I will have Mr. Rosensohn's testimony written out.

The Court: If you have not laid the foundation, I do not say that I will not give you

an opportunity to do it. You will have to have Mr. Rosensohn here to do it.

(By request of defendants' counsel, the witness is directed to stand aside for the present.)

NATHAN MYERS sworn in behalf of defendants:

Direct-examination by Mr. Woerner:

Q. What is your business? A. That of an architect.

Q. And you have been so for how long? A. This is my nineteenth year in business for myself.

Q. And where were you educated for your profession? A. I graduated from the College of Architecture of Cornell University in 1896.

Q. And you practice where, in the City of Newark? A. I had my office in Newark during all these years, and an office in the Woolworth building, in New York, for a year and a half.

Q. Have you examined this moving picture place at 635 Bergen Street? A. I have.

Q. At whose request? A. At the final request —first of yours, and finally of Dr. Stahl.

Q. And did you examine the plans and specifications? A. I did.

Q. And does the building comply with the plans and specifications? A. No, sir.

Q. Will you tell the Court and jury in what particulars the building does not comply with the plans and specifications? A. (Indicating on blueprint.) On the front of the building there are

shown three casement windows to the picture booth, and ornamental plaster ornamentation above the same. The front is changed by having round windows instead of oblong windows, and the ornamental plastering omitted.

By the Court: Q. Do I understand that the plastering is there? A. The ornamental plastering is omitted. The building as erected in section, in longitudinal section, is approximately as shown on the drawings. The rear exit doors are approximately at the same level as the vestibule doors. By actual measurements, they are three to five inches higher than shown on the plan. The runway, or the gradient, from the low part of the theatre starts at approximately 10 feet from the rear wall, instead of, as shown on the drawings, about five feet from the rear wall. The radiation is not shown on this drawing here, but it is on this side of the building, on the south side of the building. There is a door from the picture booth to the outside, not shown on this drawing.

By Mr. Leber: Q. You mean that there is a door in the building that is not shown on the drawing? A. Yes.

Mr. Leber: All right.

Witness: There are of lot of minor points that I do not know that it is worth while talking about. There is a ladder shown here on one side of the drawing, and now it is located at this other point, about 2 feet distant (indicating on blueprint).

By Mr. Woerner: Q. Now, as to the character of the work tself. What have you to say as to the character of the different work in the building? A. The work is not executed in a workmanlike manner.

Q. Will you just state in what particulars? Take the cement work. A. The cement sidewalk and the cement floor on the interior shows bad cracks—not necessary that the work will have to be taken up and replaced immediately, but the work is not done well. The gradient from the low point of the pit to the rear doors is so bad that if one stamps on them they can hear it sounding hollow, and this work will have to be rebuilt within a reasonable time. The exterior cement blocks show cracks at certain places. The chimney is built of concrete block, unlined, instead of, as specified to be, of brick and lined, and as required by the building code of the city.

Q. Will you just look at the specifications a minute with reference to that chimney? A. I have it (referring to paper).

Q. Will you just read it? A. "Build chimneys of good burned brick as shown, to correspond with the drawings. All flues to be straight and true, of uniform size throughout, and smooth on the inside. Top out above roof, using good hard burned brick for facing, laid in red mortar, properly cleaned down at completion. Furnish and set iron collars and covers where required. Cap the chimneys with cement capping. Line the flues with fire clay flue lining. Build parapet walls with cement blocks 3 feet above roof with cement coping."

Q. Have the specifications been complied with in that respect? A. They have not.

By the Court: Q. What about the lining? Your criticism was that it was not lined. Does that say anything about lining? A. Yes, sir; "Line the flues with fire clay flue lining."

Q. That has not been done, you say? A. No, sir.

By Mr. Woerner: Q. Then the chimney, you say, was built of cement, or concrete? A. Concrete blocks.

Q. Instead of brick? A. Instead of brick. And it is cracked on the outside.

Q. For what distance? A. Well, for not less than 10 feet from the grade, from the ground.

Q. From the top down? A. From the bottom up; that is, from the yard level, not where the boiler draws into the flue.

Q. What do you say as to the laying of the cement blocks, what about the workmanship of that? A. I think the laying of the cement block is the average work done in that line.

Q. About the courts, or areaways, what is the workmanship on those? A. The cement work laid in the rear court, or termed or called for as yard, is not well done, and the concrete retaining wall is very poorly done.

Q. Have you any idea how long they will last? A. Well, one or two seasons of winter frost, successive thawing and freezing, will throw that wall in.

By the Court: Q. The retaining wall? A. Yes, sir; it has started already.

By Mr. Woerner: Q. Now, as to the heating plant; did you go over that? A. I did.

Q. What have you to say as to the workmanship on that? A. As soon as I observed the building I immediately saw that the amount of radiation as installed, first, would not be enough to heat the building, and the way it was installed, even if the radiation was there, was not satisfactory,

because taking an eye observation one could easily see that the lines were trapped in themselves; the water condensation would not flow back properly and fully to the boiler.

Q. Why not? A. Because they were hollowed out. There must be a decided grade from every point of the coil, so there will be a ready flow. As the steam condenses in the coils it forms water.

Q. How long are those coils? A. The coils are about 80 feet long.

Q. What causes this sagging? A. In the first place, because they were improperly put up; the proper care was not taken to get the hangers at the proper lines, and in some places, instead of using the cast-iron hanger that they have in general, towards the rear exit they did not have the hangers, I suppose, on the premises, and they simply put in nails to try to hold up the coils.

By the Court: Q. Where does that water go when it is properly arranged? A. The water of condensation is supposed to return quite rapidly to the boiler, and then it is formed into steam and takes the same circuit again.

By Mr. Woerner: Q. What do you say as to the rest of the heating work? A. There is only one coil forming the entire radiation; in other words, there is only one air valve on the entire system, which would not allow steam to be raised as quickly as if the air could be driven quickly out of the coils. The system should have been divided into a number of coils, and on each coil its individual air and steam valve. The boiler is located in the basement, and is, like the radiation, of inadequate capacity.

Q. Now, will you just tell us what the radiation

is and what it ought to be under the plans and specifications? A. Radiation is that substance through which heat is transferred from one source to another. In steam-heating systems the radiation may be of either iron or steel or sheet metal, and the steam is created within the boiler, and is allowed to circulate to the radiators, to the radiation, through pipes, and as the heat is transferred it condenses into water and returns to the boiler.

Q. Will you give us the figures of what the radiation is and what it ought to be? A. There is approximately 800 feet of coil pipe, one-half inch pipe, and taking into allowance the main, which is also exposed in the theatre, there is approximately a little more than 400 feet of radiation in the building.

Q. And what is the capacity of the boiler? A. The manufacturers claim that the boiler will do 400—

Objected to.

The Court: You may omit that statement. We haven't the manufacturers here.

Witness: I have got the catalogue.

The Court: Confine yourself to your own knowledge.

Witness: Boilers of that kind, round top—

Q. In your opinion, what is the capacity of the boiler? A. About 425 feet of radiation.

Q. How much radiation is there according to accepted tables in your profession? A. That building should have a little more than 1000 feet of direct radiation.

Q. What would it necessitate to get that radiation? A. It would necessitate the installation of

that much of feet of radiation subdivided into proper sections, with the proper valves and a steam boiler of the capacity of about 1350 feet at least radiation.

Q. If this boiler was put in of sufficient capacity, what would you say as to whether the chimney would be large enough? A. The size flue would not be large enough for the larger size boiler, nor would the cement block withstand the stress of heat that would be put to it, and that is the cause of the present crack.

Q. Would you have to build a new chimney or simply put a new flue in? A. You would have to build a new chimney.

Q. What is your opinion of the workmanship of the steam-heating plant in general? A. It is poor.

Q. Did you examine the plumbing work? A. I did.

Q. What would you say as to the plumbing work? A. Why, the average of what might be expected for that class of work in the specification. It does not follow exactly to the specification. There is a wash-down jet instead of a syphon jet closet, and a low down tank instead of what the specification says; it calls for a high tank.

Q. Would you say it is done in a proper, workman like manner?

Mr. Leber: What?

Mr. Woerner: The plumbing work.

A. There is one point in which the specification has not been carried out, in my estimation. There is an item on page nine, which says, "Drain the court to the sewer," and the court is not drained to the sewer; it simply empties into the cellar and then is allowed to drip on the floor and run off in an indirect connection to the sewer.

Q. That is the drain which has been testified to here as extra work? A. Yes.

Q. We will go over that later. Now, as to a meter. Did you find any meter in the building? A. I did not see any meter there.

Q. Did you look where it ought to be set? A. Yes.

Q. Now, about the cross-bridging. Can you tell us whether that is called for by the specifications? A. It is.

Q. Is there any cross-bridging in the building? A. That I don't know.

Q. You have heard the testimony as to the supporting of beams, have you? A. The roof beams?

Q. Yes. A. Or the ceiling beams to the roof?

Q. Yes. A. I am not clear on that testimony.

Q. You did not hear the testimony as to how the ceiling beams are supported to the roof, did you? A. I didn't hear that—I did hear it, but I am not clear on it. I might be refreshed.

The Court: The general idea was, it seems to me, as I recall, that instead of this cross-bridging, the beams were suspended or hung from above. Am I right about that?

Mr. Woerner: Yes.

By the Court: Q. Is that your recollection? A. Your Honor, I believe that is what I remember now. Supporting the ceiling beams from the roof beams—it is a greater reason why there should be bridging in the roof beams, because there is greater stress on those roof beams.

By Mr. Woerner: Q. Can you explain that so that we can understand it? A. The object of placing cross-bridging between all beams in any

tier is that should any excessive load be applied to any particular line of beams, a span of beams helps to carry that load, whereas if the cross-bridging is omitted, should there be any particular load on any one beam, it might collapse. The building code calls for that bridging for that purpose.

Q. Can you refer to that section of the building code? A. I can by looking in the index. (Witness refers to pamphlet.) Page 94.

Q. What does it say? A. "All wood floor and roof beams shall be properly bridged with cross-bridging, and the distance between the bridging or between the bridging and walls shall not exceed 8 feet." Therefore there should have been at least two rows of bridging in that wall.

Q. That is not there? A. The space is concealed; I don't know whether it is there or not.

Q. Does the bridging make a stronger job? A. It makes a stronger and safer job.

Q. Now, as to the extra work. There is a charge made for a change from wood beams to reenforced concrete ceiling. Can you tell whether or not reenforced concrete ceiling is called for by any law or building code? A. The building department requires—concrete ceiling and vestibule.

Q. The reenforced concrete ceiling. A. Over the boiler room?

Q. Yes. A. The building department, according to their code, requires that boiler rooms be fireproofed in moving picture theatres.

Q. Will you turn to that section and read it?

Mr. Leber: I object to that, unless it is proven that these laws were in existence

at the time this contract was made and unless these laws are proved. There is no objection so far as the cross-bridging is concerned, because we have gone into that, but when it comes now to what the law requires as to the concrete, I will object to that.

The Court: The question is what the regulation was at that time.

Q. Have you got the building code before you?

A. I have.

Q. When was that building code put in force?

Mr. Leber: That is not the way to prove that. I object to that. There is a set way of proving city ordinances, and the building code is a city ordinance; it is nothing else.

The Court: If you insist upon such proof, you are entitled to it.

Q. As to the concrete between the beams and the booth floor in place of wood, is there any law or ordinance covering that, requiring concrete between the beams and the booth floor?

Mr. Leber: I object to that because it assumes the existence of a law proving it.

Mr. Woerner: We will prove it later. We have to find out what the law is.

The Court: The better way to do that is to introduce the law. If you know where it is, it can be produced, and if you cannot find it you can prove that. It will be governed, of course, by the law at the time the work was done.

Mr. Myers, it is drawing near the end of the day, and I suppose you will be here

to-morrow. I want to make a suggestion. You have referred to certain features of the work which, in your opinion, are not in conformity to the requirement of the specifications and of good workmanship. I have in mind particularly the condition of the plumbing—the condition and construction of the plumbing; the heating system, including, of course, the boiler, and whether your attention has been directed to the probable cost of making the work conform to what it should be I do not know, but you may be asked that question to-morrow, and therefore I mention it now so that you may have it in mind.

Q. In your opinion, Mr. Myers, the drain from the rear yard to the cellar, which is charged for as extra work, under the plans and specifications is that extra work?

Mr. Leber: I object. That question was argued on the direct case. I referred to that clause as being an ambiguous clause, and asked the architect who drew the specification what, in his opinion, that meant That was overruled. I was not permitted to go into that. Your Honor said that you would construe a contract, but as to an ambiguous contract, the law did not place that burden on the Court, but placed it on the jury, and I took that as final in this case.

(Question read.)

Mr. Leber: That calls for construing an ambiguous part of the specification.

The Court: That is the ditch from the court to the sewer.

Mr. Woerner: "Drain the court to sewer." Those are the words. I suppose this witness could be asked whether the yard was a court.

The Court: The witness may be asked if he finds any requirement of that kind on the specifications or on the plan.

Do you?

Witness: I term that a court, as it is termed so by the building department. In the construction of moving picture theatres the building department demands an alley or a court on two sides of the construction, but where it is not given on the two sides they at times will accept as a special consideration a court to the rear, with the exits at the rear instead of the side, where they get no extra exit through additional land on the side, where they have the court, and I would term that actually as a court, and it was meant so, in my estimation, and accepted by the department, from my experience with them.

The Court: The specification says—

Witness: "Drain the court to sewer." And there is no other court to the premises.

Q. In your opinion, then, this means a drain from the rear court, or yard, to the front?

Objected to.

Objection sustained.

Q. In your opinion, examining the plans and specifications, what do the words in the specification mean: "Drain the court to sewer"?

Objected to.

The Court: I did rule on that just now. I thought I sustained an objection to that same question just now.

Mr. Woerner: No, I just wanted to get his opinion on the specifications.

The Court: Yes, I understand, but I thought that was the question I just ruled on.

Mr. Woerner: I ask him his opinion as to whether that was extra work. Now, I ask him, and I wanted to get his opinion as an architect, as to the construction of those words.

The Court: I sustain the objection.

Q. That cellar drain, where does that empty, or the drain that is there now A. In the boiler-room? It drains to the sewer.

Q. And where does that other drain run to that is charged for as extra work—the cellar drain from the rear yard? A. I am told that a drain was put from the—

Objected to.

The Court: Never mind what was told you.

Witness: Well, one can only see the two outlets; I don't know whether it exists between or not.

Q. Did you see the cellar drain from the rear yard to the front cellar? A. I saw an opening in the yard which was supposed to connect with a pipe going underneath the theatre construction, and I saw an opening in the cellar which is supposed to be its outlet. That is in the boiler-room.

