

New Jersey Court of Errors and Appeals

Appeal from New Jersey Supreme Court

ISAAC DRUMMOND *and*
LESTER WISE,

Executors, etc.,
Plaintiffs-Appellants,
vs.

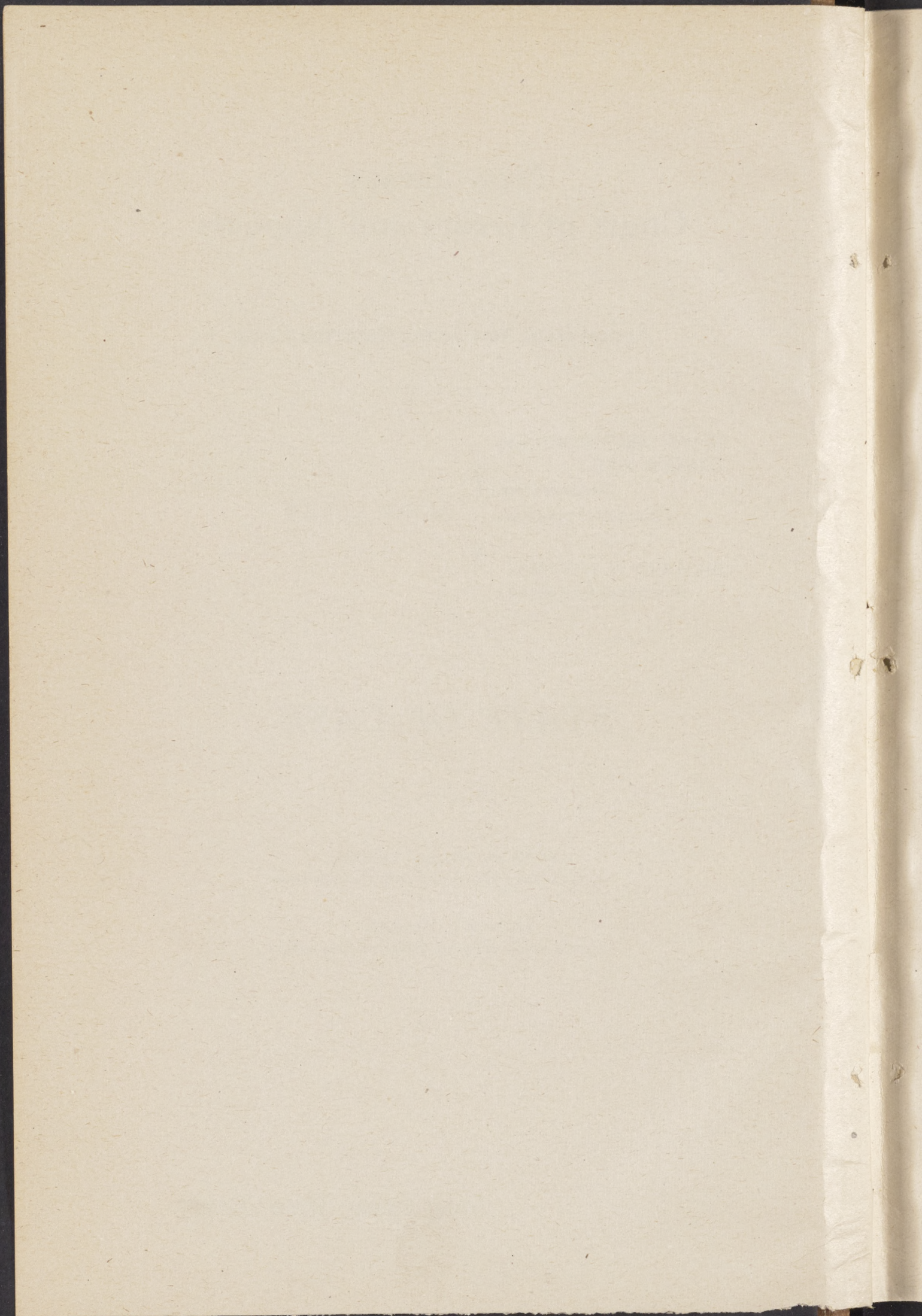
RICHARD H. HUGHES,
Defendant-Respondent.

ACTION AT LAW.

STATE OF CASE

DURAND, IVINS & CARTON
Attorneys and Counsel for Plaintiffs-Appellants

WILBUR A. HEISLEY
Attorney and Counsel for Defendant-Respondent



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Supreme Court of New Jersey

Monmouth County

ISAAC WYMAN DRUMMOND

and

LESTER DRUMMOND WISE,

*Executors of the last will and
testament of Charles F. Wise,
deceased,*

vs.

RICHARD H. HUGHES,

Defendant.

TRANSCRIPT OF
PLEADINGS FOR TRIAL

10

DURAND, IVINS & CARTON

Attorneys for Plaintiffs

WILBUR A. HEISLEY

Attorney for Defendant

(Summons Issued March 17, 1916.)

20

Plaintiffs, Isaac Wyman Drummond, of the City and County and State of New York, and Lester Drummond Wise, of the City of Long Branch, Monmouth County, State of New Jersey, as executors of the last will and testament of Charles F. Wise, late of the said City of Long Branch, deceased, say,

1. That said Charles F. Wise, in his lifetime, entered into a certain agreement in writing made by and between said Charles F. Wise, as owner, and Richard H. Hughes, as contractor, the defendant in this action, by which it was agreed that the said defendant should provide all the materials and perform all the work for the completion and finishing of all the carpenter's, mason's, plumbing, painting, tinning heating and wiring works of the building, being a dwelling house to be erected for the said Charles F. Wise, on his lot of land and premises on Morris avenue, in the City of Long Branch, particularly described and mentioned in the specifications and set forth in the drawings accompanying said contract including all materials and labor, as shown on the drawings and described in the specifications prepared by Charles H. Sparry and Louis U. Bruyere, associated architects,

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for said building, and the said Charles F. Wise, the owner, agreed to pay to the said defendant contractor for said work and materials the sum of \$18,125, in payments during the progress of the work, upon the certificates of the architects, a copy of which contract is hereto annexed and made part hereof.

2. It was mutually agreed between the parties to said contract, the said Charles F. Wise, and the said defendant, Richard H. Hughes, that no certificate given or payment made
10 under said contract, except the final certificate or final payment, should be conclusive evidence of the performance of said contract, either wholly or in part, and that no payment should be construed to be an acceptance of defective work or improper materials.

3. The specifications for carpenter work, annexed to said contract and made a part of said contract, provide that everything must be done that is necessary or required, though not especially mentioned, to make a first-class job in all respects, concerning the entire work.

20 4. The specifications for mason work, annexed to said contract and made a part of said contract, provide for the plastering of said building as follows:

PLASTERING.

LATHING:

Lath all the ceilings, partitions, jambs, soffits, etc., throughout the building with the best quality dry-seasoned
30 sound laths, all firmly and securely nailed. Lath cellar ceiling with wire lath.

Finish in three-coat work, scratch brown and hard finish the house through except laundry and cellar ceiling and toilet and inside partitions of laundry toilet, which is to be of brown coated work only.

All angles to be true, all vertical lines plumb, all mortar to be well mixed by careful and persistent working, and is to be stacked at least seven days after making before using, in some sheltered place outside the house.

40 The plastering to be applied directly to the tiled walls.

QUALITY OF PLASTER:

All plaster to be composed of best quality approved brand of lime, clean, sharp sand from pit and new long, fresh cattle-hair in the sand, finish to be of lime and sand. All plastering to be executed in the best and neatest manner.

All drying cracks to be carefully pointed so as to make a perfect finish.

CORNER HEADS:

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On all exposed angles to be set true and full length and strongly nailed Union metal corner.

ARCHES:

Run plaster arches where shown.

PLASTER COVE:

20

Run 7-in. plaster-cove around dining room, living room, halls, reception room, doctor's receiving room, office.

5. That the said defendant, afterwards and before the commencement of this suit, erected and built the said dwelling house for the said Charles F. Wise, and was paid for the same.

6. That the said defendant did not properly perform his said contract and did not erect and construct the said building for the said Charles F. Wise according to the said contract, plans and specifications, and with good and proper materials, and in a sound, substantial and workmanlike manner, but absolutely failed and neglected so to do, and on the contrary, the said defendant erected and built said building in such a slight, weak and unsubstantial manner and plastered the said dwelling house with such bad and improper materials and in such a slight, inartificial and unworkmanlike manner that the said plastering and walls of the said dwelling house became cracked, broken and loosened and fell off, so that because of said defective work and improper materials the plaintiffs were

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required to remove said walls and plastering and to replaster the walls of said house.

7. That the plaintiffs notified the said defendant of the said defective work and improper materials done and furnished in the plastering of said house and requested the said defendant to remove said defective plastering, and to replaster said dwelling house, according to said contract, plans and specifications, and in a good, substantial and workmanlike manner, and with good and proper materials, which he absolutely refused to do.

8. That the plaintiffs because of said defective work done and improper materials furnished by the said defendant, in the plastering of said house, have been compelled to, and have expended for repairing said defective work and replacing said improper materials the sum of four thousand two hundred and twenty-seven dollars and twenty-eight cents, a true statement of which is hereto annexed and made part hereof.

9. That the said Charles F. Wise departed this life September 5th, 1911, leaving a last will and testament, wherein he appointed plaintiffs as executors thereof; which will was duly admitted to probate by Joseph L. Donahay, Surrogate of the County of Monmouth, October 16th, 1911, and letters testamentary issued thereon unto plaintiffs as executors thereof, who duly qualified as such executors and the said plaintiffs bring here into court the letters testamentary of the said Charles F. Wise, deceased, whereby it appears that the said plaintiffs are executors of the last will and testament of the said Charles F. Wise, deceased.

10. Plaintiffs demand as damages four thousand two hundred and twenty-seven dollars twenty-eight cents, and interest thereon from January 1st, 1916.

DURAND, IVINS & CARTON,
Attorneys of Plaintiffs.

The Uniform Contract. Form of Contract.
 Adopted and Recommended for General Use by the American
 Institute of Architects and the National Association of
 Builders.

W. C. and A. F. Cottrell, Architects, Appleby Building,
 Asbury Park, N. J.

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 Washington, D. C. E. G. Soltmann, N. Y., Licensee for
 Exclusive Publication. Revised 1907.

10

THIS AGREEMENT, made the thirtieth day of January,
 in the year one thousand nine hundred and eleven, by and be-
 tween R. H. Hughes 132 Third Avenue, Long Branch, N. J.,
 party of the first part (hereinafter designated the Contractor),
 and Charles F. Wise, 101 Fulton Street, New York City, party
 of the second part (hereinafter designated the Owner),

WITNESSETH, that the Contractor, in consideration of
 the agreements herein made by the Owner, agrees with the
 Owner as follows:

ARTICLE 1. The Contractor shall and will provide all 20
 the materials and perform all the work for the completion and
 finishing of all the carpenter's, mason's, plumbing, painting,
 tinning, heating and wiring works of the said building men-
 tioned in the annexed specifications and set forth in the draw-
 ings (except materials and construction of hollow tile walls
 and chimneys), including materials and labor, and shown on
 the drawings and described in the specifications prepared by
 Charles H. Sparry and Louis U. Bruyere, associated architects,
 which drawings and specifications are identified by the signa-
 30 tures of the parties hereto, and become hereby a part of this
 contract.

ARTICLE 2. It is understood and agreed by and be-
 tween the parties hereto that the work included in this con-
 tract is to be done under the direction of the said architects,
 and that their decision as to the true construction and mean-
 ing of the drawings and specifications shall be final. It is also
 understood and agreed by and between the parties hereto that
 such additional drawings and explanations as may be neces-
 sary to detail and illustrate the work to be done are to be fur-
 40 nished by said architects, and they agree to conform to and

abide by the same so far as they may be consistent with the purpose and intent of the original drawings and specifications referred to in Article 1.

It is further understood and agreed by the parties hereto that any and all drawings and specifications prepared for the purposes of this contract by the said architects are and remain their property, and that all charges for the use of the same, and for the services of said architects, are to be paid by the said Owner.

10 ARTICLE 3. No alterations shall be made in the work except upon written order of the architects, the amount to be paid by the Owner or allowed by the Contractor by virtue of such alterations to be stated in said order. Should the Owner and Contractor not agree as to 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 Article 12 of this contract.

20 ARTICLE 4. The Contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the architects or their authorized representatives; shall, within twenty-four hours after receiving written notice from the architects to that effect, proceed to remove from the grounds or buildings all materials condemned by them, whether worked or unworked, and to take down all portions of the work which the architects shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications, and shall make good all work damaged or destroyed thereby.

30 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 in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architect, the Owner shall be at liberty, after three days' written notice to the Contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the architects shall certify that such refusal, ne-
40

glect or failure is sufficient ground for such action, the Owner shall also be at liberty to terminate the employment of the Contractor for the said work to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Contractor he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the 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 shall pay the difference to the Owner. The expense incurred by the Owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architects, whose certificate thereof shall be conclusive upon the parties.

ARTICLE 6. The Contractor shall complete the several portions, and the whole of the work comprehended in this agreement by and at the time or times hereinafter stated, to wit: year 1911, by the first day of July, the house to be built by R. H. Hughes at Long Branch, N. J., shall be finished and the contract completed.

ARTICLE 7. Should the Contractor be delayed in the prosecution or completion of the work by the act, neglect or default of the Owner, of the architects, or of any other contractor employed by the Owner upon the work, or by any damage caused by fire or other casualty for which the Contractor is not responsible, or by combined action of workmen in no wise caused by or resulting from default or collusion on the part of the Contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid, which extended period shall be determined and fixed by the architects; but no such allowance shall be made unless a claim therefor is presented in writing to the architects within forty-eight hours of the occurrence of such delay.

ARTICLE 8. The Owner agrees to provide all labor and materials essential to the conduct of this work not included in this contract in such manner as not to delay its progress, and in the event of failure so to do, thereby causing loss to the Contractor, agrees that he will reimburse the Contractor for such loss; and the Contractor agrees that if he shall delay the progress of the work so as to cause loss for which the Owner shall become liable, then he shall reimburse the Owner for such loss. Should the Owner and Contractor fail to agree as
10 to the amount of loss comprehended in this article, the determination of the amount shall be referred to arbitration as provided in article 12 of this contract.

ARTICLE 9. It is hereby mutually agreed between the parties hereto that the sum to be raised by the Owner to the Contractor for said work and materials shall be eighteen thousand and one hundred and twenty-five dollars (\$18,125.00), subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the Owner to the Contractor, in current funds, and only upon certificates of the architect as
20 follows:

In payments during the progress of the works upon the certificates of the architects for amounts not exceeding eighty per cent. of the value of the work done, said valuations to be made by architects and upon the entire completion of the works upon a final certificate.

The final payment shall be made within ten days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued.

If at any time there shall be evidence of any lien or claim
30 for which, if established, the Owner of the said premises might become liable, and which is chargeable to the Contractor, the Owner shall have the right to retain out of any payment then due or hereafter to become due an amount sufficient to completely indemnify him against such lien or claim. Should there prove to be any such claim after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the Contractor's default.

40 ARTICLE 10. It is further mutually agreed between the

parties hereto that no certificate given or payment made under this contract, except the final certificates or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

ARTICLE 11. The Owner shall during the progress of the work maintain insurance on the same against loss or damage by fire, in his own name and that of the Contractor, the policies 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 interest may appear. 10

ARTICLE 12. In case the Owner and Contractor fail to agree in relation to matters of payment, allowance or loss referred to in articles 3 and 8 of this contract, or should either of them dissent from the decision of the architects referred to in article 7 of this contract, which dissent shall have been filed in writing with the architects within ten days of the announcement of such decision, then the matter shall 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 reference. 20

The said parties for themselves, their heirs, successors, executors, administrators and assigns, do hereby agree to the full performance of the covenant herein contained.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals, the day and year first above written. 30

R. H. HUGHES,
CHARLES F. WISE.

In presence of Arthur Tabbutt.

(Endorsed.)

The Uniform Contract. Form of Contract.
 Adopted and Recommended for General Use by the American
 Institute of Architects and National Association
 of Builders.

Revised 1905 and 1907.

AGREEMENT BETWEEN R. H. Hughes, Contractor, and
 Charles F. Wise, Owner, for house to be built at Long
 Branch, N. J., January 30th, 1911.

Architects:

10 Charles H. Sparry, Louis U. Bruyere, Associated.

Amount of Contract, \$18,125.00.

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 Washington, D. C.

Licensed for Exclusive Publication, E. G. Soltmann,
 125 East 42d Street, New York, N. Y.

(Form 19642-Pl.)

	Plastering	\$2,216.50
	Supplies purchased for protection of floors and in	
20	connection with restoration of the defective work.	186.45
	Repairs to plumbing necessitated thereby.....	26.75
	Tile work	2.78
	Electrical work	15.00
	Labor	1,188.75
	Liability insurance	76.64
	Commission to builder	217.40
	Telephone calls	1.34
	Services of architect	195.42
	For refinishing floors	30.00
30	For moving furniture, etc	48.50
	Additional electrical work	21.75
		\$4,227.28

(Filed March 22, 1916.)

The defendant, who resides on Franklin Avenue, in the
 City of Long Branch, New Jersey, answering says:

40 First: He admits the first count in the complaint, but
 denies that he was to furnish any materials and construction
 of hollow tile walls and chimneys.

Second: He admits the second count of said complaint.

Third: He admits the third count of said complaint.

Fourth: He admits the fourth count of said complaint.

Fifth: He admits the fifth count of said complaint.

Sixth: He denies the sixth count of said complaint.

Seventh: He admits the seventh count of said complaint, simply to the extent that he received a notice from the plaintiff, but denies that he did or furnished defective work and improper materials.

Eighth: He denies the eighth count of said complaint. 10

Ninth: He has knowledge or information of the statements contained in the ninth count, sufficient to form a belief.

FIRST DEFENSE TO SIXTH COUNT:

Under the terms of the contract referred to in the complaint, to wit., article 2d, it was expressly provided as follows:

“It is understood and agreed by and between the parties hereto, that the work included in this contract, is to be done under the direction of the said architects” (referring to the architects named in said contract), and defendant did fully and properly perform his said contract in all respects, under the direction of the said architects, and to their entire satisfaction. 20

SECOND DEFENSE TO THE SIXTH COUNT:

The said contract referred to in the complaint also contained the following provision, viz:

ARTICLE 10. “It is further mutually agreed between the parties hereto, that no certificate given, or payment made under this contract, excepting the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.” 30

Defendant will insist that he did receive the final certificate of the architects mentioned in said contract (being the certificates contemplated in article 10), and that by the terms of said contract, such certificate is conclusive evidence of the 40

performance by this defendant, of his promises mentioned in said contract; that this defendant delivered said certificate to the said plaintiffs, and that the legal effect of such certificate and its delivery is to preclude the plaintiffs from maintaining their said action against this defendant, and that by reason of the making and delivery of such certificate, the complaint discloses no cause of action.

FIRST DEFENSE TO THE EIGHTH COUNT:

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Defendant, not admitting that he furnished any defective work and improper materials, insists that by reason of the making and delivering of the final certificate mentioned in article 10 above referred to, the plaintiffs are precluded from maintaining their said action against him.

SECOND DEFENSE TO THE EIGHTH COUNT:

20

Defendant insists that the plaintiffs, in doing and furnishing work and materials to take the place of the alleged defective work and materials alleged to have been furnished by the defendant, did and furnished much more work and materials than were reasonably necessary for that purpose, and did and furnished the same in an extravagant, unreasonable and unnecessarily expensive manner, for which this defendant should not be charged.

WILBUR A. HEISLEY,
Attorney for Defendant.

(Filed April 12, 1916.)

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Plaintiffs deny every allegation in the answer.

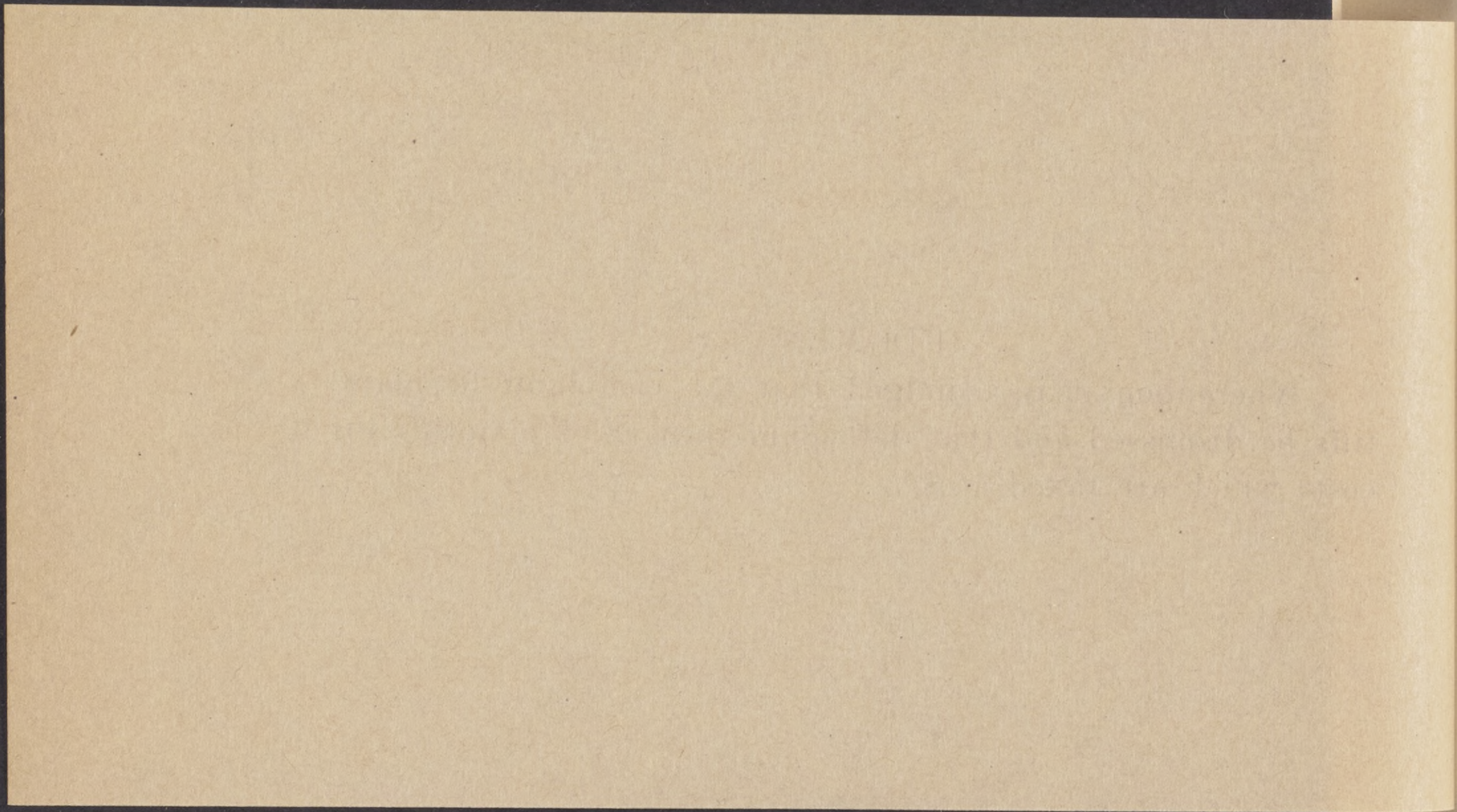
DURAND, IVINS & CARTON,
Attorneys for Plaintiffs.

(Filed April 15, 1916.)

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JUDGMENT.

Whereupon it is adjudged that the complaint of plaintiffs be dismissed and that defendant recover of plaintiffs his costs which are taxed at \$



ORDER OF REFERENCE.

The parties, plaintiff and defendant, consenting thereto it is ordered that the above stated cause be tried in the Court of Common Pleas of the County of Monmouth and the Judge of said Court have the jurisdiction over the same and proceed therein as provided by law.

Dated July 16, 1917.

Entered July 23, 1917.

SAMUEL KALISCH, J. S. C.

On motion of Durand, Ivins & Carton, Attorneys. 10

We consent to the above order.

DURAND, IVINS & CARTON, ·

Attorneys of Plaintiff.

WILBUR A. HEISLEY,

Attorney of Defendant.

A true copy.

WILLIAM C. GEBHARDT, Clerk.

POSTEA. 20

This case was tried before Judge Rulif V. Lawrence, of the Court of Common Pleas, of the County of Monmouth, with a jury, during the May Term of the Monmouth County Circuit, in said Court of Common Pleas, on July 17th and 18th, 1917.

The jury rendered a verdict against the plaintiffs and in favor of the defendant, of "no cause for action."

RULIF V. LAWRENCE, P. J. 30

NOTICE OF APPEAL.

To WILBUR A. HEISLEY, Attorney of Defendant.

Dear Sir:

TAKE NOTICE that the plaintiffs appeal to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause.

DURAND, IVINS & CARTON,

Attorneys of Plaintiffs-Appellants. 40

NEW JERSEY COURT of ERRORS and APPEALS

Appeal from New Jersey Supreme Court

ISAAC DRUMMOND <i>and</i> LESTER WISE, <i>Executors, etc.,</i> Plaintiffs-Appellants, <i>vs.</i> 10 RICHARD H. HUGHES, Defendant-Respondent	}	GROUNDS OF APPEAL
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The following are the grounds of plaintiffs' appeal, in the above stated cause:

1. The trial judge charged the jury:—

“Now, gentlemen of the jury, it appears in the case that after this work was completed complaint was made by Mr. Wise, who was then occupying the house—indeed I shall presently refer to the complaint which was made prior to the completion of the house—that the plastering had been defectively done; so much so that it was necessary to tear out the entire walls and ceilings of this house and replace with new plaster. It so happened that the new plaster was of a different character from that originally contemplated by the plans and specifications. In other words, it was what is known as a patented plaster. And I say to you that the plaintiff had no right under the law to substitute a patented plaster for the plaster which had been provided for in the plans and specifications. Therefore he could not recover, assuming you should find the preliminary question which I shall presently propound to you adversely to the defendant, the plaintiffs could not recover for the reasonable cost of the patented plaster, for the obvious reason, which will appeal undoubtedly to your common sense, that if the plaintiffs after discovering the alleged defect in the plaster which had been used, concluded that the proper plaster to use was a patented plaster, which had never been contemplated by the specifications, they could not adopt such a plaster and require the defendant to pay for it.

40 “Therefore, gentlemen, the rule which applies is this: If

there was defective work with respect to the plastering performed by the contractor, the defendant in this case, the plaintiffs were entitled to have that replaced with the plaster under the terms of the specifications in order to make the work good as contemplated by the original contract, and to be paid by the defendant or to claim of the defendant a reasonable sum for the expense so incurred.

“Under the evidence in this case, to which you will of course confine your attention, you may find that the first complaint related to cracks. Now you may as men of common sense reach the conclusion under the evidence that those cracks were no evidence of defective work, in other words, that they were the ordinary and customary cracks that appear in a new construction due to causes for which the contractor cannot be in fact held responsible. In other words, you may conclude that such cracks are not inconsistent with a good and workmanlike job. 10

“If the defendant simply complied with the terms of the specifications and the architect through a mistake, provided for timbers in those specifications which were insufficient to properly carry the weight of this building where it was necessary to have such support and as a result—the natural and proximate cause of those insufficient timbers—the cracks occurred and the plaster fell, then this defendant is not responsible in the law and no verdict can go against him. 20

“If Rockland lime was used by the direction of the architect no criticism can be made of the defendant by the plaintiffs. They were bound by the architect’s direction in that respect.

“It is undoubtedly the rule, gentlemen, that if there was any deviation in the plans and specifications made by the defendant by direction of the architect, and it afterwards appeared that such deviations were injurious to the plaintiffs, that the defendant could not be held for such resulting injury. 30

“I had occasion to refer to the testimony in the case that Rockland lime was advised by the architect. The specifications are silent as to the character of lime, other than the fact that it should be the best quality approved brand of lime. Now that indicates that somebody must approve it, because it says ‘the best quality approved brand of lime;’ and I 40

charge you as a matter of law that the defendant had the right; it was his duty under the circumstances, to look to the architect for his approval, and if he approved it he was to be guided under these specifications and the contract by such approval, and therefore was justified in using it."

Which portions of the judge's charge are erroneous.

2. The trial judge erred in charging the jury that the plaintiffs had no right to substitute patented plaster for plaster provided for in the specifications.
- 10 3. The trial judge erred in charging the jury that cracks are not inconsistent with a good and workmanlike job.
4. The trial judge erred in charging the jury in omitting to call the jury's attention that there were patches of the wall that had fallen off, which should have been brought to the jury's attention in considering the effect of the cracks.
5. The trial judge erred in charging the jury that if Rockland lime was used by the direction of the architect, and proved to be unsatisfactory, defendant was not responsible.
- 20 6. The trial judge erred in charging the jury that the defendant was obliged to follow the plans and specifications, even though the materials or work called for by such plans and specifications were defective and would not give a good workmanlike job.
7. The trial judge erred in charging the jury that the approved brand of lime called for in the specifications, contemplated a brand of lime approved by the architect, instead of an approved brand of lime, or brand approved in the trade.
- 30 8. The trial judge erred in failing to charge the jury that the defendant builder was required under the specifications to procure an approved brand of lime for the building, without regard to the approval of the architect.

Dated October 11th, 1917.

DURAND, IVINS & CARTON,
Attorneys of Plaintiffs-Appellants.

New Jersey Supreme Court

Monmouth Circuit

ISAAC DRUMMOND *and*
LESTER WISE,

Executors, etc.,

Plaintiffs,

vs.

RICHARD H. HUGHES,

Defendant.

ACTION AT LAW.

10

Freehold, N. J., July 17, 1917.

DR. LESTER WISE, Sworn for Plaintiffs.

MR. CARTON: Judge Heisley, the contract and specifications are admitted, I suppose, and we may offer them at 20 this time?

MR. HEISLEY: Yes.

(Contract and specifications marked respectively Exhibits P. 1 and P. 2.)

DIRECT EXAMINATION BY MR. CARTON:

Q. Dr. Wise, you live in Long Branch, in this county? 30

A. I do.

Q. Engaged in the practice of medicine there?

A. Yes, sir.

Q. Where is your place of residence or the house in question erected by you?

A. 119 Morris Avenue, Long Branch.

Q. When was this house erected, Dr. Wise, as you recall?

A. 1911.

Q. A contract entered into by whom?

A. With Mr. Hughes and my father, Charles F. Wise. 40

Q. Your father since died, did he not?

A. Yes; father died on September 5th.

Q. What year?

A. 1911.

Q. And who represent his estate at this time?

A. Mr. Drummond and myself.

Q. As executors?

A. Yes, sir.

Q. And you are plaintiffs in this suit?

10 A. Yes, sir.

Q. Doctor, do you know when the house was completed?

A. We moved in in the latter part of 1911; but there was still some work to be done until he left in the following June, June or July, somewhere along there—several months later.

Q. 1912?

A. 1912.

Q. And when in 1912, as you recall, was the work finally completed?

A. I couldn't give the exact date, but it was—

20 Q. Well, as you recall in the summer of 1912?

A. It was along in the summertime.

Q. You know about the occupation of this house as your residence or home?

A. Yes, sir.

Q. Mr. Sparry was the architect on the work, was he not?

A. Yes, sir.

Q. Did Mr. Sparry give Mr. Hughes his final certificate?

A. Yes, sir.

30 Q. Did Mr. Hughes receive his payments in full for his work?

A. Yes, sir.

Q. And the building was turned over to you?

A. Yes, sir.

Q. Well, Doctor, will you tell us what happened thereafter in regard to the condition of this building?

A. What do you mean; after the final certificate was given?

Q. Yes, and after you moved in, after the work was completed and Mr. Hughes had gone.

40 A. Well, there were a great many cracks appeared, and

the thing that bothered us most was the ceiling falling.

Q. How long or how shortly after you went in did these cracks first develop?

A. I couldn't give any exact time.

Q. Well, in months or years; can you approximate it?

A. A very few months. As the place dried out—

Q. What were the first indications that developed, as you observed, in the walls?

A. The cracks appearing.

Q. And then after that what happened to those cracks? 10

A. And then some ceilings fell where there were no cracks, appeared to be good.

Q. Some ceilings fell, you say, where there were no cracks?

A. Where there were no cracks, appeared to be good.

Q. Can you tell us now with regard to the time when the first ceiling fell?

A. The first ceiling fell before Mr. Hughes finished the house.

Q. That would be 1912 sometime? 20

A. Somewheres along there.

Q. Was that ceiling put back?

A. It was put back by Mr. Hughes.

Q. And later on, after Mr. Hughes left the job, what was your experience in regard to cracks in the ceiling?

A. Ceilings falling every once in a while. We had, I think—well, there were eight or nine of them fell, different places in the house.

Q. After Mr. Hughes had completed his work did he come back and replace this ceiling? 30

A. He replaced some of them.

Q. Well, how long did this matter continue, Doctor, this falling of ceilings?

A. Up until the plaster was taken off.

Q. And when was that, if you recall?

A. That was in 1915, I think it was.

Q. Now, from 1912 up to 1915, when the plaster was taken off, will you give us a little more detail of just what your observations were in regard to these cracks and this falling off in the various rooms? 40

A. Well, there would be these cracks appear and the plaster would loosen from both sides from the crack, so that it could not be cut out. If it was cut out and fixed up you still would have all this loose plaster on the side. That didn't appear in all of them, but appeared in a great many of them.

Q. Well, to what extent? What was the size of those patches that would fall off?

A. They would vary anywhere from—in one, in the kitchen closet, it practically fell out clean, the entire closet,
10 that is, from the ceiling, and they would fall anywhere from three feet to six feet in diameter.

Q. Can you give us some of the rooms where these patches fell out of?

A. There was a large patch fell out over the ice-box. That was while the plaster was being replaced. It was taken off in other parts of the house and this came down. It fell in the kitchen closet, at the end of the hall. That is where it fell out practically complete. It fell in my office.

Q. How big a patch fell from the ceiling of your office?

20 A. About four feet in diameter. There was a patch on the top floor fell, which was about six feet in diameter. There was—in fact there were two or three patches in that room fell. There was one in the coat closet fell.

Q. You were occupying the house at this time, Doctor?

A. I was occupying the house. There were places in the top hall. There was a friend of mine going downstairs and it fell just after he got from underneath it at the head of the stairs.

Q. To any considerable extent and size?

30 A. About four feet in diameter, roughly.

Q. Did you ever take occasion to examine this plaster after it would fall as to its condition?

A. Many times.

Q. What did its condition appear to be?

MR. HEISLEY: I object. He does not show that he is an expert.

40 THE COURT: Simply, Judge Heisley, as he may describe just what he saw. Any person can do that, I suppose.

MR. CARTON: I did not intend to have him as an expert, just say what he saw.

THE COURT: No, he obviously is not an expert.

A. Taking the piece of plaster, the white coat seemed to be good and hard.

MR. HEISLEY: I object and ask to have that stricken out. 10

THE COURT: Strike it out.

Q. You may tell us just what you saw, without speculating as to what it seemed to be; just exactly what its condition appeared to you to be.

MR. HEISLEY: I object, your Honor, unless he is going to show what the superficial condition was. Suppose he could say, "I saw a crack," or "I saw a hole," and so on, and for him to come in and tell us the condition and elements. 20

MR. CARTON: No; he is just describing the plaster that broke.

MR. HEISLEY: He evidently does not understand that, because he was describing the quality of it before.

THE COURT: The physical characteristics.

A. Simply what I had in my own hands. 30

Q. Now tell us about it.

BY THE COURT:

Q. What did you observe?

A. I picked up a piece of plaster that had fallen off and the white coat seemed hard; the brown coat—I don't know whether it was the scratch coat or brown coat—it was the dark portion of the plaster—was very crumbly. You could take your hands and it would crumble in your hands. 40

BY MR. CARTON:

Q. Did you take occasion to preserve any samples or any plaster taken from those various places?

A. Yes; many of them.

Q. Have you any of them with you?

A. I have.

Q. And will produce them later on?

A. I will.

Q. Were those samples taken by yourself?

10 A. Some of them, in fact, most of them.

Q. Somebody helped you take some of the others?

A. Some of them were taken while I was away by one of my relatives.

Q. Who constitute your family, Doctor?

A. Mrs. Wise and three children.

Q. All your family living with you in the house?

A. They are.

Q. In 1912 and 1915?

A. Ever since the house was built, ever since we moved
20 into the house.

Q. Doctor, what was the general condition of the house as far as appearance is concerned when you moved in? Were the walls all right, as far as you observed.

A. Seemed to be all right; seemed to be in first-class condition.

Q. You considered that the walls were all right and paid the money?

A. I considered that they were all right.

Q. Well, after you had moved in and after Mr. Hughes
30 had had his money did you take up with him the condition that the walls appeared to be in?

A. I did.

Q. On more than one occasion?

A. Many.

Q. Called his attention to it?

A. I did.

Q. What did Mr. Hughes do? Did he visit the house?

A. He did.

Q. Did you call upon Mr. Hughes to make good his work
40 under the contract?

A. We talked the matter over and Mr. Hughes at first seemed to think it was due to the settlement; and after that we had other men come down there and look the place over and they decided it was not due to a settlement; it was due to faulty plastering. Then Mr. Hughes was called on to make good.

Q. Did he make good?

A. No, sir; he didn't.

Q. Did you consult any one in authority concerning the condition of the plaster in the building and what was necessary in order to be done to make a perfect job? 10

A. Yes.

Q. Who did you consult?

A. The architect, Mr. Green, and there were several experts that I do not recall their names just at present.

Q. And did you take occasion to make any formal or written demand upon Mr. Hughes to do the work that was found to be defective.

A. I believe there was—

MR. HEISLEY: We will admit that, Mr. Carton. I don't know whether there was a formal demand, but there was a demand. We won't take any advantage of that. 20

Q. Have you the original mailed in 1915?

A. A letter?

Q. A letter.

MR. HEISLEY: I will admit that, that you made a demand. 30

MR. CARTON: I have a copy and I will offer the copy.

I offer in evidence a copy of a notice addressed to Mr. Hughes, under date of May 11, 1915, and a supplemental notice two days later, May 13, 1915.

THE COURT: I understand there is no objection. It may be marked.

MR. HEISLEY: No, sir. 40

(Papers marked Exhibits P. 3 and P. 4.)

Q. After you had served this notice on Mr. Hughes on May 15th to complete the work did you receive any reply from him?

A. I believe my attorneys did.

Q. Did you personally receive any reply from him?

A. I don't recall any reply.

Q. I show you a letter under date of May 16, 1915, and
10 ask you if you have ever seen that letter before?

A. I have.

Q. Did you receive that letter?

A. I did.

Q. From Mr. Hughes?

A. That is, I haven't read it entirely through, just glancing through it.

Q. Do you recall the letter generally?

A. Yes.

20 MR. CARTON: I ask that it be marked for identification.

(Letter marked Exhibit A for identification.)

MR. CARTON: Judge Heisley, have you Dr. Wise's letter of May 18, 1915, in reply to Mr. Hughes' letter?

MR. HEISLEY: No; we haven't got it.

30 MR. CARTON: This is in reply to the letter of the 18th.

MR. HEISLEY: I haven't seen that yet.

MR. CARTON: This is the copy, Judge. You can read it over.

(Letter submitted to Judge Heisley.)

40 MR. HEISLEY: We admit the original and the copy. I

do not see what they prove, except to show that these men are masons.

MR. CARTON: Just to show their dealings in the matter.

(Paper marked Exhibit P. 5.)

Q. I show you a letter under date of May 24th, purporting to be coming from Mr. Hughes to you. Did you receive that letter, Doctor?

A. Yes, sir.

10

MR. HEISLEY: Well, I don't object. I don't see what the letter proves, that is all.

THE COURT: How do you say it is relevant, Mr. Carton?

MR. HEISLEY: It shows there is a dispute at the present day.

MR. CARTON: It is for the purpose to show the relations 20
between these parties prior to the breaking off of the relations.

THE COURT: It probably has very slight relevancy. It may be admitted for what it is worth. It is unimportant, though, Judge Heisley.

(Paper marked Exhibit P. 6.)

Q. Dr. Wise, who were employed to do the work of making the repairs at your house?

A. Mr. Green was the architect and I can't recall the fellow's name just at present. 30

Q. Do you recall the name of the carpenter or mason who did the work?

THE COURT: Well, in any event you have them here, I suppose?

MR. CARTON: We have them here.

A. I can't recall them just at this minute.

40

Q. Fountain & Choate?

A. Yes, Fountain & Choate.

Q. Mr. Carney, the mason?

A. Yes, sir.

Q. And did they afterwards go ahead and do this work?

A. They did.

Q. Under the supervision of Mr. Green, the architect?

A. Yes, sir.

Q. And did you pay them their money?

10 A. Yes, sir.

Q. Doctor, what was done under Mr. Green's supervision and by these carpenters and masons that you observed, in completing this work?

A. The floors were protected.

BY MR. HEISLEY:

Q. Did what; took up the floor?

20 A. The floors were protected and the trim was taken off and the plaster removed. We thought at first that we could save some plaster, as they explained to me, by tying in. I don't know exactly what they meant by that, but they were going to tie on some walls, as they expressed it. But when they came to these walls that they thought could be saved it was found that the plastering was poor and would not stay there; it would simply come off the same as the rest, so it was all taken off.

Q. Were you present when the men were actually engaged in taking off the plaster?

30 A. I was present for about half the work.

Q. Tell us what you observed as they were doing the work, as this plaster was being taken off.

A. In the library I recall very distinctly in taking off the plaster from the ceiling there was a man took a shovel and simply slipped it right along that, and took it off in pieces three or four feet in diameter. It was practically the same all over the house. As it fell there was practically no dust to it at all.

Q. You had protected the floors with paper, I suppose?

40 A. The floors were protected. It was a hardwood floor in that room.

Q. In the furniture and furnishings, what was done with those?

A. The house was done about half at a time, and we took and moved all the furniture from one side over to the other side, and we lived in it in the meantime.

Q. And lived in it during the time?

A. Yes, or existed there.

Q. And as certain rooms were repaired they were cleaned up and the furniture put back again?

A. The furniture was moved back again.

10

CROSS EXAMINATION.

BY MR. HEISLEY:

Q. Doctor, I understand that you moved into this house in the fall of 1911; is that right?

A. 1911.

Q. And at that time you thought the house was all right?

A. The house was all right.

20

Q. But you say there were some things that were not done, but the house was finally finished in the following July, 1912?

