# INDEX.



Testimony for Plaintiff.



Testimony for Defendant.

EXHIBITS.

**Notice and Grounds of Appeal.**

Filed June 14, 1919.

# New Jersey Supreme Court

ESSEX COUNTY.

| | |
|---|---|
| CHARLOTTE JACOBI, *Plaintiff-Appellant,* *vs.* THE BOARD OF EDUCATION OF MORRISTOWN, IN THE COUNTY OF MORRIS, *Defendant-Respondent.* | *Action at Law.* *On Appeal.* *Notice and Grounds of Appeal.* |

To Vreeland & Wilson, Esquires,
Attorneys of Defendant.

Dear Sirs:

Take notice that the plaintiff appeals from the whole of the judgment entered in this cause to the Court of Errors and Appeals in the last resort in all causes in New Jersey and states the following grounds of appeal:

1. The Trial Court at the trial refused to direct a verdict in favor of the plaintiff and such refusal was error.

2. The Trial Court refused to admit in evidence the following letters:

(a) Letter addressed to the chairman of the Board of Education of Morristown, New Jersey, signed by H. W. Palen's Sons, dated August 29, 1917.

(b) Letter written by H. W. Palen's Sons to the chairman of the Board of Education of Morristown, New Jersey, dated September 21, 1917.

3. The Trial Court admitted in evidence the following exhibits:

(a) Copy of letter written by architects to the Board of Education of the Town of Morristown, dated August 2, 1917, and marked Exhibit D. 3.

(b) Notice to P. F. Kenny Company, dated August 11, 1917, and marked Exhibit D. 4.

(c) Notice served on P. F. Kenny Company, dated August 15, 1917, and known as three days' notice and marked Exhibit D. 5.

(d) Resolutions adopted at a meeting of the Board of Education on Friday, August 31, 1917, and served on P. F. Kenny Company, and marked Exhibit D. 6.

4. The following question to the witness Louis C. Leprophon was admitted: Question: You have heard the resolutions I read a while ago, which have been admitted in evidence. After those resolutions were adopted did the surety company take any action? The question was permitted to be answered by the said witness and the answer to be received in evidence.

5. The Trial Court charged the jury as follows:

(a) The crux of this case is a question of fact, which you must first decide before you can intelligently decide anything else. If at the time the Board of Education took the sash and hardware which was upon the premises and had been shipped there by Palen's Sons you find that the title had passed from Palen's Sons to Kenny, then I charge you that the Board of Education had a perfect right under its contract with Kenny to go upon the premises and take the materials found thereon. If, on the other hand, you find that Palen's Sons had retained title and had not passed that title to Kenny, then, of course, the Board of Education had no right to take Palen's property. In other words, it is for you to decide whether the title had passed from Palen's Sons to Kenny, or otherwise, at the time the Board of Education assumed possession of the sash and hardware.

(b) Moreover, the defendant says that the sash and hardware, under the terms of this contract, which is in evidence and which you will have the opportunity of perusing, were delivered upon the job, and delivery in the case of personal property is evidence of a transfer of title.

(c) It has been testified that there was delivery by Palen's Sons of certain sash and hardware upon the premises, and, as I told you before, delivery of tangible personal property is evidence of the passing of title.

REED & REYNOLDS,
*Attorneys for Plaintiff-Appellant.*

**Summons.**

Issued September 18, 1918.

The State of New Jersey to the Board of Education of the Town of Morristown, in the County of Morris.

(SEAL)

You are summoned to answer the annexed complaint of Charlotte Jacobi in an action at law in the New Jersey Supreme Court. And take notice that unless you file your answer to said complaint with the clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this 18th day of September, nineteen hundred and eighteen.

ENOCH L. JOHNSON,
*Clerk.*

REED & REYNOLDS,
*Attorneys.*

**Complaint.**

Filed September 24, 1918.

Plaintiff, who is a resident of the City of Newark, Essex County, New Jersey, says that:

1. On or about the 14th day of March, 1916, defendant entered into a contract with one P. F. Kenny Company, a corporation, for the construction of a new high school building, located at Atno avenue and Early street, in Morristown, New Jersey.

2. On June 9, 1916, said P. F. Kenny Company entered into a contract with H. W. Palen's Sons to do carpenter work required in the erection and completion of said high school.

3. Subsequent to June 9, 1916, said H. W. Palen's Sons entered upon the performance of the work to be done by it under the last mentioned contract, and thereafter, in order to

carry out the terms of same, prepared and caused to be placed upon and about said high school building then in the course of erection, certain materials consisting of window sash and hardware for same, belonging to said H. W. Palen's Sons.

4. On or about the 1st day of October, 1917, defendant, without authority from said H. W. Palen's Sons, took said window sash and hardware and converted the same to its own use.

5. The window sash and hardware so converted was of the value of $3,027.42.

6. Said H. W. Palen's Sons demanded the return of its property or that said defendant pay to said H. W. Palen's Sons the reasonable value thereof, but said defendant refused to do either.

7. On August 26, 1918, H. W. Palen's Sons assigned the amount due from said defendant to said company, with interest accrued thereon, to plaintiff, who is now entitled to have and receive the same.

8. Defendant has not paid to plaintiff the value of said property or returned the property to her or to H. W. Palen's Sons.

Plaintiff says that she is damaged in the sum of $3,027.42, with interest from January 1, 1917.

REED & REYNOLDS,
*Attorneys for Plaintiff.*

To the within named defendant:

If this complaint is served personally upon you and you intend to make a defense to this action you must file an affidavit of merits within ten days of such service and an answer to the action within twenty days of such service and in default of the filing of such affidavit of merits and answer or either of them as aforesaid judgment will be entered against you.

REED & REYNOLDS,
*Attorneys of Plaintiff.*

*Answer.*

## Answer.

Filed October 9, 1918.

Defendant, a municipal corporation, having its office in the Town of Morristown, in the County of Morris, and State of New Jersey, answering the complaint of the plaintiff in the above entitled action at law, says:

1. Paragraph 1 is denied.
2. Paragraph 2 is denied.
3. Paragraph 3 is denied.
4. Paragraph 4 is denied.
5. Paragraph 5 is denied.
6. Paragraph 6 is denied.
7. Paragraph 7 is denied.
8. Paragraph 8 is admitted.

VREELAND & WILSON,
*Attorneys of Defendant.*

## Judgment Record.

NEW JERSEY SUPREME COURT.

CHARLOTTE JACOBI,

*vs.*

THE BOARD OF EDUCATION OF THE TOWN OF MORRISTOWN, IN THE COUNTY OF MORRIS.

*Judgment Record.*

*Action at Law.*

*On Postea.*

*Judgment for Defendant.*

Reed & Reynolds, Attorneys.

This was tried before Judge Worrall F. Mountain, to whom it had been duly referred for trial, with a jury, at the Essex Circuit, on April 8th, 1919.

The jury rendered a verdict against the plaintiff and in favor of the defendant of no cause of action.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and that the defendant recover of the plaintiff its costs, which are taxed in the sum of .....

Costs, $.....

Judgment entered April 22, 1919.

WM. S. GUMMERE,
*C. J.*

(A true copy.)

ENOCH L. JOHNSON,
*Clerk.*

*Motion to Amend Answer.*

NEW JERSEY SUPREME COURT,

ESSEX CIRCUIT.

Monday, April 7, 1919.

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|---|---|
| CHARLOTTE JACOBI,<br>*vs.*<br>THE BOARD OF EDUCATION OF MORRISTOWN, IN THE COUNTY OF MORRIS. | *Action at Law.* |

Before Hon. Worrall F. Mountain, *J.*, and a jury.

For plaintiff appear Messrs. Reed & Reynolds, by Hugh B. Reed, Esq.

For defendant appear Messrs. Vreeland & Wilson, by C. Franklin Wilson, Esq., and Albert Holland, Esq.

A jury is called and sworn.

*Mr. Wilson.* If your Honor please, I want to move to amend our answer before we go any further, if you will hear me now, I want to amend the answer to set up a general denial of the complaint by setting up a contract in writing between one P. F. Kenny Company and the Board of Education of the Town of Morristown, dated March 14, 1916, which was duly filed in the Morris County Clerk's office; that under that contract, which provided upon the default of the P. F. Kenny Company the board might take certain action; that the default did occur, and that the board took action thereunder and completed the contract. Further, that H. W. Palen's Sons, the plaintiff's assignor, is a New York corporation, and could not sue without doing certain things, which it has not done.

I want to state to your Honor that I made a motion to amend, just as I am stating to your Honor now, before Chief Justice Gummere some four weeks ago, argued the motion before him, and the motion was denied. I say that in all frankness to your Honor. For the purpose of getting on the record, I want to renew my motion at this time to amend in those particulars the answer which we have heretofore filed.

*The Court.* Do you oppose the motion?

*Opening.*

*Mr. Reed.* Yes, sir; I oppose the motion. This is *res adjudicata.* The same motion was made before the Chief Justice, and the Chief Justice denied it on the merits.

*The Court.* I shall deny your motion.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Reed opens for plaintiff.

Mr. Wilson opens for defendant.

*Mr. Wilson.* If your Honor please, the contract and specifications and plans are here on Mr. Reed's notice to produce. They are on file in our County Clerk's office. The clerk had an operation last week and is in bed. His deputy is here in court today; one of the employees of the clerk is here with the plans and specifications and the contract. I do not know that we can mark them as an exhibit in this case, but we can produce them, and I think Mr. Reed and myself will agree that the copy of the contract may be used. Is that right, Mr. Reed?

*Mr. Reed.* Yes.

*Mr. Wilson.* We want to have that on the record.

*The Court.* Yes. Will you enter on the record the date of filing?

*Mr. Wilson.* Yes; dated the 14th day of March, 1916, between the Board of Education of the Town of Morristown, in the County of Morris, designated as the owner, and the P. F. Kenny Company, dated as the contractor, duly executed, and filed March 16, 1916, in the Morris County Clerk's office; and the specifications, marked No. 419, filed in the Morris County Clerk's office the same day. We agree that we will use the copy that Mr. Reed has.

*Mr. Reed.* Let this copy of the contract be marked.

(The paper referred to is marked Exhibit P. 1.)

*Mr. Reed.* And the specifications.

(The paper referred to is marked Exhibit P. 2.)

*Mr. Reed.* I will offer in evidence the contract between H. W. Palen's Sons and P. F. Kenny Company, dated June 9, 1916.

(The paper referred to is marked Exhibit P. 3.)

*Morris Samter, direct.*

*Mr. Reed.* I will offer in evidence an assignment made by H. W. Palen's Sons to Charlotte Jacobi, the plaintiff in this case, dated August 26, 1918.

(The paper referred to is marked Exhibit P. 4.)

MORRIS SAMTER, sworn in behalf of plaintiff.

*Direct examination* by Mr. Reed.

Q Mr. Samter, you are connected with H. W. Palen's Sons, are you not? A I am.

Q In what capacity? A Treasurer.

Q I show you Exhibit P. 3. Are you familiar with the work that was done in connection with that contract? A I am.

Q Will you tell us what work has been done and where? A Well, the work was done at the Morristown High School, at Morristown; the rough carpenter work had been done under that contract, such as floor beams—

Q What did that consist of? A All rough carpenter work, such as floor timbers and ceiling rafters, the general rough work —installing the window frames.

Q Window frames? A Yes.

Q What about the window sash? A We delivered those on the grounds for our convenience, to install at such time as when the building was ready to install them.

Q They had not yet been installed? A They had not.

Q None of them? A I believe about six or seven.

Q Had been installed? A Yes.

Q The rest had not? A Had not.

Q Do you know where they were? A They were in a shed on the premises.

Q What about the hardware in connection with them? A That was also in a shed there on the premises.

Q What time of what year was that? A Without the records I could not say off-hand.

Q What records do you refer to? A Why, the bills of lading.

Q What is this that I show you (shown to witness)? A That is the estimate of the window frames and sash for the Morristown High School.

Q What else? A Bill of lading showing the shipment of the sash.

*Morris Samter, direct.*

Q Having refreshed your memory from that, will you tell us when it was? A They were delivered, I think, in December, 1916.

Q December, 1916? A November and December.

Q Did you have any conversation with a member or members of the Board of Education of the Town of Morristown subsequent to the delivery of this material? A I did; yes, sir.

Q Can you fix the date on which you had that? A No, I cannot.

Q What year was it in? A It was in 1917.

Q 1917; and what part of the year? A A short time prior to the Morristown board letting the contract to Reeve & Burr. I haven't got that date fixed.

Q And where were you? A I saw one member of the board at Morristown, in the building of the Morristown High School, and I saw two members of the board in our New York office.

Q Which occured first; which meeting? A The meeting with the members of the board over in our New York office.

Q And what occurred at that meeting?

*Mr. Wilson.* I object, if your Honor please. I do not know that anything that the members of the Board of Education might have said or might not have said, or anything that Mr. Samter might have said to them, is binding on the Board of Education. They could not take action that way.

*The Court.* Of course, you cannot prove the agency by the agent's declarations. I sustain the objection.

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

Exception noted as ground of appeal.

Q Do you know anything further about these members of the board that came to New York than that they were members of the board? A Members of the board, and represented as being members of the building committee, in charge of the building.

*Mr. Wilson.* I move that that be stricken out.

*The Court.* I will admit that.

*Louis C. Leprohon, direct.*

Q Where did you learn that and from whom? A From the individual members.

Q When they came over there? A Yes, sir.

Q Who were they? A Mr. Todd and Mr. Leprohon; there was a representative of the architect with them, whose name I do not recall, and Mr. Casale, a mason contractor, or plasterer.

Q Whom did you see in Morristown? A Mr. Day.

Q Do you know what connection he had with the board? A He told me he was the member of the building committee.

*Mr. Reed.* For the sake of continuity of this story, may I withdraw this witness and ask that the clerk of the Board of Education be sworn, to show the connection?

*The Court.* Yes.

(The witness stands aside for the present.)

LOUIS C. LEPROHON, sworn in behalf of plaintiff.

*Direct examination* by Mr. Reed.

Q In the year 1917 were you connected with the Board of Education of the Town of Morristown? A I was.

Q What was your official capacity? A During what dates of 1917?

Q Well, from January until September? A From January until July I was simply a member of the board; I think it was on July 1st I became clerk.

Q You became clerk of the board? A On that date.

Q Have you the records of the board showing the members and the committees? A I think I have; I am not positive that they are in this book (producing book).

Q In what book? A In the book that I have here. I can explain by saying that this is a new minute book, and I don't know that this goes back to that date.

Q All right, sir. A What date do you want?

Q Well, I want the date between January 1st and July 1st, 1917, first. A (Referring to book.) The first meeting of record is a special meeting of the board on January 10, 1917. I was not clerk at that time.

*Louis C. Leprohon, direct.*

Q Who were the members of that time? Can you tell from your books? A Messrs. Hinchman, Conklin, Todd, Day and Leprohon, myself.

Q And were there any committees? A There is no record of any at that time. I think that would follow at the next meeting.

Q Well, have you the record of the next meeting? A The next meeting was the organization meeting, at which time the committees were appointed.

Q What were the committees appointed?

*The Court.* May we have the date of that meeting first?

*Witness.* February 1, 1917.

A Mr. Conklin was succeeded by Mr. Smith as member.

Q What were the other officers, Mr. Leprohon? A At that meeting?

Q Yes. A Mr. Smith was elected president of the board.

Q Who was the vice president? A Mr. Day.

Q And the clerk? A John R. Eichlin.

Q What were the committees—first, the building committee? A The building committee, W. Parsons Todd, Wilbur F. Day, Louis C. Leprohon.

Q That is, yourself? A Yes, sir.

Q And how long did that continue to be the building committee? A One year.

Q I think that you said you were elected clerk on July 1st? A Yes, sir.

Q Did you still continue—

*Mr. Wilson.* No; he did not say he was elected then.

*Mr. Reed.* Chosen or selected.

*Mr. Wilson.* He said from July 1st. The election was probably ahead of that.

Q You took office as clerk on July 1st? A On July 1st.

Q And did you still remain a member of the building committee? A I did.

*Mr. Reed.* That is all.

*Mr. Wilson.* We produce, if your Honor please, the minute-book of the Board of Education, which is in the

hands of the clerk now, under notice to produce, and we have offered it to Mr. Reed and he has it. We have no objection to the book being marked in some way to show. I do not know how they want to mark it.

*Mr. Reed.* So far as I am concerned, I have no necessity yet for marking it at all. I have no objection to its being marked, if you wish that it shall be identified.

*The Court.* It having been referred to, not for the purpose of refreshing this gentleman's recollection, I presume, but as a record, you have the right, if you desire to, on your case, to have it marked in evidence. You can now have it marked for identification.

*Mr. Wilson.* I think it ought to be.

(The book referred to is marked D. 1 for identification.)

Cross examination waived.

MORRIS SAMTER, resumes the stand in behalf of plaintiff.

*Direct examination* (continued) by Mr. Reed.

Q Mr. Samter, will you tell us now with whom you had a conversation in Morristown? A Mr. Day.

Q Mr. Wilbur Day? A Yes, sir.

Q What was said between you and Mr. Day with respect to the contract which you had with Mr. Kenny or the material which you have described that you had delivered on the premises?

*Mr. Wilson.* I must object, sir. It occurs to me that no conversation with Mr. Day or any member of the Board of Education would be competent. The only way that the board, being a municipal body, could act would be at a meeting duly held and action taken by motion or resolution. It seems to me that is the only thing that would bind the Board of Education. What Mr. Day or Mr. Leprohon or Mr. Todd may have told Mr. Samter, it seems to us, cannot bind the Board of Education—that is, these individuals—whether you say that they were speaking as individuals or as members of the building committee or as members of the board, if it was not in a board meeting, and if it was in a board meeting there is a record.

*Morris Samter, direct.*

*Mr. Reed.* Of course, if your Honor please, while this conversation may not bind the Board of Education in the sense that Mr. Wilson refers to—it may not have that effect—it is competent, however. It may show notice to them. The question of the effect of this conversation, in other words, is not at issue now. We have a right to show, if this testimony is competent, whether or not it binds the Board of Education, because it may be a step in showing notice to the Board of Education, where we have a conversation with a member of the building committee of that board, and notice to that committee would, of course, be notice to the board, we contend.

*By the Court.*

Q When was this conversation held, Mr. Samter? A Held with Mr. Day?

Q Yes. A Before we had any notice that Kenny was put off the job, really.

Q Can you fix the time, about? Was it 1916 or 1917. A It was in 1916.

*The Court.* You have not any proof, have you, that Mr. Day was a member of the building committee in 1916.

*Mr. Reed.* No, I do not intend to ask about any conversation that took place in 1916. I thought it was a conversation that took place in 1917, after the delivery of the material. I understood this witness to say that the material was delivered in 1916.

*Witness.* I am wrong in that date. Our sash was on the job when I saw him; it was in 1917 when I saw Mr. Day.

Q It was in 1917? A It was after the sash was there, because I saw the sash at the time.

Q That was the conversation that you referred to when you were formerly on the stand and said that you had a conversation after delivery? A Yes, sir.

Q When did you say that you delivered this sash, do you remember?

*Mr. Wilson.* December, 1916.

A December, 1916.

*Morris Samter, direct.*

Q Oh, yes. How long after the delivery was it, do you remember, Mr. Samter? A Oh, it was at least a couple of months, I think. I am not positive of the date.

Q At that time where was the sash? A In a shed on the premises.

*The Court.* I will admit your question, Mr. Reed.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q (Question read as follows: "What was said between you and Mr. Day with respect to the contract which you had with Mr. Kenny or the material which you have described that you had delivered on the premises?") A Mr. Day said that he was a member of the Board of Education, and al o of the building committee; that there had been some discrepancy between the P. F. Kenny Company and the Morristown Board of Education, and it was apparent that the Kenny Company would not finish their contract. I told him that we had delivered the sash and the hardware on the premises; that at that time neither the Kenny Company nor ourselves had received or were entitled to receive pay for them until they were installed, and that we had other work in progress for the building, and suggested to him that the Board of Education make a contract direct with us to finish our contract with P. F. Kenny Company, paying us the difference between what was paid to the Kenny Company and the amount of our contract. He stated that he thought that was a fair thing to do; that the material belonged to us; that we had not been paid for that, and we should be paid for it, and he was in favor of proceeding along that line, if he could influence the board to do so.

*By Mr. Reed.*

Q Well, you said that the next conversation took place in New York, between you and whom? A Mr. Todd and Mr. Leprohon and Mr. Casale.

Q And what was said there?

*Mr. Wilson.* I interpose the same objection, if your Honor please.

*The Court.* Yes.

*Morris Samter, direct.*

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

A I reiterated to these members of the board that were there that the sash and hardware was there; that it was our sash, and we should be given an opportunity to finish the contract and have the Board of Education pay us direct for it. Mr. Todd took exception to it, and he said that might be a question; that they may be able to take our sash without paying for them; and we told him we didn't see any justice in that; and they led us to believe, and, in fact, asked us—

Objected to.

*The Court.* No, do not tell us that.

Q Just tell us what was said. A They told us to make up an estimate of the amount for finishing the contract, which we did; we made up an estimate, the amount being the difference between what the Kenny Company paid us and the amount of our contract with the Kenny Company.

*Mr. Reed.* Mr. Wilson, have you a letter addressed to the chairman of the Board of Education of Morristown, New Jersey, signed by H. W. Palen's Sons, dated August 29, 1917?

(Defendant's counsel produce paper.)

*Mr. Reed.* I will ask that this be marked in evidence. It is a letter from H. W. Palen's Sons, addressed to the chairman of the Board of Education of Morristown, New Jersey, dated August 29, 1917, produced by Mr. Wilson.

*Mr. Wilson.* I will have to object, if your Honor please, to the admission of this letter. In reading the letter, it will be found, I dare say, to be a proposal to make a contract with the Board of Education. It is not asserted that any contract was ever made between H. W. Palen's Sons and the Board of Education, so that I fail to see the materiality or the relevancy of this letter.

*The Court.* How is this material, Mr. Reed?

*Mr. Reed.* Well, it is all part of the question, of course. This was followed by other letters which we propose to introduce in connection with the conversation which took

place between these gentlemen in New York. It all goes to show notice of the fact to the board that this property was the property of H. W. Palen's Sons.

*The Court.* As I understand, your suit is brought directly for the conversion of the window sash.

*Mr. Reed.* Yes. Of course, one of the steps in the suit is to prove the fact that the Board of Education took this sash knowing it was our sash and used it or caused it to be used.

*The Court.* I shall sustain your objection.

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

Exception noted as ground of appeal.

(The paper referred to is marked P. 5 for identification.)

*Mr. Reed.* Now, Mr. Wilson, will you produce a letter written by H. W. Palen's Sons to the chairman of the Board of Education of Morristown, New Jersey, dated September 21, 1917?

*Mr. Wilson.* We cannot find any such letter as that; we do not find any record of that letter.

*Mr. Reed.* I am going to offer these copies, Mr. Wilson (handing papers to defendant's counsel).

*Mr. Wilson.* I will have to object to that, if your Honor please, for the same reason. It seems to be an offer to make a contract with the board.

*Mr. Reed.* Yes, it is. I want to make the offer. I assume that the same ruling will be made.

*Mr. Wilson.* I assume that the same ruling will be made, because it is exactly the same thing that has been ruled upon.

*The Court.* I shall make the same ruling.

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

Exception noted as ground of appeal.

(The paper referred to is marked Exhibit P. 6 for identification.)

*Mr. Reed.* Now, Mr. Wilson, will you produce a letter addressed to Mr. George T. Smith, president of the School Board of Morristown, New Jersey, dated October 8, 1917?

*Mr. Wilson.* Mr. Smith tells me that he cannot find that letter. Whether he received it or not I do not know.

*Mr. Reed.* I have a copy of it; I will offer that (handing paper to defendant's counsel). Do you object to that?

*Mr. Wilson.* I do not object to your offering it. I do not admit that it was ever received.

Q I show you a copy of a letter dated October 8, 1917, addressed to George T. Smith, president (paper shown to witness). What can you tell me about that letter? A The letter was written and mailed to Mr. George T. Smith.

Q About what time? A October 8, 1917.

*Mr. Reed.* I will offer this in evidence.

*Mr. Wilson.* I think I am entitled to examine on that now.

*Mr. Reed.* You can do so.

*The Court.* You may.

*By Mr. Wilson.*

Q Do you know who wrote it, Mr. Samter? A I do; yes, sir.

Q Who wrote it? A Mr. Hallett, in my presence.

Q Who is he? A He is our manager of our New York office and secretary of the company.

Q Did he write it on a typewriter? A He dictated it to a stenographer.

Q Did you see it after it was written? A I did; yes, sir.

Q Where did you see it? A In our New York office.

Q Well, where was it when you saw it? A Possibly in my hands.

Q I beg your pardon? A In my hands, reading it.

Q After it was written? A Yes, sir.

Q Who signed it? A Mr. Hallett.

Q This copy does not seem to be signed at all. A We do not sign copies.

Q Well, after you read it what did you do with it? A It was mailed, given to—

Q No, what did you do with it? A I gave it to Mr. Hallett to sign.

Q Did you see it after that? A I did.

*Morris Samter, direct.*

Q Where did you see it? A Given to our stenographer to mail.

Q Did you see her mail it? A I did not.

*Mr. Wilson.* I object to it. There is no proof that it was ever mailed.

*Mr. Reed.* I think it is held that where it appears that the letter was written and prepared for mailing that that is *prima facie* evidence.

*The Court.* I think it is where it is shown that it was given to someone whose duty it was to mail letters. I will admit the letter.

(The paper referred to is marked Ex. P. 7.)

(Mr. Reed reads Ex. P. 7.)

*By Mr. Reed.*

Q Well, after that did you see any other member of the board, Mr. Samter? A After what, Mr. Reed?

Q After that letter. A No, sir.

Q And did you see any member of the board other than on the two occasions which you have told us about? A I was once in Mr. Leprohon's office—I think once or twice.

Q What time with respect to the making of the— A It was after the board had been to our office.

*Mr. Wilson.* I object to that, if your Honor please. It does not appear that the board ever did go to his office.

*The Court.* I sustain the objection.

*Mr. Wilson.* I move that that be stricken out.

*The Court.* Strike it out.

Q After who was at your office? A The two members of the board, Mr. Todd and Mr. Leprohon.

Q And how long after that? A Oh, I think I was there—I was there twice within the next sixty days after that.

Q And what occurred? A Why, I asked Mr. Leprohon what action had been taken by the board, and he stated they were—

*Mr. Wilson.* I will have to object again to any conversation between Mr. Leprohon and Mr. Samter, merely to be consistent.

*The Court.* Yes, I will overrule your objection.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

*Witness.* He said that they were considering our offer to complete the job and that they thought it was fair and they thought it would be accepted.

Q Now, can you tell me just what material was there that you supplied, what material you had placed there for the purpose of completing the job? A There were three hundred and some odd sash; I don't recall the exact number; and also the hardware for the same sash.

Q What record has your company of that? A We have the bills of lading and paid freight bills showing shipment.

Q What is this paper that I show you (paper shown to witness)? A That is our order sheet on which the sash was listed in the factory.

Q And what is this paper that I now show you (paper shown to witness)? A That is our estimate of the window frames and sash.

Q Made when? A Made April 14, 1916.

*Mr. Reed.* I shall ask that this first paper, dated May 26, 1916, be marked for identification.

(The paper referred to is marked P. 8 for identification.)

*Mr. Reed.* And that the paper referred to as estimate be marked for identification.

Q What is this P. 8? A That is the order sheet from which the sash were manufactured.

Q Now, can you tell me just how many sash were delivered? A (Referring to paper.) I can't exactly tell from this off-hand; I would say three hundred and fifty-seven pair.

Q What record do you need to tell exactly? A I have a memorandum here, I think. While there are more sash listed here, some of them are interior sash, for which we are not bringing this action.

Q You are not claiming for the interior sash? A Not claiming payment.

*Morris Samter, direct.*

Q What record do you need to show the exact number of exterior sash? A I think Mr. Hallett figured these sash—I didn't figure these—so he can answer that question.

(Question withdrawn.)

Q What else was there? A The hardware for the sash.

Q And what have you to say about the hardware? A It was patented hardware, made special; we purchased it from the Austral Hardware Company and had it delivered on the job for our account and paid them for it.

Q Were these sash all alike? A They were of different sizes.

Q Can you tell me the number and value of each size? A The value would be shown on this exhibit (indicating paper).

Q That is marked for identification. Can you tell me the value independent of that exhibit? A The total value?

Q Yes.

*Mr. Wilson.* That calls for yes or no, Mr. Samter. Can you tell the amount?