Q. Where does that lead to, or empty, if you know? A. Drips onto the boiler-room floor over or about a basin that leads to the sewer.

Q. In your opinion, is that a proper construction? A. I wouldn't say so, no.

Adjourned until to-morrow, January 6, 1915, at ten o'clock, a. m.

THIRD DAY

Wednesday, January 6, 1915.

Met pursuant to adjournment.
Present: Counsel as before stated.

NATHAN MYERS, resumes the stand in behalf of defendants:

Direct-examination (continued) by Mr. Woerner:

Q. Mr. Myers, since you were on the stand yesterday have you been to the building? A. I have been.

Q. Can you tell us now whether or not there is a water meter in the building? A. There is positively no water meter in the building.

Q. As to the water pipe put in by the plumber, is that in accordance with the specifications? A. It is not.

Q. In what respect do they differ? A. The specification calls for three-quarter inch water supply and a five-eighth water supply has been put in.

Q. I forgot to ask you yesterday: you are a licensed architect by the state of New Jersey? A. I am.

Q. Will you explain, as shortly as you can, the difference between a syphon jet closet and a washdown closet? A. The action of a syphon closet is that the substance in the bowl is syphoned out; a jet acts and syphons everything out cleanly; in other words, everything is pulled out. A washdown jet, the action is to force the water out; it

does not cleanse the bowl as thoroughly and does not act as properly. There is a great difference in the sanitary value. Besides, a wash-down closet uses more water than a syphon jet closet.

By the Court: Q. Can you tell us the difference in the price? A. They vary according to the quality and size. The specifications call for a high tank—that is why the chain was called for—and they have got a low tank. An average difference of price might be from $8 to $12 on each combination. I believe there are two in the building.

By Mr. Woerner: Q. You heard the testimony of Mr. Habele, the plumbing expert, the plumber on this job? A. As to steam heating?

Q. Yes. A. I did.

Q. Can you tell us where his calculations are wrong, if they are? A. Why, if I remember rightly, he testified that he figured the heating as to cubitage, only the amount of air space in the building, and upon the assumption that the ventilators would be closed; in other words, no change of air in the cubitage. He figured, as I remember, 16 feet for the height of the auditorium, whereas the auditorium as shown on the plan and as built is almost 21 feet average, being 18 feet 6 inches at the entrance and 23 feet at the low point. That makes almost one-third more cubitage in the building than he figured. I don't believe he took in the full depth—

Mr. Leber: I object to that. I don't think the witness ought to tell us what he believes.

Witness: Well, he testified, I believe—

Mr. Leber: Just a moment. I have made an ob-

jection to your testimony, and I am entitled to a ruling by the Court.

The Court: I have here the testimony of Mr. Habele. There cannot be any doubt as to what he said. What particular feature of his testimony have you now in mind?

Witness: The dimensions of the size of room that he estimated. If I remember he estimated—

The Court: Well, now, we will see.

Mr. Leber: My particular objection is to the witness going on in his testimony and saying what he believes another witness did. Now, there is quite a difference between referring to a man's actual acts and what a man believes that he did.

The Court: Eighty-five by 22 by 16; those are Mr. Habele's figures.

Witness: He assumes the length of the building to be heated as 85 feet, omitting the toilet rooms and the vestibule and the booth, which need heating, and if they do not have the radiation exposed in themselves they will rob the theatre part of the heat through the openings, and therefore he should have figured, instead of 85 feet for the length, a length of about 97 to 98 feet; and he has simply taken the thumb rule of cubitage instead of taking into consideration the exposure of wall surface, exposure of ceiling, glass surfaces, defects in workmanship of the openings and changes of air.

By the Court: Q. Now, what number of cubic feet of air did you get? A. The approximate number of cubic feet of air in the entire auditorium and accessory rooms is approximately 46,851.

Q. Mr. Habele's figures were 29,920, which

would require, in his opinion, 374 feet of heating surface, and he said that the building had 437 square feet. That was the surface. Now, how many feet of heating surface do you say that your calculation requires? A. I haven't it separate for the volume of air; I have a total after considering the volume of air by changes of air; wall surface, glass and ceiling.

Q. Well, take it in that way. What are your figures in square feet? A. Feet of radiation?

Q. Yes. A. 1064 feet of direct radiation.

Q. One thousand what? A. 1063.

Q. As against Mr. Habele's 374? A. Yes.

By Mr. Woerner: Q. Is that all on that? A. As to that question.

Q. Now, are you familiar with the state laws governing construction of buildings? A. Theatre buildings?

Q. Yes. A. Yes.

Q. Can you tell us whether or not there is any state law governing booths in moving picture theatres? A. There is.

Mr. Leber: I object to that. I do not think that is proper.

The Court: We can be referred to the law. He says he knows there is a law. We can be referred to it.

By the Court: Q. Do you know where it is? A. The law was enacted in 1912 and, I believe, signed in March, 1912.

Q. What head ought that to be under? A. "Moving Picture," or "Motion Picture Building," or "Booths."

The Court: (Referring to book.) It is page 300.

By Mr. Woerner: Q. Can you point out in the Pamphlet Laws of 1912 the section governing booths in moving picture theatres, regarding the doors (handing book to witness)? A. Chapter 197 of the session of 1912 is "An act for the regulation of public shows," and prescribes how booths in moving picture theatres shall be constructed.

By the Court: Q. What do you mean by "booth"? A. The compartment in which the projecting machines are located.

By Mr. Woerner: Q. Can you find the section governing the exit doors and fireproof doors? A. "For each booth there shall be provided a door not less than two feet in width and six feet in height, consisting of an angle iron frame covered with sheets of said fire-resisting material one-quarter of an inch in thickness, and attached to the framework of such booth by hinges, in such manner that the door shall be kept closed automatically at all times, when not used for ingress or egress."

Q. In your opinion, does that section require the extra door covered with metal in the booth and the double iron trap door above iron ladder, under that section?

The Court: Well, that is a matter of construction of the statute. Let me see it. "For each booth there shall be provided a door not less than two feet in width and six feet in height, consisting of an angle iron frame covered with sheets of said fire-resisting material one-quarter of an inch in thickness"—(the relative word "said" looks back to the first section, I think. "Asbestos or other strong fire-resisting mate-

rial.'') ''—one-quarter of an inch in thickness, and attached to the framework of such booths by hinges, in such manner that the door shall be kept closed automatically at all times, when not used for ingress or egress.'' All you want to speak about now is the doors. Well, the statute calls for one door in each booth.

By the Court: Q. Did you find a door of that kind? A. I found the door. The only door that there is there is the door to the—

Mr. Leber: Well, now, the witness has answered the question. He found a door. I do not see why the witness should keep on speaking.

By the Court: Q. Well, tell us about the door. What kind of a door did you find? A. A sheet metal door to the exterior wall, providing egress from the booth in case of fire.

Q. Well. A. May I explain the object of that door?

Q. The door that you found? A. That is required by statute.

Mr. Leber: Are you interested in the object of that, if your Honor please?

The Court: The witness may give us his idea about it. He is an architect.

Q. Go on. A. The object of placing a door of that size in case a sudden fire appears in the films that the man contained therein can save himself instead of being burnt up. The object is to get a door large enough and proper so he can get away. There is no door in that booth that a man could get away to save his life outside of the door that was put in that exterior wall.

Q. Well, is that door that you found in the booth? A. Sir?

Q. Is the door which you found in the booth? A. Yes, sir.

Q. But you say it is more distant from the location of the operator than you think it ought to have been? A. No, it is in the booth; the law does not say how distant it shall be.

Q. Well, your criticism on the door that you found, I understood, was that it was not readily accessible to the operator? A. I beg your pardon. My testimony, I believe, is to show that the door was required by law.

Q. So I understand. And you found a door. Did you find a door in compliance with the statute? A. Not absolutely; it is not of the same construction, but it serves the same purpose.

Q. Well, how does it differ in construction? A. Well, it is not built of angle iron and it is not built of as strong material as asbestos, as specified, being of less than—I don't think the door is more than a quarter of an inch thick, and covered with sheet metal.

Q. Did it have an angle iron frame? A. No, sir.

Q. And was it covered with asbestos? A. No, sir.

Q. But merely with metal, you say? A. Yes, sir.

The Court: That does not seem to be in compliance with the statute. You may proceed.

By Mr. Woerner: Q. Is there any section governing the door opening on the bottom to the iron ladder? A. I believe the same law contains a

section which requires all other openings to the booth to be fireproof, to have fireproof inclosures.

By the Court: Q. You are now speaking of doors or windows? A. Windows or openings.

The Court: "The windows in said booth used in connection with the machines and apparatus, and by the operators thereof, shall not be larger than is reasonably necessary to secure the desired service, and such fire-resisting material shall be provided for each window and shall be so suspended and arranged that they will automatically close the window openings upon the operation of either a fusible or mechanical releasing device, with a fusible link attached."

Q. Well, do you think there is a general provision as to all openings? A. I believe that relates to all openings.

Q. Do you think that relates to windows? A. Yes. Well, these windows are just small enough just to get the projection through it.

Q. Did you find windows provided with asbestos? A. I don't remember what their covering is; I remember they are sheet metal covering, the same as the door.

Q. Similar to the door? A. Yes, sir.

By Mr. Woerner: Q. Is that the only section covering openings, that you know of? A. That is all I find.

Q. In your opinion, then, the exit door used as an exit would not be extra work under the specifications?

Mr. Leber: I object. That is for the jury to say.

The Court: What is this extra door?

Mr. Woerner: Exit, your Honor.

The Court: Exit door?

Mr. Woerner: Yes, sir.

By the Court: Q. Do the specifications call for an exit door? A. To where, the booth?

Mr. Woerner: The one you have been testifying about, outside.

Witness: Whether the plans and specifications call for that particular exit door?

The Court: Call for an exit door.

Witness: They do not show an exit door to the booth.

The Court: The contract, if I remember right, requires that the contractor shall conform to legal requirements in his construction. That would bind him to put up a door which is called for by law, I take it, whether the specifications mention it or not.

Mr. Leber: While we are on that subject: the testimony is that there was a special agreement made to furnish this extra door and that it was to be paid for. I simply call your Honor's attention that it may have a bearing on the question.

The Court: That is to be considered in connection with the contract obligation to comply with the law.

Mr. Leber: Yes, sir. I objected to the question.

The Court: I sustain the objection.

Defendants' counsel objects to this ruling of the Court.

Objection noted as ground of appeal.

By Mr. Woerner: Q. Are you familiar with the

building code of the City of Newark? A. I am.

Q. And can you tell us whether or not there is any provision in the building code requiring a reenforced concrete ceiling in a building similar to this?

Mr. Leber: I made the same objection yesterday to this, and I reiterate my objection.

The Court: Let us have the building code produced, and we will look it up.

Mr. Woerner: I find it very difficult to get the code. The only one we have cannot be used, and my object in asking the question is to get a ruling. It seems to me that an expert has a right to testify without going into the means of his testimony. For instance, I think a lawyer could testify that so and so was the Statute of Limitations. My objection in asking this question is to bring that matter to a head.

Mr. Leber: I do not understand that Mr. Myers is called as a legal expert.

The Court: In the face of an objection, I think the code ought to be produced.

Defendants' counsel objects to this ruling of the Court.

Objection noted as ground of appeal.

Q. Has the word "Court" any technical meaning in the building trade? A. It has.

Q. And what is that meaning? A. An open space surrounded on more than to sides by inclosures.

Q. I show you the specifications and call your attention to the words, "Drain the court to sewer," and ask you as an architect what the

meaning of that is in the building trade (paper shown to witness)?

Mr. Leber: I do not know whether that is exactly a proper question, if your Honor please.

(Question read.)

The Court: The question as now presented relates to a technical term, a term which the witness considers to be a technical term, having a special meaning in the trade. The rule in those cases is that testimony may be taken to understand a contract by interpreting special terms, works of art, and so forth. On that ground I think it is admissible.

Objection withdrawn.

A. The meaning of this clause in relation to the problem for the building before us would mean the draining of the court about the building, to the side and rear of the building.

Q. And in your opinion, would the charge of an extra cellar drain from rear yard to cellar be a proper extra charge under the specifications?

Mr. Leber: I object. That is for the jury to say.

The Court: That depends upon the interpretation of the contract, does it not? It is called for in the specifications, is it not?

Mr. Woerner: "Drain court."

The Court: "Drain court to sewer." That is called for in the specification?

Mr. Woerner: Yes.

The Court: If it is called for in the specification, it is part of the contract, of course.

Question withdrawn.

Q. Going back to the booth, what would you say about the strength of the floor? A. The floor is structurally dangerously weak.

By the Court: Q. The floor of the booth? A. Yes, sir.

By Mr. Woerner: Q. What is the reason for that? A. Because the wood beams originally placed and intended to only hold a wood floor were afterwards covered with a number of inches of concrete; they have overloaded the floor, and the slightest hammering of the floor with the foot of the weight of the body creates a severe vibration.

By the Court: Q. What is the remedy? A. To take the entire floor out and put in a new floor of proper strength.

Q. Can it be braced as it is? A. Not unless one would put additional girders underneath the same exposed in the vestibule, or columns in the vestibule, which would be objectionable.

By Mr. Woerner: Q. Now, under the specifications, in your opinion, if they were properly performed, would the painting spot inside of the building? A. It should not.

Q. Now, as to the general character of the workmanship on the job, what would you say as to that? A. The cement exterior block walls are fairly well laid up; they have some holes through the same—

Q. Just make this short. The general workmanship, not specially. We have been over that, I think. A. Poor.

Q. Now in your opinion, would the architect in this case, considering the contract and plans and specifications and the building, from your exam-

ination, be justified in issuing a final certificate under the contract?

Mr. Leber: I object. That again is a jury question. That is the very issue. This man cannot decide this case.

The Court: I think this is a question for the jury, all the facts being before them. If the contract was complied with, the final payment was earned; if it was not complied with, the final payment was not earned. It is for the jury to say from all the evidence whether there was a compliance.

Defendants' counsel objects to this ruling of the Court.

Objection noted as ground of appeal.

Q. Was the building, in your opinion, finished in compliance with the contract and plans and specifications? A. It was not.

CROSS-EXAMINATION by Mr. Leber:

Q. Mr. Myers, I believe you said that you were first requested to make your examination by Mr. Woerner? A. I was.

Q. A little louder, please? A. I did.

Q. When did he request you to examine the building? A. On the afternoon of December 31, 1914.

Q. 1914? A. Yes.

Q. Prior to that time you did not even know of this structure, did you? A. Not the slightest, no more than I passed by and saw the structure.