A. I don't know whether it was July; it was along in the fall of the year.

Q. About that time?

A. Yes.

Q. Without going into detail, what was the nature of those things which were unfinished until the following summer?

A. There was some hardware, I believe.

Q. Well, little things about the house?

A. And then there was some discussion about these cracks, but that we did not think was a serious matter at that time.

30

Q. When did the cracks begin to appear?

A. I couldn't give the exact date, but a reasonable time after the walls were put on, when you would expect cracks to appear; I suppose in three or four months, somewhere along there.

40

Q. And the cracks began appearing in the wall then, you would say; some time along about the first of that year; somewhere along about that?

A. I couldn't say definitely.

Q. Certainly not, I understand, but approximately about the end of that year or the beginning of the next, as you moved in in September?

A. Yes.

Q. And did they keep increasing in number?

10

A. Yes.

Q. And when did you call Mr. Hughes' attention to it first; do you recall?

A. That I can't recall.

Q. How long after you moved in the house?

A. That I can't tell.

Q. Well, did you call his attention to it while he was putting on these little unfinished things, like the hardware and so on, or was it after that?

A. It was before the final payment; there was some discussion about it.

20

Q. But the final payment was not made until—

A. Along in October.

Q. A year after you moved in?

A. Yes.

Q. Now, what I am getting at is when he was there finishing up the hardware and other little things about the house, do you recall whether or not during that period you talked with him about the cracks, or was it after that and before the giving of the final certificate?

30

A. Do you mean that I complained that the plaster was not good or that the cracks were excessive?

Q. Well, either.

A. I complained that the cracks were excessive.

Q. That the cracks were excessive?

A. Yes; that is, more than I thought they should be.

Q. But I am trying to direct your attention to the time when you complained. Was it after he had finished these little odds and ends down in, say, July of 1912, that you complained?

40

A. It was before that.

Q. Before that?

A. Yes.

Q. Well, Mr. Poole did some mason work, didn't he, plastering work?

A. He did.

Q. And didn't he come back to the house and fill in some of those cracks?

A. That I don't recall. There was some patching there that he did, where the ceiling had fallen, that he did.

Q. And you don't recall whether he filled in any cracks 10 or not?

A. He may have, but I don't recall definitely.

Q. Well, when was this, before the fall of 1912 or afterwards?

A. That was before.

Q. He did that because you had complained to Mr. Hughes about the condition of the walls; isn't that so?

A. I believe so.

Q. Mr. Sparry was an architect that your father knew, wasn't he? 20

A. Not until he engaged him.

Q. Well, was he an architect in good standing in New York City?

A. As far as I know. I don't know the standing of him at all.

Q. But you people would not deliberately employ a poor architect, would you?

A. Hardly. We supposed he was all right.

Q. You did employ him because you supposed he was a reputable architect? 30

A. Yes.

Q. What was the firm name of which he was a member?

A. It was Sparry & Bruyere.

Q. Where was his office; do you recall?

A. About 36th Street, somewhere in there, or Fifth Avenue, between Fifth and Sixth, I think it was, or 7th Street, somewhere along in there.

Q. Now, did you complain to Mr. Sparry about these walls at that time?

A. I did. 40

Q. And was this before the final certificate?

A. It was.

Q. And before Poole finally came there and did this repairing, whatever it was; is that right?

A. That I couldn't say.

Q. Well, Poole has never been there since the fall of 1912 to do any patching, has he, that you know of?

A. I don't recall any.

Q. Well, then isn't it your best judgment that the patching or repairing done by Poole was done prior to the giving of the final certificate?

A. That I couldn't say.

Q. Well, isn't it true that the final certificate was not given until October, 1912?

A. It was given on that date to the best of my knowledge.

Q. And isn't it true that after your father's attention and after your attention had been called to the condition of these walls and that Poole had gone through and repaired them, that the architect expressed his satisfaction with the work as done, that he gave a written certificate to Mr. Hughes, which was delivered to your father, and after all that didn't your father, or your successors anyway, in title down there, give Mr. Hughes a check for over \$1,700 for the last payment? Isn't that so?

A. Seventeen hundred and over; I don't recall what the last payment was.

Q. Do you think it was larger than that?

A. I don't recall what it was.

Q. Well, isn't it true that after you had made all these complaints and these alleged errors and defects had been called to the architect's attention, that the architect expressed himself as satisfied himself with the manner in which the work had been done and with the quality of the work and materials, that he gave the final certificate called for by the architect and that the owners of the property paid a large sum of money, aggregating \$2,000, as a final payment to Mr. Hughes?

A. At one time the architect said—

Q. I want a responsive answer.

THE COURT: You may answer yes or no.

A. No.

Q. What part of my statement is wrong?

A. The architect said that the plaster job was in poor shape and that he was going to have some settlement. He went to see Mr. Hughes and everything seemed to be all right.

Q. He said this?

A. That is what he told me.

Q. He told you and said he was going to have some settlement? 10

A. I wouldn't say he said settlement, not exactly in those words, but that is what he implied, that there was going to be something done about it.

Q. He called your attention then to the fact that the plastering was not right?

A. Yes.

Q. Isn't that so?

A. Yes.

Q. And yet after that gave a certificate, a final certificate, and you people, with knowledge that the plastering was not right, paid nearly \$2,000 to Mr. Hughes as a final payment; isn't that so? 20

A. After the architect switched around and said it was all right.

Q. Will you be good enough, Mr. Wise, to answer my question? Isn't it so that after you had learned from your architect that the plastering was not right that you accepted his final certificate and paid Hughes nearly \$2,000 as the last payment; isn't that so? 30

A. We hadn't found out the plastering was not all right.

Q. Won't you tell me; isn't it so that you paid the \$2,000?

A. We paid the \$2,000.

Q. Wait a minute. After you had knowledge from the architect that the plastering was not right; isn't that so?

A. When he said it was not right—

THE COURT: I think you may answer the question, Doctor, yes or no. 40

Q. It won't hurt you, Doctor.

THE COURT: The counsel may then direct your attention to any qualification you desire to make. Repeat the question.

MR. HEISLEY: Let me just re-ask the question.

Q. Isn't it true that after the architect called your attention to the fact that the plastering was not good that he gave you a final certificate, or Hughes a final certificate, and you people accepted it and paid Hughes nearly \$2,000 as a final payment on the contract?

A. It was part of the wording there that the architect told us afterwards that he has not put in. If you put that in I would be very glad to say yes.

BY THE COURT:

Q. With that qualification you say yes?

A. Yes, if he puts that in I will say yes.

BY MR. HEISLEY:

Q. But you admitted awhile ago that the architect did tell you before this?

A. Yes.

Q. The point I want you to admit, Doctor, if you would save time on this hot day, is this: Isn't it true that you accepted the final certificate and made a final payment after you had been told by the architect that the plastering was not right?

A. We did that, yes, after he told us that it was all right.

Q. What?

A. I say we did that after he told us finally that it was all right. Now if you want to put in that qualification I will say yes.

Q. Now you say pieces of ceiling fell off the wall before Hughes left the job?

A. Yes.

Q. Where was that ceiling located?

A. That was on the top floor.

Q. Doctor, didn't you cause that ceiling to fall by your undertaking to build yourself a little room on the top floor, and didn't you pay for the cost of replacing that ceiling?

A. No, sir.

Q. What ceiling did you pay for replacing?

A. I don't recall any.

Q. Didn't you build a room somewhere in the house?

A. I simply laid a floor on the floor in the attic. 10

Q. You drove nails into the floor?

A. Into the beams.

Q. Into the beams, of course; and wasn't it right under that place where the plastering fell?

A. Yes.

Q. Two by six beams, weren't they?

A. I don't recall.

Q. And didn't you undertake to lay that floor on those beams before the plastering was dry?

A. No. 20

Q. How do you know?

A. Gave a reasonable time for the plaster to dry.

Q. How long after the plaster was on there before you undertook to lay this floor?

A. That I couldn't say definitely.

Q. Do you say that you did not pay Poole or Hughes for the expense of replacing that plaster that fell?

A. I didn't say that. I say I don't recall.

Q. Won't you be good enough to reply?

A. Well, I don't remember. 30

Q. Will you swear that you didn't pay for the expense of it?

A. I said I didn't remember. How can I swear that?

Q. Well, if you paid for it you must have thought it was your bill, didn't you?

A. I very seldom pay bills that I do not think are mine.

Q. So if you paid for it it must have been because you thought you caused the damage; isn't that so?

A. Once in a while I pay bills while I don't think I cause the damage. 40

THE COURT: Where he says he doesn't remember it leaves you to affirmative proof of the transaction.

MR. HEISLEY: Well, I will prove it.

Q. Where else did the ceiling fall?

A. Down in the kitchen closet.

Q. Is the bathroom over the kitchen?

A. No.

Q. How big a piece fell there?

10 A. About the size of the closet. The closet I should say was about five feet square.

Q. It all fell off, didn't it?

A. Practically, yes.

Q. What was directly over that closet ceiling, Doctor?

A. I think the back hallway on the second floor.

Q. Don't the heater pipes pass through there?

A. That I don't recall.

Q. When did this piece of plaster fall off?

A. That I couldn't remember. I don't recall any date.

20 Q. Long after the giving of the final certificate?

A. That I don't recall.

Q. Why don't you recall?

A. This is three years ago.

Q. Was it a year ago that that fell?

A. No; it wasn't a year ago.

Q. Was it two years ago?

A. Now, you are getting back further than I can recall.

30 Q. Then you mean for this jury that you are holding Hughes for the plaster that falls off in the building at least three years after the work is done; is that right?

A. When the plaster starts to fall almost before he gets out of the house.

Q. No; but I am talking about this piece over the kitchen closet.

A. If there had been just one ceiling fell off in three years after he left I wouldn't have said anything about it.

40 Q. But a part of the ceiling which you are seeking to hold him for is the ceiling which fell, you say, not three years ago, and you think perhaps over two years ago, let me say in 1915, likely it fell; is that right?

A. I couldn't say.

Q. What?

A. I couldn't say what year it fell. It fell, that is all I know.

Q. Where else did it fall?

A. Fell over the ice-box door of the ice-box room. That fell while the men were in the house repairing.

Q. How big a piece fell there?

A. Well, there was quite a large piece there, three or four feet in diameter. 10

Q. What is located directly over that?

A. I think that is a continuation of the back hallway on the second floor.

Q. Isn't there a bathroom over that?

A. No bathroom over it.

Q. That fell before the men left the work; is that right?

A. That fell when the men were repairing the work; that is, when we were having the work redone.

Q. And you mean to say your men knocked it down?

A. No; I didn't say so. I say it fell down while they were in the house. 20

Q. You think we are responsible for that, do you?

THE COURT: Don't argue with the witness. Strike it out. Proceed.

Q. When was it that these men did this work?

A. In 1915, as I recall it.

Q. Four years after the plastering was put on the wall, isn't that right? 30

A. That is correct for that date.

Q. What else fell?

A. In my office.

Q. How much there?

A. A piece about three feet in diameter.

Q. When did that fall?

A. That fell—well, I would say roughly within a year or so after we got in the house.

Q. Maybe two or three years?

A. I don't think it was so long as that. 40

- Q. What is there over your office?
 A. Bathroom.
 Q. Don't you know that leaky pipes caused that to fall?
 A. That was—
 Q. Well, now, don't you, Doctor, yes or no?
 A. No.
 Q. You don't know whether it did or not?
 A. I know it, yes. I know it was not. That fell before
 the leak.
- 10 Q. There was a leak there afterwards?
 A. There was a leak there afterwards.
 Q. What else fell?
 A. In the hat closet off the main hall.
 Q. What closet?
 A. Coat closet off the main hall.
 Q. Downstairs?
 A. Downstairs.
 Q. How big a piece fell there?
 A. I don't recall just the size of it. It was a large patch.
- 20 Q. What do you mean by large, as big as your head or
 five feet or what?
 A. No, the closet is not as large as that. Why, I should
 say maybe two or three feet in diameter, maybe larger. It
 was an appreciable piece.
 Q. It was in the closet?
 A. It was in the closet.
 Q. What else fell?
 A. A piece on the top floor, just at the head of the stairs
 fell.
- 30 Q. How big was that?
 A. About four or five feet in diameter. These sizes are
 very rough.
 Q. I understand they are approximate. When did this
 fall?
 A. The one at the head of the stairs, I should say about
 two years after the house was completed.
 Q. Did any of these fall when the men were there re-
 pairing it excepting the one piece you spoke of over the ice-
 box?
- 40 A. That is the only one I recall.

Q. What else fell?

A. I don't recall any others just this minute.

Q. Well, then, what was the necessity for going in the parlor and the drawing room and dining room and stripping off all the side walls, if only, as you say, in these places did the plastering fall?

A. Because the plaster was loose there and we were afraid it was going to fall.

Q. And these men who were doing the job advised you to have it taken off?

10

A. They did not. We didn't take their opinion on the job.

Q. You took somebody else's?

A. We took the architect's.

Q. Were you there when the work was being repaired?

A. About half the work.

Q. Do you recollect whether the floors and timbers were jacked up when you were taking off the old plaster or right afterwards.

A. What floors do you refer to?

20

Q. The first floor.

A. Yes, there was a place there that was jacked up.

Q. There was a settlement there, wasn't there?

A. I don't know whether it was settlement or not. The place was jacked up.

Q. Well, Doctor, you know without being an architect, they don't jack up a place that is high; they jack up a place that is low.

A. Usually.

Q. Then there was a settlement?

30

A. Not necessarily.

Q. There was a low place?

A. I don't know why they jacked it up.

Q. There was a low place in the floor?

A. Not so you could see it.

Q. Don't fence with me. There was a low place that they jacked up, wasn't there?

A. Not so you could have seen it.

Q. Have you any idea then why they jacked it up?

A. I suppose to bring it up to a true level.

40

Q. Did the ceiling sag any?

A. No.

Q. You say you took off some of this mortar and it crumbled?

A. Yes.

Q. Don't you know that any mortar unless it is patent plaster will crumble in your hands?

A. Not the sample I got from the company.

Q. I am asking you if you don't know that lime and sand
10 plaster will always crumble in your hands.

A. I say I don't know.

Q. You say it will not?

A. I say I don't know.

Q. You don't know whether it will crumble or not?

A. I will simply say that the sample sent me by the company didn't crumble, and that was supposed to be proper.

Q. That was the company that put on that last plaster?

A. No, that was the company that furnished Mr. Poole.

Q. I am not asking you that. I am asking you whether
20 you don't know or whether you do know whether it is usual for plaster which is made from lime, sand and hair to be so soft that you can crumble it in your fingers.

A. I say I have no experience except the sample that this company sent me; that did not crumble.

Q. Do you know that that sample which they sent you was made of sand and lime and hair?

A. I do not; no.

Q. Then why do you answer that way?

A. Because they sent me that as a sample of properly
30 mixed lime, using right material.

Q. Don't you know that the lime called for in your specifications which governed the building of this house called for lime, sand and hair?

A. Yes.

Q. Don't you know that when you put on this other plaster you put on patent plaster?

A. We did.

Q. And wasn't it because there were so many settle-
ments in the house that you were afraid to put on the old-
40 fashioned plaster?

A. No, sir; it was because we were not going to make another mistake like the first one.

Q. What was your first mistake, going to Sparry?

A. No, sir; because it was not mixed properly.

Q. That is your opinion?

A. No, that is the opinion of experts.

Q. Well, we will take their own oath rather than have you say it.

A. Well, you asked me whether it was my opinion.

Q. You say you went to the walls and you took a shovel, 10
or somebody did, and put it between the lath and the plaster
and forced the plaster off; is that right?

A. The men that were taking the plaster down, that is
the way they did it.

Q. Do you think that is any evidence of bad plastering?

A. I am not an expert on that.

Q. What made you tell us about that when you thought
it had no significance?

A. Because I was asked.

Q. You didn't attach any special significance to the fact 20
that you could take a shovel and take plaster off the lath?

A. The plaster came off very easily.

Q. Do you know that it would come off easier than good
plaster that came off?

A. The patch that was put in by Mr. Hughes—I don't
know whether it was patent plaster or what it was—you can't
get a knife into it.

Q. And you can't get a knife into what you put on this
last time?

A. That I haven't tried.

Q. But you do know it was what they call patent plaster? 30

A. It was patent plaster we used; correct.

BY THE COURT:

Q. But the plaster used under the specifications was not
patent plaster?

A. Was old-fashioned lime.

Q. Was not patent plaster?

A. No, sir.

A. The specification did not call for patent plaster.

A. The specification did not call for patent plaster.

BY MR. HEISLEY:

Q. It called for old-fashioned lime?

THE COURT: That is what he said.

10 Q. Old-fashioned plaster? Now when you got ready for action you went to New York and got some New York architect to supervise the doing of this work?

A. Yes.

Q. You were then a resident of Long Branch?

A. Yes.

Q. And you ceased your relations with Mr. Sparry and whatever their name is?

A. Couldn't find them.

Q. You don't hold us responsible for that, I suppose?

20 A. Not at all.

Q. You discovered them first?

A. We didn't discover them.

Q. And who did you give a contract to, if you gave a contract to any one, to do this work under this new batch of New York architects?

A. That was given to—the name was given you a short time ago.

Q. Bowman and somebody?

A. Fountain & Choate.

30 Q. Where are they from?

A. From New York.

Q. You went to New York and got your architect and to get your men to do this work; is that right?

A. We went by what the architect said.

Q. That is all you did there?

A. Yes.

REDIRECT EXAMINATION.

40 BY MR. CARTON:

Q. You had formerly lived in New York?

A. I did.

Q. Before coming to Long Branch?

A. I did.

BY MR. HEISLEY:

Q. When was it that this work of repairing was done? Did you answer that specifically or not? I meant to ask you.

A. I think it was the summer of 1915.

10

Q. Yes, so I understood you.

BY MR. CARTON:

Q. Doctor, you have stated on your cross-examination that certain cracks were apparent in the walls prior to Mr. Hughes getting his final certificate and last payment?

A. Yes.

Q. I ask you now whether the principal falling off of the walls was after that or before that, after Mr. Hughes left the job or before.

20

A. I think there was more ceiling fell after the job was completed, that is, after Mr. Hughes was through with the work.

Q. Will you tell us, of these walls that fell off; whether they fell principally from the ceilings or the side walls?

A. They were all ceilings, all but one. There was only one that I recall, and that was over the ice-box, where there was a side wall fell. Well, there was one more, I believe, downstairs in the cellar, but I don't recall much about that. There was some off the side there.

30

Q. The falling was principally from the ceiling and not the side wall?

A. Yes, principally the ceiling.

Q. You said something about your observation of the mechanics in taking off the plaster, and made some reference to a patch that had been put on?

A. Yes.

Q. What was that?

A. That was a patch on the top floor that Mr. Hughes

40

replaced. I tried that with my knife and it was very hard, and where the old plaster was right next to it you could run a knife right through it. That is, the brown coat.

Q. This work in taking off the plaster with a shovel, as you have described, as you observed, did they have any difficulty in breaking the clinches?

A. None whatever. They would get a shovel in and you would have a great big patch fall off.

Q. Did you prior to taking up with Mr. Green and Fountain & Choate make any effort to have Long Branch to make these repairs?

A. I believe we did.

BY MR. HEISLEY:

Q. Don't you know?

A. Yes.

BY MR. CARTON:

Q. Did you experience difficulty in getting them to take the matter up?

A. They said they didn't care to touch the matter.

Q. Because Mr. Hughes lived in Long Branch?

A. What do you say?

Q. Did they say that because Mr. Hughes lived in Long Branch?

A. No, they didn't make any comment on it.

Q. Didn't care to take it and then you went to a New York man?

A. A New York man.

RECROSS EXAMINATION.

BY MR. HEISLEY:

Q. You had no trouble in finding people in New York to come down there to do it?

A. No, sir.

Q. You had a garage on that property, too, didn't you?

A. We did.

Q. That was plastered also?

A. Just the room.

Q. How big a room was it, would you say?

A. Roughly, ten by twelve, I should say; maybe larger.

Q. Doctor, you have had no trouble with the plaster there, have you?

A. That cracked there. That is the reason that was taken off.

Q. In the garage?

A. Yes, in this room I am talking about. That is the 10
man's room that was plastered.

Q. Was there only one—

A. That is the only place that was plastered, I understand. I believe the rest of it was concrete.

Q. Wasn't the ceiling in the garage plastered?

A. I think it is concrete on wire lath.

Q. Now assuming that it was plastered, that you are wrong about supposing that it was concrete, has that ceiling been satisfactory?

A. That ceiling has been all right. It is on wire lath. 20

BY MR. CARTON:

Q. Will you while the next witness is being examined get the samples, please, that you have with you?

A. Yes.

MRS. MARGARET G. WISE, sworn for plaintiffs.

DIRECT EXAMINATION BY MR. CARTON: 30

Q. Mrs. Wise, are you the wife of Dr. Wise, the last witness?

A. I am.

Q. And now living in the Long Branch home?

A. Yes.

Q. Been living there since 1912?

A. Part of 1911.

Q. Can you tell us, according to your observation, when you first went into the house? 40

A. We moved in the house in 1911, in September, I believe, and remained there constantly until the repairing, that is to say, excepting visits, until the repairing started in.

Q. In 1915?

A. Sometime in 1915.

Q. Dr. Wise has said that the early part of your occupation of the house the work had not quite been completed, such as hardware, etc., that Mr. Hughes and his men were doing some work. Is that your recollection?

10 A. Yes.

Q. The doctor's recollection is that Mr. Hughes completed the work here sometime in the summer or fall of 1912. Is that as you recall it?

A. Yes.

Q. What has been your experience in observing the walls in the house since you went in it, Mrs. Wise?

A. Well, they started and fell with apparently no reason and without our being able to get any idea what was going to fall.

20 Q. When did they start falling?

A. Well, as the Doctor said a few minutes ago, the first ceiling fell almost immediately.

Q. After you went in?

A. After we went in. And that was redone without bringing the matter up, I think, then to Mr. Sparry. It think it was done right away, because there were some men in the house that were there when it happened.

Q. Some of Mr. Hughes' men?

30 A. Yes. And after that we didn't think anything about that much. Of course cracks were noticeable, but I didn't pay much attention to the cracks. I didn't pay any attention to anything until the ceilings began to fall, and then when they fell, as they did on two or three occasions, just as a person had stepped out of a room or stepped away from a place, it became very annoying and made us all very nervous.

Q. Have you children?

A. I have three children, and my baby's first two years was from the time when the first was falling.

40 MR. HEISLEY: I don't know as that makes any difference, does it? We haven't killed anybody yet.

THE COURT: Well, they are not suing for damages on that ground, of mental suffering or apprehension or anything of that kind.

Q. Will you describe in a way what you observed in those ceilings as they fell in different rooms from time to time?

A. Well, there wasn't much to observe. The ceilings seemed to look all right, and the rooms that we thought might fall because of cracks were the rooms that did not fall; and they just fell, that was all. 10

BY THE COURT:

Q. Well, Mrs. Wise, the rooms where you thought the walls might fall and did not, were they afterwards taken down?

A. They were afterwards taken down. All the walls were taken down afterwards. We were very much inconvenienced as they were taken down. 20

BY MR. CARTON:

Q. Was it your experience that walls would fall where there were apparently no cracks in them at all?

A. Most of them that I remember, there were no cracks in them when they fell.

Q. Will you tell us as best you can remember the different rooms in which the ceilings fell?

A. Well, there were two in the maids' rooms on the top floor; there were two in the doctor's office. 30

Q. These on the top floor, about what were the dimensions of the patch?

A. I am rather bad on dimensions.

Q. Well, approximately.

A. I should say they were in the neighborhood of four feet long. And the stairs, the head of the stairs on the top floor.

Q. How large was that?

A. That was a little larger. Then the closet at the end— 40

the coat closet, the linen closet, the ice-box room, the kitchen closet, the staircase going down into the kitchen. I think that is all I recall just now.

Q. How about the library and the Doctor's office?

A. The Doctor's office, too, I said.

Q. And generally the dimensions of the places they fell from these various rooms, what would they be?

A. Well, they were like that. (Indicating.)

Q. Indicating three or four feet?

10 A. Yes.

Q. Did you ever see any of them fall?

A. Well, no. I have been there just a minute after it fell. There was a great deal of sifting too around the trim. If you closed a door it would sift, so that we continually had to be wiping up the hardwood floor. The plaster would come out at the bottom.

Q. You mean where plaster would not fall it would sift?

A. I mean through the house that was the case, around the bottom boards, it was continually, as I have never noticed it
20 in any other house.

Q. Did you observe that very generally before the repairs?

A. Yes.

Q. Where in the Doctor's office did this patch fall from?

A. Well, it was right over his desk and chair.

Q. And what was the condition of the plaster after it fell as you observed it?

A. Well, it would always crumble all to pieces after it fell.

30 Q. You never made any special examination of it, I suppose?

A. No.

Q. Now this continued until the summer of 1915?

A. Yes, sir.

Q. You know nothing, I suppose, about Dr. Wise's efforts to have Mr. Hughes do the work, do you?

A. I know Mr. Hughes was there on several occasions, once that I remember distinctly with Mr. Poole and another
40 gentleman.

Q. After the walls had fallen, after some walls had fallen?

A. Yes, the Doctor was in New York. It was Saturday. Mr. Sparry was there also for him.

Q. Were they looking over the rooms?

A. They were going through the rooms and asking me questions about the walls at that time.

Q. These walls, principally did they fall after Mr. Hughes had left the work?

A. Yes, I think with the exception of that one it was after the workmen were out of the house. 10

Q. Did you observe the workmen who afterwards took the walls off as they took them off?

A. Yes, I was there. For a month or more they were taking them off.

Q. Did you observe what effort, if any, they had in getting them off?

A. It was quite noticeable, and some of our friends in the neighborhood even came in to look at it.

Q. What did you observe? 20

A. Well, the occurrence I observed that was most marked it was not a shovel that was being used, but it was a piece of lath, by one colored man and he used a half of lath and ran it along. That was in the library.

Q. Ran it between the plaster and the lath?

A. Between the plaster and the ceiling, just to take it down.

Q. What effect would that have when he did this?

A. It would all come down, come down beautifully. And Mr. Key was there. He is dead now, I am sorry to say. He couldn't help remark about it. 30

Q. You lived in the house the greater part of the time it was being repaired.

A. Yes.

Q. Were the floors protected?

A. They were all protected very thoroughly with paper and boards.

Q. Did you move from one part of the house to another when it was being done?

A. Yes; we remained there because we thought we had 40

to keep track of our own furniture and things. That is the only reason we remained.

Q. How many rooms in your house?

A. I could count them. It would take me a minute, though.

Q. Well, approximately; eighteen or twenty?

A. About sixteen.

Q. Where the walls fell was it principally from the ceilings or the side walls?

10 A. With the exception of two places that I recall it was all ceiling.

Q. And did you observe the efforts of the men when they were taking off the ceiling when they came to a patch that had been put on by Mr. Poole?

A. Well, the one that I think of, it was perfectly hard and they had to take a hammer in that case.

CROSS EXAMINATION.

BY MR. HEISLEY:

20 Q. Mrs. Wise, as I understand you, all the plaster in the entire house was taken off.

A. I believe that is correct.

Q. In rooms where plaster did not fall at all it was taken off?

A. It was taken off in places. It didn't fall, but it was because—

Q. I am not asking because. Just answer my question, please. Isn't it true that in rooms where no plaster had fallen either from the ceiling or the sidewalls that the ceiling and

30 the sidewalls were all taken off?

A. That is true.

Q. And the lathing was not taken off?

A. I don't recall any lathing. Well, I think there was a place in the library that was removed, but I am not positive.

BY THE COURT.

40 Q. You say they had difficulty in getting the plaster off those rooms where it had not fallen?

A. The one patch that I say.

Q. Where was that?

A. That was on the top floor.

BY MR. HEISLEY:

Q. You don't know that that was made of patent plaster, do you?

A. I don't know.

10

ERNEST GREEN, sworn for plaintiffs.

DIRECT EXAMINATION BY MR. CARTON:

Q. Mr. Green, where do you reside?

A. New Canaan, Connecticut.

Q. What is your business or profession?

A. Architect.

Q. And where are you engaged in practicing your profession?

20

A. 5 Beekman Street, New York City.

Q. How long have you been engaged in that business, Mr. Green?

A. Over twenty years.

Q. Actively engaged as an architect?

A. Actively.

Q. In and about New York City?

A. In the same location.

Q. Will you indicate generally what your experience has been?

A. My experience has been a general one, all kinds of buildings, from small buildings and small houses to large buildings, churches, public buildings, libraries, factories; in other words, a general architectural practice.

30

BY THE COURT:

Q. Including private residences?

A. Including a great many private residences.

Q. Where were you trained?

40

A. In an office in New York City, mostly.

Q. Practical training?

A. Practical work.

BY MR. CARTON:

Q. And I suppose you have had some experience with cement or the plastering of walls?

A. Considerable.

10 Q. Are you acquainted with Dr. Wise?

A. I didn't know Dr. Wise until I came down to see this house. I knew his father. It was through Dr. Drummond, who was the co-executor, that I came.

Q. When did you first visit Dr. Wise's house?

A. Well, I can't recall the exact date, but it was in the spring of 1915.

Q. That was the house on Morris Avenue in Long Branch?

A. Yes, sir.

20 Q. Mr. Green, will you tell us generally what was the condition of the house as you observed it at that time, with particular regard to the walls?

A. Well, the walls were badly cracked and seemed to be loose in a great many cases.

Q. What do you mean by loose?

A. Well, I mean you could put your hand up—in fact I think we got a broom or a pole with a rag on it and pushed it up on the ceilings so as to see just how loose they were.

30 Q. Indicating that there had not been proper clinching of the mortar or what?

(Objected to as leading.)

THE COURT: No; he can answer that and give his reason.

A. Indicating that there was some defect in the plaster, so that it did not adhere to the lath.

40 MR. HEISLEY: Just exactly what Mr. Carton suggested.

THE COURT: Counsel's objection came late.

Q. Go on with some further detail, Mr. Green, with regard to the condition of the wall as you observed it when you made your examination?

A. There were a number of places where the plaster had fallen. I remember the one in his office where it had been patched up at some previous time, and where the patch seemed to be quite secure. I also recall the one in the third floor, a small room there, where there was a patch which was very secure and the plastering alongside of it was very insecure or very soft. In fact, the plastering seemed more soft than it ought to have been throughout. 10

Q. When you took up this job, Mr. Green, did you examine the contract or specifications for the work that had been done by the contractor?

A. I looked over the specifications.

Q. Was it a lime and sand wall?

A. Yes. No reason why it should not have been a fairly good secure job under that specification as I interpret it. 20

Q. That was your conclusion as you examined the specification?

A. Yes.

Q. Did these specifications call for good quality lime, sand and long fresh cattle hair?

A. Well, the specification was very general, but it called for a first-class job, and that is perhaps the strongest specification that anybody could possibly have.

Q. Well, as you observed this work, was it a first-class job in your opinion? 30

A. It was not.

Q. Did you examine any plaster that came off these walls, Mr. Green.

A. I saw some pieces that had come off; yes.

Q. What was its condition as you examined it?

A. It was soft; rather without sufficient quantity of hair, I should judge, and did not have cohesion due, to something—well, I can't tell what it was due to, but that was the fact. 40

BY THE COURT:

Q. That is, no cohesion in the mass, you say?

A. In the mass, yes.

Q. You would say that was due to lack of hair, wouldn't you; the proper quantity of hair?

A. No; I wouldn't hardly say that. It might be due to a poor quality of sand, sand that had salt in it, and it might be due to it having had enough hair in it and lime being put in
10 and the lime burning the hair off, and it might be due, I should think, to not sufficient lime. Without a chemical analysis I could not say.

Q. That specification prescribed, as you recall the several quantities of the lime, sand and hair?

A. The specifications that I saw did not. They were very general and merely specified first-class work and the old style lime and sand mortar.

BY MR. CARTON:

20 Q. In the lime and sand walls called for by these specifications how many coats are there?

A. Three, usually.

Q. What are they?

A. Well, there is the scratch coat, the brown coat and the white coat.

Q. When you examined the walls as they came off did you make any special examination as to the different coats that were put on, which was good and which was bad?

A. No, I did not personally.

30 Q. You did not form any conclusion in regard to that matter?

A. I was not there when they were taking down all the plaster. It was either some one from my office or the plasterer.

Q. You made an examination at the time of doing the work?

A. I was there during all times during the progress.

Q. Was this a good job and the work well done?

A. Which do you mean? Do you mean the original job?

Q. The original job.

40 A. My judgment is that it was not a good job.

Q. In your judgment was it such a job as the specifications contemplated and called for?

A. It was not, in my judgment.

Q. What did you advise was necessary to be done at the time you visited the work in 1915 in order to make it a good job?

A. The first time I went down there I advised doing as little as possible to make the walls in fairly good condition, and I thought that we could get along by taking down a few of the loose ceilings and the ones that would fall down in a month or two if we did not take them down, and that was our idea at first. When we looked into it more we found every wall in the house was in such condition or appeared to me to be, and to the others, that if we did not take them down then it would be a question of their having to come down a little later. And although it was very distasteful to both Dr. and Mrs. Wise and also to me, to make them so much inconvenience, because they had to move their furniture from one part of the house to the other and get it covered with dust and dirt and lime mortar, and we had to take off all the trim from the boards, because the trim would have been entirely ruined by the mortar getting on it, still it was understood that that was really the only thing to do, to replace the entire house. 10 20

Q. And in order to replace it in your judgment it was necessary to take off the trim, I suppose?

A. It was absolutely necessary in order to preserve the trim.

Q. In the construction of the house the trim is put on after the plastering?

A. Yes, and of course a large expense was involved also in protecting the floors, which had to be covered with paper and strips of lath put around the base, so as to prevent the mortar and sand from getting on the floors. 30

Q. What sort of floors were they in the building?

A. Hardwood floors.

Q. Did you advise proper protection of the floors in the method you have named?

A. I advised that protection.

Q. Was this work put out by contract?

A. An estimate was drawn for it. 40

Q. Under your direction?

A. Under my direction, yes. And the method was—it was done on a cost and percentage method, with the largest item being the plastering. We got two bids on the plastering from a thoroughly reputable concern whom we could trust to do a first-class job, and the contract was awarded to the lowest of those two bidders. It was Carney Brothers, who have business in New York and live here in New Jersey.

Q. And who had charge of the general superintendence
10 of the woodwork and so on?

A. Well, of course my office had charge as an architect, and an occasional inspection of Fountain & Choate by superintendent on the job the entire time, Mr. Moore.

Q. Mr. Moore?

A. Mr. Moore.

Q. And after you had advised what you deemed necessary to be done did you visit the job from time to time?

A. Visited the job, either I personally or my outside superintendent about every—I should say every week or ten
20 days.

Q. Could the job be done and made a proper job as the specifications called for in any other way than the way the work was finally done?

A. Well, you mean could it be repaired?

Q. Yes.

A. It didn't seem to me so.

Q. At first you thought it might be?

A. At first I thought we might, to save trouble, that it might be wiser for Dr. Wise to put up with some imperfect
30 walls rather than go to all the trouble and expense that he was put to, aside from the cost of the repairs.

Q. Has it been your experience that with lime and sand and hair a proper and perfectly good wall can be put up?

A. Very good. Some of the old walls were fully as good, from the lasting standpoint, as our modern cement, patent cement plaster.

BY THE COURT:

40 Q. I notice, Mr. Green, that the specifications with re-

spect to the quality of plaster provide "that all plaster be composed of best quality approved brand of lime, clean, sharp sand from pit, new long and fresh cattle hair in the sand, finish to be of lime and sand. All plastering to be executed in the best and neatest manner." As a result of your observation of the plaster can you tell us whether those ingredients were used or not by the contractor?

A. No, I could not tell. Nothing but an analysis could tell whether the sand—that is, I should not as an architect be able to tell whether it came from the pit or what kind of a pit, whether it had a little loam in it or whether it did not; whether the hair was long and had been burned by putting in the lime too soon, or lime before it was slacked, or something of that kind. 10

Q. You say you are not able to tell even whether this plaster put on was of the character called for by the specifications?

A. Well, I am able to tell that the result was not as called for; that it was not a first-class job.

20

BY MR. CARTON:

Q. Nor was it done in a good and workmanlike manner was it?

A. Well, that is incidental.

THE COURT: A corollary of the other.

MR. CARTON: Yes, I suppose that is so.

Q. Did you have charge, Mr. Green, of certifying the payments and checking up the moneys expended by Dr. Wise to various men? 30

A. I did.

Q. I show you a statement contained in the complaint in this case. Did you have to do with the making up of that statement?

A. Not of this particular statement. I gave the items from which this statement was made up. The bills that were submitted to me included the labor and every day's work on the job, the payrolls, as we call them, the bills from all the 40

material men before they were paid, usually; and they were all added in the sum total and then a certificate issued for the amount of the labor, plastering and material—the usual method.

Q. And those sums that were expended for labor and material, certified to by you, were what you deemed necessary in order to complete this job when you found it?

A. No, not quite.

Q. You may explain.

10 A. There were several things.

BY THE COURT:

Q. Also there were other alterations made which were not made necessary by this alleged defect?

A. Yes, that is it exactly.

Q. And of course the original contractor should not have been held responsible or liable for the cost of those alterations?

20 A. Yes, your Honor; that is it.

Q. You may distinguish.

BY MR. CARTON:

Q. You mean by that, Mr. Green, that by doing the work some additional work was done at the same time?

A. Yes.

30 Q. Which of course Mr. Hughes would have no concern with?

A. Yes, of course. They are separated in the bills there. There was an extra washbasin put in and some plumbing.

BY THE COURT:

Q. How many bathrooms in the house?

40 A. There are two lavatories on the first floor and I think there are three bathrooms on the second. I cannot recall. I have not looked at the plan.

BY THE COURT:

Q. Do you know whether there had been leaks in any of the bathrooms or either of the lavatories?

A. I think there had been one over the office, but I do not think that that made any difference, because the plastering was in the same damaged or rather bad condition where there were no leaks.

Q. Now are you able to separate the items which you say were alterations from those which you say were made necessary by the defective character of this plastering? 10

A. I have endeavored to do that in that statement.

BY MR. CARTON:

Q. Are they indicated on this statement, Mr. Green?

A. As far as I can see, glancing over it; it is a copy of my statement. There were some things for instance—

BY THE COURT:

20

Well, just give us the amount of the cost of the alterations and the cost of the work which you say was made necessary by the defective plastering.

MR. HEISLEY: If your Honor, please, there has been no evidence at all here to show that this work was done. This gentleman has taken something and made up a statement. I do not think he ought to do it.

THE COURT: I understand that he supervised the work. He testified to what was done. 30

MR. HEISLEY: Each month he said there were payrolls kept and bills. I do not see that he has any personal knowledge of it at all. For instance, he does not know that the payroll was kept.

THE COURT: Let us ask him.

BY THE COURT:

40

Q. Have you any personal knowledge of the alterations as distinguished from the other class of work?

A. I do not quite understand what you mean.

Q. In other words, do you know that this work was done, personally know it was done?

A. I know it from seeing the building before it was done and after it was done.

BY MR. HEISLEY:

10

Q. But, Mr. Green, you don't know that the books and bills and so forth from which this statement is supposed to be made up or of which this is a summary, that those books and bills and payrolls were accurately kept of your own knowledge, do you? You simply assumed that they were and made up this statement; isn't that right?

A. I assume when I pass on a bill—for instance, when a contractor submits a bill to me for so many days and so much money I have to assume to the extent that he knows and that
20 that work was done.

BY THE COURT:

Q. Were such bills submitted to you?

A. Yes, and every payroll was O. K'd by me and I checked it over and I knew about how many men were on the job; but I couldn't tell whether the men left at four o'clock in the afternoon instead of five.

30

MR. HEISLEY: I suppose that would not absolutely prove it, but I suppose for the purpose of having time he might testify from that.

THE COURT: Yes; testify from that for the purpose of refreshing your memory.

MR. HEISLEY: I do not want to make any captious objections, but of course I shall insist that the man who kept
40 the payrolls and all that sort of thing be produced here.

THE COURT: You are entitled to that, but we are simply working in a general way to anticipate.

MR. HEISLEY: I will withdraw my objection to save time.

Q. Proceed. What were the alterations?

A. Well, the total is \$4,227.28; and that includes some things like plumbing—

10

BY MR. HEISLEY:

Q. How much is it you are trying to hold us for? That is what you are getting, isn't it?

A. I am not in that. I don't know.

THE COURT: He says he is not attempting to hold you for anything.

MR. HEISLEY: Somebody is.

20

BY THE COURT:

Q. What I would like to know is the cost of these alterations.

A. Well, this is itemized with a good many items. Do you want me to read them all? There are two or three copies here.

Q. It will take some little time to do that.

30

A. And I was going to say I could tell you two or three things. For instance, the plumbing, will you cut out the plumbing, which amounted to \$108.84, and of that \$82.93 was for new work and \$6.75 was for taking down the fixtures in the bathrooms where plastering had to be done and repairs had to be made and setting them back again? That applies also to the electrical work. The electrical work is \$143.80, and for new work is \$128.80, and \$15 included just the repair.

Q. We won't take the time now to digest that. If you will segregate those items you will be recalled later.

40

MR. CARTON: I think they are segregated in that. The amounts are carried over.

THE COURT: That is what I was trying to find out.

BY THE COURT:

Q. What is the total cost of the new work; the so-called alterations?

10 A. The total cost of the new work is what I gave before, \$4,227.28.

BY MR. HEISLEY:

Q. That is everything?

A. No; that is not everything; that is the necessary repairs. The additional work is shown on the statement but not charged for or carried over.

20 BY THE COURT:

Q. Oh, I see. Then you mean of this sum of \$4,000, you are claiming that all of that was incurred with respect to the repairs made necessary by the plastering?

MR. CARTON: Yes.

Q. Now the new work here that is not in the repairs—

30 MR. HEISLEY: How are we interested in that? All that you want of us is \$4,227.

THE COURT: I thought the \$4,200 included the extra work.

BY MR. CARTON:

Q. And this statement showing \$4,200 was checked up by you at Dr. Wise's order and which you deemed necessary
40 to complete that job?

A. Yes, sir.

Q. Now, there is an item on this statement as sued for, Mr. Green, the liability insurance, amounting to \$76.64. Will you tell us what that item was for?

A. It was the employers' liability insurance. The contractors would be able to tell you more about that. I did not take it out. It is a usual charge on all contracts now on a percentage job. Every contractor takes out liability insurance.