A I don't understand your question.

Q Can you tell us the value of that sash? A Yes, sir.

Q How long have you been connected with this company? A Twelve years.

Q And in what capacity? A Various capacities, from clerk in the office up to treasurer and manager of the business.

Q And as treasurer and manager of the business what do you do with respect to making estimates and entering into contracts? A I oversee the business in general.

Q Do you have anything to do with making prices for contracts? A I pass on the prices.

Q You pass on the prices? A Yes, and make the prices also.

Q What about the hardware? What do you know about the value of hardware and how have you acquired knowledge of it? A In making up our estimate the patented hardware was specified, and it could only be purchased from one concern. We wrote to them for a price on it, which they quoted us, which we used in making up our estimate; that is the price that we purchased for.

*Morris Samter, direct.*

Q That is the price you purchased it for? A That is the price for which we now claim payment.

Q They are the only firm that makes this particular hardware? A Just so; yes, sir.

Q What is the amount that you claim for sash? A $1,575.42.

Q What is the value of the hardware?

*Mr. Wilson.* It seems to me that we cannot lump together a lump item such as this, your Honor. We do not know yet what sized sash were delivered, nor how many. He has not told us how many sash were delivered. He tells us that the values of certain sash, or a certain number of sash, were a certain amount. I do not believe that is the proper sort of proof, and I move to strike out that answer. I did not have a chance to object to it, because I thought Mr. Reed was going to show the number of sash delivered on the job.

*The Court.* In the first place, he has not been asked that yet, and, secondly, I think you can bring that out on cross examination.

Q Can you tell me the value of the different kinds of sash? A It is submitted in evidence on this list; I can read it from our list here.

Q When was that list made, do you say? A April 14, 1916.

Q What was that date with respect to the time the estimate was made? A I beg your pardon?

Q What time was the estimate made with respect to that date? A The estimate was made about that same time.

Q Will you tell me from that the value of the different sash?

*Mr. Wilson.* Was it made by you, Mr. Samter?

*Witness.* It was not.

*Mr. Wilson.* I object to it if it was not made by him.

*The Court.* I sustain your objection.

Q What did you have to do with it? A It was submitted to me for my approval, and the prices on it.

*By the Court.*

Q You have stated that that was an estimate. Was that an estimate for Kenny? A Yes, sir; that was the estimate on which our order was based.

*Morris Samter, direct.*

Q And that contains the kinds of sash, the sizes and the price? A Yes, sir.

Q That was made up by someone in the employ of your company and submitted to you before it was— A Yes, sir.

Q And is that the estimate that was given to Kenny? A Yes, sir.

Q And accepted by him? A Yes, sir.

Q Were there any deviations from that estimate on the delivery? A No, sir.

*Mr. Wilson.* That is exactly what I wanted, if your Honor please. If that is the estimate that they made for Kenny, I have not the slightest objection to his telling you and this jury what parts of that estimate they delivered on the job, calling off the size, the number and quantity of sash that they delivered. If Mr. Samter will do that, we can get along fine. I shall not have the slightest objection to that.

*By Mr. Reed.*

Q Can you say whether or not it was all delivered?

*Mr. Wilson.* He has said it was not some time ago.

*Mr. Reed.* I did not understand him to say so.

*Mr. Wilson.* I understood him to say so.

A All of the exterior sash were delivered.

Q All of the exterior sash? A Yes, sir.

Q Can you indicate on this Exhibit P. 9 for identification the sash that was delivered and that which was not (paper shown to witness)? A I think Mr. Hallett would be in a better position to do that; he knows more about it than I do.

*Mr. Reed.* Very well. Then I will ask him that.

Q What was the value of the hardware?

*Mr. Wilson.* I object to that question, if your Honor please. The fact that H. W. Palen's Sons paid a certain price for hardware does not fix the value. I do not think I need cite any cash on that. A witness who is testifying as an expert as to values must show some knowledge of values of hardware. The fact that Palen's Sons paid a

certain sum for hardware that was delivered on the job does not fix the value of the hardware, as I understand it.

*Mr. Reed.* My theory was this. This witness has shown that he was in charge of a concern that has made sash and furnished sash for buildings and put them in and erected them, and he has been doing that for a number of years for this company. He was manager, and the bids were submitted to him. In addition to that, he said that this hardware was specified and had to be bought at a certain place, and consequently that would fix the value of the hardware. In addition to that, as I understand it, the cost of an article is some evidence of its value. It may not be conclusive evidence of the value, but it is admissible to show the value of the article. So that, I think, from all three of those standpoints this testimony is admissible.

*The Court.* I think it is admissible. I will admit the question.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

A $1,452.

*Cross examination* by Mr. Wilson.

Q Mr. Samter, what hardware, if you know, was included in the price of $1,452? A The hardware called for in the specifications.

Q Can you tell us what hardware you purchased for that? A The Austral Hardware Company took it off from the plans and specifications and gave us a price on what was required, it being necessary to buy it from them.

Q Have you anything which will show what comprised that list of hardware? A The specifications show it.

Q Have you got them? A They are in evidence, I believe. I have not got them.

Q Well, you show me, will you, what hardware that was?

(Mr. Reed hands paper to witness.)

A (Referring to paper.) "Alternate Estimate; Pivoted Windows. Submit a separate estimate for providing pivoted win-

dows for all exterior sashes in place of D. H. specified; the pivoted windows are to be of a type similar and equal to that of the Austral Window Company, 101 Park avenue, New York City."

Q Is that all you find in the specifications? A That is all I note just now.

Q Did you ever go to Morristown? A I did.

Q How many times? A Once.

Q When was that? A At the time I saw Mr. Day, in the early part of 1917, I think.

Q You say that was in the early part of 1917. Was P. F. Kenny Company at the time working on the job? A They were not; H. W. Palen's Sons were, and we being a sub of Kenny, the Kenny Company could be considered as working.

Q In that way? A Yes.

Q Was that January or February, 1917? A I can't fix the day right now.

Q At any rate, it was January, February or March, 1917? A I think so.

Q Were you ever there again? A No, sir.

Q At that time was there any hardware on the premises? A Yes, sir.

Q What? A Why, I didn't check it up, but it was the hardware that we had ordered.

Q You did not check it up? A No, sir; I didn't check it up.

Q Then you do not know what hardware was there, do you? A Only that it was delivered to the job. Our records showed payment of freight and cartage for delivery to the job, and the report from the foreman on the job that it was there; he checked it up.

Q Where is your report? A I haven't got it.

Q When was it delivered? A I have a bill there; there is a bill for cartage. I don't just recall the date.

Q Can your counsel help you? A Yes. Mr. Hallett has the bill.

Q What have you to show the items of hardware which you say was delivered at the premises? A We have the bill from the Austral Hardware Company showing what they shipped.

Q No. I asked you what would show the delivery, anything? A What would show the delivery?

*Morris Samter, cross.*

Q Yes. A Here is two bills for cartage. Freight and cartage, $4.46; express on two boxes of hardware, 44 cents (referring to papers).

Q What is the date on them? A One is January 4th and the other the date is punched out—January, 1917.

Q I hold two bills which you have submitted to me against H. W. Palen's Sons to P. F. Kenny Company, debtor, one of January 4, 1917, "To expressage on two boxes of hardware, 44 cents," and one of January 25, 1917, "To freight, storage on boxes and cartage on seven boxes of hardware, $4.46," and I ask you if those two bills are what you refer to as being the bills to refresh your recollection as to the hardware? A Yes, sir.

Q Did you ever open the boxes? A I did not.

Q You do not know what was in them, do you? A I do not.

Q And you do not know from looking at those bills where that hardware came from, do you? A It was the only hardware shipped for our account.

Q But from looking at those bills you cannot tell where that hardware came from, can you? A Of course not.

Q Have you any other bill for freight for hardware? A The Kenny Company evidently kept the bills and rendered us their bill.

Q Have you any other bill except those two? A No, sir.

Q And you never saw the hardware on the premises? A I saw some of it; yes, sir.

Q Were the boxes opened? A Some of them; yes, sir.

Q How many? A I don't recall.

Q You did not check it up at all? A That was not my duty, to check it up; the foreman checked it up.

Q Who? A The man working on the job. I don't know; I didn't handle the job personally. These reports came in to another man.

Q Do you know who did check up the hardware in those boxes? A Not now, not offhand; no, sir.

*Mr. Wilson.* If your Honor please, I move that the testimony of the witness as to the hardware be stricken out, so far as his testimony is concerned.

*The Court.* I deny your motion.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q You never saw Mr. Day except in Morristown, did you? A I never recall seeing him anywhere else.

Q And that was the visit to which you have just referred, was it? A Yes, sir.

Q In January, February or March, 1917? A Some time in 1917.

Q What did you go to Morristown for? A To try to find out what the board was trying to put over on us.

Q At that time you had a contract with Kenny Company, did you not? A We did, yes.

Q And you were doing work for Kenny Company, were you not? A We were.

Q On the Morristown High School? A We were—not at that time—well, yes, that is right.

Q I so understand you, Mr. Samter? A Yes, sir.

Q You said H. W. Palen's Sons were at work out there? A Yes, sir.

Q You had an account against P. F. Kenny Company, did you not? A We did.

Q Is that in your ledger? A Yes, sir.

Q Will you produce it, please?

(Mr. Reed hands paper to witness.)

Q Is this paper that you now hand me your ledger account against P. F. Kenny Company? A Yes, sir; for the Morristown High School.

Q For the Morristown High School; that is quite right. H. W. Palen's Sons keep a loose leaf ledger, do they, Mr. Samter? A They do.

Q And this is page what? A 86.

Q And you have taken that from your ledger? A Yes, sir.

Q And that is the account between H. W. Palen's Sons and P. F. Kenny Company? A Yes, sir.

Q On the Morristown High School job? A Yes, sir.

*Mr. Wilson.* I have given no notice to produce it. I want to have it marked and offer in evidence. I do not know whether I can do it on cross examination or not.

*Mr. Reed.* I will agree to it.

(The paper referred to is marked Ex. D. 2.)

Q Did you see anyone connected with the Board of Education except W. F. Day? A At Morristown?

Q At Morristown. A I think not.

Q Where did you see him? A I called at his place of business and he drove me over to the school house.

Q What did you say to him? A I have already testified to that.

Q Well, you say you asked him to make a direct contract with H. W. Palen's Sons; is that right? A I didn't say it in those terms, I think.

Q Maybe I am mistaken. On your direct examination I have it that you say Mr. Day told you that he was on the building committee, and that you asked him to make a direct contract with H. W. Palen's Sons. That is not quite true, is it? A I don't believe that is what I said.

Q All right. I do not intend to say that you did. You did not say anything like that to him, did you? A I said something like that to him; yes, sir.

Q What did you say? A I asked him if he did not think it would be fair for the Board of Education to make a direct contract with H. W. Palen's Sons.

Q In January, February or March, 1917, you say this was?

*Mr. Reed.* He did not say that.

*Mr. Wilson.* I want to find out.

*Mr. Reed.* He said he could not fix that time exactly; he said it was some time in 1917.

*Mr. Wilson.* He said it was two months after the stuff was delivered, and that was December, 1916. That is what I have here.

*Witness.* I said I thought it was about two months.

Q Now, you fix the time for me, Mr. Samter. When in 1917 did you see Mr. Wilbur F. Day? A I would have to look over our correspondence—I think we have some of it here—to try to fix the date. I can't fix it in my mind now. I know it was some time after the sash was delivered, quite some time; it may have been a month or two or it might have been two or three; I don't know.

Q That is what you told us some time ago; you said the sash was delivered in December, 1916? A Yes, sir; November or December.

Q November or December? A Yes.

Q And within a month or two months or three months you saw Mr. Day? A I said I thought it was within that time. I can't fix the date; I wouldn't want to swear to the date without—

Q Is it not true that it was in August or September, Mr. Samter? A I don't know.

Q Did you know whether or not Kenny Company had abandoned the contract when you saw Day? A Repeat the question, please.

Q (Question read.) A We weren't sure of it; no, sir.

Q Do you know whether or not Kenny Company ever did anything after you saw Day? A Why, H. W. Palen's Sons did, and we were working for Kenny Company.

Q Anything else except what H. W. Palen's Sons did? A Not to my knowledge.

Q Well, now, doesn't that refresh your recollection, and was it not in August or September or July? A I would have to look the papers over; I couldn't answer that question.

Q What paper do you want to look at? A Well, give me the date that Kenny abandoned his contract.

*Mr. Reed.* We can give you the date that the Board of Education said they served a notice on him.

Q August 15, 1917, is the date of the notice. Will that help you? A August 15th?

Q Yes. A When the Board of Education served notice on him?

Q Yes, 1917. A No, that doesn't help me any, Mr. Wilson. I understood that a payment had been authorized to be made to Kenny by the architect and the board refused to make the payment.

Q How did you understand that, from Kenny? A From Kenny, yes—from Kenny personally or through his employees; I am not certain.

Q You were after Kenny for money, were you not? A I don't recall that we were on that job.

Q Well, he owed you some money, did he not? A Yes, sir.

*Morris Samter, cross.*

Q Were you not pressing him for payment? A Why, we don't press our customers.

Q All right. We will admit that you did not. Well, now, Mr. Samter, this was about August, then, that this conversation that you had with Mr. Day took place, was it not? (No response.)

Q Did he tell you that Kenny had quit? A It depends on how long after Kenny quit the job that the board served me with that notice. If that notice was in August and it was two months after Kenny abandoned the job, then it was two months after that I saw him.

Q Did Mr. Day tell you that Kenny had quit the job? A No.

Q He did not? A No.

Q Well, why was there any talk about your making a contract with the board? A He said apparently that Kenny—that there was some move being made either by the board or by Kenny.

Q Did he tell you that everything had come to a standstill? A I saw that.

Q Did you see that? A Yes, sir.

Q Did he tell you that the board had served a notice on Kenny? A I don't think so.

Q You did not have any information of that sort? A No.

Q Was there anything said between you and Mr. Day about your material on the job? A There was.

Q What did you tell Mr. Day about the material there at the time you had a conversation with him? A I said our sash and hardware were there, and I asked him if it wasn't fair that we be given an opportunity to install it and get our pay for it. If they were going to put Kenny off the job and finish it themselves, we should be given an opportunity to complete the contract, if that was the way they were going to handle it.

Q And you told that to Mr. Day when you saw him? A Yes, sir.

Q You have never seen him before? A No.

Q And you never saw him afterwards? A No.

Q And you think that was either at his place of business or the high school grounds? A Yes, sir.

Q You did not attend any board meeting, did you? A No, sir.

*Morris Samter, cross.*

Q Now, after that, how long was it before you saw Messrs. Todd and Leprohon? A I haven't the date fixed. I think the date may be on that letter that was submitted as an exhibit. We confirmed the conversation, I believe.

Q Do you think that was in August, 1917, then? I think Mr. Reed said the letter was dated August 29th; I think so.

*Mr. Reed.* Yes, I think that was the date of it; yes, August 29th is right.

Q Mr. Reed says that the letter that you referred to is dated August 29, 1917. A Does that confirm the conversation?

Q No. Referring to that date, can you tell us when you had the conversation with Mr. Todd and Mr. Leprohon?

*Mr. Reed.* Show him the letter.

*Mr. Wilson.* Not unless he thinks it will refresh his recollection. I have given him the date. That is all I want to know.

A I don't know what is in the letter. If the letter states that we confirmed the conversation— Does it state the date—

Q Well, you say that you do not know the date, then? A No.

Q Well, it was after you had seen Mr. Day? A Yes, sir.

Q I understand you to say that this conversation was at the office of H. W. Palen's Sons, in New York city? A Yes, sir.

Q Is that right? A Yes, sir.

Q And you said that Mr. Leprohon, Mr. Todd and Mr. Betelle were present, did you? A Some representative of the architect, whether it was Mr. Betelle. The other two members were present.

*Mr. Wilson.* Mr. Betelle, will you please stand up?

(A man arises.)

Q Was Mr. Betelle present? A I don't recall whether it was the architect or the representative; I think it was Mr. Betelle, but I won't be positive.

Q You know him. Do you think he was present? A I don't know him. I think he was present.

Q Now, didn't they want Palen's Sons to bid on finishing the carpenter work remaining to be done? A They requested us to bid on it.

Q Yes, that is what they wanted you to do; isn't that so? A Yes.

Q They wanted you to bid on the carpenter work required to finish the job? A Yes.

Q They told you then that Kenny had quit, did they not—the Kenny Company? A As much as that, I presume. I don't remember that they had told us that he had quit or was going to quit or—

Q At that time did they not tell you that the Kenny Company had quit and the board had to finish the job? A They intimated that.

Q You understood that from them, did you not? A Yes, sir.

Q And they told you that they would be glad to have Palen's Sons submit a bid for the carpenter work necessary to finish the job, did they not? A I don't know as they said they would be glad to have them do it; they said—

Q That is what they came there for, is it not? A No, I don't think so.

Q What did they come there for? A They came to see whether he would give them the sash and hardware, or whether we would put in a bid and they would have it, or whether we would play Santa Claus and give it to them, or whether they would give it to somebody else.

Q Well, that is what it was; they asked you to put in a bid? A If you call that bidding.

Q So that they told you they had to get bids from other people to finish the job that Kenny had fallen down on, did they not? A They said they had to protect themselves because of their constituents in Morristown.

Q Did they not tell you that they wanted to finish the building? A I don't know how far the Board of Education can go after they had fallen down to finish a building.

*Mr. Wilson.* I ask that that be stricken out.

Q (Question read.) A They said they wanted to, yes.

Q And they came down there to give you an opportunity to bid on the carpenter work, did they not? A Give us an opportunity to bid on the carpenter work?

Q Yes. A I presume so.

Q And you submitted a bid afterwards, did you not? A We did.

Q Now, you said, as I understood you, that you had a second conversation with Mr. Todd and Mr. Leprohon; is that right? A No, sir.

Q Or Mr. Leprohon? A Mr. Leprohon.

Q Mr. Todd was not present? A No.

Q Was that conversation in New York? A It was.

Q At the office of H. W. Palen's Sons? A It was not.

Q Where was it? A At Mr. Leprohon's office.

Q Mr. Leprohon's office? A Mr. Leprohon's office.

Q Was that before or after you had submitted a bid for the carpenter work? A After.

Q How long afterwards? A I don't recall.

Q Well, at the time of this second conversation with Mr. Leprohon, the district clerk of the Board of Education of Morristown, did you know whether or not a contract had been let to complete the job? A I did not.

Q Did he tell you it had? A He did not.

Q You had no knowledge whatever? A I don't think the contract was let at the time I saw him.

Q Do you know when the contract was let? A I do not, offhand.

Q When did you first learn that the contract had been to let to finish the job? A At the time we wrote Mr. Smith that letter telling him—

Q That is when you first learned it? A Yes, sir.

Q P. 7 is October 8, 1917. That is the letter that you refer to? A Yes, sir.

Q Now, in that letter you say that you learn from Reeve & Burr. How did you learn it from Reeve & Burr? A They asked us for a price on furnishing the material that we had at the factory.

Q You gave them a price, did you not? A Yes, sir.

Q And furnished the material? A We did, except the sash and hardware.

Q Well, I think that is perfectly clear. You had some material at your factory, or plant, for this job, did you not? A We did.

Q Where was that, Mr. Samter? A Kingston, New York.

Q Kingston, New York? A Yes.

Q And you sold that to Reeve & Burr, did you not? A We did.

Q Delivered it to them? A We did.

Q Now, that letter of October 8th to Mr. George Smith, president of the board, tells you that Reeve & Burr are using your material. How long before October 8th, the date of the letter, was it that you knew Reeve & Burr were using your material? A Why, at the time we quoted Reeve & Burr on the material. I haven't the date fixed in my mind.

Q Well, when was this? A I haven't the date fixed in my mind. This has been hanging three years now. It is pretty hard to keep track of the dates.

Q That is the fall of 1917, only a year and a half ago. A April, 1916, is three years ago.

Q Well, it was in the fall of 1917 that you quoted this price to Reeve & Burr, was it not? A Yes, sir.

Q Have you anything to fix the date? A There is a letter there from Reeve & Burr.

Q Will you have somebody find out when you learned first that Reeve & Burr were using your material? It was before October 8th, was it not? A It must have been.

Q It must have been; is that right? A Yes, sir.

(Mr. Reed hands paper to witness.)

Q Now, was it before October 8th that you had this conversation with Mr. Leprohon? A Yes. This letter of September 18th is the letter in which Reeve & Burr said—

Q We do not want what they said. A Well, between September 18th and the date of the other letter—October 8th, wasn't it?

*Mr. Wilson.* Yes, October 8th.

*Mr. Reed.* October 8th.

*The Witness.* Between September 18th and that date.

Q Between September 18, 1917, and October 8, 1917, you had a conversation with Mr. Leprohon? A Well, no.

Q Well, that is what I thought you said. A That was not the question. The question was what date I knew Reeve & Burr were awarded the contract.

*The Court.* Yes, that was the question.

*Morris Samter, cross.*

Q All right. Then that was some time between those two dates? A Yes, sir.

Q When, with reference to those dates, did you have the conversation with Mr. Leprohon at his office in New York? A My memory on dates is not very good. It was simply on one of my trips to New York I went to his office, but I don't know the date offhand.

Q Did you see him more than once after Mr. Todd and Mr. Betelle and Mr. Leprohon had been to your office? A I think I saw him twice.

Q Both of those visits were after the three had come to your office? A I think so.

Q Now, were they before October 8th? A Yes, sir.

Q Now, what did you say to Mr. Leprohon? A I have already testified to that.

Q Well, tell me again. You went to his office. What did you say to him? A We went down to find out what they were going to do about finishing up the high school.

Q And what did he tell you? Did he tell you that they were finishing it? A No; he said they were working on it; they were advertising for bids; I think he said they were still undecided as to whether they would deal with the subcontractors that had stuff on the job, for which they were entitled to pay, and pay them for it, or get somebody to do the work and use their stuff.

Q Then at that conversation the contract had been let to Reeve & Burr? A No.

Q Did you have a conversation with him after the contract had been let to Reeve & Burr? A No.

Q You did not see him after that? A No.

Q Mr. Samter, did you ever count the number of sash delivered on the premises of the Morristown High School? A No; I did not.

Q You do not know the number, do you? A I do not.

Q And you do not know what hardware was delivered? A No.

Q At the time P. F. Kenny Company quit the job how much did it owe your concern? A On this job?

Q On this job. A Oh, about—in addition to this sash and hardware, do you mean? Of course, we hadn't sold it to them yet; that was ours.

Q Well, I want to know what they owed you. A For work delivered they owed us in the neighborhood of $500, not con-

sidering the sash and hardware that we had not yet sold to Kenny Company.

Q I have here D. 2 for identification, your ledger sheet 86, May 12, 1916. "Contract, $25,000." What was that for? A Carpenter work on the Morristown High School.

Q Did it include any material? A The carpenter work includes material.

Q Which material? A For the carpenter work.

Q Now, do not let us have any misunderstanding about it. You charged up on your ledger here, "May 12, 1916, to P. F. Kenny Company, Morristown High School, contract F O 494, $25,000." A Yes, sir.

Q Did that include all of the material and all of the labor you were to do and furnish under your contract with the P. F. Kenny Company? A That simply represented the amount of the contract that we had with the Kenny Company; it did not become a charge until the material was furnished, of course.

Q Well, no matter about that; that is what we will argue; but that figure did include it, did it not? A That included our contract.

Q The sash for which this suit is brought was included in that amount, was it not? A It was included in our contract.

Q The hardware for which this suit was brought is included in that figure, is it not? A It was in our contract.

Q Now, how much credit have you given P. F. Kenny Company on account of that contract? A $5,102.18.

Q That is all? A Yes, sir.

*Mr. Wilson.* I understood you to rule, your Honor, on my motion to strike out the testimony of this witness as to the price and delivery of the hardware and sash sued for; that you denied my motion to strike that out.

*The Court.* Yes.

*Mr. Wilson.* I want to renew it at this time. The witness has clearly said now that he does not know how much sash or how much hardware was put on those premises.

*The Witness.* May I answer on that point?

*The Court.* No; not without counsel asking you a question, Mr. Samter.

My recollection is that this witness has testified that all the exterior sash was delivered. He did not count the

sash on this job, but he refers to certain documents that have been handed to him and indicates that the sash on those documents, whatever that number may be—I understand that the number included in those documents includes the interior sash—represents the exterior sash that was delivered, and he has stated that the hardware was delivered on the job; he does not know what hardware, but hardware was delivered in boxes, and they have paid for the delivery or express charges for the hardware, and that he saw some of the hardware.

*Mr. Wilson.* I think he said that he saw it in the shed.

*By the Court.*

Q Did you not say that some of the hardware was on the windows? A They were putting it in.

Q Yes; that is what I thought you said? A I saw some of it in the boxes and some they were putting in.

*The Court.* In addition to that he has testified to the values that he paid, or that his firm paid, for the hardware, and I admitted that testimony as being competent at the time, and he has indicated the value of the sash—that is, the exterior sash. He states that the value is $1,575.42. At this time I will not strike that testimony out. I will deny your motion.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

JACOB L. MATTOX, sworn in behalf of plaintiff.

*Direct examination* by Mr. Reed.

Q Mr. Mattox, where do you live? A Morristown.

Q What is your line of business? A Carpenter.

Q Whom are you connected with? A Reeve & Burr.

Q What had Reeve & Burr to do with the Morristown High School, if anything?

*Mr. Wilson.* I object to that, if the Court please. I do not know that it could be material if Reeve & Burr had anything to do with the Morristown High School.

*The Court.* Of course, if his answer indicates that there was some contractual relation I would strike it out, but I will allow the question.

*Mr. Reed.* I will change the question.

Q What did Reeve & Burr, or you, in your connection with Reeve & Burr, do at the Morristown High School? A Finished up the carpenter work.

Q Finished up the carpenter work? A Yes, sir.

*Mr. Wilson.* Now, if your Honor please, I move that that be stricken out.

*Mr. Reed.* That is a recital of what he did.

*Mr. Wilson.* Why is it material to show what they did?

*The Court.* I will not strike it out.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q In finishing up the work you were there on the premises, were you not? A Yes, sir.

Q Where is the Morristown High School? A The corner of Atno avenue and Early street.

Q When you went there, what was the state of the completion of the carpenter work, we will say, with respect to the exterior windows? A The frames were in.

Q The frames were in? A Yes, sir.

Q Was there any sash there on the job? A Yes.

Q Where was that? A There was some upstairs and a few in the toilet room.

Q Well, how many were there altogether? A Well, I couldn't say how many there was altogether; I should judge there was probably twenty or twenty-five.

Q No; how many windows were there altogether? A I don't know; I never had any occasion to count them.

Q Can you tell approximately? A No, sir.

Q Was there any sash outside of the building—outside of the school building? A Yes, sir.

Q Where? A They were in a barn, stored on the property.

Q In the barn? A Yes, sir.

*Jacob L. Mattox, direct.*

Q What have you to say as to the quantity that was there, in comparison with the quantity that was inside? Was it greater or less? A It was greater.

Q Much greater? A Yes, sir.

Q Did you take the sash out of the place where they were stored? A Yes, sir.

Q What did you do with them? A Put them in the school house, in the frames.

Q You installed them in the school house? A Yes, sir.

Q All of them? A All of them.

Q You do not remember how many? A No; I don't remember how many.

Q Well, can you tell me whether there were as many as five hundred? A No; I don't have any recollection how many.

Q You have no recollection of the number? A No.

Q Well, now, as to the number of sash that you found there, will you tell us whether or not there were sufficient to supply all the exterior windows? A Yes.

Q Just enough? A Just enough.

Q Did you find any hardware in connection with these sash? A Yes, sir.

Q What sort of hardware? Did you recognize it? Are you familiar with them? A Well, it was the hardware that was called for for the windows.

Q The hardware that was called for for the windows? A Yes, sir.

Q Where did you find that? A In the barn.

Q Was it in boxes? A In boxes, yes.

Q And what did you do with that? A Put it on the windows, or had it put on.

Q You had that put on the windows, and the window sashes were then installed in the building? A Yes, sir.

Q And what have you to say as to the amount of hardware there; that is to say, was there enough, or not enough, or more than enough, to supply the windows? A There was enough.

Q Enough to supply all the windows? A Yes, sir.

Q Did you notice how this hardware was marked? A Well, the hardware was marked "Palen & Sons."

Q The hardware was marked "Palen & Sons"? A I am not positive about that, but I think it was.

*George E. Reeve, direct.*

Q How about the sash? A I have a recollection of seeing a card, but not many, two or three cards, probably not one out of every fifteen or twenty sash, marked "Palen & Sons."