Q. And when Mr. Woerner requested you to make your examination, did he then show you the plans and specifications? A. Our conversation was over the 'phone.

Q. Are you to be paid for your expert services in this case? A. I am.

Q. Was that arrangement made with Mr. Woerner or with Dr. Stahl? A. Dr. Stahl.

Q. When did Dr. Stahl complete these arrangements with you? A. The same afternoon, December 31st.

Q. Over the 'phone or in your office? A. He was sent to my office by Mr. Woerner.

Q. Your office in this city or in New York? A. In this city.

Q. And did Dr. Stahl then and there give you the plans and specifications? A. I believe he did.

Q. And I suppose you discussed— A. He did.

Q. He did? A. He did.

Q. And I suppose you discussed then and there your terms for your services? A. To Mr. Woerner and also Mr. Stahl—Dr. Stahl.

Q. And upon the agreement being made as to what you were to be paid, you consented to act? A. No, sir.

Q. When did you consent to act? A. I told Dr. Stahl that as an expert I had often refused cases, and I would not act—

Q, I did not ask you that; I asked you when you consented to act? A. After I had made an examination of the plans and visited the building next morning with him and saw the conditions.

Q. When did you make an examination of the plans? A. On New Year's Eve, December 31st.

Q. Was Dr. Stahl present when you examined the plans? A. No.

Q. Was Mr. Woerner there? A. No.

Q. Was anybody there besides yourself? A. Nobody besides myself.

Q. But before Dr. Stahl left you and he agreed as to what you were to be paid, didn't you? A. If I was to act.

Q. If you were to act? A. Yes.

Q. Now, then, on New Year's Eve you studied the plans and specifications? A. I did.

Q. And when did you examine the building? A. New Year's morning.

Q. Did you examine it alone or did you have some assistance? A. I had no assistance. Dr. Stahl came and saw that I could get into the building.

Q. Did he point out things to you?. A. No.

Q. Was Dr. Stahl the only person there while you made your examination? A. The only person.

Q. Did he stay there during the entire time while you were examining the building? A. He did.

Q. When did you get there? A. I got there, I believe—I got there at 10 o'clock.

Q. When did you leave? A. About an hour after.

Q. So that you made an examination of an hour that day? A. Yes, sir.

Q. And when did you again see that building? A. The day the jury went up, Monday.

Q. Well, you made no examination that day, did you? A. Yes I looked about.

Q. You looked about— A. And I verified by rule—

Q. I did not ask you that? A. Yes, I did look.

Q. Did you make an examination then? A. I did.

Q. How much of an examination did you make

on that occasion? A. About fifteen minutes' time.

Q. What did you examine? A. I examined to verify by rule the height of the sill of the rear exit doors relative to the floor level in the front of the theatre.

Q. Is that the only examination you made? A. I verified my opinion as to the soundness of the runway of the rear, towards the rear exit doors, and the general cement work.

Q. Is that all that you did that day? A. Yes, sir.

By the Court: Q. That is where you say the cement sounded hollow? A. Yes, sir.

By Mr. Leber: Q. When did you again see that building? A. This morning.

Q. And how much time did you spend this morning on that structure? A. Ten minutes.

Q. Did you time yourself? A. Why, I did not take out my watch.

Q. Well, you judge that you were there ten minutes? A. About ten minutes.

Q. And you went there this morning for what purpose? To go into the cellar to look at the steam boiler and to look at the water lines and to further seek the possibility of a meter.

Q. So that the testimony you have given us, Mr. Myers, relates largely as to the condition of the building as you found it when you made your examination? A. Yes, sir.

Q. Of course, you cannot tell in what condition that building was on or about the 26th day of April, 1913, can you? A. I can tell very well its condition since it was erected, and even during its erection of that work which is to be seen.

Q. There might have been a water meter there

on the 26th of April, 1913, might there not? A. Impossible, because there is no connection on the water line, which I examined this morning especially for that purpose, where a water meter could have been placed. There is only one union on the line, whereas if there was a water meter there would have to be two unions.

Q. There might be a change as to the water lines? A. I don't believe so.

Q. You do not believe it, eh? A. No.

Q. Well, persons can change their structures within a year's time, can they not? A. Well, they would have to take out their entire water line.

Q. I know, but they can change their structures? A. Oh, people can change their structures.

Q. And there might be a change in the water line there, might there not? A. No, I don't think so.

Q. You are positive about that? A. Yes, sir.

Q. I believe I understood you to say, Mr. Myers, that so far as the plumbing work was concerned, it was as that class of work usually is. Did you say that yesterday? A. I did.

Q. Well, what did you mean by that? A. I meant to say that the plumbing as installed is of that quality as is generally installed in that class of moving picture theatres.

Q. Does this building as it is shown on the plans described in the specifications belong to a class? A. Yes, sir.

Q. Well, by "class," we must understand that there are more than one like it? A. Yes.

Q. And to what class does this building belong? A. A class of buildings that should not be permitted to be erected.

Q. In your opinion? A. Yes, sir.

Q. But that is not the opinion of the city authorities, evidently, is it? A. Yes, sir; it is the opinion of the city authorities.

Q. Well, they are erected by the permission of the building authorities, are they not? A. Yes, sir.

Q. Do I understand you to say that, in your opinion, this building belongs to a class that is so poor and so cheap that it ought not to be erected—it ought not to be allowed to be erected by law; that is what you mean by that? A. The Code is against it, the law is against it.

Q. Well, if the Code is against it and the law is against it, will you please tell us why it is that these plans have been approved by the city building department and that the place has been licensed to do business there?

The Court: You are asking the witness rather too much, I think.

Mr. Leber: Do you think I am putting two or more questions in one, or is it not proper.

The Court: I think it is a question that the witness ought not to be expected to answer; why it is that the city officials licensed something that is not according to law, in the view of the witness. How can the witness answer that question?

Q. Well, you think, then, that this building is of a very cheap class of buildings? A. Yes.

Q. And ought not to be permitted to be built; that is what I understand you to mean? A. Yes, sir.

Q. That means, I suppose, that the entire structure is of poor class? A. The entire workmanship of the structure is of a poor class.

Q. I am not talking of the workmanship; I am talking about the building itself as it was shown on the plans and described in the specifications. That is of a poor class, is it not? A. Why, I do not mean to say that the plans and specifications require a poor class of work—

Q. No, and I did not ask you that, either. A.—but the work that results from them is a poor class.

Q. This is a poor class of structure; that is what you mean to tell us? A. Yes, sir.

Q. And it is shown on the plans and described in the specifications as a poor structure, is it not? A. No, the specifications require the workmanship and materials to be the best of their kind.

Q. Let us understand that. So far as the front is concerned, with the exception that the ornamental plaster is not on and the exception that the windows are oval instead of rectangular, the front is as shown on the plan, is it not? A. Approximately so; it is not exactly.

Q. Substantially so, is it not? A. Yes, in the design.

Q. And so far as the four walls of that building are concerned, substantial compliance has been had with the plans and specifications, has it not? A. One moment.

Q. I am talking of the exterior? A. The exterior?

Q. Yes. A. Yes.

Q. That is right, is it not? A. It is.

Q. And so far as the general pitch of the interior is concerned, there is substantial compliance, is there not? A. Yes, sir.

Q. And the plumbing is as it ought to be, according to the specifications? A. No.

Q. Did you not say that it was just as it ought to be in that class? A. I did not say it was just as it ought to be; I said that the plumbing is substantially as that class of work is done, but the specification does not call for that.

Q. What? A. The specification does not call for that in particular cases.

Q. In some particular cases you have pointed out to us the difference, have you not? A. It has been pointed out.

Q. You have pointed it out, have you not? A. Not entirely.

Q. I think you said there were a few minor things that you did not care to speak about yesterday; isn't that true? A. Yes, there are many little things that are too small to bring up.

Q. It is not worth while to talk about it at all? A. No, not that it is worth while talking about. We can talk for a week, you know, if we talk about everything in the building.

Q. The case would take too long? A. That is the idea.

Q. Was that chimney built according to the size shown on the plans? A. I believe it is.

Q. If it had been built of brick and not of cement blocks, it would be of sufficient size to accommodate a heater such as ought to be put into that building, according to your opinion, is that true? A. That is right.

Q. So that, in order to accommodate a heater of the size you believe ought to be put in there, the chimney ought to be removed and a new chimney built of a larger flue? A. Yes, sir.

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

By the Court: Q. Do the specifications prescribe

the size of the chimney? They do the materials, I know. A. I don't think that they do. I looked at them. I am not quite sure it does not (examining paper). It gives no size.

By Mr. Leber: Q. Now, Mr. Myers, that chimney ought not to be thrown down because it is built of cement blocks, ought it? A. It ought to.

Q. Why? A. Because cement blocks will never stand the expansion that will occur in flue from the heat that is delivered there by the direct contact with the boiler.

Q. Even with the boiler that is there? A. That is the cause of the crack that is there.

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

Q. I believe you said that the cement floor is cracked; did you say that? A. Yes.

Q. Is it badly cracked? A. That is a quality term.

Q. Well, you are an expert; you ought to know; you ought to know what I mean by "badly cracked." A. I would term it badly cracked.

Q. Is the entire floor in that condition? A. The cracks extend over a large area of the floor; not every square foot is cracked, but the cracks run in various directions.

Q. Is that a substantially good floor? A. I would not consider it so.

Q. Can you tell us whether or not that floor has been laid in accordance with the specifications? A. (Referring to paper.) The specifications called for, "The entire auditorium and cellar bottom of building to be leveled off and settled thoroughly and concreted four feet deep and finished with one foot Portland cement finish." The specifications do not say as to what each should constitute—

By the Court: Q. What? A. The composition of each, and what the composition of the top should be.

By Mr. Leber: Q. Well, will you say that Rizzolo complied with these specifications? A. From the general conditions at the beginning of the specifications, which covers the fact that all material should be of the best described, I should say not.

Q. What causes the cracks? A. Contraction.

Q. You have seen cement floors that you yourself have supervised or had constructed that cracked, have you not? A. Yes.

Q. And it is not possible that cement floors made of the best material would crack? A. Yes.

Q. It would depend also upon the time of the year when the cement is laid, would it not, or when the concrete is laid? A. Somewhat, but we lay concrete in the dead of the winter.

Q. Mr. Myers, you have answered the question. Have you examined the seats in that building? A. Not carefully.

Q. Did you notice whether the seats were screwed to the floor? A. I did not.

Q. Are they not screwed to the floor? A. They are.

Q. And was not this floor drilled for the purpose of screwing the seats to the floor? A. They must have been.

Q. And would not that have an effect upon the floor so far as cracking is concerned? A. Positively not.

Q. It would not? A. No.

Q. Well, if bad material had been used in laying this concrete, would the concrete hold the screws? A. No.

Q. So that the fact that the seats are in substantial condition and not loose would prove that good material has been used, would it not? A. But there is no such proof.

Q. Well, did you try the seats? A. No, and I don't know anybody else that did.

Q. Well, was it not your duty, for the purpose of determining whether Rizzolo used good or poor material in laying that floor, to make all the tests required for that determination? A. I might have made additional tests above those that I did make.

Q. Well, why did you not make them? A. I forgot to make that particular test.

Q. Well, was it not fair to Rizzolo that you should use every test known to you for that purpose?

Mr. Woerner: I object to what his duty was to Mr. Rizzolo. It does not seem to me that that is a fair question.

The Court: That is a matter of opinion. I sustain the objection.

Q. You have prepared a great number of specifications during the nineteen years of you practice as an architect, have you not? A. I have.

Q. And do you always call a yard a court? A. We do not—I do not.

Q. A yard is a yard, is it not? A. A yard is a yard.

Q. And usually the word "yard" is employed to designate the space between the rear of a building and the end of the lot, is it not? A. Not in theatre planning.

Q. Would you call any side space a yard? A. We do.

Q. Do you? A. We do—I do.

Q. Would you call a front space a yard? A. It is not a yard.

Q. Well, some people designate it as a front yard, do they not? A. No, sir.

Q. They do not? A. Not in theatre construction.

Q. But you have, in your experience, designated the space between the rear of the building and the rear end of the lot as a yard, have you not? A. Not in theatre construction.

Q. You have in other kinds of buildings? A. In residences, tenements.

Q. Have you ever run across specifications prepared by other architects relating to the construction of a theatre where the rear space was called a yard instead of a court? A. I have not.

Q. Then the only one who called the rear space a yard is Mr. Rosensohn? A. That is the first time I have seen it so called.

Q. The first time in all your experience, is it not? A. That is right.

Q. You say that the floor of the booth is structurally weak, do you not? A. It is.

Q. And you tested it? A. I did.

Q. How did you test it? A. By jumping on it.

Q. There are other tests to determine whether a floor is structurally weak or not, are there not? A. Yes.

Q. Did you use the other tests? A. There was no other test necessary.

Q. Did you use the other tests? A. No.

Q. Is that floor leading from the booth out into the space a fireproof door? A. No.

Q. Do you know that there was a fire in that booth last Saturday? A. I read so in the paper.

Q. Did you see that place this morning? A. I wasn't up in the booth this morning.

Q. Do you know whether there was any loss of life there or any danger to life? A. The fire was not large enough, according to the paper reports, to cause loss of life.

Q. Then you gain your information from the paper reports? A. As to that fire.

Q. You say that the specifications require a three-quarter inch water supply and that is a five-eighth inch water supply there? A. Yes.

Q. Now I would like to have your assistance, Mr. Myers, regarding that heating plant. As I understand you to say, your computation shows that that building requires 1063 square feet of heating— A. Of radiation.

Q. —Of radiation, rather, for the purpose of heating that building to 70 degrees Fahrenheit in zero weather? A. Zero weather, yes.

Q. And to give us the benefit of that determination or of that opinion, you have made calculations, have you? A. Yes, sir.

Q. By saying that 1063 square feet of radiation is necessary, you mean that the pipes carrying the heat ought to be of that dimension, do you not? A. That is the idea.

Q. And in addition to that, of course, you ought to have a heater of the capacity to radiate through those pipes enough heat to produce the result, as you have testified? A. Yes.

Q. Is that right? A. Yes.

Q. How many feet of radiation are now in that building? A. About 400, 400 to 425 feet.

Q. So that it would be necessary to have nearly three times as many pipes? I am talking only as a layman, Mr. Myers. Pardon me! A. Yes.

Q. Three times as many pipes in that building—A. Yes, sir.

Q. —as there are now to properly heat that space? A. Yes.

Q. And you would have to have a heater of nearly three times the capacity that the present heater is? A. Yes.

Q. That is right? A. Yes.

Q. Does that mean that the heater would have to be three times the size? A. Yes.

Q. It does? A. It does.

Q. Now I think I understand it, that in order to heat this building according to the requirements of the specification it would be necessary to have about three times as many pipes as you have there now and a heater about three times the size of the one that is there now? A. Yes.