Q. And the commission item of Fountain & Choate amounted to \$217.14. Was that the customary commission to pay to these men? 10

A. That is the customary commission. It is a little less than the customary commission.

Q. A little less than the customary commission?

A. Yes, I got them to do it a little less than the usual rates.

CROSS EXAMINATION.

BY MR. HEISLEY:

Q. Doctor, this work was done according to the New York rate of charges, wasn't it? 20

A. What do you mean? I don't understand.

Q. Why, the architect's charge, according to the New York rates and these contractors who did the work under you—

A. Well, the architect's charge was according to the charge of the American Institute of Architects. That is hardly New York.

Q. Do you know whether that rate prevails in New Jersey or not? 30

A. It prevails in New Jersey. In fact, we are all licensed in New Jersey if we do any work here.

Q. What is that charge?

A. It is ten per cent. for alteration work and six per cent. for new work.

Q. Doctor, do you mean to say of your own knowledge that down along the shore in this county that the architects, New Jersey architects, exact any such commissions as that?

A. I don't mean to say anything of the kind. You can get plans drawn for one and a half per cent. 40

Q. Are you a licensed architect of New Jersey?

A. I am; have been for years, ever since I have done business here.

Q. What did your fees amount to on this?

A. Well, I couldn't tell you without refreshing my memory. It is right on that statement.

MR. CARTON: \$195.42.

10 Q. And what did the contractors—

A. As I remember, Fountain & Choate, their charge was seven per cent, which is—

BY THE COURT:

Q. Customary?

A. No; it is not. Ten per cent. is customary, but this was lower than that.

20 MR. HEISLEY: What did he get, Mr. Carton, please?

MR. CARTON: \$217.40.

BY MR. HEISLEY:

Q. Now, do you know whether the wages paid the men who worked on the job, the carpenters—yes, I suppose you had carpenters that took off the trim—and the plasterers and so on, whether they were the New York or New Jersey rate of wages?

30 A. I couldn't tell you about that at this date.

Q. That makes a great difference, doesn't it?

A. Well, I don't know. I think the men came from—

Q. Now, hold on. Do you mean to say that you don't know that a mechanic in New York City gets a great deal more than the mechanics in New Jersey?

A. In the city?

Q. Yes.

A. Yes, I know that, certainly.

40 Q. Now, were these charges made according to the rates paid mechanics in New York City at that time?

A. Well, as I say, I don't recall about the payrolls, but they are here anyway.

Q. But why do you say that this is a reasonable and fair charge if you don't know—

A. Because I believe it.

Q. Yes, but you don't think it is a fair and reasonable charge if these mechanics have been brought down from New York City to do work at Long Branch and Mr. Hughes is sought to be held for the New York City rate of wages, do you?

10

A. Well, I don't know but what I might.

Q. Why? Why wouldn't you get mechanics around here in Monmouth County to do this work?

A. Well, I suppose we could have done so if we had found mechanics to do it thoroughly.

Q. You could have easily have found out. There are lots of mechanics along the shore, aren't there?

A. I suppose there are.

Q. Will you tell me then how you seek to justify the charging against Mr. Hughes, if he is to pay anything, the rate of wages paid mechanics in New York City when the work was done at Long Branch and mechanics could be had at Long Branch?

20

A. I did not say that the rates were according to the New York rates.

Q. Why didn't you find out, if you were a fair man, before you certified to this bill, whether the rates charged against Mr. Hughes were New York City rates or Monmouth County rates?

A. I said I didn't recall now about the payrolls. I may have found them out. It is two years ago.

30

Q. But for all you know, they may be charged at the rate of New York City mechanics; isn't that so?

A. Well, I don't recall, I say.

Q. But they may be, you don't say they are not?

A. I can't swear that they are; no.

Q. Where was the material bought, New York City?

A. No; it is bought here at Cranmer & Company's.

BY THE COURT:

40

Q. I suppose, Mr. Green, that necessarily you would pay more to New York City mechanics because this board is included, isn't it, at the time the job is going on?

A. Yes.

Q. Whereas the local mechanic would not have the item of board to consider?

A. The superintendent was the only man brought out of town excepting the plasterers. We had two plasterers in competition and we took the lowest bid for the work.

10

BY MR. HEISLEY:

Q. But they were men brought down from New York City to do the work, weren't they?

A. Which work?

Q. The men that actually did the plastering.

A. I don't know where they came from. That didn't make any difference, because this man was the lowest bidder, and if he got the men here he had a perfect right to get them, providing he did a good job.

20

Q. But he was a New York contractor?

A. His office is in New York, his home in New Jersey.

Q. But his office is in New York City, no matter where he sleeps; isn't that so?

A. I suppose so; yes.

Q. And as far as you know he had New York mechanics to do this work and paid them New York City wages; isn't that so?

A. I don't know anything about it. It didn't make any difference to me.

30

Q. And as far as you know you didn't care whether he did or not?

A. I didn't care whether he did, if he fulfilled his contract.

Q. You didn't think that you were obliged, in giving out this work, if you intended to hold Hughes for any damage, to try to minimize the damage, did you?

A. I didn't think it would be right to do any more than we had to do, but I did think it was right to get a thoroughly good job.

40

Q. Did you think that you were under the duty of overcoming this defective work as cheaply as you could consistent with getting a good, first-class job?

A. Yes; that is the reason that we got bids on the job.

Q. Why didn't you get bids on that in New Jersey, where you have admitted that the rate of wages was less than it is in New York?

A. Because I didn't know of any first-class man down here to go to.

Q. You don't think we have first-class people down here; 10
is that your idea?

A. I didn't say that at all. I say I didn't happen to know of them.

Q. Why didn't you try to find out?

A. Well, that is going back two years. I couldn't tell you.

Q. But you are going back two years to make us pay for this thing.

A. I don't make you pay for it.

Q. I am trying to find out, if you are going to be fair and honest in the matter, why it was you didn't try to do the work as cheaply as you could and let Hughes out of a bad hole if he was in a bad hole. 20

A. Because I wanted to get a first-class job. I was perhaps more interested in turning out something that I would not be ashamed of and to see Dr. Wise with this plastering in good condition than I was in saving Mr. Hughes.

Q. And you didn't ask a single New Jersey contractor doing business in New Jersey to figure on this thing, did you?

A. Not a single one. 30

Q. And your chief desire was to get a good job, regardless of the cost?

A. No, not regardless of the cost. My chief desire was to get a good job.

Q. You were not very solicitous about Hughes' end of it, were you?

A. Not the slightest, except I was more solicitous about my end of it.

Q. I say you were regardless of the cost?

A. No, not regardless of the cost. 40

Q. When you got all through with this what kind of plaster did you advise to go on this building?

A. A patent plaster.

Q. Why did you advise patent plaster?

A. Because I considered it easier to put on. It comes already mixed in boxes. The lath being so close together that it would hold better on lath that are close together. That was one trouble, I think, that it seemed to me that the lath were not far enough apart to get a good clinch between them.

10 Q. You don't blame Hughes for that, do you?

A. I don't know whether he put them on or not.

Q. Do you blame the man who put on the lath for their being too close together?

A. I should think so, certainly.

Q. And you would still blame him if he did it under the direction of the architect who approved of that distance between the two laths?

A. No, I shouldn't.

Q. You would blame the architect, wouldn't you?

20 A. I suppose I would have to. But it is a trouble that we all have, and Mr. Hughes knows it also, trying to get the plasterers to put the lath far enough apart.

Q. You have answered my question. Doesn't patent plaster run more even?

A. Very much more even, mixed by machinery.

Q. And as a general thing, Mr. Green, it is superseding or has superseded the old style of plaster, lime, hair and sand, isn't that so?

30 A. Yes, because the human element is eliminated. The mixing is all done by machinery.

Q. Now that statement was unnecessary. You have answered the question. Then you can't say really what was the matter with this plaster?

A. Yes.

Q. You don't say the hair was bad?

A. No, I say that there didn't appear to me to be enough hair in it, but what was the matter with the hair, what happened to it, I don't know.

40 BY THE COURT:

Q. Is there a recognized rule in the trade with respect to the mixture of the old-fashioned plaster, such a proportion of hair and such a proportion of sand and so on?

A. Yes, I know there is, but I don't recall it just at present.

Q. And you don't know whether that rule was applied in this particular instance or not?

A. No, my only conviction is that the plaster was not good. What caused it did not interest me so much.

10

BY MR. HEISLEY:

Q. Did you use any wire lath?

A. I don't think we used any.

Q. Didn't you use them in the angles?

A. We may have. I don't recall using any. There is no necessity for it.

Q. You don't say that this lime was bad lime?

A. All I say, the plaster was not good.

Q. But I am trying to find out, Mr. Green, what makes 20 the plaster not good. In what respect is it not good?

A. It doesn't stay on the wall.

Q. Well, these specifications say that the plaster is to be composed of best quality approved brand of lime. Do you say this was not an approved brand of lime that was used in there?

A. I don't say that.

Q. And you don't say it was not the best quality of approved lime?

A. I don't say that, either.

30

Q. And you don't deny that Sparry permitted the use of this particular kind of lime, do you, either?

A. No.

Q. Do you say it was not clean, sharp sand from the pit?

A. I don't say that, either.

Q. And you do not say it was long, clean, fresh cattle hair?

A. I don't say that.

Q. You simply say it came off?

A. I say more than that; it was bad.

40

Q. You don't know why it was bad?

A. I don't know why it was bad.

Q. And you don't know what the element was of badness in it?

A. Yes, the element of badness in it was it would not stay on the wall; it had no cohesive strength and would not stay together and it was soft.

10 BY THE COURT:

Q. You did observe that the lath was rather close together, didn't you?

A. Yes, the lath were close together, but still I have seen some jobs where notwithstanding the lath being too close, the plaster has stayed on.

BY MR. HEISLEY:

20

Q. Wasn't there a clinch on this mortar?

A. Oh, yes; in a good many places.

Q. Well, now generally, wasn't it clinched well?

A. My recollection is that there were a good many places where it was not.

Q. Now you say your recollection. Do you say that as a fact, testify under oath that there were places where it was not properly clinched?

30 A. No, I say that was my recollection. I can't recall absolutely.

Q. If it was properly clinched then it would be proof, wouldn't it, from a mechanical standpoint, that the lath were a proper distance apart?

40 A. Well if it were properly clinched it would mean that the lath were far enough apart so that the cement or plaster would push up through and have a strength there to hold it up. You might get them an eighth of an inch apart, as I have seen them, but you would get a clinch there, but the strength of that clinch would be so small that the slightest jar walking across the floor would break it.

BY THE COURT.

Q. Through the weakness of the plaster?

A. Yes; would not provide a hook. It would break off.

BY MR. HEISLEY:

Q. We all know this: that a plaster when it is put on it is soft.

A. Yes. 10

Q. And it is put on with so much force that it runs between the lath?

A. Yes.

Q. And it drops down behind and hardens and that is the clinch?

A. Yes.

Q. That is the way this plaster was, was it?

A. To a certain extent. Of course if it was half way, even a sixteenth inch crack, if you push it hard enough it will go through, but it will not have any strength. 20

Q. You don't mean to say that you can force plaster through a sixteenth inch crack do you?

A. I don't mean to say that you can do it easily, but I mean to say you can.

Q. You don't mean to say that these lath were not far enough apart, do you?

A. I said my recollection was that a good many of them were not.

Q. But you have no positive knowledge of the fact? 30

A. It is so long ago that I have forgotten.

Q. You think \$4,227.28 is a fair price for that work?

A. I don't think that that is exactly a question for me to answer, is it, your Honor?

Q. Well, if you don't want to don't answer it.

A. I don't know anything about it.

Q. I will withdraw it if you don't want to answer it. Mr. Green, do you recollect whether there was any settlement down there?

A. Yes, there was a little settlement. 40

Q. Well, you say a little. Wasn't there quite a pronounced settlement?

A. In the cellar, yes.

Q. And a settlement in the first floor, wasn't there?

A. Yes.

Q. And where was that?

A. In the middle of the house.

Q. Had the middle of the house settled?

A. Yes.

10 Q. How much had the middle of the house settled?

A. I couldn't tell, but I suppose it had gone down an inch or so.

Q. And what was it that caused that settlement, if you know?

A. Why, I think it was caused by the center of the house being built with a wooden frame and the outside walls being mason work and the wood shrunk on the inside and settled.

Q. Would that be a reasonable deduction, do you think?

A. I think it would.

20 Q. I understand you to say that you think the settlement was due to the fact that the outside of the house was made of stucco, hollow tile, wasn't it?

A. Hollow tile, mason work.

Q. And the interior of the house of frame?

A. Yes.

Q. Does that usually cause shrinkage and settlement?

A. Yes; it very often causes shrinkage and settlement.

Q. And this settlement was from the roof down, wasn't it?

30 A. Well, of course, it settled in the middle.

Q. Well, I mean it would be the whole house from the roof down would settle, wouldn't it?

A. Yes.

Q. And wouldn't that thing of itself cause a great many cracks?

40 A. That would cause some cracks, and it is a common condition in almost all kinds of houses, but not the kind of cracks in this house. It is very seldom that a house does not have some settlement cracks, due to the shrinkage, even when they are built of frame. They may have some vertical timbers

on the outside walls or some horizontal timbers on the inside. and the vertical timber does not shrink and the horizontal does when they are put on top of each other. That is the customary cause of cracks.

BY THE COURT:

Q. Is it customary to regard those cracks as a breach of the condition of the contract?

A. No, sir; it is not.

10

BY MR. HEISLEY:

Q. Wasn't part of that settlement due especially to the great weight of the supporting beams on the second and third floor?

A. I didn't observe it.

Q. Don't you know, Mr. Green, that this superstructure up through the center was supported by a wooden partition in the cellar?

20

A. That is what I was speaking of.

Q. That should have been bricked up, shouldn't it?

A. Well, I don't know about that.

Q. Well, if it had been bricked, with a good base under it, if it had been a brick wall or a lot of brick piers, it would give a wide base under the walls, it would have overcome that settling very largely wouldn't it?

A. It would not have overcome the shrinkage settlement of the masonry.

Q. I am talking about a settlement. Does it shrink?

30

A. It is very difficult to separate a shrinkage settlement from the other settlements. I cannot tell. I know that there was settlement there and that the outside was masonry and the inside timber, and there was a settlement.

Q. If there was an economy in that you would not blame the irregularity and any settlement on the carpenter work, would you?

A. No; it is a usual settlement.

Q. And a good architect, not desiring to have a poor job, would not advise that kind of construction, would he?

40

A. Well, I don't know. I wouldn't go as far as that personally. But I know it is done a good deal.

Q. If you had been the architect on this job would you have drawn the plans and specifications showing wooden partitions down cellar with a hollow tile and stucco wall or not?

MR. CARTON: I object. It is immaterial what this witness would have done.

10 THE COURT: Yes, I think it is quite immaterial, other than the fact that Judge Heisley has the right to show that the specifications were defective in that regard, producing the cracks complained of.

MR. CARTON: That was not the question, your Honor. The question was what would he have done.

MR. HEISLEY: The question is whether he complied with the specifications, and having done that there was no
20 liability resulting. That is what I want to show.

THE COURT: I think he has a right to do that.

Q. Will you answer the question?

A. What was the question?

Q. If you were drawing plans and specifications for the general character of this class of house, that is, with a hollow tile and stucco exterior, would you have prescribed the wood-
30 en partition or support in the cellar in the center of the house?

(Objected to. Objection overruled.)

A. Personally I should not; but as I said before, it is the ordinary—

Q. Never mind. You have answered the question. No matter what other people would do, I want to know what Mr. Green would do.

40 MR. CARTON: Being the opinion of an expert, I insist

he has the right to indicate what has been done or what the practice is. He simply states what he would have done.

THE COURT: You may cross-examine him on it.

REDIRECT EXAMINATION.

BY MR. CARTON:

Q. Such construction is advised and recommended by architects, generally, is it not, Mr. Green? 10

A. I don't know whether it is generally so. I know it is advised and recommended by architects.

Q. This settling, Mr. Green, that you observed, would cause, I suppose, the ordinary cracks we find in all new houses?

A. Yes.

Q. Would such settling be more apt in your experience to cause cracking in the side walls or ceilings, settlement in the middle?

A. Almost always in the side walls, instead of the ceiling. Naturally when the partition goes down it carries the beams with it and there is a twisting of torsion there. 20

Q. And it is your experience from ordinary settling of new houses that the cracking is most prominent in the side walls or in the corners more?

BY THE COURT:

Q. Where were the cracks that you saw?

A. Almost all in the ceiling, and more noticeable than cracks was the looseness of the plaster so that you could crush it up. 30

BY MR. CARTON:

Q. Now, irrespective of what you would want Mr. Hughes to pay, as Judge Heisley puts it, was the amount of this statement, some \$4,200, necessary to do the work, the work that was done there in your judgment?

A. It was, according to my judgment. In other words, it was a fair charge. 40

Q. Had you, prior to your association with Dr. Wise in this instance, formerly done work for him in New York or for his father?

A. For his father, or for his company, Devoe, Reynolds & Company. He was a director in the company.

Q. I think you said the mason work, putting back the walls, etc., was put out by contract?

A. The plastering.

10

FURTHER CROSS EXAMINATION.

BY MR. HEISLEY:

Q. Mr. Green, you say that in construction such as this house is, that the cracks caused by settlement would appear mostly in the side walls; is that right?

A. Well, as compared with the ceiling.

Q. More in the walls than in the ceiling?

20

A. Yes.

Q. You found the ceiling walls loose in some places, didn't you?

A. The ceilings loose; yes.

Q. Well, you found a different condition anyway, speaking generally, between the walls and the ceilings; isn't that so?

30

A. It was a more noticeable condition on the ceilings, because the weight sagged them down, and as soon as we took a room off the walls were just about as bad; I don't know but what fully as bad, but held in place by the trim and by the vertical position.

Q. If the plaster put on those walls and on the ceilings were mixed up at the same time, in the same bed, and put on in the same way, would you ascribe the difference in the condition of the walls and the ceilings to the fact that the construction of the house was of a frame interior and hollow tile exterior?

A. I don't quite understand what you mean.

40

(Question repeated.)

A. Do you mean the difference between the plastering put on the terra cotta blocks and the plastering put on the inside? Because there was a very decided difference between that which was put on the inside and outside walls and on terra cotta blocks and the wooden partition.

Q. No; I am speaking of the plastering on the walls and the plastering of the ceiling of the room. Now, assuming that the plaster was one and the same, mixed up at the same time and put on the same way, to what would you ascribe the difference in the appearance of those ceilings and the condition of the appearance of the walls, remembering it was identically the same plaster? Wouldn't you ascribe it to the fact that there was a wood interior and a hollow tile exterior house? 10

A. No; I would ascribe it, as I said just now, to the vertical position of the walls, which held them in place, and the horizontal position of the ceilings, which made them sag.

Q. They would stand up and interlock and not fall over?

A. Certainly, held on by the trim. As soon as we took the trim off it was loose. 20

Q. How do you account for the plastering on the outside of the house, that is, on the hollow tile, being better than it was on the inside, better in condition, if it was plaster mixed exactly the same as the plaster which was on the interior?

A. I don't know exactly why that was, but I presume that that on the outside walls was two coat work. I presume that it was mixed a little bit stronger.

Q. No; but I want you to assume that it was mixed at the same time and that it was exactly the same kind of plaster that was put on the inside of the house. 30

A. I don't think that assumption—

MR. CARTON: I don't think he has the right to assume any such thing. It is not in the evidence yet.

THE COURT: It must be based on a fact.

MR. HEISLEY: It is so.

THE COURT: There is nothing in the case. 40

MR. HEISLEY: Mr. Hughes tells me it was the same plaster.

THE COURT: But the other side objects.

A. It might be the same plaster but it might not be the same batch.

Q. Let me ask you this: If you will just assume, leave it to us and see whether we prove it or not—

10

MR. CARTON: I have no objection.

Q. If you will just assume that the plaster on the inside of the house was mixed at the same time—

A. That the plaster—excuse me—of the inside or outside walls?

Q. Yes; on the inside and outside walls, and was mixed at the same time and was part and parcel of the same plaster that was on the ceiling and walls of the interior of the house.
20 How do you account for one being good and staying firm and the other not?

A. I do not account for it, except, as I have said, that one would not be apt to be three coat work and the other one would, and they could not be in the same batch.

Q. Now you say that you think this charge of over \$4,000 is a fair and reasonable charge. Would you still say that if you were told that the original contract for the plastering of the entire house and garage was less than \$1,200?

A. I think that a very large portion of this was due to
30 the extra care with which it had to be done on account of the completion of the house. I think it would cost just twice as much, but I think the original cost was very small.

Q. But because you deal in New York prices and we deal down here in the country?

A. I have built some houses at Monmouth Beach.

Q. For New York people?

A. Well, for Mr. Hughes.

40

BY MR. CARTON:

Q. You have built some houses at Monmouth Beach, Monmouth County?

A. I did awhile ago, and Mr. Hughes built one or two houses for me some years ago, Stephenson & Green.

BY MR. HEISLEY:

Q. You got along all right, didn't you?

A. I got along with him very well at that time.

10

BY MR. CARTON:

Q. Do you say, as you observed the walls on the outside of the house, that they appeared to be better than the walls on the inside of the house?

A. They seemed to adhere more strongly to the terra cotta than they did to the lath.

Q. Did you arrive at any conclusion that it was better than on the inside?

A. My idea was, as I said, that it was two coat work, and they made it a little stronger, because it had to stick on the lath and had to work properly. It seemed to be very much better.

20

BY MR. HEISLEY:

Q. If it was not two coat work, but three coat work, your explanation would not explain, would it?

A. Would not explain the same way.

30

RECESS TO 1.30 P. M.

(Trial of the cause resumed at 1.30 P. M.)

WILLIAM J. DALZELL, sworn for plaintiffs.

DIRECT EXAMINATION BY MR. CARTON:

Q. Mr. Dalzell, where do you reside and what is your business?

40

A. I am superintendent of the Haskell Building Company of New York.

Q. Is the Haskell Building Company engaged in general building operations?

A. General building operations.

Q. How long have you been engaged in the work of erecting buildings?

A. Thirty years.

10 Q. And in and about New York City?

A. All the way from New York to New Orleans, all the way down, the several cities, Washington, Baltimore, Richmond and Philadelphia.

Q. Have you been actively engaged and continuously engaged in the prosecution of your work?

A. Continuously engaged; yes, sir. It is all the business I know.

Q. Did you at the request of Dr. Wise or some one representing him examine the Dr. Wise house at Long Branch?

20 A. I did in June, 1914.

A. In June, 1914?

A. Yes, sir.

Q. What were you employed to go there for?

A. Mr. Wise complained about the condition of the building and asked me to go down and look it over.

Q. Did you go down and make an examination of the house?

A. I did.

30 Q. What did you find the condition of the house to be with particular regard to the plastering, Mr. Dalzell?

A. Well, there had been two or three patches where it had been new, new plaster, and there were cracks in most of the rooms; I cannot remember exactly where now, but there were several cracks; and the plastering was loosened in a great many places on the partitions from the lath. You could move it with your hand. It was loose from the lath, appeared to be.

Q. Did you make a thorough examination of the entire house, all the rooms?

40 A. I was in all the rooms; yes.

Q. And what generally was the condition of the plaster in the various rooms?

A. Well, as I say, it was cracked in places, and there were some new patches, and the rest of it appeared to be in a condition to fall at any time under any jar of any kind in several places.

Q. Had you seen or been informed of the condition of the plans and specifications for this work, Mr. Dalzell?

A. No, I didn't see it.

Q. Was the plastering of the patent cement or the lime and sand type? 10

A. I think the old-fashioned plaster.

Q. Lime, sand and hair?

A. Lime, sand and hair.

Q. Did you recommend or advise Dr. Wise what was necessary to be done to fix it?

A. I told Dr. Wise in my opinion that the patching would have to be kept up indefinitely and the only proper way was to take it all off and replaster it, in my opinion.

Q. And why did you deem that advice necessary, Mr. Dalzell? 20

A. From the condition of the plaster that was on the walls that had not fallen appeared to be in to me.

Q. Did you make a report to that effect to Dr. Wise?

A. I did.

Q. Something has been said about some settlement in the building. Did you notice anything in particular in regard to that?

A. Well, there is always settling in a new building. I didn't notice there was any more there than would naturally follow. 30

Q. That has been quite your experience in a new building that there will be some settlement after a few years?

A. Yes, in a frame building, shrinkage of timber and settlement which would cause plaster cracks.

Q. Has it also been your experience that that would cause some cracking in the walls?

A. Always does.

Q. Were the cracks or defects in the walls that you observed such as ordinarily appear from such settlement? 40

A. Yes, only they appeared to be rather numerous.

Q. In your experience has the ordinary settling or the settling of an ordinary building had the effect of loosening the plaster from the lath such as you found this to be?

A. I don't think so.

Q. What did you advise was necessary to be done in order to make a good job of those walls?

A. I advised the covering of the floor, removing the furniture from the rooms, either out of the house entirely or from
10 one part of the house to another, protecting the floors, un-
hanging the doors and replastering.

Q. What about the trim?

A. Well, I didn't advise him to have the trim taken off, because I thought at that time it could be done without taking it off by covering the trim up.

Q. You advised the covering of the trim?

A. Covering the trim to protect it.

Q. And the floors; did you make any special recommendation concerning those?

A. To carefully cover them to prevent them from dam-
20 age.

Q. Assuming that the plans and specifications called for a good job, good material and good workmanship, and those walls put up in a good and workmanlike manner, would you say that the work that you observed had been done in such a manner?

A. I should say not.

Q. What sort of a job would you express it as being?

A. Very poor.

Q. Did you make any observation or examination of the
30 plaster on the outer walls of the building?

A. Not particularly more there than anywhere elsewhere.

CROSS EXAMINATION.

BY MR. HEISLEY:

Q. You say the work was very poor. Now do you speak
of the act of applying the plaster or do you speak of the qual-
40 ity of the plaster, the mixture?

- A. The quality of the plaster.
 Q. The workmanship was all right.
 A. Apparently.

BY THE COURT:

Q. Is it your opinion, was it necessary to take out the ceilings and walls as they were taken out, as has been testified here?

A. I considered so, because continual patching would be kept up indefinitely, in my opinion. There would have been no way to do until the entire plasterwork of the house would be removed. 10

REDIRECT EXAMINATION.

BY MR. CARTON:

Q. I think you said you made your examination in June, 1914? 20

A. Yes.

Q. You didn't examine the job from that until the following year when the work was done, did you?

A. I have never seen it since.

Q. You don't know whether the condition you observed progressed or otherwise?

A. I don't know anything about it. I heard that today for the first time.

FRANCIS MOORE, sworn for plaintiffs. 30

DIRECT EXAMINATION BY MR. CARTON:

Q. Mr. Moore, where do you live?

A. Jamaica, Long Island.

Q. And what is your business?

A. Superintendent of Fountain & Choate.

Q. And what is their business?

A. Builders, general contractors.

Q. Their place of business is in New York City? 40

A. Yes, 110 East 23rd Street.

Q. How long a time have you been in the building business?

A. Twenty-five years.

Q. What part of the work do you generally take up?

A. Superintendent of construction.

Q. And where has the prosecution of your work taken you to, in what parts of the country?

A. Well, generally in New York.

10 Q. Were you on Dr. Wise's job in Long Branch?

A. Yes, sir.

Q. Representing Fountain & Choate?

A. Yes, sir.

Q. Do you recall when you first went there?

A. The first of June.

Q. 1915?

A. In 1915, right.

Q. Did you make an examination of the house when you went down there?

20 A. Yes, sir.

Q. For what purpose?

A. To take off the plaster and take off the trim, protect the floors, etc., so that the plasterers could replaster the house and put it in condition again.

Q. Had your firm taken over the work at that time when you were sent down?

A. Yes, sir.

Q. Tell us what you found the condition of the walls in the rooms to be when you went there.

30 A. Well, I found the plaster pretty badly cracked and off the ceiling when I went there. I tried the ceilings and I found those to be very loose.

Q. What do you mean by very loose?

A. Well, the first we did we took a stick and pressed it upon it and you would see the plaster vibrate on the ceiling; you would know it was loose.

Q. That pinched fast to the lath?

A. That is the idea.

Q. Did you make an examination of the entire house?

40 A. Yes; pretty generally.

Q. Had some walls been patched prior to your coming there?

A. Yes, sir.

Q. Did you or men under your employ take off these walls?

A. Yes, sir.

Q. Were you there superintending the building when it was done?

A. I was there all the time.

Q. Saw it being done?

10

A. Yes.

Q. Now describe to us how you took it off and what efforts you made to get it off.

A. Well, the men used a trowel as a rule, just an ordinary trowel, to push the plaster off with, off the walls, which of course came off very easy.

Q. And with regard to the condition of the plaster when it came off?

A. Well, it all broke up into pieces, very small pieces.

Q. Come off in chunks or did it pulverize?

20

A. Well, it came off in sheets or large pieces, but when it fell it all pulverized or all went into very small pieces.

Q. Did there appear to be more cracking in the ceilings of the rooms or on the side walls?

A. More on the side walls; not so much cracking on the ceilings. I think if it had cracked it would have fallen.

Q. The outer coat of the ceiling had kept intact pretty well?

A. Yes.

Q. And held the walls up in that way?

30

A. That is the idea.

Q. Was all the plaster taken off?

A. Yes, sir.

Q. And was it all of this kind that you have referred to, loose?

A. It appeared to be generally all—well, it was all more intact on the outer walls, that is, the inside of the outer walls, it was better, but where they had come off it all seemed to be this very loose material.

40

BY THE COURT:

Q. You say when it did fall to the floor it pulverized?

A. Yes, sir.

Q. What did that indicate?

A. Well, what I would term, there didn't seem to be any strength in the plaster, wouldn't hold together.

Q. Doesn't all plaster do that in such circumstances?

A. No, sir; it does not. It will stay in large pieces.

10

BY MR. CARTON:

Q. What did you observe as to whether or not hair had been used, and if used the quality of the hair?

A. Well, now, I didn't see very much hair in it, to tell the truth.

Q. Had you acquainted yourself with the terms of the specifications for the plastering?

A. No, sir; I didn't read the specifications at all.

20 Q. You didn't?

A. No, sir.

Q. Did you observe whether the walls were of the cement type or the lime and sand type?

A. It is the lime and sand.

Q. The lime and sand?

A. The old style.

Q. Now, what was done with the trim? Was that taken off?

A. Yes; I took off the trim.

30 Q. Was that necessary in your judgment?

A. Well, yes. The trim is a single member trim about four inches wide, and the plaster goes behind the trim, and if I didn't take off the trim, and you had no wall member there to cover that, you never could make a job with the old plaster and new plaster. The old plaster is behind the trim and plastering against it you would always have a crack and always have the same condition of plaster dropping out.

Q. There would always be a dropping out?

40 A. Yes. It is one member trim.

Q. Ordinarily in plastering houses the plaster is put on before the trim?

A. Yes.

Q. And the trim covers over a portion of the plaster?

A. Yes.

Q. Was the trim taken off in all the rooms where you did plaster?

A. Yes; all the standing trim, on doors and windows and the like, and the base; I, as a rule, take off just the upper member, the moulding.

10

Q. Not the baseboard?

A. Not the baseboard. I covered that with a piece of paper and left over the top of that to keep the water from destroying the base.

Q. And the walls now, what did you do with regard to protecting those—the floors, rather?

A. The floor, I covered this with a tar paper, a building paper on top of this, and then covered with boards, so that plaster or any material would not grind into the floor.

Q. What kind of floors are they?

20

A. Well, I call them hardwood floors. The second story were comb-grained yellow pine and on the first floor yellow pine. Some of the second floor were also oak floors.

Q. The mason work had been let out by contract, had it not?

A. Yes.

Q. Who did that work?

A. Carney Brothers.

Q. And your firm had charge of the general superintendence of the work?

30

A. Yes, sir.

Q. Did you put on the new walls?

A. What do you mean; did I put on the new walls?

Q. Did the mason put on the new walls?

A. He did; he plastered the whole house.

Q. And did you put back the trim?

A. I did.

Q. And put the walls and floors back in their original condition?

A. Yes, sir.

40

Q. And how long a time in weeks or months were you prosecuting this work, Mr. Moore?

A. I think it was around three months.

Q. Were you on the job all the time?

A. All the time; yes, sir.

Q. Did you keep timesheets and a payroll?

A. Yes, sir.

Q. In charge of that?

A. Yes, sir; I turned it in each week to the office.

10 Q. And do you know Mr. Green, the architect?

A. Yes, sir.

Q. It was under his supervision the work was being done?

A. Yes; he or his superintendent from the office came down, well, about once a week.

Q. Where did you employ your men from; what section?

A. I hired from Long Branch.

Q. Your laboring men you hired around Long Branch?

A. Yes, and carpenters also.

20 Q. And did you inform yourself as to the scale of wages being paid to men in that neighborhood?

A. Yes, sir; they were union men and I gave them union wages.

Q. And those men had to do with taking off the walls and trim and protecting the floors and replacing them back again?

A. Yes, sir.

BY THE COURT:

30 Q. Do you know whether the union rates in Long Branch differed from those of New York?

A. I do.

Q. Higher or lower?

A. Lower.

Q. You paid Long Branch rates?

A. I paid Long Branch rates; yes, sir.

BY MR. CARTON:

40 Q. Have you your timesheets or payrolls?

A. No, sir; I have not.

(Paper shown witness.)

Q. The lumber and materials that were purchased, where did you purchase them?

A. From Lacour, Cranmer & Company.

Q. They are the lumber people at Long Branch?

A. Yes, sir.

Q. And the plumbing; who did that, a Long Branch man?

A. Yes, sir; Mr. Curr.

Q. And the electric work and so on?

A. He was Long Branch, too. He was Sprague.

Q. And the plastering work was done by contract, was it not, Mr. Moore?

A. Yes.

Q. Do you know the amount of the contract?

A. No, I do not. I don't recall just what it was.

Q. Have you a copy of the statement?

20

A. I have it; yes sir.

Q. Will you tell us now the amount of the material and labor furnished and used on that job for the different items?

MR. HEISLEY: He has the payroll here, the original from which he made this out?

A. I was the one that turned this into the office.

BY MR. HEISLEY:

30

Q. And have you got your payrolls here?

A. I didn't bring them with me, no. I say I turned it into the office. I know that it is right, for I have already looked them over or compared them at our office.

MR. HEISLEY: We are entitled to the payrolls.

BY MR. CARTON:

Q. You have the original payrolls at your office?

40

A. I turned it in each week to the office.

BY THE COURT:

Q. What have you there?

A. This is from our office, the payroll each week from the office.

Q. Rendered to whom?

A. To our bookkeeper in the office by me.

10

Q. Are they the original sheets made up by you?

A. Yes, I turned the book in each week.

Q. It is their payroll sheet?

A. Yes; these are White's.

MR. HEISLEY: I thought he said he didn't have them.

THE WITNESS: I thought you had reference to my book.

20

BY MR. HEISLEY:

Q. As I understand, these are the original payrolls that you turned into the office, so that the office could keep track of the expense; is that right?

A. Yes; this is a copy of them. This would not be my writing.

Q. They are not the original then?

A. They are a copy of my sheets.

30

MR. HEISLEY: I want to say I think we are entitled to the original.

BY THE COURT:

Q. Where are your sheets?

A. I don't know whether I could find my same book or not. I imagine I could.

Q. Are they preserved anywhere?

A. I can't say they are. This copy was turned into the office each week.

40

Q. Have you examined them?

A. Yes; I know this is right.

Q. Do you know whether those original sheets are in existence or not?

A. I can't say.

Q. What ordinarily becomes of the sheets?

A. We don't keep the timebook after the job is finished.

Q. Throw them away?

A. Yes.

Q. You say this is an accurate copy?

10

A. An accurate copy of this.

MR. HEISLEY: May I cross-examine him?

THE COURT: Yes.

CROSS EXAMINATION.

BY MR. HEISLEY:

Q. You kept a timebook, didn't you?

20

A. Yes, sir.

Q. Showing the names of the people and the amount which they worked on that job?

A. Yes.

Q. And when they worked?

A. Yes.

Q. That book you turned into your employers?

A. Yes, sir.

Q. And as far as you know they have that book yet?

A. I can't say that; I don't know.

30

Q. You don't think they have them?

A. I don't know anything about that.

Q. You don't know whether that book is in their possession or where it is?

A. No; I don't.

Q. You have made no effort to get it?

A. No, sir; I know this is right.

Q. And what you propose now to tell us is simply that this paper you have is a copy of the statement you sent them; is that right?

40

A. Yes, sir; right.

MR. HEISLEY: I object to it and I insist that the original must be produced.

FURTHER DIRECT EXAMINATION.

BY MR. CARTON:

10 Q. Have you since the work was done had occasion to examine those payrolls or papers you have in your hand, comparing them with your original reports, in order to determine their correctness? Let me ask you this, Mr. Moore. Tell us what your practice is generally and what it was on this job in regard to handing in the timesheets to your house.

A. I make out a time slip each week and send them to the office each week.

Q. Would you get anything back from them, from your firm?

20 A. Oh, no. I send that slip in each week and then they send the money to me.

Q. And you would pay—they would send the money back to pay for the bills that you had sent in?

A. Yes, sir.

BY THE COURT:

Q. You say that you were on this job every day?

A. Yes, sir.

30 Q. From the time it was started until it was completed?

A. That is right.

Q. Do you know how many men you employed?

A. Yes, sir.

Q. Each day, masons and carpenters?

A. You mean can I remember off-hand now?

Q. Yes.

A. No; it would be impossible for me to do that.

Q. Have you a general recollection as to how many men were employed?

40 A. Yes, sir.

Q. Do you know how much you paid them?

A. Yes, sir.

Q. Without referring to any memoranda or book do you know the amount you paid them; not the total amount, but how much per day?

A. Per day?

Q. Yes.

A. Oh, yes; I can tell you that.

Q. Do you know the length of time that the work consumed?

10

A. Yes about that. I said about three months.

Q. And that answer would apply to the carpenters and masons as well, would it?

A. Yes. Not masons. The labor for the mason work was a contract, that is, the plastering.

Q. You have reference to the plastering, have you not?

A. Yes, sir. That was a contract. I didn't keep time of that. I didn't keep the time of their plastering work. That was a contract with the plasterer.

Q. What did you keep time of?

20

A. Of the carpenters and the laborers.

Q. Now as to those, have you a recollection as to how many were employed each day?

A. Yes. Of course they varied. Some days I had as many as five.

Q. But by referring to this paper you have, that would refresh your memory?

A. That would refresh my memory; yes, sir.

THE COURT: I will allow this witness to testify from his memory as to the number of laborers employed there, and merely for the purpose of refreshing his memory, refer to the memorandum which he says is an actual copy of the sheets; not that they will be introduced in evidence however, but for the purpose of refreshing his memory.

30

BY MR. HEISLEY:

Q. May I ask the witness when did you make this copy?

A. At the end of each week.

40

Q. This copy?

A. This is the bookkeeper's writing, you understand; this is not mine. I sent a sheet into the office, a timesheet into the office at the end of each week.

Q. And the paper handed you is something that the bookkeeper has sent you?

A. Yes, sir.

Q. And you can't for the life of you tell whether that is a straight account or not; you simply assume that the bookkeeper would not send you an incorrect account; isn't that so?

A. Well certainly I can't do anything else but tell you I sent a sheet in each week.

MR. HEISLEY: I still object.

BY MR. CARTON:

Q. Can you by looking at the papers you have in your hand refresh your memory sufficiently to enable you to testify whether this is right, the items you sent in or not?

MR. HEISLEY: If your Honor please, I submit I know of no rule which allows him to say that he can refresh his memory or that he can use a paper made by somebody else for the purpose of refreshing his memory. It is nothing that he did; and yet your Honor has said that this is not to be offered in evidence, but still he gets the fact before the jury just as effectually by stating the contents of this paper as he does by having it offered in evidence.

THE COURT: Suppose, Judge Heisley, he had not already testified that he was the actual superintendent for the contractor on this job, he was there from the beginning to the end every day, he knew generally how many men were employed and how much per day they received, because he made the contract of employment with the plaintiffs. Now it appears that he made the reports every day, and every week those reports in the regular course of business were sent into the main office to their bookkeeper and there the bookkeeper copied from the original reports made up by him for the purpose of their own bookkeeping, and they make from their books this statement. It does not make any difference wheth-

er the memorandum is made originally by him or not, but merely for the purpose of refreshing his memory he may refer to the statement he made himself in connection with his original testimony or memory, as I understand that to be the rule.

MR. HEISLEY: I do not propose to debate it, and I do not want to seem obstinate, your Honor, but if the man remembers who worked there of course he needs nothing to refresh his memory. How is it possible for this man, after his admission here in open court within the last two or three minutes, to say that this is an accurate statement, when he admits that he cannot say that it is an accurate statement? He says he cannot say that it is. 10

THE COURT: No; I understood him to say that he has already examined it and finds that it is an accurate statement.

MR. HEISLEY: He said that he could not say that this was accurate, but simply he sent accurate statements in and he assumed that the bookkeeper would not send him an inaccurate statement. 20

THE COURT: You may ask him whether he regards this as an accurate statement or not.

BY MR. HEISLEY:

Q. Do you know of your own knowledge that this is an actual copy of the reports which you sent in to the bookkeeper? 30

A. I believe this to be actually correct.

Q. I am not asking you what you believe; I want to know if you know that they are an actual copy. Have you ever compared them with the original?

A. No, sir; I have not. I never saw this before till now.

Q. You are simply assuming that your officers would not send you copies which were incorrect; isn't that so? Isn't that so? 40

A. Why, certainly I feel sure they would not send anything but what was right.

Q. And that is all you can say about this paper, isn't it?

A. I just looked them through and I believe them to be right.

Q. Of course you believe them to be right. The point is how you know them to be right.

A. Then I will say I know them to be right.

Q. Don't say too much.

10

THE COURT: No; you will have an opportunity to examine them and then say whether they are correct or not.

MR. HEISLEY: I think the reports say the books are the record.

THE COURT: The difficulty is, Judge Heisley, that the witness says that he does not know whether the original reports made by him are in existence or not.

20

MR. HEISLEY: But isn't it their duty to prove that they are not in existence? Isn't it their duty to come here with a search? They have come without any search.

(After further argument.)

MR. CARTON: As I understand the situation of this witness at this time, he was the superintendent of construction and had charge and checked up and sent in the reports daily every week to the main office. Now he is only asked to refer to these papers, not any book supposed to be a duplicate, but asked after having examined them if they refresh his memory sufficiently to testify as to their correctness.

THE COURT: I shall apply the rule simply that they be used to refresh his memory.