Q When was this work done? A About the 1st of October, I think it was, when I went there, and the sash were the first thing we put in; in October, I think it was.

Q What year? A 1917.

*Cross examination* by Mr. Wilson.

Q Reeve & Burr used this sash and hardware? A Yes, sir.

GEORGE E. REEVE, sworn in behalf of plaintiff.

*Direct examination* by Mr. Reed.

Q Mr. Reeve, where do you live? A Morristown.

Q What is your business? A Builder.

Q Do you know the Morristown High School? A Yes, sir.

Q Where is that? A Corner of Atno avenue and Early street, Morristown.

Q Did you do any work on that building? A We did.

Q When? A We commenced about October 1, 1917.

Q Were you doing that independently or did you have a contract with anyone? A We had a contract with the school board of Morristown.

Q And have you a copy of that contract? A Yes, sir.

Q Let me see it, please. A (Witness produces paper.)

*Mr. Reed.* Well, Mr. Wilson, I see that you are the person who witnessed this contract (handing paper to defendant's counsel).

*Mr. Wilson.* Yes.

*Mr. Reed.* You will not ask me to call you as a witness, will you?

*Mr. Wilson.* Not unless you wish to. I will testify for you if you wish me to.

*Mr. Reed.* I will offer in evidence contract dated the 26th day of September, 1917, between the Board of Education of the Town of Morristown, in the County of Morris, and George E. Reeve and John R. Burr, partners, trading as Reeve & Burr, of Morristown, New Jersey.

*George E. Reeve, direct.*

*Mr. Wilson.* All right.

(The paper referred to is marked Exhibit P. 10.)

Q Were there any specifications with this contract? A There was.

Q Where are they? A I have them in my seat there.

(Mr. Reed hands paper to witness.)

*The Witness.* These are the specifications.

*Mr. Reed.* I offer these in evidence and ask that they be marked.

(The paper referred to is marked Exhibit P. 11.)

Q Now, will you turn to that part of those specifications which refer to the use of the material on the premises? A It will be quite a job to find that.

Q Page 36. A (Witness refers to specifications.)

*Mr. Reed.* I would like to read this paragraph from the specifications, Exhibit P. 11, referring to sash on the premises: "The contractor to install and set complete with all hardware all sash now on the premises; he is to ascertain the number and quantities of window sash, hardware and fixtures for same now on the premises. If any are found to be missing or in defective condition the same shall be finished or made good by this contractor. The contractor will note that a certain number of Austral window sash are in place. Any such sash that is not properly fitted or that require repairing shall be put in a satisfactory condition."

Q Now, can you tell me what sash, if any, was on the premises which were occupied by the school? A Well, the total number of outside windows is near 370.

Q 370? A 370; about.

Q Yes; and it refers to some that had been hung, some outside sash that had been hung. How many were hung when you took it over? A There were about twenty or twenty-five windows that had been placed in.

Q Twenty or twenty-five? A I should say about that.

Q And what have you to say as to the remainder of exterior window sash required to furnish the windows of the building? A They were there on the ground, stored in the barn.

At 1 o'clock P. M. the Court takes a recess of one hour.

*George E. Reeve, cross.*

After Recess.

GEORGE E. REEVE resumes the stand in behalf of plaintiff.

*Direct examination* (continued) by Mr. Reed.

Q Mr. Reeve, with regard to the hardware— A The hardware was in boxes in the barn.

Q You used that, did you? A Yes.

Q It was brought out here that you got some material from Palen & Sons. A Yes, sir.

Q What was that? A The interior trim and doors.

Q The interior trim and doors? A Yes, sir.

Q Was that at the job at the time? A It was not.

Q And how did you get it? A We bought it from Palen & Sons.

Q Did you or did you not pay them for this material, these window sashes? A We did not.

Q Why not? A Well, by our specifications the school board turned that material over to us at the time we signed the contract.

*Cross examination* by Mr. Wilson.

Q Mr. Reeve, you say there were 370 outside windows, about? A Yes, sir.

Q How many of those were open when you commenced your work about October 1, 1917? A You mean how many windows were out of the building?

Q Yes, how many had not sash in them? A I don't know exactly.

Q Well, Mr. Reeve, there were about 132 windows on the third floor, were there not? A About that; yes.

Q And there were sash in about half of them, were there not? A I don't think so.

Q About how many were there? A As I recollect, there was twenty or thirty windows that were installed, that the sash were put in the windows; there might have been more, but I don't think so.

Q You mean there were twenty or thirty openings in which sash had been placed? A Yes, sir.

Q There were two sash in each opening, were there not? A Well, according to that, one sash; we call that one window;

two pieces in each opening; we call that one. When I say twenty or thirty, I meant one window. There are double the amount of pieces of the sash.

Q There would be double the amount that go in the windows? A Yes, sir.

*Re-direct examination* by Mr. Reed.

Q When you say there were about 370 altogether, does that mean there were double that many sash? A Yes, sir.

Q And your best recollection now is that there were from twenty to thirty windows hung? A No, sir; they were simply placed in temporarily; they were not hung.

Q They were not hung; they were simply placed there temporarily? A Yes.

CLAUDE H. HALLETT sworn in behalf of plaintiff.

*Direct examination* by Mr. Reed.

Q Mr. Hallett, you are connected with H. W. Palen & Sons? A Yes, sir.

Q In what capacity? A Secretary.

Q You have heard us speak this morning of some sash supplied in connection with the contract for the carpenter work at the Morristown High School? A Yes, sir.

Q Can you tell me the value of those sashes? A Yes.

Q Well, what is your information in connection with them obtained from, as to actual knowledge or as to the amount of the estimate? A The price charged is according to the estimate.

Q The price charged is according to the estimate? A Yes, sir.

Q How long have you been connected with business of this nature? A Thirty-two years.

Q And in your business dealings have you had any occasion to learn the value of sash of this nature? A I have; yes, sir.

Q How did you obtain that? A Through actual experience and in manufacture.

Q Well, from your knowledge of this sash, will you tell us what was the value of the sash furnished this building?

*Claude H. Hallett, direct.*

*Mr. Wilson.* I object, if your Honor please, until it is shown that this witness knows what sash was delivered on the job. In other words, the question is too indefinite.

*The Court.* I think it is at this time. I sustain the objection.

(Question withdrawn.)

Q Are you familiar with the sash that was furnished for this building? A I am familiar with the records.

Q You never saw the sash itself? A I never saw the sash.

Q Taking the sash specified—will you tell me the value of the sash as specified?

*Mr. Wilson.* I object to that, if your Honor please. I do not know what sash is specified. I have no objection at all to the witness testifying as to the value of the sash which Palen & Sons put on the Morristown High School site, but I have not found anywhere yet any number of sash or size of sash put there. Now, if Mr. Reed will confine himself to that, I shall not object at all. I think this witness can testify—I think he is qualified to testify as to the value; but if he will tell us the number of sash and the size of them, then we will be able to get somewhere. I must object at the present situation.

*Mr. Reed.* I have asked him for the sash specified on this job. Of course, the witness did not see the sash on the job. He knows what was specified. It is the sash specified that my question is directed to.

*The Court.* Let me ask a question or two, Mr. Reed.

*By the Court.*

Q Do you know what kind of sash or sashes were specified for this job? A Yes, sir.

Q And did you have anything to do with the estimation of values of those sashes? A No, not originally, I did not; no sir. I checked up the prices and checked up the quantity.

Q You do not know whether the sash were ever actually delivered, because you never saw them there, did you? A I never saw them there.

Q And your knowledge as to the value is directed entirely to the values of the kinds of sash which might be specified? A Yes, sir.

*Claude H. Hallett, direct.*

*The Court.* Suppose he gives the sash that were specified and then the values. I think that will obviate any objection, Mr. Reed.

*By Mr. Reed.*

Q I show you P. 9 for identification (paper shown to witness). Can you tell me what that is? A Yes, sir.

Q What is that? A That is the original estimate.

Q Will you examine P. 2 (shown to witness)? Can you tell me from this whether that is the sash that was specified on that job? A I can tell you the kind of sash.

Q Yes, the kind of sash. A (Witness examines paper.)

Q Have you found it? A Yes, sir.

Q What have you to say as to whether that was the kind of sash that was specified? A It is the same as the specification.

Q Can you tell me how many were required to fill this? A There were 412 openings, all told.

Q And how much of this was exterior sash? A All exterior.

Q What was the value, as specified, of the sash furnished?

*Mr. Wilson.* I object to that.

(Question read.)

*Mr. Wilson.* I do not know whether I understood the question.

*Mr. Reed.* What was the value of the sash specified?

*Mr. Wilson.* I will have to object to that. I do not know that we are interested in the sash specified in a contract made with Kenny. At least, that is the way I understand the situation at present.

*The Court.* I overrule your objection.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Question read.)

A $1,575.42.

Q Now, what was the value apiece of that sash? A Of course, there are many different prices, according to sizes.

Q They run different prices? A Yes, sir.

Q Now, can you tell me the price of the most expensive one? A The average price of the windows, inclusive, that took the hardware, $3.35 a sash.

Q $3.35 per sash? A Per window, yes.

*The Court.* That is exclusive of hardware.

*The Witness.* Yes, sir.

Q That is for two pieces? A Yes, sir.

Q And what was the value of the hardware per window? A $7 and some cents. (Witness refers to paper.) $7.35.

Q Now, I understood you to say that that was the average price? A The average price of the windows that took the hardware; some of these windows did not take hardware.

Q What windows were they that did not have hardware? A The single sash.

Q The single sash windows? A Yes, sir.

Q What was the value of the sash in the single sash windows? A Well, they are all different prices, according to that itemized bill.

Q Is this what you refer to, P. 8 for identification (shown to witness)? A That is the order. It is that itemized bill, that one right under your hand (indicating).

Q This is not the original; this is a copy of the bill of particulars. A This gives the itemized prices.

Q Can you tell from that? A The single sash runs from $1.70 to $11.70, different prices, according to size and kinds.

Q How many of those were there, can you tell me? A Yes; I can tell you.

Q Do those prices include hardware? A No; just the sash without the hardware.

Q I understood you to say that there was no hardware on the single sash? A No, none.

Q None specified? A No. There were sixty-four single sash.

Q What have you to say about the double sash? A There were 358 double sash.

Q 358 double sash? A Yes, sir.

Q And what about the price of those; were they different? A That was not. That was the first price I gave you, $3.35 average for the double sash.

Q Well, how high did they go? How much did they vary? A They varied from $2.65 to $3.90.

Q That is, without the hardware? A Without the hardware.

Q Now, what have you to say as to the cost of the hardware? Was that the same in each case, or did that vary also? A So far as I know it was the same in each case.

Q (*By the Court.*) You said they varied from $2.65 to $2.90, was it, or $3.90? A $3.90.

Cross examination waived.

PLAINTIFF RESTS.

*Mr. Wilson.* If your Honor please, we move for a nonsuit at this time, and I will state the grounds briefly, as follows:

In the first place, there is no testimony at present which would let the jury estimate the value of the damage done to this plaintiff, if there was any. It is entirely too indefinite and too indecisive and indeterminate.

The principal ground upon which I rely is this: Here admittedly at present is a subcontractor, H. W. Palen's Sons, under a contract with P. F. Kenny Company, made with the Board of Education of the Town of Morristown. That is the contract dated March 14, 1916, a general contract, and that, with the plans and specifications, was filed March 16, 1916. The Kenny Company was to do all the work under that contract and furnish all of the material for the building of this school building. It appears that he obtained from H. W. Palen's Sons, some time in May or June, 1916, a subcontract whereby Palen's Sons agreed to furnish all the material and do all the labor that was necessary for the carpenter work under that contract. The contract is offered in evidence. At the time that contract was made the original contract between the Board of Education and Kenny was on file in the County Clerk's office. The contract between the Kenny Company and the Board of Education provided that, if certain defaults occurred, the Board of Education, on a three days' notice, could enter into possession of the premises and take possession of all the material and the job, just as it stood, and finish the job.

Now, certainly, Palen's Sons had constructive notice, if not actual notice, at the time they made their subcontract. I say constructive notice, if not actual notice, be-

cause Mr. Samter's conversation with Mr. Day in the early part of 1917 would seem to indicate that they knew all about the contract. Their own contract referring to the plans and specifications with Kenny would seem to indicate that they knew about that contract, so that they had, perhaps, actual notice of it. Now, they say that they know that Kenny quit, abandoned his contract, and they know that the board advertised for bids and made a new contract with Reeve & Burr to finish the job—they proved that—and that Reeve & Burr took possession of the stuff which was on the job, which was left there by Palen's Sons, and finished the work.

Now, we say that, under those conditions and with that knowledge, the board did not illegally take possession of their material; that it had a legal right to take possession of it. If it did have a legal right to take possession and use it, then the only remedy of Palen's Sons, as against the Board of Education, against this defendant, is a stop notice, and a suit under the stop notice.

*The Court.* What legal right did it have to take this sash that was stored in the barn?

*Mr. Wilson.* I do not think it had any at all, sir. The minute they delivered it there any title they might have passed to Kenny, and through Kenny to the board. No title is reserved anywhere. They merely charged up the contract price, $25,000, on the books.

*The Court.* The fact that they charged the contract price on the books does not indicate necessarily that they parted with title to the goods that they delivered on the job.

*Mr. Wilson.* No, that contract provides that it shall be delivered on the job. They delivered it there. Whose stuff was it? They have not reserved any title. It was a conditional sale, and they delivered it there on the job. Whom did they deliver it to? I do not know whether they delivered it to themselves or to Kenny. They delivered it under their contract with Kenny and put it there to do this work. I have never had the slightest doubt about the right of a municipal corporation under such a contract to take possession of the material that was

on the job and finish the job; I have never had the slightest doubt about it. As a matter of fact, Palen's Sons partly performed the work to be done; it partly delivered the material on the premises; and I think it is perfectly clear that when they did that whatever title they had went to Kenny, and through Kenny to the Board of Education.

*The Court.* (After argument.) The motion for non-suit will be denied.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

JAMES O. BETELLE, sworn in behalf of defendant.

*Direct examination* by Mr. Wilson.

Q Mr. Betelle, where do you live? A I live in Newark.

Q And what is your profession? A I am an architect.

Q A member of what firm? A A member of the firm of Guilbert & Betelle.

Q Did your firm have charge as architects of the Morristown High School, in Morristown, New Jersey? A Yes, sir.

Q As such architects, under date of August 2, 1917, did you write the Board of Education of the Town of Morristown a letter of which this is a copy (paper shown to witness)? A Yes, sir.

(Mr. Wilson hands paper referred to to Mr. Reed.)

*Mr. Wilson.* I will state, if your Honor please, that the original of this letter cannot be found; the clerk cannot find it; but I have a copy of it here and I want to offer it in evidence.

*Mr. Reed.* I do not object to the copy; I object to its materiality.

*Mr. Wilson.* All right. I will offer it in evidence (handing paper to the Court).

*The Court.* If the objection is to the materiality, I will admit it.

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

*Discussion.*

Exception noted as ground of appeal.

(The paper referred to is marked Exhibit D. 3.)

(Mr. Wilson reads Exhibit D. 3.)

(By consent of counsel, the witness stands aside for the present.)

*Mr. Wilson.* I offer, if your Honor please, a notice to the P. F. Kenny Company, dated August 11, 1917. Mr. Reed, I understand, wants to object to the materiality of it (handing paper to the Court).

*Mr. Reed.* I want to object to that, if your Honor please, because it does not in any wise affect the issue that is here. That is in connection with some part of the work which was to be done, about which the Board of Education appeared to think it had a right to complain; but it is no decisive action under the contract; it did not affect, and could not affect, the termination of the contract with Mr. Kenny and the Board of Education. If it did, it could not affect the ownership of the property that we are here suing for.

*Mr. Wilson.* A notice dated August 15th, which Mr. Reed admits, he and I agree was served on P. F. Kenny Company. I am offering that likewise.

*Mr. Reed.* Will your Honor hear me on the second one?

*The Court.* Yes. That is the notice of August 15, 1917?

*Mr. Reed.* Yes, sir.

*The Court.* Directed to the Kenny Company?

*Mr. Reed.* Yes, sir.

*The Court.* That is a three days' notice?

*Mr. Reed.* Yes, sir. I take it that that was served in pursuance to the architect's certificate. "Article 5: 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 to pay insurance premiums, 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, or shall become insolvent or be declared bankrupt, such refusal, neglect, failure,

insolvency or bankruptcy being certified in writing to said owner by the said architects, the owner shall be at liberty to provide watchmen to guard the property, and to furnish all labor, material," and so forth. The certificate of the architect does not seem to follow that. It does not go to the extent of certifying that that is sufficient for the purpose. If you read the last clause, you will see it says (reading). That is not a certificate such as is called for in the contract. That is not a certificate that sufficient cause exists, and it was not considered by the board to be. They served a notice, of which you have seen a copy; they served a notice to go on and correct those floor arches. I think, under the terms of the contract, it was necessary, in order to enable them to terminate the contract, to have the architect certify to them in accordance with the terms of the contract, and, so far as now appears, that is not what has been done.

*Mr. Wilson.* Here is the certificate that has been submitted, if your Honor please (handing paper to the Court).

*Mr. Reed.* It should be strictly in accordance with the terms of the contract.

*The Court.* You base your objection on some clause in the contract between the Board of Education and Mr. Kenny, do you not?

*Mr. Reed.* Yes, sir.

*The Court.* I have not seen that contract. I should like to look at that particular section.

*Mr. Wilson.* It is Article 5 (handing paper to the Court).

*The Court.* I will admit that in evidence.

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

Exception noted as ground of appeal.

(The paper first referred to as a three days' notice is marked Exhibit D. 4; the paper second referred to as a three days' notice is marked Exhibit D. 5.)

*Mr. Wilson.* Now, if your Honor please, we produced here in response to notice the minutes of the Board of Education, which Mr. Reed has used, and in those minutes

*Discussion.*

are certain resolutions adopted at a meeting held by the board on Friday, August 31, 1917. I have here a copy of those resolutions, which I want to offer, the resolutions being served on P. F. Kenny Company and on the Casualty Company of America, the surety. Mr. Reed does not object to the proof of service, because I served them myself, but he does object to the materiality.

*Mr. Reed.* They are irrelevant; I object to their relevancy.

*Mr. Wilson.* Or relevancy. I am offering them as a part of the records of the board which were served on the Kenny Company and on the surety company on the Kenny Company's bond.

*The Court.* These are exactly the same?

*Mr. Wilson.* Exactly the same, one to the Kenny Company and one to the surety company.

*The Court.* You offer those in evidence.

*Mr. Wilson.* Yes, sir.

*Mr. Reed.* Your Honor, I do not see how it can be possible that a notice served on the surety company can be of any relevancy to the issues here, whatever may be the relevancy of the other.

*The Court.* Well, technically, Mr. Reed, I do not suppose it is, but I thought it would fill out the transaction, perhaps.

*Mr. Wilson.* That is just what I think, sir.

*The Court.* I do not think that technically it is a part; I do not think it is exactly relevant; but, still, it shows the complete transaction, and I do not see how it affects you one way or the other.

*Mr. Reed.* That is the reason for my objection. I cannot see how this has any relation to our issue here at all.

*The Court.* But I mean I do not see how it hurts you or prejudices your case to put it in. It makes the defendant's case entire instead of fragmentary.

*Mr. Reed.* I suppose if it benefits the defendant it must be of some disadvantage to me.

*The Court.* I do not say that it benefits them.

*Louis C. Leprohon, direct.*

*Mr. Reed.* When we come down to this resolution, it has nothing to do with the termination of the contract; it cannot be used to show that the contract was terminated. The Board of Education, if they had any right to terminate it, by this resolution did not add to or detract from that right. They might have passed resolutions from then until now, and it would not affect the rights of Kenny or Palen's Sons, or any other rights. So that it seems to me that this resolution, with a long preamble, must be self-serving and can have no effect on us at all. It is immaterial, irrelevant and incompetent, and, going still a step further, it is outside of our horizon altogether.

*The Court.* If you want to press your objection as to the surety company, I will sustain that. I will admit the other.

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

Exception noted as ground of appeal.

(The paper referred to is marked Exhibit D. 6.)

(Mr. Wilson reads Exhibits D. 4, D. 5 and D. 6.)

*Mr. Wilson.* It seemed to me, if your Honor please, that the notice to the surety company was material, and that is the reason I offered it. It seemed to me that we should show that the surety company had notice of the action the board took, and that we should show you and the jury that the surety company took no action under that notice, and therefore the board was compelled to finish the building. I may be wrong about it, but I offered that notice with that view.

*The Court.* I will adhere to my ruling.

LOUIS C. LEPROHON, recalled in behalf of defendant.

*Direct examination* by Mr. Wilson.

Q Mr. Leprohon, you are the district clerk of the Board of Education of the Town of Morristown? A I am.

Q You have heard the resolutions I read a while ago, which have been admitted in evidence. After those resolutions were adopted did the surety company take any action?

*Mr. Reed.* I will object to that, if your Honor please.

*The Court.* I will admit it.

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

Exception noted as ground of appeal.

A They did not.

Q Did the surety company complete the job? A They did not.

Q Did P. F. Kenny Company complete it? A He did not.

Q Do you know Mr. Samter, this gentleman here (indicating)? A I have met him before.

Q Did he ever call at your office in New York? A I don't recall that he did.

Q Did you ever call at his office? A I did.

Q With whom? A Mr. Betelle and Mr. Todd.

Q And when was that? A Just after Mr. Kenny had abandoned the contract for the high school. I don't know the exact date; I couldn't fix the date.

Q August or September, 1917? A I would say yes; August or September.

Q Who was present at this call made by you, Mr. Betelle and Mr. Todd at the office of H. W. Palen's Sons? A I am quite positive Mr. Hallett was there; I don't know whether Mr. Palen was or not. I do not know that I ever met Mr. Palen. I am quite sure that Mr. Hallett was there, and this gentleman.

Q Was this gentleman, Mr. Samter, there? A Yes, as far as I recall; yes.

Q What conversation did you have with them? A The board had a meeting two or three evenings previous. We had discussed the probabilities of going to the different creditors, or contractors, to see if they could not arrange to get together themselves and complete their contracts, and we went to Palen & Sons with that object in view, for their own protection; that is, we thought possibly in some way they might go on and complete the carpenter work, and in that way save themselves any loss. No member of the board wanted them to lose any money.

Q Did you tell Mr. Samter and Mr. Hallett that? A We did; that was a part of our conversation.

Q And was that the object of your visit? A It was.

*Louis C. Leprohon, cross.*

Q Was that the only visit that you made to their office? A So far as I recall, yes. I had two or three telephone conversations with them, with Mr. Hallett, pertaining to the material that Reeve & Burr took hold of.

*Cross examination* by Mr. Reed.

Q Were the conversations that you had with Mr. Hallett before or after this meeting? A I presume it was after; it must have been after; yes.

Q With regard to the material. What material do you refer to? A The material that Reeve & Burr purchased from Palen's Sons.

Q Do you know what that was? A Yes; I do.

Q What was it? A That is the material they shipped for the completion of the building.

Q The interior trim, was it? A The interior trim; yes.

Q You had no conversation with him about the sash? A The sash and hardware was mentioned, but I don't know in just what way; I wouldn't say that that was included.

Q Not included in your conversation about it? A Yes; but I don't recall to what extent.

Q You say that you had had a meeting of the board some few days before this with relation to how the job should be finished? A Yes, sir.

Q This was before you had given the contract to Reeve & Burr to finish? A Yes.

Q But this was after you had served notices on Kenny, was it? A I don't know that it was after; I wouldn't say that it was after.

Q I think you told me this morning that you were clerk of the board from July 1st on? A July 1, 1917.

Q Well, do you recall a certificate presented to the board by Kenny Company in August for a payment? A I think there were several presented; I don't remember the dates.

Q Well, the last one that was presented by him? A The one that was not paid?

Q Yes. A Yes, sir.

Q That was presented on the 15th of August, was it not? A Yes, sir.

Q He presented a certificate then from your architects, Guilbert & Betelle, for about $4,900? A I don't recall the amount.

Q But there was such a certificate? A Yes, sir.

Q And do you know whether that was approximately the amount? A Approximately, I would say; yes.

Q And do you remember that that was dated the 11th of August? A I don't remember the date.

Q In August? A I don't remember the date. I know it was not paid.

Q Well, you do recall that it was made—that is, the certificate was dated after the certificate of August 2nd, do you not? A I don't recall the date of it; no.

Q Will you say that it was not? A I don't recall the date of it; I know that the last certificate that Mr. Kenny presented was not paid.

Q And that was presented after the certificate made by the architects on August 2nd, was it not? A I don't think it was.

Q You do not think it was? A I don't think so.

Q Have you that certificate? A I have not.

Q What became of that? A I don't know whether it is in the safe or whether Mr. Wilson has it.

*Mr. Reed.* Have you it, Mr. Wilson?

*Mr. Wilson.* No, sir; I have not.

*Mr. Reed.* May I ask Mr. Betelle, have you got the certificate.

(The former witness James O. Betelle says, "Yes, sir," and hands paper to Mr. Reed.)

Q I show you a certificate that Mr. Betelle has kindly handed to me (paper shown to witness). Will you please tell me if that is it? A That is it.

*Mr. Reed.* I will ask that that be marked for identification. I will put it in now, if you consent.

*Mr. Wilson.* Put it in now.

(The paper referred to is marked Ex. P. 12.)

*Mr. Reed.* This is certificate No. 622, dated August 11, 1917, $4,908.75, to the Board of Education of Morristown, New Jersey.

(Mr. Reed reads Ex. P. 12.)

Q Mr. Leprohon, will you turn to your minutes and tell me whether after the certificate of the architect which is in evidence

and marked D. 3 you received any certificate from the architect? I refer to the letter of August 2nd, D. 3. A (Witness refers to book.) There is no record of any certificate. After August 10th?

Q After August 10th. A There is no record made of the receipt of any such certificate, although the object of the meeting seems to be to discuss it. It says, "The meeting was to discuss whether a three days' notice should be served on the P. F. Kenny Company," and so forth. "It was regularly moved and carried that counsel serve such notice on P. F. Kenny Company."

Q What date was that? A That was on August 11th, and on August 15th we had another meeting.

Q The certificate discussed at that meeting, August 11th, was this Exhibit D. 3, was it not? A I should think it was.

Q Did you have any other? A Not that I recall, but I presume that was the object of this meeting, and there is no mention made of the receipt of the certificate.

Q Was there any mention made of the receipt of this certificate for $4,908.75, Exhibit P. 12? A What is the date, please.

Q August 11, 1917. A There is no mention made of that receipt.

Q Is there any evidence in the books of the time it was presented to the board by Mr. Kenny? A No, none.

Q You say you do not remember when he did present it? A I presume—

*Mr. Wilson.* He does not say that it was ever presented, Mr. Reed.

Q Well, was it presented? A It was.

Q And do you know when? A I don't know the exact date. It was about that time, I presume. I would like to state, if it was presented, or why it was presented, if you will permit me.

Q Surely. A Although it is not part of the minutes, no action being taken, we didn't regard it as a meeting of the board. Mr. Kenny was present, and it became generally known that Mr. Kenny could not—

Q No, I wish you would confine yourself to what was said. I do not mind your telling what was said at the meeting. A Mr. Kenny said that he required money. We told Mr. Kenny

that we would allow the architect to be as liberal with him as was possible on the payments—

Q What date was this? A About the 1st of August; I don't know the exact date.

Q About what? A About August 1st. Mr. Kenny was to report to us at a meeting which we had four or five days later, at which time this certificate was presented. Mr. Kenny—

Q Let me call your attention to the fact that the certificate was dated on the 11th of August? A Yes, sir.

Q Well, it must have been after that date. A No, it was on that date—well, it might have been on August 11th, yes. As I recollect, it was on Friday afternoon, at three o'clock, following August 11th; at which time we had arranged for Mr. Kenny to be present. Three or four nights before, at which time we had a meeting at which Kenny was present, he gave us a financial statement of his condition, giving us all the creditors. We had investigated and found that he did not include several others, and upon finding that he had given us a false report, we did not pay this certificate.

Q Because of the fact that he had not been truthful in his statement? A Yes.

Q Now, on August 15th, I think it was— You served a notice dated August 15, 1917. When was that served, can you tell me? Probably the exhibit itself would show that. A I think so.

*Mr. Wilson.* It is in evidence.

*Mr. Reed.* August 15th was the date of it.

*Mr. Wilson.* Here it is (handing paper to plaintiff's counsel). The affidavit shows when it was served.