Q. And if we had all these pipes there and this sized boiler, or heater, then we would be able to heat the building 70 degrees in zero weather? A. Yes.

Q. Is that right? A. Yes.

Q. Now, in order to determine the amount of radiation that was necessary for any building, students of architecture and building contractors have experimented and have formulated rules for the guidance of the profession, have they not? A. Not students of architecture, but professors and heating engineers.

Q. Professors of what? A. Professors of heating and engineering, such as Professor Carpenter, of Cornell, is considered an expert.

Q. Yes, I was about to ask you about Professor Carpenter, of Cornell. Did you study under him? A. I did.

Q. And he formulated a rule, did he not? A. Yes.

Q. And I suppose he formulated the rule after a great deal of experimentation? A. Yes.

Q. Of your own knowledge? A. Yes.

Q. And is that rule considered an authority? A. We do not follow it any more.

Q. Why? A. We used to follow it ten or twelve years ago.

Q. Why? A. Because since Carpenter formulated his rules, twenty years ago, there have been a great number of additional tests made as to the radiating capacity of materials, which the later rules govern and take into account to a greater exactness.

Q. Is Professor Carpenter alive yet? A. I don't remember if he has died since I was there or not.

Q. So that his rule is obsolete? A. Some still follow it.

Q. But you would condemn following Carpenter's rule? A. I have given up following Carpenter's rules in my practice.

Q. Other architects follow Carpenter's rule, do they not? A. I don't know.

Q. Could you assist us and give us the result that Professor Carpenter would reach on the question of radiation required in this building? A. That would take about an hour to do.

Q. Would it take an hour? A. I think so.

Q. I think we could get at it quicker than that, if the Court will let me have a board and some chalk. While we are waiting for the setting of the scene, I have another question to ask you. There is a difference in computation between

dwelling-houses and halls and theatres, is there not? A. Yes.

Q. So that you have two sets of rules to follow, have you not? A. Why, the rules have to be made adaptable to the usages and the air chambers, and things of that sort.

Q. So that every set of rules must be modified by the particular building and the experience that we have gained, must it not? A. Yes.

Q. And experience plays a great deal, does it not? A. Yes.

Q. So that the judgment of a practical steamfitter is worth something in computing the rule, is it not? A. I don't believe so. The later rules take into consideration those factors. Of course, it is left somewhat to the experience and discretion what factor is to be used for some of these purposes.

Q. Well, these rules that have been set down have been formulated by human beings, have they not? A. Yes.

Q. And probably by only one man; isn't that so? A. I don't think so; I think they are the result of experiments.

Q. Now you are familiar with this book issued by the United States Radiator Corporation, are you not (pamphlet shown to witness)? A. We have their catalogue.

Q. Have you a copy of it in your office? A. We have.

Q. Now, we spoke a little while ago about Carpenter's rule. Was he one of your professors? A. He was.

Q. Would you recognize his rule if I showed it to you? A. I think I would, although I have not used it in over ten years.

(Plaintiff's counsel indicates in pamphlet.)

Witness: I would rather send for an engineering book in my office showing Carpenter's rules better than this.

Q. Well, is not that Carpenter's rule? A. I don't recognize it as such; it might be.

Q. You have not Carpenter's rule here? A. No; I can send for it. I looked at it this morning.

Q. Have you read this rule? A. I have looked over that. It says in the catalogue that that is his method of figuring.

Q. Well, suppose we use the method prescribed by the rule as given in this book. Now, what is the first thing to do? A. According to this catalogue, it says that Carpenter submits the following rule for determining the size of the radiator needed for a given room: "Add the area of glass surface"—

Q. Let us go slowly, step by step. Have you measured the area of glass surface in this building? A. We measured 2508 feet—no, pardon me! —264 feet of glass surface.

Q. 264 feet of glass surface? A. Yes.

(Plaintiff's counsel writes figures on board).

Mr. Leber: I will just call that glass.

Q. Does that include all the glass surface throughout the entire building? A. Yes.

Q. Does that include the glass in the front door? A. I don't believe it does; I don't remember that it does.

Q. Well, who took the measurements for the glass surface? A. Mr. Durant, under my instructions.

Q. Does it include the glass surface of the oval windows? A. I believe it does.

Q. And wherever there is any glass in that building? A. Yes.

Q. And that gives us 264 square feet? A. Yes.

Q. Now, what are we to do with it, according to Carpenter? A. Add the area of glass surface in the room to one-quarter of the exposed wall surface.

Q. Now, what is the exposed wall surface? A. 2,508 feet.

Q. How do you make that out? A. It was figured.

Q. Did you do that figuring? A. Mr. Durant did these figures and I checked them afterwards.

Q. Look at these plans and tell us what the measurements show according to the plans. See if that is correct. I simply want to know whether that is the right figure? A. (Referring to plan.) Well, we will have to take the average height of the building, which is 21 feet, by the length of all the exposed wall surfaces, the rear, the side and the front, and that part of the north side which is not protected by the building to the north. There is a building on the neighboring property to the north, which we would not add to it.

Q. That would give you 2,508 feet? A. Yes.

Q. Now, you have got to take a quarter of that, you say? A. According to this rule, one-quarter.

(Plaintiff's counsel figures on board.)

Q. That gives us 627; is that right? A. Yes.

The Court: That seems to be right.

Q. That gives us 627 square feet. What is the next step? A. "And to this add from 1/55 to 3/55 of the cubical contents—1/55 for rooms on

upper floors, 2/55 for rooms on the first floor, and 3/55 for large halls." You see, this rule of Carpenter is applicable mostly to residential buildings; it is not applicable to a building of this kind.

Q. It is not? A. No, and if I had Kent on Heating & Ventilating, which devotes half a page to Carpenter—

Q. Criticizing Carpenter? A. No, it simply gives an opinion on Carpenter. Kent is not even the newest book on heating and ventilating. It would show you this particular instance. This United States Radiator catalogue—

Q. Well, suppose we go on and figure that out. What is the cubical contents of the air in the building? A. The cubical contents is 46,851; you might say 47,000 approximately.

Q. Well, I am not so much interested in making that so large; I would rather have it less. A. Well, giving you the benefit of the doubt, make it 46,800.

Q. Now, you think that we ought to take 3/5 of that? A. 3/55.

Q. 3/55? A. According to this rule. Multiply the 3 and divide by 55.

(Plaintiff's counsel figures on board.)

Q. Is that right—2,500? A. Well, it is about right—2,550, yes.

Mr. Leber: (Figuring on board.) Well, we put that under the other figures. What must we do next?

By the Court: Q. Let us see how far we have got. First you put down you 627? A. No, 264 feet for glass first.

Q. Then 627? A. Yes, sir.

Q. Then 2,550? A. Yes.

By Mr. Leber: Q. And then what do we do? A. Multiply by 25 per cent for steam.

Q. Well, you add these three? A. Yes.

Q. And then you take 25 per cent of that; in other words ¼? A. Yes.

The Court: That is 3,441, is it not?

Mr. Leber: Yes, 3,441.

Q. You take a fourth of that? A. Yes, and that gives 860.

The Court: How much?

Mr. Leber: About 860.

Q. Then according to Carpenter's rules all you would have to have would be 860 square feet of radiation, would you not? A. If you apply his rule, but you would not get the heat.

Q. Now, you mentioned in your direct-examination the thumb rule. I show you the thumb rule as stated in this book (indicating in pamphlet). Is that substantially the rule you refer to? A. There are many rules that people take by general experience.

By the Court: Q. What book are you referring to? A. This is the catalogue of the United States Radiator Company.

Q. Is that the concern that furnished this radiator? A. No.

By Mr. Leber: Q. You say that there are many rules. Do you mean that there are many thumb rules? A. Yes, many people have their own thumb rule by experience, but they never come—

Q. Well, I thought this rule was promulgated by Mr. Thumb? A. No, just a casual expression.

Q. You mean the thumb that is sometimes called a finger? A. Yes, sir.

Q. Will you look at this rule that is called a thumb rule. Are you familiar with that rule? A. I have seen that before.

Q. Is that used? A. Not by people that are—

Q. Well— A. Well, it should not be used; whether it is used or not I don't know.

Q. I know what is your opinion, that it should not be used, but is it used? A. I don't know that it is used.

Q. You have never used it? A. No.

Q. Well, according to the thumb rule as given in this book, in order— A. The rule of thumb.

Q. The rule of the thumb. The rule to follow in figuring the radiation in assembly halls and churches is 100 to 125. Does that mean 100 cubic feet of steam to 1,000 cubic feet of contents—of space, I mean? A. Let me see the space. "As this method of figuring only considers the cubical contents of space to be heated, some experience in heating is required to determine the proper factor to be used for different conditions; the exposed wall and glass surface varies the amount of rediation to be used."

Q. Then there is a rule stated? A. "One square foot of direct radiation will heat assembly halls and churches, cubic feet, by steam from 100 to 125 cubic feet."

Q. If the space shows a cube of 46,800 feet, applying the rule you just read, hom many square feet of radiation would it require? A. 468 according to this rule.

Q. 468? A. Yes.

Q. We will put that down (writing on board). Then according to the rule you have just read, it would require 468 feet of radiation, and, accord-

ing to the Carpenter rule that we figured out on this board, it would require approximately 860 square feet of radiation? A. Yes.

RE-DIRECT-EXAMINATION by Mr. Woerner:

Q. You said that the number of radiators and the size of the boiler would have to be increased three times. Do you mean that necessarily the boiler would have to be three times as large? A. A boiler of almost three times of that which is installed would have to be installed to heat that building to 70 degrees of temperature at zero weather outside.

Q. But it would not necessarily have to be three times as large in size, would it? A. It would have to be three times the grate surface and three times of its creative capacity.

By Juror No. 2: Q. Mr. Myers, you spoke of a crack alongside of the chimney, running from the top of the chimney down— A. It is not alongside that I refer to, but it is through the blocks in the chimney.

Q. Is not that due to a settling? A. No.

Q. —either of the front part of the building or the other end of the auditorium? A. Do you refer to the crack at the side of the chimney?

Q. Yes. A. (Sketching on board.) There is a crack where this cement block of the wall adjoins the chimney; there is a large crack there through the flue, and there is a slight crack there (indicating on sketch). Which one do you refer to, the one through the flue or the one adjacent?

Q. The cause which made that crack possible alongside of the chimney on the main wall, would

that be in any way responsible for the crack in the chimney as well? A. This would not be responsible for that (indicating,) positively not. This might have resulted from this expansion, because the heat of the flue expanded the chimney until it opened up about half an inch, and after the chimney contracts, when it gets cold and closes up —it might be that it has expanded and forced this wall apart, and when it contracts it leaves this side crack there. That side crack might be from the expansion in the flue, which I believe it is, and it might be from the settling away from it, but I don't believe it was; but this crack here was due to expansion.

Q. That crack might be due to conditions of the ground, in settling, and so forth? A. It might, but I don't believe it is. We test these things right along in high pressure plants and bakeries, and so forth.

By the Court: Q. Mr. Myers, I suggested yesterday that you might be asked today to form and give an estimate of the cost of making good certain features that you found objectionable; I mentioned particularly the runway, where you said the cement sounded hollow under the foot, and the insufficiency of the boiler capacity, including the chimney, and today you have mentioned the overloading of the floor by concrete, which you think would necessitate the taking out of the floor and putting in another. Have you given any attention to the possible cost of making the necessary changes, the changes which, in your view, would be necessary to remedy those difficulties? A. I have.

Mr. Leber: If your Honor please, may I be heard on that question?

The Court: I asked him if he gave any attention to it, and he says he has. I have not asked any question. A question would probably come from counsel, if they desire to ask it.

Mr. Leber: Well, it has not so far come from counsel.

The Court: If counsel object to any question, I will not ask it.

Mr. Leber: I am afraid I should have too good a lawyer against me if your Honor should ask these questions.

ALFRED STAHL, resumes the stand in behalf of defendants:

Direct-examination by Mr. Woerner:

Q. Dr. Stahl, did you make the final payment on this building? A. I did not.

Q. Do you know whether it was made? A. It was not, to my knowledge.

Q. Why was it not? A. Because the work was not satisfactorily finished.

Q. In what respect was the work not finished? A. Well, the heating system would not heat properly; the painting on the wall and decorating, both the exterior and interior, were not satisfactory; the cracking of the floor and weakness of the floor of the booth; the runways being cracked; the inability to drain the court in the rear, and the general workmanship in general was considered bad.

Q. What was the matter with the heating? A. It would not heat it on cold days.

Q. Were you there when the heater was going? A. No, but Mr. Poysher was there; he run the place.

Q. Did you see the painting work? A. I did.

Q. What was the matter with the painting work? A. Well, it had been originally painted a green color, and it had run all down; in other words, it was streaked and spotted probably fifteen different shades.

Q. You say the drain in the court in the rear would not drain? A. No, it would not.

Q. Do you know what the cause of that was; or do you not? A. Well, my opinion was that the trap, or the strainer, that he had over it was simply of tin, and even before he had finished the job it had already rusted through and dirt got into the pipe and partly filled it up.

Q. Is the ornamental plaster piece on the building? A. It is not; it never has been.

Q. What would you say about the woodwork in the toilets? A. Well, the material is bad and the workmanship is worse. So far as the material is concerned, the crating that was around the seats when they came from the manufacturer was used for some of the trim.

By the Court: Q. You are now speaking generally of the woodwork? A. Of the inside trim.

By Mr. Woerner: Q. What would you say as to the plumbing work? A. The fixtures, most of them, were loose, the sinks especially and instead of nickel-plated fixtures, they were brass.

By the Court: Q. Which particular fixtures have you in mind? A. Why, the faucets in the toilets.

By Mr. Woerner: Q. Was the building, in your

opinion, finished according to the plans and specifications? A. It was not.

Mr. Leber: I object to that.

The Court: I will let it stand.

Q. Did you provide the funds for the erection of this building? A. Partly.

Q. Were any funds provided after the third payment was made? A. No, I am sure not.

Q. What I want to know is whether you set aside any funds for the balance of the contract after the third payment? A. Yes.

Objected to.

The Court: How many payments were there, four.

Mr. Leber: Four:

Mr. Woerner: Four.

Mr. Leber: Does that make any difference, whether he set aside any money or not?

The Court: What difference does it make? It is a matter of contract obligation. If the contract was performed the fourth payment became due.