(Objection noted for defendant as ground of appeal.)

40

BY MR. CARTON:

Q. Will you tell us the amount disbursed by you upon your O. K. for the labor on this job?

A. The total amount?

Q. Yes.

MR. HEISLEY: I desire to make the same objection.

BY THE COURT:

Q. Can you tell that without referring?

A. No, sir. 10

Q. Can you tell approximately how much it was?

A. No, sir; I cannot.

Q. Can you tell us by referring to the memorandum that you hold?

A. Yes, sir.

Q. And would you then know whether it was accurate or not?

A. Yes, sir; I will tell you why. I know about the number of men that were on the job.

Q. I will allow you to refer to it. 20

MR. HEISLEY: I object on the ground that whether that paper will tell him what has been expended must depend absolutely on whether this paper he is referring to is accurate, and he cannot swear that it is, and nobody else has testified to it.

BY MR. CARTON:

Q. Will you tell us, Mr. Moore? 30

A. \$1,268.75.

BY THE COURT:

Q. Now, independent of that memorandum, is that amount correct to the best of your judgment?

A. Yes, sir.

Q. Why do you say it is correct?

A. Well, from the timesheets that were sent in at each week. 40

Q. All right, but anything else?

A. No.

Q. How do you know it is correct, the number of men employed?

A. Yes, sir.

Q. The time consumed in doing the work, you know that of your knowledge, don't you?

A. Yes, sir.

10 BY MR. CARTON:

Q. Now, Mr. Moore, in addition to what you said, and not taking up too much time, won't you run through the time-sheets and the items which total up this sum you have given and say conforms to your recollection and the actual expenditure as made?

MR. HEISLEY: I make the same objection.

20 (Objection overruled. Objection noted for defendant as ground of appeal.)

Q. Take a minute and look over the papers.

A. Do you want me to give it to you each week, or what do you have reference to?

Q. No; you might look over each week and say, after looking over that memorandum, if it refreshes your memory sufficiently to state that those were the amounts disbursed by you each week, keeping in mind the number of men and the price.

30 (Witness examines paper.)

A. I believe them to be right.

MR. HEISLEY: That is not the question; is it?

THE COURT: No; that is not the question.

40 MR. HEISLEY: Of course I think he is doing as well as he can with strange papers.

THE WITNESS: I have no way to compare them here.

MR. HEISLEY: Of course he hasn't.

THE COURT: Mr. Carton, let me ask you; is it possible to produce the original books here in this case?

Q. Do you think it is possible to produce the original book; the timesheet that you sent in?

10

THE COURT: Either the timesheet, or if that be destroyed, the original book kept by the bookkeeper of this concern.

A. I sent a sheet in each week.

Q. They are transcribed to a book of some kind?

A. Yes.

Q. And you have those books in your home office in New York?

20

A. I don't know whether he keeps them or not.

Q. They may be preserved with the other matters of the firm?

A. I can't say. I can't give you an answer at all.

Q. Will you endeavor to ascertain if they are intact and to get them here?

A. All right.

Q. Have you gone over the timesheets indicating the number of men employed and the price paid them?

A. Yes, sir.

Q. How does that conform to your recollection of the number of men employed and the price paid them?

30

MR. HEISLEY: Counsel asks if he has gone over the timesheets; has he gone over this paper, he means, to which I have objected?

THE COURT: Yes, the copy.

MR. HEISLEY: The alleged copy?

40

THE COURT: Yes; the alleged copy of the timesheet.

MR. HEISLEY: I object to the question on the same grounds stated. It seems to me anybody can hand the witness a bundle of papers and say, "Go on and testify."

BY THE COURT:

Q. Do you recognize the handwriting, or is that type-writing?

10 A. No, it is handwriting.

Q. Do you recognize the handwriting?

A. No.

BY MR. CARTON:

Q. Referring to the various items, what do they indicate, work done at Long Branch or New York or Hoboken or where?

20 MR. HEISLEY: The same objection.

(Objection overruled. Objection noted for defendant.)

A. May I answer.

Q. Yes.

A. The work done on Dr. Wise's house at Long Branch.

Q. Do the items refer to a certain number of men having worked a certain number of days?

30 (Objected to on the same ground and that the paper speaks for itself.)

THE COURT: The paper will of course speak for itself. There is probably some substance to the objection that this paper which the witness now has has not been sufficiently identified, even by him. He does not recognize the handwriting, and while he thinks it is a copy of a book or a copy of his return he is not sure as to the handwriting. If you are in a position to prove the accuracy of this statement you new
40 have, I think your statement will perhaps be a little stronger.

MR. CARTON: I propose to do that after the books themselves and the timesheets get here.

THE COURT: I will give you an opportunity to produce the timesheets and books.

MR. CARTON: Anticipating our possible inability to do that—

THE COURT: You had better withdraw this witness at the present time. 10

Q. Well, outside of the item of labor to which you have just referred—

THE COURT: Of course you have a perfect right to interrogate this witness with respect to his personal knowledge as to the number of men employed, the character of work done and the time consumed. He may give original testimony with respect to that so far as his recollection goes. Of course he testifies that he was there every day in charge of the work for his employers and knew what was going on. He has a perfect right to testify to it. 20

Q. Ordinarily how many men were in charge each day?

A. The carpenters varied from two or three and the laborers from two to five.

Q. And what price was paid the carpenters?

A. \$3.50.

Q. \$3.50 for the carpenters and the laborers how much? 30

A. Twenty-five cents an hour.

BY THE COURT:

Q. Working how many hours?

A. Eight hours a day as a rule.

Q. What was the time consumed in the work? When did you start and when did you end?

A. You mean a day or in the overall?

Q. Overall. 40

A. About three months.

BY MR. CARTON:

Q. And the work going continuously during that time?

A. Yes, sir.

Q. From the time when it started till the finish?

A. Yes, sir.

10 BY THE COURT:

Q. Every working day?

A. Yes, sir.

Q. Interfered with by inclement weather at all?

A. No, sir.

Q. All indoor work?

A. Yes, sir.

BY MR. CARTON:

20

Q. From whom were the supplies purchased?

A. What kind?

Q. Well, whatever you purchased on this job.

A. Well, the lumber from Lacour Cranmer Company.

Q. And who were they, Long Branch men?

A. Yes.

Q. And have you their bills there? Look them over.

A. Yes, sir.

Q. What is the amount of the bill of Lacour Cranmer

30 for supplies furnished this job? Do you find the receipts?

A. Yes, sir; \$186.45.

Q. And did that work go in this job and was it necessary for the work you did?

A. Yes, sir.

Q. And was that one of the bills that you checked up and sent into your main office?

A. Yes, sir.

Q. Now in regard to the plumbing, have you the plumber's bill there?

40 A. Yes, sir.

Q. Who did the work?

A. Mr. Curr.

Q. And what amount was paid to him for work done on this job?

MR. HEISLEY: Now, it may be all right to ask him this, but in view of the statement of Dr. Wise that he explained, unless this witness knows something about it—

MR. CARTON: The bill shows. It was separated. But a small portion of this work is charged to this man. 10

THE COURT: Mr. Green testified to that, too, ninety odd dollars, as I understood it.

Q. Have you the bill there? What does it amount to?

A. \$108.84.

Q. Have you separated the amount of work done on the new contract?

A. Yes, sir.

Q. What is the amount of the item, the charge on this bill, for work made necessary by changing? 20

A. \$26.75.

Q. And with regard to Stark & Fassett, tile work, have you that there?

A. Yes.

Q. What is the amount?

A. \$2.78.

Q. And that work was made necessary in connection with your work?

A. Yes.

Q. Was that new work? 30

A. No, sir.

Q. Now, there is an item for liability insurance, \$76.64. What is that for, Mr. Moore?

A. Well, employers having men injured, in case of any accident.

Q. Is that customary, or was it necessary on this job?

A. Yes, sir; it is always done.

Q. Why?

A. Well, if there is an accident happens during the proceedings— 40

Q. For the protection of the job and the parties interested?

A. Yes, the boss would be liable.

BY THE COURT:

Q. I notice in your schedule that the item of plumbing necessitated by this work was only \$26.75, and the total is
10 \$108.

A. That is the total loss on new work.

MR. CARTON: He changed it. He gave the total, but gave a deduction of \$82.

THE COURT: Making a total of \$26.75?

MR. CARTON: Yes, sir

20 BY MR. CARTON:

Q. Was this item paid for liability insurance the customary premium necessary for covering this job?

A. Yes, sir.

Q. And you checked up that item also, did you?

A. Yes, sir.

Q. Now, the commissions charged by your firm for your work, Fountain & Choate, what do they total?

A. It is all on this sheet here.

Q. What does it amount to?

30 A. \$244.83.

Q. And did you deduct a proportionate amount of that total for new work?

A. Yes, sir; \$26.83.

Q. And leaving a balance for the old work how much?

A. \$217.40.

THE COURT: That is under the item, "Commission to bill, \$217." That is what he was talking about, is it not?

40 MR. CARTON: Yes, the Fountain & Choate commission.

Q. They are the people for whom you were working?

A. Yes, sir.

BY THE COURT:

Q. What rate was that?

A. I believe it is ten per cent. I don't know for sure. I don't know certain about that.

BY MR. CARTON:

10

Q. Is ten per cent. the regular rate?

A. I guess it is regular, but I suppose what they got. I don't know what the rate is.

Q. As a matter of fact it amounts to seven per cent., doesn't it?

A. I don't know that. I didn't figure it up at all, that part.

Q. Now, you have a charge for telephone calls. Were those rendered necessary?

A. Yes, sir.

20

Q. And incurred by you?

A. Yes, sir.

Q. Amounting to \$1.84?

A. That is right; \$1.34, was it not?

Q. The next item is services of architects, which Mr. Green referred to. Now, you have an item for refinishing floors, \$30. What was that for?

A. Some floors were damaged and had to be refinished, repolished.

Q. You mean notwithstanding the care that you used in putting down the paper and the boards, there was still some damage done? 30

A. Yes, sir.

Q. And was that item a necessary item to put the floors back in the same condition?

A. Yes; had to put them back as we found them.

Q. Now, there was an item, "Moving furniture, etc., \$48.50." Do you know anything about that?

A. Yes; labor for moving furniture from one part of the house to the other.

40

Q. How large a house was this as you recall, in rooms?

A. I should judge around fifteen or twenty rooms! I don't know just exactly.

Q. Three stories?

A. Yes.

Q. And was that a fair amount, that amount actually expended by you, for that purpose?

A. I would consider so.

Q. There is another item for additional electrical work
10 amounting to \$21.75. What was that for?

A. Electrical work?

Q. Yes.

A. It was not that much, was it?

Q. Electrical work, Sprague's bill was \$143.50, less new work, \$128.50, and left only \$15. You have already referred to that. And then there is another item on your statement of additional electrical work done. Are you familiar with that item?

A. Yes; I know what it was but it was in connection
20 with bell work.

BY THE COURT:

Q. How much?

A. \$21.75. I know what it was, in connection with the bell work.

MR. CARTON: That is all with this witness at this time, your Honor. When Judge Heisley has finished cross-examination I desire to have him returned.

30 THE COURT: To bring his books, in connection with the item of labor?

MR. CARTON: Yes.

CROSS EXAMINATION.

BY MR. HEISLEY:

Q. Mr. Moore, you were there, you say, about three
40 months?

A. About three months.

Q. What wages did you get?

A. \$33.

Q. \$33 a week?

A. Yes, sir.

Q. And all of the plastering work was put out by contract?

A. By contract.

Q. And all the rest of the work was done under your supervision as superintendent?

10

A. Yes, sir.

Q. Is this firm of Fountain & Choate a very large firm? Do they do a very large business?

A. Yes.

Q. Are you their general superintendent?

A. Yes, sir.

Q. And their business is confined generally to the State of New York?

A. Yes, sir.

Q. How is it, if you know, that this large firm, doing this big business, could afford to send their general superintendent down to Long Branch for three months on a little job like this?

A. I was not general superintendent.

(Objected to as immaterial.)

A. I was not general superintendent at the time.

Q. I thought you said you were.

30

A. I am now. You asked me what I was doing and I told you.

Q. I was speaking of that time.

A. I was foreman with them.

Q. What is your trade?

A. Carpenter.

Q. Did you ever serve your apprenticeship?

A. Yes, sir.

Q. And followed the trade as a trade, did you?

A. Yes, sir.

40

Q. While we are speaking of the help, you say that you paid the carpenters \$3.50?

A. Yes, sir.

Q. Don't you know that at that time the union rate of wages in Long Branch for carpenters was \$3?

A. No, sir; I don't know it.

Q. And that the prevailing rate for laborers was \$1.75 instead of \$2?

10 A. No, sir.

Q. You don't know?

A. No, sir; I don't know that it was.

Q. And you don't know that it was not?

A. I know the union rate of wages was \$3.50 in Asbury Park, anyway.

Q. In Asbury Park?

A. In Asbury Park.

Q. Don't you know that there was a difference in the rate of wages in Asbury Park and Long Branch?

20 A. I don't know it.

Q. Did you try to find out?

A. No, sir.

Q. You have learned so since, haven't you?

A. No, sir.

Q. Now you say that this plaster on the interior of the hollow tile wall was good.

A. All right; it was good.

Q. Now wait a minute.

A. I said it apparently was good on the outside.

30 Q. You saw nothing wrong anyway with this plaster, did you?

A. Yes; much of it was cracked.

Q. You heard Mr. Green's evidence here this morning, didn't you?

A. Yes, sir.

Q. You still say it was cracked?

A. Yes, sir.

Q. But there was no occasion for taking it down, was there?

40 A. Our orders were to take down the plaster that was

in the same condition as the plaster on the side wall, and it was apparently the same condition.

Q. Did you take down any of the plaster on the interior walls of the hollow tile wall?

A. I did.

Q. You took that off, too?

A. Yes, sir.

Q. Then you not only took off the plaster which was on the studded partitions, but you also took off the plaster which was inside of that and on the hollow brick?

10

A. Yes, sir.

Q. Was it loose?

A. Some places.

Q. Well, what was your idea in taking that down? What necessity was there from taking off the plastering from the walls, the hollow tile wall?

A. Because it was the same, it seemed to be the same consistency to all powder up.

Q. It all did that; did it?

A. It all powdered; yes, sir.

20

Q. How many laborers did you have there?

A. It varied from two to five or six.

Q. Never less than two?

A. No; I don't think there was any less than two at any time.

Q. And they were there the entire time of about three months?

A. Yes; about three months. I don't just remember exactly.

Q. What kind of work did those laborers do?

30

A. Ripping off plaster and helping to cover and protect the floors and taking out plaster.

Q. Wasn't the plastering all done by contract?

A. Not in taking off the plaster nor in taking it out. That was all done by my laborers.

Q. That was extra?

A. Yes, sir.

Q. That was quite a job, was it?

A. Yes, sir.

Q. Then it didn't come off very easy, did it?

40

A. Yes, sir.

Q. You say now that you thought it was necessary to take off the standing trim because if you had left that on there would be plaster back of that trim which you couldn't get at very well; is that right?

A. No, sir; I said that the plaster behind the trim and the new plaster joined against the old plaster behind the trim, would always leave a broken joint there that the plaster would fall from or powder and run down.

10 Q. But why would you leave any of the plaster in back of the trim?

A. How would I get it out?

Q. Don't ask me a question, but I ask you one. You say that you couldn't very well get the old plaster out from behind the standing trim, don't you.

A. All right.

Q. Why couldn't you have done it easily when it would simply crumble any time you touched it almost?

A. How would you get it from behind there? I couldn't
20 get it out.

THE COURT: Don't ask questions, just answer.

Q. The standing trim would stand out like that trim around that doorway back of the jury, wouldn't it?

A. Yes, sir.

Q. And you say the plaster ran in back of that, don't you?

A. Yes, sir.

30 Q. If you could go along back of that plastering on this side why wasn't it perfectly practical and easy, if this plaster was all so poor as you say it was, to pick that out back of there just as easy as it was to take off the rest of the plaster from the rest of the wall?

A. It was not possible to get in behind the trim.

Q. Why?

A. I say because it was not possible to go behind the trim.

Q. Tell us why it wasn't.

40 A. Why wasn't it?

MR. CARTON: I think it is obvious why it was not.

THE COURT: His answer is because.

MR. CARTON: I think it is apparent to everybody.

Q. Suppose this is the wall that runs in back of the trim. That is the wall running in back of the trim, isn't it? You took off this wall here?

A. Yes. 10

Q. And then you would have exposed to your view this trim and the old plaster back of that, wouldn't you?

A. Yes, sir.

Q. Why couldn't you get the plaster out of there?

A. The plaster that is in behind this trim, I had no way of getting it out.

Q. Couldn't you take a knife and get it out?

A. It would take very much longer than to take it off and do it right.

Q. It would if the plaster was hard wouldn't it? Isn't that so? 20

A. No.

Q. Suppose the plaster was in that soft state as you say it was; couldn't you have gone there very readily with some instrument and knocked that out of there and avoided it instead of the necessity of taking all the trim off that entire house?

A. No, sir.

Q. Why?

A. I couldn't get at it to get it out. 30

Q. Why not? It would be exposed, wouldn't it?

A. No, sir; it wouldn't be exposed. It was hidden behind the trim.

Q. You would have all the rest of the plaster taken off out here and you could see that plaster, and why wouldn't it be exposed?

A. It would be behind the trim where I couldn't get at it there. I couldn't make a job, to get the plaster in behind the trim, to make a suitable job and work the trim afterwards. 40

Q. Why couldn't you get in behind the trim? Say that paper book is called the trim; why couldn't you get in behind that trim and take out that plaster?

A. I might if I had used a toothpick.

Q. You think it would come out with a toothpick, do you?

A. Yes.

Q. You are under oath.

A. Well, you could get at it with any small instrument
10 probably.

Q. Then you could get at it, couldn't you?

A. Part way in.

Q. Why didn't you get it then and take it out?

A. Because I could do it quicker by taking the trim out and make a better job by taking the trim off and letting him plaster behind it and then put the trim back as it should be.

Q. Wasn't it because you wanted to make the bill as big as possible, so as to increase the commission of your employers?

20 A. No, sir.

Q. You could put a quarter-round there, couldn't you?

A. It would not make a good job.

Q. Suppose you had left the old plaster in back of the trim and had plastered the walls; you say where it was joined it would show. You could put a quarter-round there, couldn't you?

A. It would not be back as it was originally.

Q. Is it not a fact that you put on patent plaster instead of lime, sand and hair plaster?

30 A. That trim looks now as it did originally when I took it off.

Q. You say you were there about three months?

A. About three months.

Q. This Curr bill begins on June 15th and ends on July 29th.

A. Well, it is for three months.

Q. What, from June 15th to July 27th this year is for three months?

40 A. No; that is not for three months. There is June, July August—I was there around September, about Septem-

ber sometime; I think around the first of September that I came back, somewhere in September.

Q. He charges Mr. Hughes with 1916, July, with 624 feet of roofers and 202 feet of roofers, \$21.89. What were those roofers used for?

A. Covering the floor.

Q. And you have a lot of other charges for roofers through here?

A. Yes, sir.

Q. When you got through with those roofers what did you do with them? 10

A. I left them on the job. I don't know whatever became of them.

Q. Did you give Mr. Hughes any credit for them?

A. I didn't give anybody any credit for them.

Q. Well, you know that in this account which you have read off there is no credit given Mr. Hughes for those roofers, is there?

A. No; because I didn't think they would be any good.

Q. Why not? 20

A. Because they were all covered with plaster.

Q. All covered with plaster?

A. Yes, sir; all covered with plaster; walked on all through the work, all through the job.

Q. What are roofers used for generally? What is a roofer? Just tell the jury, won't you?

A. Boards used for sheathing on a roof or used for under flooring.

Q. And are not shown at all after they are put in use? For instance, you put them on a roof and then shingle over them; isn't that right? 30

A. Right.

Q. They are not visible at all? What difference then in the value of it did it make whether they had lime on them or not and had been walked over? Can't you answer that? Well, if you can't, I can't. You have got him charged with 301 feet of spruce, 1-2 by 6. What are they for?

A. 1-2 by 6?

Q. Yes; that is what it says, \$9.03; 1-2 inch by 6 spruce, \$9.03. What is that used for? Well, was it used there at all? 40

A. 1-2 by 6?

Q. That is what it says here in the bill.

A. Oh, yes. Used them also as a protection. I didn't know what it was. Spruce, is it?

Q. Yes; that is what it says.

A. Yes; that is all right.

Q. Coil spring. What did you use a coil spring for?

A. We had a door moved from the part that we were ripping out or tearing the plaster off, and that part that was
10 not disturbed, and we had a door in between this and a coil spring on it.

Q. Now here is another item on the 18th of June, 876 feet of tongued and grooved roofers, \$24.21. What did you do with those roofers when you got through with the work?

A. They are all left on the job.

Q. You made no effort to turn them into cash or to give them back to Mr. Hughes?

A. No, sir.

20 Q. I see you have him charged with a lot of spruce lath. What did you use them for?

A. Lath?

Q. Yes.

A. Some lath, when we put on the plaster again, the old lath would curl. We had to cut them out. But the majority of them lath was used in our protection of the base, where I put the paper up against it the base, went up over the top and nailed a lath over the top of that so as to keep the water from getting over in behind the base and curling that off.

30 Q. Now let me ask about this item here. You say this is a fair bill. On the 23rd your charged him with two jackscrews, \$8.

A. Use of the jackscrews.

Q. It doesn't say so; two jackscrews, \$4 each, \$8.

A. But you will see also further on a credit.

BY THE COURT.

Q. For the same amount?

40 A. Yes, sir.

BY MR. HEISLEY:

Q. Well, I don't say it is not, Mr. Moore.

A. I think you will find a credit there. (Examines paper.) Here it is, two jackscrews, \$8.

Q. Now, where is the credit? I don't say it is not there.

A. I think you will find it here.

Q. Well, why do you think there would be a credit for it if it was charged simply for the use of two jackscrews?

A. He sent the two jackscrews over and when he sends then he will charge for them; when they are returned he gives credit for them. 10

Q. You don't see any credit on there, do you?

A. I haven't found it yet, but I think you will find it is in here somewhere.

BY THE COURT:

Q. What did you use them for, to support uprights, hold up the ceiling or something? 20

A. No, I didn't. I used them when I jacked up over in the basement, or in the cellar rather, by the rear door, or the side door what I call the side door.

BY MR. HEISLEY:

Q. What did you jack up that settlement with?

A. What did I jack up that settlement with?

Q. Yes.

A. The jackscrews. That is what I used the jackscrews for. 30

BY THE COURT:

Q. It was upstairs, wasn't it?

A. No; it was downstairs in the basement.

BY MR. HEISLEY:

Q. Speaking about these laths that you say curled, 40

weren't they laths that curled after you put your patent plaster on?

A. Once they curled; yes.

Q. I mean to say, didn't the patent plaster cause some of those lath to curl, and didn't you take them off and buy these in place of it?

A. No; this lath—I had to stop to think what they were for. Now I remember. I tell you what they was for, for protection of base.

10 Q. I am asking you if it is not so that they were laths which you used over which you have placed your patent plaster and your patent plaster caused them to curl and you bought these laths to take the place of those which your patent plaster caused to curl?

A. No; I did not. I told you I had to stop and think what it was for.

Q. Never mind. I know you do.

A. That is two years ago that happened.

Q. What did the \$1,268.75 represent generally?

20 A. The payment for the labor for taking off the plaster, taking off the trim, protecting the floors, the base, etc., cutting out the old plaster and replacing the trim and putting the house in condition generally.

REDIRECT EXAMINATION.

BY MR. CARTON:

30 Q. Just a question, Mr. Moore. Outside of whatever the results may have been between Judge Heisley and yourself as to taking off the plaster back of the trim, it would be necessary to take the trim off anyhow to put the new plaster on, wouldn't it?

A. Yes; it would. I told the Judge that.

RE CROSS EXAMINATION.

BY MR. HEISLEY:

40 Q. Why do you say it was necessary to take that trim

off, when Mr. Dalzell said in his judgment it was not necessary to take it off?

MR. CARTON: He said he didn't think it was necessary when he was there in 1914.

A. Mr. Dalzell probably didn't notice that there was no backband on the back of the trim. If there had been a backband back of the trim we could have taken the backband off and plastered against it, but you would have had the same condition of the plaster falling down over the head of the door, as it done all the way through. There is no way to get that plaster out over the head of the door that I know of, only by taking the trim off. 10

BY THE COURT:

Q. Let me ask you, what percentage of the entire work would the plastering behind the trim represent?

A. Just the plastering of that? 20

Q. Yes; in other words, how much of the space in the several rooms that were replastered was taken up by the trim?

A. There was about ten feet. The trim was about four inches wide and the door is seven feet high, and it would all depend on how many doors you would have in there.

Q. You mean ten feet of trim in each room?

A. Yes; I was just figuring up what the trim would cover.

Q. What do you say? 30

A. Well, say about six feet around at each door.

Q. Can't you tell us in percentage whether it is one per cent. or two per cent. or five per cent. of the amount of plastering necessarily done behind the trim?

A. No; it would be a very small percentage.

Q. A small percentage?

A. Yes; certainly.

Q. So small as to make—

A. It wouldn't make any difference in the plaster end of it, very little; no. 40

BY MR. HEISLEY:

Q. Taking off this trim and putting it back represented several hundred dollars worth of expense, didn't it?

A. Yes.

Q. What would you say, how many hundred dollars would you say, likely, four or five hundred?

A. Well, no; it wouldn't amount to that much.

Q. Well, several hundred? All right.

10 A. Yes.

MR. HEISLEY: I admit that the bill of Lacour, Cranmer & Company is for material furnished on this job for which the plaintiff is suing, to the amount of \$186.45; and that Mr. Curr's bill for material of \$26.75 is for material and work done there. Of course, I do not mean to admit the propriety of the charges.

20 THE COURT: You mean as far as the contract is concerned or as far as these bills are concerned?

MR. HEISLEY: I do not mean to admit that we are in any way liable.

THE COURT: He simply admits that that amount of material was used in connection with this work.

MR. HEISLEY: And the charges were reasonable.

30 MR. CARTON: I ask to have these two bills marked.

(Bills marked Exhibits P. 7 and P. 8.)

WILLIAM E. CROOKER, sworn for plaintiffs.

DIRECT EXAMINATION BY MR. CARTON:

40 Q. Mr. Crooker, where do you live?

A. New York.

Q. What is your business?

A. I am with the Palmer Lime and Cement Company.

Q. How long have you been in the lime and cement business?

A. Twelve years.

Q. Continuously?

A. Yes, sir.

Q. In what capacity; selling it?

A. Outside business; yes, sir.

Q. Are you acquainted with the Dr. Wise job at Long Branch?

A. Well, I met him down about four years ago.

Q. What took you down there?

A. Well, at that time I was working for the Rockland, Rockport Lime Company.

Q. Had that lime been used on the Wise job, do you know?

A. Well, they said it had. I couldn't say.

Q. Did you make an examination of the house?

A. The manager sent me down to see what was the matter.

Q. Had a complaint been made about the lime?

A. I believe Mr. Wise wrote in something about it.

Q. And you went down to Long Branch and examined the house?

A. Looked at it; yes.

Q. Did you go through the house and examine the various rooms?

A. Went through some of the rooms, yes.

Q. What did you find the condition to be?

A. Well, the ceilings were cracked and some of the ceiling had dropped down.

Q. Did you examine the lime or the mortar?

A. I looked at some of it there. I believe there was a ceiling fell the night before.

Q. One of the ceilings had fallen the night before, you say?

A. Yes.

Q. Did you examine that lime?

A. I looked at it; yes sir.

Q. What did it appear to be?

MR. HEISLEY: Speaking of the lime itself?

MR. CARTON: And the plaster mass that had fallen on the floor.

MR. HEISLEY: I object.

10 BY MR. HEISLEY:

Q. I understand you to say you deal in lime, represent lime?

A. Yes.

MR. HEISLEY: I submit he shows no knowledge of buildings at all. A mason or plasterer could testify to that.

MR. CARTON: He could tell what was in the lime, I
20 think.

THE COURT: Or whether he found any lime.

A. There was some lime there.

BY MR. HEISLEY:

Q. A little bit, you think, eh?

A. Yes.

30 BY MR. CARTON:

Q. Not very much, according to indications?

A. Well, there appeared to be a three coat, or scratch, brown and finish. The scratch coat was very thin.

Q. And you examined where it came off the wall as to—

A. Well, it was on the ceiling, came off the ceiling.

Q. What did you find as to whether there had been any clinching or not?

A. Well, the whole thing dropped. You could see where
40 the keys were broken.

Q. You mean by the keys that stuff that goes through and clinches over; is that what you call the keys?

A. Yes, sir.

THE COURT: That is what I would call a hook.

BY THE COURT:

Q. The hook didn't hold?

10

A. They were keys.

BY MR. CARTON:

Q. You say it didn't hold?

A. That was what dropped down; yes, sir; broken off.

Q. In your experience in selling lime have you had occasion to examine jobs, that is, the constituency of the mixture that has gone on houses?

A. Well, go around in buildings every day and see how they mix it. 20

Q. What did you observe if anything with regard to the extent of the hair that was found in this?

A. I see some hair in it, you know, but this was two year after, I believe, that I was down there.

Q. That was 1914, wasn't it?

A. 1913, I think it was. It will be four years this September.

Q. You do say, however, that one of the pieces had fallen off the night before?

30

A. We went down to the house. There was a ceiling on the floor and the Doctor said that that probably fell the night before.

Q. Well, in regard to the side walls, did you examine those?

A. Well, I think there was some cracks there that I see. I didn't pay much attention to it.

Q. Did you examine any ceiling that had not fallen off, to determine whether the keys were holding or not?

A. No, sir.

40

THE COURT: Was this suit started in March, 1916, over a year ago.

MR. HEISLEY: Yes.

Q. Did you observe anything with regard to the plaster or its falling off as you went from room to room in closing the doors?

A. I see it would come away from the lath.

10 Q. That it was loose?

A. Where it had fallen down, you know, and I believe some ceiling had been put up.

CROSS EXAMINATION.

BY MR. HEISLEY:

Q. Could you tell, Mr. Crooker, whether the lime was
20 good lime or not?

A. Well, if it was the Rockland, Rockport lime they have been shipping to New York here one hundred and twenty-five years. They sell it all around from New York, all through the east. It comes from Rockland, Maine.

Q. Well, you mean to say that the lime as far as you could see was all right?

A. Yes.

REDIRECT EXAMINATION.

30

BY MR. CARTON:

Q. You don't know where this lime came from, I suppose; do you?

A. Well, it comes from Rockland and Rockport. There are two towns.

Q. I mean the particular lime in this job?

A. Well, came from Rockland, I suppose.

Q. You mean to say the lime in the mortar was all
40 right, that the mixture appeared to be all right?

(Objected to.)

THE COURT: No; he hasn't said he knew that, Mr. Carton.

MR. CARTON: It seems to me the witness says the lime is all right that he saw there.

THE COURT: I will allow you to ask him this: if he knows from experience what proportion of lime should be used in a job of that sort; that is, you may ask him in his opinion, from his experience of it, if there was such a proportion of lime. 10

Q. Will you tell us your experience about that, the proportion?

A. Well, on the scratch coat they use about two and a half barrels of sand to a barrel of lime; that is, about three hundred pounds of lime and about three or four pounds of hair. And on brown mortar it is poorer; they use about five barrels of sand. As a general rule the plasterers of New York use about thirty to thirty-five shovelfuls of sand to a barrel, the scratch coat. And then the white coat, finish coat, that is run up through a screen, that is run into a slack-box and put through a screen, then it is this white mortar. Then they take and gauge it in plaster of paris, you know, and put it on the walls. 20

BY THE COURT:

Q. Now, after that is put on is there any way of telling what proportion has been used, whether that particular proportion has been used? 30

A. No; there is no way of telling.

Q. Then are you able to say from actual inspection whether such a proportion was used?

A. No, sir; I couldn't, but I have got a copy of the plastering laws of New York if you want to look at it.

BY MR. CARTON:

40

Q. The first coat, the scratch coat, is the more important coat?

A. Yes; that is the body of it.

Q. And is that the coat that is forced through the lath and forms the keys?

A. Yes, sir.

ALZEO W. PLACE, sworn for plaintiffs.

10

DIRECT EXAMINATION BY MR. CARTON.

Q. Mr. Place, were you employed by Fountain & Choate?

A. Yes, sir.

Q. In what capacity?

A. As estimator.

Q. Did you visit the Dr. Wise job at Long Branch?

A. I did.

Q. For the purpose of making an estimation of the ap-
20 proximate cost of the work?

A. As a matter of inspection more than estimation at that time. The estimate was to be made up after inspection.

Q. And tell us what you found at the time you made your inspection.

A. At that time the Doctor admitted us to his home, took us in several of the rooms, showed us the various patches that had been replaced, also some of the plastering in two rooms that was at that time down. I think one was the office and the other upstairs. What identical room I couldn't say.

30 Q. It was some time prior to the actual doing of the work, was it, when you made the visit?

A. Yes.

Q. Did you afterwards make an estimate of this work?

A. We compiled our estimate on bids of the sub-contractors or plasterers. At that time of my inspection I had a plasterer with me. We were asked to make our estimates to cover certain work, the plasterer to do his end, we to do our end. Our end consisted of the carpenter work and protection. The sub-contractors' work was the plasterer's work. That esti-
40 mate was made up and sent to the architect in rough.

Q. Did you have any thing to do with the checking up of the actual sum expended in the doing of this work afterwards?

A. No, sir; I did not.

Q. You are not in a position to testify to the books of Fountain & Choate, are you?

A. No, sir; I am not their bookkeeper.

NO CROSS EXAMINATION.

10

ARTHUR CORNEY, sworn for plaintiffs.

DIRECT EXAMINATION BY MR. CARTON:

Q. Mr. Corney, where do you live?

A. Glen Ridge, New Jersey.

Q. What is your business?

A. Contractor of plain and ornamental plastering.

Q. In what territory generally do you work?

A. Principally in New York City.

20

Q. Have you done work in the country outside of New York City?

A. Yes; we do it and we are engaged now in doing some work in Connecticut, some in Long Island City; we have done work down as far as Elberon there, and on the same style job as this one we did at Mr. Wise's there, where the work was faulty and did it over again.

Q. You are the mason contractor that put up these walls, are you not, Mr. Corney?

A. Yes.

30

Q. What was the price, the amount of your work?

A. \$2,200.

Q. Did you submit a bid in competition with others for this work?

A. Yes; I went down to the building there, made an inspection and figured up and sent it in and received an acceptance, as I believe. As I remember now, it was an acceptance I received for that amount.

Q. Well, you actually did the work?

A. Yes, sir.

40

Q. Now, was the work done for which you put in the bid necessary to put this building in proper shape?

A. Why, I made an estimate what I would do that plastering for and make a first-class job, and I figured to replace the whole job there and made my bid accordingly and sent it in.

BY THE COURT:

10 Q. That is hardly responsive. The question is whether it was necessary to do what you did of the work yourself.

A. I didn't look into that, sir.

Q. You were simply asked to do it and you made an estimate?

A. Yes, sir.

Q. You were not asked about the quality of the work?

A. No, sir.

Q. Did you see the work?

A. No, sir; I did not.

20 Q. Whether it was bad or not?

A. No, sir.

BY MR. CARTON:

Q. You were given the dimensions of the rooms and the amount of work to be done and you put in your figure?

A. Yes.

BY THE COURT:

30

Q. You were in the attitude of a man that if a person asked you to tear down a building you would do it?

A. I am in the attitude of a man to go there and make an A No. 1 job of plastering, which we did.

BY MR. CARTON:

Q. Did you examine the work at all before you put in your bid?

40

A. No; I don't think I could qualify on that.

Q. You don't?

A. No.

Q. Was the bid that you submitted, \$2,200, a fair bid for the work that you did there?

A. I would say it was a fair bid for the work we did there; yes.

BY THE COURT:

Q. Well, did you have a large or small profit on it? 10

A. Why, I had a medium-sized profit on it.

Q. Medium sized?

A. Yes.

Q. By medium what would you say, speaking in percentages, eight per cent., ten per cent., five per cent or what?

A. I should imagine it would be about twelve per cent., what I would call a medium.

BY MR. CARTON:

Q. In per cent. it would be how much? 20

A. I would say a moderate percentage, there would be about twelve per cent.; yes.

Q. Such as you would ordinarily expect for doing work of that kind?

A. Yes.

Q. And you received your money? Have you been paid?

A. Yes, sir.

CROSS EXAMINATION. 30

BY MR. HEISLEY:

Q. You didn't sustain any serious loss in doing the work, I suppose, Mr. Corney?

A. No, sir; I didn't.

BY THE COURT:

Q. You say a medium profit, twelve per cent.; your prof- 40

it therefore in dollars and cents would be in the neighborhood of \$140?

A. Yes, sir.

Q. And the actual cost therefore of this work was about \$1,960?

A. I am not testifying to the cost, sir. I just simply made an estimate on it. You asked me what I thought would be a fair profit on that job and I told you. I don't say what my profit was. I don't believe it is necessary for me to men-
 10 tion anything about that.

Q. I suppose you would answer me if I directed it.

BY MR. HEISLEY:

Q. What did your profit include, what kind of work? Simply putting on the plaster, wasn't it?

A. Supplying the material and the labor for doing that plastering.

Q. Not taking off the old plaster?

20 A. No, sir; I didn't.

Q. And not putting on any lath?

A. Why, after the old plastering was taken off naturally we had to go there, as an experienced man—

(Objected to.)

A. We nailed some lath there which had to be done and in some cases had to put on new lath, and where in our judgment in order to make a good job there we attached with lath
 30 in the angles of the wall and building.

Q. You used wire lath?

A. Just a small quantity; I just don't remember the amount.

Q. What I am getting at is, I suppose the fact is that your contract was simply to furnish the material for the plastering?

A. Yes, sir.

Q. And apply the plaster but not do any lathing except in cases where it was necessary to put on new lathing; isn't
 40 that right?

A. Yes; that we could guarantee the job.

Q. Do you recollect what you charged a yard?

A. No; I don't remember that at all. I just made up a bid what I would do the work for and sent it in.

MR. CARTON: We offer the final certificates of the architect.

(The paper was admitted in evidence by consent of Judge Heisley and marked Exhibit P. 9.)

10

DR. LESTER WISE, recalled for plaintiffs.

DIRECT EXAMINATION BY MR. CARTON:

Q. Doctor, this box, did you produce this?

A. Yes, sir.

Q. What does it contain?

A. Contains plaster taken from the walls of the house at Long Branch.

20

BY THE COURT:

Q. The house in question?

A. Yes, sir; the house in question.

BY MR. CARTON:

Q. Taken by whom?

A. Taken by myself and Miss Griswold.

30

Q. And there appear to be several packages. What do they represent, the different packages?

A. They represent different ceilings, different rooms.

Q. When were they taken?

A. On the dates that are on the packages.

Q. Well, pick up one. What is that package you now have?

A. That is what we call the boys' room, on the north wall. That is 7-18-1915. That would be July 18, 1915. It was on the second floor.

40

Q. A sample taken at the time the wall was taken off by the men?

A. No; that was taken before that.

Q. And put in that package by you at the time?

A. I don't recall whether that was put in there by me or Miss Griswold. One or the other of us put it in these packages.

BY THE COURT:

10 Q. In any event you saw it done?

A. Yes, sir.

BY MR. CARTON:

Q. Where has the package been from that time to this?

A. It has been locked up in the lower bureau drawer.

Q. In your house?

A. Yes, sir.

Q. Under your care?

20 A. Yes, sir.

MR. CARTON: I offer it in evidence. Your Honor, I assume the better way would be to offer all of them.

THE COURT: Offer all of them and then let them be opened and then let the jury inspect them.

MR. CARTON: I offer all the packages.

30 THE COURT: Any objection, Judge Heisley?

MR. HEISLEY: No, if he says these packages represent plaster which was taken from the various parts of this house which was put on by Mr. Hughes, the contractor.

THE WITNESS: Yes.

THE COURT: Properly labeled with respect to the date and the room from which they were taken?

40 THE WITNESS: Taken off the wall in the room.

MR. CARTON: Now, your Honor, reserving the right to have Mr. Moore get his bookkeeper here, if he can, we rest.

THE COURT: Well, that bookkeeper should produce the original memorandum made by Mr. Moore or his books, containing entries made directly from this memorandum; in other words, the timesheets made out by Mr. Moore.

MR. CARTON: He has called the office and had the information that they have not the timesheets but that the book- 10
keeper transcribed the result of those timesheets to his book
from which these were taken.

THE COURT: At the time?

MR. CARTON: At the time.

THE COURT: Now, these were taken when?

MR. CARTON: I will have to produce the bookkeeper 20
to show that.

THE COURT: Now, Judge Heisley, you may proceed.

MR. HEISLEY: If your Honor please, there has been offered this box of samples; a great many of them are full; one has been opened.

MR. CARTON: They all go out to the jury, your Honor.

MR. HEISLEY: No; that is not my point. There has 30
been one opened at my request. Now I want to ask the Doctor whether he has any reason to believe that the samples in these other bags which have not been opened are any different from the sample which we have opened. Do you think that is a fair representative sample?

THE WITNESS: I haven't seen them.

MR. CARTON: I object to that question for the reason 40

that the samples are here. The jury are the best to determine whether they are equal in condition.

THE COURT: Oh, I think it is entirely a proper cross-examination.

MR. CARTON: I do not suppose the Doctor has seen them in two or three years.

10 MR. HEISLEY: My point is, if the Doctor will say that he knows they are practically like this I do not propose to take time to examine those at all.

MR. CARTON: We do.

MR. HEISLEY: Well, I will have to look at some of them then.

PLAINTIFFS REST.

20

MOTION FOR NONSUIT.

MR. HEISLEY: If your Honor please, I move to nonsuit the plaintiffs upon the following grounds:

In the first place, because the plans and specifications concerning the plastering prescribe that "the plaster is to be the best quality approved brand of lime, clean, sharp sand from pit and new, long, fresh cattle hair; the sand finish to be
30 of lime and sand." Even admitting, for the sake of argument, that the plastering was not right, this plaintiff, I submit, would have no right to charge us for an entirely different kind of plaster. It is admitted in this case, been proven repeatedly, that they put on this wall a kind of plaster utterly different from the specifications, and are asking us to pay for it. They put on a patent plaster. And I submit they cannot recover for that; that they only could recover from us on account of our failure to carry out our contract properly, what it would cost them to carry out the contract. They have not
40 carried it out at all.