*Mr. Reed.* It was served on August 20th, 1917.

*Witness.* Pardon me just a moment? I was referring to a date here on August 11th, but on turning to the next page I find the minutes where that certificate was received.

Q Well, what was it? Read it. A "Whereas Guilbert & Betelle, architects named in the contract between the Board of Education of the Town of Morristown, in the County of Morris, and P. F. Kenny & Company, dated March 14th, have certified in writing to said Board of Education that said P. F. Kenny & Company have neglected and failed to remove," and so forth.

*Louis C. Leprohon, cross.*

Q What is the date of that? That is this long resolution that was served, is it not? A Yes, sir.

*Mr. Wilson.* It was the meeting held August 31st.

*Witness.* Dated August 15th, isn't it, Mr. Wilson?

*Mr. Wilson.* No, it is August 31st.

*Mr. Reed.* Let us see the beginning of it.

*Mr. Wilson.* If you look at it you will find the date.

*Witness.* Yes, August 31st; you are right.

*Mr. Wilson.* August 31st?

*Witness.* Yes, that is true.

Q Now, in the meantime, Mr. Leprohon, you had served upon him this notice dated August 31st, or was that served before or after that resolution?

*Mr. Reed.* Will you show me this exhibit dated August 31st?

*Mr. Wilson.* The notice dated August 31st was served September 5th. Here it is (handing paper to plaintiff's counsel).

Q This Exhibit D. 6 says, "You have abandoned your contract." A Yes.

Q What minute of the board provided for the service of this particular notice? A The minutes of the same meeting: "Mr. moved that Mr. Wilson, the attorney for the board, prepare a notice in pursuance of the foregoing resolution, and have the same served."

Q This was the notice which was served pursuant to that resolution? A Yes.

Q And that said, "The board has decided that you have abandoned your contract"? A Yes, sir.

Q Now, Mr. Kenny had been served with a notice on the 20th terminating his contract on the part of the board, had he not? A On the 20th of what?

Q Of August. A I have no record of it here.

Q Here is Exhibit D. 5, dated August 15th. A Served when?

Q Served August 20, 1917. This says, "You have failed and neglected to supply sufficiency of properly skilled workmen and materials of the proper qualities and in many other respects

to prosecute the work with the promptness and diligence called for, all of which has been certified in writing by the architects named in the contract, as therein provided, and you are hereby notified that the undersigned, the owner referred to in the said contract, will three days after service of this notice upon you terminate your employment." A That I would interpret as applying to the floors in the various class-rooms, and not to the whole of the contract.

Q You say that D. 5 applied only to the floors of the class-rooms and the arches. Refer to it (paper shown to witness).

*Mr. Wilson.* It was said that that referred to the whole thing and this witness referred to the arches.

Q Here is Exhibit D. 4, which I will show you at the same time, so that you will have the matter clearly in mind, Mr. Leprohon (paper shown to witness). A According to the minutes, the first notice would apply to the arches and the floors and the second notice to the whole contract.

Q The first notice that you refer to is D. 4? A Yes.

Q And the second one that you refer to is D. 5, dated August 15th, is it not? A Which was served first?

Q Well, D. 4 was served first. A I would take it that D. 4 applied to the floors and D. 5 applied to the entire contract.

Q Now, you had served on him a notice terminating his connection with the job on the 20th of August? A Well, the last date there; whether it was served in August or September I don't know.

*The Court.* Is that D. 4 or D. 5?

*Mr. Reed.* D. 5 is the one terminating the job.

*The Court.* Is that the one that was served August 20th?

*Mr. Reed.* Yes, sir.

Q Notwithstanding that, you served him with a notice dated August 31st, in which you said, "The board has decided that you have abandoned your contract"? A That was served on him on August 31st, you mean?

Q No, dated August 31st and served September 5th. A Yes, sir.

Q What had happened between the time that the notice of August 15th, D. 5, had been served and the service of the notice

of August 31st, D. 6? A The one of August 15th was relative to the floor arches. The other was at the later date.

Q What I want to understand is why, after terminating his connection with the job on August 20th, you notified him on September 5th that he had abandoned the job? A I have no record of notifying him of his abandoning the job.

Q You have no record of the fact that he abandoned it? A I have no record of notifying him to that effect.

Q Here is the record. Exhibit D. 6 says that "The board has decided that you have abandoned it." A This is August 31st.

Q Yes. A This notice was served on September 5th.

Q Yes. A Yes, sir.

Q What had happened between August 20th and September 5th which justified your notice directed to the Kenny Company saying that the board had decided that they had abandoned the job? A Well, that was part of the notice that was passed at that time, I would say, Mr. Reed; this notice is the same as the minutes exactly.

Q It is the same as the minutes? A Yes, sir.

Q The same as the minutes of August 31st? A Yes, it is a part of the minutes.

Q Well, does it appear when he had abandoned the job? A No.

Q It does not appear when that happened? A There is no date given.

*Re-direct examination* by Mr. Wilson.

Q Mr. Leprohon, that certificate of Mr. Betelle's is dated August 11, 1917, is it not? A Yes, sir.

Q You said that it was presented at a meeting of the board on August 15th? A Well, about that date, Mr. Wilson; I don't know the exact date; as I recall, it was the Friday following this date.

Q Is it not a fact that on the 9th and 10th of August stop notices were served on the Board of Education?

Objected to as leading.

Objection sustained.

(Question withdrawn.)

Q Were stop notices served on the Board of Education? A Yes, sir.

*Louis C. Leprohon, re-cross.*

Q When? A Previous to the presenting of this certificate.

Q Now, at this meeting of August 15th was the fact that stop notices had been served on the board brought to Kenny's attention?

Objected to as leading.

Objection sustained.

Q What happened at the meeting of August 15th? A If that is the date this certificate was presented—

Q Who was present? A Upon my arrival at the building a gentleman representing, I think, the Kitatinny Brick Company was present and served me with a stop notice, as was also, as I recall, Mr. Carl Vogt, representing the Morristown Crushed Stone Company, who served me with a stop notice; he also served the president of the board. Mr. Kenny was present, Mr. Casale was present at that meeting, and also the members of the board.

Q What did Kenny say, if anything, about the board paying this certificate? A Mr. Kenny at first had promised Mr. Casale a payment, and when we found Mr. Kenny had given us a false report, and also the stop notices—Mr. Kenny objected to paying the stop notices. Counsel ruled they must be paid before any other payments, and when Mr. Kenny learned of that fact he agreed to accept the difference by paying the stop notices and giving him the balance. Due to the fact that we had found that Mr. Kenny had made a false statement as to his financial condition, we didn't make any payment on that day; no check was drawn.

Q Did Mr. Kenny make any statement to the board about stopping or going on with the work? A He did.

Q What did he say? A He said he would quit the job, and Mr. Casale, his plasterer, also said that he would quit the job. Mr. Kenny further stated that if we paid this money we wouldn't have enough money to complete the job; he made that statement.

*Re-cross examination* by Mr. Reed.

Q You say that he had misinformed you? A Yes, sir.

Q How did you learn that? A By investigating.

Q Did you yourself do the investigating? A I did some.

*Louis C. Leprohon, further direct.*

Q And what did you find that he had misinformed you on? A I found that he owed a bill in Morristown, Ennis & Company, a bill of about $1,600, that he had not reported.

Q You say that this conversation took place on the 15th; was that the date? A I would say that it was about the 15th; if that is a Friday—

Q Then it was before the service of the notice Exhibit D. 5, date August 15th, was it not (paper shown to witness)? A That I couldn't say, whether it was before or not.

*Mr. Wilson.* The affidavit shows when it was served.

*Mr. Reed.* It was served the 20th. I just wanted to know if he had that in mind.

*Witness.* It must have been previous to that.

Q You say that Kenny said he would quit? A Yes, sir.

Q Was it definitely settled at that time when he would quit? A We understood by the way that he appeared, on that day.

Q You understood that he had abandoned the job on that day? A Yes, sir.

Q And from that time forward? A Yes, sir; he so declared that day, that he quit the job.

Q Yet you served the notice on the 20th, five days later? A Yes.

Q In which you said that the architect had certified that he had not supplied a sufficiency of workmen? A Yes.

Q And then you followed that up on September 15th, sixteen days later, with a notice that the board decided that he had abandoned the job; you did not say that he announced that he had abandoned it? A No work had been done since he said on that date, the 15th, if that was the date—he said that he quit the job.

Q Well, he quit it; you did not decide it; he decided it? A He quit, and then we served him with a notice.

Q You served him with two notices? A Two notices.

Q But you did not pay him the balance? A No, we did not.

*Further direct examination* by Mr. Wilson.

Q Mr. Leprohon, you did not draw any of those notices, did you? A I did not.

Q The attorney for the board drew them? A Yes, sir.

JAMES O. BETELLE, recalled in behalf of defendant.

*Direct examination* (continued) by Mr. Wilson.

Q Mr. Betelle, were you with Mr. Leprohon and Mr. Todd at the office of H. W. Palen's Sons? A Yes, sir.

Q What was said at that time?

*The Court.* When was that, please? How do you fix that date?

*Witness.* August 28th.

Q 1917? A 1917, yes.

Q What was said at that time by you or by anybody connected with Palen's Sons? A The object of the meeting was to get the two principal subcontractors, the Kennys and the plasterer, Mr. Casale, who was there, and the mill men, to see if they wouldn't take upon themselves, or get the subcontractors to get together and complete the work on the Morristown High School.

Q What was the condition of the work on the high school at that time? A Practicaly at a standstill.

Q Was Mr. Kenny there, or anybody from the Kenny Company there, then? A You mean at the meeting?

Q No, I mean on the job—on August 28th. A I think not.

Q Go ahead and tell us what happened. A Palen's Sons said, "We will do the work, and be glad to do it, directly with the Board of Education at the price that the Kenny Company owe us"; and the next morning I received a copy of an estimate which they sent to the Board of Education. They further stated that they could not get the subcontractors together, or that they could not finish the work; they were not willing to make that effort.

Q Were there other subcontractors besides Casale and Palen's Sons? A No, there were no others there.

Q No, I mean were there more? A Oh, yes, many more.

Q Many more? A Yes.

Q You say it was the idea of the board and yourself to have these subcontractors finish the job? A Yes.

Q What was said about the Kenny Company quitting, do you remember? A I don't remember anything in particular.

*James O. Betelle, direct.*

Q How many openings were there for exterior sash on the job of the Morristown High School, Mr. Betelle? A I can't tell you from my own knowledge; I did not count them.

Q About? A The statement made by the previous witness seems about right; I think there were 410 or 412.

Q Did you have a man on the job in charge of it as superintendent, a watchman? A We had a superintendent on the job all the time; yes, sir.

Q What was his name? A Frank Cregar.

Q Mr. Frank Cregar? A Yes, sir.

Q Did you receive a report from him with reference to the number of windows? A Yes, sir; I received a report from him every day on the condition of the work and the number of the men on the job.

Q Have you that report with you now? A I have one report here, yes (producing paper).

Q Dated September 5th, I think it is? A September 4th.

*Mr. Wilson.* I will offer this report.

*Mr. Reed.* You have not the man here, have you?

*Mr. Wilson.* Yes, I have. I am going to put him on afterwards.

*Mr. Reed.* Have it marked for identification.

(The paper referred to is marked D. 7 for identification.)

Q Referring to that report, how many sash were in on that date?

*Mr. Reed.* I object to that. I do not think that this witness—

*Mr. Wilson.* If I cannot prove that the man made it, your Honor can strike it out. He is the architect, and it is made by one of his men. If I cannot prove it, I will consent that it be stricken out.

*Mr. Reed.* I think the report itself is not material. I think it can only be used to refresh the memory of the man who actually made the inspection of the sash and saw the numbers of sash that were in. I do not think they can use the report itself as evidence. It is not a book; it is not a record.

*The Court.* I will sustain the objection.

*Frank Cregar, direct.*

Q Mr. Betelle, if you used that report to refresh your recollection, would you be able to tell how many sash were or were not in at that time? A I would be able to tell what was reported to me.

*Mr. Wilson.* Now, your Honor, may he use it? It is a report made by one of his employees.

*The Court.* You can easily see that he is testifying deliberately, as he says, to hearsay evidence. Unless Mr. Reed will consent to have him answer the question, that cannot be done.

*Mr. Wilson.* I will withdraw him and prove that the report was made by Mr. Cregar.

*Mr. Reed.* I cannot see how that would add to the weight of the testimony at all—a report made by another man. It is merely what he heard.

*Mr. Wilson.* All right. I will not press it.

*By the Court.*

Q Mr. Betelle, you had a conversation at the office of Palen's Sons, Mr. Samter's office? A Yes, sir.

Q Was anything at all said by any of the parties that were there that day as to the disposition of the material that was on the job at the Morristown High School? A I don't recall it, sir.

Q Was anything subsequently said at any conference that you attended? A No, sir.

Cross examination waived.

FRANK CREGAR, sworn in behalf of defendant.

*Direct examination* by Mr. Wilson.

Q Mr. Cregar, where do you live? A Morristown.

Q What is your occupation? A Architect.

Q How long have you been an architect? A About six or seven years.

Q Were you employed by Guilbert & Betelle on this Morristown job? A Yes.

Q Did you make a report to them dated September 5, 1917? A I did.

Q Is this it (shown to witness)? A Yes.

*Mr. Wilson.* I offer it in evidence (handing paper to plaintiff's counsel).

*Mr. Reed.* I do not think I shall make any objection to that.

(The paper referred to is marked Ex. D. 7.)

(Mr. Wilson reads Ex. D. 7.)

Q Were the rest all closed with sash, Mr. Cregar?

Objected to as leading.

(Question withdrawn.)

Q What was the condition of the remaining openings on the third floor? A They were closed with sash.

Q How many? A I couldn't tell unless I referred to the plans; it is so long ago.

Q Well, how many do you think there were? A Well, there was something over a hundred sash on a floor, I presume.

Q Haven't you looked to see and don't you know that there were 132 on the third floor?

Objected to as leading.

Objection sustained.

Q Haven't you got on your report the figures showing the number of openings on the third floor? A I don't know whether I have or not.

Q Won't you look? A It is a good while ago. (Witness examines paper.) Yes. I don't know whether that is mine or not.

Q Well, does it look like yours? I understood that was yours, Mr. Cregar. I may be mistaken. I was told that it was yours. A No, it is not. I never make an *e* like that.

Q Then it is not yours? A Evidently the figures are all right; there was about that many sash.

Q About how many? A Something over a hundred.

*Cross examination* by Mr. Reed.

Q In this Exhibit D. 7, dated September 4, 1917, you say, "No men working today. Foreman and two carpenters have not been paid for last week's work." There had been men working there the week before this, hadn't there? A Yes, sir.

*Frank Cregar, cross.*

Q Do you know whose men they were? A Were they in September?

Q Yes; that is, your notice was in September? A They were men working for a subcontractor of Mr. Palen's.

Q A subcontractor of Mr. Palen's? A That is what I understood.

Q What is that? A That is the way I always understood it. They called them Connelly's workmen. A man named Connelly was supposed to be working under Mr. Palen.

Q They had been working that week? A Up to that time.

Q The week before September 4th? A I believe so.

Q Well, how many men were on the job? A At what time?

Q On September 1st? A September 1st?

Q Yes. A That I couldn't tell.

Q On September 2nd? A About that time there were about three men there, I think.

Q How long had they been working there? A Oh, they would average three men there for probably a month or so.

Q Up until September 4th? A About that time.

Q According to this letter of yours, these men were waiting there that morning, September 4th, were they not? A Waiting for their money, yes. I can't tell.

Q What is that? A That is so long ago that I am not sure.

Q Look at that. A I will have to look at the report to refresh my mind.

Q Just look at it; that is all right (handing paper to witness)? A Yes, that is right.

Q So that they were working right up to that time? A If this was on a Monday, or whatever it was, they had been working the week before.

Q Now, to turn for a moment to the window openings. The window openings on one side of the building were filled with cotton or something like that, were they not? A I don't know whether it was all on one side or not, but certain portions were.

Q Well, was that true of the third floor? A The third floor is the one that that refers to.

Q Now, some of those openings that you refer to as closed were closed with cloth then, were they not? A Not at that time.

Q What? A Not when I made that report.

Q Are you sure of that? A Oh, yes.

*Frank Cregar, cross.*

Q What was in them? A Sash.

Q Now, you cannot tell me how many sash? A If I had access to the plans a few moments I can.

Q Were those sashes permanently placed or temporarily placed? A They were fitted, but they had to be taken out for the hardware to be fitted.

Q There was no hardware on? A No, not all.

Q How many had hardware on? A I think there were three; I am positive that one was finished complete.

Q One was finished complete? A Yes, with all the hardware on.

Q Three, you think, were fitted complete, but you are sure of one? A Yes, sir.

Q Can you tell by looking at the plans how many windows were fitted? A Yes. I have got to see the floor plans, the blueprints, in connection with the daily report.

Q Did you make all these daily reports? A Every day.

Adjourned until tomorrow, Tuesday, April 8, 1919, at ten o'clock A. M.

SECOND DAY.

Tuesday, April 8, 1919.

Met pursuant to adjournment.

Present, counsel as before stated.

FRANK CREGAR, resumes the stand in behalf of defendant.

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

Q Have you considered that matter that we were discussing at the last meeting? A Considered it?

Q Yes. A Well, no, only—I will still have to look over the plans. (Blueprints shown to witness.) Now, if I can have the daily report. (Paper handed to witness.)

Q Now, what do you find with respect to the windows? A About forty.

Q About forty were in? A Yes.

Q Sash frames? A Yes.

Q I thought you said that three of those had hardware on and the remainder did not? A Yes, I think there were three; I know there was one; I think there were three.

*James O. Betelle, direct.*

Q And the remainder did not? A Yes.

Q The remainder were put in there temporarily to keep the window up? A Well, they were supposed to be fitted. Of course, they had to be taken out to put in the hardware.

JAMES O. BETELLE, recalled in behalf of defendant.

*Direct examination* by Mr. Wilson.

Q Mr. Betelle, can you tell us how much was owing to P. F. Kenny Company by the Board of Education on its contract with Kenney Company at the time the certificate dated August 11, 1917, was made?

*Mr. Reed.* I object to that. I think the certificate speaks for itself.

*The Court.* Well, I do not know that it says so. I will admit the question.

Q Can you tell us? Yes or no. A I can, yes.

Q Would you have to look at any paper to refresh your recollection or to state the exact amount? A To state the exact amount I would have to look at my certificate.

Q I show you certificate dated August 11, 1917, and ask you, looking at that certificate, to tell us the amount that the Board of Education of the Town of Morristown owed to P. F. Kenny Company on that day?

*Mr. Reed.* I object to that, because the certificate has been given, and that speaks for itself. That is the certificate of the architect, and that determines the amount. It is in evidence, and I think that further testimony from the witness with respect to that is incompetent, immaterial and irrelevant.

*The Court.* I sustain the objection.

Q Was that certificate correct at that date? A Yes, absolutely, yes.

DEFENDANT RESTS.

(By direction of the Court, the jury withdraws from the court-room.)

*Defendant's Motion for Direction of Verdict.*

*Mr. Wilson.* If your Honor please, I move for the direction of a verdict for the defendant of no cause of action.

As I understand this case, the Board of Education is sued for illegally taking certain material which the plaintiff says belonged to H. W. Palen's Sons, and by assignment belonged to her. Admitting that the Board of Education took this material and finished the job, it is our insistment that we lawfully and rightfully took it, and that we had a right to take it under the contract made by the board and P. F. Kenny Company. It is not denied that P. F. Kenny Company defaulted, made a default, and quit work. The testimony is undisputed; there is no question of fact about that in dispute. The clerk has told your Honor and the jury that at a meeting held on the Friday following August 11th, which he thinks was August 15, 1917, Mr. Kenny was present with this certificate, dated August 11, 1917; that at that time there were two stop notices served on the board; that Mr. Kenny disputed the claims, the stop notice claims, and directed the board, which was then in session, not to pay those claims, that he disputed them, and he told the board that he was through and was not going to do any more work on that job. Now, those are undisputed facts. There is not any denial of them whatever, if the witness can be believed, and there is nothing to the contrary.

The minutes show that the board directed its counsel to prepare and serve notices on Kenny, and the notices are in evidence, showing that the notices were served on P. F. Kenny Company, and the resolutions of the board adopted at the meeting of August 31st, in which the board found that the notices had been served and that Kenny had stopped work, quit, abandoned his contract, and that is undisputed. There is not any question about those notices having been served, about the architect having given the certificate, about Kenny's having quit and the Board of Education taking over the job to finish it.

Now, the minutes are all in evidence; they have been offered. The minutes show, if your Honor please, that in September the board advertised for bids to complete this job, and subsequently let the contract to finish the high school in Morristown to Reeve & Burr, and the evidence is undisputed that Reeve & Burr finished the job, and that they took what material they found on the job; it was there, and they took possession of it and finished it. I am not going to argue that their taking possession

of it was their own act. I think, as a matter of law, what they did they did for the Board of Education, and I say, as I look at it, that they had a perfect right—that is, the Board of Education—to take possession of all material and finish the job.

Now, the contract of the Board of Education with Kenny was filed in the County Clerk's office two days after it was made, before any work had been done at all. So far as this case is concerned, that is certainly clear. It is also clear from the contract between P. F. Kenny Company and H. W. Palen's Sons that H. W. Palen's Sons were a subcontractor under Kenny. There is not any doubt about that. They were not material men selling material under a conditional sale; they were a subcontractor under Kenny, and they were bound by the provisions of the contract between the board and Kenny to know that any material they put on the job, if Kenny defaulted, the board could take it and use it to complete that job.

Now, I do not think that, in view of this motion, and in view of how this case ought to be decided, that it is material at all to show how much or how little of the material had been really incorporated into the building. There is not anything before your Honor to show that all of this material for which they have brought suit had not been or to show what part had been. Certainly some part of it had been incorporated into the building—at least eighty of the sash in that specification, in what they call their estimate. That estimate was of a certain number of sash called for by the specifications. Of that estimate, eighty sash, it is undisputed—Mr. Burr said between twenty-five and thirty; Mr. Mattox said he did not know; he had never made any count. The man on the job, in charge of it, says forty, which made eighty sash. At any rate, there were fifty, sixty or eighty sash, these identical sash that they estimated on and had shipped, that were in the building. I do not think that is material at all. And if they had all been there and none in the building, I think that this board had a perfect right to take them.

(Mr. Wilson cites cases and argues further.)

*Mr. Wilson.* It seems to us that there should be a direction of a verdict of no cause of action, a direction of a verdict for the defendant. We think that there is no disputed question of fact for the jury to pass upon; that, being a subcontractor, as

clearly proven here, Palen had no remedy and Miss Jacobi has no remedy except a stop notice.

*Mr. Reed.* If your Honor please, I think a verdict should be directed, but that it should be directed for the plaintiff.

There does not appear to be any question of fact. If this property for which we are suing was the property of the Board of Education, they had a right to use it, no doubt. If the property was the property of H. W. Palen's Sons, we are entitled to recover. I think that that must be so.

Now, the defendant contends that the property was the property of the Board of Education, and in that way justifies its use, and they say that it became the property of the Board of Education in this way. The Board of Education had a contract with P. F. Kenny Company, and in that contract there was a clause that provided that under certain contingencies P. F. Kenny Company might be removed from the job, and under those circumstances the board might use property on the premises for the completion of the building.

The court of this State, as well as the courts of every other State, I think, have held, and properly held, that the property that passes to the owner of the premises was the property of the general contractor and of no one else. In other words, the Wildwood case and all of the cases hold that it is only the title of the general contractor that can pass under that contract to the owner.

There is not a line of evidence in this case, so far as I can recall, which would show that H. W. Palen's Sons had lost title in any way or that title had passed from them to P. F. Kenny Company.

But before taking up that question I want to call attention to the condition of affairs between the Board of Education and P. F. Kenny Company, and see whether even under that contract, had this property been the property of Kenny Company, would the title to that property have passed to the Board of Education under the action taken by the board.

Your Honor has had the exhibits before you, and perhaps is more familiar than I with the dates, with the chronology of these notices, but I shall state them as nearly as I can, and if I am wrong I shall ask you to correct me.

On August 2, 1917, Guilbert & Betelle made a certificate to the Board of Education, which I criticized as not conforming

to the wording of the contract, but in which they told them that they were justified in demanding the removal of certain particular items, and they recommend that the notice be served, and that if that was not complied with a three days' notice might follow. Subsequent to that, and on the 11th day of August, they certified to Kenny that there was due to him the sum of about $5,000, or $4,900. They gave him a certificate, which is here, certifying that there was due to him at that time, on August 11th, the sum of $4,908.75. That was presented to the Board of Education, I think, as testified to by Mr. Leprohon, about the 15th. In the meantime, however, it appears that there had one or more stop notices been served. Those stop notices are not produced, and perhaps are not material; but Mr. Kenny first objected to the payment of those stop notices, as I recall the testimony, but it was insisted on that he must pay them, and finally he said, "Well, pay those and give me the balance"; but Mr. Leprohon said, "We refuse to do that because we found that he had not been accurate in his statement to us of his liabilities." They had a certificate in their hands showing that they owed to Mr. Kenny money, more than enough to pay the certificate, or the stop notices, leaving him a balance, but they refused to give it to him, not because of any default that he had made in the contract, but because they found that he had been inaccurate in stating to them his liabilities. Now, that is no justification. I think you must agree that if they owed this man that money they had no right to withhold it because he happened to have liabilities which he had not accurately stated to them. And when they refused to do that, he said, "Well, I will quit"; and I think there was a justification on that basis for his refusal to continue, if they refused to pay him money that was due to him under his contract and which they were obliged to pay him. That is one of the reasons why a man may refuse to continue his contract until it is corrected. It never was corrected until, on the 20th, they served on him a three days' notice.

Now, that three days' notice, if valid, must have been based upon the certificate given by Messrs. Guilbert & Betelle, dated August 2nd, subsequent to which time they had given Kenny a certificate that the board owed him $5,000. Very well. The board itself was evidently dissatisfied with the situation. I think the notice that they served shows that they were self-

conscious, because on the 5th of September they served him a notice which I would like to read to you, because it seems to me to show plainly that what had taken place before that time had not been justified. Exhibit P. 6, the second paragraph, says, "You are hereby notified that the board has decided that you have abandoned your contract, and the said board will proceed with the work required to complete the high school building." Now, this was after. On the 15th Mr. Kenny had refused to continue, because they refused to pay him money that they owed him, and on the 20th they decided to put him off the job, and they decided on the 5th of September that he had abandoned it. They do not say when. They do not say whether they eliminated him after they served the notice of the 20th, or he abandoned it because they refused to carry out the terms of the contract that was agreed to; in other words, to pay him the amount that was due him as appeared by the certificate of the architects.

Now, I think that, under those circumstances, they were not justified in any of the notices. They were in default themselves, and they could not, under those circumstances, do that, if the certificate of the architect had originally been in the form that the contract required and it had not been in effect countermanded, when he delivered a certificate that they owed the money. So that I contend that they never were entitled to remove Mr. Kenny from the job; that he was entitled to refuse to continue until they performed their part of the contract, and that, in consequence, had this property been the property of P. F. Kenny Company, it would not, under the contract, have passed to the board or justified their use of it; but, under the case of Wildwood, and under all the cases that I have found, which I would be glad to quote to your Honor, the property of the subcontractor will not pass unless it has already passed to Mr. Kenny. In our contract with Mr. Kenny there was a similar clause, which provided that if Palen's Sons failed the property would pass to Mr. Kenny; he might take it and use it. Article 5, I think, is the same, probably the same form of contract. But there is no whisper here that we were in default in any way; there is no suggestion of that kind; and consequently no property that belonged to Palen's Sons passed to Kenny Company except that property which they had incorporated in the building.

Now, I do not think that I need dwell on that subject, because that, I think, is practically conceded by the case that Mr. Wilson quotes.

(Mr. Reed cites and reads from authorities.)

*Mr. Reed.* Now, it appears here that there were certain sash. The number is clearly set forth. There was a total of 412, I think, altogether. Certain of those sash had been put into the windows to stop the openings. Apparently only three of them had been put in permanently with the hardware affixed. The estimate of the number of other sash that had been put in place varies, it is true, from twenty, or perhaps from twelve, to forty. Forty was the highest number, including the three sash that were put in with the hardware. The others were put in to fit them apparently, because it was the intention to remove them. So that it seems to me the question is merely a calculation of what is due to the plaintiff in this case. It certainly is true that, if the plaintiff took the goods of Palen's Sons, they must pay for them; they must pay the market value of them, and the market value has been shown; the price, the cost of the hardware which was specified, the various amounts, the price per window, have been shown. So that all we have to do is to calculate the amount due, and that can be done, it seems to me, without much difficulty, and therefore there should be a verdict for the plaintiff.