Mr. Woerner: Mr. Rizzolo has testified to that fact, and besides he has testified that the reason the certificate was not issued was because Mr. Poysher said he had no money. I want to show that the actual cash was in the bank to make this payment. It seems to me it is material.

The Court: Well, as a response to the statements by a witness on the other side, you may ask the witness the question.

Witness: There was approximately $2,000 after the third payment was made.

Q. How was that provided? A. I drew the money out of my own account and deposited it in a second account, making checks payable only on signature of Mr. Poysher and myself.

Q. Do you know about the date that you provided that money? A. About January 26, 1913 —or 1914.

Q. And where was the money deposited? A. Clinton Trust Company.

Q. Did you ever issue any instructions to Mr. Rosensohn as to the issuing or withholding of a certificate? A. None whatever.

Q. Did you ever have any conversation with him with relation to issuing a certificate? A. None whatever.

Q. Mr. Rosensohn testified that when you and Mr. Poysher were at his office you asked a deduction of $500 or $600. A. I did not ask for any amount at that time or any other time.

Q. What was said at that time?

Mr. Leber: I object to that. You Honor ruled on that yesterday.

The Court: This is a conversation between whom?

Mr. Woerner: Mr. Poysher, Mr. Rosensohn and the witness.

The Court: This was something in Mr. Poysher's presence?

Mr. Woerner: Yes.

Mr. Leber: Not in Mr. Rizzolo's presence.

The Court: Not in Mr. Rizzolo's presence. Then you are inquiring as to conversation among your own clients and your own agent. I do not think that is competent proof.

Defendant's counsel objects to this ruling of the Court.

Objection noted as ground of appeal.

Mr. Woerner: I would just like to ask two more questions, to put it on the record.

Q. Was that conversation in relation to the contract on this building? Do not answer that question.

Mr. Leber: I object to that.

The Court: I make the same ruling.

Defendant's counsel objects to this ruling of the Court.

Objection noted as ground of appeal.

CROSS-EXAMINATION by Mr. Leber:

Q. Dr. Stahl, you are related to Mr. Poysher, are you not? A. I am.

Q. What relation exists between you? A. He is my brother-in-law.

Q. You testified on your direct-examination yesterday that you have seen the building recently? A. I have.

Q. And some changes have been made there since you owned the property? A. There have.

Q. You said that the interior walls were re-decorated; is that right? A. I did.

Q. And that the interior of the vestibule was re-decorated? A. I did.

Q. Then the beautiful art panels that we saw the other day were not on that building when you owned it? A. Assuredly not.

Q. And the front was re-painted? A. It was.

Q. And the cement floor of the auditorium was fixed up? A. It was.

Q. But you did not do any of these things, did you? A. No.

Q. When did you discover that the heating system was not sufficient? A. During the winter that Mr. Poysher ran the theatre.

Q. Do you remember when he commenced running the theatre? A. Well, he told me that he started on February 22d, the first night that he opened.

Q. Were you interested in running that theatre?

Objected to.

Mr. Leber: Well, it is not so awfully important.

The Court: It might be competent for the purpose of showing that he took an interest in it and would be likely to pay some attention to it.

Mr. Leber: Yes.

The Court: That is all. You may answer it.

A. Yes.

Q. So that you had an interest in the building and in the land, and also an interest in the business that was to be run there? A. I have had.

Q. With Mr. Poysher, your brother-in-law? A. Yes.

By the Court: Q. Was that February 22d a year ago?

Mr. Leber: Was that February 22, 1913?

Q. You said Poysher started on February 22d a year ago or two years ago? A. Was that 1914 or 1913?

By Mr. Leber: Q. Well, don't you remember, Doctor? A. Well, I have got to fix these dates in my mind. I am on the witness stand. I don't want to make a statement that I am not positive of.

The Court: Very well, if you do not remember.

The Witness: I think it is simply a matter—when the theatre was finished, that is when he opened the theatre, I think the records will show that.

Q. Well, you say that you discovered that the heating plant was insufficient during that winter? A. Yes.

Q. Did you make any complaint about it—I mean you yourself? A. I was not here to make the complaint.

Q. Where were you? A. I was in New York State, Saranac Lake.

Q. Were you there in January? A. I was; I was here in—

Q. When did you come back from Saranac Lake? A. I came here for two days on a visit, January 25th or 26th, and I stayed two days or probably three, and then I returned—

Q. Did you go back? A. Yes, sir.

Q. And how long did you stay there? A. I stayed there until about the 29th or 30th of March, the same year.

Q. Then you came back? A. I came back.

Q. So the information that you had that this heating plant did not work you gather from what was told, do you not? A. I do.

Q. And who told you that? A. Mr. Poysher told me, the officer and any number of people that had been in the theatre.

Q. What was done regarding that heating plant do you not know, do you—I mean of your own knowledge? A. I don't understand the question.

Q. Well, was there anything done to fix that heating plant? A. Not to my knowledge.

Q. And when the end of the winter came around you still had information that that heating plant was insufficient? A. I did.

Q. Did you ever fix it? A. No.

Q. Did you ever spend a dollar on that heating plant? A. No.

Q. Did you ever spend a dollar fixing up that building? A. No, I didn't spend any money.

Q. And then you sold it, did you not? A. I did.

Q. And you sold it to Denberg, didn't you? A. Yes.

Q. And you sold him that property with a defective heating plant, did you not? A. He understood that.

Q. Never mind that. I am asking you that question.

Mr. Woerner: I submit that the answer is proper. He said he sold it in a defective condition, and the witness said he knew it.

The Court: No, yes or no would be a proper answer to that question.

(Question read.)

Mr. Woerner: I object to the question.

The Court: I will allow the question. Answer it yes or no.

A. It was sold in that condition, yes.

Q. You sold him the property as it was, with all its defects, did you not? A. Yes.

RE-DIRECT-EXAMINATION by Mr. Woerner:

Q. When you sold this property to Mr. Denberg were the defects known to him? A. They were.

Q. What about the purchase price? A. The purchase price was made in accordance with these defects, so much so—Do you want me to tell you—

Mr. Leber: I object to that. That will open quite an inquiry.

The Court: I will not let it go any further. He said the purchase price was made in accordance with these defects.

CHARLES W. POYSHER, sworn in behalf of defendants:

Direct-examination by Mr. Woerner:

Q. Mr. Poysher, are you one of the defendants in this case? A. Yes, sir.

Q. And you are the person that made the contract with Rizzolo, trading as the Rizzolo Construction Company? A. Yes, sir.

Q. For the erection of the moving picture place involved in this suit? A. Yes, sir.

Q. Was that contract finished? A. No, sir.

Q. In what respects was it unfinished? A. Well, the specification called for ornaments on the front and different kind of woodwork and door, and the painting was to be in first-class condition; the toilets were supposed to be better that what they were, as they overflowed pretty near—two or three times a week, anyway so that I had to take a broom and go out there and sweep the water out of the auditorium when the people were there, I had Mr. Nungesser come over to fix them, and he couldn't fix them.

Mr. Rizzolo also looked at them, and he couldn't fix them. And the paint rubbed off in the lobby there on everybody's clothes, and the swinging doors in the front were not what they should have been. The heating plant was not sufficient to heat the auditorium, and the people complained about that, and in general the work was very poor, as far as I considered. The booths upstairs were very shaky.

By the Court: Q. What was? A. The booth floor was shaky at the time, and there was no cross-bridging, as I noticed, that had been put in, but upright boards to support the ceiling. I mentioned those things to Mr. Rizzolo, and he said, "I fix." and he never fixed those things. We could not pass on the building until those things was fixed. I told Mr. Rizzolo at the time that if he would fix those things his money was ready for him at any time. I had stop notices coming to me nearly every day, which was turned over to Mr. Rosensohn; Mr. Rosensohn was to take care of those when Mr. Rizzolo got through with the job.

Mr. Leber: Is the witness answering questions or making a speech? I object to it so far as that is not an answer.

The Court: I will let the testimony stand.

By Mr. Woerner: Q. Did you run the place after it was finished? A. Yes, sir.

Q. A moving picture place? A. Yes, sir.

Q. What did you say about the heating plant? A. Mr. Rizzolo—

Q. No, what do you say as to how it worked? A. Well, we could never get heat properly in

there; I couldn't say what temperature we could get in there; I never tested it; but it was very cold all the time Mr. Stevenson was with me at the time, and he made some notes, which I practically just found. Of course he didn't sign them at all, but he made these notes—

Q. No, you cannot use them. A. Well, he said—

Q. No. A. It was very cold; the people complained of being very cold, their feet to their knees, I noticed. We could not seem to get it hot enough, although I put in all the coal I could use there; I had it red hot myself to bring the heat up.

Q. Did you pay Mr. Rizzolo his last payment? A. No, sir.

Q. Now, as to the items which Mr. Rizzolo claimed as extra work. Did he see you every time he did these different items? A. Practically after he had started in onto them, sometimes he talked to me onto it different times.

Q. Did you make an agreement for each particular item? A. No, not for all, not a written agreement.

Q. What? A. No written agreement.

Q. Did you make any verbal contract? A. Not for all; some.

Q. Did you ask for a written agreement? A. Did he ask for one?

Q. Yes. A. He never ask me for one, no.

Q. Do you know what caused the delay in the commencement of the construction of the building? A. I do not. Mr. Rizzolo didn't get on the job.

Q. Was it through any fault of yours or Dr.

Stahl's? A. No, sir. I went to Mr. Rosensohn and spoke about Mr. Rizzolo, why he hadn't been there, and so on, and Mr. Rizzolo was to go—

Mr. Leber: I object to the conversation with Rosensohn.

The Court: You need not state what you said.

Q. Did you have any talk with Mr. Rizzolo about the delay? A. I did.

Q. What did he say? A. Couldn't get the men at the time they excavated.

Q. When was the building to have been completed? A. On the 31st of December.

Q. Well, was it? A. No, sir.

Q. Do you know why the 31st of December was set? A. Yes, sir; because we wanted to get open for the first day of January, which was New Year's.

Q. You wanted to get what open? A. The theatre.

Q. When did you get it open? A. The 22d day of February.

Q. Did you run a show then? A. That evening, yes, sir.

Q. And you ran right along after that? A. After that; yes, sir.

Q. Did you ever tell Mr. Rizzolo not to start until he was notified? A. No, sir.

Q. It has been testified by Mr. Rizzolo and Mr. Rosensohn that at the time they met you and Dr. Stahl at the building that the only objections you made were to the painting and the heating, is that so? A. No, sir; I made other objections besides that.

Q. Did you ever instruct Mr. Rosensohn to issue or withhold the certificate for the final payment on the contract? A. I told Mr. Rosensohn that—

Objected to.

Witness: Let me have that question again please.

Mr. Leber: Just a minute.

Q. (Question read.) A. Yes, sir.

The Court: What is the objection?

Mr. Leber: I object to that. I do not think that whatever he told Mr. Rosensohn in our absence is admissible.

The Court: It affects his own position, his own attitude. It seems to me he has a right to answer.

(Question and answer read.)

Q. What instruction did you give him?

Objected to.

The Court: For the same reason, I think it is competent.

By the Court: Q. What instructions did you give him? A. Well, I told Mr. Rosensohn not to issue this certificate until I told him to go ahead and do so, and that Mr. Rizzolo had not finished the work up there satisfactorily, and the repairs should be made and fixed up according to the plans and specifications. After a long try, I finally got Mr. Rosensohn and Mr. Rizzolo together. When I would make an appointment at Mr. Rosensohn's office, Mr. Rizzolo would not be there, and when I made it up at the theatre, Mr. Rosensohn would not be there. Finally I got Mr. Rosensohn there, and he told Mr. Rizzolo when he left the building to go ahead and help me to

get the theatre going, so that I could make money; the work did not look right as it was, and he should rectify these things, and the payment would be ready for him, and Mr. Rizzolo said, "I fix."

By Mr. Woerner: Q. Did you have funds on hand to make the final payment? A. Yes, sir.

Q. Where were those funds? A. Clinton Trust Company.

Q. Now, Mr. Rizzolo testified that some of the prior certificates were withheld on account of lack of funds; is that so? A. No, sir; they were paid ahead of time; the money was advanced to him.

CROSS-EXAMINATION by Mr. Leber:

Q. How did you pay Rizzolo in check or in cash? A. Some cash and some in checks.

Q. And you paid him in different sums, did you not? A. Yes, sir.

Q. From time to time, as you went along? A. Yes, sir.

Q. Sometimes before he was entitled to a certificate? A. Yes, sir.

Q. You say that there were funds deposited in the Clinton Trust Company Bank? A. Yes, sir.

Q. Is that the money that Dr. Stahl testified to a minute ago? A. He put it in with me together; yes, sir.

Q. Two thousand dollars, on about January 26th? A. Yes, sir, about that date.

Q. When did you pay the third certificate? A. That I don't remember. I knew the third payment was due when I paid it, the balance of it.

The Court: The second and third were paid at the same time, were they not?

Mr. Leber: They were dated the same time, yes, sir.

The Court: We have the dates.

Q. I show you the two certificates marked D-4 and D-5 for identification, and ask you to examine the receipts on the back of them. What dates do they bear (paper shown to witness)? A. January 18, 1912, for $900.

Q. Is it 1912 or 1913? A. 1912 on this receipt.

Q. Probably an error. A. January 18, '7—I don't know whether that is '7 or not; it must be '12—both dated the same day.

Q. Is that the time you deposited the money in the Clinton Trust Company? A. No, sir; I don't know exactly the date that we deposited the money there. This was in small amounts. Little cards were given for different amounts, and finally these were given for the full amount, and those cards were taken up.

Q. You owned this property alone at one time, did you not? A. Yes, sir.

Q. You owned it along at the time you made the agreement with Mr. Rizzolo? A. Yes, sir.

Q. And sometime in November you conveyed a half interest in it to your brother-in-law Dr. Stahl? A. Yes, sir.

Q. And I believe in April, 1913, you conveyed the remaining half interest to Dr. Stahl? A. I think it was about that time, yes, sir.

Q. Do you remember when or about when this building was finished? Well, that is probably not a fair question for you. I do not want to be unfair. Do you know when Rizzolo stopped

working on that building? We will put that question that way.

Mr. Woerner: I object as not proper cross-examination. I asked him nothing about the date.

The Court: I think it is competent.

Defendant's counsel objects to this ruling of the Court.

Objection noted as ground of appeal.

Q. About when did Rizzolo stop further work on this building? A. If I remember right—I haven't paid much attention to it because I wasn't much interested in it—if I remember right—I didn't look up the dates—the runways were to be cut down, ordered by Chief Gasser, and I was allowed one month to do it in; I signed for it before Mr. Gasser, and Mr. Rizzolo—

Q. Are you answering the question?

By the Court: Q. When did Rizzolo do his last work? A. Well, I think about along the last part of March or the first part of April; I don't know the dates.