I desire to call your Honor's attention to other grounds upon which we base this motion, and which refer to the contract, Article 2 of the contract shows that the work is to be done under the direction of the architect, and the uncontradicted evidence shows that it was so done. If your Honor will refer to Article 2 you will see that it is said it is to be done under the direction of said architect.

The following portions of the contract and the "General Conditions" show that the architect had almost unlimited power over this defendant; that the defendant was obliged to follow the architect's instructions and that he did so follow them; and it would be unconscionable as well as illegal to permit this plaintiff to repudiate the action of the architect who was acting in behalf of and as a representative of the plaintiff. 10

THE COURT: Now, Judge Heisley, how does that appear? There has been no evidence that what was done there was done in accordance with the architect or otherwise. They say there was an architect, that was all, and that the architect gave certificates from time to time and finally a final certificate. 20

MR. HEISLEY: You are quite right, your Honor, that does not appear affirmatively; but I submit that it is part of the plaintiff's case to prove that we did not do this according to the direction of the architect. They admit that this work was done under this contract which has been offered in evidence. Now, I submit that the law does not presume a violation of this contract upon the part of Hughes and Mr. Poole. They claim that we violated the contract. They can show a violation by showing that this was not done under the direction of the architect, not under his supervision, but they fail to show that. They do not say it was not done under it. They say, on the contrary, in effect, that it was done under supervision, because it does appear in evidence that he brought Mr. Poole back and finally gave him a certificate and Dr. Wise says that the architect told him that the work was all right. It seems to me, though, in other words, that it is the duty of the plaintiff to prove affirmatively that this work was not 30 40

done under this contract and under the direction of this architect.

THE COURT: What do you say to the paragraph under the title "Responsibility?"

MR. HEISLEY: I am going to come to that.

THE COURT: In connection with the "General Condi-
10 tions."

MR. HEISLEY: I am going to come to that. But my point is that they must show, having alleged a breach of this contract, they must show the breach. There is no presumption that this was not done under the direction of the architect. We are not presumed to be violators of the law. There is no presumption that we violated the contract.

THE COURT: I think that is part of your affirmative
20 defence, that you must show that everything that you did there, just as you said in your opening, was done under the direction of the architect. I think the burden of proof, in other words, in that respect is upon you. I will listen to you, however.

MR. HEISLEY: Well, I don't want to take up time unnecessarily.

THE COURT: In fact, you set that up in your answer,
30 as I recall.

MR. HEISLEY: Yes, but it occurs to me that where they seek to recover, as they do here, for the doing of work improperly, which work according to the contract was to be done under the supervision of the architect and the inference to be drawn that it was done under his supervision, because they admit that he gave all the certificates, even the final, that they must also show, in order to recover, that we did not do it according to his direction; otherwise there would be no
40 breach; because if they did it according to his direction it

would be harmless, I think. I won't argue this at length, though. I want to make my motion, and of course if your Honor feels, as you have intimated, that we should offer affirmative proof, of course we shall have to do it, and I would have the benefit of this on my request to direct.

THE COURT: Yes.

MR. HEISLEY: So I will hurry through this and go on with the defence. 10

THE COURT: Yes; I think it would be more pertinent on the question of a motion to direct.

MR. HEISLEY: Then I will withdraw this motion, your Honor, because it is simply a matter of the order—

THE COURT: You withdraw the entire motion for a non-suit?

MR. HEISLEY: Well, I don't know whether in going on then I would be said to waive—no, I will not withdraw it, please, but I am not going to press it. I will do it very hurriedly, so as to say that I have made it. 20

THE COURT: I will say now in respect to your first point, I think it is established, the fact that they have restored this work as contemplated by the original contract, but they used a different method, namely, a patent cement. Assuming that to be true, assuming they establish a violation of this contract, at least they would be entitled to nominal damages. Of course I am inclined to agree with you that they cannot substitute a cement other than that originally contemplated by the plans and specifications. But in that event, holding the view that I do, that there is a prima facie case thus far made with respect to the failure to observe the provisions of the contract concerning the plastering, then I should be obliged to hold that at least they were entitled to nominal damages for the breach. 30

MR. HEISLEY: Now, may I cut across lots? May it be 40

understood that by entering into my defence the court will permit me to renew these objections at the end of our case upon a motion for the direction of a verdict?

THE COURT: You may consider now a motion for nonsuit as having been made and overruled and an exception taken without prejudice to any motion you may see fit to make at the end of the defendant's case.

10 MR. CARTON: If your Honor please, I desire to make this suggestion at this time, in view of Judge Heisley's motion to nonsuit and your Honor's comments with regard to the plaintiff making out an affirmative case as to the amount of the cost for the plastering.

THE COURT: The damages?

MR. CARTON: The damages, because we did not put back the same sort of plaster that the contract called for. It
 20 is my view that this was not a question of violation of the contract, not a question of the architect's certificate; this was a question of latent defect that was not determined until a year or two after the work was done by Mr. Hughes; and the result is that a proper job had not been done; a matter that was not capable of being ascertained and detected at the time, and that we put back a wall which, as we deemed, was proper and necessary under the circumstances. And I would like to offer proof
 30 at this time to show why it was desirable to put back the wall in cement patent plaster instead of lime and plaster for this reason: that the people were occupying the house, and in order that they might not be deprived of the use of the other rooms, that the architect advised this because of its quick drying qualities, and that was a factor entering into the consideration and that cement was put back instead of lime. Now, I would like, in view of your Honor's comment, to make an offer by the architect to show why this course was advised.

THE COURT: Mr. Carton, my view is this: that the defendant is not bound by any advice that the architect gave
 40 to the owner with respect to the erection of that house; but

that having adopted the suggestion of the architect, adopted his plan with the specifications attached, the defendant was obliged merely to substantially comply with that contract and the specifications. If the architect misconceived the character of the plastering required, that misconception, the result of the misconception, should not fall upon the defendant.

The burden is upon you to show that there has been a failure to substantially comply on the part of the defendant with respect to that plastering. Now, you have shown prima facie—I practically said that you have made out a prime facie case. 10
It has no effect upon the jury, that statement, understand, because the defendant still has the opportunity to offer his affirmative evidence, and there are elements in the case, but I would have permitted you to show what it would have reasonably have cost to restore the walls to the condition in which they would have been had there been a substantial compliance with the contract by the original contractor, the present defendant. Now, you have shown the cost of putting in some other sort of plaster. I am obliged to hold that you have no right to do that. If you care to show by competent evidence 20
what it would reasonably have cost to restore those walls with the same material as contemplated in the original contract and specifications, I will allow you to do so.

MR. CARTON: Your Honor, I do desire to do that.

THE COURT: I think the situation is more or less academic, it strikes me.

MR. CARTON: That is my view of it. I do not view 30
this as a situation where the contractor has failed to complete his contract and we were obliged to go on and hire some one else to do it in the manner in which he contracted.

THE COURT: Oh, no.

MR. CARTON: Then, of course, we would be obliged to carry out its terms.

THE COURT: This is an action for damages and the 40

only thing we are concerned with is the measure of damages. Now, the measure of damages is the reasonable cost of it, assuming that there was a lack of substantial compliance. I am not passing upon that at all, excepting upon this motion now.

MR. CARTON: The idea was that Mr. Hughes was to give us a wall. The wall he gave us was not satisfactory. We put back the wall. I wish to make this offer now, to show the
 10 difference in the cost, if there is any, between such a wall as Mr. Hughes did put on and such a wall as we put on, which would be evidential, of course.

THE COURT: You certainly have no right, finding that Hughes' wall was not the kind of wall you wanted—you may say by reason of inherent defects—in other words, the architect made a mistake in providing this sort of specification—and then making the burden fall upon Hughes of a different character of wall. If there is any difference in the cost of the
 20 wall, the cost of the wall erected first by Mr. Hughes would be the proper measure.

MR. CARTON: That is our contention, that Mr. Hughes gave us a wall, and because we adopted this sort of wall in order to save time and inconvenience, which we had a perfect right to do, we are justified in so doing. If there is any difference I would like to show it.

THE COURT: I will allow you to offer evidence, reopen
 30 your case and offer evidence as to the reasonable cost of a wall in a workmanlike condition, and in connection with a substantial compliance with the specifications. Is there objection, Judge Heisley?

MR. HEISLEY: I cannot object to it, your Honor. It is discretionary.

THE COURT: It is purely in my discretion.

MR. HEISLEY: Yes, sir.
 40

THE COURT: That being so, it is nearly the hour for adjournment and we might as well take an adjournment now. If counsel have any authorities, especially Mr. Carton, that will change the court's view of the situation, I would be glad to have them.

(Adjourned till July 18, 1917, at 9.30 A. M.)

Freehold, N. J., July 18, 1917.

(Trial of the cause resumed at 9.30 A. M.)

10

MR. CARTON: If you Honor please, after the adjournment yesterday afternoon Judge Heisley conferred with his witness and we conferred with ours as to the difference, if any, in the cost of putting the wall back according to the plans and specifications and putting it back in cement, as it was put back; and while the witnesses varied somewhat, we agreed that the difference would be \$150 in favor of the old wall; that the wall that we put on would cost \$150 more than the wall put back in lime and sand plaster. We can dispense 20 with several witnesses by this.

THE COURT: In other words, instead of the item of \$2,216.50, that item should be \$150 less?

MR. CARTON: Yes. I am not sure whether letters testamentary were admitted in the answer or not. I will make that offer.

MR. HEISLEY: All right. If your Honor please, about this admission about which Mr. Carton has just spoken, of 30 course the effect of it, as far as we are concerned, is that they have charged us at least \$150 more than they should have charged us. We do not concede for a moment that it will cost anything like \$2,000 to put that wall on, but we do say that by reason of the manner in which they put it on, that is, by patent plaster instead of the old-fashioned lime and sand plaster, that they have charged us \$150 more than they should have charged us.

THE COURT: Then you have stipulated what on the 40

record as the measure of damages, assuming that you are entitled to recover at all? As I suggested yesterday, the measure of damages would be what it would reasonably cost to replace those walls with the material contemplated by the original contract and specifications. Now, if your stipulation does not cover that item, in other words, if this sum of \$2,216.50 does not represent what you would be required to prove as reasonable cost then you have eliminated the necessity for further evidence with respect to that item.

10

MR. CARTON: The effect of it, as I understand and as I think Judge Heisley understands, is this: that there will be proof undoubtedly on behalf of the defendant that any cost that we expended was too much. Now, the admission, as I understand it, goes this far: that we say the proper cost was \$2,200; the item should be about \$2,000.

THE COURT: If the admission is on your part that the reasonable cost of replacing the walls with the material contemplated by the specifications, namely, the old-fashioned
20 plaster, is \$2,066.50, as you claim, then of course the stipulation does cover it, but it does not close the door for Judge Heisley to show that the reasonable cost is no such sum.

MR. CARTON: No; that is our construction of it.

THE COURT: Now, then, the stipulation is instead that you claim that the reasonable cost to restore the plaster of a character contemplated by the specifications is \$2,066.50?

30

MR. CARTON: Our stipulation only goes to that extent instead of \$2,200.

THE COURT: Because the \$2,200 did cover the cost of putting on the patent plaster?

MR. CARTON: Yes; that is it.

THE COURT: You may offer the letters testamentary,
40 Mr. Carton.

MR. CARTON: I make that offer.

MR. HEISLEY: We pleaded to it; that is an admission anyway. We filed an answer that admits the capacity of the plaintiffs.

THE COURT: Now, you rest, Mr. Carton?

MR. CARTON: Yes.

10

MR. HEISLEY: Excepting one thing we overlooked; We had quite a little lovefeast after we got away from the influence of the jury and the audience, and I agreed that I would not require him to bring his books and slips back.

THE COURT: Then in that respect the testimony of that witness, Mr. Moore, will stand as though he were refreshing his memory from the—

MR. CARTON: From the actual books instead of this 20 memoranda.

MR. HEISLEY: Yes; that is right.

MR. CARTON: I will offer these slips in evidence. The two material men's bills have been offered in evidence, but I now offer these payroll slips.

MR. HEISLEY: They are the ones that he referred to yesterday? 30

MR. CARTON: They are the ones that he referred to yesterday.

(Payroll slips marked Exhibits P. 10 and P. 11.)

DEFENDANT'S TESTIMONY.

RICHARD H. HUGHES, sworn for defendant.

40

DIRECT EXAMINATION BY MR. HEISLEY:

Q. Mr. Hughes, how long have you lived at Long Branch and followed the occupation of contractor and builder there?

A. About thirty-five years.

Q. And what has been the character of buildings generally that you have erected in this county?

A. Well, the buildings along the shore principally are
10 good cottages.

Q. Have you built many cottages occupied by summer residents, New York people?

A. Quite a number.

Q. Well, now, in what territory have your operations covered?

A. Well, all the way from Elberon to Sea Bright you might say, and Deal.

Q. You are the defendant in this suit?

A. Yes, sir.

20 Q. Did you say how long you had been there? You did say, didn't you?

A. Yes; I said I had been in business about thirty-five years.

Q. You, I believe, sub-contracted the plastering to the Monroe V. Poole Company, didn't you?

A. Yes, sir.

Q. And have you known them for a long time?

A. Ever since I have been in business.

30 Q. Have they been in business all that time at West Long Branch?

A. In business before I was.

Q. Do you know the general class of buildings which they have operated on?

A. I do.

Q. Well, is it the same class that you have?

A. The same thing exactly, the same class.

Q. This work was supposed to be done under the contract and specifications which you and Mr. Wise in his lifetime signed; is that right?

40 A. That is right.

Q. And under the direction of an architect by the name of Sparry?

A. Yes, sir.

Q. Let me ask you a general question. During the progress of that work from start to finish do you know of any deviation by you or by your men or by Poole & Company and their men in the kind and quality of the material and work used in that house.

MR. CARTON: That is objected to for this reason: because it has not been shown yet that Mr. Hughes himself was actually on the job. 10

THE COURT: The objection is overruled. The question was, Do you know? Of course if he doesn't know he can say so.

Q. Do you know?

A. There were none.

Q. No; answer yes or no. Do you know? You do without doubt. 20

A. I do.

Q. How did you get that knowledge? Were you frequently on the building, I mean?

A. I was on the building every day, yes; sometimes two or three times a day.

Q. For instance, in the matter of the plaster. The specification says that all plaster is to be composed of the best quality approved brand of lime. Do you know whether that kind of lime was used?

A. Yes, sir. 30

Q. What kind of lime was it?

A. Rockland lime.

Q. Will you tell us what you know about Rockland lime, whether it is a lime that has been long in use or was an experiment or what?

A. Rockland lime had been on the market for a long time and considered about as good a lime as we can get; and the architect insisted upon having Rockland lime.

Q. Well, do you know of your own knowledge whether or not this was Rockland lime that was used on this property? 40

A. I do.

Q. How do you know it?

A. I saw it there. Mr. Poole got a carload of fresh Rockland lime on purpose for that job,

Q. Are you familiar with the different kinds of lime?

A. Well, yes; we use other kinds, but principally Rockland.

Q. Do you know good Rockland from bad Rockland when you see it?

10 A. Well, only by the brand. We go by the brand, you know.

Q. How do you know that the architect insisted upon having Rockland lime?

A. Well, because he knew it was good lime, I presume.

Q. No; but how do you know that he insisted on it?

A. He told me he wanted Rockland lime.

THE COURT: The question is did he insist.

20 MR. HEISLEY: Yes; he said awhile ago, Judge, he did.

THE WITNESS: He said he wanted Rockland lime.

Q. Do you know whether he saw the lime on the ground there?

A. I do. He went up and saw the lime and looked at the brand on the barrels.

Q. Did he make any remark about it?

A. Said it was all right, the lime was all right.

30 Q. The specifications say that the sand shall be clean, sharp sand from the pit. Where did this sand come from?

A. Came from Eaton's pit.

Q. John Eaton's pit?

A. John Eaton's pit, they call it.

Q. Where is that located?

A. Up in the upper ward, sand pit there. We have been using sand out of there for thirty-five years or more.

Q. Who has been using it?

A. All the builders in Long Branch.

40 Q. Do you know of any pit around there that has fur-

nished more sand for building than Johnnie Eaton's pit.

A. I do not.

Q. Do you know whether generally the sand has been satisfactory?

(Objected to.)

MR. HEISLEY: Does he know?

THE COURT: If he knows he may answer, owing to the fact that he has been building there for years. 10

A. As far as I know it has been satisfactory.

Q. Did you ever hear any complaint of it?

A. No.

Q. Do you know whether it was good sharp sand?

A. It was sharp sand. The architect went up and felt of it and said, "It is good sharp sand and is all right."

Q. When you say the architect, do you refer to Sparry?

A. Sparry. 20

Q. Where was it he examined this sand and said it was all right?

A. On the job. The sand was piled up in a heap. They were carting it there at that time. He saw it in the bed and examined it and said it was all right.

Q. Who else was present if anybody when he examined the sand?

A. Well, the man who was mixing the mortar.

Q. Was Poole or his man there?

A. I am not sure whether Poole was there with me or not. 30

Q. What do you mean by sharp sand, Mr. Hughes?

A. Well, you can tell by feeling of it. Good sharp sand has sharp edges. You can tell by feeling it; got good grit.

Q. I don't want to lead you, but there must be sand which is not sharp.

A. Yes; it is fine, not gritty. The specifications say that the other ingredient shall be new, long, fresh cattle hair.

BY THE COURT:

40

Q. I suppose that the distinction between good sharp sand and the other class would be one which was gritty and one which was not; is that the idea?

A. That is the idea.

BY MR. HEISLEY:

Q. What kind of hair was used on this job?

A. The hair called for in the specifications, long hair.

10 He saw the hair and went and examined it.

Q. You examined it?

A. The architect, he saw it; saw it being pounded and put in the mortar.

Q. Did he express any opinion about the hair that was being used?

A. All right.

Q. He told you so?

A. Yes.

20 Q. Mr. Hughes, did the architect in any instance condemn any one of the elements which you were using in the making of this plaster?

A. He did not.

Q. Did he as far as you know ever complain about the manner in which the plaster was being mixed?

30 A. No; he went up and asked the mixers how they were mixing it, in what proportions, and they told him how they were mixing it, the proportions, etc., and he said it was all right; and in fact he approved everything before it was used. Nothing was covered up until it had been approved by the architect.

Q. In the doing of this work did he criticise you or your men for the kind of labor they were performing there or the kind of materials they were using?

A. He did not.

Q. Did he make a single criticism of any kind of the work, whether it be carpenter work or mason work?

A. He did not.

40 Q. Did he ever express his opinion about the quality of the work and the materials which you were using in the fulfillment of this contract?

A. He said it was a good job, that is all; he was perfectly satisfied with it when it was complete.

Q. Now, you heard the testimony, Mr. Hughes, about the cracks and the wall being loose in various places. They say that the cracks began to appear soon after the job was practically finished, a few months after, and in the following summer, I think, that Mr. Poole went back there and filled in some cracks. Do you know whether that is so or not?

A. That is so.

Q. Now, won't you tell these men what kind of cracks 10 they were?

A. Well, they were cracks in the partition, that is, the hall partition principally, caused by the settlement of the center of the house. There was one partition, the plans will show a partition in the cellar, simply a stud partition, where the beams joined, 3 by 10, 3 by 12 and 2 by 10 beams joined and all rested on that partition.

Q. What would you say as to that kind of beam, a 2 by 10 or 3 by 12? Is it considered very heavy or very light or 20 medium timber?

A. 3 by 12 is considered a pretty heavy beam, placed only 12 inch centers up in that room. And I called the architect's attention to this partition when we were putting it up.

BY THE COURT:

Q. Is that called for by the specifications?

A. Yes, sir; put up exactly as called for by the specifications, the partition was, and I called the architect's attention to it, that in my opinion it was rather light to carry so 30 much timber; and he said it was all right, plenty heavy enough, and so, of course, I had nothing more to say. He was the boss, I considered, all the way through.

BY MR. HEISLEY:

Q. Where was it that you told him that in your judgment that studding partition under those heavy beams would be too light?

A. Well, that was the cellar partition. 40

Q. No; but where was it you told him?

A. Right on the job in the cellar at that time.

Q. Was it before you had built the partition?

No; after we had built it but before the very large timber had been put on it.

Q. Did you see any evidence of any sagging at that time, or did you see anything, rather, that suggested to you that the studding was too light?

A. Well, to a practical builder the studding was appar-
10 ently too light to carry so much weight above.

Q. What did the lower end of this studding rest on in the cellar?

A. Well, they rested on a plate which rested on a foundation, cement foundation.

Q. How wide was that cement foundation?

A. I don't just remember. It is on the plan there. It is whatever is called for.

Q. Now, this studding set for instance under here on some sort of foundation and went up and then there was a
20 plate on top of that?

A. A plate on top of that and then the beams on that.

Q. Those beams go crosswise?

A. Yes.

Q. How big a span, about, without taking time to refer to the specifications, do you say that was across there?

A. Why, about twenty feet, twenty to twenty-two feet, something like that.

Q. Now, then, did these studding support any weight other than the first floor beams?

30 A. Oh, the second floor beams, the third floor beams, also the roof. The whole weight came down on that partition.

Q. Was there any portion of that house, in your judgment, where there was more weight concentrated than there was on that studding partition?

A. No, sir.

Q. Was there any place where as much weight was concentrated?

A. No, sir.

40 Q. Well, after you had suggested to him, as you say, that the studding was too light, did you do anything to make

the studding any stronger before you proceeded with the work?

A. That was boarded—simply a stud partition, all it called for—which I afterwards boarded that up, which stiffened it to a certain extent, stiffened it some, made it a little bit stronger.

Q. Did the architect tell you to do that?

A. I made a contract to do that, paid extra for it.

Q. They paid you extra for that?

A. Yes. 10

Q. Now, as a matter of fact, do you know whether subsequent events proved that that studding was sufficient to prevent the settlement or whether a settlement occurred notwithstanding your sheathing the studding?

A. Settlement occurred there notwithstanding all that.

Q. Was it much of a settlement?

A. Well, quite a settlement; I should judge probably two or three inches.

Q. Was it noticeable by the naked eye as you would enter the room? 20

A. Yes; you could see it on the floors.

Q. Would you notice it on the ceilings too?

A. Yes; the whole thing came down and caused cracks?

Q. Why do you say this settlement caused most of these cracks?

A. Well, it couldn't help it. The settlement in the center of a house couldn't help but cause cracks, because the partition that ran at right angles with this cellar partition went under, came down on the other end of the stud and up again, the end that was against the outside wall; but at the center end they came down, and that caused the cracks in the center partition walls, the whole partition, couldn't help it. 30

Q. You heard the witness here yesterday, I think it was Mr. Green, the architect, say that he did not think the cracks in the ceiling could be attributed to the settlement. He inferred, as I understood him, that the cracks on the ceiling might be caused by the settlement. Do you know of any reason why the settlement would not cause cracks on the ceiling if it caused cracks in the wall in the partition?

A. Well, I have felt all along that the settlement in the 40

partitions caused the cracks in the ceiling walls and side walls.

Q. Now, they say there was a lot of this wall, or some of this wall, at least, that was loose from the ceiling. Do you know of any such instance?

A. I do not. We went there—

Q. Who?

A. Mr. Poole and Mr. Green and myself, met there by—

Q. When?

10 A. Well, I think it was in the summer or spring of 1915, at the solicitation of Dr. Wise, and went over the job. The ceiling seemed to be all right at that time. There were cracks in the partitions, as they have already explained. The only plastering that had fell at that time was a little ceiling in one of the hall closets and a little piece under a bathroom at the end of the hall.

Q. Do you know what caused those two places to fall?

20 A. Well, the one under the bathroom was caused by a leak in the bath room, a leak in the pipe, and a little of the ceiling, I suppose about 2 1-2 by 4, in the closet, I couldn't tell what caused that to fall, unless it was from a leak from some of the steam pipes or plumbing pipes.

Q. Now, do you say that they are the only two places where your attention was called to where the ceiling had fallen?

A. Those were the only two places. There was no loose ceiling at that time, as our attention was not called to it, and they didn't appear to be loose.

30 Q. Who went through the house with you?

A. Mr. Poole and Mr. Green.

Q. I mean who representing the Wises?

A. Mr. Green.

Q. When was the building completed?

A. 1915.

Q. What time in 1915?

A. No, 1912.

Q. You said 1915.

A. This was when we went there.

Q. When was it completed?

40 A. 1912, I think.

Q. That is when the family say, in 1912.

A. It was finished in October, 1912.

BY THE COURT.

Q. Now, this visit was in 1915, was it?

A. I think it was; yes, sir. Yes, 1915.

BY MR. HEISLEY:

Q. Well, long after the family had moved in? 10

A. Yes, had been in there a year or two.

Q. You have told me something, Mr. Hughes—I just want to call your attention to it without leading—but especially about some ceiling being knocked off by reason of somebody hammering upstairs. Had you forgotten that?

A. Why, there was a piece fell off the third floor ceiling.

Q. The third floor ceiling?

A. The third floor ceiling; I suppose four or five or six feet square. That fell off by reason of Dr. Wise going up there himself and laying a floor on the third floor ceiling beams. There was no attic to this house, but he wanted to make a dark room or something up there and he went up there himself and hammered on the ceiling beams and caused the plaster to fall; and I told him why it fell when he called my attention to it, and I refused to put it on unless he paid for it. So we put it on and they paid for it. 20

Q. You heard him say yesterday that he did not recall that?

A. Yes.

Q. You do recall it, do you? 30

A. I do.

Q. And are you sure that he paid you for the repairing of it?

A. Yes, paid \$10. I say he paid; it was put on the bill. It was paid.

Q. Well, Mr. Hughes, after your visit there with Mr. Green and with Mr. Poole did Mr. Poole do any filling up of the cracks?

A. Yes; he went over the whole house and pointed them up once, I think. 40

Q. And do you know what the condition of the plaster was after he got through with that pointing up?

A. Seemed to be all right.

Q. Did the architect express any approval or disapproval of the manner in which this work had been done after Poole was through?

A. He did not.

Q. Was it after that that he gave you this final certificate? The final certificate is dated September 28, 1912.

10 A. Yes; it was given after everything was satisfactory, entirely satisfactory to the architect.

Q. Now, this certificate called for a final payment of \$1,702.50; and I call your attention now to a receipt, dated October 9th, and purporting to be signed by you, for \$1,702.50. Is that your signature?

A. My signature.

Q. After you got this final certificate from the architect to whom if any one did you present it?

A. Why, to the executor in New York.

20 Q. Drummond?

A. Mr. Drummond; I took it up and presented it to him.

Q. And did you receive payment from these executors, the plaintiffs in this suit, of the \$1,702?

A. I did. Mr. Drummond gave me a check.

Q. Did they at that time express any dissatisfaction with this job?

A. They did not.

Q. Did they say anything about whether they were dissatisfied?

30 A. There was nothing said.

Q. Did they make any objection at all to honoring this certificate of the architect?

A. None whatever.

BY THE COURT:

Q. How soon after the certificate was presented to Mr. Drummond was the amount paid?

40 A. About five minutes, as soon as he could make out a check. I would say when we went over the job, Mr. Poole,

Mr. Green and myself, Mr. Poole agreed to fill up all the cracks except the cracks caused by the settlement.

BY MR. HEISLEY:

Q. Was the settlement discussed at that time? I mean was the settlement mentioned at that time?

A. I am not sure that it was mentioned at that time.

Q. Why did you say that he agreed to fill up all the cracks excepting those caused by the settlement? 10

A. There were some few cracks on the side walls that did not show down—

BY THE COURT:

Q. Mr. Hughes, describe all the cracks which you saw. Where were they?

A. Well, the cracks were diagonal cracks, principally, and the cracks in the hall and partitions running lengthways of the hall and on some partitions running at right angles 20 with the hall. They were all diagonal cracks caused by the settlement.

Q. How many partitions were there in which cracks appeared?

A. Well, that I couldn't say.

Q. Did you go over the entire house?

A. Went over the entire house.

Q. Some evidence has been offered as to the falling of the ceiling in some of the closets, at least one of them. Did you see that? 30

A. We saw that, one closet.

Q. How do you account for that ceiling falling?

MR. HEISLEY: He said about the steam pipes, Judge.

THE COURT: Yes; I beg pardon. You said the steam pipes and the leak in the bathroom caused the other.

A. The leak in the bathroom caused them and I called Mr. Green's attention to them. 40

Q. How soon was that after the completion of the house?

A. After the house was completed, did you say?

Q. Yes.

A. I think this was in 1915; the spring of 1915.

Q. Then you say the ceiling did not fall until 1915?

A. I don't know how long that had been down at that time. I don't think it had been down very long at that time.

Q. When were you first notified that it was down?

A. I don't know that I was ever notified that it was
10 down. I was simply requested by Dr. Wise to come up there
and go over the job with Mr. Green.

Q. Then you did turn the house over to the owner in
June, 1912, did you?

A. Yes, sir.

Q. And of course this check was in October or September,
1912?

MR. HEISLEY: Yes, sir; that was September 28th.

20 Q. This visit as requested by Dr. Wise was in 1915?

A. I think it was 1915.

Q. When?

A. In the spring, I think.

Q. The spring of 1915?

A. Yes.

THE COURT: Proceed.

BY MR. HEISLEY:

30 Q. You say, Mr. Hughes, that these cracks were diagonal
cracks, all diagonal cracks, indicating a settlement. Now,
we do know from common knowledge that often a crack will
appear in the plastering occasioned by the shrinkage of timber;
that is so; isn't it?

A. Yes.

Q. Was there anything about those cracks to indicate
that the cracks were due to the shrinkage of the timber or
were due to a settlement?

A. Well, they indicated to me that they were due to a
40 settlement.

Q. Why?

A. Well, because the cross-partitions, the cracks ran diagonally?

Q. All ran the same way?

A. On the cross-partitions, yes; where they ran down to the center.

Q. Now, they have brought up here some samples. I just want to call your attention to it. Of course you have no personal knowledge where these samples came from of plaster.

A. No.

10

Q. You yesterday looked at several of those bags containing samples?

A. Yes.

Q. What do you say of the quality of that plaster?

A. I would say that is a rich mixture.

Q. What do you mean by rich?

A. Well, there is plenty of lime in the sand and there seems to be plenty of hair into it—a good mixture.

Q. Well, would you say it was good plaster or not?

A. I would say it was good plaster.

20

Q. Would you say that it was plaster called for by the plans and specifications or not?

A. I would.

Q. Of that quality?

A. Yes.

Q. Now, the fact that I can take this and crumble it in my fingers this way, does that tend to prove that the plaster is not a good plaster?

A. It does not. Well, remember, that is an old-fashioned lime and sand. Of course that naturally will crumble, the old-fashioned kind.

30

Q. Is it or is it not usual for a plaster made of lime and hair and sand to be soft enough so that you can crumble it in your hands and yet be good plaster?

A. Yes.

Q. The outside wall, the outside white coat, is hard, is it not?

A. Certainly, hard.

Q. And you cannot crumble that?

A. No.

40

Q. Do you know of any reason why plaster of that consistency should not have stuck to the lath if it was properly clinched?

A. No; I do not.

Q. Of course there must be numerous things which may cause the falling of plaster; is that right?

A. Oh, yes.

Q. Suppose, for instance, that this wall was plastered and this ceiling was plastered in this room in which we are sitting and there had been a settlement, and suppose you put
10 jacks or other instruments under the beam which was weak and caused the settlement and jacked it up, would that have a tendency to crack the walls or not?

A. Naturally loosen it; certainly.

Q. Well, would it have a tendency to loosen it?

A. Oh, yes.

Q. Have you any doubt about that?

A. None whatever.

Q. You noticed the plastering on the inside of the hol-
20 low tile, did you not?

A. Yes.

Q. Frequently or only once?

A. Noticed it every time I was there; two or three times.

Q. Do you know whether that was the same kind of plaster which was used in these walls which they say fell and on the ceiling walls where the cracks appeared?

A. The same plaster, all put on at the same time, out of the same batch.

Q. Made out of the same stuff?

30 A. The same stuff, all taken out of the same pile.

Q. The evidence here yesterday on the part of the plaintiff was that that adhered to the walls. Do you know whether there were any cracks in that plaster?

A. Didn't seem to be any on the side walls, outside walls.

Q. On the walls—I mean the plaster which was attached to the face of the hollow tile—you said there didn't seem to be any?

A. Didn't seem to be any cracks there.

40 Q. Did you examine the quality of that plaster?

A. No. It was all the same. It was all taken out of the same pile and put on at the same time.

THE COURT: Pardon me just a moment. Let me understand. A witness yesterday referred to the plaster attached to the inside of the outside wall?

MR. HEISLEY: Yes.

THE COURT: Now, what is that?

10

MR. HEISLEY: The hollow tile. The inside of the hollow tile. It is a hollow tile building and they put a coat of plaster right on the face of the inside of the hollow tile, as I understand it.

THE COURT: And did that provide the interior wall, the side wall?

THE WITNESS: Yes, sir.

20

THE COURT: That was the interior of the side wall?

THE WITNESS: Yes.

THE COURT: Just that wall as it is there? (Indicating.)

THE WITNESS: Yes.

Q. There was no lathing or studding there?

30

A. Oh, no, sir.

Q. Now, assuming, Mr. Hughes, that the plaster on the interior of the hollow tile did not crack and did not fall off, but that the same kind of plaster on the ceiling and on the wooden partition and studding did fall off, can you tell the court—

THE COURT: You should say which was lathed.

MR. HEISLEY: Yes.

40

Q. Can you tell the court and jury why in your judgment why that condition prevailed, why it cracked in one place on wood and did not crack on the hollow tile?

A. Well, the only way I can account for it is by the settlement and some shrinkage, of course.

THE COURT: What about the lath being too close together, Mr. Hughes?

10 MR. HEISLEY: I am going to come to that.

Q. I want to call your attention to the fact that Mr. Green, the architect called yesterday by the plaintiff, assigned as a possible reason the fact that the exterior of the house was all brick or hollow tile, and the inside was all wood, that that might cause it. Do you attach any importance to that?

A. None whatever. The hollow tile did not settle and the center partitions did, which caused it.

Q. Is that then your solution of the problem?

20 A. That is my solution.

Q. It didn't occur on the hollow tile because they didn't settle, you say?

A. Didn't settle.

Q. And cracked on the other because it did settle?

A. Yes, sir.

Q. Now, sometimes, isn't it true that plasterers will put their laths so close together that they cannot get a good joint, a good break? That is true, isn't it?

A. That is true.

30 Q. Now, wait a minute. Do you know whether or not these lath on this house were placed too close for the plaster to be forced through and make a clinch on the other side?

A. They were not.

Q. How do you know that?

A. They were put on for old-fashioned plaster. We always put them on a little wider apart for what we call lime and sand work. It is necessary to put them a little wider apart. And the architect was there and when the lathers started lathing he told them how far he wanted them put
40 apart.

Q. Who told them?

A. The architect.

Q. Mr. Sparry?

A. Mr. Sparry.

Q. Told the lathers how far he wanted the lath put apart?

A. Yes; and he came there in a day or two and watched the lathing as it progressed and went over the entire job of lathing, after the lathing had all been done, before there was any plaster put on, and approved it.

10

Q. He approved what?

A. Approved the lathing.

Q. Did he make any suggestion as to change, more lathing in any particular place?

A. Only one spot, one side of a wall downstairs, where he thought there were too many lath broken on one beam. He suggested taking out the work, two or three lath taken out and have the joints broken there. And that was the only one place in the house that he had any fault whatever to find with the lathing.

20

Q. And I understand you to say that this all occurred before a trowel of plaster was put on that wall; is that right?

A. Yes, sir.

Q. While the plaster was being put on was the architect there at any time?

A. Yes, sir.

Q. Did he make any criticism of the manner in which it was being put on?

A. Not that I know of; I have never heard it.

Q. You have seen a great deal of plastering in your time?

A. Yes, sir.

Q. Was the workmanship good, bad or indifferent on this house?

A. Good.

Q. Who did it for him?

A. Monroe Poole & Company.

Q. Who was the man actually in charge?

A. Mr. Wardell was the man actually in charge of the plastering work.

40

Q. Fred Wardell, here in court?

A. Yes, sir.

Q. How long has he been a plasterer to your knowledge?

A. Well, I guess thirty or forty years.

Q. Do you know what his reputation is around there as to being an efficient and competent plasterer?

A. First-class mechanic.

Q. Do you know of any better down there?

A. I do not.

10 Q. Some witness for the plaintiff has said that when they took off this wall, stripped these walls off, they took a shovel and put it in between the plaster and the lath. Is that an unusual way to take it off? Is it the usual way?

A. The usual way, of course, to strip off plaster.

Q. The fact that they could strip it off with a shovel that way, is that any indication that the plaster was bad or poor?

A. None whatever.

Q. You say that is the usual way to take it off?

20 A. It is the usual way, to take a spade or shovel.

Q. Assuming, Mr. Hughes, that it was necessary to take off this plaster—just assuming it, not admitting it—do you know of any reason or necessity for taking off all the trim of that house?

A. It was not necessary at all.

Q. Why not?

A. Well, the plaster could have been taken off up to the trim and then with a half-inch chisel—you see there is about a half inch of plaster or five-eighths between the back of
30 the trim and the lath.

Q. Can you illustrate there?

A. Well, that could have been taken off say a half inch back of the edge of the trim, the plaster could have been taken out there with a trowel or with an old chisel, could have gone around the side of the trim in about ten or fifteen minutes and taken it back about half an inch from the edge of the trim, and that would have answered. That is the way we always do it.

40 Q. You mean take out back there from the edge half an inch? (Indicating.)

A. Yes, sir.

Q. Would there have been any difficulty in forcing the new plaster in back there so that the joint caused by the union of the new plaster with the old plaster would have been hidden?

A. No; no difficulty whatever. We have done lots of jobs that way. It is the usual way of doing.

Q. Have you ever known a case where they replastered a house where they took off all the trim, as they did in this house?

10

A. Not before.

Q. Would you say that was expensive or not, to take that off and put it back?

A. Very expensive.

Q. Just to make a rough estimate—of course you haven't figured it out, but to make a rough estimate, some of these witnesses, I think, or Mr. Moore, said yesterday it perhaps cost several hundred dollars. What would you say about that.

A. It evidently did cost several hundred dollars.

20

THE COURT: Well, do you think that is a responsive answer? What is your estimate of the cost? He says it evidently did. You are asking him for an affirmative statement.

Q. What would you say, approximately, Mr. Hughes, would be the cost and expense of taking off all that trim and putting it back again, \$400 or \$500, \$1,000 or what, just roughly?

A. Well, I would say it would cost \$300 or \$400.

Q. Mr. Hughes, is there anything else that I have failed to ask you about the house? Do you think of anything that I have overlooked, Mr. Hughes?

30

A. I can't recall anything, except I was going to state as well as this one partition there were two or three partitions in the cellar there that all settled, where it came together practically in the center of the house. The plans will show. And it looked as if they all went down, practically in that one spot.

Q. Here is something I forgot to ask you about. Was there any of this same plaster used in the garage?

40

A. The same plaster.

Q. How did it work out there?

A. Why, just as good today as the day when it was put on, apparently.

Q. Was there any settlement there, apparently?

A. No settlement, no cracks.

CROSS EXAMINATION.

10 BY MR. CARTON:

Q. Mr. Hughes, you were the general contractor for this job, were you not?

A. I was.

Q. And your contract covered not only the mason but the plumbing and electrical work and everything?

A. Everything.

Q. And you in turn let out the sub-contracts for the different branches of the work?

20 A. Yes, sir.

Q. You, I suppose, in figuring on this job went over the plans and specifications in some detail?

A. Certainly.

Q. And understood the character of the job required by the plans and specifications?

A. Yes, sir.

Q. You are, of course, familiar also with the terms of the contract that you afterwards entered into?

A. Yes, sir.

30 Q. And knew that it required that this should be a first-class job, first-class material and first-class workmanship; you knew of that?

A. Yes, sir.

Q. You have stated that Mr. Sparry O. K.'d everything and have gone to great pains by saying that he passed upon everything and said that it was all right?

A. Yes.

40 Q. Is it your idea that there is no responsibility resting on the contractor to see that he carries out the work that he contracts for?

MR. HEISLEY: I object. It makes no difference what his idea is. The law speaks.

THE COURT: No; it is a matter of argument, anyway.

Q. You contracted to do this work for so much money for Mr. Wise, didn't you?

A. According to the plans and specifications.

Q. And under the supervision of the architect?

A. Mr. Sparry. 10

Q. The plans and specifications do say, do they not, that if there are any inconsistencies or any discrepancies that they shall be made up by you in order to make a complete job as contractor; you say that is so, don't you?

THE COURT: Mr. Carton, I have already ruled that under the plans and specifications in this case and the contract that the approval of the architect is not conclusive in respect to defective work. The plaintiff has a perfect right to hold the contractor, assuming that there was defective work; so it is purely argumentative. 20

Q. Mr. Sparry was the architect?

A. Yes.

Q. And he is not here today but his testimony is here. His testimony has been taken?

A. Yes.

Q. You knew, of course, when you figured on the job, that this called for the so-called old-fashioned plaster, lime, hair and sand? 30

A. Yes, sir.

Q. And did you oversee the putting on of this plaster and its mixture as it went on the job?

A. I saw it being put on and saw it mixed.

Q. Well, you had charge of the general work, the carpenter work?

A. Yes.

Q. Mr. Poole had charge of the mason work?

A. Yes, 40

BY THE COURT:

Q. Did you say you saw it mixed?

A. Yes.

Q. What proportion of hair and sand and lime?

A. I couldn't say. The architect saw it mixed. He called my attention and wanted to know how it was mixed, went up and asked the laborers who were mixing the mortar, in what proportion they were mixing it. They told him and
10 he said it was all right.

BY MR. CARTON:

Q. Well, the architect was not there but once and saw this, was he?

A. Yes, he was there nearly every day at that time, at that time of the building.

Q. How many days' time, roughly speaking, do you say it occupied to put on all these walls by the men?

20 A. I couldn't say. I don't know how long they were.

Q. Well, a great many, I suppose, did it not?

A. Yes.

Q. And was more than one batch of mortar mixed for that job?

A. I think the specifications called for the mortar to be mixed and piled up for seven days, I think, before being put on, and I think it was—

Q. Do you know whether that was done or not?

A. Yes, I do.

30 Q. How do you know?

A. Well, because I saw it all piled out there and I noticed the time from the time it was piled up until they commenced to put it on the wall.