*The Court.* My view of this case has been illuminated by the opportunity that I had last evening of reading the exhibits.

In my opinion, the case hinges entirely upon the fifth article in the contract between the Board of Education of Morristown and P. F. Kenny Company, which says, "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 to pay insurance premiums, 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, or shall become insolvent or be declared bankrupt, such refusal, neglect, failure, insolvency or bankruptcy being certified in writing to said owner, by the said architects, the owner shall be at liberty to provide watchmen to guard the property, and to furnish all labor, materials and supplies necessary to properly care for the work already performed. If the said architects shall certify

that such refusal, neglect, failure, insolvency or bankruptcy is sufficient ground for such action, the owner shall be at liberty, three days after service of a written notice upon the contractor of its intention so to do, to terminate the employment of the contractor for the said work and enter upon the premises for the purpose of completing the work included under this contract, and to take possession, in whole or in part, of any or all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor," and so forth. This contract was placed on file before any work was done or materials furnished, as I recollect the testimony, and, of course, then became notice to all the world. When Palen's Sons entered into a contract with Kenny they were supposed to have had notice of the terms of this contract.

This action is brought to recover compensation for goods which, it is alleged, the Board of Education took, and, I think, both counsel admit that the Board of Education must have taken these goods illegally unless Kenny had title to the goods, or unless, under the fifth article of this contract, they had the right to take any material that they found upon the land and use it themselves.

In the Wildwood case, as I understand it, the only reason that Mr. Justice Swayze ordered a new trial was because there was a question of title, a question as to whether the delivery of the goods had not been made so that it was in the nature of a conditional sale. In that case, among other things, Mr. Justice Swayze says, "Delivery of possession is the ordinary way of passing legal title to tangible personal property." I shall not take the time to read the syllabus, which Mr. Wilson has already read.

The fifth clause in the contract, to which I have referred, definitely fixes the rights of the contracting parties, and we have enacted laws in this State for the purpose of protecting materialmen and subcontractors, and, I suppose, in pursuance of those laws this contract was filed. So that any subcontractor must have had notice of the terms of this contract.

*Mr. Reed.* I do not want to interrupt your Honor, but may I call your attention in that respect to this fact? I think this would perhaps bear on that situation. There was nothing due to us until the property was incorporated in the building under

the contract. We could not proceed under those laws. The property was not incorporated in the building. May I also call your attention to that portion of the Wildwood decision?

*The Court.* Yes, I have it right here.

*Mr. Reed.* We could not include in any claim or notice any part of the property that was not incorporated in the building, because it was not due to us under the terms of the contract. It was only eighty-five per centum of the property actually incorporated in the building, under our contract with Kenny & Company, or under Palen's contract with Kenny & Company, that was due to us. We could not file any notice as to property brought on the premises but not yet incorporated in the building.

*The Court.* No, that is perfectly true, Mr. Reed.

*Mr. Reed.* So that we had not that remedy.

*The Court.* No, but what I meant was that your client had notice of the existence of a contract which gave the Board of Education the right to go upon this property and take posession of the materials thereon.

(Counsel argue further.)

*The Court.* It seems to me that we must either say that the fifth section of this contract on file, the first contract with the Board of Education, is of such notice to any contractor or any subcontractor that he takes his own material on the premises at his peril, whether they be building materials, tools or shovels or anything else, realizing that the contract being on file, if it is abandoned by the contractor, he is liable to lose them, or else we must take the view that is rather indicated by the Wildwood case, that before the owner can take possession of the goods of a subcontractor he must prove that the title went from the subcontractor to the contractor, which is the view that Mr. Justice Swayze takes. He says that if there was a conditional sale, the question of title is a question for the jury, and that if the Richmond Construction Company did not have title, of course, the Wildwood Board of Education could not get title. I am more influenced by Mr. Justice Swayze's opinion than I am by anything else, because it is a New Jersey case and because the facts are somewhat similar to those in this case.

I have listened with much interest to counsel and have read these exhibits very carefully, and I am going to rule this way:

that the question of title is a jury question; that if the jury finds that at the time of the abandonment of this contract the title of these materials was in the contractor and not in Palen's Sons, then the Board of Education had a right to take them. That will bring this matter squarely at issue. If they do not find that, then your action is proper, and damages can be assessed by them. That is the view that I take, and having that attitude of mind, I shall deny your motion and give you an exception. That will put you in a position where on an appeal you can have the issue squarely raised.

*Mr. Reed.* Your Honor will allow me an exception to your refusal to direct a verdict for the plaintiff?

*The Court.* Oh, yes.

Exception noted as ground of appeal.

(The jury returns into court.)

Mr. Wilson sums up for defendant.

Mr. Reed sums up for plaintiff.

The Court charges the jury as follows:

MOUNTAIN, *J.*

Gentlemen of the Jury. The Board of Education of Morristown entered into an agreement with one P. F. Kenny Company for the construction of a school building, and Kenny Company in turn entered into an agreement with one H. W. Palen's Sons for some carpentry work and the furnishing of materials to do the work. The contract is in evidence and will be handed to you. Palen's Sons' claim has been assigned to the plaintiff, Charlotte Jacobi, who brings this action. The plaintiff, in effect, says, "We put certain sash and hardware on the premises belonging to the Board of Education of Morristown, and we did not pass any title in the sash or hardware to anybody else; we retained it; and when you, the Morristown Board of Education, took this sash and hardware and converted it to your own use by incorporating it in the building, you took something that belonged to us, and we want money damages to compensate us for depriving us of our property." That is the stand of the plaintiff.

Now, let us look at the other side. The defendant, the Board of Education, says, "We had a contract with Kenny, and one of the provisions of that contract was to the effect that upon the happening of certain contingencies we could go upon the premises and take possession of the materials found thereon, and we put that contract on record, so that it was notice to all the world as to its terms, and after we put it on record Palen's Sons made a subcontract with Kenny. We are not affected by that contract, because we are not a party to it. Our contract is with Kenny, and when Palen's Sons made this contract with Kenny they had knowledge of our contract, because our contract was a matter of public record." Moreover, the defendant says that the sash and hardware, under the terms of this contract, which is in evidence and which you will have the opportunity of perusing, were delivered upon the job, and delivery in the case of personal property is evidence of a transfer of title.

The crux of this case is a question of fact, which you must first decide before you can intelligently decide anything else. If at the time the Board of Education took the sash and hardware which was upon the premises and had been shipped there by Palen's Sons you find that the title had passed from Palen's Sons to Kenny, then I charge you that the Board of Education had a perfect right under its contract with Kenny to go upon the premises and take the materials found thereon. If, on the other hand, you find that Palen's Sons had retained title and had not passed that title to Kenny, then, of course, the Board of Education had no right to take Palen's property. In other words, it is for you to decide whether the title had passed from Palen's Sons to Kenny, or otherwise, at the time the Board of Education assumed possession of the sash and hardware.

What evidence have you to assist you? You have the contracts, which have been read and which are a guide in law, but which, due to the fact that there are certain other transactions, you can only take as being an indication of what the parties had in mind.

It has been testified that there was delivery by Palen's Sons of certain sash and hardware upon the premises, and, as I told you before, delivery of tangible personal property is evidence of the passing of title. But Palen's Sons say, in effect, as I recollect it, "That was done for our convenience, and we paid

the freight and express bills, and the property was consigned to us." I will not say that the evidence is that the property was consigned to them, but there was evidence, as I recall it, to the effect that the sash and hardware were in boxes or crates upon which the name of Palen's Sons appeared, indicating on behalf of the plaintiff that the property had been sent by Palen's Sons to themselves.

As you see, the question that you must determine in your deliberations is, who owned the property when the Board of Education took it? On that day did Kenny own it, or on that day had Palen's Sons not parted with their title? Because if Kenny did own it on that day, I charge you that the Board of Education had a perfect right, under its contract, to take it. If, on the other hand, Palen's Sons had not parted with their title, the Board of Education had no right to take it. If you find that the title was in Kenny and the board had a right to take it, your judgment, of course, would be for the defendant.

In coming to your conclusions, I charge you, as you probably already know from your service on juries, that you must keep in mind that the burden of proof is upon the plaintiff to prove his case by the greater weight of evidence. If you find that the case is in such poise that it is impossible to distinguish which way the balance would fall, you must apply that rule. The plaintiff must establish his case to your satisfaction by the greater weight of evidence.

Assuming that you find as a result of your deliberations that the title had not passed from Palen's Sons to Kenny, and that the Board of Education was not justified in taking this property, because it did not belong to Kenny, then the next question that would naturally arise is as to what damages you would assess for the conversion of this property.

The testimony that has been adduced before you is to the effect that sash, or sashes, were delivered upon the premises and stored thereon, amounting to $1,575.42, and that hardware amounting to $1,452 was similarly placed upon the premises of the board. But there is further evidence that some of this sash was used and some of the hardware was used. The plaintiff cannot recover for any sash or hardware that was used and built in, so that it became a part of the building, so that it was incorporated in the building, because the minute that occurred Palen's Sons and their assignee lost title to it. The plain-

tiff frankly says that he admits that; that he does not want to recover for that; that he wants to recover for the sash that was on the ground and was not incorporated in the building.

When you get in the jury room you must not take my recollection of any testimony; you must take your own recollection of it, because your recollection, not mine, is to guide you as to facts.

As I recollect the testimony, there were from twelve to forty sash in the building, and there were some of these sash that were thoroughly equipped, or entirely equipped, with hardware. I think that there was some testimony to the effect that there were three such pairs.

What was the value of the sash? That was given us by one of the witnesses, and, according to my notes, the value of the sash was $3.55 apiece, not including hardware. The value of the hardware per window was $7.35. Further, there was testimony that some of the windows varied in value, so far as the sash were concerned, from $2.65 to $3.90, not including hardware.

If you decide that the plaintiff is entitled to a judgment, you will, of course, have to ascertain, as nearly as you can, how many sash were used by the board, as I have said, and were not incorporated in the building. Value the amount of sash and hardware so used, and bring in a judgment for that amount. If you should so find, the plaintiff is also entitled to interest on that amount at 6 per cent from October 1, 1917, which should be included in your judgment.

That is the date, is it not?

*Mr. Reed.* Yes, that was the date, according to the testimony of Mr. Reeve; that was the time that he began to perform his subcontract.

*The Court.* The interest would be computed from the date that the property was taken by the Board of Education. Mr. Reeve did testify that he started to work on the property on October 1, 1917. That would be a safe date, I presume; but that date is for you to determine. Should you find for the plaintiff, the interest is to be computed from the date that the conversion took place to today.

I have been asked to charge, and I do charge, that "If the defendant used the property of H. W. Palen's Sons, or caused it to be used in completing the high school building, the plaintiff is entitled to recover the value thereof." "Even if you find

that P. F. Kenny Company defaulted in the performance of its contract, that fact would not entitle the defendant to use property belonging to H. W. Palen's Sons."

You may take the case.

(The Jury Retires.)

*Mr. Reed.* I want to ask an exception to that part of your Honor's charge in which you said, "If you find that title to the property had passed to Kenny & Company, then I charge you that the board had the right to take the property"—whatever your Honor said to that effect.

*The Court.* Yes.

Exception noted as ground of appeal.

*Mr. Reed.* I also want to take exception to that part of the charge wherein your Honor said that delivery is evidence of the passing of title, because of the fact that it does not apply to this case. There was no evidence of delivery to P. F. Kenny Company.

Exception noted as ground of appeal.

*Mr. Wilson.* The defendant's exceptions, if your Honor please, are these:

We desire to except to so much of your Honor's charge as said that the crux of the case was a question of fact as to the passing of title to the Board of Education.

Exception noted as ground of appeal.

*Mr. Wilson.* Secondly, to so much of your Honor's charge as charged the jury that if they found that Palen had retained title to the sash and hardware—whatever your Honor charged as to Palen's retaining title.

Exception noted as ground of appeal.

*Mr. Wilson.* Third, to so much of your Honor's charge as charged that Palen said that the delivery was for their own convenience, because, as I recall it, there was no evidence of that at all.

Exception noted as ground of appeal.

*Mr. Wilson.* Fourth, to so much of your Honor's charge as said that the shipment of sash and hardware, either boxed or

with cards with Palen's Sons name on them, indicated that the property had been sent to themselves.

Exception noted as ground of appeal.

*Mr. Wilson.* Fifth, to so much of your Honor's charge as charged that the question was for the jury to find, Did Kenny own the sash and hardware or was it Palen's Sons' at the time Kenny defaulted?

*The Court.* I did not say "at the time Kenny defaulted;" I think I said "at the time the board assumed to take possession."

*Mr. Wilson.* Well, I have not got it down exactly.

*The Court.* I do not think I said "at the time Kenny defaulted;" I said "at the time the board took possession."

*Mr. Wilson.* All right, I will put it that way, then. I want to except to whatever your Honor said about the question being, Did Kenny own it or Palen own it, whether at the time Kenny defaulted or the board took possession?

Exception noted as ground of appeal.

*Mr. Wilson.* Sixth, to so much of your Honor's charge as charged that incorporation of the material in the building was a sure indication of the passing of title, or whatever your Honor said with reference to the incorporating of the material being an indication of passing of title.

Exception noted as ground of appeal.

*Mr. Wilson.* Seventh, to your Honor's charging the plaintiff's requests to charge without at the time again limiting the force of the requests in the manner in which you had theretofore limited it.

Exception noted as ground of appeal.

*Exhibit P. 1.*

**Plaintiffs' Requests to Charge.**

Plaintiff's counsel respectfully requests the Court to charge the jury as follows:

(1) If the defendant used the property of H. W. Palen's Sons, or caused it to be used in completing the high school building, the plaintiff is entitled to recover the value thereof.

(Charged.)

(2) Even if you find that the P. F. Kenny Company defaulted in the performance of its contract, that fact would not entitle the defendant to use property belonging to H. W. Palen's Sons.

(Charged.)

**EXHIBIT P. 1.**

GUILBERT & BETELLE

Architects

New York, N. Y. Newark, N. J.

CONTRACT

THIS AGREEMENT, made the fourteenth day of March, in the year one thousand nine hundred and sixteen, by and between the Board of Education of the Town of Morristown, in the County of Morris (hereinafter designated the Owner), party of the first part, and P. F. Kenny Company, a corporation, party of the second part (hereinafter designated the Contractor),

WITNESSETH, that the Contractor, in consideration of the agreements herein made by the Owner, agrees with the Owner as follows:

Article I. The Contractor shall and will provide all the materials and do and perform all the work required in the general construction of the new high school building located on Atno avenue and Early street in Morristown, N. J., including the following alternates mentioned in the specifications, viz: On page 21, tile drain; on page 28, tapestry brick; on page 28, face brick in gymnasium; page 55, pivoted windows; on page

*Exhibit P. 1.*

63, Kalamein partitions; page 62, composition floors, and on page 67, auditorium, etc., painted, being all the material and work shown in plans and specifications for said building, except the electrical work, heating and ventilating work and plumbing work, and to construct and complete the same, to erect, construct and complete, as shown by the drawings and described in the specifications prepared by Guilbert & Betelle, architects, which drawings and specifications identified as the High School of Morristown, N. J. Guilbert & Betelle, architects, dated December 18th, 1915, and bulletin No. 1, dated February 19th, 1916, and by the signatures of the parties hereto are, together with the form of advertisement, instructions to bidders, forms of proposal and bond, hereby acknowledged and incorporated into these presents and are to be taken as part of this contract.

Article II. The Contractor declares and agrees that it will be responsible for the full performance and completion of all the work to be done under this contract, and by the execution hereof admits that it has carefully informed itself respecting all conditions at the site and pertaining to the work to be done.

Article III. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the directions of the architects, who will decide as to the construction and meaning of the drawings and specifications, and pass upon materials and methods for performing the contract.

It is also understood and agreed by and between the parties hereto that they will conform to and abide by such additional drawings and explanations as may be furnished by the said architects to further detail and illustrate the work to be done, which drawings and explanations will be consistent with the purpose and intent of the original drawings and specifications referred to in Art. I and not be considered as indicating additional work.

Article IV. The Owner, the architects, and their representatives shall, for the purpose of inspection, have free and safe access at any and all times, to the building and to the shops of the Contractor, its sub-contractors and material men, wherever any material for this building is being prepared or manufactured.

The architects and their representatives may reject any part of the work or materials which, in their opinion, is not in ac-

*Exhibit P. 1.*

cordance with the drawings and specifications, whether already inwrought into the building or not. Work or materials rejected shall be at once removed from the site and not be returned at any subsequent time, but be replaced with approved workmanship or material at the expense of the Contractor, who will also make good any damage incident thereto, or after three (3) days' notice, the Owner shall have the right to have the same done and charge the cost thereof to the Contractor's account, or at its option, and upon recommendation of the architects, retain and receive from the Contractor the difference in value between the work involved and that required, together with a fair allowance for damage, as determined by the said architects.

The final inspection of all materials and workmanship shall be made at the building, all others being preliminary.

Article 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 to pay insurance premiums, 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, or shall become insolvent or be declared bankrupt, such refusal, neglect, failure, insolvency or bankruptcy being certified in writing to said Owner, by the said architects, the Owner shall be at liberty to provide watchmen to guard the property, and to furnish all labor, materials and supplies necessary to properly care for the work already performed.

If the said architects shall certify that such refusal, neglect, failure, insolvency or bankruptcy is sufficient ground for such action, the Owner shall be at liberty, three days after service of a written notice upon the Contractor, of its intention so to do, to terminate the employment of the Contractor for the said work and enter upon the premises for the purpose of completing the work included under this contract, and to take possession, in whole or in part, of any or all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor, and pay such insurance premiums, and any other expenses caused by such refusal, neglect, failure, insolvency or bankruptcy, and to deduct the expenses incurred therefor from any money then due or to become due to the Contractor under this contract.

*Exhibit P. 1.*

In case of such discontinuance of the employment of the Contractor, it 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 shall exceed the expense incurred by the Owner in finishing the work, such excess shall be paid by the Owner to the Contractor; but if such expense shall exceed such unpaid balance, the Contractor or his Surety shall pay the difference to the Owner.

The expense incurred by the Owner as herein provided, either for furnishing materials or finishing the work, or for any other cause, and any other damage incurred through such default shall be audited and certified by the said architects, and the amount so certified will be deducted from the balance due the Contractor.

Article VI. In case of failure of the Contractor to supply material or labor at such times as in the opinion of the said architects will insure completion within the contract time, and if upon demand of the said architects it cannot within three days, not including Sundays or legal holidays, state definitely when it can and will furnish such material or labor, then the architects shall have the right to send their own representatives to the shops of sub-contractors, or supply centers, and trace cars or otherwise ascertain the real facts. Should this be necessary, the time of the representatives at $10.00 per day each and all necessary expenses will be charged against the Contractor, the Owner deducting from any money due or thereafter becoming due it, the amount of such charge.

Article VII. The architects shall have the right at any time, upon notice in writing, to require the Contractor at its expense to employ and keep so much extra labor and material as in the opinion of said architects shall be necessary to insure completion of the work within the contract time, and if the Contractor shall fail to comply with such notice within three days, not including Sundays or legal holidays, from the time of service upon it, then the said architects shall be at liberty to employ such extra labor and material as they deem necessary and the Owner will deduct the cost thereof from any money due or thereafter becoming due the Contractor.

Article VIII. The Owner shall have the right to require alterations, additions or deductions in the total amount of work to be performed under this contract, but no modification shall be made without a written order of the said architects approved

*Exhibit P. 1.*

by the Owner. No modifications as above shall involve any time extension unless such is defined in the formal order for same, and when so defined, will be understood to apply only to the work required by the order and shall not affect the time of completion for the contract as a whole unless the order so states. Failure to complete any modification, as above, within the time stated by the order, or within the time to which completion of same may have been extended for reasons stated in the specifications, shall subject the Contractor to a deduction of five ($5.00) dollars per day on work involving $1,000 or under and ten ($10.00) dollars per day on amounts above $1,000, Sundays and holidays excepted, which sum is hereby agreed upon, fixed, settled and determined as the liquidated and ascertained damages which will be suffered by the Owner for such failure of the Contractor to complete the work required by such order within the time fixed, and such deductions shall not in any way release the Contractor from the further or other obligations in respect to the fulfillment of the entire contract nor affect the liquidated damages in Article X. In case of modifications, the Contractor should base its estimate of the amount to be added to or deducted from the contract price upon the unit rates in the schedule, provided such apply and are considered by the said architects to be reasonable; or if not considered reasonable or applicable, the fair market valuation will be ascertained by the said architests and the amount so ascertained will be added to or deducted from the contract price. If modifications be ordered after the manufacture of material has begun, then such material and labor will be paid for at a reasonable rate, based upon the Contractor's estimate if considered reasonable, or ascertained by the architects as in the foregoing. Should the Contractor not agree with the architects as to the amount to be paid or allowed, the work shall go on under the order required above, and in case of failure to agree, the determination of said amount shall be referred to arbitration, as provided for in Art. XV. of this contract.

Article IX. The Contractor further declares and agrees that it will not assign, transfer or otherwise dispose of this contract, or of its right or interest therein, nor assign by power of attorney or otherwise any of the moneys due or to become due to it without having obtained the previous consent in writing of the Owner. If, without such consent, he should assign or otherwise dispose of its contract, its interest therein or money

*Exhibit P. 1.*

due or to become due, the Owner may revoke and annul the said contract and thereupon be relieved from all liability growing out of the said contract to it or to its assignees.

Article X. It is further understood and agreed by and between the parties hereto, that the work herein included shall be commenced within ten days after the signing of this contract and be completed on or before January 14th, 1917.

Whereas, time is of the essence of this contract, and the Owner would suffer loss by the failure of the Contractor to complete the work at the time hereinbefore stated or at other than the time to which completion may have been extended, as provided in the specifications under certain condition, and as the parties hereto might be unable to agree as to the amount of the loss which would be suffered by the Owner and it might be impossible to compute the amount of such loss, the Contractor agrees that the Owner may deduct and retain out of any moneys due or thereafter to become due it under this contract as and for liquidated and ascertained damages, the sum of forty ($40.00) dollars for each and every day which may elapse between the appointed and actual time of completion, Sundays and holidays excepted, which sum is hereby agreed upon, fixed, settled and determined by the schedule following as the liquidated and ascertained damages which will be suffered by the Owner for such failure of the Contractor to complete this contract within the time fixed, and such deductions shall not in any way release the Contractor from the further or other obligations in respect to the fulfillment of the entire conract.

SCHEDULE OF LIQUIDATED DAMAGES.

| | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| $5.00 | per | day | on | contracts | up to | $2,500 | inclusive | | | | |
| 10.00 | " | " | " | " | above | 2,500 | and | up | to | $10,000 | |
| 15.00 | " | " | " | " | " | 10,000 | " | " | " | 20,000 | |
| 20.00 | " | " | " | " | " | 20,000 | " | " | " | 50,000 | |
| 25.00 | " | " | " | " | " | 50,000 | " | " | " | 100.000 | |
| 32.50 | " | " | " | " | " | 100.000 | " | " | " | 150,000 | |
| 40.00 | " | " | " | " | " | 150,000 | " | " | " | 200,000 | |
| 50.00 | " | " | " | " | " | 200,000 | " | " | " | 250,000 | |
| 60.00 | " | " | " | " | " | 250,000 | " | " | " | 300,000 | |
| 67.50 | " | " | " | " | " | 300,000 | " | " | " | 350,000 | |
| 75.00 | " | " | " | " | " | 350,000 | " | " | " | 400,000 | |
| 87.50 | " | " | " | " | " | 400,000 | " | " | " | 500,000 | |
| 100.00 | " | " | " | " | " | 500,000 | | | | | |

*Exhibit P. 1.*

Article XI. It is hereby mutually agreed by and between the parties hereto, that the sum to be paid by the Owner to the Contractor for said work and materials shall be one hundred and sixty-seven thousand and twenty-five ($167,025) dollars subject to additions and deductions as provided for herein, and that such sum shall be paid by the Owner to the Contractor, in current funds, and only upon certificate of the said architects, countersigned by

Payments to be made monthly, representing 85% of the labor and materials satisfactorily incorporated into the building during the month preceding payment, thus accumulating a 15% reserve until final payment, which will be made in not less than 15 days nor more than 30 days after the completion and acceptance of the work by the Owner. Except that 1% shall be retained for one year after date of final acceptance of the work.

The Contractor's application for monthly payment must be itemized and will be audited by the architects, modified if found necessary, and certificate issued for amount approved by the architects.

All payments shall be due when certificates for the same are issued, such certificates being a condition precedent to any liability of the Owner respecting payments. No certificate will be issued should violations of the contract or unsatisfactory materials, workmanship or conditions exist, and such certificate shall not become due until such violations or conditions have been corrected to the satisfaction of the said architects.

Article XII. It is further mutually agreed by and between the parties hereto, that no certificate issued 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 made nor the occupancy of the building in whole or in part shall be construed as an acceptance of defective work or improper materials, nor relieve the Contractor from making good, defects, as required by its guarantee.

The final acceptance shall not be binding upon the Owner nor conclusive, should it subsequently develop that the Contractor had supplied inferior material or workmanship or had departed from the terms of its contract. Should such a condition become

*Exhibit P. 1.*

evident, the Owner shall have the right, notwithstanding final acceptance and payment, to cause the work to be properly done in accordance with the drawings and specifications at the cost and expense of the Contractor or his surety.

Article XIII. That the Owner may be free to adjust liens, claims or other liabilities arising from the construction of the work under this contract for which, if established, the Owner might become liable, and which are chargeable to the Contractor, or to repair or replace materials or workmanship which may be defective, if any, the Owner shall have the right to retain out of any payment then due or thereafter to become due the Contractor under this contract, an amount sufficient to completely indemnify against such liens, claims, or other liabilities, or the repairing or replacing of defective materials or workmanship, if any.

Previous to the issue of the final certificate the Contractor shall furnish to the Owner satisfactory evidence of the settlement of all claims against the building and the Owner.

Article XIV. The Contractor agrees that it will provide a satisfactory bond, in amount equal to its contract, executed upon the blank form in use by the architects by a Surety Company acceptable to the Owner and qualified to do business under the laws of the State of New Jersey, such bond insuring the fulfillment of all the provisions of this contract, the advertisement, instructions to bidders, drawings and specifications which are a part hereof, and the satisfactory completion of the work thereby required and shown, within the time stated and covering the one year's guarantee required in the general conditions of the specifications, the prompt payment of all persons furnishing materials or labor, or both, required for the prosecution of the work, and the defending and settlement without expense to the Owner of liens, claims for personal injury, or otherwise, or from other liabilities arising from the execution of the work, or from the use of patented articles. The Contractor further agrees that it will furnish an additional satisfactory bond or bonds by a like Surety Company in the amount, for the period of time, and covering any and all guarantees as required by the specifications.

Article XV. In case the architects and the Contractor fail to agree as to payment, allowance or loss referred to in Article VIII of this contract, or should the Contractor dissent from the

*Exhibit P. 1.*

decision of the architects as to the extension of time for completion as provided for in the specifications, which dissent shall have been filed in writing with the architects within one week of the announcement of such decision, then the matter shall be referred to the Owner and if its decision be also unsatisfactory to the Contractor, then be referred to a board of arbitration to consist of one person selected by the Owner and one person selected by the Contractor, these two to select a third. The decision of any two of this board shall be final and binding on both parties hereto. Each party hereto shall pay one-half of the expense of such arbitration.

Article XVI. This agreement shall bind the heirs, executors, administrators, successors and assigns of the respective parties hereto.

In Witness Whereof the party of the first part has caused its corporate seal to be hereto affixed and these presents to be signed by its proper officers, and P. F. Kenny Company, Contractor, party of the second part, has set his or their hand and seal or hands and seals, or has caused its corporate seal to be hereto fixed and these presents to be signed by its proper officers,
the day and year first above written.

BOARD OF EDUCATION OF THE TOWN OF MORRISTOWN, IN THE COUNTY OF MORRIS,

By JOSEPH HURCHMAN, President.

Attest:

W. M. H. Linder,
District Clerk.

[seal]

Signed, Sealed and Delivered by the said Contractor in the presence of

P. F. KENNY COMPANY,
P. F. KENNY, Prest.,
Contractor.

[seal]
W. W. Cutler.

Date March 14, 1916.
Filed March 16, 1916.

*Exhibit P. 2.*

## EXHIBIT P. 2.

SPECIFICATIONS.