By Mr. Leber: Q. And it was after he got through that you conveyed to Dr. Stahl your remaining half interest in this property; isn't that so? A. Yes, sir.

Q. And you had been running a theatre business in that place from the 22d day of February on? A. Yes, sir.

Q. And up to what date had you been running that business? Q. Up to what date have I been running it?

Q. Had you been running it? A. When Mr. Rizzolo got through.

Q. From what date to what date did you run

that business? A. Well, I ran that business up until about the latter part of July, if I remember right.

Q. Was that the time that the property was then sold by Dr. Stahl to Denberg? A. I think it was. I had to get out of there on account of that. I had it leased from Dr. Stahl.

By the Court: Q. For how long a period or for how many months were you running it? A. About five months.

Q. Beginning when? A. February 22, 1913.

Q. Until the latter part of July? A. I think it was about that time.

By Mr. Leber: Q. You said a minute ago that you had no interest in that building. What did you mean by that?

Objected to.

Q. Were you not interested in that building? A. After I had sold it?

Q. No, at that time.

Mr. Woerner: I make an objection.

The Court: You mean at the time he was running it; is that the question?

Mr. Leber: Yes.

The Court: I will allow it.

Q. Were you not interested? A. At what time was I interested?

The Court: At the time you were running it.

Q. At the time you were running it. A. Oh, yes, I had to be interested in it or I wouldn't be running it.

Q. And in the month of March and the beginning of April you were interested in the building, were you not? A. Yes, at that time.

Q. What did you mean when you said a moment ago that you were not interested? A. What do you mean, what question?

Q. Well, I do not know what you meant; you said it. A. Well, there is one time I said I didn't remember the dates because I wasn't interested at the present time, I meant; that is, I had no ownership in it, inasmuch as Dr. Stahl had the property; it was turned over to him, and he assumed all responsibility for everything, and consequently I couldn't see where I was interested in it.

Q. Did he assume responsibility for all the defects in the building, too? A. Certainly, he accepted it that way.

Q. He did, eh? A. Yes.

Defendants rest.

HARRY DENBERG, re-called in behalf of plaintiff in rebuttal:

Q. Mr. Denberg, did you ever paint the front part of this building—I mean the outside? A. Only the frame.

Q. The frame? A. Yes.

Q. Did you ever do any repairing to the cement floor in the theatre building? A. No.

Q. Is that cement floor cracked up? A. No.

Q. Did Mr. Stahl ever tell you at the time when you bought the property that the heating plant was out of order? A. No, he had nothing to tell me, because I bought it.

Q. I am not asking whether he had anything to tell you. Did he tell you that the heating plant was out of order? A. No, he didn't tell me nothing.

Q. Did he tell you that he had trouble with that heating plant? A. No.

Q. Had he had trouble with that heating plant?

Objected to.

Question withdrawn.

Q. Did he not tell you that the plumbing work was loose and out of order?

Mr. Woerner: I object to this line of questions. I think they are immaterial. If a man sells a house he does not tell the buyer what defects there are, if any.

Mr. Leber: Dr. Stahl testified that he called his attention to it and that that was taken into consideration in the purchase price.

The Court: You may answer the question.

Defendant's counsel objects to this ruling of the Court.

(Question read.)

A. No, he didn't tell me nothing.

Q. Was the plumbing work loose at that time when you bought the property? A. It ain't loose; it ain't loose now.

Q. Was it loose at that time? A. No.

Q. Did he call your attention to the fact that the painting work was spotted? A. He didn't—why, I painted it myself.

Q. Did you see that the painting work was spotted when you bought the property? A. Well, it was spotted; it was dried in from the walls.

Q. Did you receive any allowance from Dr. Stahl for the defect or any other defects in that property when you bought this property? A. No.

The Court: You need not answer that; it is immaterial.

Question withdrawn.

CROSS-EXAMINATION by Mr. Woerner:

Q. You examined this building before you bought it, did you not? A. Yes, sir.

Q. And you agreed to pay a certain price? A. Well, I paid the price what he wants for it.

Q. And you got what you paid for? A. Yes, sir.

Q. Was there not a deduction made at the time the agreement was signed of some $200? A. Well, the reduction was—

Mr. Leber: Now, I was stopped from going into this thing.

Mr. Woerner: I think he answered the question, and it got before the jury. I thing it ought to be rectified, if possible. The question was really answered before—

The Court: I think it is irrelevant; I do not think it bears on the present issue.

Mr. Woerner: I do not think so either.

Q. You say you did not do any repairs to the cement floor? A. No.

Q. Did anybody else? A. No.

Q. Since you owned it? A. Since I own it, yes.

Plaintiff rests.

Mr. Woerner: I offer in evidence the three certificates, D-3, D-4 and D-5 for identification.

Papers marked respectively Exhibit D-3, Exhibit D-4 and Exhibit D-5.

Mr. Woerner: Also the specimens of the cement work produced by Mr. Stuven.

(Not marked.)

Mr. Leber: If your Honor please, I think that Mr. Woerner has no objection to your Honor signing the order containing the amendments, and I would like to have the record complete before the case goes to the jury (handing paper to the Court.)

Mr. Woerner: I have no objection to the form.

Mr. Leber: Yes, to the form. Pardon me!

Mr. Woerner: I would like to make a motion for the direction of a verdict on the ground that there is no evidence to go to the jury to show the completion of the contract in accordance with its terms, to show a fraudulent withholding of the final certificate by the architect, or to show a waiver of the written agreement as to extra work, and that there is no evidence to show the date of performance of the contract and extra work.

The Court: The motion is denied.

Defendant's counsel objects to this ruling of the Court.

Objection noted as ground of appeal.

Mr. Woerner sums up for defendants.

At 1 o'clock p. m., the Court takes a recess of one hour.

After recess.

Charge

Mr. Leber sums up for plaintiff.

The Court charges the jury as follows:

Charge

ADAMS, J.

Gentlemen of the Jury:

The largest and most important item in the plaintiff's claim is an item of $1,500, the amount called for by the contract as final payment. Whether the defendants are bound to pay this sum depends upon your settlement of a very simple question of fact, whether the work has been completely done in accordance with the contract. One feature, and a very important feature, of the contract, is that the parties have appointed an architect to determine when these payments became due. There were four payments. Three have been paid. And the evidence of his conclusion, which is final when he makes it, is afforded by a certificate given by him to the builder, to the contractor. It the contract is certified by the architect to be completely performed, if the final payment is certified to be due, there is nothing for the builder to do but pay, because the arbitrator, the architect, has been appointed by mutual consent the judge of that question. If the architect does not give a certificate when he has applied for it his refusal is final against the right of the contractor to receive the payment, unless his refusal is fraudulent, by which I mean without reasonable and proper excuse; and the only thing that would excuse him from giving the certificate would be the fact that the work was not, in fact, completely done. It is possible that an

architect might, from malice or any of the various motives which are classified under the word fraud, refuse to certify to the correctness of a final payment which was, in fact, due, and which he must have known, or ought to have known, was, in fact, due. Under such circumstances the contractor may recover the amount of that payment, notwithstanding the architect withholds his certificate. But so important is his judicial character created by the act of the parties, that unless the plaintiff in a case of this kind shall satisfy your minds that his failure to produce a certificate for the payment which he claims is due to fraud, or what I think is an equivalent phrase, to some excuse which is not a reasonable and proper excuse, he does not entitle himself to the payment.

There being no evidence of a waiver in this case of the architect's certificate the question is presented in its bald naked form. The final payment is not made and the contractor cliams it and urges it is due, and he does not succeed in getting from the architect this certificate.

It is for the plaintiff to show, if he can, that the failure to meet this requirement is due to the misconduct and misbehavior of this architect; and in that way, and in that way only, can the plaintiff get the payment which he claims. Therefore it is a question for you whether this certificate was properly withheld, whether in fact the contract work was completely and properly done.

Take the item of heating. A great deal has been said upon that subject and it is a very important subject you will agree. The contract was not that any particular heater should be put in; the contract was not that any particular number

of feet of pipe should be installed; the contract was not that any particular formula should be used in making the calculations; the contract was that a certain result should be produced, a result which would insure the comfort and health and freedom from liability to illness of audiences in severe winter weather, and that would yield a temperature of 70 degrees Fahrenheit in zero weather. As soon as the contractor does that, and gets that result, he satisfies the demand of the contract. If for any reason whatever he fails in producing that result, either because he gets too small a boiler, too small a number, too low a number of feet of radiating surfaces; or if for any other reason he does not get the result, he fails in that very important respect to perform his contract; and if you find from the evidence in this case that he did so fail this plaintiff cannot recover one penny of his $1,500.

There are other important features of the work which are said to be not in accordance with the contract. It is hardly necessary for me to go over them. I recall the construction of the chimney, which is said to be totally inadequate to the carrying off of the amount of draft that would be created by an adequate plant, and that this would be the case whether it was built of brick or concrete; also the matter of the floor which was dangerously overloaded, according to one of the witnesses, by a superimposition of cement. Not to dwell on these different items, the question, which is a very simple one, is a comparison of the work done with the contract requirements. If your minds are led to the conclusion—and you

have had the advantage of seeing the premises which I have not—that the contract has been fully complied with, the plaintiff is entitled to your verdict for this item of $1,500. If you are led to the conclusion that the contract has not been fully complied with, then the architect was justified, (and not only justified but it was his duty) in withholding his certificate, and the plaintiff can recover nothing of that sum.

The rest of the case consists of items of extra work. You will notice when you read the contract, gentlemen, that there is a careful provision that when extra work is desired there shall be an agreement made between the owner and the builder, and it shall be reduced to writing, specifying the work and perhaps the amount—I do not remember the exact phraseology of it—and only then is a foundation laid for the recovery of that extra item. Undoubtedly that was put in to prevent fraud by the insertion into jobs of unsound items for extra work and intended to throw a guard around that, and to bind the parties to precautions, to definite agreements, as to each item of extra work. The Courts have cut that down a great deal on the very intelligible principle that the parties who made the contract could make another, and that if these parties, after having made this bargain, with this imposing clause in it, concluded to waive it do it in the simple and more direct rule of thumb way (to allow an expression which is applicable to steam-heating) they had the legal power to do it; and the thing has finally come into this position, that if the parties agree on the amount of the extra work, and if the builder promises to pay for it, the formal requirement

or the written agreement is understood to be waived and no longer necessary. But it does require, you will see, something; it does require an agreement as to price and promise to pay. Probably if nothing definite was said about promise to pay a reasonable sum would be implied. But at any rate the law goes as far as I have indicated in requiring some definite proof.

There are only a few of these items and I do not propose to dwell on them. $80; $50; $15; $80; $72. I have written the word "omit" on those that are to be left out. $68; $253 for the lowering of the exits.

I submit to you three questions. Does the evidence show that any of these provisions were required by statute or by the building code? If so, even although they are not mentioned in the contract the plaintiff in this case was bound to do them and cannot charge for them as extra work.

Another question. Are any of these items, items which are mentioned in the contract itself? If so, they are not extra items.

Was the work done upon these extra items at an agreed price specified here and did the owner, the builder, promise to pay? Is the law satisfied by a compliance with the requirements necessary to establish liability to pay the extra item?

In the first place, is it an extra item, which depends upon the question, is it in the contract, or is it required by some building code which the contract requires the contractor to observe? If it is an extra item, that is, if the work itself is extra to the work called for by the contract, was it the subject of an agreement binding upon the parties?

Charge

This is a mechanic's lien case, gentlemen. It affects certain lands on the westerly line of Bergen Street, 300 feet to the north of Clinton Avenue, a lot 75 by 100, owned by the defendant, Alfred Stahl.

You are to determine, also, in considering the question of the liability to the land, whether the period of four months has elapsed after the last work done and materials furnished and the commencement of the suit or filing of the lien claim. I do not know whether it appears—the first day of July, 1913. Thse conditions being fulfilled, if they are fulfilled, the land, which is owned by Mr. Stahl, would be liable to whatever claim can be established in this case in favor of Mr. Rizzolo against Charles W. Poysher, the builder. If the plaintiff, Mr. Rizzolo, shall appear to you to be entitled to anything on this contract, including extra work, he would be entitled to a general judgment against Mr. Poysher on that sum, with interest at six per cent from the time the money was due, and that amount would become a special lien on the land of Mr. Stahl.

Your verdict will be either for the plaintiff or for the defendants. If you find for the plaintiff the clerk will take your verdict as being a verdict against Mr. Poysher, to be specially made on the land of Alfred Stahl, the other defendant. Whether the liability exists you will determine from the principles which I have endeavored to state to you.

The jury retires.

Exhibit P-1, D-1 and 2

THIS AGREEMENT,

Made the Twenty-ninth day of October, in the year one thousand nine hundred and twelve by and between Rizzolo Construction Co., of the City of Newark, County of Essex and State of New Jersey, (hereinafter designated the Contractor), and Charles W. Poysher, partly of the first part, of the City of Newark, County of Essex and State of New Jersey, hereinafter designated the Owner), partly of the second part.

WITNESSETH, that the Contractor in consideration of the fulfillment of the agreements herein made by the owner, agrees with the said Owner, as follows:

ARTICLE I. The Contractor under the direction and to the satisfaction of

HYMAN ROSENSOHN (Architect)

acting for the purpose of this contract as agent of the said owner, shall and will provide all the materials and perform all the work mentioned in the specifications and shown on the drawings prepared by the said Architect for the proper erection and completion of all the General works required for the one story moving picture theatre building to be located at 635 Bergen Street in the City of Newark, County of Essex, the State of New Jersey,

which specifications are identified by the signatures of the parties and annexed hereto.

Exhibit P-1, D-1 and 2

ART. II. Architect shall furnish to the Contractor, such further drawings or explanations as may be necessary to detail and 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 referred to and identified, as provided in Art. 1.

It is mutually understood and agreed that all drawings and specifications are and remain the property of the Architect.

ART. III. No alterations shall be made in the work shown or described by the drawings and specifications, except upon the written order of the Architect, and when so made, the value of the work added or omitted shall be computed by the Architect and the amount so ascertained shall be added to or deducted from the contract price. In the case of dissent from such award by either party hereto, the valuation of the work added or omitted shall be referred to three (3) disinterested Arbitrators, one to be appointed by each of the parties to this contract, and the third by the two thus chosen; the decision of any two of whom shall be final and binding, and each of the parties hereto shall pay one-half the expense of such reference. No 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, and it shall then form part of this contract.