Q. Why was that necessary, if it was necessary? I assume it was.

A. Well, it is customary with the old-fashioned lime and sand to have it slacked up. It makes better mortar.

Q. It is supposed to be put up and stand for some seven or ten days; that is the rule, isn't it?

40 A. Yes.

Q. How many different batches were mixed to complete this job, if you know?

A. I don't know of but one batch.

Q. You think it was all one batch, do you?

A. I think it was all piled up there in one heap, mixed at one time and piled up.

Q. What season of the year was it put on; do you recall that?

A. Put on in the summertime, if I remember.

Q. You didn't purchase the sand, did you? 10

A. No, sir.

Q. Nor the hair?

A. No, sir.

Q. Nor the lime?

A. No, sir.

Q. You say that you saw the lime and it was Rockland lime?

A. Yes, sir.

Q. And you can't tell whether that is good lime, only because it had a brand of being Rockland lime; you therefore 20 assumed it was good lime; that is the only reason?

A. That is the reason.

Q. It is possible that the contractor got a bad sample or a bad lot of Rockland lime isn't it?

A. I never heard of a bad—

Q. That could be true?

A. It could be, I suppose.

Q. You say it was good lime because it came from Rockland, barrels or bags, I suppose, and therefore ought to be good lime? 30

A. Yes.

Q. This sand came from Eaton's pit did you say?

A. Yes, sir.

Q. Do you know whether that sand was used entirely or exclusively in this mixture?

A. I do not.

Q. You had beach sand on the job, did you not?

A. There was a little beach sand used in the foundation.

Q. Do you know whether any of that got in this mixture or not? 40

A. I am quite sure there wasn't any.

Q. It could have got in there without your knowledge?

A. There might have been a few shovelfuls. There might have been a shovelful or two left over that got in.

Q. You don't mean to say that you inspected at all times Mr. Poole's workmen in actually composing this mixture, do you?

A. I was there every day and sometimes twice or three times a day. I live right close by.

10 Q. And you had to do with the carpenter work and general supervision of the job?

A. Yes, sir.

Q. And you made no special examination of this lime any more than to see it was Rockland lime?

A. None whatever.

Q. And the hair looked good to you?

A. Yes, sir.

Q. And he was getting Eaton sand?

A. Yes, sir.

20 Q. Now, whether they made that mixture in the proper proportions or not you don't know, do you?

A. No.

Q. You know what the proper proportions are of lime and sand, I assume?

A. I always follow the specification of the architect, whatever it is.

Q. What are the requirements of this specification in regard to that?

30 A. I don't know. I don't remember what they do require.

Q. From your own knowledge what is the proper specification?

MR. HEISLEY: I object. I don't think that is material at all. The question is what were these specifications. If he followed these specifications that is the end of it.

40 THE COURT: I do not see anything in the specifications with regard to the proportions of sand, lime and hair at all. The only reference is "that all plaster be composed of

the best quality approved brand of lime, clean, sharp sand from pit, new long and fresh cattle hair." I do not see that has any reference. I was looking for that here. I wish counsel if they know there is such a specification would produce it.

MR. CARTON: I have not seen it.

THE COURT: No; I have not, either. Therefore this question will be proper, Judge Heisley, as to what is the usual and customary method of proportioning. 10

MR. HEISLEY: All right, sir.

Q. Will you tell us what that is, Mr. Hughes?

A. The only way that you can tell the proportion is by the working. Now in mixing up—

BY THE COURT:

Q. If you don't know what the general rule is with respect to such mixtures I wish you would say so. Do you know the general rule? 20

A. No, they work it until it works properly, until it is properly worked so that it will work easy with the trowel, and there may be a difference in them. It may depend upon the sand.

Q. Do you know any rule which contemplates a certain number of pounds of hair or so many shovelful of sand or so many bags of lime? 30

A. No; I don't know that there is any rule laid down.

BY MR. CARTON:

Q. Well, as a general contractor of some thirty-five years' experience you must have some general idea of what the proper mixture is, haven't you?

A. It is always mixed so that it will work properly.

Q. Well, the lime known as pure lime, that is not mixed with anything, is it? 40

A. No.

Q. And you get the sand and get the hair. Now, there must be some proportionate parts that should be put in to make up this mixture?

A. Well, I consider we always mix it until—throw in enough sand. We can tell by mixing whether it is properly mixed or not; whether it has enough sand.

Q. Who is to determine what that proper mixture shall be; the man who is mixing it, the laborer?

10 A. Well, the foreman of masons generally superintends that and overlooks that.

Q. And instructs the laborer how much sand to throw in and how much lime to throw in?

A. Yes.

Q. You say you could not instruct men making up a batch of lime what the proportions are?

A. I could tell whether the lime was properly mixed or not, the mortar was properly mixed or not, but just what proportions—

20 Q. Do you mean to say you would have to go on and go through the process of mixing and then you could tell when it was properly finished?

A. Yes.

Q. Have you any idea what the proportionate parts are of sand and lime?

A. No; I have made no study of that.

Q. Haven't any idea about that?

A. No.

30 Q. Well, wouldn't a lean mixture or a rich mixture go on the same way? Wouldn't it be applied easily to the lath?

A. No; the plasterer could not put on a lean mixture. They wouldn't do it.

Q. Why not?

A. It works so much harder what they call a lean mixture or poor mixture, it works very hard; and in fact, it would not pay. It costs so much more to put it on, and you couldn't make a good job putting on a poor mixture. It would have to be just so rich in order to make it work properly and make it work easy.

40 Q. Is it your experience that they do not ascertain

whether the mixture is proper until such time as they apply it to a wall, if there is no fixed rule as to what the mixture should be in the bed?

A. Well, the masons have a fixed rule. I have always contracted that out.

Q. You don't know what that is?

A. No.

Q. Whether those men you saw mixing up this mortar did it properly or not you don't know?

A. Only from the architect's approval. 10

Q. Well, it went on the wall all right, didn't it?

A. Yes, sir.

Q. And apparently looked all right when it was put on?

A. Certainly did.

BY THE COURT:

Q. Mr. Hughes, is there any guarantee as to time against a wall cracking or falling where the work has been done in a workmanlike manner? 20

A. I never hear of any.

BY MR. CARTON:

Q. Well, a wall, such a wall as you put on, is supposed to last for years and years, isn't it, Mr. Hughes?

A. Certainly.

Q. I suppose these walls are made of the same sort of plaster?

A. I suppose so. 30

Q. Probably put up here fifty years?

A. Probably.

THE COURT: 1872.

Q. Mr. Hughes you say that everything went on swimmingly between yourself and Mr. Sparry, everything was O. K. The fact is, is it not, that you did not get your final certificate until about a year after the work was done? That is true, isn't it? 40

A. Well, yes; somewhere about there.

Q. Why were you held out of your money all that time if everything was so beautiful between yourself and Mr. Sparry?

A. Well, there were some little things missing. The hardware was pretty much all special hardware and some missing, and Mr. Poole went over there and fixed the cracks, I think, once. That was some time after the job was practically done; but if I remember right it was on account of some missing
10 hardware that had to be made.

Q. Well, then, while you were yet on the job there was evidence of imperfection in those walls, was there not?

A. Hair cracks; yes, in the center of the house.

Q. And Mr. Poole put on a couple patches?

A. Yes.

Q. One he made the Doctor pay for upstairs?

A. Yes, sir.

Q. Now, tell us what the Doctor did up there to cause
20 that trouble, will you?

A. Why, he built a dark room up there, if I remember, sort of a dark room, and he laid a floor over the ceiling beams.

Q. The third floor had not been finished off; is that the idea?

A. The third floor attic had not been finished off at all.

Q. Just rough beams?

A. Just rough beams; and he laid a floor over that on the ceiling beams, and I think they were 2 by 6 beams, and
30 the jar, of course, knocked the ceiling down.

Q. Well, hasn't it often been your experience that parties have often put boards over the rafters in the attic so they might walk over it; you have often observed that before and known that to be done; haven't you?

A. Yes; they are put on before the plaster is put on.

Q. Haven't you often known it to be put on after the plaster is put on?

A. After the plaster is thoroughly dry; yes.

Q. When did he put this on?

A. Well, he did this—I have forgotten now just how
40

long—not very long after the plaster had been put on, probably.

Q. Six months or so?

A. No; I don't think it was a month after the plaster had been put on.

Q. You mean to say the Doctor was occupying the house a month after the plaster was on?

A. No; I don't think he occupied the house for several months; two or three months after the plaster was on.

Q. Is it your contention that he went in there while you were working there and put this floor on? Is that it? 10

A. He went in there. I don't think he had moved in yet. No; he hadn't moved in yet when this floor was put down, if I remember.

Q. Ordinarily how long would it take such a wall as you put on to dry out?

A. Well, it would depend. We, of course, know this was put on in the summertime. In damp weather—there shouldn't be any floor laid over a six-inch beam for six months after the plaster is put on, I should say. 20

Q. And earlier than that, in your judgment, it would be a mistake to do it?

A. It is liable to crack the clinch; yes.

Q. This mortar or plaster that is put on is supposed to go through this lath and come over and form a clinch? That is the purpose?

A. Yes, sir.

Q. How many times did you look this job over after you received your final payment, final certificate, in the fall of 1912, Mr. Hughes? 30

A. I don't think I went over but that one, and then at the request of Dr. Wise.

Q. Was that in 1912 or 1915?

A. Well, I think it was 1915.

Q. 1915?

A. Yes.

Q. And these patches had been put on by Mr. Poole while you were yet on the job?

A. Yes, sir.

Q. Did Mr. Poole go over the job with you and Mr. 40

Green at this time that you went up to look at the house in 1915?

A. Mr. George Poole.

Q. Who else was with you?

A. Mr. Green, Mr. Wise and myself.

Q. Any one else?

A. No, sir.

Q. Neither of your men or Mr. Poole's men?

A. No.

10

BY THE COURT:

Q. What was your purpose in going there?

A. We went there at the request of Dr. Wise.

Q. What for?

A. To go over and look at the cracks in the house.

Q. He complained of those cracks, did he?

A. He complained of those cracks; yes, sir.

20

BY MR. CARTON:

Q. Mr. Hughes, long prior or some time prior to this trip in 1915, didn't you go over the job with Mr. Poole and his attorney, Mr. Van Note, and after complaint had been made by Dr. Wise?

A. No; I don't remember going over with Mr. VanNote at any time.

Q. Do you know whether Mr. Poole and his attorney and some of his men went over?

30 A. He might have gone; I don't know.

Q. You were not with them?

A. No, sir.

Q. Now, Mr. Hughes, you I suppose used your own judgment to some extent, outside of the plans and specifications, in figuring what a proper construction should be to carry the weight and strains of that house, did you?

A. In that house? No; I didn't do any figuring as to what the proper construction would be.

40 Q. When you examined the plans and specifications did you assume that they were proper as far as the proportions,

dimensions, etc., were concerned to carry that proposition, that house?

A. I assumed so, yes.

Q. They appeared so to you, their measurements and dimensions, coupling that with your general experience?

A. That is not a contractor's business, to figure up whether a job will carry itself or not. We always figure according to the plans for this. We do not consider ourselves responsible for the proper construction of the plans.

Q. You mean to say that if you were sure that these plans were not proper and would not do the work, would not give this owner a proper job, that you would go on and put it up nevertheless. 10

A. I certainly would put it up as he wanted it put up, as the architect wanted it put up.

Q. And knowing that it would not do its work, would not be a proper job?

A. I considered everything up to the architect.

Q. Then there is no responsibility on the part of the contractor in ascertaining whether the plans and specifications are correct generally? 20

A. Not after the contractor calls the architect's attention to it.

Q. You knew that this house was to be occupied by Dr. Wise, didn't you?

A. Yes.

Q. And you mean to say that you knew in constructing this house that these piers or timbers were not of sufficient carrying strength to hold the building up?

A. That is the way it struck me and that is why I called the architect's— 30

BY THE COURT:

Q. When did you form that opinion?

A. When did I form that opinion?

Q. Yes.

A. During the construction of the house, when this timber was being placed in the partitions.

Q. At the time the timber was being put in? 40

A. Yes.

Q. You called the architect's attention to it?

A. I did.

Q. What did he say?

A. He said they were heavy enough.

BY MR. CARTON:

Q. That situation had not suggested itself to you when
10 you went over the plans, when you figured the job, had it?

A. No.

Q. It appeared to be all right at that time?

A. Well, we never take that into consideration in figur-
ing.

Q. Well, it appeared to be a properly constructed house
according to the plans, I assume? How were those piers erect-
ed in the center of the house, upon which these beams were
laid?

A. Well, there was a cement foundation put under this—

20

MR. HEISLEY: You don't mean piers, you mean stud-
dings, don't you?

MR. CARTON: Well, I call them piers.

MR. HEISLEY: They were not piers; they were stud-
ding. There is a big difference between piers and studding.

THE WITNESS: There were some piers and some stud-
30 ding.

Q. Tell us what they were, Mr. Hughes.

A. Well, there was one long partition running along this
house, ran about two-thirds of the length of the house, I sup-
pose. That is simply a sill resting on a cement foundation,
and then studded from there up the height of the cellar and
another plate on top of the studding, and the beams resting
on that plate.

Q. Well, that is the usual way that buildings are con-
40 structed, is it not?

A. Yes; it would have been all right if it had been heavy enough?

Q. What should have been heavier?

A. This timber in this partition. In the stud partition all of it should have been heavier.

Q. The uprights?

A. The uprights and the sills, the plates should all have been heavier than they really were.

Q. What about the sub-base foundation, the cement work? Was that sufficient in strength, in your judgment? 10

A. Yes, that was put down; I have forgotten just what the size of that was. It shows on the plan there. It seemed to be all right.

Q. What was the size of the uprights?

A. I think they were 3 by 4. It was a 4 inch partition, and I claim it should have been a 6 inch partition, and the studs 3 by 6 or 4 by 6 instead of 3 by 4 and put close together.

Q. What were the dimensions of the piers?

A. Well, the piers, I don't know. It would show—there was one pier only came up to the top of the foundation and then what we call a lally column from there up to the top of the girder. 20

Q. You say there was some settlement afterwards. There is always some settlement in a new house, isn't there?

A. Shrinkage.

Q. Well, aren't there settlements? Don't new buildings settle until they find their bed in the earth?

A. Not the foundation don't settle, if properly put in.

Q. Well, isn't it a fact that certain portions of the building settle because of the material in them? 30

A. Yes.

Q. Naturally?

A. Yes.

BY THE COURT:

Q. Atmospheric conditions with respect to the seasoning of the timbers have something to do with it, don't they?

A. Yes; some timbers shrink more than others.

Q. And that generally produces cracking?

A. Yes. 40

BY MR. CARTON:

Q. That often causes cracks, slight cracks that we were all accustomed to?

A. Yes.

Q. Now, you say that this building settled more than is ordinarily the case?

A. It seemed to.

Q. Well, when do you say it settled?

10 A. It settled after it was built, after it was completed.

Q. Within what time?

A. Oh, it kept settling more and more there for two or three years.

Q. When did you first notice there was any settlement?

A. When I went there with Mr. Green and Mr. Poole and Mr. Wise.

Q. Some three or four years after the building was erected?

A. Two or three years; yes.

20 Q. Did you take occasion then to take any measurements as to what the actual settlement had been?

A. No; I did not.

Q. From the naked eye and from casual observation walking through the house you assumed and determined that there were settlements?

A. Yes, sir.

Q. Where were the settlements principally; in the middle of the house?

A. Seemed to be in the center of the house.

30 Q. The center of the house?

A. About.

Q. Where were the cracks that you observed principally?

A. Well, the cracks were on the center partition and on the partitions running at right angles to the center partition.

Q. On the side walls or ceilings?

A. On the side walls.

Q. The ceilings were not cracked, were they, much?

A. Not much, if I remember. There were very few if any cracks in the ceilings if I remember.

40 Q. Did you take occasion to try the ceilings with a broom

or anything else to ascertain whether they had lost their hold on the wall?

A. No.

Q. You have heard a witness who testified in this case concerning that situation, have you not?

A. Yes.

BY THE COURT:

Q. What was it necessary to do to repair the cracks in 10
the walls as you saw them?

A. Simply cutting them out and filling them up.

Q. What they call pointing up?

A. Pointing up.

Q. And what would be the reasonable cost of that?

A. Why, I think Mr. Poole went over it and he agreed to do it for one-half the cost; and if I remember right Mr. Poole's figure of the entire cost was \$150.

BY MR. CARTON: 20

Q. Well, what did that cover, if you know, Mr. Hughes?

A. Covered all the cracks.

Q. At that time you didn't know that the ceiling had all separated from the lath, did you?

A. No.

Q. The ordinary cracks in the side walls that you observed where simply they could be patched, the figure covered that, I suppose? 30

A. Yes, sir.

Q. What you saw, without taking the walls off?

A. Yes.

Q. Without spoiling the work?

A. Yes.

Q. Did you notice that the ceiling had fallen off the Doctor's office?

A. No, sir.

Q. It has been said by witnesses that it did, a large patch.

A. Yes. 40

Q. The Doctor's office is located in the most westerly portion of the building, isn't it?

A. Yes, sir.

Q. How would you account for that ceiling falling off if it was settlement in the center of the house?

A. That had not fallen off at that time when we were there. I cannot account for it.

Q. How do you account for it on your theory that the settlement in the center of the house caused this cracking and
10 falling off.

A. Well, I can't account for it. It might have been some pipe. It was right close to the bathroom. There might have been a leak there. I know a patch that fell off at the end of the hall. I called Mr. Green's attention to the bathroom above, and it certainly came from a leak in the pipe; and he admitted the same thing.

Q. When you went through the house you made no special examination as to taking off any portion of the plaster or ascertaining whether it was fast to the ceiling or not?

20 A. No.

Q. Now, you have said that it is quite the usual way to take off plaster with a shovel. Has it been your experience in doing that that the plaster is all loose from the wall and the clinches are not holding?

A. Well, it don't make any difference. That is the usual way of taking off plaster.

Q. Well, you jam a spade or shovel through and break the clinches to take it down; that is the way you take it off, isn't it?

30 A. Yes; certainly.

Q. Have you had any experience in running along with a lath, running a lath through and pulling yards of it off?

A. Yes.

Q. You say you have done lots of jobs that way. What jobs do you refer to?

A. Lots of shore jobs, along the shore.

Q. Taking off old walls?

A. Yes.

Q. Now, you say if you were to complete this job, Mr.
40 Hughes, that you would not have taken the trim off?

A. No.

Q. You say time could have been saved and the trim could have been protected by doing the work that you indicated?

A. Yes.

Q. That is your judgment?

A. Yes.

Q. How much overlap was there of the trim over the mortar, over the wall?

A. About three inches, three or three and a half inches. 10

Q. Assuming that all the walls were necessary to be taken off do you say as a mechanic that a better job could be done, a less expensive job, by digging the mortar out back and running it down in there again and not disturbing the trim?

A. Yes.

Q. Wouldn't that very process in itself take considerable time?

A. Take practically no longer to plaster it, to do the plastering that way than it would the other way, practically no longer. 20

Q. Well, you would first have to take out back of the trim some three or four inches and then you would have to get that back in there, wouldn't you?

A. No, I have testified that it was only necessary to go back half an inch from the edge of the trim.

Q. You would make a break there?

A. Yes.

Q. You would tie up the new mortar to this old rotten mortar a half inch back of the trim? 30

A. Yes.

THE COURT: You are characterizing it as old rotten mortar.

MR. CARTON: I am only saying what the witness characterized it.

THE COURT: The proper expression would have been the old mortar. What I was getting at is whether the witness 40

intended to answer that he would have hooked it up to the old rotten mortar.

Q. Assuming, Mr. Hughes, that this old mortar, this wall, this plaster, was old rotten mortar, would that change your course? Would you still hook it up?

A. It wouldn't make any difference.

Q. It wouldn't make any difference?

A. There is no clinch there whatever.

Q. You would run it back that way anyhow?

10 A. Yes.

Q. How about the protecting of the trim with this wet mortar? Wouldn't it stain the trim?

A. That should have been protected, of course; covered up with paper.

Q. How would you protect that?

A. Cover it up with paper, cloth or bagging of some kind, which is usually done.

Q. You would have to cover that and get it over the top edge of the trim, wouldn't you, so that the wet mortar
20 would not come up against the trim?

A. Poke it around the edge all the way around, you usually do.

Q. And in doing that wouldn't you get the mortar down so as to make a union with the trim?

A. We wouldn't go back of the back edge of the trim with any paper or cloth or anything when we covered it over.

Q. You said you would go down a half inch or inch and a half there, wouldn't you?

A. Not back of the trim; no, sir.

30 Q. Just come down to the trim?

A. The plaster I said would go a half inch back of the trim, in behind the trim, but in covering up the trim we would simply go just to the edge.

Q. Well, isn't this trim supposed to fit tightly on the plaster?

A. Yes; we usually loosen that up. That could have been loosened up a very little and this plaster taken out very easy.

Q. You do admit that it might be desirable to at least
40 loosen the trim up?

A. We sometimes do just a little.

Q. So as you can get it covered and protected and get it well back again?

A. Well, that is so we could get the plaster out from behind there easily.

Q. It would have to be loosened up for both purposes, to get the old plaster off and the new plaster on?

A. Not really necessary.

Q. Not really necessary if you want to protect the trim?

A. No.

Q. What sort of trim was there used in this house? 10

A. Well, there were three or four different kinds of wood. There was red birch and whitewood, white pine, cypress, and I don't know; three or four different kinds of wood. Different rooms had different kinds of wood.

Q. After Dr. Wise endeavored to have you give him proper walls you took the matter up with him on two or three occasions, did you not?

A. I think so; yes.

Q. You appreciated when you went there that there was something the matter with the walls, didn't you? 20

A. Yes.

Q. And it was your own suggestion that you submitted to arbitration, was it not? That was your suggestion, was it not?

MR. HEISLEY: Well, how is this relevant, if your Honor please?

THE COURT: I think it may be an admission against interest, Judge Heisley, to submit to arbitration. 30

MR. HEISLEY: If you submit it to him and he can't agree and he says, "I will submit it to arbitration," how is that an admission?

THE COURT: It may have some bearing.

Q. You did make that suggestion?

A. I don't remember making the suggestion of arbitration. 40

Q. I show you Exhibit A for Identification and ask you if you sent that letter?

A. Yes, sir.

Q. To Dr. Wise?

A. Yes, sir.

Q. In response to a complaint about these walls?

A. Yes, sir.

THE COURT: What is the date of the letter?

10

MR. CARTON: The letter is dated May 16, 1915. I ask to have it marked as an exhibit.

THE COURT: It may be marked.

(Paper marked Exhibit P. 12.)

Q. After having read the letter have you ascertained whether you did suggest that it be submitted to arbitration?

A. In that letter I suggested arbitration through the
20 Masonic body.

Q. Through the Masonic Brotherhood?

A. Yes.

Q. Because both Dr. Wise and yourself were fellow members of the lodge?

A. Yes; that is what I meant by an arbitration, as cases have been settled that way.

Q. And you also appreciated at that time that there was something the matter with those walls, didn't you.

A. Yes, sir.

30

REDIRECT EXAMINATION.

BY MR. HEISLEY:

Q. You said that the nailing of those boards on the upper timbers of the 6 inch beam would likely cause the ceiling to fall?

A. Yes, sir.

Q. The 6 inch beam was on the ceiling of the top floor,
40 wasn't it?

A. The third floor; yes, sir.

Q. What was the size of the other timbers all the way down.

A. Well, 2 by 10 and 3 by 10 and 2 by 12.

Q. 3 by 12 on the bottom and 3 by 10 next?

A. Well, that would depend upon the span, you know.

Q. Were there any brick piers under this beam that settled in the cellar? Was that supported entirely by the studding?

A. Supported entirely by the studding. 10

Q. Do you know of any necessity for the taking off of these walls and putting them back again in order to overcome the defects in the wall?

A. No; I do not.

RECROSS EXAMINATION.

BY MR. CARTON:

Q. What would you have advised? What course would you have advised, Mr. Hughes, to remedy this defect? 20

A. I advised jacking up the floor beams, as they did do, I understand, and putting proper supports under them and taking off what was necessary to take off and put it back.

Q. Well, assuming that when you did that, when you started this job, started taking the walls off that the walls had all broken loose, the keys had broken loose, you would then have been obliged to do the same thing they did, wouldn't you, take all the walls off?

A. Well, of course, settling and jacking up naturally twisted the partitions, and that would naturally affect the ceilings as well, which probably broke the clinches. 30

Q. But you heard Mr. Green and Mr. Moore and Dr. Wise and various witnesses yesterday who examined the house before there was any work done or before there was any jacking up, and heard what they said about those walls all being loose at that time, didn't you?

A. Yes; but the outside walls were not loose. There was nothing said about the outside walls.

Q. Yes; and they have said they were not loose. 40

A. Yes; but they took them off.

Q. You heard them say the walls were all rotten and pulled right off, didn't you?

A. The inside walls; yes;

Q. Did you state—you did on your direct examination, did you not, that the plaster that went on the stucco on the outside walls was made out of the same batch that all the other walls were?

A. Made out of the same batch and put on at the same
10 time.

Q. You observed that?

A. Yes.

BY MR. HEISLEY:

Q. The outside of the hollow tile?

A. Inside of the hollow tile; the inside walls, I am speaking of.

BY MR. CARTON:

20 Q. Is this the floor plan, the foundation plan of the building? (Plan shown witness.)

A. This is the foundation plan as near as I can remember. This is not the original plan, I noticed that this morning. This is not the original plan, only I don't know of any changes in the cellar. I don't know any.

Q. Look at the plan and see if you can point out the beams that you have just referred to now in your answer to Judge Heisley.

30 A. Well, here is where the settlement seemed to be, right around here, right in the center of the house.

Q. Indicating in the center of the house?

A. Yes; right around here. This is the partition I referred to that was the stud partition that was not heavy enough.

BY MR. HEISLEY:

Q. How long is that partition, to show what the span was?

40 A. About 36 feet.

Q. 36 feet span?

A. Yes, sir.

BY MR. CARTON:

Q. And what is this light thing, the indication in the center of the building?

A. That is a pier there.

Q. What is that composed of?

A. Cement. Well, it is a lally column. It is a pier 10 comes up to the cellar floor and then what we call a lally column up to the girder. The girder runs across here and the end of that girder rests on that partition, which causes a big weight.

Q. What are those piers?

A. That is a partition footing, the same as this.

Q. Where is the library as compared with this floor plan; can you tell us?

A. It is over this.

Q. Where is the Doctor's office? 20

A. The Doctor's office is over here.

Q. On the extreme westerly end?

A. Yes; over the vegetable cellar in the end.

Q. The west end of the building?

A. Yes, sir.

Q. This is evidently his plan and seems to be signed by you, Mr. Hughes.

A. Well, that floor plan may be; it may be the original. There don't seem to be any change in that.

Q. Do you say the floor plan was changed afterwards? 30

A. On the second and third floor plan there was a dumbwaiter put in which was not in the original contract, and I see that he has that marked on the plan. After the original blueprint was made the dumbwaiter was put in.

REDIRECT EXAMINATION.

BY MR. HEISLEY:

Q. Just step down here a minute. Show the jury where 40

the settlement seemed to be generally. Just point generally where it was.

A. Well, in the center of the house, right around here, the end of this.

Q. Is that the center of the house?

A. About; yes. You can see.

Q. Now, where is the partition which was supported up on the piers?

A. Well, this is the partition, stud partition that I refer
10 to.

Q. Where the settlement was?

A. Where the settlement was.

Q. And how long do you say that partition is?

A. Thirty-six feet.

Q. And did that carry the main weight of the house?

A. That carried the main weight of the house.

BY A JUROR:

Q. Is that the girder that carries the floor beams?

A. Here is the girder that carries the floor beams, on
20 the first floor. But on the second floor they run to a hall partition, so it brings the weight of the second and third floors and the roof on this third partition in the cellar.

BY MR. HEISLEY:

Q. And it is thirty-six feet long, you say?

A. Yes.

BY MR. CARTON:

Q. The girder from the ground floor is supported by a
30 girder going over here?

A. Yes, and the beams on this side rest on that girder.

BY MR. HEISLEY:

Q. Then the weight is concentrated on this span, isn't
it?

A. Yes, on that span.

40

RECESS TILL 1.15 P. M.

(Trial of the cause resumed at 1.30 P. M.)

MONROE V. POOLE, sworn for defendant.

DIRECT EXAMINATION BY MR. HEISLEY:

Q. Mr. Poole, you live at West Long Branch and have lived there practically all your life, haven't you?

A. I have.

10

Q. And you are a mason contractor and have been so for how many years?

A. Fifty-two years, a mechanic.

Q. In doing this work, this plastering of this house, do you know of a single instance in which in the plastering, the doing of the plastering and the making of the plaster, you departed in any way from the specifications or from the architect's orders?

A. Not in any instance.

Q. Not in the least, do you say?

20

A. Not in the least.

Q. The specifications say that this shall be Rockland lime used in this plaster. What kind of lime was used in it?

A. Rockland lime from Rockport.

Q. How did you come to get Rockland lime?

A. Mr. Sparry ordered me to.

Q. As far as you know was it good lime or not?

A. So far as I know. I haven't used any in fifteen years.

Q. Well, is Rockland lime a lime that is regarded in good favor in the trade generally?

30

A. Fair; Thomas's No. 1.

Q. Do you know whether Sparry inspected this lime?

A. He did.

Q. The specifications say that you are to use fresh, long hair. What kind of hair did you use?

A. Cattle hair.

Q. Well, was it fresh, long hair?

A. As far as I know.

Q. Well, as far as you know. You did the work, didn't you?

40

A. It looked so, but it was sent to me from the manufacturer.

Q. What do you say?

A. I couldn't tell the age of it.

Q. Did it look to you like good hair?

A. Looked all right.

Q. Was there anything about the hair to suggest to you, with all your experience, that the hair was bad hair?

A. No.

10 Q. The sand shall be sharp sand from the pit. What pit did you get it from?

A. Got it from John Eaton's pit.

Q. Is that a pit in good repute about there for sand?

A. Excellent.

Q. How long has it been there, Mr. Poole, as far as you know and used it?

A. I have been getting sand out of there for twenty-five years.

Q. Do the masons generally use it?

20 A. Very generally.

Q. Had you used it before?

A. Several hundred loads.

Q. Found it all right?

A. I did.

Q. Do you know whether or not the architect approved of the sand?

A. He approved of it. I was with him when he felt of it.

Q. You saw him when he felt it?

A. Yes.

30 Q. What did he say about the sand?

A. He asked me where I got it and I told him at the upper village. He wanted to know how far away it was and I said possibly a mile. He said, "I didn't know that you had as good sand as that in this locality."

Q. What did he say if anything about the hair?

A. He didn't say anything.

Q. Didn't condemn it?

A. No.

40 Q. Do you know whether or not he made any inspection of the way the lathing was put on the studding?

A. One day I was there and he says, "This is a pretty good lather you have got here," and that is all the remark he made.

Q. Was the building all lathed before you started to put on any plaster?

A. Completely lathed.

Q. Suppose that you wanted to take off a wall, a plastered wall, off the lath; you have often done that, haven't you, in your experience?

A. Often.

10

Q. What is the implement which you generally use to take the plaster off the lath?

A. I generally suggested a spade. It cuts the clinches.

Q. I want you just to look at a couple of these samples, Mr. Poole—take them indiscriminately from the bag—tell me what you think of these samples. Are they samples of good plaster, poor plaster, medium plaster or what?

A. I don't see that there is any difference in any lime and sand plaster.

Q. No difference from this?

20

A. No difference from any other lime and sand plaster.

Q. Tell me whether or not this is good plaster, poor plaster or indifferent plaster.

A. I should say it was good on account of the mixture.

Q. Have you any doubt of it?

A. No doubt of it.

Q. The fact that the brown coat may be crumbled in the fingers, does that indicate it is bad plaster or not?

A. Always use more sand in the brown. You have to do so to level it up, or else there is a split between the lath.

30

Q. You went back to that house, I believe, after the family was living in it, didn't you?

A. I did.

Q. To see about some of these cracks?

A. Yes.

Q. What do you say those cracks were attributable to?

A. Settling.

Q. The settlement that Hughes testified to?

A. Settlement and shrinkage there.

Q. Was there settlement there?

40

A. There was

Q. Would the jacking up of the building be apt to crack any of the walls, the jacking up of it?

A. Of course as soon as you move the plaster, no plaster is strong enough to hold the frame of the building together.

Q. Would it have any effect on the plaster of the ceiling?

A. The same, to a certain degree. The further you get away from the raising the less effect it would have.

Q. Do you know of any reason which would justify a
10 prudent person in taking off all that plaster and putting back new plaster of any kind?

A. I don't know of any reason.

Q. Do you know of any reason why, if that was necessary, that they should also take off all the trim all through the house?

A. I wouldn't do it if it was mine.

Q. Could you replaster it without doing damage to the trim?

A. By cutting in half or three-quarters of an inch—

Q. Answer yes or no; could you replaster it without do-
20 ing damage to the trim?

A. Yes, sir; done it more than once.

Q. You had the contract for plastering this house and lathing it, too, didn't you?

A. Yes, sir.

Q. That was all you were to do?

A. I was to do all the work except the exterior.

Q. Now, listen; let's get it down to hard tacks. Isn't it
30 a fact that you were simply to lath and plaster the entire house?

A. I was to do more than that. I was to do everything in the line of mason work except the exterior.

Q. Except the exterior?

A. The exterior was done by a New York man.

Q. Were you to put all plaster on the interior of the hol-
low tile?

A. Yes.

Q. And what was your contract price for that entire job?

A. For lathing and plastering was 2,644 yards, and my
40 bid was \$1,189.80.

Q. Was that a fair price for it?

A. It was.

Q. Did you make a profit at that figure?

A. Made the regular profit. It was forty-five cents a yard solid.

Q. Forty-five cents a yard? Now, at this price that these plaintiffs are charging it amounts to what; do you know?

A. Eighty-five.

Q. Outside of the lathing, too, isn't that?

A. That is outside of the lathing. That is just simply for 10 covering the lath.

BY THE COURT:

Q. You say, Mr. Poole, that your figure of \$1,189.80 would provide a regular profit?

A. My figures?

Q. Yes.

A. Yes; that was the regular profit.

Q. The regular profit?

A. Yes. 20

Q. And what is the regular profit; ten per cent. or twelve?

A. Ten per cent.

BY MR. HEISLEY:

Q. Who was your foreman?

A. A man by the name of Wardell.

Q. Has he had much experience in plastering?

A. Well, I don't know. 30

Q. You do know, don't you?

A. Let me see. He has been working there about forty-five years.

Q. Forty-five?

A. Yes.

Q. Well, then, you would say he had a good deal of experience, wouldn't you?

A. Yes, sir.

Q. What instructions if any did you give Wardell as to the way in which you wanted this plastering done? 40

A. I read the specifications to him first and I admonished him not to deviate one iota from them.

Q. As far as you know did he observe those instructions?

A. I believe he did. I was there every day unless I was out of town, and sometimes three times a day.

Q. Do you know, Mr. Poole, whether the plaster on the ceiling and on the partitions is the same kind of plaster that was put on the face of the hollow tile?

10 A. The mortar was all made up at the same time.

Q. Of the same material?

A. The same material, slacked up for eight days.

Q. Can you tell us about what are the relative parts going to make up the plaster, how much of sand and how much of lime?

A. I can tell you what we estimate for.

Q. What for?

20 A. We estimate one barrel of lime for an average three coat work, for five-eighths of a yard of sand, two-thirds of a bushel of hair.

Q. Was that estimate followed?

A. So far as the material would allow it. Now, understand me, that is what we estimate for. And some lime used more sand than other lime, and we had to regulate that by the working of it and consequently no certain recipe will follow every instance.

Q. Was this plaster mixed according to good plastering practice?

30 A. It was mixed by a man that did nothing but that.

Q. What was his name?

A. His name was Bowman.

Q. And he is dead, I believe; isn't he?

A. Yes; and another colored fellow. This is a white man.

Q. What is the other man's name?

A. His name is Scott Randolph. He is dead, too.

Q. A colored man?

A. A colored man, he was.

Q. Was the garage plastered the same?

40 A. Out of the same heap.

CROSS EXAMINATION.

BY MR. CARTON:

Q. Mr. Poole, I assume that you left the doing of this work to your foreman, the gentleman that you have referred to?

A. While I had a foreman, I am always on the job, as I said before, unless I am out of town.

Q. But you had a foreman on the job outside of your own supervision, did you not? You had a foreman on the job looking after the work for you? 10

A. Oh, yes.

Q. Mr. Wardell?

A. Mr. Wardell.

Q. And who directed the mixing of the mortar, you or Mr. Wardell?

A. We both did.

Q. Both did?

A. We consulted. We consulted about all the work. 20

Q. And you say you got Rockland lime?

A. Rockland lime.

Q. The specifications as a matter of fact do not call for any particular brand of lime at all, do they, but only for a good brand?

A. A good brand.

Q. Approved brand?

A. Approved brand. Mr. Sparry ordered me to get Rockland.

Q. And you assumed that the Rockland brand was an approved brand? 30

A. Well, Mr. Sparry told me I must get it.

THE COURT: Will you refer me to the specifications with respect to the approved brand of lime?

MR. HEISLEY: Yes; it is in the mason's specification, page 6.

MR. CARTON: Under the "Quality of plaster," "All 40

plaster to be composed of the best quality of approved brand of lime.”

THE COURT: I thought you meant there was something here which prescribed Rockland lime.

MR. CARTON: No; there is not. Mr. Poole said on his direct examination that there was, but that was an error, undoubtedly.

10

THE COURT: Nothing here to show the particular kind, only an approved brand of lime.

Q. And you said, I think, that Rockland brand was a fair brand of lime?

A. I didn't say anything. I did as he ordered.

Q. What?

A. I didn't say anything when he told me to get Rockland.

20

Q. I mean when Judge Heisley asked you this afternoon.

A. I said it was a fair brand of lime.

Q. You would call it a good brand of lime?

A. Well, I would call it fair. - There is better brands.

Q. Only fair? What is a better and more approved brand, Mr. Poole?

A. Thomas's lime is better, so-called. Rockland comes next.

Q. Is that higher or lower in price?

A. I can't tell. I haven't used any in twelve years. I

30 use patent mortar.

Q. Had you been allowed to act on your own notion as to purchasing lime you would not have purchased Rockland lime, I suppose?

A. No; from the fact that I sent away to have it shipped. There wasn't none in this locality.

Q. Some difficulty to get the Rockland lime, is there?

A. Had to send to Rockport for it.

Q. Did you assume that when you got Rockland lime, after conferring with Mr. Sparry, that it was such an approved brand of lime as the specifications called for?

40

A. I suppose so.

Q. Well, this lime came there. I don't suppose you are able to say whether it was faulty or not, are you?

A. I can't say. Lime may be overburned and you not know it until after you use it.

Q. And that might be true and you might not determine it until when?

THE COURT: Until it had been used, he said.

10

Q. Until it had been used?

A. Yes.

Q. You mean it might have been burned in the kiln?

A. Yes, that is what I mean, overburned.

BY THE COURT:

Q. What would be the effect, Mr. Poole, by the fact of its having been overburned? How would it appear?

A. As they said a little while ago, it would be rotten.

20

Q. And drop down?

A. Mr Carton said.

BY MR. CARTON:

Q. Do you agree with me on that, that it would be rotten?

A. I am just repeating that.

Q. You have suggested that we characterized it as being rotten. Do you say it would be rotten?

30

A. Overburned in the kiln it would be rotten.

Q. That is what some of our witnesses said in this case. You have heard some of them, haven't you?

MR. HEISLEY: No; I haven't heard one of them yet say it was rotten. They can't tell.

THE COURT: The nearest they came to it was the witness who said that it crumbled in the hands.

40

MR. CARTON: I suppose we can draw our own deductions from that, whether it is rotten or not.

Q. Well, Mr. Poole, the actual mixing of the lime, the proportionate parts of sand and lime, that was left to these two colored men who made a practice of doing that, I suppose, wasn't it?

A. Under our supervision.

Q. Under your supervision?

10 A. Yes.

Q. Did you direct the parts that should be put in or did they fix upon that?

A. The foreman attended to that.

Q. Mr. Wardell?

A. Mr. Wardell; yes.

Q. What do you say the proportions are?

A. One barrel of lime, five-eighths of a yard of sand and two-thirds of a bushel of hair. That is the average of three coat work.

20 Q. On ordinary work that will work out all right?

A. That will work out all right.

Q. Do I understand you to say that you cannot actually tell until after the plaster is put on whether it is properly mixed or not?

A. No; I didn't say that.

Q. Is that a fact?

A. I said you couldn't have any certain recipe for the ingredients only as you are doing it. The recipe I give you is for estimating.

30

BY THE COURT:

Q. Did you see this plaster mixed, Mr. Poole?

A. Why, off and on.

Q. What rule were they observing with respect to the ingredients, the mixing?

A. The way we make mortar is, we say, for instance—

40 Q. No; I mean in this particular case, this particular mortar, plaster. What proportions were used as you saw it being mixed?

A. Why, the proportions I just gave you, one barrel to five-eighths and two-thirds of a bushel of hair.

Q. That is what I am asking, whether this same rule was observed in this particular plaster.

A. Observed on that one job.

Q. Observed on that job?

A. Yes, sir.

Q. Did you see it so observed?

A. I saw it, two or three times a day, standing around looking after them.

10

BY MR. CARTON:

Q. Mr. Poole, when prior to the Wise job had you used Rockland lime in any other job?

A. I don't know. I think ten or twelve years.

Q. So that when you advised the proportions and the mixing of the Wise job were you relying upon your recollection of how you did it some ten or twelve years before?

A. On my estimate book.

20

Q. You have a book that advises you as to the proper proportions, I suppose?

A. That was a recipe I made myself from experience.

Q. Do you say as a matter of fact that it is impossible to tell whether the mixture is proper or not until it is applied to the wall?

A. I don't think so.

Q. You say that it is possible and that you can determine whether the mixture is proper by using the proper proportions in the bed?

30

A. You use a certain recipe in the bed and maybe when you come to put it on it will need a little more sand or a little less or a little more lime and a little less sand. You have to regulate that the same as a painter would regulate turpentine in his lead.

Q. In this job do you know whether you had to use a little more sand or a little more lime or whether you had gotten it just the way you wanted it when you mixed it?