COMPLETION OF MORRISTOWN HIGH SCHOOL.
BETWEEN
BOARD OF EDUCATION OF MORRISTOWN
AND
P. F. KENNY COMPANY.

Page 54

MILL WORK:

Should the "Mill Work" be let as a separate contract, such Contractor's attention is directed to "General Conditions" in the forepart of these specifications.

MATERIALS:

All exterior work shall be of clear, kiln dry, white pine or cypress, excepting the sashes which shall be of clear white pine and pulley stiles of window frames which shall be long leaf clear yellow pine.

Page 54

WINDOW FRAMES AND SASHES:

Sashes in central portions of the windows shall be arranged for austral fittings and sashes and jambs and other portions shall be made accordingly.

Page 54

SASHES:

All exterior sashes shall be 1¾ inches thick, interior 1⅜ inches, sliding sashes to have 1⅞-inch meeting rail, casement sashes to have rebatted or rounded out meeting stiles, 1-inch mutins, stiles, top and bottom rails, all as detailed.

Page 55

MILL WORK—PRIMING:

All window frames and sashes shall be primed before leaving the factory. The concealed portions of the window frames shall be painted with one good coat of metallic paint, the exposed portions, other than the pulley stiles, parting strips and heads, shall be painted one coat of white lead and oil. The pulley stiles and parting strips shall receive one good coat of linseed oil. All sashes shall be primed with white lead and oil, giving par-

*Exhibit P. 3.*

ticular attention to the rebats of the sashes and allowing same to thoroughly dry before glazing.

Page 55

ALTERNATE ESTIMATE—PIVOTED WINDOWS:

Submit a separate estimate for providing pivoted windows for all exterior sashes in place of D. H. specified, the pivoted windows are to be of a type similar and equal to that of the Austral Window Co., 101 Park avenue, N. Y. City.

## EXHIBIT P. 3.

THIS AGREEMENT, made the 9th day of June, in the year one thousand nine hundred and sixteen, by and between P. F. Kenny Company, a corporation organized and existing under the laws of the State of New York, party of the first part (hereinafter designated the general contractor), and H. W. Palen's Sons, 1451 Broadway, N. Y. C., party of the second part (hereinafter designated the sub-contractor).

WITNESSETH, that the said sub-contractor in consideration of the agreements herein made by the general contractor agrees with the said general contractor as follows:

Article I. The sub-contractor under the direction and to the satisfaction of the general contractor shall and will provide all the materials and perform all the work mentioned in the specifications and shown on the drawings prepared by Guilbert & Betelle, architects, for all the carpenter work required in the erection and entire completion of the Morristown High School, Atno avenue and Early streets, Morristown, N. J., with the exception of Nale code, sleepers, glass, hardware, Kalamein work, painting except priming window frames and sash, copper flashing, which drawings and specifications dated July 18, 1916, identified and acknowledged by the signature of the parties hereto as forming part of this contract, are hereby accepted by the sub-contractor and made a part hereof.

Article II. The work included in this agreement is to be done under the direction of the said architect, whose decision as to the true construction and meaning of the drawings and specifications shall be final. Such additional drawings and explanations as may be necessary to detail and illustrate the work

*Exhibit P. 3.*

to be done are to be furnished by said architect, and the parties hereto agree to conform to and abide by the same.

Article III. No claim shall be made by the sub-contractor against the general contractor for any increase of compensation or for any allowance on account of any change or variation from the plans and specifications, or any extra or additional work or materials furnished, unless such change or variation or extra work or materials have been expressly authorized by a written order signed by the general contractor, by an officer thereof, specifically ordering such change or work or materials as additional work or materials not included in the contract and specifying the amount to be paid for same. No extension of time for completion shall be given to the sub-contractor for any such change or variation or extra work or materials, unless such extension of time and the amount thereof are specified in such written order.

Should there be work or materials omitted by reason of any change or variation from the plans or specifications above referred to, the sub-contractor shall make a proper allowance therefor to the general contractor. If the parties hereto cannot agree as to the amount of such allowance, the determination thereof shall be referred to arbitration, as hereinafter provided.

Should the general contractor and sub-contractor not agree as to the amount to be paid or allowed to the sub-contractor, or the extention of time to be granted or the amount to be allowed to the general contractor, the work shall go on under the order required above without specifying the amount to be paid or allowed or the extension of time to be granted, and the determination of said amount and said extension of time shall be referred to arbitration as hereinafter provided.

Article IV. The sub-contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the general contractor, the architect, or their authorized representatives; shall within twenty-four hours after receiving notice from the general contractor to that effect, proceed to take down all portions of the work and remove from the grounds or buildings all materials, whether worked or unworked, which the architect condemns as unsound or improper, or in any manner failing to conform to the drawings and specifications, and shall make good all work, damaged or destroyed thereby.

*Exhibit P. 3.*

Article V. Should the sub-contractor at any time become insolvent, or 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, the general contractor shall be at liberty, and shall have the right after three days' written notice to the sub-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 sub-contractor under this agreement, and in such event the general contractor shall also be at liberty and shall have the right to terminate the employment of the sub-contractor for the said work, and to enter upon the premises and take possession of and use, for the purpose of completing the work comprehended under this agreement, all materials, tools and appliances thereon, and to employ any other person or persons to finish the work and to provide the materials therefor; and in case of such discontinuance of the employment of the sub-contractor they shall not be entitled to receive any further payment under this agreement until the said work is finished, and until all liens filed against the property by parties claiming a lien by virtue of having performed labor or furnished materials to the sub-contractor, or for any other cause, are discharged of record, at which time, if the unpaid balance of the amount to be paid under this agreement exceeds the expenses incurred by the general contractor in finishing the work, making good improper or defective work or material, and removing liens, and all such expenses, such excess shall be paid by the general contractor to the sub-contractor, but if such expenses exceed such unpaid balance, the sub-contractor agrees to pay the difference to the general contractor. The expenses incurred by the general contractor as herein provided for furnishing materials, performing the labor, and for removing liens, and any damage incurred through the default of the sub-contractor shall be chargeable to such sub-contractor.

Article VI. As time is of the essence of this agreement the sub-contractor agrees to commence the work comprehended herein within two days after notice to that effect from the general contractor, and to complete the same on or before

19 , said work to be carried on expeditiously and as fast as the general construction of the

*Exhibit P. 3.*

building will permit and so as not to interfere with, or in any way delay the work of the general contractor or any other sub-contractor. Should the sub-contractor be obstructed or delayed in the prosecution or completion of the work by the neglect or default of the general contractor, owner, or other sub-contractor, over whom the sub-contractor has no control, or by fire or other casualty for which the sub-contractor is not responsible, or by strikes or other combined action of the workmen, in no wise caused by the sub-contractor, or resulting from default or collusion on the part of the sub-contractor, the time for the completion of the work shall be extended for a period equal to the duration of the delay; but no extension shall be allowed in any case unless a claim therefor is presented in writing to the general contractor within forty-eight (48) hours after the commencement of such delay, and unless a further claim therefor is presented in writing to the general contractor within five (5) days after the termination of such delay, specifying in detail the duration of delay and the causes thereof. If the delay for which extension of time is claimed is not continuous then separate claims in form aforesaid must be made for each delay, and in event the sub-contractor shall fail to present written claims for such extension as herein provided, all claim for, or right to any such extension shall be deemed to have been waived by the sub-contractor.

Article VII. No extension whatever of the time for the completion of the work included in this agreement shall be valid or binding unless it is in writing signed by the general contractor, by an officer thereof, except when an extension is allowed by arbitrators as provided in Article XIII hereof.

Article VIII. The sub-contractor shall provide all tools, scaffolding, machinery, permits and all other means of carrying on and completing the work comprehended in this agreement and shall not use in or about the work comprehended in this agreement any patented article or process or means of doing work or appliance without first procuring the written consent of the patentee of such article, process, means or appliance in writing, to such use, and the sub-contractor shall and will indemnify and save harmless the general contractor from all responsibility and damage arising out of or caused or created by such use as aforesaid.

*Exhibit P. 3.*

Article IX. The sub-contractor shall indemnify and save harmless the general contractor against all liability under or pursuant to any Workmen's Compensation Act, Employees' Liability Act, or any act of similar purport now in force or hereafter enacted, and for damage arising out of or caused by any accident to persons or property happening by reason of the acts or omissions of the sub-contractor or the employees or agents of the sub-contractor in the performance of the work comprehended in this agreement, including all costs, charges and expenses of whatsoever kind that the general contractor may be put to by reason of any claim being made for such damage and or compensation, or arising out of any litigation in regard thereto, and in the event that any claim for compensation or damage is made or any action commenced or proceedings taken against the general contractor by or on behalf of any person or persons employed directly or indirectly by the sub-contractor or under control of the sub-contractor, the general contractor shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify it against all such claims, actions or proceedings. Should such amount be in excess of the amount due or to grow due to the sub-contractor under this agreement then the sub-contractor agrees to pay to the general contractor the amount of such excess.

Article X. The general contractor agrees to pay the sub-contractor for the said work and materials the sum of twenty-five thousand ($25,000) dollars, subject to additions or deductions as hereinbefore provided, and that such sum shall be paid in current funds in installments as follows: On the first day of each month or as near thereafter as possible, the sub-contractor shall file with the general contractor a true statement of the value of labor and material incorporated in the building during the preceding month, and the general contractor shall within fifteen (15) days after the receipt of such statement pay to the sub-contractor eighty-five (85%) per cent of the total amount of such statement, or so much thereof as shall be found true and correct, the remaining fifteen per cent (15%) to be deducted and retained by the general contractor until the work comprehended in this agreement is entirely completed and accepted by the owner and architect; the final payment shall be made only on the certificate of the architect evidencing such completion and

*Exhibit P. 3.*

acceptance and within thirty (30) days after the delivery thereof to the general contractor.

Article XI. Increased compensation for variations or changes or for extra or additional work or materials furnished shall be payable at the same times and subject to the same conditions and stipulations as those above set forth. No payments made under this agreement shall be deemed an acceptance of the work comprehended in this agreement, either wholly or in part, and no payment shall be construed to be an acceptance of defective work or improper material, nor a waiver of the right of the general contractor to require strict performance of this agreement and of the work comprehended herein.

Article XII. If at any time there shall be evidence of any liens or claims for which, if established, the said premises, or the owner of the said premises, or the general contractor might become liable, and which is, are or purport to be chargeable to the sub-contractor the general contractor shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify it against any such liens or claims, including all expenses of whatsoever kind incurred or necessary to be incurred by the general contractor in defending or in bonding, discharging, or otherwise disposing of such liens or claims. Should such amount be in excess of the amount due or to grow due to the sub-contractor under this agreement then the sub-contractor agrees to pay to the general contractor the amount of such excess.

Article XIII. In case the parties hereto fail to agree in relation to the amount to be paid or allowed, or extension of time, referred to in Article III, or extension of time referred to in Article VI of this agreement, then the sub-contractor may within ten (10) days after such failure to agree refer the matter to a board of arbitration to consist of one person selected by the general contractor, and one person selected by the sub-contractor, these two to select a third. The decision of any two of this board shall be final and binding on both parties hereto. Each party shall pay one-half of the expense of such arbitration. If the sub-contractor fails to refer such matter of disagreement to arbitrators as herein provided, then the determination of the general contractor in regard thereto shall be final and binding.

*Exhibit P. 3.*

Article XIV. The sub-contractor further obligate themselves to carry during the life of this contract, Employers' and Public Liability and Workmen's Compensation Insurance in a company or companies and in amounts approved by the general contractor, which amounts shall be sufficient to cover the liability of the general contractor and of the sub-contractor arising by statute or common law or under any Workmen's Compensation Act, Employers' Liability Act, or any act of similar purport now in force or hereafter enacted, applying in any way to the parties to this agreement. Should the sub-contractor fail, refuse or neglect to procure such insurance and to furnish the general contractor with satisfactory evidence thereof and of the payment of the premium thereon prior to the commencement of the work comprehended in this agreement, the general contractor may procure such insurance at the expense of the sub-contractor and may deduct such expense, to wit, the cost thereof from any amount due or to grow due by the general contractor to the sub-contractor, but failure on the part of the sub-contractor to procure or carry such insurance or failure on the part of the general contractor to secure such insurance on behalf of the sub-contractor, shall not in any way relieve the sub-contractor from liability to hold harmless the general contractor under the terms of this agreement. It is further understood and agreed that every such policy of insurance shall have made a part thereof, as a condition thereto, a clause providing that the same shall not be cancelled either by the assured or by the insurer except upon ten days' notice in writing to the general contractor at its principal place of business, 33 Old Broadway, New York City.

Article XV. The plans and specifications hereinbefore mentioned are intended to co-operate so that any works exhibited in the plans and not mentioned in the specifications, or mentioned in the specifications and not exhibited in the plans, shall be executed the same as if mentioned in the specifications and exhibited in the plans, to the true intent and meaning of the said plans and specifications.

Article XVI. The sub-contractor shall not sublet this contract or any part thereof and shall not transfer or assign said contract or any interest herein or part hereof or any right to any of the moneys to be paid him hereunder, and any such assignment, transfer or subletting as aforesaid shall, at the option

*Exhibit P. 3.*

of the general contractor be null and void, and if it so elects make void this contract.

Article XVII. All materials delivered at the premises or furnished to the general contractor under this agreement shall be and continue to be free from conditional sale agreements, chattel mortgages, liens or other incumbrances, and the sub-contractor agrees that he will then have a good and absolute title thereto, free from all incumbrances, and that no payment shall be due or thereafter become due to the sub-contractor so long as such materials or any part thereof is contrary to the foregoing provisions and the sub-contractor hereby agrees, at the request of the general contractor, to furnish a good and sufficient waiver of lien on said materials from every person or persons or corporation, furnishing labor or material under the sub-contractor in connection with this agreement.

Article XVIII. The sub-contractor agrees to guarantee the work comprehended in this agreement in accordance with the terms of the specifications. Said guarantee to be in writing and in form satisfactory to the general contractor, and the delivery thereof to the general contractor to be a condition precedent to final payment.

Article XIX. The sub-contractor agrees to furnish a surety company bond, acceptable to the general contractor, conditioned to faithfully comply with, do and perform each and every of the covenants and agreements embodied herein.

Article XX. The address of the sub-contractor is No. 1451 B'way, N. Y. C. Any notice provided for herein may be given by depositing such notice, in a sealed post paid envelope addressed to the sub-contractor and directed to the above address, in any United States Post Office Station, letter box, or other official receptacle for mailable matter.

Article XXI. The sub-contractor during the progress of the work shall maintain insurance on the same against loss or damage by fire in companies and in amounts approved by the general contractor, the policies of said insurance to cover all work incorporated in the building and all materials for the same in or about the premises and to be made payable to the parties hereto as their interests may appear, and in default of so doing the general contractor may effect such insurance at the expense

*Exhibit P. 3.*

of the sub-contractor, deducting the cost thereof from any balance due or to grow due to the sub-contractor.

Article XXII. Except as herein provided, this agreement can neither be altered nor modified unless by agreement in writing signed by the parties hereto, and no officer, agent or representative of the general contractor shall have power to waive or be deemed or held to have waived any of the provisions of this agreement unless such waiver, if any, be in writing signed by the general contractor by a duly authorized officer.

Article XXIII. It is understood and agreed that wherever the word "Architect" appears herein it shall be deemed to mean the Architect named in Article I, hereof or their successor or successors as architect for the work comprehended herein.

It is to be understood that under flooring is to be installed under finished gymnasium floors.

It is to be understood that austral patented windows are to be installed in accordance with alternate, as called for on page #55 of the specifications.

It is to be understood that alternate for composition flooring in corridors has been accepted, and therefore, no finished flooring in corridors is included in this contract.

It is also to be understood that alternate for stairway enclosures has been accepted, and therefore, these enclosures are not included in this contract.

Article XXIV. The said parties for themselves, their heirs, successors, executors and administrators do hereby agree to the full performance of the covenants and agreements herein contained.

In Witness Whereof, the parties hereto have signed and sealed this instrument the day and year first above written.

*In Presence of*

P. F. KENNY CO.

E. S. Good. per P. F. Kenny, Pret.

(SEAL)

H. W. PALEN'S SONS

W. A. Horton. per F. H. Humpheny. Pres.

(SEAL)

*Exhibit P. 4.*

AGREEMENT

Between

P. F. KENNY COMPANY

General Contractor.

and

H. W. PALEN'S SONS

Sub-Contractor.

For

Carpenter work at Morristown High School, Atno Ave. & Early Sts., Morristown, N. J.

DATED

June 9th, 1916

ARCHITECTS,

Guilbert & Betelle, Archts., #665 Broad St., Newark, N. J.

AMOUNT OF CONTRACT,

$25,000.00.

**EXHIBIT P. 4.**

Assignment—H. W. Palen's Sons, a corporation of the State of New York, to Charlotte Jacobi, for valuable consideration, of claims against the Board of Education of the town of Morristown in the County of Morris in the State of New Jersey in amount of $3027.4 made up as follows

| | |
|---|---|
| Exterior window sash | 1575.42 |
| Austral hardware for same | 1452 |
| | $3027.42 |

*Exhibit P. 5 for Identification.*

**EXHIBIT P. 5 FOR IDENTIFICATION.**

Aug. 29, 1917.

MORRISTOWN HIGH SCHOOL.

Chairman of the Board of Education,
Morristown, N. J.

Dear Sir:

Agreeable to our understanding yesterday we submit herewith our estimate to complete the woodwork for the Morristown High School as covered by our contract with P. F. Kenny Co., according to plans and specifications prepared by Guilbert & Betelle, Architects, which includes supplying and erecting in place the following items:

Grounds, bucks, centers, blocking, door and window bucks, furring, floor timbers, ceiling light support, flag pole, plank walks, wood strips for stage curtains, finished floors and rough hardware, such as: nails, bolts and screws, hardware for Austral windows. Exterior window frames and sash, and interior trim complete including blackboards, cork bulletin boards, and under flooring for gymnasium. All in white not filled, varnished or painted except exterior window frames and sash for same which are to be primed one coat lead and oil for the sum of TWENTY THOUSAND FOUR HUNDRED FORTY-SEVEN 82/100 DOLLARS. ($20,447.82)

*Exceptions.*

Items not included: window cleaning safety bolts, sleepers, nailcoad, finished floors in corridors, enclosure for stairs, glass, finished hardware, copper flashing for exterior windows, weather strips or ploughing for same, painting except as specified above. This estimate provides for accordin doors instead of Sectional Folding Partitions for the reason that the manufacturer will not sell the hardware separate from the partitions, no metal or metal covered work of any kind.

We are prepared to give quick service in the completion of our work which no doubt can be done within four weeks after building is in shape to receive it.

Yours truly,
H. W. PALEN'S SONS.
Per

CHH/MG

*Exhibits P. 6 and P. 7.*

**EXHIBIT P. 6 FOR IDENTIFICATION.**

Sept. 21, 1917.

MORRISTOWN HIGH SCHOOL.

Chairman of the Board of Education,
Morristown, N. J.

Dear Sir:

Enclosed herewith you will find copy of letter, and also copy of estimate referred to herein mailed this day to Guilbert & Betelle.

There is nothing further we can add to that which we have said to the Architects except that in case of changes or modification of the plans and specifications such as changing the flooring from Maple to N. C. Pine our estimate will be modified according.

Yours truly,

H. W. PALEN'S SONS.
Per

CHH/MG

**EXHIBIT P. 7.**

Oct. 8, 1917.

MORRISTOWN HIGH SCHOOL.

Mr. George T. Smith, Pres.
School Board,
Morristown, N. J.

Dear Sir:

We are advised by Reeve & Burr, contractors for completing this building, that they are using material delivered by ourselves to this building for which we have not been paid, and which under our contract with P. F. Kenny Co., requires erecting or setting in place in the building.

The material in question comprising hardware, sash, and other woodwork was delivered at the building for our convenience for setting in place as the building progressed.

*Exhibit P. 10.*

We shall therefore, expect to be reimbursed for said material, and by this notice you will understand that we lay claim for the value of same.

Yours truly,

H. W. PALEN'S SONS.

CHH/MG Per

**EXHIBIT P. 10.**

GUILBERT & BETELLE

ARCHITECTS

New York, N. Y. Newark, N. J.

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CONTRACT

THIS AGREEMENT, made the twenty-sixth day of September in the year one thousand nine hundred and seventeen by and between The Board of Education of the Town of Morristown, in the County of Morris, (hereinafter designated the Owner), party of the first part and George E. Reeve and John R. Burr, partners trading as Reeve & Burr, of Morristown, New Jersey, party of the second part (hereinafter designated the Contractor),

WITNESSETH, that the Contractor, in consideration of the agreements herein made by the Owner, agrees with the Owner as follows:

Article I. The Contractor shall and will provide all the materials and do and perform all the work required to complete the general construction of the New High School Building located on Atno Avenue and Early Street, in Morristown, New Jersey, including the alternate for the use of cinder concrete and wood sleepers in place of "Nail fast" as referred to on pages 18 and 35 of Specifications, and also including work of reinforcing floor slabs over third floor and furring and plastering ceilings and beams as referred to on page 17 of the Specifications.
shown by the drawings and described in the specifications prepared by Guilbert & Betelle, Architects, which drawings and

*Exhibit P. 10.*

specifications identified as High School, at Morristown, N. J., Guilbert & Betelle, Architects, Dated Dec. 18th, 1915, and Bulletin No. 1, dated February 19, 1916, and Specifications, dated September 1, 1917, and by the signatures of the parties hereto, are, together with the form of advertisement, instructions to bidders, forms of proposal and bond, hereby acknowledged and incorporated into these presents and are to be taken as part of this contract.

Article II. The Contractor declares and agrees that he will be responsible for the full performance and completion of all the work to be done under this contract, and by the execution hereof admits that he has carefully informed himself respecting all conditions at the site and pertaining to the work to be done.

Article III. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the directions of the Architects, who will decide as to the construction and meaning of the drawings and specifications, and pass upon materials and methods for performing the contract.

It is also understood and agreed by and between the parties hereto that they will conform to and abide by such additional drawings and explanations as may be furnished by the said Architects to further detail and illustrate the work to be done, which drawings and explanations will be consistent with the purpose and intent of the original drawings and specifications referred to in Art. I and not be considered as indicating additional work.

Article IV. The Owner, the Architect, and their representatives shall, for the purpose of inspection, have free and safe access at any and all times, to the building and to the shops of the Contractor, his sub-contractors and material men, wherever any material for this building is being prepared or manufactured.

The Architects and their representatives may reject any part of the work or materials which, in their opinion, is not in accordance with the drawings and specifications, whether already inwrought into the building or not. Work or materials rejected shall be at once removed from the site and not be returned at any subsequent time, but be replaced with approved workmanship or material at the expense of the Contractor, who will also make good any damage incident thereto, or after three (3) days'

*Exhibit P. 10.*

notice, the Owner shall have the right to have the same done and charge the cost thereof to the Contractor's account, or at its option and upon recommendation of the Architects, retain and receive from the Contractor the difference in value between the work involved and that required, together with a fair allowance for damage, as determined by the said Architects.

The final inspection of all materials and workmanship shall be made at the building, all others being preliminary.

Article 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 to pay insurance premiums, 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, or shall become insolvent or be declared bankrupt, such refusal, neglect, failure, insolvency or bankruptcy being certified in writing to said Owner, by the said Architects, the Owner shall be at liberty to provide watchmen to guard the property, and to furnish all labor, materials and supplies necessary to properly care for the work already performed.

If the said Architects shall certify that such refusal, neglect, failure, insolvency or bankruptcy is sufficient ground for such action, the Owner shall be at liberty, three days after service of a written notice upon the Contractor, of its intention so to do, to terminate the employment of the Contractor for the said work and enter upon the premises for the purpose of completing the work included under this contract, and to take possession, in whole or in part, of any or all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor, and pay such insurance premiums, and any other expenses caused by such refusal, neglect, failure, insolvency or bankruptcy, and to deduct the expenses incurred therefor from any money then due or to become due to the Contractor under this contract.

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 shall exceed the expense incurred by the Owner in finishing the work, such excess shall be paid by the Owner to the Contractor; but if such expense shall exceed such unpaid balance, the Contractor or his Surety shall pay the difference to the Owner.

*Exhibit P. 10.*

The expense incurred by the Owner as herein provided, either for furnishing materials or finishing the work, or for any other cause, and any other damage incurred through such default shall be audited and certified by the said Architects, and the amount so certified will be deducted from the balance due the Contractor.

Article VI. In case of failure of the Contractor to supply material or labor at such times as in the opinion of the said Architects will insure completion within the contract time, and if upon demand of the said Architects he cannot within three days, not including Sundays or legal Holidays, state definitely when he can and will furnish such material or labor, then the Architects shall have the right to send their own representatives to the shops of sub-contractors, or supply centers, and trace cars or otherwise ascertain the real facts. Should this be necessary, the time of the representatives at $10.00 per day each and all necessary expenses will be charged against the Contractor, the Owner deducting from any money due or thereafter becoming due him, the amount of such charge.

Article VII. The Architects shall have the right at any time, upon notice in writing to require the Contractor at his expense to employ and keep so much extra labor and material as in the opinion of said Architects shall be necessary to insure completion of the work within the contract time, and if the Contractor shall fail to comply with such notice within three days, not including Sundays or legal Holidays, from the time of service upon him then the said architects shall be at liberty to employ such extra labor and material as they deem necessary and the Owner will deduct the cost thereof from any money due or hereafter becoming due the Contractor.

Article VIII. The Owner shall have the right to require alterations, additions or deductions in the total amount of work to be performed under this contract, but no modification shall be made without a written order of the said Architects approved by the Owner. No modifications, as above shall involve any time extension unless such is defined in the former order for same, and when so defined, will be understood to apply only to the work required by the order and shall not affect the time of completion for the contract as a whole unless the order so states. Failure to complete any modification, as above, within the time stated by the order, or within the time to which completion of same may have been extended for reasons stated in the specifi-

*Exhibit P. 10.*

cations, shall subject the Contractor to a deduction of five ($5.00) dollars per day on work involving $1,000 or under and ten ($10.00) dollars per day on amounts above $1,000, Sundays and Holidays excepted, which sum is hereby agreed upon, fixed settled and determined as the liquidated and ascertained damages which will be suffered by the Owner for such failure of the Contractor to complete the work required by such order within the time fixed, and such deductions shall not in any way release the Contractor from the further or other obligations in respect to the fulfillment of the entire contract nor affect the liquidated damages in Article X. In case of modifications, the Contractor should base his estimate of the amount to be added to or deducted from the contract price upon the unit rates in the schedule, provided such apply and are considered by the said Architects to be reasonable; or if not considered reasonable or applicable, the fair market valuation will be ascertained by the said Architects and the amount so ascertained will be added to or deducted from the contract price. If modifications be ordered after the manufacture of material has begun, then such material and labor will be paid for at a reasonable rate, based upon the Contractor's estimate if considered reasonable, or ascertained by the Architects as in the foregoing. Should the Contractor not agree with the Architects as to the amount to be paid or allowed, the work shall go on under the order required above, and in case of failure to agree, the determination of said amount shall be referred to arbitration, as provided for in Art. XV. of this contract.

Article IX. The Contractor further declares and agrees that he will not assign, transfer or otherwise dispose of this contract, or of his right or interest therein, nor assign by power of attorney or otherwise any of the moneys due or to become due to him without having obtained the previous consent in writing of the Owner. If, without such consent, he should assign or otherwise dispose of his contract, his interest therein or money due or to become due, the Owner may revoke and annul the said contract and thereupon be relieved from all liability growing out of the said contract to him or to his assignees.

Article X. It is further understood and agreed by and between the parties hereto, that the work herein included shall be commenced within ten days after the signing of this contract and be completed on or before January 1, 1918.

*Exhibit P. 10.*

Whereas, time is of the essence of this contract, and the Owner would suffer loss by the failure of the Contractor to complete the work at the time hereinbefore stated or at other than the time to which completion may have been extended, as provided in the specifications under certain condition, and as the parties hereto might be unable to agree as to the amount of the loss which would be suffered by the Owner and it might be impossible to compute the amount of such loss, the Contractor agrees that the Owner may deduct and retain out of any moneys due or thereafter to become due him under this contract as and for liquidated and ascertain damages, the sum of Twenty-five ($25.00) dollars for each and every day which may elapse between the appointed and actual time of completion, Sundays and Holidays excepted, which sum is hereby agreed upon, fixed, settled and determined by the schedule following as the liquidated and ascertained damages which will be suffered by the Owner for such failure of the Contractor to complete this contract within the time fixed, and such deductions shall not in any way release the Contractor from the further or other obligations in respect to the fulfillment of the entire contract.