ART. IV. The Contractor shall provide sufficient safe and proper facilities at all times for the inspection of the work by the Architect or his authorized representatives. He shall within twenty-

four hours after receiving written notice from the Architect to that effect, proceed to remove from the grounds or buildings all materials condemned by him whether worked or unworked, and take down all portions of the work which the Architect shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specification.

ART. V. Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architect, the Owner shall be at liberty, after three days written notice to the Contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the Architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner shall also be at liberty to terminate the employment of the Contractor, for said work and to enter upon the premises and take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools and appliances thereon, and to employ any other person, or persons, to finish the work, and to provide the material therefor; and in case of such discontinuance of the employment of the Contractor he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at

which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expenses incurred by the owner in finishing the work, such excess shall be paid by the Owner to the Contractor, but if such expenses shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expense incurred by the Owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Architect, whose certificate thereof shall be conclusive upon the parties.

Contractor to proceed with work so as not to cause any delay.

ART. VI. The Contractor shall complete the several portions, and the whole of the work comprehended in this agreement, on or before the Thirtieth day of December in the year one thousand nine hundred and twelve.

ART. VII. Should the Contractor be obstructed or delayed in the prosecution or completion of his work by the act, neglect, delay or default of the Owner or the Architect or of any other contractor employed by the Owner upon the work, or by any damage which may happen by fire, lightning, earthquake or cyclone, or by the abandonment of the work by the employees through no default of the Contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid; but no such allowance shall be made unless a claim therefor is presented in writing to the Architect within

twenty-four hours of the occurance of such delay. The duration of such extension shall be certified by the Architect, but appeal from his decision may be made by arbitration, as provided in Art. III, of this contract.

ART. VIII. The Owner agrees to provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the Contractor agrees that he will reimburse the Contractor for such loss; and the Contractor agrees that if he shall delay the material progress of the work so as to cause any damage for which the Owner shall become liable (as above stated), then he shall make good to the Owner any such damage. The amount of such loss or damage to either party hereto shall, in every case, be fixed and determined by the Architect or by arbitration, as provided in Art. III of this contract.

ART. IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Contractor for said work and material shall be $4600 00/100

Forty-six hundred 00/100 Dollars

subject to additions and deductions as hereinbefore provided, and that such sum shall be paid in current funds by the Owner to the Contractor in installments, as follows:

First Payment $1000 when ready for ceiling beams.

Second Payment $900.00 when plastering done.

Exhibit P-1, D-1 and 2

Third Payment $1200 when standing trim, metal ceiling and cement floors done.

Fourth Payment $1500 when completed and accepted.

Fifth Payment

Sixth Payment

Seventh Payment

Eighth Payment

Ninth Payment

Final Payment

The final payment shall be made within three days after this contract is fulfilled.

All payments shall be made upon written certificates of the Architect to the effect that such payments have become due.

If at any time there shall be evidence of any lien or claim for which, if established, the Owner or the said premises might become liable, and which is chargeable to the Contractor, the Owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify him against such lien or claim. Should there prove to be any such claim after all payments are made the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the Contractor's default.

ART. X. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final

certificate or final payment shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

Contractor to employ union men.

ART. XI. The said parties for themselves, their heirs, executors, administrators or assigns, do hereby agree to the full performance of the covenants herein contained.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

RIZZOLO CONSTRUCTION CO., Seal
by Saveria Rizzolo Seal

CHARLES W. POYSHER. Seal

In presence of

Hyman Rosenshon.

Exhibit P-1, D-1 and 2

(Endorsed on the back)

#3625

BUILDING AGREEMENT

BETWEEN

Rizzolo Cons. Co.

Contractor.

AND

Chas. W. Poysher

Owner.

FOR

General

AT

635 Bergen Street,

Newark, N. J.

DATED

October 29 1912

AMOUNT OF CONTRACT

$4600 00/100

ARCHITECT

HYMAN ROSENSOHN

745-747 Broad Street, Newark, N. J.

Filed 11-22-12 12:16 P. M.

Joseph McDonough, Clerk

Specifications filed with this contract Nov. 22.

Exhibit P-1, D-1 and 2

SPECIFICATION:

Of labor and materials required in the erection and completion of a one-story brick building to be located at #635 Bergen St., Newark, N. J., for

CHAS. W. POYSHER owner.

According to the plans and specifications made for the same by

Hyman Rosensohn, Architect.
800 Broad St.
Newark, N. J.

Under his personal supervision and directions.

DRAWINGS AND GENERAL CONDITIONS.

The several drawings herein referred to consist of the following:

FRONT ELEVATION	Plan of First Story
CROSS SECTION	" " Foundation
LONGITUDINAL SECTION.	

The several drawings must be accurately followed and measured according to their scale and all notes and explanation wherever they appear on the drawings as they are all part of the contract.

The plans and specifications are the property of the Architect and are not to be copied or used for any other buildings but are to be returned to him at the completion of the work.

Anything that is not mentioned in this specification and is on the plans or *vice versa* shall be considered as part of the contract.

Exhibit P-1, D-1 and 2

The contractor is to comply with all State and City laws and to erect the building according to permit, plans and specifications.

All materials to be of the best description and should the contractor introduce any materials different from the kinds herein expressed it shall be immediately removed and made good at contractor's expense.

The contractor is to be responsible for all violations of the laws and to obtain all necessary permits at his own costs and charges and is to comply with all State and Corporation laws relative to the erection and completion of the building.

The contractor shall properly remove all rubbish and waste materials from the premises at completion of the work.

MASONRY

Excavating:

Do all necessary excavating and levelling required for the cellar walls and trenches, and foundations as shown and required by the drawings.

Footings:

To be 12″ concrete to be composed of gravel and portland cement and to extend 6″ on each side of the walls as shown. All to be clear of frost.

Foundation:

Properly lay up the cellar and trench walls as shown 16″ thick with concrete composed of 1

portland cement two sand and five gravel, all to be clear of frost.

Cement Blocks:

Cement blocks for all walls which must be laid wet in warm weather with flushed joints leaving no open spaces in the walls. For thickness of walls see plans and section.

All cement blocks to be laid in the most workmanlike manner with portland cement mortar. Attend other mechanics where necessary to block up and fill in properly behind the work.

Chimneys:

Building chimneys of good hard burned brick as shown to correspond with the drawings. All flues to be straight and true of uniform size throughout and smooth on the inside. Top out above roof using good hard burned brick for facing laid in red mortar properly cleaned down at completion. Furnish and set iron collars and covers where required Cap the chimneys with cement capping. Line the flues with fire clay flue lining. Build parapet walls with cement blocks 3′-0″above roof with cement coping.

Hatchways:

Build hatchways as shown. Concrete riser coped with 2x10 cement treads. Side walls of concrete 12″ thick. Furnish and put up iron doors in two parts over hatchways as shown and directed. Furnish and put up an iron ladder to booth.

Furnish and set cement sills for all windows

and doors. Sills to be not less than 4″ on wall. Cement coping on front.

Concrete:

The entire auditorium and cellar bottom of building to be levelled off and settled thoroughly and concreted 4″ deep and finished with 1′ portland cement finish.

Tiling:

Tile in lobby and toilet floor with Ceramic tile to cost 40¢ per sq. ft. Tile in lobby to have name.

Plaster Blocks:

All partitions and booth to be of plaster blocks.

Plastering and Damp Proofing:

Damp proof all back walls with R. I. W. damp proofing. All walls and partitions to be plastered one coat of Adamant plaster in the regular manner scratch only.

Do all necessary patching after other craftsmen. Furnish and put up on front elevation plaster ornamentals as per design, as shown.

Plaster board and scratch coat on cellar ceiling as directed. Furnish and set iron beams of size and weight as shown on plans furnish and put up iron railings as shown on plans. Furnish and set iron ladder to booth as directed. All iron to be painted before setting.

Stucco Work:

Front to be stucco on cement blocks as shown

on elevation to be regular four coat work, 1st scratch to be floated up true and even, face to be well scratched to form a key for second coat, 3rd coat to be rough composed of five gravel washed so as to be clear of all earthy particles to be put on with brush. Fourth and finish to be same as third with brush.

Owner ————————

Witness ————————

Contractor ————————

CARPENTER WORK:

Timber:

All timber used throughout to be the best of the several kinds, Sawn Die Square, free from shakes and other imperfections impairing its durability and strength. Timber not exposed to be of hemlock.

All timbers, girders, trimmers, joists, partitions, studs, roof, etc., must be properly finished according to the plans. All joists and studding must be properly sized in width and pointed.

Wood Lintels:

All openings of every kind in brick and stone work must have wood lintels, that of stone not less than 5″ thick by required length and good bearing on the walls.

Cross Bridging:

Cross bridge all rafters in the building every 6′-0″ with 2″ x 2″ stuff properly cut in between timbers as soon as joists are levelled and secured and nail each with 2 10d nails.

Exhibit P-1, D-1 and 2

Headers and Trimmers:

All headers and trimmers to be 4″ thick properly braced and spiked together leaving all openings of sufficient size for the finishing of all chimneys, etc., and in no case allow the wood to come within 2½″ with the brick around the smoke flue. The carpenter must take all necessary care in framing his work so that all important timbers will not require cutting for chimneys, plumbing pipes etc., to pass through but he must so frame all timbers so that pipes can run between such framing.

Size of timbers:

Ceiling beams	2″ x 8″	20″ on centres
Floor beams for lobby	2″ x 10″	16″ " "
Partition studs	2″ x 4″	" " "
Rafters	2″ x 12″	20″ " "

Furnish any other timbers required by the drawings of the required size, etc. Do all necessary cutting for other craftsmen.

Partitions:

All partitions to be built for plaster blocks. All partitions to be substantially bridged once in their height. Partition between toilets to be of 7/8″ x 3 ½″ beaded and centre beaded N. C. pine. Beam over cellar to be notched and made ready for tiling.

Timber:

For inside cypress. Roof to be covered with 1x 10 grooved hemlock boards for roofing. All doors

and window frames to correspond with the drawings.

Inside work:

The carpenter must run the flooring closely around all studs and close to the brickwork closing all spaces completely. Ceiling of entire building to be ceiled with 1 x 10 tongued and grooved N. C. pine boarded for metal. Lattice work of 2″ strip ventilating opening.

Flooring:

All doors to be five cross panel doors of birch veneered except water closet compartment doors to be cypress. Front doors to be constructed of white pine as shown. All doors and windows to have 7/8″ x 4½″ moulded centre trim and 5″ cabinet head with crown neck moulding as per detail.

Jambs for all outside doors to have 1 1/4″ rebated. For doors inside to have 7/8″ jambs and ½″ x 2″ stop planted on. Auditorium to have 7″ base with wall moulding and quarter round on floor. Construct frame for screen as directed by owner. Put in auditorium a 4′-0″ railing as directed of wainscoting 2½″ x 7/8″ beaded and centre beaded with wooden cap with 5 x 5 newel post on side of aisle.

Hardware:

All doors to have mortice locks, hardwood knobs, butts, escutcheons and to hand on three hinges of copper bronze. All doors to have one key.

Exhibit P-1, D-1 and 2

Sash:

To be made in the usual and best manner 1½" thick of white pine to be casement windows with all necessary hardware, etc., complete. Construct box office and operating room as directed.

Glass:

For all windows use American sheet glass, single thick, free from shakes and other imperfections. American glazing quality plate glass for box office with metal cornice and nickel plated clamps. For front doors to have American plate glass with 1½" bevel.

Roofing:

The main roof to be covered with 5-ply tar and gravel roofing warranted tight for ten years.

Galv. Iron Work:

Furnish and put up a galv. iron ventilator and skylight as shown on plan and as per detail. Furnish and put galv. iron column on front as shown on plans. Furnish and set galv. iron caps for plaster in auditorium.

Metal Ceiling:

Furnish and put up steel metal ceiling in auditorium and lobby with 9" cove cornice to cost 8¢ per square foot of design as selected.

Note:

Booth to be made fireproof. Both sides of booth to be covered with metal.

Owner———————

Witness———————

Contractor———————

Exhibit P-1, D-1 and 2

PAINTING SPECIFICATION

All painting to be done in a first class workmanlike manner. Materials to be of the very best description. Cover all sap knots etc., of the woodwork smoothly before priming with a strong coat of shellac. Putty up all woodwork smoothly before priming. All tin to have two coats of Prince's metallic paint.

Exterior:

To be painted two coats in color as selected. Casings and cornices on front to have three coats.

Interior:

Use Flood & Conklin Co's. crystal finish varnish. All other woodwork to be stained and to receive 2 coats of hard oil finish.

Metal ceiling to be painted 2 coats in color as selected by owner.

Do all necessary painting and staining to make a complete job.

Decorating to be as selected and directed by owner.

Owner_____

Witness_____

Contractor_____

PLUMBING, TINNING AND GAS FITTING

Furnish all materials and perform all labor required for the proper putting up and completing all the plumbing work in a good, substantial and workmanlike manner according to the plans and specifications and to the full extent and meaning of the same.

Exhibit P-1, D-1 and 2

All local laws to be complied with even if they conflict with this specification. All cutting for pipes to be done by the carpenter and then only close to the bearings.

Any beams etc., cut by the plumber will be replaced at his expense. All horizontal and vertical pipe connections to have large joints made with oakum and run with molten lead well caulked. All Y branches and 1/8″ bends, all cast iron pipes to be properly secured and supported with iron hooks, bracers and hangers.

All water service pipes must be run on inch strippings or in case they are to be prepared by the carpenter to be put so that they can easily be gotten at to examine. No pipes will allowed to run on the outside wall unless absolutely necessary.

All lead water and ventilating connections to iron pipes to be made through brass ferrules which must be soldered to the lead pipes and caulked with oakum iron and the joints run with molten lead. The plumber to do all necessary digging, obtain permits at his own costs and charges. *Drains to be first* quality cement of size as shown and connected with sewer. Pipes to be properly trapped and cemented tight.

Cast iron soil and waste pipes:

From a point 6′-0″ outside of cellar wall connect with earthen drain a 4′-0″ cast iron pipe continue up through roof 2′-0″ above the highest point of roof, place a clean-out on main soil pipe inside of cellar wall where it can easily be gotten at to clean out. *Drain the court to sewer.*

Exhibit P-1, D-1 and 2

Water supply:

Excavate a sufficient depth and lay a 3/4″ galv. iron pipe from street main to house with lever handle and stop cock. All supply pipes to be 3/4″ galv. iron. Place stop cock at curb according to the rules of the local water Co. Furnish and put up a water meter as required.