A. I am not sure.

Q. You are not sure?

40

A. I don't remember that.

Q. Is the plaster for both coats, the scratch coat and the brown coat, taken from the same bed, the same mixture?

A. More sand is put in the brown.

Q. The first is the scratch coat, isn't it?

A. Yes.

Q. The first is called the scratch coat, isn't it?

A. That is right.

Q. And that is supposed to be a little stronger, a little
10 better coat, isn't it?

A. Yes; less sand.

Q. Then more sand is put in the mortar when they put on the brown coat?

A. That is right.

Q. Now, you say that you were in the house, the Dr. Wise house, after the work was done, and observed some cracking?

A. I did. I don't say I have been in the house since 1914. I got sick and wasn't able.

Q. How many times had you been in the house, had you
20 gone to look the job over, after you completed it up until 1914?

A. Oh, three or four times.

BY THE COURT:

Q. When did you complete it, as a matter of fact?

A. I think the last of 1912.

Q. What time in 1912?

A. It was in the winter, in the early winter, late fall or
30 early winter; either early in 1913 or late in 1912. I didn't refresh my memory on that.

Q. When after you had completed your work did you have any complaint with respect to the cracks?

A. The first complaint I had was about the ceiling falling in the attic.

Q. In the attic?

A. Yes.

Q. Where was that?

A. Where Dr. Wise nailed some boards. And then there
40 was another place—

Q. When was that? Can you fix the time?

A. I can't fix the time, no.

Q. How long after you had left the job completed?

A. Maybe three or four weeks.

Q. Three or four weeks?

A. I am not sure about it. And then there was another patch put on, I think on his office, which fell there because of the beams being cut off.

Q. That was done before the house was done, by the plumber to let his pipes through. So to make it secure they finally reinforced it with an iron beam. I put that in. 10

Q. Reinforced it with an iron beam?

A. Reinforced it with an iron beam. The timbers were cut so by the plumber that they would not carry anything. That was reinforced.

BY MR. CARTON:

Q. How many times altogether were you at the house after you completed it in 1912? 20

A. I think three times.

Q. And one occasion was when you put the patch up in the attic, on the room up in the attic?

A. Yes.

Q. And another occasion when you put the patch on the Doctor's office?

A. That was before it was finished.

Q. That was before it was finished?

A. Yes.

Q. And you say that was caused owing to the carelessness of some other sub-contractor, the plumber? 30

A. I don't know whether it was carelessness or not, but the beams were cut off to let the pipes through, and it would not carry, and so they rearranged it by reinforcing with an iron beam.

Q. In addition to that, as a matter of fact, another portion of the ceiling in the Doctor's office fell off later, didn't it?

A. I don't know.

Q. Don't know about that?

A. No. 40

Q. You went over the job with Mr. Hughes and Dr. Wise and Mr. Green, did you?

A. No; I wasn't.

Q. You were not with them?

A. That was my son.

Q. Your son representing you?

A. Yes; the president of the company.

Q. You did know, Mr. Poole, that it was claimed by Dr. Wise that this was not a good job, didn't you?

10 A. I heard so.

Q. And you say that if you had been employed to put back those walls that you would not have taken the trim off; is that so?

A. I would not.

Q. You think you could do a good job in a house of that kind by leaving the trim on and plastering around it?

A. I have done so.

Q. An old house, taken off old walls?

A. Two rooms is the most I ever did.

20 Q. Have you ever had occasion in all your experience to replaster an entire house in two or three years after the walls were put on?

A. No, sir.

Q. Mr. Hughes says that he would be obliged to loosen the trim. Would you do that in your plans?

A. That would make it easier.

Q. And you think that would be less expensive than taking the trim right off, tearing the old plaster off and putting the new plaster right on?

30 A. I think so.

Q. When you went through the house you didn't make any thorough examination as to whether the clinching had held fast to the ceiling or not, did you?

A. I didn't make any special examination. I could see by the way the building was cracked it was settling.

Q. You could see it was cracked from the settling?

A. And in fact, to be plain about it, it commenced to settle when we were white-coating.

40 Q. As a matter of fact the ceilings were not cracked at all; were they?

- A. Yes; those partitions.
 Q. But the most of the cracks you saw were on the side walls?
 A. On the partitions.
 Q. The partitions?
 A. Yes.

REDIRECT EXAMINATION.

BY MR. HEISLEY:

10

Q. Did I understand you to say that the building had begun to settle before you put on the white coat?

A. When we was white-coating we noticed settlement.

Q. You noticed that yourself?

A. Noticed it myself.

Q. Now, when you went back there this other time to examine the cracks and so on, did you make an estimate of what it would cost to fill in the cracks which you saw all over the house and give an estimate to the Wises?

20

A. I gave it to the architect, Mr. Sparry?

Q. Didn't you make an estimate?

A. I did.

Q. What was the estimate that you made of the entire house?

A. \$50

Q. In your judgment would \$50 have corrected those cracks?

A. That was my decision. I was willing to do it for that.

30

RE CROSS EXAMINATION.

BY MR. CARTON:

Q. Was that the estimate that Mr. Hughes referred to this morning; the \$150 estimate?

A. I don't know what he said.

Q. You think it was \$50.

A. I know it was.

40

Q. And what you intended to do for that \$50 was to cut out \$50 worth of cracks?

A. Fill the cracks for \$50, I estimated at that time.

GEORGE POOLE, sworn for defendant.

DIRECT EXAMINATION BY MR. HEISLEY:

- 10 Q. You are the son of the last witness?
 A. I am.
 Q. And you are a mason?
 A. Yes.
 Q. How long have you been a mason?
 A. Over thirty years.
 Q. And did you work on this Wise job?
 A. No, sir.
 Q. You say you didn't work on this job?
 A. No; I didn't work on it.
 Q. And you never examined it?
 20 A. Yes; I have examined it.
 Q. When did you examine it?
 A. I think it was in the spring of 1915.
 Q. What part of the house did you examine?
 A. Practically through it.
 Q. In all the rooms?
 A. Practically all through, I think.
 Q. What condition did you find the plaster in?
 A. The plaster on the center partition and the partitions running towards the center were broken and cracked.
 30 Q. How about in the other parts of the house?
 A. The side walls on the outside of—the outside walls of the interior were all right.
 Q. That is, the wall on the interior of the hollow tile?
 A. The interior of the hollow tile on the outside of the room, or wherever they occurred where partitions were, were all right.
 Q. Did you notice any settlement there in the house?
 A. I did.
 Q. Where were those cracks as relates to the locality of
 40 that settlement?

A. All through the center partition.

Q. Well, were they in the same place, in that neighborhood?

A. Where the settlement occurred?

Q. Were these cracks that you saw all in the neighborhood of that settlement?

A. They were, through this long partition, through the center of the house.

Q. Is that where the settlement was?

A. That is where the settlement was. My proof of it was that on the center partition, the main partition through both rooms, was already so that you could see it in a moment that the walls had buckled, the plastering had buckled; they tried to force themselves together in that manner and shoved out, which denotes that partition had gone down and buckled, the partitions running from the outside, and had a bearing on to the center partition, that split this way and opened so that you could take a lead pencil and run into them. 10

Q. What did that show?

A. Denoting that this center went down and pulled this way and had broken the keys. 20

Q. Did you notice that yourself?

A. I did.

Q. Are you sure of that?

A. I am.

Q. How was the plaster on the hollow tile?

A. The hollow tile, the plaster on the hollow tile was all right.

Q. Did you examine the plaster in the garage?

A. I did. 30

Q. How was that?

A. We went through the garage and it looked all right.

Q. Mr. Poole, did you see any necessity there, if you wanted to remove those cracks, of stripping all the plaster off of that entire house?

A. Not the center. But where this partition went down the keys of the wall were broken, and where the keys of a wall are broken it is no good; as soon as you knock into it it would fall. It would answer for the ceiling going down as well as on the side wall. It would break the keys. 40

Q. But assume for the sake of illustration that you were going to take all of that plaster off the house; do you know of any reason why it was necessary to take off all the trim too?

A. It certainly was not. If there was a back moulding on the base or around the trim it would be necessary to take that off, but if there was no back foulding it would not; because after you have broken the wall away from itself, it is held very loosely, will come out with a trowel. If the wall of a lime and sand wall is broken once, if the bond is broken, 10 there is no strength there whatever. It could knock out, which we have done several times.

Q. Won't you look at two or three of these samples of plaster and express your opinion as to their quality?

A. The quality, which I examined before, is apparently all right. If it should crumble it is not necessarily a poor wall, because there is lots of lime and sand walls that are soft. That is the rough mortar is soft and will adhere and not crack as much as a real hard wall, which will crack more if there is any cause for it to crack.

20 Q. What would you say the quality of this sample is, good, bad or indifferent?

A. There are two samples there that are all right.

Q. Those two others?

A. There is practically no difference.

Q. What would you say of the quality, good, bad or indifferent?

A. The quality is all right.

Q. You won't tell me, eh?

A. Good. Take off a piece there and you can see the 30 same. (Indicating.)

CROSS EXAMINATION.

BY MR. CARTON:

Q. Did you go through all the rooms, Mr. Poole, when you made your examination?

A. I think we did. We went through practically, I think, the whole house. There was Mr. Hughes, Dr. Wise and I think his name is Green, Mr. Green, the architect or said he 40 was the architect.

Q. The witness who appeared here yesterday?

A. Yes sir; I believe.

Q. And you found cracks in practically all the rooms?

A. There was practically—let's see—yes; there was some cracks in practically all the rooms.

Q. Cracks in the Doctor's office, weren't there?

A. Not very many, if any.

Q. Well, the ceiling had fallen off a couple of times, hadn't it?

A. No ceiling falling off. 10

Q. You say no ceiling had fallen off?

A. I saw a patch there or the stain of a leak of the ceiling which was from the bathroom above it.

Q. And those cracks where you could run your lead pencil through them appeared quite generally?

A. They appeared on the partitions running to the center.

Q. How about the ceilings of those rooms where the side walls had cracked?

A. The ceiling was not cracked very much. 20

Q. Were there any cracks at all?

A. There were some cracks on them.

Q. Did you make any examination of the ceiling to see whether the key had broken or not?

A. I made some examination.

Q. And those that you examined, did you determine whether the keys had broken or not?

A. It looked to me some places where they were.

Q. And in a situation like that wall is that a good key?

A. After the key is broken it was no good. 30

BY THE COURT:

Q. What would you say would be the reasonable cost of repairing in the situation you found where the keys were broken?

A. I will answer it this way: I made a proposition—I am president of the M. V. Poole Company—I made a proposition to Dr. Wise and Mr. Green, whatever his name was, that we would fix all cracks in the house free of cost except those 40

that were caused by shrinking and settling of the house, which I did not think that we should stand for.

BY MR. HEISLEY:

Q. What was your estimate?

A. The answer that he made me—

Q. That is what we want to find out.

A. And that was the last I heard from them.

10 Q. What was your estimate, your amount?

A. The estimate—I didn't go over it at that time.

BY THE COURT:

Q. Are you able to state now what would have been a reasonable price for repairing the walls where the keys were broken?

A. \$150 would cover everything, in my estimation, with what I would have done for nothing, that is, free of cost.

20 Q. That is, the cracks you were prepared to do for nothing?

A. Why, it was in order to have—

Q. Those cracks your father has testified could be repaired for about \$50.

A. Yes.

Q. That you were willing to do for nothing?

A. Yes.

Q. These other cracks, due to the breaking of the hooks, as I call them—

30 A. Well, the keys.

Q. The keys?

A. Yes.

Q. Could have been properly repaired for \$150?

A. I would think so, the way they were at that time. But still, in my estimation, the house was going down all the time, from the moment the first trowelful of weight was put on it.

Q. The construction is very bad in the center?

A. Yes; very bad.

40 Q. By reason of the inherent defects in the specifications, as you said?

A. In other words, there should have been more support and as solid work through the center of the house as on the exterior walls.

BY MR. CARTON:

Q. The fact is, in that construction the lath and plaster are carried in the stucco walls on the outside, are they not?

A. Yes.

Q. The weight? 10

A. To a certain extent.

Q. That is the construction?

A. Yes; but on the interior from both sides. Where the outside wall only carries one portion of the timber the other carries both portions.

Q. Yes; but where it is hooked up on both sides it carries the upper floors, doesn't it?

A. It carries the upper floors only, where all bearing goes on to them.

Q. You had in mind about the proportion of work that you should do which you thought you might be responsible for could be done for about \$150? 20

A. No, I didn't say so.

Q. What did you say then?

A. I said \$150 would put it in repair at the time I was there, including what I would do, what it would cost me to do for nothing, which I offered to do. In other words, \$150 in my judgment at that time would put the job back providing it didn't go no further.

Q. That would include not only what you claim might be the result of your work, but the result of this settling as well? 30

A. Not the result of my work, the result of the trouble caused by the settling as well. Not the result of buckling and shrinkage of the walls of the house owing to the fault of nobody.

Q. Then you mean for us to understand that \$150, according to your estimate, would patch up the entire cracks in the house caused by settling and otherwise?

A. Or otherwise, at that time that I was in there, I think \$150 would have been all right for it. 40

Q. And that covered the patching and sealing up of the cracks, didn't it?

A. That would put the walls, as I said, I think, in first-class condition, where this plaster was broken.

Q. Does that mean taking off the walls?

A. Where it was necessary.

Q. And isn't it your experience, Mr. Poole, where you start to take off walls, improper walls, that you can't tell the extent of the damage until you get at it? Isn't that a fact?
10 Isn't that common experience?

A. What do you mean by proper walls?

Q. Where these keys had broken, we will say, they are improper for some cause. Isn't it true that you can't tell the extent of the damage until you start to do the work?

A. In some old work.

Q. Well, in old work or new work?

A. Do you want me to answer that that way?

Q. Yes.

A. I say in some work.

20 Q. In some work?

A. In some work possibly you can, but not in this job. You can almost tell by looking at it, as far as the keys are broken, especially on the ceiling, because there is no ceiling will stay up there any length of time after those keys are broken, if they are broken on the entire ceiling, because there is nothing to keep it there.

Q. But I don't suppose they all broke at the same time, did they, in some rooms?

A. Possibly. I imagine or know personally from experience that it would keep breaking as the house settled, that it would go at those times.
30

Q. Assuming that they were broken in this house; you couldn't determine whether or not they had broken until you started to take the walls off?

A. The extreme limit, no, you couldn't tell about that.

Q. If you had started to do this work for \$150, the condition when you took your observation of it, and found that the damage was much greater than you anticipated, the cost would be very much more, wouldn't it?

40 A. If I had that much more to do I would have to do it.

Q. And if you found more work there that needed attention you would be obliged to do it to make a complete job?

A. If I offered to do it for \$150 I should do it and make a complete proposition.

Q. Whether you got stuck or not?

A. Certainly. I always have.

FREDERICK WARDELL, sworn for plaintiffs.

DIRECT EXAMINATION BY MR. HEISLEY:

10

Q. Mr. Wardell, you were the foreman for Monroe V. Poole Company, were you, that did this work?

A. I was.

Q. And how long have you been a mason and plasterer?

A. Ever since 1871, around there.

Q. And you have done a great deal of work, have you?

A. Worked all the rest of my life on it.

Q. You saw the lime that went into this building?

A. I certainly did.

20

Q. Did you see it mixed?

A. I did.

Q. Who mixed it for you?

A. Scott Randolph was the head mixer and was helped by a man by the name of Bowman. Scott Randolph is an experienced man.

Q. Had he had much experience?

A. He had ever since he has been in the business, and the man that helped him was a man by the name of Bowman.

Q. Were they both, to your knowledge, men of much experience in mixing plaster? 30

A. They certainly was.

Q. Had they often mixed it for you?

A. Yes, sir.

Q. Did they mix it properly?

A. Always. All I had to do was to give them the order, what I wanted, and that was the end of it. I never had no more trouble with them.

Q. This plaster was, according to the specifications, to be made of an approved quality of lime, brand of lime, and 40

clean sharp sand from the pit and fresh, long hair. Do you know whether those ingredients went into this plaster?

A. I certainly do.

Q. What kind of lime was it?

A. Supposed to be Rockland lime.

Q. You say suppose?

A. That was the brand on the barrel.

Q. The brand was on the barrels?

A. Yes, sir.

10 Q. And the hair; was that long, fresh hair?

A. It was long, fresh hair.

Q. The sand, where did that come from?

A. From the pit at Hampton's Hill.

Q. Now, you heard them speak about Johnnie Eaton's pit. Do you know that?

A. It is Johnnie Eaton's pit.

Q. Did you often use sand from that before?

A. Often.

Q. Do you know of any better pit out there in that neighborhood?

A. Not any better at that time.

Q. Had you ever had any trouble with it?

A. I have never had no trouble.

Q. Do you know whether or not the architect, Mr. Sparry, saw this lime, saw this hair and saw this sand and made any comment about it?

A. I do not, because Mr. Sparry never used to have anything to say to me; always all his business was done through Mr. Poole and Mr. Hughes.

30 Q. You saw the plaster put on?

A. I did.

Q. And they have said here that there was no plastering begun until the house was entirely lathed. Is that true or not?

A. It was.

Q. How were those lath put on, right or not?

A. It was about the best job of lathing, I think, I ever had covered.

Q. Were the lath too close together for this old-fashioned lime to get through to make a clinch on the other side?

40 A. It was not.

Q. Did the plaster clinch properly?

A. It did.

Q. Do you know that of your own knowledge?

A. I do.

Q. They have brought here some samples of this plaster. Have you seen any of these? Did you see them yesterday or not?

A. I saw one piece.

Q. I am showing you five pieces. Just look at those five pieces and tell the jury on your oath and according to your experience what is the quality of that plaster. 10

A. I pronounce that about the best I have seen of the kind of mortar.

Q. What do you mean by the kind of mortar?

A. The old-fashioned mortar.

Q. The old-fashioned kind?

A. Cement and lime.

Q. And hair?

A. And hair.

Q. Do you see in there any hair? 20

A. Do I see any hair?

Q. Yes; do you notice hair in it?

A. There is hair in it. It stands for reason after lime is on the wall a certain length of time you can't see any hair into it. The hair appears to evaporate away from it.

Q. You haven't got your glasses on now, either. Do you use glasses generally?

A. No, sir.

Q. How old are you?

A. Sixty-three. 30

Q. Don't wear any glasses any time?

A. No.

THE COURT: Well, do you see hair with your glasses?

MR. HEISLEY: I saw it either with my glasses or without. I think I saw it without.

THE WITNESS: I see they have got the two coats, but 40

they certainly haven't got the third coat there, which you certainly would see the most hair in.

Q. How do you account for that?

A. They couldn't get it out of the lath, I suppose, to fetch it.

Q. Do you say on your oath, Mr. Wardell, that that plaster, which according to the specifications was to be three coats that they have only produced two coats of it?

A. There is only two coats there; the most of it.

10 Q. Are you sure of that?

A. I am sure of it.

Q. Suppose that you were going to take the plastering all off of that house and replaster it, do you know of any necessity for your also taking off all of the trim and putting it back again?

A. I haven't saw the inside of the house. That I couldn't say.

20 Q. No; but let me ask you this: Just assume, Mr. Wardell, that the plastering was bad; assume that you are going to take the plastering off. Assume that. No, suppose you were going to take it off; could you or not have taken off that plaster and replastered the house without taking off all the trim and putting the trim back again?

A. The trim?

A. Yes.

A. I have never taken off any trim in my life. I have plastered many a room and many a house with the trim on.

Q. What do you say; it was not necessary?

30 A. Only last Thursday I plastered a room with the trim on.

Q. What do you say, it was necessary or unnecessary to take off the trim?

A. I do.

Q. Do you know anything about that settlement through the center of the house?

A. No; I haven't saw it. I couldn't tell anything about that.

40 Q. Mr. Wardell, one question more and then I am through. Can you tell the jury and his Honor whether or not

this plaster to your knowledge was mixed in a first-class or a good or an ordinary or a poor manner?

A. The plaster was mixed as good as it could be mixed. There wasn't any attempt in any part of the plastering to skin the job or nothing. It was fixed and mixed as good as we could do it. That was my orders from Mr. Poole. That has always been my orders when I worked on a job, that I am to do the work the best that I can; no attempt in any way, shape or form to skin the job.

Q. Mr. Wardell, who are you working for now?

10

A. James Hires.

Q. Not working for Mr. Poole?

A. Not working for Mr. Poole.

Q. Have you any interest at all in the result of this trial?

A. No, sir; I have not.

CROSS EXAMINATION.

BY MR. CARTON:

20

Q. You didn't advise much with Mr. Sparry at all, did you?

A. You will have to speak louder.

Q. You didn't advise with Mr. Sparry at all, did you, about getting any instructions to you?

A. I did not.

Q. He advised with Mr. Poole and Mr. Poole in turn advised with you.

A. Yes.

Q. You advised the mixture of the plaster, didn't you?

30

A. I did.

Q. Instructed those men how to make it?

A. I did.

Q. What proportions did you advise?

A. There is no working proportions that you can provide. The working proportion in putting on walls is the man that is using the tools. The contractor, they have a proportion that they figure on, but the man that is using the tools, he is the man that knows when his mortar is right. And some- 40

times some lime will take a little more sand than others and some lime won't take as much.

Q. Has it been your experience then that after mortar is mixed and after the man started to put it up that they have to change the mixture some?

A. Sometimes they do.

Q. Sometimes?

A. Take, for instance, our patent mortar, we go on a new job, different sand, it takes two or three gaugings before
10 they get the gauge right to use, usually.

Q. This whole batch, or rather all the mortar used in this job was made in one batch, was it not?

A. It was not.

Q. It was not?

A. It was slacked in one large bed and throwed up in a bed, slacked and tempered it down into a large box.

Q. Well, the whole lot was put there, all that you used was put in this and allowed to stand wasn't it?

A. Tempered down in the box. All that was used was
20 tempered in the box and used.

Q. How long did you let it stand after you slacked it and mixed it?

A. I should judge it stood there some ten days or two weeks. We had about somewhere in the neighborhood of fifty or sixty barrels slacked up and cut it down as we want to use it and temper it down in the box and use it.

Q. Then it is not a fact that you mixed up the entire allotment for this job in one batch, is it?

A. For the entire building?

30 Q. Yes.

A. No; it is not.

Q. How many different batches or allotments were made, as you recall, for the work?

A. How many different?

Q. Yes.

A. As I say, we have a box there, what we call a tempering box. If we want the full batch, full box, we temper down the boxful. If it is in the right shape to use it is carried to the workmen and used.

40 Q. And is the reason that you don't mix it all up at

one time because you can't tell whether it is right or not until you use it; is that the reason?

A. The reason is it has got to be thoroughly mixed and used. You mix up enough for a building, you have got to mix it again.

Q. I suppose it is, too, because you can't determine definitely by any formula whether you have it consistently for the wall or not?

A. After an experienced temperer mixes one lot he can tell within a shovelful of sand or two on the next lot just ¹⁰ what he wants.

Q. And there were several lots mixed up for this job?

A. Sure there were; impossible to mix it up any other way than in lots.

Q. Mixed up by those same two men, I suppose, at different times?

A. By the same one man. The other man was a helper once in a while. We had one man that had charge of it, and somebody come in and help him out if he got in a jam, that is, ²⁰ got hurried.

Q. When prior to the Wise job had you advised the mixture of lime, sand and hair?

A. What is that?

Q. When before you had this Wise job had you another job of lime, sand and hair?

A. It has been quite a while. I couldn't exactly say.

Q. And you hadn't had much experience with this sort of plaster at that time, had you?

A. I have had experience with all the first part of my ³⁰ life with it.

Q. But I mean not any just prior to that time.

A. Might have been four or five years; might have been longer. I couldn't say.

Q. And what you do is to mix it according to a formula and then temper it down and get it in proper shape when you put it on the wall?

A. Certainly do.

Q. And you apply that same process to each batch as it is used?

A. No; we applied this process first at work with the tools, which is the only process you could apply to it.

Q. Did you consider that a good lime?

A. Supposed to be the best they had.

Q. Did it meet your approval?

A. What?

Q. Did that lime, such as was used on this job, meet your approval?

A. It appeared to slack up all right.

10 Q. Appeared to?

A. That is all you could tell about it.

Q. You learned afterwards that it did not stay on the walls all right?

A. I think it did if it had been properly used after it was on the walls, by the evidence that I have heard.

BY THE COURT:

Q. What is that?

20 A. As near as I can find out by the evidence, but I haven't been in the house any more than in the hall since I left the house finished. On the evidence I have heard here it must certainly have been pretty well racked.

Q. Then you think the cracks which have been testified here were due to causes other than the character of the mortar and the plaster, due to other causes than the quality of the plaster, do you?

A. Its quality?

Q. Yes.

A. No.

30 Q. What do you think it was that caused these walls to crack, or at least those walls?

A. As I heard the evidence I think it was settlement of the building.

Q. Settlement of the building?

A. It will crack any wall. Take our patent mortar; it will crack that.

Q. Were you in charge of the plastering itself?

A. I was.

40 Q. Was any complaint made by the architect at any time?

A. Not a word.

Q. During the progress of your work?

A. Not a word. I never hear a word.

Q. Was any criticism made to you as to the quality of the plaster?

A. Not one word. I never had either the architect—I was working on the outside of the building. The only complaint the architect made with me was I was leaving a hard joining on the outside of the building, which we always do going up a casing. He wanted it finished soft. That is the 10 only complaint I ever had with the architect.

BY MR. CARTON:

Q. Would the settling to which you have referred have the effect of breaking of the keys in the ceiling?

A. It certainly would.

Q. It would?

A. On a hard wall.

Q. The scratch coat is the best coat, isn't it, the strongest 20 est coat.

A. It is the strongest coat.

Q. It dries up harder than the other coats, the brown coat.

A. It does.

Q. That is so it gets a proper clinch, I suppose, inside the lath?

A. Yes.

Q. And the white coat on here is a good coat, isn't it, as appears from these samples? 30

A. That is a good white coat on there.

Q. And that being a good coat would have a tendency to hold the wall up longer, wouldn't it, even though the inner coats are defective; that is a fact, isn't it?

A. Not on the white coat; no.

Q. If the white coat was a good strong coat wouldn't it have the effect of holding the inner coat longer than a poor white coat?

A. After a crack is made where is the strength in a white coat? 40

Q. Does the white coat prevent cracking if it is good and have a tendency to hold it together?

A. No.

Q. These samples that you have looked at, you say that you don't find the scratch coat at all?

A. Not on those I have looked at.

Q. Look through some of these other bags and see if you see anything of the scratch coat.

A. There is a piece of one where it has been left on to
10 it. You see where the clinch went through the lath.

Q. That is a piece of the scratch coat?

A. Yes.

Q. What do you suppose has become of the scratch coat in picking up those samples, Mr. Wardell?

A. The brown mortar has let loose of it and you haven't got the scratch coat. You know the scratch coat put on the lath is not very heavy.

Q. But it is very strong?

A. It was strong.

20 Q. And firm?

A. Yes.

Q. See if you can find any pieces of scratch coat in those samples anywhere, those that are open there.

A. You can't find it, because they are not there, that is, the whole piece.

Q. What is your conclusion, that in picking up those samples the scratch coat has been picked off?

A. No; the scratch coat has been left fast to the lath in most cases. It has been left fast to the lath in most cases.

30 Q. Not taken off at all?

A. It has been knocked off.

Q. When you take this mortar off these walls with your spade you take off everything except the keys, don't you?

A. You do sometimes.

Q. Isn't it rather your conclusion that the scratch coat is in sand on the floor and could not be gotten?

A. Oh, no.

Q. You don't believe that is the reason why they are not here, eh?

40 A. I do not.

Q. You might look in the bottom of the bag and see if you find it in there. Will you wait a minute, Mr. Wardell? Maybe you will find some of the scratch coat in the bottom of the bag. Look in there and see if you can discover it. What does that look like, scratch coat?

A. Looks like brown mortar.

Q. Does it look like the scratch coat or brown coat?

A. Looks like the brown coat.

Q. They didn't get any scratch coat here at all, eh? Well, that is all.

10

MR. HEISLEY: If your Honor please, with the reading of the evidence of Mr. Sparry, which was taken here by consent one time when we could not get on to the trial of the case, we have finishel our side of the case. Mr. Hughes secured the attendance of Mr. Sparry here one day when this case was going to be tried and Mr. Carton and Mr. Durand very kindly consented to take his evidence before a notary public, and that we should read it before the court and jury just as though Sparry was here. Sparry lives at Saratoga Springs, and we did not want to keep him down here.

20

(The deposition of Mr. Sparry was read.)

PLAINTIFFS' TESTIMONY IN REBUTTAL.

DR. LESTER WISE, recalled for plaintiffs.

DIRECT EXAMINATION BY MR. CARTON:

Q. Dr. Wise, there has been something said, in fact it has been said that the same sort of plastering was done in the garage that was done in the house. Is that so?

30

A. The man's room upstairs was plastered with the same kind of plaster that the house was.

Q. How about the garage itself downstairs? Is that the same sort of plaster?

A. On the inner walls I think it is concrete, to the best of my remembrance. It is a hard plaster, the ceiling the same.

40

Q. With the man's room upstairs, what have you to say as to whether the plaster stayed on or did not stay on?

A. In the man's room it cracked and became loose in one or two places, and small pieces came out.

Q. Was that taken off and replastered?

A. That was removed and new plaster put on at the same time the house was put on. There was no part of the garage except that.

10

NO CROSS EXAMINATION.

BOTH SIDES REST.

MOTION FOR DIRECTION.

20 MR. HEISLEY: If your Honor please, I desire to ask for the direction of a verdict and I will state my reasons as briefly as possible.

Article 2 of the contract shows that the work is to be done under the direction of the architect, and the uncontradicted evidence shows that it was so done. I submit that upon that point there is not a scintilla of evidence in this case to show that we went contrary to the direction of the architect.

30 The following portions of the contract and the "General Conditions" show conclusively that the architect had almost unlimited power over this defendant; that the defendant was obliged to follow the architect's instructions, and that he did so follow them, and it would be unconscionable as well as illegal to permit this plaintiff to repudiate the act of the architect, who was acting in behalf of and as a representative of the plaintiffs.

We refer to the following portions of the contract and "General Conditions."

40 Under the sub-title of "Power to discharge," in the "General Conditions" and Article 4 of the contract, the architect was given unlimited power.

Article 9 of the contract makes the architect the absolute arbiter as to the value of the work. Without taking time to read it, it will be seen that he was to appraise the work as it went along and from time to time issue his certificate, which he did.

Article 10 makes him the absolute judge, not of plans and specifications, but of the performance of the contract. I desire to call your Honor's attention to this paragraph. I think it is absolutely conclusive. The tenth paragraph says: "It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract except the final certificate or final payment shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be considered to be any acceptance of defective work or improper materials." 10

Now, I want to be perfectly fair with your Honor. I made a motion before Judge Dungan to dismiss this suit, alleging that this final certificate had been given and that it was conclusive upon the owner as well as upon us. Judge Dungan, in an opinion, refused to dismiss, and said this—I will only read a part of it: (Reads.) How on earth a man possessing the intelligence of Judge Dungan could fall into such an error as that I cannot perceive. He says that his decision is to be limited under Article 10 absolutely to the true consideration and meaning of the drawings and specifications; yet under Article 10 it does not say anything of the kind. It says this: "That the final certificate shall be conclusive evidence"—of what? Of the construction of the drawings and plans? No; of the performance of the contract. And I say, with all respect to Judge Dungan—because I do respect him—how he could make such an egregious blunder as that I don't know. 20 30

But, fortunately, since that decision of Judge Dungan our Supreme Court has construed this very clause in the case of the Ferber Construction Company vs. The Board of Education of the Borough of Hasbrouck Heights, and I am not going to read much of that. It is reported in volume 100 of the Atlantic Reporter, issued on April 19, 1917, at page 329, where Judge Trenchard, reading for the Court of Errors and Appeals speaking of this very clause—because I took occasion and I have it here to show to your Honor, to get the state of 40

the case from the attorneys in that case, so I could see the clause was the same as this, and it was identical. Judge Trenchard says this: (Reads.)

THE COURT: You see in that case, however, the contractor was suing for the balance of the contract price, wasn't he?

MR. HEISLEY: Well, I suppose they are always doing
10 that, of course. But Justice Trenchard, speaking for the Court of Errors and Appeals, says that that tenth paragraph does not mean what Judge Dungan said he was limiting it to, simply to the construction of the plans and drawings; but that under that he had the power by his certificate to determine conclusively what? That is the contract had been completed. That is the end of it.

THE COURT: That is to say that the contract had been completed, entitling the contractor to the payment as originally
20 agreed upon?

MR. HEISLEY: Yes.

THE COURT: What do you say, Judge Heisley, however, is the effect of the provision under the head of "Responsibility?"

MR. HEISLEY: Let me come to that, won't you, Judge, in my own way? I am going to deal with that.

30 The reservation in Article 10 refers to payments contemplated by Article 9 and not the final payment. The title "Payments" in the "General Conditions" supports this view. To place any other construction is to make the words "final and conclusive" in paragraph 10 absolutely meaningless, and thereby violate one of the well-known rules of construction, which requires a meaning to be given to every portion of the written instrument.

The title in the "General Conditions" of "Responsibility" refers to things which may happen during the course of
40 construction but not after the final certificate. To give this

paragraph entitled "Responsibility" any other construction than we contend for is to absolutely destroy the conclusive effect of the words in paragraph 10 and render the paragraph nugatory; because the only construction to be placed upon this entire contract and the "General Conditions" is that the architect was agreed upon and designated by these parties as the absolute arbiter, not only of the "True construction and meaning of the drawings," but of every other thing that could possibly arise or create discussion during the completion of this contract, and by Article 10 they expressly agreed that there should come a time when the architect, by his judgment and certificate, could determine conclusively as against both parties whether the contract had been performed. He did so decide without any fraud. The plaintiff accepted his decision, made the final payment and thereby legally and finally discharged the defendant from any further responsibility. 10

Now, I want to call your Honor's attention to some authorities upon the rules of construction.

THE COURT: Do you find any case in New Jersey which construes this paragraph under the title of "Responsibility?" 20

MR. HEISLEY: No, sir. I think that is to be determined under the rules of construction as laid down in our textbooks. The rule is to construe an instrument so as if possible to give effect to every word of it.

(Cites authorities.)

If you say, your Honor, that this clause of "Responsibility" which says that he shall never be released, that a payment by the owner or a certificate and so on shall never release him, you have got to absolutely, it seems to me, violate this rule of construction, because you absolutely eliminate the best part of the tenth paragraph, and no rule of construction justifies that. We are obliged to construe all parts of this contract so the entire contract can stand; and if you can find a way consistent with justice and by carrying out the intent of the parties, we respectfully suggest that you must adopt that way, so that you will leave the "Responsibility" clause stand 30 40

and not involve paragraph number 10. And I say it is very easy to see what was the object of that "Responsibility" clause. Here was a man, Hughes, who could do absolutely nothing on that job except by the approval of Sparry—Sparry, the man who was sought out and found by Wise. The paragraph which I have referred you to says that Sparry had the right to go on that job and order every man off of it and use his helpers. He had the right to tell him to put any man in there that he wanted. It had to be according to the approval
 10 of Sparry, whether it was good or bad, whether Hughes approved of it or not, whether he had good men on there or not, Sparry could take him by the throat, figuratively speaking, and Wise, over his seal, agreed to stand by it.

Now, I say that such a contract as that is manifestly unjust, as the evidence shows in this case that we did everything that this architect required of us, if there never was to come a time, not only up to 1917, but for fifty years to come, and after Hughes has gone to glory or some other good place, his children or estate can be sued by the representatives of Wise
 20 for some defect in that house. It cannot be possible that any such construction is going to be put upon it. You cannot get your houses built if the contract is to be construed that way, that a man is to never, never be released from responsibility at any time even though he follows literally the orders and the instructions of the man whom the owner has placed in charge of the building.

And so I therefore say that if the final conclusion that would be reached, to adopt the construction insisted upon by my learned friend, that we have got to show that that responsibility clause simply meant that none of these intermediate
 30 payments that were made, "that any bad work which you put in there, that no payment which we may make shall release you;" but, Mr. Hughes, there will, of course, come a time when you shall be released; and we see right in the few concluding lines of this paragraph, we see "that the final certificate shall be conclusive as to the performance of this contract," which ends it, and the man gets his money and is released. What other construction can you place upon it?

40

(Continues argument and cites authorities.)

Then may I ask for a direction upon this ground: That even if the walls have been proven to have cracked and fallen off, that the plaintiff has utterly failed to prove that the walls were made of defective material or put on improperly?

THE COURT: I have given this question somewhat of thought, and I have reached the conclusion that there is a very clear distinction with respect to the application of the rules of law in this case. This is not a case which involves the question of the completion of a building in the sense of defective materials or a waiver under such acceptance of defective materials. There are a line of cases in this State which hold the statement that where a final certificate is given by an architect there is no waiver on the part of the owner by defective workmanship of the right to recover or the right to reduction, as referred to in the case of *Benson vs. Bardsley*, 56 N. J. Law: "Where the contract and specifications themselves contain terms which manifest a clear intent on the part of the parties to the contract that with respect to defective work such certificate of the architect is not conclusive." 10 20

I am obliged to disagree with counsel for the defendant that the paragraph entitled "Responsibility" under the title "General Conditions," which embody the specifications and which are made a part of the original contract by its terms, is to be construed as claimed by him. That paragraph is this:

"All contractors under these specifications agree to be held solely responsible for the faithful execution of the same and for any damages growing out of failure so to do; and no acceptance or approval through oversight, concealment or otherwise of any imperfect work or materials shall ever relieve the contractor from such responsibility. Neither the owner, the superintendent nor the architect shall be held in any event to have assumed any responsibility in this matter." 30

Now, it strikes me that I am obliged to hold, therefore, that with respect to a claim for defective work—and of course without any idea at all of suggesting the court's persuasion that the plaintiffs have shown defective work, for which the defendant would be responsible—that the effect of that paragraph did not preclude the plaintiffs from instituting this suit 40

for the alleged defective work. The motion will therefore be denied. You may have an exception.

(Objection noted for defendant as ground of appeal.)

CHARGE OF THE COURT.

Gentlemen of the jury, it appears in this case that on January 30, 1911, Mr. Charles F. Wise entered into a building contract with the defendant, Mr. Hughes, for the erection of a dwelling house in the City of Long Branch. The contract contained terms and stipulations and as a part thereof what are known as "General Conditions," in which general conditions the portion of a building contract commonly known as specifications were embodied. In the contract it is provided substantially that the work shall, so far as the owner is concerned, be under the supervision, direction and control of an architect; and such an architect was engaged in this particular transaction.

It appears that the building was erected by Mr. Hughes under the terms of the contract and general conditions or specifications, as I shall refer to them, and completed; and that the contract price was paid by the representatives of the estate of Mr. Wise, who it appears died after the building was started and prior to its completion.

In connection with the contract and the general conditions, however, it was provided that "all contractors under the specifications agree to be held absolutely responsible for the faithful execution of the same (meaning the work) and for any damages growing out of failure so to do; and no acceptance or approval through oversight, concealment or otherwise of any imperfect work or material shall relieve the contractor from such responsibility. Neither the owner, the superintendent nor architect shall be held in any event to have assumed any responsibility in this matter."

Now, unlike the ordinary suit, gentlemen, to recover a building contract price, that question is not here involved. But I charge you that it is a rule of law that where the certificate of an architect has been given to the effect that the contractor has completed his work, that the contractor would have the

right to recover the contract price, but the owner would have the right to have deducted from such contract price a reasonable sum to cover the cost of replacing any defective work under the contract.

I have had occasion, gentlemen of the jury, to rule upon a motion made by counsel for the contractor adversely to the direction of a verdict for the defendant in this case; and it is my duty to say to you that the disposition of that motion is not to have the slightest effect in your minds upon the inference of facts in this case. In other words, that motion and its disposition by the court is not intended or to be interpreted by you as any suggestion by the court as to what verdict shall be returned in this case from the facts found by you, of which you are the sole judges and with which neither the court nor counsel have anything to do. 10

Now, gentlemen of the jury, it appears in the case that after this work was completed complaint was made by Mr. Wise, who was then occupying the house—indeed I shall presently refer to the complaint which was made prior to the completion of the house—that the plastering had been defectively done; so much so that it was necessary to tear out the entire walls and ceilings of this house and replace with new plaster. It so happened that the new plaster was of a different character from that originally contemplated by the plans and specifications. In other words, it was what is known as patented plaster. And I say to you that the plaintiff had no right under the law to substitute a patented plaster for the plaster which had been provided for in the plans and specifications. Therefore he could not recover, assuming you should find the preliminary question which I shall presently propound to you adversely to the defendant, the plaintiffs could not recover for the reasonable cost of the patented plaster, for the obvious reason, which will appeal undoubtedly to your common sense, that if the plaintiffs after discovering the alleged defect in the plaster which had been used, concluded that the proper plaster to use was a patented plaster, which had never been contemplated by the specifications, they could not adopt such a plaster and require the defendant to pay for it. 20 30 ffl

Therefore, gentlemen, the rule which applies is this: If there was defective work with respect to the plastering per- 40

formed by the contractor, the defendant in this case, the plaintiffs were entitled to have that replaced with the plaster under the terms of the specifications in order to make the work good as contemplated by the original contract, and to be paid by the defendant or to claim of the defendant a reasonable sum for the expense so incurred.

But you have a preliminary inquiry to make before you get into the question as to the reasonable sum to which I have referred. And the first inquiry is this: Was the work defective? You must determine that before you can proceed to consider the other phase of the case.

Under the evidence in this case, to which you will of course confine your attention, you may find that the first complaint related to cracks. Now, you may as men of common sense reach the conclusion under the evidence that those cracks were no evidence of defective work; in other words, that they were the ordinary and customary cracks that appear in a new construction due to causes for which the contractor cannot be in fact held responsible. In other words, you may conclude that such cracks are not inconsistent with a good and workmanlike job.