SCHEDULE OF LIQUIDATED DAMAGES:

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| $5.00 | per | day | on | contracts | up to | $2,500 | inclusive | | | |
| 10.00 | " | " | " | " | above | 2,500 | and up to | $10,000 | | |
| 15.00 | " | " | " | " | " | 10,000 | " | " | " | 20,000 |
| 20.00 | " | " | " | " | " | 20,000 | " | " | " | 50,000 |
| 25.00 | " | " | " | " | " | 50,000 | " | " | " | 100,000 |
| 32.50 | " | " | " | " | " | 100,000 | " | " | " | 150,000 |
| 40.00 | " | " | " | " | " | 150,000 | " | " | " | 200,000 |
| 50.00 | " | " | " | " | " | 200,000 | " | " | " | 250,000 |
| 60.00 | " | " | " | " | " | 250,000 | " | " | " | 300,000 |
| 67.50 | " | " | " | " | " | 300,000 | " | " | " | 350,000 |
| 75.00 | " | " | " | " | " | 350,000 | " | " | " | 400,000 |
| 87.50 | " | " | " | " | " | 400,000 | " | " | " | 500,000 |
| 100.00 | " | " | " | " | " | 500,000 | | | | |

Article XI. It is hereby mutually agreed by and between the parties hereto, that the sum to be paid by the Owner to the Contractor for said work and materials shall be Fifty Six Thousand Four Hundred and Fifty-Nine ($56,459.00) dollars subject to additions and deductions as provided for herein, and

*Exhibit P. 10.*

that such sum shall be paid by the Owner to the Contractor, in current funds, and only upon certificate of the said Architects, countersigned by

Payments to be made monthly, representing 85% of the labor and materials satisfactorily incorporated into the building during the month preceding payment, thus accumulating a 15% reserve until final payment, which will be made in not less than 15 days nor more than 30 days after the completion and acceptance of the work by the Owner, except that 1% shall be retained for one year after date, of final acceptance of the work.

The Contractor's application for monthly payment must be itemized and will be audited by the Architects, modified if found necessary, and certificate issued for amount approved by the Architects.

All payments shall be due when certificates for the same are issued, such certificates being a condition precedent to any liability of the Owner respecting payments. No certificate will be issued should violations of the contract or unsatisfactory materials, workmanship or conditions exist, and such certificate shall not become due until such violations or conditions have been corrected to the satisfaction of the said Architects.

Article XII. It is further mutually agreed by and between the parties hereto, that no certificate issued 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 made nor the occupancy of the building in whole or in part shall be construed as an acceptance of defective work or improper materials, nor relieve the Contractor from making good, defects, as required by his guarantee.

The final acceptance shall not be binding upon the Owner nor conclusive, should it subsequently develop that the Contractor had supplied inferior material or workmanship or had departed from the terms of his contract. Should such a condition become evident, the Owner shall have the right, notwithstanding final acceptance and payment, to cause the work to be properly done in accordance with the drawings and specifications at the cost and expense of the Contractor or his surety.

Article XIII. That the Owner may be free to adjust liens, claims or other liabilities arising from the construction of the work under this contract for which, if established, the

*Exhibit P. 10.*

Owner might become liable, and which are chargeable to the Contractor, or to repair or replace materials or workmanship which may be defective, if any, the Owner shall have the right to retain out of any payment then due or thereafter to become due the Contractor under this contract, an amount sufficient to completely indemnify against such liens, claims, or other liabilities, or the repairing or replacing of defective materials or workmanship, if any.

Previous to the issue of the final certificate the Contractor shall furnish to the Owner satisfactory evidence of the settlement of all claims against the building and the Owner.

Article XIV. The Contractor agrees that he will provide a satisfactory bond, in amount equal to one-third of his contract, executed upon the blank form in use by the Architects by a Surety Company acceptable to the Owner and qualified to do business under the laws of the State of New Jersey such bond insuring the fulfillment of all the provisions of this contract, the advertisement, instructions to bidders, drawings and specifications which are a part hereof, and the satisfactory completion of the work thereby required and shown, within the time stated and covering the one year's guarantee required in the general conditions of the specifications, the prompt payment of all persons furnishing materials or labor, or both, required for the prosecution of the work, and the defending and settlement without expense to the Owner of liens, claims for personal injury, or otherwise, or from other liabilities arising from the execution of the work, or from the use of patented articles. The Contractor further agrees that he will furnish an additional satisfactory bond or bonds by a like Surety Company in the amount, for the period of time, and covering any and all guarantees as required by the specifications.

Article XV. In case the Architects and the Contractor fail to agree as to payment, allowance or loss referred to in Article VIII of this contract, or should the Contractor dissent from the decision of the Architects as to the extension of time for completion as provided for in the specifications, which dissent shall have been filed in writing with the Architects within one week of the announcement of such decision, then the matter shall be referred to the Owner and if its decision be also unsatisfactory to the Contractor, then be referred to a Board of Arbitration to

*Exhibit P. 10.*

consist of one person selected by the Owner and one person selected by the Contractor, these two to select a third. The decision of any two of this Board shall be final and binding on both parties hereto. Each party hereto shall pay one-half of the expense of such arbitration.

Article XVI. This agreement shall bind the heirs, executors, administrators, successors and assigns of the respective parties hereto.

In Witness Whereof the party of the first part has set his or their hand and seal, or hands and seals, or has caused its corporate seal to be hereto affixed and these presents to be signed by its proper officers, and George E. Reeve and John R. Burr, partners trading as Reeve & Burr, Contractor, party of the second part, has set his or their hand and seal or hands and seals, or has caused its corporate seal to be hereto affixed and these presents to be signed by its proper officers, the day and year first above written.

THE BOARD OF EDUCATION OF THE TOWN OF MORRISTOWN, IN THE COUNTY OF MRRIS, By

[owner]

Attest:

Louis C. Leprohon,
Dist. Clerk.

George C. Smith,
President.

GEORGE E. REEVE
JOHN R. BURR
Contractor.

Signed, Sealed and Delivered by the said Contractor in the presence of

C. F. Wilson.

*Exhibit P. 11.*

CONTRACT

For Completion of the General Construction of the New High School Building located at Atno Avenue and Early Street, in Morristown, N. J.

BETWEEN

THE BOARD OF EDUCATION OF THE TOWN OF MORRISTOWN, IN THE COUNTY OF MORRIS,

Owner

AND

REEVE & BURR,

Contractor.

Date September 26th, 1917

GUILBERT & BETELLE
Architects

**EXHIBIT P. 11.**

SPECIFICATIONS.

COMPLETION OF MORRISTOWN HIGH SCHOOL.

BETWEEN

BOARD OF EDUCATION OF MORRISTOWN,

AND

REEVE & BURR.

CARPENTRY: Bottom pgs. 35 & 36.

MILL WORK:

Should the "Mill Work" be let as a separate contract, such Contractor's attention is directed to "General Conditions" in the fore part of this specification.

MATERIALS:

All exterior work shall be of clear, kiln dry, white pine or cypress, excepting the sashes which shall be of clear white pine and pulley stiles of window frames which shall be long leaf clear yellow pine.

*Exhibit P. 11.*

WINDOW FRAMES & SASH:

Provide frame and sash for opening #9A in Boiler Room. Provide and secure in place any missing or loose staff beads on exterior door or window frames.

This Contractor shall make good about 35 to 40 crooked and sprung window jambs and mullions, sills, heads, etc.

All exterior windows are to be of a type similar and equal to that of the Austral Window Co., 101 Park Ave., New York City, except those shown as casement windows.

SASH ON PREMISES:

The Contractor to install and set complete with all hardware, all sash now on the premises; he is to ascertain the number and quantities of window sash, hardware and fixtures for same now on the premises. If any are found to be missing or in defective condition the same shall be furnished or made good by this Contractor.

The Contractor will note that a certain number of austral window sash are in place, any such sash that is not properly fitted or that require repairing shall be put in a satisfactory condition.

MILL WORK PRIMING.

All new window frames and sash to be given one (1) coat of lead and oil at the mill.

Page 54.

WINDOWS: Note; windows installed are "AUSTRAL SASH".

*Exhibit P. 12.*

## EXHIBIT P. 12.

Certificate No. 622.

$4,908.75 August 11, 1917

To Morristown Board of Education, Morristown, N. J.

This is to Certify That under the terms of the contract dated Mar. 14/1916 for work upon Morristown High School, Atno Ave. & Early St., Morristown, N. J. Messrs. P. F. Kenny Co., #33 Old Broadway, N. Y. City Contractor for General Construction entitled to the fourteenth payment amounting to Four-thousand-Nine-hundred-Eight-and-75/100..... /100 Dollars,

Guilbert & Betelle, Architects
Newark, N. J.

| | |
|---|---|
| Amount of Contract....$167,025.00 | Note |
| Additions .....$ 2,700.00 | Total amount of work done to date .....$143,501.00 |
| Total .....$169,725.00 | Less 15% retained.....$ 21,525.15 |
| Deductions .....$ | Total amount paid to date .....$121,975.85 |
| Total .....$169,725.00 | |
| Am't of this Cert..$ 4,908.75 | |
| Previously Paid..$117,067.10 | |
| Total paid to date.....$121,975.85 | |
| Balance .....$ 47,749.15 | |

Approved

(Signed)
GUILBERT & BETELLE,
Architects.

$..... .....191

Received from .....

..... /100 Dollars,

as per above Certificate. .....

*Exhibits D. 2 and D. 3.*

## EXHIBIT D. 2.

Sheet No. ACCOUNT OF P. F. Kenny Co. No. 86

ADDRESS Morristown High School

Occupation Bank

| DEBITS | | | | | CREDITS | | | |
|---|---|---|---|---|---|---|---|---|
| Date 1916 | Invoice No. | Factory Sales | Lumber Sales | Total | Date 1916 | Reference | Total | Remarks |
| May 12 | 4532A | Contract F. O. 494 | 25,000.00 | | July 7 | 60 d. note | 1,500.00 | |
| | | | | | Sept. 9 | 3 M. note | 1,710.00 | |
| | | | | | " 29 | 60 d. " | 500.00 | |
| | | | | | Oct. 16 | V R 102 | 111.70 | Anchors |
| | | | | | " 17 | " " | 15.18 | " |
| | | | | | 1917 | | | |
| | | | | | Jan. 4 | V R 108 | .44 | Expr. H'dware |
| | | | | | " 5 | " " | 6.60 | " " |
| | | | | | " 8 | " " | 37.00 | Labor |
| | | | | | " 16 | 2 M. note | 1,000.00 | |
| | | | | | " 25 | V R 108 | 4.46 | Expr. H'dware |
| | | | | | " 29 | " " | 31.60 | " & Labor |
| | | | | | Mar. 14 | V R 111 | 84.90 | |
| | | | | | May 22 | V R 115 | 42.00 | |
| | | | | | " 23 | " " | 58.30 | |
| | | | | | | | 5,102.18 | |

## EXHIBIT D. 3.

August 2nd, 1917.

BOARD OF EDUCATION,
Town of Morristown,
County of Morris,
State of New Jersey.

MORRISTOWN HIGH SCHOOL
General Construction.

Gentlemen:—

In accordance with the provisions of ARTICLES IV—V and VII of the contract between the Board of Education of the Town of Morristown, in the County of Morris, and the P. F. Kenny Company, we hereby certify, that, the P. F. Kenny Company, General Contractors on the High School at Morristown, N. J., have refused or neglected to supply a sufficiency of properly skilled workmen and materials, and to prosecute the work with promptness and diligence, especially in connection with the weak and defective floor arches in the front of the building on the third floor, which are either to be removed and replaced with arches of proper strength, or otherwise satisfactorily reinforced

*Exhibit D. 4.*

and strengthened. Such neglect to promptly rectify these conditions and to prosecute the work on the contract generally, is the cause of delay to other Contractors in the completion of their work, and unnecessary delay in the completion of the contract of the P. F. Kenny Company.

In accordance with the terms of said contract, we hereby recommend that a three days' notice be served upon the P. F. Kenny Company to proceed with the making good of these defective floor arches, and to employ and keep sufficient additional labor and material on the job as to insure the completion of the work without further delay. Otherwise the Morristown Board of Education will proceed in accordance with the terms of the contract applying to these conditions.

Very truly yours,
Guilbert & Betelle,
Architects.

JOB—MW

**EXHIBIT D. 4.**

To P. F. Kenny Company:—

Take Notice, That you have failed and neglected to remove the defective work comprising floor arches on the third floor front of Morristown High School building, the same having been rejected by the Architects, and you notified by them of such rejections; and

You Are Hereby Notified, To remove said defective floor arches and replace same, in a manner to be approved by said Architects, and as called for and provided in contract between you and Board of Education of Town of Morristown, dated March 14, 1916, and the drawings and specifications therein and thereby referred to and made a part thereof.

Dated, August 11th, 1917.

BOARD OF EDUCATION OF
THE TOWN OF MORRISTOWN,

By Geo. C. Smith,
President.

*Exhibit D. 5.*

Service of the Notice of which this is a copy is hereby acknowledged, this August 13, 1917.

P. F. Kenny Company,
By P. F. Kenny,
President.

## EXHIBIT D. 5.

To P. F. Kenny Company:—

Take Notice, That you have refused, failed and neglected to supply a sufficiency of properly skilled workmen and materials of the proper quality, and in many other respects to prosecute the work with promptness and diligence, called for and provided in your contract with the undersigned, dated March 14, 1916, all of which has been certified in writing to the undersigned by the Architects, named in said contract as therein provided; and

You Are Hereby Notified, That the undersigned, the owner referred to in said contract, will, three days after service of this notice upon you, terminate your employment for the said work and enter upon the premises for the purpose of completing the work included in said contract as therein provided, said Architects having certified that such refusal, failure and neglect is sufficient ground for such action.

Dated, August 15th, 1917.

BOARD OF EDUCATION OF THE TOWN OF MORRISTOWN, IN THE COUNTY OF MORRIS.

By Geo. C. Smith
President.

*Exhibit D. 6.*

## EXHIBIT D. 6.

To P. F. Kenny Company:—

At a meeting of the Board of Education of the Town of Morristown, in the County of Morris, held on Friday, August 31, 1917, I was directed to notify you of action taken by said Board with reference to your contract with said Board for the erection of the High School Building, dated March 14, 1916; therefore

You Are Hereby Notified, That said Board has decided that you have abandoned your said contract, and that said Board will at once proceed with the work required to complete and finish said High School Building as the same is called for and provided in its contract with you, unless the surety on your bond, after being notified, shall at once proceed so to do; and

You Are Hereby Further Notified, That annexed hereto is a copy of the Resolution of said Board which I was by said Board directed to serve upon you.

Dated, August 31, 1917.

Yours respectfully,

Louis C. Leprohon,
District Clerk,
and Clerk of The Board of Education of the Town of Morristown, in the County of Morris.

Whereas, Messrs. Guilbert & Betelle, architects named in the contract between The Board of Education of the Town of Morristown, in the County of Morris, and P. F. Kenny Company, dated March 14, 1916, have certified in writing to said Board of Education that said P. F. Kenny Company had failed and neglected to remove and replace the defective floor arches on the third floor front of the building called for by said contract, called Morristown High School Building; and

Whereas, Notice thereof was served on said P. F. Kenny Company on August 13, 1917, of which notice the following is a true and correct copy, namely:—

"To P. F. Kenny Company:

"Take Notice, That you have failed and neglected to remove the defective work comprising floor arches on the

*Exhibit D. 6.*

third floor front of Morristown High School Building, the same having been rejected by the Architects and you notified by them of such rejection; and

"You Are Hereby Notified, to remove said defective floor arches and replace same, in a manner to be approved by said Architects, and as called for and provided in contract between you and Board of Education of Town of Morristown, dated March 14, 1916, and the drawings and specifications therein and thereby referred to and made a part thereof.

"Dated, August 11th, 1917.

"Board of Education of the Town
of Morristown,
By Geo. C. Smith,
President."

And Whereas, said Architects have further certified in writing that said P. F. Kenny Company had refused, failed and neglected to supply a sufficiency of properly skilled workmen and materials of the proper quality, and in many other respects to prosecute the work with promptness and diligency called for by said contract; and

Whereas, Notice to that effect was served on the said P. F. Kenny Company on August 20, 1917, of which notice the following is a true and correct copy, namely:

"To P. F. Kenny Company:

"Take Notice, That you have refused, failed and neglected to supply a sufficiency of properly skilled workmen and materials of the proper quality, and in many other respects to prosecute the work with promptness and diligence, called for and provided in your contract with the undersigned, dated March 14, 1916, all of which has been certified in writing to the undersigned by the Architects named in said contract, as therein provided; and

"You Are Hereby Notified, That the undersigned the owner referred to in said contract, will, three days after service of this notice upon you, terminate your employment for the said work and enter upon the premises for the purpose of completing the work included in said con-

*Exhibit D. 6.*

tract, as therein provided, said Architects having certified that such refusal and neglect is sufficient ground for such action.

"Dated, August 15th, 1917.

"BOARD OF EDUCATION OF THE TOWN OF MORRISTOWN, IN THE COUNTY OF MORRIS,

By Geo. C. Smith,
President."

AND WHEREAS, said P. F. Kenny Company has not complied with the said notices, has ignored the same, has taken no action by reason thereof, and has abandoned said contract and said work under said contract for the erection and completion of said High School Building, and has ceased to do or have done any work thereon; therefore be it RESOLVED.

1. That said P. F. Kenny Company be notified by the Clerk of this Board that this Board has decided that said P. F. Kenny Company has abandoned its said contract, and that this Board shall at once proceed with the work required to complete and finish the said High School Building, as the same is called for and provided in the contract with the said P. F. Kenny Company, unless the surety on the bond of the said P. F. Kenny Company, after being notified, shall at once proceed so to do, and that said Clerk serve a copy of this Resolution on said surety and said P. F. Kenny Co.

2. That the Clerk of the Board notify the surety on the bond of the said P. F. Kenny Company of the action taken by this Board in relation to the contract between said Board and said P. F. Kenny Company, and that this Board will hold said surety responsible for the faithful performance of said contract, and serve a copy of this Resolution on said surety.

3. That said Architects be, and hereby are, directed to prepare proper specifications for work undone and necessary to be done to completely perform and finish said contract of said P. F. Kenny Company, and report the same to this Board with all convenient speed to the end that this Board may proceed with the doing of said work pursuant to said contract, in the event that the surety on the bond of said P. F. Kenny Company shall fail and neglect so to do, after being notified as aforesaid.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

# New Jersey Court of Errors and Appeals

| | |
|---|---|
| CHARLOTTE JACOBI,<br>*Plaintiff-Appellant,*<br>*vs.*<br>THE BOARD OF EDUCATION OF MORRISTOWN, IN THE COUNTY OF MORRIS,<br>*Defendant-Respondent.* | *Action at Law.*<br>*On Appeal from Supreme Court.* |

## BRIEF OF PLAINTIFF-APPELLANT.

On March 14, 1916, defendant entered into a contract with P. F. Kenny & Co., a corporation, hereinafter referred to as Kenny Co., for the construction of a new high school building, located at Atno avenue and Early street, in Morristown, N. J. (Ex. P. 1, case, p. 85, etc.; specifications, Ex. P. 2, p. 94, etc.). On June 9, 1916, said P. F. Kenny & Co. entered into a contract with H. W. Palen's Sons to do carpenter work required in the erection and completion of the said high school (Ex. P. 3, case, p. 95, etc.). Subsequent to June 9, 1916, said H. W. Palen's Sons entered upon the performance of the work to be done by it under the last mentioned contract, and, thereafter and in November or December, 1916, in order to carry out the terms of the same, prepared and caused to be placed upon and about the said high school building, then in the course of erection, certain materials consisting of window sash and hardware for same, belonging to H. W. Palen's Sons (case, p. 9, ll. 15-45; p. 10, ll. 1-4; p. 39, l. 40; p. 40, ll. 1-3).

Over the objection of the plaintiff the defendant introduced in evidence a letter written on August 2, 1917, by Guilbert & Betelle, the architects, to defendant stating that Kenny Co. neglected to supply a sufficiency of workmen and materials and to prosecute the work with diligence and that there was defective work and suggesting that a three days' notice be given by defendant to Kenny Co. (Ex. P. 3, case, p. 119).

On August 11, 1917, the architects certified to the defendant that Kenny Co. was entitled to $4,908.75 (Ex. P. 12, p. 118, l. 1; case, p. 55, l. 41).

The defendant refused to pay to Kenny Co. the amount certified to by the architects in this certificate (case, p. 58, ll. 10-20; p. 62, ll. 22-32).

In spite of this fact the work upon the school building continued up as late a day as September 4, 1917; men were working on the job, as testified to by witness of the defendant (case, p. 67, ll. 40-45; case, p. 68, ll. 1-25).

Over the objection of plaintiff, defendant introduced in evidence a notice dated August 11, 1917, which was served by defendant on Kenny Co., August 13, 1917 (Ex. D. 4, case, p. 120, l. 25) to the effect that the Kenny Co. had not removed defective work, and likewise a notice dated August 15, 1917, was served by defendant upon Kenny Co. August 20, 1917, to the effect that Kenny Co. had neglected to supply sufficient workmen and material and prosecute the work with promptness and thereby notifying Kenny Co. that three days after service defendant would terminate the employment of Kenny Co., stating that the architects had certified that such refusal, failure and neglect was sufficient ground for such action (Ex. D. 5, case, p. 121, l. 15); likewise there was introduced in evidence, over objection of plaintiff, a resolution served on September 5, 1917, by defendant upon Kenny Co., which resolution was dated August 31, 1917 (Ex. D. 6, p. 122, l. 1, etc.), which stated that Kenny Co. had abandoned its contract.

Thereafter several conferences were held between H. W. Palen's Sons and members of the building committee of the defendant relative to the question of having H. W. Palen's Sons finish the work under its contract which it had with Kenny Co. H. W. Palen's Sons offered to finish the work for the same amount as its contract called for less the amount Kenny Co. had already paid, but defendant refused (case, p. 10, ll. 9-25; p. 13, ll. 25-30; p. 14, ll. 18-45; p. 15, ll. 1-45; p. 16, ll. 1-45; p. 30, ll. 30-40; p. 31, ll. 38-45; p. 32, ll. 1-45).

On September 26, 1917, defendant entered into a new contract with Reeve & Burr for the completion of the entire work (Ex. P. 10, case, p. 107, l. 15, etc.; specifications, Ex. P. 11, case, p. 116, ll. 25-45; case, p. 117).

Under that contract and specifications Reeve & Burr were required to use the material of H. W. Palen's Sons aforementioned (case, p. 42, ll. 18-25), namely, the window sash and hardware which H. W. Palen's Sons had placed on the premises for

its (H. W. Palen's Sons) own use in the work under the contract which it had with Kenny Co. (case, p. 9, ll. 15-45; p. 10, ll. 1-4).

Reeve & Burr began the work on October 1, 1917 (case, p. 40, ll. 8-11, ll. 25-30) and finished the building and used the said window sash and hardware, material belonging to H. W. Palen's Sons. Neither Reeve & Burr nor the defendant paid for the same or any part thereof (case, p. 42, ll. 19-25).

The defendant admits that whatever Reeve & Burr did as respect to this material they did under the instructions of the defendant (case, p. 71, ll. 10-13).

The defendant admitted the above facts and claimed that it had a legal right to take the said material on the ground that Kenny Co. had defaulted in its contract and under Article V of said contract all materials upon the defendant's premises, the defendant had a legal right to take and use.

H. W. Palen's Sons assigned its claim to the plaintiff Charlotte Jacobi (Ex. P. 4, case, p. 104, l. 27).

Plaintiff moved for a direction of a verdict on the ground that it was admitted defendant took the material; that there was no contradictory evidence as to its value; and that the defendant had no right to take it, first, because Kenny Co. had not defaulted in its contract with the defendant, but that defendant had itself defaulted; second, that even if Kenny Co. had defaulted, the title to the material was still in H. W. Palen's Sons and no title had passed to Kenny Co.

The Trial Court submitted the case to the jury on the question of whether title had passed from Palen's Sons to Kenny Co. and the jury brought in a verdict for defendant.

The appellant states the following grounds of appeal:

1. The Trial Court at the trial refused to direct a verdict in favor of the plaintiff and such refusal was error.

2. The Trial Court refused to admit in evidence the following letters:

(a) Letter addressed to the chairman of the Board of Education of Morristown, New Jersey, signed by H. W. Palen's Sons, dated August 29, 1917.

(b) Letter written by H. W. Palen's Sons to the chairman of the Board of Education of Morristown, New Jersey, dated September 21, 1917.

3. The Trial Court admitted in evidence the following exhibits:

(a) Copy of letter written by architects to the Board of Education of the Town of Morristown, dated August 2, 1917, and marked Exhibit D. 3.

(b) Notice to P. F. Kenny Company, dated August 11, 1917, and marked Exhibit D. 4.

(c) Notice served on P. F. Kenny Company, dated August 15, 1917, and known as three days' notice and marked Exhibit D. 5.

(d) Resolutions adopted at a meeting of the Board of Education on Friday, August 31, 1917, and served on P. F. Kenny Company, and marked Exhibit D. 6.

4. The following question to the witness Louis C. Leprophon was admitted: Question: You have heard the resolutions I read a while ago, which have been admitted in evidence. After those resolutions were adopted did the surety company take any action? The question was permitted to be answered by the said witness and the answer to be received in evidence.

5. The Trial Court charged the jury as follows:

(a) The crux of this case is a question of fact, which you must first decide before you can intelligently decide anything else. If at the time the Board of Education took the sash and hardware which was upon the premises and had been shipped there by Palen's Sons you find that the title had passed from Palen's Sons to Kenny, then I charge you that the Board of Education had a perfect right under its contract with Kenny to go upon the premises and take the materials found thereon. If, on the other hand, you find that Palen's Sons had retained title and had not passed that title to Kenny, then, of course, the Board of Education had no right to take Palen's property. In other words, it is for you to decide whether the title had passed from Palen's Sons to Kenny, or otherwise, at the time the Board of Education assumed possession of the sash and hardware.

(b) Moreover, the defendant says that the sash and hardware, under the term of this contract, which is in evidence and which you will have the opportunity of perusing, were delivered upon the job, and delivery in the case of personal property is evidence of a transfer of title.

(c) It has been testified that there was delivery by Palen's Sons of certain sash and hardware upon the premises, and, as I told you before, delivery of tangible personal property is evidence of the passing of title.

## ARGUMENT.

### POINT I.

**There should have been a direction of a verdict in favor of the plaintiff.**

The property of plaintiff's assignor, H. W. Palen's Sons, was taken by the defendant. This is admitted by defendant in the argument of its attorney. "Admitting that the Board of Education took this material and finished the job, it is our insistment that we lawfully and rightfully took it, and that we had a right to take it under the contract made by the Board and P. F. Kenny Company" (case, p. 71, ll. 10-13). It was the property of Palen's Sons (case, p. 30, l. 31; case, p. 35, l. 25; p. 35, l. 42).

There was no dispute that the great majority of the sash and hardware was not yet incorporated in the building and plaintiff was willing to concede the amount testified to as so incorporated and asked for a direction of a verdict in plaintiff's favor as to the residue, which should have been granted. The evidence of the value of the material taken by the defendant was uncontroverted.

The defendant would not be justified in taking said property unless

(I) P. F. Kenny Co. had defaulted in its contract with the defendant and

(II) Title to the property had passed from Palen's Sons to Kenny Co. These two things must have existed before any rights to this property accrued to defendant.

Let us examine the evidence as respect to these two points.

(I) There was absolutely no justification for the termination of the contract with Kenny Co. No proper certificate had been given by the architects to warrant such action. There was no default on Kenny Co.'s part.

(1) Only under circumstances set forth in Article V, paragraph 2, could the defendant terminate the contract which it had with Kenny Co. and take possession of material. Paragraph 2 of Article V is as follows:

> "If the said architects shall certify that such refusal, neglect, failure, insolvency or bankruptcy is sufficient ground for such action, the owner shall be at liberty, three days after service of a written notice upon the contractor, of its intention so to do, to terminate the employment of the contractor for the said work and enter upon the

> premises for the purpose of completing the work included under this contract, and to take possession in whole or in part, of any or all materials, tools and appliances thereon, etc." (Ex. P. 1, case, p. 87, l. 30).

It was necessary that the architects should certify that "the refusal, neglect, failure, insolvency or bankruptcy is *sufficient ground for such action.*" There was no such certificate made by the architect.