Back air pipes:

Furnish and place a 3″ cast iron pipe extending from fixtures leaving a 1½″ branch to all fixtures except water closet to have a 2″ branch. All connections with waste and back air pipes to be made with brass and wide soldered joints.

Toilets:

Furnish and put up in toilet compartment a syphon jet porcelain closet with hardwood seat, tank, chain and pull complete.

Sinks:

Furnish and put up in each toilet compartment an iron enamel sink on brackets with necessary nickel plated faucets etc., complete. Furnish and put up urinal Standard lipped shaped with necessary slate partitions and brick in Gent's toilet.

Tinning:

Run galv. iron leaders where directed to connect with sewer.

Steam heating:

Building to be heated to 70 degrees Fahrenheit in zero weather.

Exhibit P-3

Electric wiring:

Wire the entire building for electric lights to all gas outlets according to the laws of the Underwriters knob and tube system. Wire for 2 arc lights on front. Electric fixtures to be supplied and selected by Architect.

Owner———————

Witness———————

Contractor———————

Exhibit P-3

IN THE OFFICE OF THE CLERK OF THE COUNTY OF ESSEX

SAVERIO RIZZOLO, trading under the name and style of Rizzolo Construction Co., Claimant, vs. CHARLES W. POYSHER and ALFRED STAHL, Builders and Owners.	Lien Claim.

County of Essex. ss:

BE IT KNOWN, that Saverio Rizzolo, trading under the name and style of Rizzolo Construction Co., of the City of Newark, in said County, claims a lien upon building and lands hereinafter described, pursuant to the provisions of "An Act to secure to mechanics and others, payment for their

labor and materials in erecting any building," and the several supplements thereto, for a debt contracted and owing to him for labor performed and materials furnished for the erection and construction of said building as hereinafter set forth, to wit:

First: The said building is a one story moving picture theatre building on a lot of land or curtilage, situated in the City of Newark, in the County of Essex and State of New Jersey, and more particularly described as follows:

Beginning at a point in the Westerly line of Bergen Street distant therein Northerly three hundred and five feet and thirty-one one-hundredths of a foot from the corner of the same and Clinton Avenue; thence (1) Northerly along Bergen Street seventy-five feet; thence (2) Westerly at right angles to Bergen Street one hundred and five feet and six one-hundredths of a foot; thence (3) Southerly parallel with Bergen Street seventy-five feet; and thence (4) Easterly one hundred and five feet and six one-hundredths of a foot to Bergen Street and place of Beginning.

Second: The names of the Owners of the said land and the estate therein, on which said lien is claimed are Charles W. Poysher and Alfred Stahl who have an estate in fee simple therein.

Third: The names of the persons who contracted the said debt, and for whom and at whose request the said labor was performed, and materials furnished, for which the aforesaid lien is claimed, are the said Charles W. Poysher and Alfred Stahl.

Fourth: The following is a bill of particulars of the aforesaid labor performed and materials

furnished by the said Saverio Rizzolo, trading as aforesaid, the amount and kind of labor performed and materials furnished, and the prices at which and times when the same were performed and furnished, and giving credit for all the payments thereupon, and deductions that ought to be made therefrom, and exhibiting the balance justly due to him from the said Charles W. Poysher and Alfred Stahl, *viz:*

Final payment under contract dated Oct. 29th, 1912	$1500.00
Extra work performed and materials furnished at the request of the owner and architect as follows:	
Change from wood beams to reinforced concrete ceiling	80.00
Concrete between beams and booth floor in place of wood	50.00
One extra door covered with metal in booth completed	15.00
One double iron trap door above iron ladder	8.00
Six brass shore electric Chandelier sets	72.00
One ½ shell with brass frame chandelier	10.00
Extra Work cellar drain from rear yard to cellar	68.00
To lower the two rear exits excavating, retaining wall as per submitted estimate	253.00
Total amount claimed	$2056.00

All the above labor was performed and materials furnished between the twenty-ninth day of

October, 1912, and the Twenty-sixth day of April, 1913.

SAVERIO RIZZOLO,
Claimant.

State of New Jersey, } ss:
Essex County. }

Saverio Rizzolo, of full age, being duly sworn, on his oath saith, that he is the claimant named in the foregoing claim; that the within bill of particulars and statements therein set forth are true; that the same is for labor performed and materials furnished by the claimant in the erection of the building in the said claim described, at the times therein specified, and that the amount, as claimed therein, is justly due and owing from the said Charles W. Poysher & Alfred Stahl to the claimant.

Signed:

SAVERIO RIZZOLO.

Sworn and subscribed to before me this
21st day of June, 1913.
Meyer E. Ruback,
Notary Public of
(Seal) Essex County, N. J.

Filed, June 23, 1913.
Joseph McDonough,
Clerk.

Exhibit D-3

Endorsement on back of Lien Claim

LIEN CLAIM

SAVERIO RIZZOLO, trading under the name and style of Rizzolo Construction Co.,
Claimant,
vs.
CHARLES W. POYSHER, and ALFRED STAHL, Builders and Owners.

Summons issued on the within Lien Claim 1 day of July, A. D., 1913.

JOSEPH McDONOUGH,
Clerk.

Filed June 23, 10:02 a. m., 1913.

JOSEPH McDONOUGH,
Clerk.

Exhibit D-3

HYMAN ROSENSOHN, ARCHITECT

$1000.00 Dec. 17, 1912

To Chas. W. Poysher

THIS IS TO CERTIFY THAT

Rizzolo Cons. Co. Contractor for General is entitled to the First Payment of

Exhibit D-4

One thousand . . . . . .00 Dollars
100
as per Contract when ready for ruling beams

Bergen St.

Amount Previously Paid, $.....
Amount of Contract, $4600
Extra, $..... HYMAN ROSENSOHN
No..... Receipt on other side.

RECEIPT

$1000.00 Dec. 17th, 1912
100

Received from C. W. POYSHER,

Ten Hundred and No/100.....Dollars cash and as per certificate on the other side.

RIZZOLO CONSTRUCTION CO.,
by Saverio Rizzolo

Exhibit D-4

HYMAN ROSENSOHN, Architect

$900.00 Jan. 17, 1913

To Chas. W. Poysher

This is to Certify That

Rizzolo Cons. Co. Contractor for General is entitled to the Second Payment of
Nine hundred . . . . . .00 Dollars
100

Exhibit D-5

as per Contract .....

Bergen St.

Amount Previously Paid, 1000.00

Amount of Contract, $4600.00

Extra, $..... HYMAN ROSENSOHN

No..... Receipt on other side.

RECEIPT

$900.00 Newark, N. J., Jan., 18, 1912
100

Received from CHAS W. POYSHER

Nine hundred .....00 Dollars
as per certificate on the other side. 100

RIZZOLO CONSTRUCTION CO.,
by Saverio Rizzolo

Exhibit D-5

HYMAN ROSENSOHN, Architect

$1200.00 Jan. 17, 1913
To Chas. W. Poysher

This is to Certify That
Rizzolo Cons. Co. Contractor for General is entitled to the Third Payment of
Twelve hundred .....00 Dollars
100

Exhibit D-5

as per Contract when white coat on
Bergen St.
Amount Previously Paid, $900.00
Amount of Contract, $4600.00
Extra, $..... HYMAN ROSENSOHN
No. ..... Receipt on other side.

RECEIPT

$1200.00 Newark, Jan. 18th, 1912
100

RECEIVED FROM CHAS. W. POYSHER
Twelve hundred .....00 Dollars
100

rec following $950.00 for pay until
cement Block Nine hundred fifty
dollars 950.00
One hundred to Moses Rosenstine 100.00
and one hundred thirty to Omberio in
fooll. 130.00

1180.00
20

Received in full.....$1200.00

as per certificate on the other side.

RIZZOLO CONSTRUCTION CO.,
by Saverio Rizzolo

Opinion

(Filed, March 6, 1916)

NEW JERSEY SUPREME COURT

NOVEMBER TERM, 1915

SAVERIO RIZZOLO,
vs.
CHARLES W. POYSHER, Builder
and ALFRED STAHL, Owner.

Submitted November term, 1915.
Decided February , 1916.
Appeal from Essex Circuit.

Samuel F. Leber, Esq., for plaintiff.
Hugo Woerner, Esq., for defendants-appellants.

PER CURIAM:

We find no error which warrants reversal of the judgment against the builder. The case is different with the judgment against the owner. The lien claim contained a bill of particulars as follows:

Final payment under contract dated Oct. 29th, 1912	1500.00
Extra work performed and materials furnished at the request of the owner and architect as follows:	
Change from wood beams to reinforced concrete ceiling	80.00

Concrete between beams and booth floor in place of wood	50.00
One extra door covered with metal in booth completed	16.00
One doubt iron trap door above iron ladder	8.00
Six brass shore electric Chandelier sets	72.00
One ½ shell with brass frame chandelier	10.00
Extra work cellar drain from rear yard to cellar	68.00
To lower the two rear exits excavating, retaining wall as per submitted estimate	253.00
Total amount claimed	$2056.00

At the close of the plaintiff's case a motion was made to non-suit as against the owner because of the insufficiency of the bill of particulars. Thereupon on application of the plaintiff, the Circuit Judge allowed amendments specifying that the items of $80, $50, $15, $8, $68, and $253 were furnished by agreement in the months of February or March, 1913. No amendment was made as to the items of $1500, $72 or $10. Clearly the item of $1500 is not set forth as the statute requires. Section 16, IV (C. S., 3304) requires

> "A bill of particulars exhibiting the amount and kind of labor performed and of materials furnished, and the price at which and times when the same was performed and furnished, and giving credit for all the payments made thereupon and deductions that ought to be made therefrom, and exhibiting the balance justly due to such claimant."

When the work and materials are furnished by contract, the particulars need not be stated

> "further than by stating, generally, that certain work therein stated was done by contract at a price mentioned."

The present bill of particulars does not set forth the amount and kind of labor performed and materials furnished, it does not state prices and times, as to the $1500 even after amendment; it does not give credit for all payments made; and if it can be held to state that the work was done by contract, it does not mention the price. The plaintiff does not defend this method of setting forth the particulars but argues that the question was not properly raised by motion to non-suit, since the lien might be good as to the other items as to which amendments were allowed. The difficulty with this argument is that the bill of particulars is a single bill and if it fails to comply with the statute, it cannot support a lien as to a portion only. The owner was entitled to a non-suit and as far as the judgment is special against the property, it must be reversed. Whether or not an amendment is still permissible is a question not presented by this record. The reversal is without costs.

Order of Reversal and Affirmance

(Filed, March 15, 1916)

NEW JERSEY SUPREME COURT

SAVERIO RIZZOLO, trading under the name and style of Rizzolo Construction Company, Plaintiff-Respondent, vs. CHARLES W. POYSHER, Builder and ALFRED STAHL, Owner, Defendants-Appellants.	Action at Law On Mechanic's Lien On Appeal.

This cause having been argued at the November term of this Court by Samuel F. Leber, of counsel for the respondent, and Hugo Woerner, of counsel for the appellants, and the Court having considered the same and finding no error in the record, judgment and proceedings in the Essex County Circuit Court, so far as Charles W. Poysher, builder, is concerned, and the Court finding error in the record and judgment below as to Alfred Stahl, Owner, and in so far as the judgment is special against his lands.

It is, thereupon, ORDERED, that the judgment of the Essex County Circuit Court removed by notice of appeal in this cause be affirmed as to Charles W. Poysher, Builder only.

It is FURTHER ORDERED AND ADJUDGED that the said judgment of the said Essex County Circuit Court be in all things reversed, set aside and for nothing holden as to the defendant-appellant, Al-

fred Stahl, owner, and so far as the said judgment is special against the property of the defendant-appellant, Alfred Stahl, owner, situate in the City of Newark, in the County of Essex and State of New Jersey, described as follows:

BEGINNING at a point in the westerly line of Bergen Street distant therein northerly three hundred and five feet and thirty-one one-hundredths of a foot from the corner of the same and Clinton Avenue; thence (1) northerly along Bergen Street seventy-five feet; thence (2) westerly at right angles to Bergen Street one hundred and five feet and six one-hundredths of a foot; thence (3) southerly parallel with Bergen Street seventy-five feet; and thence (4) easterly one hundred and five feet and six one-hundredths of a foot to Bergen Street and place of BEGINNING, together with the buildings thereon without costs.

It is FURTHER ORDERED that the record and proceedings be remitted to the said Essex County Circuit Court to be proceeded with in accordance with this judgment and the practice of said Court.

Entered March 15, 1916.
On motion of

HUGO WOERNER,
Attorney of Appellants.

A true copy.
Wm. C. Gebhardt,
Clerk.

Notice and Grounds of Appeal

(Filed, April 14, 1916)

NEW JERSEY SUPREME COURT

SAVERIO RIZZOLO, trading under the name and style of Rizzolo Construction Company, Plaintiff, vs. CHARLES W. POYSHER, Builder and ALFRED STAHL, Owner, Defendants.	Action at Law On Mechanics Lien On Appeal

Take notice that the plaintiff appeals to the Court of Errors and Appeals from so much of the judgment entered in this cause, by our Supreme Court, as adjudges that the judgment of the Essex County Circuit Court be in all things reversed, set aside and for nothing holden as to the defendant, Alfred Stahl, Owner, and in reversing said judgment so far as the same is special against the property of the defendant, Alfred Stahl, Owner, which property is particularly described in the Order of Reversal entered by our Supreme Court in said cause.

Also take notice that the plaintiff appeals to the Court of Errors and Appeals reserving to himself all rights that he may have to move for an amendment to his said lien claim with respect to the bill of particulars therein contained.

The plaintiff appeals upon the following grounds:

Notice and Grounds of Appeal

1. The Court erred in reversing the judgment of the Essex County Circuit Court against the defendant, Alfred Stahl, Owner, and in reversing said judgment in so far as the said judgment is special against the said lands of the defendant, Alfred Stahl, Owner.

2. The Court erred in holding that plaintiff's lien claim failed to comply with the Mechanic's Lien Act respecting the bill of particulars in said lien claim contained.

3. The Court erred in holding that the plaintiff's lien claim after amendment in the Trial Court failed to comply with the Mechanic's Lien Law respecting the bill of particulars therein contained.

4. The Court erred in holding that the defendant, Alfred Stahl, was entitled to a non-suit at the trial below.

5. The Court should have affirmed in whole the judgment of the Essex County Circuit Court.

SAMUEL F. LEBER,
Attorney for Plaintiff-Appellant.

To:

Hugo Woerner, Esquire,
Attorney for Defendant,
Alfred Stahl.

Service of the within Notice and Grounds of Appeal acknowledged this 13th day of April, 1916.

HUGO WOERNER,
Attorney for Defendant,
Alfred Stahl.