(2) On August 2, 1917, the architects certified,

> that Kenny Co. "have refused or neglected to supply a sufficiency of properly skilled workmen and materials and to prosecute the work with promptness and diligence, especially in connection with the weak and defective floor arches in the front of the building on the third floor, which are either to be removed and replaced with arches of proper strength, or otherwise satisfactorily reinforced and strengthened. Such neglect to promptly rectify these conditions and to prosecute the work on the contract generally, is the cause of delay to other contractors in the completion of their work, etc. * * * we hereby recommend that a three days' notice be served upon the P. F. Kenny Company to proceed with the making good of these defective floor arches and to employ and keep sufficient additional labor and material on the job to insure the completion of the work without further delay. Otherwise the Morristown Board of Education will proceed in accordance with the terms of the contract applying to these conditions" (Ex. D. 3, case, p. 119, l. 30).

This notice was interpreted by Mr. Leprophon, the clerk of defendant, "as applying to the floors of the various class-rooms, and not to the whole of the contract" (case, p. 60, l. 10). There was certainly nothing said in this notice to the effect that such "neglect" gave defendant the right to terminate the contract. There was no certification by the architects that sufficient grounds for such termination existed. Such a certification was necessary in order to give such right of termination under Article V of the contract, and the notice must state the intention of the defendant to terminate (Ex. P. 1, case, p. 87, l. 30).

See *Ferler Construction Co.* v. *Board of Education,* 90 N. J. L. 193;

*Wilson* v. *Borden,* 68 N. J. L. 627;

*Fenstra* v. *Bunn,* 81 N. J. L. 680.

(3) On August 11, 1917, the architects issued a certificate to Kenny Co. for $4,908.75, certifying that under the terms of the contract Kenny Co. was entitled to that amount (Ex. P. 12,

case, p. 118). This certificate was given nine days subsequent to the above notice. Article XI allows payments be made monthly (Ex. P. 1, case, p. 91, ll. 12-25), and the same Article XI, paragraph 4 says:

> "All payments shall be due when certificates for the same are issued, such certificates being a condition precedent to any liability of the owner respecting payments. *No certificate will be issued should violations of the contract or unsatisfactory materials, workmanship or conditions exist,* and such certificate shall not become due until such violations or conditions have been corrected to the satisfaction of the said architects" (Ex. P. 1, case, p. 91, ll. 19-25).

This certificate abrogated the notice of August 2, and whatever validity such notice might have had was thereby nullified under the contract.

(4) Payment of this certificate was refused because, as alleged by defendant, the Kenny Co. had made untrue statements as to its financial status (case, p. 28, ll. 14-25). The testimony of Mr. Leprohon is as follows:

> "Q Let me call your attention to the fact that the certificate was dated on the 11th of August? A Yes, sir.
>
> "Q Well, it must have been after that date. A No, it was on that date—well, it might have been on August 11th, yes. As I recollect, it was on Friday afternoon, at three o'clock, following August 11th; at which time we had arranged for Mr. Kenny to be present. Three or four nights before, at which time we had a meeting at which Kenny was present, he gave us a financial statement of his conditions. We had investigated and found that he did not include several others, and upon finding that he had given us a false report, we did not pay this certificate.
>
> "Q Because of the fact that he had not been truthful in his statement? A Yes" (case, p. 58, ll. 14-25).

Stop notices had been filed against the building, but the amount of these stop notices was less than the amount the certificate called for and Kenny agreed that the amount of these stop notices be deducted from the amount of the certificate and that the difference be paid over to the Kenny Co. The defendant refused to pay over any money to Kenny Co. (case, p. 62, ll. 22-32). The testimony of Mr. Leprophon is as follows:

> "Q What did Kenny say, if anything, about the Board paying this certificate? A Mr. Kenny at first had promised Mr. Casale a payment, and when we found Mr. Kenny had given us a false report, and also the stop notices—

> Mr. Kenny objected to paying the stop notices. Counsel ruled that they must be paid before any other payments, and *when Mr. Kenny learned of that fact he agreed to accept the difference by paying the stop notices and giving him the balance.* Due to the fact that we had found that Mr. Kenny had made a false statement as to his financial condition, we didn't make any payment on that day; no check was drawn'' (case, p. 62, ll. 22-32).

The contract provided for this very contingency in Article XIII (Ex. P. 1, case, p. 92, ll. 8-22), which is as follows:

> ''Article XIII, that the owner may be free to adjust liens, claims or other liabilities arising from the construction of the work under this contract for which, if established, the owner might become liable, and which are chargeable to the contractor, or to repair or replace materials or workmanship which may be defective, if any, the owner shall have the right to retain out of any payment then due or thereafter to become due the contractor under this contract, an amount sufficient to completely indemnify—against such liens, claims, or other liabilities, or the repairing or replacing of defective materials or workmanship, if any.
>
> ''Previous to the issue of the final certificate, the contractor shall furnish to the owner satisfactory evidence of settlement of all claims against the building and the owner'' (case, p. 92, ll. 8-22).

It is quite evident that there was not the least justification for the refusal of the defendant to pay the amount of this certificate.

(5) On August 13, 1917, after the refusal of the defendant to pay Kenny Co. the amount of the certificate, as stated above, a notice dated August 11, 1917, was served by defendant upon Kenny Co. ''to remove said defective floor arches and replace same, in a manner to be approved by said architects'' (Ex. D. 4, case, p. 120, ll. 25-45). This notice was absolutely inconsistent with a possible intention of terminating the contract under the previous notice (Ex. D. 3, case, p. 119, l. 30) if in fact there was any such intention, which the plaintiff denies.

(6) No new or additional certificate was made by the architects, but on August 20, 1917, the defendant served upon Kenny Co. a notice dated August 15, 1917, to terminate the contract after three days. There was no justification whatsoever for this notice. The only possible basis for it was the certificate of (Ex. D. 3, case, p. 119, l. 30) August 2, 1917, which was entirely inadequate for the purpose and as above stated was

nullified by the subsequent certificate of money due to Kenny Co. (Ex. P. 12, case, p. 118), dated August 11, 1917, which the defendant unjustly refused to honor.

(7) On September 5, 1917, defendant served upon Kenny Co. a notice of resolution dated August 31, 1917, that it had abandoned its contract, yet at that very time and up to September 4, 1917, men had been working upon the building as testified to by witness of defendant. Testimony of Frank Cregar (case, p. 68, ll. 14 to 23).

> "Q They were working that week? A Up to that time.
> "Q The week before September 4th? A I believe so.
> "Q Well, how many men were on the job? A At that time?
> "Q On September 1st. A September 1st?
> "Q Yes. A That I couldn't tell.
> "Q On September 2nd? A About that time there were about three men there, I think.
> "Q How long had they been working there? A Oh, they would average three men there for probably a month or so.
> "Q Up until September 4th? A About that time."

There was not the least justification for this resolution. As stated before there had been no certification by the architects to terminae the contract. The only statement from the architects was that of August 2, 1917 (Ex. D. 3), a recommendation that a three days' notice to rectify certain defects be given to Kenny Co. which, as stated before, was nullified by the certificate of payment due. The subsequent action of the defendant was wholly without right or semblance of right in consideration of the contract's terms.

II. But had the contract with Kenny Co. been properly terminated, the defendant could take possession only of materials belonging to Kenny Co. and not those of anyone else.

> *Wildwood Board of Education* v. *Bright,* 91 N. J. L. 579, 9 C. J., page 732, etc.;
> 30 Am. & Eng. Ency. 1215;
> *Clore* v. *Johnson,* 56 S. W. (Ky.) 5;
> *Muscrelli* v. *Merchantile Trust Co.,* 69 Atl. 40;
> *Calhoun County* v. *Art Metal Const. Co.,* 44 So. 876.

There is not a syllable of evidence which would justify the conclusion that title had passed from Palen's Sons to Kenny Co. of any part of the goods which had not already been in-

stalled in the building. Of the 418 pairs of sash, an amount not exceeding 40 pairs had been installed and of the hardware not to exceed sets for three windows.

The sash and hardware had been sent by Palen's Sons to Morristown consigned to itself so that it might complete its contract (case, p. 8, ll. 15-45; p. 10, ll. 1-4; p. 40, ll. 1-4; p. 39, l. 40). No part of this material became the property of Kenny Co. until it was installed. Under the terms of the contract Palen's Sons must own the material when delivered on the premises.

Article XVII of contract between Palen's Sons and Kenny Co. (Ex. P. 3, case, p. 102, ll. 7-20) reads as follows:

> "Article XVII, All materials *delivered at the premises or furnished to the general contractor* under this agreement shall be and continue to be free from conditional sale agreements, chattel mortgages, liens or other encumbrances, and the sub-contractor agrees *that he will then have a good and absolute title thereto, free from all encumbrances, etc.*"

Where is any fact from which a change of ownership from Palen's Sons to Kenny Co. of this sash and hardware, not installed, could be deduced?

The defendant depended on the fact that Palen's Sons had made an entry in its ledger charging Kenny Co. with the contract price of $25,000.00 (Ex. D. 2, case, p. 119, l. 1). The Trial Court disposed of that contention when he said (case, p. 48, ll. 31-35):

> "*The Court.* The fact that they have charged the contract price on the books does not indicate necessarily that they parted with title to the goods that they delivered on the job."

The Court in its charge to the jury said:

> "It has been testified that there was delivery by Palen's Sons of certain sash and hardware upon the premises, and, as I told you before, delivery of tangible personal property is evidence of the passing of title" (case, p. 80, ll. 40-45).

Delivery of personal property is evidence of passing of title when it is a delivery from one person to another, but not when it is from one place to another. The Court had in mind the case of *Wildwood Board of Education* v. *Bright, supra,* where the question was a delivery by a material-man to a general contractor and the material-man had surrendered all control over the property when he sent the material to the general contractor.

But in the present case the owner of the property never parted with possession or control of the property, but consigned the same to its own order for its own use in completing its work. The property was never delivered to Kenny Co. It was put upon the premises where the work was to be performed solely for the convenience of Palen's Sons, the owner. This is no more evidence of passing of title than if Palen's Sons was carrying the material along the street in a truck, which broke down and the material was placed on the premises of defendant, until Palen's Sons could repair its truck.

The property belonged to Palen's Sons and title thereto never passed from it. The Kenny Co. never defaulted. The amount and value of the property was not in dispute and a verdict should have been directed for the plaintiff.

## POINT II.

Letters offered by plaintiff (Ex. P. 5, case, p. 105, and Ex. P. 6, case, p. 106, ll. 1-25) should have been admitted in evidence. They showed that Palen's Sons, the assignor of the plaintiff, claimed the title to the property in question and that that fact was brought home and made known to the defendant.

## POINT III.

Letters of architects to defendant and notices of defendant to Kenny Co. (Exhibit D. 3, case, p. 119, l. 30, etc.; Ex. D. 4, case, p. 120, l. 25, etc.; Ex. D. 5, case, p. 121, l. 15, etc.; Ex. D. 6, case, p. 122, l. 1, etc.) should not have been admitted in evidence. They were not material, competent or relevant. ~~See our page ——~~. The question in the case was the wrongful taking of the plaintiff's property by the defendant. Defendant's contention was that title had passed to Kenny Co. from Palen's Sons and that Kenny Co. had defaulted in its contract. Defendant failed to show that title had passed from Palen's Sons to Kenny Co. or that Kenny Co. had defaulted in its contract with defendant, and until it showed that such passing of title and default the letter and resolutions served upon Kenny Co. were not admissible. They were only self-serving statements.

## POINT IV.

The admission of the answer by the witness Louis C. Leprophon to the question whether the surety company took any action after the resolution was adopted (case, p. 53, ll. 42-45; p. 54, ll. 1-9) was error. It was not material or relevant what the surety company did, or whether it did anything or not.

## POINT V.

The Trial Court incorrectly charged the jury when it stated that it was for the jury "to decide whether the title had passed from Palen's Sons to Kenny, or otherwise, at the time the Board of Education assummed possession of the sash and hardware" (case, p. 80, ll. 32-35), and further when it said "and delivery in the case of personal property is evidence of a transfer of title" (case, p. 80, ll. 19-20), and again when it said "it has been testified that there was delivery by Palen's Sons of certain sash and hardware upon the premises, and, as I told you before, delivery of tangible personal property is evidence of the passing of title" (case, p. 80, ll. 41-44).

As has been stated in the argument under Point I, the Trial Court evidently had in mind the case of *Wildwood Board of Education* v. *Bright, supra,* which dealt with the question between a material-man and a general contractor and not, as in the present case, between a sub-contractor and a general contractor. In the Wildwood case the rule was correctly stated, for in the case of a material-man, when property is delivered to the general contractor, the material-man parts with the possession of the property and necessarily loses control over it. But, in the case of a sub-contractor, as in the present case, the sub-contractor consigns the material to his own order and places it upon the premises only for his own use and convenience to do the work that he has contracted to do. He never intends to deliver the property to a general contractor, or anyone else, but must necessarily have it at hand in order to perform his contract.

We respectfully submit that for the above reasons the judgment below should be reversed.

Respectfully submitted,

REED & REYNOLDS,
*Attorneys for Plaintiff-Appellant.*

ARTHUR HARRIS,
*Of Counsel.*

## New Jersey Court of Errors and Appeals

CHARLOTTE JACOBI,
Plaintiff-Appellant,

vs.

THE BOARD OF EDUCATION OF THE TOWN OF MORRISTOWN, IN THE COUNTY OF MORRIS,
Defendant-Respondent.

*Action at Law*

*On Appeal. from Supreme Court.*

# Brief of Defendant-Respondent

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VREELAND & WILSON,
Attorneys for Defendant-Respondent.

MORRIS COUNTY PRESS PRINT

NEW JERSEY COURT OF ERRORS AND APPEALS.

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| CHARLOTTE JACOBI, Plaintiff-Appellant, | *Action at Law* |
| VS. | *On Appeal.* |
| THE BOARD OF EDUCATION OF THE TOWN OF MORRISTOWN, IN THE COUNTY OF MORRIS, Defendant-Respondent. | *Brief of Defendant-Respondent.* |

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## FACTS.

P. F. Kenny Company, a corporation, contracted with the defendant-respondent, the Board of Education of the Town of Morristown, in the County of Morris, a municipal corporation, to construct the new High School Building, located on Atno Avenue and Early Street, in Morristown, New Jersey, by contract in writing, dated March 14, 1916. This contract was recorded and filed in the Morris County Clerk's Office on March 16, 1916, and thereafter P. F. Kenny Company entered into and upon the performance of the work.

In June of 1916, the Kenny Company subcontracted the carpenter work to H. W. Palen's Sons.

In September of 1917, the Board of Education entered into and upon its premises, and took

possession of all the materials, tools and appliances thereon, for the purpose of completing the contract which had not been completed by P. F. Kenny Company; and upon entering found some window sash and hardware, which the Board of Education also used in completing the contract and finishing the building.

This window sash and hardware is now being claimed by the Assignee of H. W. Palen's Sons as the property of the said H. W. Palen's Sons, and in the Court below the plaintiff sought to collect damages for the wrongful conversion of said sash and hardware.

A judgment in favor of the defendant-respondent was rendered by the Trial Court and from that judgment this appeal is now being taken.

Several grounds are alleged in plaintiff-appellant's notice and grounds of appeal but the ones principally urged, we believe, are the same grounds urged at the Trial, namely,

1. That the certificate of the Architects, dated August 2nd, 1917, that there was defective work and recommending that a three days' notice be sent to P. F. Kenny Company was not sufficient to come within the provisions of Article V of the Contract. (Ex. D-3, and P-1).

2. That the Architects' certificate for the payment of further moneys to P. F. Kenny Company, issued August 11, 1917, abrogated the certificate of August 2, 1917 to the Board of Education recommending a three days' notice; and

3. That in any event, the title to the sash and hardware in question was never divested from H. W. Palen's Sons.

## ARGUMENT.

### Point One.

### THE ARCHITECTS' CERTIFICATE OF AUGUST 2nd, 1917, TO THE BOARD OF EDUCATION, RECOMMENDING A THREE DAYS' NOTICE TO P. F. KENNY COMPANY WAS SUFFICIENT.

The Fifth Clause of the Contract provides,

"If the said Architects shall certify that such refusal, neglect, failure, insolvency or bankruptcy is sufficient ground for such action, the Owner shall be at liberty, three days after service of a written notice upon the Contractor, of its intention so to do, to terminate the employment of the Contractor for the said work and enter upon the premises for the purpose of completing the work included under this contract, and to take possession, in whole or in part, of any or all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor, and pay such insurance premiums, and other expenses caused by such refusal, neglect, failure, insolvency or bankruptcy, and to deduct the expenses incurred therefor from any money then due or to become due to the Contractor under this contract.

"In case of such discontinuance of the employment of the Contractor, it 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 balances shall exceed the expense incurred by the Owner in finishing the work, such excess shall be paid by the Owner to the Contractor; but if such ex-

pense shall exceed such unpaid balance, the Contractor or its Surety shall pay the difference to the Owner."

This is an almost universal and commonly accepted clause in building contracts, and has been passed on and upheld by the highest Courts of the Country.

In Duplan vs. Spencer, 115 Fed. 693, it was said that Section V (referring to the fifth clause) is not a clause of forfeiture, but one in the interest of both parties, and a judgment for the Owner and against the material men was rendered for tools, material &c., which were on the premises at the time of the default.

In Harder vs. Marion County, 97 Ind. 455, and 6 Cyc. pg. 15, it was held that the enforcement of the clause permitting the completion by the owner, does not entitle the builder to damages against the owner.

And in Dingley vs. Green, 6 Pac. 81—11 American Digest, pg. 1839, it was held that upon the default of the builder the owner need not finish the contract himself nor wait for the contract time to expire, but may make an independent contract for completion at once.

Other cases hold that the builder could not recover anything, after a default, where the aggregate expenses exceeded the contract price.

Howlett vs. Alexander, 87 Ala. 193-11 A. D. 1842.

Hammond vs. Miller, 2 Mackey (D. C.) 145-11 A. D. 1842.

Murphy vs. Buckman, 60 N. Y. 297.

The Fifth Clause being upheld by Courts of all states including our own (citations later), as as a clause of forfeiture, (which would have to as a cluase of forfeiture, (which would have to be strictly construed), the certificate of the Architects, dated August 2, 1917, was well within its perview, especially as it provides,

"In accordance with the provisions of Articles IV, V and VII of the contract between the Board of Education of the Town of Morristown, in the County of Morris, and the P. F. Kenny Company, we hereby certify &c." (Ex. D-3).

and further provides,

"In accordance with the terms of said contract, we hereby recommend that a three days' notice be served upon the P. F. Kenny Company to proceed with the making good of these defective floor arches, and to employ and keep sufficient additional labor and material on the job as to insure the completion of the work without further delay. *Otherwise the Morristown Board of Education will proceed in accordance with the terms of the contract applying to these conditions.*"

We believe that this certificate of the Architects could be no stronger or more explicit in its certification, than if couched in terms of strict forfeiture, coupled with lengthy recitals to the contract provisions.

At the time of the trial plaintiff laid much stress upon the testimony of the witness, Louis C. Leprohon, who attempted to interpret this notice as applying to the floors in the various class-rooms and not to the whole of the contract. (State of Case, page 60, lines 6, 7 and 8 &c.). It is our contention that the certificate speaks for itself and even though it does apply only to a portion of the work comprehended in the whole contract, that portion in itself, if it was defective, would and does constitute ground to invoke the protection afforded the owner by Article V of the contract.

Pursuant to this certificate the Board of Education served a notice on P. F. Kenny Company, dated August 11, 1917, (Ex. D-4) which

notice was served August 13, 1917, notifying P. F. Kenny Company that these defective floors and arches would have to be removed and replaced.

But the notice was not complied with and on August 15, 1917, because of the failure of P. F. Kenny Company to remove and replace this defective work, and in further pursuance of the Architects' certificate (Ex. D-3) a three days' notice was served on the said P. F. Kenny Company, providing,

> "That the undersigned, the owner referred to in said contract, will, three days after service of this notice upon you, terminate your employment for the said work and enter upon the premises for the purpose of completing the work included in said contract as therein provided, said Architects having certified that such refusal, failure and neglect is sufficient ground for such action." (Ex. D-5).

Even a superficial reading shows, it seems to us, that this notice is drawn in pursuance to the last paragraph of the Architects' certificate of August 2, 1917. (Ex. D-3).

Even after the service of this notice the defective work was not removed or replaced, but on August 15, 1917, the president of the P. F. Kenny Company stated to the Board that he would not continue with the contract. (State of Case, page 62, line 34 to page 63, line 25). Thereafter, and on August 31, 1917, final resolutions of the Board were adopted and afterwards served on P. F. Kenny Company again apprising said Kenny Company of the notices which had been served upon it, First; to cure the defective work; Second; that its contract in the absence of such curing would be terminated; and Third; that the Company had now actually quit and abandoned the job.

The fact is, that the Kenny Company actually did quit and abandon the job after the notice to terminate had been served upon it, and the Board of Education had to employ a new contractor to complete the High School Building; and the P. F. Kenny Company's Surety was also notified to this effect, but still the contract remained uncompleted until the Board of Education completed it itself. (State of Case, page 54, lines 11, 12 and 13).

We respectfully submit that the Architects' certificate dated August 2, 1917, was well within the terms and meaning of Article V of the contract between P. F. Kenny Company and the Board, and that the notices served upon the Kenny Company were well within the perview of the Architects' certification of August 2. 1917.

## Point Two.

THE ARCHITECTS' CERTIFICATE OF AUGUST 11, 1917, FOR THE PAYMENT OF $4,908.75 (Ex. P-12) DID NOT ABROGATE NOR CONFLICT WITH THE ARCHITECTS' CERTIFICATE OF AUGUST 2, 1917, RECOMMENDING THREE DAYS' NOTICE.

P. F. Kenny Company needed money and the Board was disposed to grant it as much leeway as possible. Had the Board wished, or been so disposed, all payments then due could have been held up pending the removal and replacement of any defective work in the building, (Article XI of the Contract, Ex. P-1), but also the Board had the right to be as liberal as it choose to be, and it did allow the Kenny Company to have as much money as it had earned up to the time

that the defective work was discovered. (State of Case, page 57, line 43 to page 58, line 11). Thereafter a certificate was issued bearing date August 11, 1917 authorizing the further payment of $4,908.75 (which did not include the defective work, however [State of Case, page 70, line 38]); but to say that the issuing or presentation of this certificate is an abrogation of defective work or the certificate concerning it is not, it seems to us, in accordance with the purport of Article XII of the Contract.

Article XII of the Contract provides as follows:

> "It is further mutually agreed by and between the parties hereto, that no certificate issued 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 made nor the occupancy of the building in whole or in part shall be construed as an acceptance of defective work or improper materials, nor relieve the Contractor from making good defects, as required by its guarantee."

It is our contention that no payment or certificate except the final ones could abrogate the defect in the construction, or the effect of the certificate issued, for if that were so all that a contractor would have to do upon the discovery of a defect would be to establish that this defective work occurred or existed prior to the last certificate issued to him or payment obtained by him and then successfully contend that he could not be called upon to remedy a defect which had been so conveniently disposed of by a certificate or payment he had procured in accordance with the terms of the contract.

In no event, however, in the case at bar, does the plaintiff show that the defective work which did exist, was ever remedied; and, as a matter of fact, the failure to remedy these defects called for the serving of the notice dated August 15, 1917, (Ex. D-5) and the serving of the notice and resolutions dated August 31, 1917 (Ex. D-6).

We contend that the Architects' certificate of August 2, 1917, remained in full force and effect so long as the defective work, which was specified, existed and further contend that the various notices served thereunder constituted the proper procedure; First; requesting a remedy of the specified defects; and then terminating the employment for failure to remedy the said defects.

## Point Three.

## THE TITLE TO THE SASH AND HARDWARE PASSED INTO THE BOARD OF EDUCATION WHEN IT TOOK POSSESSION FOR THE PURPOSE OF COMPLETING THE CONTRACT.

The contract, specifications and plans between the Board of Education, the Owner, and P. F. Kenny Company, the Contractor, were recorded and filed in the Morris County Clerk's Office. (State of Case, page 8 lines 14 &c.).

This is notice to the world; and a subcontractor or materialman entering upon the performance of any portion of the work comprehended within the terms of the contract, did so with full knowledge of the duties, obligations, liabilities and privileges imposed by and afforded under the contract of record.

And with the full knowledge that Article V of the contract on record provided that the Owner might

> "enter upon the premises for the purpose of completing the work included under this contract, and to take possession, in whole or in part, of any or all materials, tools and appliances thereon,"

the said H. W. Palen's Sons deliberately delivered upon the premises the various sash and hardware that was specified and required by the contract on record.

We contend that this action, in view of the provisions of Article V in the Contract on Record, gives to the Board of Education the right to take possession

> "of any or all materials, tools and appliances thereon,"

irrespective of where the title is so long as the materials, tools and appliances and their places of delivery are comprehended by the contract on record. For otherwise every contractor could escape the provisions of Article V by having everything on the premises during the course of construction belong to subcontractors. This holding it seems to us would be a severe detriment to Owners and would open wide the door to fraudulent Contractors.

On the other hand, if this Court should hold that the title to the sash and hardware *must* first have vested in Kenny Company before it could pass to the Board, then we contend that this question, a question of fact, was correctly decided by a jury who passed on the facts. The jury had before it the fact that H. W. Palen's Sons had charged on its ledger account against P. F. Kenny Company the full amount of the contract price, namely, $25,000.00. Why this debt should be charged against the Kenny Company on the books of H. W. Palen's Sons unless the Kenny Company was to have title to all the materials &c., delivered on the premises, is not explained, and it does not seem logical to us

that Kenny Company should owe this money as charged, and yet not own the very materials which go to make up a portion of the contract price charged against it.

The jury also had before it a contract entered into between P. F. Kenny Company and H. W. Palen's Sons (Ex. P-3) Article XVII of which provides:

> "All materials delivered at the premises or furnished to the general contractor under this agreement shall be and continue to be free from conditional sale agreements, chattel mortgages, liens or other incumbrances, and the subcontractor agrees that he will *then* have a good and absolute title thereto, free from all incumbrances &c."

To us it seems that this Article cannot have any efficacy unless it comprehends the passing of title from the subcontractor to the contractor upon

> "all materials delivered at the premises or furnished to the general contractor,"

at the *time* it is so delivered or furnished, so that when the title vests in the general contractor the title may be an unencumbered one; otherwise a subcontractor's materials might, perhaps, be encumbered right up to the time the subcontractor overtly passes title to the general contractor. This it does not seem to us, is the construction to be given to Article XVII. We contend that, irrespective of the overt acts of the subcontractor, the title passed by operation of the contract from the subcontractor to the general contractor upon such delivery or furnishing.

In any event these questions were passed upon by the jury and decided in favor of the Board of Education.

The Trial Court charged the jury the law in accordance with the rules laid down in Wild-

wood vs. Bright, 103 At.-422. In that case, a replevin suit, the Court in a sylabus prepared by the Court, succintly declares,

"By a contract for constructing a building, the contractor agreed that in certain contingencies the owner might terminate the employment, enter the premises, and take possession for the purpose of completing the work, of all materials thereon. The contingency happened.

"Held that by taking possession pursuant to the contract, the owner acquired title to the material."

Whether the title to the materials vested in the general contractor or not was a question of fact for the jury to decide. And the Trial Court so charged the jury. And the jury in the case at bar decided that title had vested in P. F. Kenny Company and passed from it to the Board of Education.

It is our contention, however, that not only under such circumstances would the Board obtain legal title for the purpose of completing the contract but that it would also obtain a full legal title upon its taking possession of the premises, materials &c. thereon, for the purpose of completing the contract, irrespective of whether the title was in the contractor or one *by it,* is bound by its provisions.

The important thing being the fact that the contract between Kenny Company and the Board is on record and that a subcontractor or materialman who is engaged in the execution or performance of *any of the work comprehended* by it, is bound by its provisions.

Several other grounds are alleged as reasons for appeal. We do not believe that in any of the reasons or grounds stated has the plaintiff-appellant been aggrieved. The letters Exhibits P-5 and P-6 for identification cannot, we be-

lieve, have any bearing on the questions to be decided. The admission in the evidence of the answer to the question of the witness Louis C. Leprohon, alleged as ground No. 4 for appeal, was not in our opinion, error. Because had the Surety Company completed the contract, then the Board of Education would have had no right to enter upon the premises and complete the contract itself.

We respectfully submit that the appeal should be dismissed and the judgment of the Trial Court sustained.

VREELAND & WILSON,
Attorneys for Defendant-Respondent.