The legal obligation upon Mr. Hughes was to do this work in a good and workmanlike manner. There is nothing in the contract, for example, which in terms refers to a first-class job; but the legal obligation was on Hughes to do his work in a good and workmanlike manner. If those cracks that are spoken of are found by you under the evidence as a fact not to go into the category of defective work, then the plaintiffs will have failed to satisfy you, as they are obliged, under a fair preponderance of the proof, that this work was defective at all. As a corollary of that, gentlemen, there is another feature of the case which you must consider in answering this question—Was the work defective?—and which the plaintiffs are obliged to satisfy you under a fair preponderance of proof. Suppose the cracking of the walls in question and the falling of the plaster was due to a settling of the building by reason of the fact that the supporting timbers were not strong enough to hold the structure and therefore there was settling. Now, if that were so, if the sagging of the walls and the falling of the plaster was due to insufficient support through

joists or timbers, even though the defendant put them in, but if the specifications called for them, this defendant cannot be held responsible in this case. In other words, if the defendant simply complied with the terms of the specifications and the architect, through a mistake, provided for timbers in those specifications which were insufficient to properly carry the weight of this building where it was necessary to have such support and as a result, the natural and proximate cause of those insufficient timbers, the cracks occurred and the plaster fell, then this defendant is not responsible in the law and no verdict can go against him. 10

I am inclined to think, gentlemen of the jury, in deliberating upon this case that your inquiry will be directed more particularly to answering this question: Was the work defective with respect to the nature of the plaster and the character of the plaster which was used in this building by the defendant under the terms of this contract? It appears in the case that the work was actually done by a sub-contractor, that is to say, a plasterer. But that is of no consequence here, because the contractor, if there was any defective work of an actionable character, is primarily liable therefor, or for the natural and proximate damages, which I have pointed out to you include a reasonable sum to restore the work in a good and workmanlike manner as originally contemplated by the contract. The specifications do point out the character of the composition of the plaster, and the provision in the specification in that respect is this: "All plaster to be composed of best quality approved brand of lime, clean, sharp sand from pit and new long, fresh cattle hair, and the sand finish to be of lime and sand." Now, it appears that Rockland lime was used in the composition of this plaster. If Rockland lime was used by the direction of the architect, no criticism can be made of the defendant by the plaintiffs. They were bound by the architect's direction in that respect. If the composition of the plaster however was not made or the parts combined in the customary and usual way, and as a result a defective plaster was provided or used, you would have a right to consider the answer to the question whether there had been defective work or not in that regard. In other words, if the cracking and falling of the plaster complained of was due to 20 30 40

bad workmanship in preparing the plaster, that is to say, if it was done not in the ordinary and customary way, then you would have a right to regard that as an element in reaching the conclusion whether there had been defective workmanship or not.

There is in the case some evidence, gentlemen, from which you might infer that while certain portions of the plaster fell there was no reasonable cause to believe—and it is for you to determine; you are not obliged to accept the statement of any
 10 single witness in the case as a finality, because you are the judges of the facts, and it is your duty in this case to determine what the facts are—that in certain rooms where it had not fallen such plaster would fall, and assuming you reach the conclusion under a fair preponderance of proof in the case that there was defective work in this regard, there would be no legal right to tear out all the plaster in the rooms where it had not fallen. The plaintiffs would have no right, without reasonable cause, to condemn the entire plaster work
 20 in that house simply because in this room or that room the plaster fell.

Therefore, gentlemen, assuming under a fair preponderance of the proof—and I do not say that you will find an affirmative answer to the question at all, because it is for you to determine—that there was defective work in the respect complained of, then you would pass on to the question how much the plaintiffs are entitled to recover, if anything, against the defendant. The rule, as I have already suggested to you, is that the plaintiffs would be entitled to recover a reasonable
 30 sum for restoring the walls or replacing the defective work with that work which was contemplated and which the defendant assumed to do in a good and workmanlike manner under the contract and specifications originally.

There is considerable difference in the testimony with respect to such cost. The plaintiffs claim that the cost was \$4,227.28. But you will bear in mind that in such cost was included the entire replastering of the house. You will remember what the evidence was in that regard, however. If you should find that such replastering was unjustified, that
 40 there was no reasonable ground for any such extensive work,

you would have no right to require the defendant to pay for that which was done so extensively.

The defendant's testimony is that the original cost of the plastering of the house was \$1,185.40, which included, as the contractor testified, a ten per cent. profit. Now you will observe that there is quite a difference between the two figures. Indeed there is testimony that whatever defects there were in the plaster could have been overcome and the so-called defective work repaired for \$150. So that it is left to you in your good judgment, gentlemen, to determine what was, under all the evidence in the case, assuming you reach the conclusion that there was defective work, a reasonable sum for the repair of the work so defective in order to restore it to that condition which the defendant was bound to provide, namely, as the result of its having been done in a good and workmanlike manner. 10

It is undoubtedly the rule, gentlemen, that if there was any deviation in the plans and specifications made by the defendant by direction of the architect, and it afterwards appeared that such deviations were injurious to the plaintiffs, that the defendant could not be held for such resulting injury. As I have already pointed out to you, the mere fact standing alone that the walls cracked, is not sufficient to justify a verdict against the defendant, unless you find it was the result of defective workmanship on the part of the defendant under the evidence in the case. 20

Finally, gentlemen, I may say to you that this defendant was obliged to follow the plans and specifications as prepared by this architect. The only question involved is whether there was any defective work for which the defendant should be required to pay a reasonable sum. The rule applies, as in all civil cases, that the plaintiffs must satisfy you by a fair preponderance of the proof—and that does not mean a greater number of witnesses on one side or the other, but the greater weight of credible, legal evidence—that their contention with respect to this alleged defective work is true and what would be a reasonable sum to compensate the plaintiffs for such defective work. 30

Therefore, as I see this case, gentlemen, it is within a comparatively narrow compass. Your endeavor will be to do 40

exact justice under the evidence and under your oaths in this case as it is possible for you as reasonable men to do.

DEFENDANT'S OBJECTIONS.

MR. HEISLEY: I desire an objection to your Honor's failure or refusal to charge or any modifications on the requests which I made to your Honor to charge.

2. Also an exception to that portion of your Honor's
10 charge where you spoke evidently about the clause in the general conditions entitled "Responsibility," although you did not specifically say it was that particular clause.

3. Also where your Honor said that the legal obligation of this defendant was to do the work in a good and workmanlike manner; my contention being that the obligation was to do it to the approval of the architect, whether it be in a good and workmanlike manner or not; and that the proof in the case shows that he did it to the approval of the architect.

20

PLAINTIFFS' OBJECTIONS.

MR. CARTON: I wish to except to that part of the court's charge at the outset, where you stated that the plaintiffs had no right to substitute patented plaster for the plaster provided for in the specifications; it being my contention that the defendant had the right to erect walls, when he found the walls erected by the defendant defective, in his view, and that he had a right to substitute that wall. There should be a qualification, of course, that he could not recover more in doing
30 that, in substituting the new wall, than what the old wall would cost which in this case has been agreed upon as being \$150.

2. I also wish to except to that part of the court's charge which in effect says that cracks are not inconsistent with a good and workmanlike job; my contention being that the cracks as testified to in this job are inconsistent with a good and workmanlike job.

3. I also criticise the charge in that particular regard, that the court in referring to cracks omitted to make mention
40 also that there were patches of this wall that had fallen off,

which should have been suggested for the jury's consideration in considering the question of cracks.

4. I also wish to object to that part of the court's charge which in effect says that if Rockland lime was used by direction of the architect and proved to be unsatisfactory that the defendant was not responsible. I criticise the charge in that the specification calls for a good lime, specifying no particular brand; and that even though the architect did approve this brand of lime and it were defective, it is no excuse to Mr. Hughes now because of such defect. 10

5. I also wish to object to the court's charge which in effect said that defendant was obliged to follow the plans and specifications, in that there is an obligation imposed by law and under the conditions of the contract that if he knows that certain materials or certain work are defective, even though indicated by the plans and actually approved by the architect, he would not be justified in proceeding that way.

(After the statement of the exceptions by the respective counsel the jury were further instructed by the court as follows:) 20

THE COURT: At the request of the court counsel for the respective parties have stated certain exceptions to the court's instructions to the jury, and with respect to them the court desires to make the following supplemental charge before the retirement of the jury:

It is in the evidence that a final payment of the contract price was made on the certificate of the architect, approving this work as having been completed. I desire to call your attention to that circumstance in this connection only: that you would have a right to consider the architect's approval and the conduct of the plaintiff in making the final payment as a circumstance with respect to whether there was any defective work of the character complained of in this suit. You would have a right to consider that merely as a circumstance in arriving at the inference of fact as to whether or not the plaintiffs had satisfied you by a fair preponderance of the proof whether there was any defective work of a character which justified the charge in this action against the defen- 30 40

dant. Now, it is in that respect that the evidence with respect to the giving of this certificate may be considered by you. I do not say that you shall put any interpretation upon my mere suggestion, because I have no right at all to attempt to control your action with respect to the fact; and if that certificate was given at a time when there were latent defects unknown to the plaintiffs or to the architect, then you would not give it the effect that I have just suggested to you. It is for you to say what effect as a circumstance in the case shall be given to the giving of that certificate under the circumstances.

Now, I have not undertaken to say to you with respect to the evidence in this case anything which binds you or deprives you of your right to act as judges of the fact in this case. For example, my reference to the cracks as not necessarily being inconsistent with a good and workmanlike job; you may disagree with me on that. That is merely a comment of the court, and you may accept it or not as you see fit. There is some evidence that there were not only cracks, but there were patches of plastering that fell off. You will take that into consideration in arriving at the question whether there was defective work or not.

I had occasion to refer to the testimony in the case that Rockland lime was advised by the architect. The specifications are silent as to the character of lime, other than the fact that it should be the best quality approved brand of lime. Now, that indicates that somebody must approve it, because it says "the best quality approved brand of lime;" and I charge you as a matter of law that the defendant had the right, it was his duty under the circumstances, to look to the architect for his approval, and if he approved it he was to be guided under these specifications and the contract by such approval, and therefore was justified in using it.

I think that is all I care to say.

MR. HEISLEY: Would you permit me to call your attention to something publicly?

THE COURT: Yes.

MR. HEISLEY: I am referring to the final certificate.

Under the signature of Charles H. Sparry is printed these words: "This payment does not accept the work done until after final payment is made." All of those words are stricken out excepting the words "final payment."

THE COURT: Well, Mr. Carton, do you care to make any answering comment on that?

MR. CARTON: I have several exhibits I would like to read here. That is an exhibit that goes out to the jury. 10

MR. HEISLEY: You think I should not comment on it?

THE COURT: I think you should not comment at this stage of the case. The certificate speaks for itself and it will go out to the jury in connection with the letters of Mr. Sparry.

MR. CARTON: I want to take further exception to that part of the court's last charge referring to the approved brand of lime; that is, where the court stated that the approval contemplated in effect was the approval of the architect; it being my contention that it must be an approved brand of lime or brand approved in the trade; and that the obligation was on the builder to procure such an approved brand of lime before presenting it to the architect. 20

MR. HEISLEY: I desire an exception to that part of your Honor's charge wherein you said something to the jury about that it was for the jury to decide about what effect it would give to this final certificate; my thought being that it was the duty of the court to say what the legal effect would be. 30

Monmouth County Circuit Court

	ISAAC WYMAN DRUMMOND	} DEPOSITION
	<i>and</i>	
	LESTER DRUMMOND WISE,	
	<i>Executors, etc.,</i>	
	<i>vs.</i>	
10	RICHARD H. HUGHES.	

Freehold, N. J., June 13, 1917

APPEARANCES

For Plaintiffs
DURAND, IVINS & CARTON

For Defendant
WILBUR A. HEISLEY

20

CHARLES H. SPARRY, a witness produced on the part of the defendant, being duly sworn, testifies as follows:

DIRECT EXAMINATION BY JUDGE HEISLEY:

Taken by consent of counsel on both sides and to be read in evidence before the court and jury with the same effect as though he were personally present and sworn and testified. Signature is waived.

30

Q. Mr. Sparry, where do you live?

A. Saratoga Springs, New York.

Q. What is your occupation?

A. Architect.

Q. Were you one of the architects mentioned in the contract involved in this suit?

A. I was.

Q. What was the name of the firm of architects?

A. It was an association.

40

Q. What was the name of the association?

A. Charles H. Sparry and Lewis W. Bruyere, associated.

Q. Were you the architect who was actually in charge, physically in charge of the erection of this building?

A. I was.

Q. Did or did not you ever issue to Mr. Hughes and deliver to him the final certificate mentioned in paragraph 10 of the contract?

A. I did.

Q. Were you at the building much of the time?

A. The usual number of times necessary to the super- 10
intendence of the work.

Q. How often do you suppose you were there on an average, during a week?

A. Well, taking it on an average I should say possibly twice.

Q. Did or did you not keep yourself acquainted with the character of the materials and labor that went into the construction of this building?

A. I did; that is to the extent of a general supervising architect. 20

Q. And was the building erected under your direction?

A. Yes.

Q. You are, of course, familiar with the plans and specifications?

A. O, yes.

Q. Was the building ever finally finished under the contract?

A. Yes.

Q. Before the final certificate was rendered, of course, that would be? 30

A. Yes.

Q. Do you know of any instance or any particular in which the building was not erected according to the contract and the plans and specifications at the time that you gave the final certificate?

A. I do not.

Q. Do you know of a single instance where there was put into the building a different kind of material other than that called for by the plans and specifications or directed to be put in it by you? 40

A. Nothing was directed any different from the plans and specifications.

Q. Were the materials that were put in it all according to the plans and specifications?

A. To the best of my knowledge.

Q. And was there any instance in which the contractor or anybody under him deviated from your instructions as to the doing of the work and the kind of labor and material used in that building?

10

Objected to for the reason that it calls for a conclusion that the witness manifestly cannot answer because he has testified he was not up to the building more than two times each week.

Q. Do you know of any instance?

A. I do not know of any.

CROSS EXAMINATION BY MR. CARTON:

20

Q. Where were you practicing your profession at the time these plans and specifications were drawn?

A. My office was 11 West 36th Street.

Q. New York City?

A. Yes, sir.

Q. You have since removed to Saratoga Springs?

A. Yes; very lately, though—possibly within six weeks.

Q. Have you kept open an office in New York until a period of some six weeks ago?

30

A. Yes, sir.

Q. Where were you located then?

A. At what time?

Q. Prior to your going to Saratoga, some six weeks ago, where in New York?

A. At 2 West 47th Street.

Q. That your place of residence or place of business?

A. Place of business.

Q. You have stated, Mr. Sparry, that you gave to the builder, your final certificate on this job; when was that certificate given?

40

A. As to date you mean?

Q. Yes.

A. I really couldn't tell you the date. I think I got that date from you, didn't I? I think you asked me about the date when I was in your office down there—or Mr. Durand.

Q. When, with reference to the finishing of the building as you have termed it, was the certificate issued?

A. The final certificate was issued some time after the completion of the building; I don't know how long, but some months. The certificate was held up for certain things to be completed and done which were not completed at that time, many little things. 10

Q. It is a fact, is it not, that the final certificate was not executed by you and turned over to the builder for many months after the building was completed?

A. I think that is right. It was practically completed.

Q. How long time was this building in course of construction?

A. If the time consumed in finishing those small things— 20

Q. From start to finish?

A. I should say to the best of my memory nine or ten months, probably, before the final certificate was issued. The building was I think erected, outside of those small things, in about six months, as I remember.

Q. The building as a matter of fact was nearly completed at the time of Mr. Wise's death in the fall of 1911, was it not?

A. Yes, sir.

Q. You didn't execute your final certificate until nearly a year after that time did you? 30

A. It wasn't as long as that, I don't think.

Q. The builder claimed that the building was completed in the early part of 1912, did he not, January or February?

A. I don't remember as to that.

Q. Your recollection, I suppose, is hazy on this matter at this time, because of the length of time?

A. Yes; it is seven or eight years ago that we started that building.

Q. Why do you say the final certificate was held up 40

from the early part of 1912 until this date in October, 1912?

A. Well, I think it was because of the many things in there that were not quite completed, as I remember, as to parts of the contract that were not all finished. I think little things like hardware and different things, I don't remember just what.

Q. Now, you say, Mr. Sparry, that you kept yourself informed as to the character of the materials that got into the building; do you mean by that, that the information was such as you got on the weekly trips you made to the job?

A. There was no clerk of the works reporting to me. I only had the knowledge of the supervising architect as when he visits the work for the purpose of finding out how much of the work has been done and whether it is according to the plans and specifications to that date of issuing payments.

Q. This building was being erected in Long Branch?

A. Yes, sir.

Q. And your office at that time was in New York.

A. Yes.

Q. And you made trips once or twice a week to the job?

A. Yes. The latter part of the work I was there much more often and then, of course, I was down here at the shore.

Q. That is the information that you acquired, the information that you got on the trips to the job, as to the character of the materials being used on the job?

A. Yes.

Q. With regard to the condition of the plaster, did that have anything to do with the withholding by you of the final certificate?

A. So far as to one part of the plaster; there was a question as to whether—there was a leak in the doctor's office and there was a large piece of plaster off of the ceiling and there was a question whether it was poor plaster.

Q. That was one of the reasons why the certificate was held up?

A. Yes, sir; I remember that was one.

Q. Were there other instances where the plaster was defective outside of the one to which you have referred.

A. Well, we found in going over the building in certain places, numbers of cracks, and I went over the building with

the Doctor and there seemed to be in certain places a settlement and the doctor at the time took patches from the wall and examined them under a microscope. This was after the issuing of the certificate.

Q. This was after that?

A. Yes; some time afterward.

Q. And that was after the work was completed by Mr. Hughes and he had had his certificate?

A. Yes, sir; Doctor asked me to go over the plaster with him at the time he got these samples from the wall.

Q. How did you come to visit the job after the certificate was issued? 10

A. Why, as I remember, at the Doctor's request, I examined the plaster.

Q. What was the Doctor's claim or contention when he requested you to go there?

A. That the plaster was poor.

Q. Did you visit the building on more than one occasion after the work was completed?

A. O, yes; I did. I was there, I think, on several occasions, and at one time did additional work in putting on some copings which I designed. 20

Q. As a matter of fact, Mr. Sparry, Doctor Wise made a claim to you at that time, that the plaster was defective, not according to the contract, did he not?

A. Yes, sir.

Q. That was some time after the issuing of the certificate?

A. Yes, sir. I don't know how long it was.

Q. Did you take up with Mr. Hughes after you learned of Doctor Wise's claim, the matter of correcting these defects? 30

A. I did.

Q. Did he refuse to correct it?

A. I don't know, but as stated to me by Mr. Hughes he went to the building and examined the work with Mr. Poole and Mr. Poole suggested that there was more work to be done there in replacing this work than he claimed was his fault, and he wanted to be paid an additional amount at the time—I forget what the amount was—something in the neighborhood of a hundred dollars. 40

Q. Who was Mr. Poole?

A. He was the mason.

Q. Mr. Hughes, the sub-contractor, doing the work?

A. Yes, sir. It was claimed by Mr. Poole that he was not obliged to replace this work in his contract. He claimed that the plaster that he called Mr. Hughes' attention to was possibly from settlement in certain places, some certain settlement through a side partition or something of that kind, I don't remember exactly.

10 Q. Well, are you testifying now, Mr. Sparry, from what you actually recollect or generally?

A. I recollect some of the places, but not all of them.

Q. Was there settling there more than the ordinary settling in a new house?

A. Well, possibly in two or three places there was.

Q. Where were they?

A. One was in the cornice in the living room. I spoke to Mr. Hughes about that and I think he looked at that and examined it.

20 Q. You say now there was more settling there than there is ordinarily in a new job of that kind?

A. No, I wouldn't say that because jobs differ on settlements; on some jobs there is quite a good deal of settlement without any apparent cause. It is almost impossible to figure out why some settlements occur in new buildings.

Q. This house had been properly planned by you?

A. Yes, sir.

30 Q. You prepared the plans and specifications, all the details?

A. Yes, sir; all the details; of course the mechanical work was turned over to my assistant.

Q. And proper timber and materials of such character were used so far as you knew to make it a good job?

A. The supporting timbers and face were all of proper strength and weight and carrying qualities. I think the specifications all bear me out in that.

Q. This was rather a large house, was it not, Mr. Sparry?

40 A. Not so very large.

Q. Approximately, what was its cost? The cost of construction?

A. I think under the terms of the contract in the neighborhood of twenty-two thousand dollars.

Q. Do you recall what the actual expense of erecting the house was outside of the contract?

A. There were some additions, elevator lift and certain other things were put in, additions which were not a part of the plans and specifications. The building was complete so far as the plans and specifications were concerned. I think the final cost was in the neighborhood of probably two thousand dollars more, on different things. I don't remember the figures; I haven't got them. 10

Q. After Doctor Wise had called your attention to the defect in the plastering you say you took it up with Mr. Hughes and Mr. Poole as well; is that so?

A. Not with Mr. Poole, but Mr. Poole afterwards made a statement to me that the cost of correcting would really be one hundred dollars, but he didn't consider the settling or the cracking due to his work. 20

Q. What plastering had Mr. Poole in mind that would cost a hundred dollars? Some particular part?

A. No; he took different patches, different places; one place I remember was in the living room cornice, where it had cracked, by settlement probably, or shrinkage of timber.

Q. Was it shrinkage of timber that caused the cracks?

A. I think very likely.

Q. What was the character of the timber used in that room?

A. Seasoned material, as nearly as we can get seasoned material; it isn't once in a hundred that the material is absolutely dry material. 30

Q. You say you inspected all material that went into this job and the material was satisfactory?

A. Yes, as good as you usually get.

Q. Mr. Poole as a matter of fact didn't do any of the repairing, did he?

A. I really do not know.

Q. I show you a letter addressed to Doctor Wise under date of March 13, 1912. Was that letter signed by you? 40

(Witness reads letter.)

A. Yes; this is my signature and initialing under here (indicating) and this other part is by Mr. Bruyere; that is not mine.

Q. The signature to the letter proper is your own and that letter was written by you, and the signature to the postscript is by your associate?

A. Yes, sir. This is not regarding the plaster, though.

10

(Letter Marked D-1.)

Q. I show you a letter purporting to be signed by you addressed to Doctor Wise dated March 28, 1913. That is your letter, I suppose?

A. Yes.

(Letter Marked D-2.)

20 Q. Also another letter signed by you and addressed to Doctor Wise under date of April 16, 1913. That is your letter?

A. Yes, sir.

(Letter marked D-3.)

Q. Again, a letter signed by you and addressed to Doctor Wise, May 3, 1913. You wrote that letter to Doctor Wise?

A. Yes.

(Letter marked D-4.)

30

Q. All these letters which you have identified and which have been marked were addressed by you to Doctor Wise subsequent to the completion of the work and the issuing to Mr. Hughes of the final certificate, were they not?

A. Well, that I don't know. I don't know the date of that final certificate.

Q. Assuming that the certificate was issued in October, 1912?

40 A. As I remember this question of plaster as to whether it was good or bad that you have asked me about—

Q. I haven't asked you anything about the plaster.

A. You mean this letter—I really don't know.

JUDGE HEISLEY: They are all dated subsequent— they all appear to be dated subsequent to the issuing of the final certificate.

MR. DURAND: I think there is one dated before. March 13, 1912, that is before.

MR. SPARRY: These letters are really relating to the question of cracks principally, I believe. 10

MR. CARTON:

Q. Mr. Sparry, I suppose we will have to be governed by what the contents state. The fact is, with the exception of this one letter of March 13, 1912, all others were written to Doctor Wise after the completion of the work, and after the certification of the same to Mr. Hughes, that is the fact? 20

A. Yes; as far as I know. I am sorry I haven't got the date of the certificate.

Q. You have stated on your direct examination that all of the material that went into the job was first class; is that your best information in the matter?

A. Well, do you mean at the time that I wrote the certificate or—

Q. Any time you wish to fix, Mr. Sparry; you have stated as I recall upon your direct examination that you kept yourself informed as to the character of the material and that the materials were good. Is that right? 30

A. To the best of my knowledge the materials were all good.

Q. If that is so, Mr. Sparry, how do you account for the statement contained in your letter of March 28, 1913, D-2, wherein you state "I had occasion to knock off a piece of plaster from a portion of your house a few days ago and found the plaster to be very poor, crumbling very easily. I believe that much of the cracking is due to the poor quality of the plaster." 40

A. The places we examined, not the entire job of plastering, but the places we examined. We examined this plaster and cut samples from the wall. Under the microscope we found that the sand in places instead of being a sharp sand, was a round sand and not a sharp sand, in certain patches, probably in three or four patches. We cut from the wall in nine or ten places and Doctor labelled those and put them in small pill boxes at the time.

10 Q. When you answered Judge Heisley's question that the material in this job was O. K., all right, you had reference to the entire material on the job, did you not—not to any samples or patches—you had reference to all the material going in that job, didn't you?

A. In general; yes.

20 Q. Well, then, how do you differentiate now and state that what you referred to in this letter referred only to certain samples? The fact is when your attention was called to this defective material and when you examined it you were of the opinion at that time that it was a very poor quality of plaster, were you not?

A. So far as those places went; not in general; not the entire building.

Q. Well, why didn't you state in your letter to Doctor Wise that only those portions of the plaster that you examined were of poor quality and that the balance was good, why didn't you state that?

A. I don't know; probably my letter may not have been as carefully written as it should have been.

30 Q. Well, you refer in your letter to the fact that you had occasion to go to his house and you noticed a piece of the plaster and found it to be very poor and crumbling. I suppose you wrote that letter shortly after you made that examination, did you not?

A. I imagine it couldn't have been very long. I don't know now.

Q. You say that you believe much of the cracking is due to the poor quality of plaster. Did you have reference then only to the portions that you examined?

40 A. Yes; the portions that I examined.

Q. You didn't make an examination of the entire plaster on the job at that time, did you?

A. That I couldn't say. There was an examination made by me at two different times—over the entire first floor, and another time over the entire second floor.

Q. Your letter had reference, I suppose, to the character of the plaster you actually did examine?

A. Yes; but not all of the plaster that I examined.

Q. Do you state you found some of it good in your letter?

A. Possibly not, but that was the case. We had nine or ten samples of plaster there that we cut out from back of pictures and doors. 10

Q. And as a matter of fact, Mr. Sparry, you, with Doctor Wise, on that occasion, took samples from every room in the house, didn't you?

A. Not to my knowledge. I think we took samples on that occasion of all places or all rooms down stairs.

Q. Was that the occasion when these samples were put into pill boxes?

A. Yes. 20

Q. How many samples were there in all if you remember now?

A. I should imagine nine or ten, some rooms we took two or three patches from, if I remember right. In the sitting room we took two samples.

Q. Why was it necessary, in your judgment, to take all these different samples from the various rooms at that time?

A. I didn't take the samples. The Doctor cut those samples out himself; I stood by. 30

Q. You were with him?

A. Yes.

Q. The Doctor was complaining at that time that it was a poor job, was he not?

A. Well, I wouldn't say. The case of the cracks was the thing that called the Doctor's attention to the question of whether the plaster was good or not and to my attention.

Q. Outside of the question of cracks, as a matter of fact, this plaster fell off in patches from the ceiling, did it not? 40

A. In one place.

Q. Where was that?

A. In the Doctor's office. That was the only place that I know of.

Q. Was it because of the falling off of this patch in the Doctor's office that led you to make the statement that the plaster was of very poor quality?

A. No; I don't think it was. I think there were some other places I found where I didn't think the plaster was right.

Q. You don't mean to say, Mr. Sparry, but what there may have been instances when there were deviations from the plans and specifications on this job by Mr. Hughes, do you?

A. I am depending upon what you mean by that, because in the ordinary mixing of lime and sand, white sand,—lime will not mix with two different sands alike, and possibly in the mixing of the mortar there might be a little more or less lime under the same specifications.

Q. Well did you take occasion to ascertain whether the lime that Mr. Hughes had on the job was properly mixed with the sand he put in the job?

A. To the best of my knowledge.

Q. Did you make any examination at all?

A. Yes; I also examined the sand on the ground.

Q. Have beach sand there on the ground?

A. Yes; on another contract I had beach sand, using it for the roofs for the tile.

Q. Do you know as a matter of fact whether beach sand was used in the plastering of this house?

A. No; I don't.

Q. That could be so and might have happened without your knowing?

A. Without my knowledge.

Q. The specifications of this entire job call for a good plaster and good lime, do they not?

A. First-class.

Q. Was a good lime procured by Mr. Hughes, do you know?

A. Why, to the best of my knowledge. I examined this

sand; I also saw the other sand on the ground that the other contractor was using.

Q. Under the plans and specifications with reference to the character of the lime and the character of the sand, if they were procured and properly mixed and properly applied would make a complete and perfect job?

A. Yes. I want to add, though, that with the old-fashioned plaster you don't get the result that you do with the hard wall.

Q. What do you mean by that, that you don't get a wall that is all right? 10

A. Oh, yes, because old-fashioned plaster had been used on all buildings up to—probably the first adamant plaster doesn't go back more than twenty-five years. Up to that time it was all old-fashioned.

Q. Lime and sand were used entirely, exclusively, up to that time?

A. Yes, sir.

Q. Walls properly constructed of lime and sand will last for many, many years will they not? 20

A. With two exceptions I have done every job in my practice up to probably a year or two years of the time of Doctor Wise's house, with the old fashioned plaster and under practically the same specifications and same mixture.

Q. And with the result that you got a good wall?

A. Yes, sir.

Q. And lasted for years and years?

A. Yes.

Q. You drew the plans and specifications yourself?

A. I designed the building. The actual drafting work I didn't do. 30

Q. And as an expert, as an architect, you figure that the lime specified and the sand specified if properly applied would give a first-class job, would you not?

A. I would.

Q. This was to be a first-class job?

A. In every respect.

Q. You, Mr. Sparry, met with Doctor Wise at Mr. Fletcher's office, Dr. Wise's attorney, in New York, about a complaint to this job, didn't you? 40

A. Not to my knowledge.

Q. Let me call your attention to this instance: Do you recall an occasion going with Doctor Wise to Mr. Fletcher's office and meeting him there on which occasion these various samples of the plaster taken from the walls were examined by you, Mr. Fletcher and Doctor Wise, do you remember that?

A. I remember seeing Mr. Fletcher the attorney; yes.

Q. He represented Doctor Wise?

A. Yes; but I don't remember Doctor Wise being at the
10 office; I also met a Mr. Richards.

Q. At Mr. Fletcher's office?

A. Yes.

Q. About this Wise job?

A. I don't think it was about the Wise job at that time.

Q. Well, whether Doctor Wise was there on this occasion or not, do you remember meeting at Mr. Fletcher's office, meeting Mr. Fletcher himself and examining the samples of plaster taken from the Wise house, these various little boxes.

20 A. Wait a minute—I will correct that—I do remember Doctor's being there,—I remember now—with the samples.

RE-DIRECT EXAMINATION BY JUDGE HEISLEY:

Q. Mr. Sparry, you said while this work was going on at least a part of the time you were down at the shore, where do you mean?

A. I was living at Asbury Park when the latter part of
30 the work was completed.

Q. And would you frequently, or not, get off of the train on your way from Asbury Park to New York, and go to this building?

A. Yes.

Q. And inspect it?

A. Yes.

Q. You were employed by whom, by Doctor Wise, or by Mr. Hughes?

A. By Dr. Wise's father.

40 Q. Not employed by Mr. Hughes?

A. No.

Q. Never received any money from him?

A. No.

Q. Did you know him before the making of this contract between Wise and Hughes?

A. No. When Doctor Wise's father recommended Mr. Hughes—and in fact Mr. Hughes figured on the work—I mailed him the drawings and he figured on the work.

Q. Is it so that Mr. Wise selected Hughes and you did not select Mr. Hughes?

A. That is so. 10

Q. You say that when Poole went to the building that he estimated it would cost a hundred dollars at least, I understood you to say, to remove the cracks in the plastering. Is that right, and he declined to stand for that expense; is that right?

A. Yes, sir.

Q. Can you tell us or not, in your experience of buildings, whether a hundred dollars was an adequate or an inadequate allowance for the plastering which would be required to be done to remove those cracks? 20

Objected to for the reason that the only cracks that Mr. Sparry has referred to, were cracks in the Doctor's office. The evidence, therefore, would be immaterial.

Question withdrawn.

Q. You say that you went on two occasions to this house and examined the cracks; one one occasion you went through the rooms on the first floor and on the second occasion you went through the rooms on the second and attic floors? 30

A. Yes; that is to the best of my memory. I think the second floor at the time was in use; the family was in the house.

Q. Did you see cracks in this building?

A. Certainly.

Q. Were there an unusual number of cracks or only the ordinary number of cracks supposed to be found in a building of that kind at the seashore? 40

A. In two or three places there were an unusual number of cracks in certain spots, one in the living room cornice, there was a small plaster cornice running around the room and that was cracked at intervals of about eighteen inches. There was a partition in that place and very likely caused from some settlement of the wood partition.

Q. Outside of that place were there any more cracks in this plaster than you would ordinarily find in a building of that character, in the construction?

10 A. Well, I will make one other statement,—the Doctor's ceiling.

Q. Eliminating those two places were there any more cracks in the rest of the house than you would ordinarily find in a building of good construction—of that kind of construction?

A. Well, there were possibly two or three other places in the building.

Q. Where were they?

20 A. I think very likely from what those letters refer to, that is, wherever I found plaster that seemed to be soft.

Q. Now, then, you spoke of about four or five places?

A. Yes.

Q. Eliminating those four or five places, was there in this building any more cracks in the plaster than you would ordinarily find in a building of that kind of construction and material?

A. Not outside of those certain places.

30 Q. What would you say would have been a fair cost to have removed those cracks in all these places and made the plastering entirely whole?

Objected to because in the first place it is entirely speculative because he didn't make a complete examination and it is immaterial at any rate for the reason that it doesn't cover the entire job.

Q. Bearing in mind, I have asked you about the first, second and attic floors—what do you say, Mr. Sparry?

A. I should say somewhere in the neighborhood of \$150.

40 Q. Were you familiar with the prices of plastering at that time and of labor and material?

A. Yes, sir.

Q. What was the general appearance of the plastering in the house outside of these places where you have said there were a number of cracks? Was it good, bad, indifferent, or what?

A. The places that were cut, the samples from the wall, were perfectly smooth except in certain places where we worked near the cracks to find out what condition existed there—where we cut these samples the walls were perfectly smooth. 10

Q. Give me, if you will, a concise and responsive answer to this: Outside of these places where you saw the cracks, what would you say was the general appearance of the plaster; did it indicate good plaster, poor plaster, medium plaster, bad plaster, or what—outside of the places?

A. It indicated the ordinary job of plastering; it might be all right. There were certain rooms, certain white walls that had no cracks at all.

Q. Where it had no cracks at all, how did the plaster appear to your practiced eye, as good plaster or bad plaster? 20

A. Good plaster.

Q. Did you pass it as such?

A. I passed it as such.

Q. Do you know of any necessity or any reason for taking off all the walls and plastering of that house and replastering it?

A. I do not.

Q. Do you think it was necessary?

A. I do not. 30

Q. How would you have gone about it to have remedied the job as you saw it there?

A. I would have cut out those places that were defective, or the cracks, and I would have taken down that piece of cornice that I spoke of, and also all of the ceiling in the Doctor's office, in that room.

Q. Do you think that would have been according to good mechanical work?

A. Yes, sir; it could have been finished in proper shape.

Q. Why did you hold up the giving of the final certifi- 40

cate for several months after the building was practically completed?

A. Because it wasn't entirely completed, many little things to be done around there by Mr. Hughes, as the contractor, to complete his contract.

Q. And when you gave him the final certificate was or was not the building according to your best and honest judgment completed according to the plans and specifications in the contract?

10 A. When I issued the certificate, it certainly was.

Q. Did you give it to him in the honest belief that the work was done?

A. I did.

Q. Were you in any conspiracy or agreement with Hughes to give him this certificate although you did not believe the work was done according to the contract?

A. No.

RE-CROSS EXAMINATION BY MR. CARTON:

20

Q. Mr. Sparry, I suppose it is a fact that of course if you didn't think the job was completed you wouldn't have executed this certificate?

A. I certainly would not.

Q. It is also a fact, is it not, that after the issuing of this certificate that you did find these defective walls, patches, as you put it,—that is a fact too, isn't it?

A. Yes, sir.

30 Q. Had you known of these defects, the existence of them, you would not have given the certificate?

A. I would not.

Q. Those were defects that were not observable by you and not discovered by you until after the certificate had been issued?

A. Yes, sir.

Q. Now, when do you say it was when you made your last inspection of this house, Mr. Sparry, about what year or what month?

A. I really can't answer that question.

40 Q. Now, you have stated, Mr. Sparry, that in your judg-

ment it would cost about \$150 to fix these spots that you observed. Hasn't it been your experience that when you start to tear down old walls you don't know what it is going to cost, you can't tell what the cost will be until you actually do the work?

A. Yes; in the case of plastering, because you find loose plaster and take it as you find it and test it out.

Q. You say that you only saw cracks in certain walls. Would it be your idea to repair those cracks or seal them up by plastering over or put on new? 10

A. Depending upon the condition of the plaster. Some cracks would have to be done over. I remember a place on the back staircase, that was where it was also evidently from settlement, and that had a pressure and you could see where the white plaster lapped a little.

Q. It would also depend upon what you found after you started the work as to what the cost would be, would it not?

A. In making a statement as to the cost I am just roughing the number of yards that there might be. 20

Q. Just the number of yards and what it cost to put the plaster back there?

A. Yes.

Q. Not keeping in mind the protection of the furniture or the room nor what additional defects might be found in attempting to cure the defect discovered?

A. No; only I did include some costs as to that and also some profit, stating about the amount that we would really have to be paid there.

Q. You are not in the contracting business, are you? 30

A. No.

RE-DIRECT EXAMINATION BY JUDGE HEISLEY:

Q. These places where Doctor Wise took off the patches, I understood you to say they looked smooth before he took them off. Is that right?

A. Not all of the places because some of the patches were cut right next to cracks. 40

Q. What was the object, if you know, in cutting out some of the patches that were smooth?

A. Doctor suggested that he put them under a microscope, which he did in his laboratory.

Q. Was the plaster which he cut off a good plaster—would it have stayed there if he hadn't cut it off?

A. Oh, yes, in several cases; in three or four places probably it would not.

Q. You say that under the glass some of the sand appeared to be round, smooth sand. Was all the sand in the specimen under the glass smooth sand or only certain grains of the sand?

A. Only certain parts. I think probably, as I remember the samples, certain samples had more of that round sand than others—two or three.

Q. In your judgment was there any sea sand, or don't you know?

A. I really don't know, it is too hard to tell.

Q. I understand you to say out of nine or ten samples you only found three or four that had any of this round sand in it?

A. Yes, sir.

RE-CROSS EXAMINATION BY MR. CARTON:

Q. Mr. Sparry, what would you say was the cause of the poor quality of this plaster or lime, or including a mixture of lime, the defective plaster that you saw?

A. Why, that is pretty hard to answer. It might have been caused by the sand that I speak of or it might have been caused by either too much or too little lime. Pretty hard to say.

Q. That would very likely be the principal cause, would it not; not enough lime?

A. Not any more than too much.

Q. Have you had much experience from any trouble of too much lime or cement in the work?

A. It often happens in patches; yes, in almost any work, in cement work, it damages the work just as much, probably

a little more sometimes than if you didn't have enough.

Q. And such a composition could have been mixed and gotten in this job by Mr. Hughes without your observing it?

A. I wasn't a clerk of the works, only there at times.

Q. An inexperienced workman could have done that and put it on in such shape that you would not have observed it, and it would have caused this very trouble, would it not?

A. Do you mean in the places that I found?

Q. On the whole job; particularly the places you found?

A. Yes, possibly, that is very likely. Something happened in those places that we found. 10

RE-DIRECT EXAMINATION BY JUDGE HEISLEY:

Q. Of all the plaster that you found defective, there were only three or four samples?

A. Not exactly; if you take in consideration the cracks, there was more than that.

Q. A crack might be due to a settlement, might it not?

A. Yes. 20

Q. I want to know if it isn't true of all of the plaster you found which was defective or might be defective, would be those three or four out of eight or ten specimens which Doctor Wise cut out of the plaster; is that right?

A. Yes.

Q. And the defect of which you speak was simply that the sand, as far as you could see—some of the sand was smooth instead of being coarse, is that right?

A. Yes; sharp.

Q. You saw nothing wrong with the lime, did you? 30

A. No.

RE-CROSS EXAMINATION BY MR. CARTON:

Q. The fact is that the white or finish coat on this job was a good coat, was it not—that was a good job, was it not?

A. To all appearances, but where the cracking occurred that was damaged as well and where the settlements occurred.

Q. Was this cracking that you have in mind—do you 40

think that was due to a defect in the white coat or a defect in the scratch or brown coat?

A. Outside of one place, one room, I think it was the brown coat.

Q. Mr. Sparry, just look and see if these are the contracts and plans and specifications? (Papers shown to witness.)

A. Yes.

10 RE-DIRECT EXAMINATION BY JUDGE HEISLEY:

Q. What do you mean by saying or inferring that the scratch coat or brown coat was defective?

A. In the portions that we found damaged.

Q. What do you mean, damaged by what?

A. Where we found the cracking, really in the imperfect places, not the entire work.

20 Q. I want to know whether you mean to have the court and jury infer that you are saying that the brown coat, in quality and material was originally defective when placed on that house, the scratch coat, or whether you are simply speaking of cracks which occurred there through shrinkage or settlements?

A. I wouldn't like to say just exactly, and I don't think that could be settled under a chemical analysis.

Q. Have you any reason to believe, Mr. Sparry, that the brown coat or scratch coat in labor or material, was defective when it was put on there?

A. No; not to my knowledge when it was put on.

30

New Jersey Court of Errors and Appeals

Appeal from New Jersey Supreme Court

10

ISAAC DRUMMOND and LESTER WISE

Executors, etc.,
Plaintiffs-Appellants,

vs.

RICHARD H. HUGHES,

Defendant-Respondent.

ACTION AT LAW

Brief of Durand, Ivins & Carton
Counsel for Appellants.

20

Charles F. Wise, in his lifetime, contracted with the defendant Richard H. Hughes, a Long Branch contractor and builder, to erect for him a house on Morris Avenue, Long Branch, which contract included the mason work and plastering.

The plans and specifications were prepared by an architect, one Sparry, and the contract provided the work was to be done under his direction, and contained two provisions, to which attention is called, as follows: 30

Article 10. "It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials." (Printed case P. 10.)

40

“Responsibility” under the title “General Conditions,” which embody the specifications and which are made part of the original contract by its terms,—

“All contractors under these specifications agree to be held solely responsible for the faithful execution of the same and for any damages growing out of failure so to do; and no acceptance or approval through oversight, concealment or otherwise of any imperfect work or materials shall ever re-
10 lieve the contractor from such responsibility. Neither the owner, the superintendent nor the architect shall be held in any event to have assumed any responsibility in this matter.”
(Printed case P. 225.)

During the progress of the work, and before the completion of the building, cracks appeared in some of the walls, and some patches of plaster fell off, and also some of the ceilings fell (printed case p. 21), which Hughes, the builder, re-
placed.

20 The house was practically completed in the spring of 1912, and the contractor did not get his final certificate and payment until September of that year. During the interim there was a continuous dispute about the plaster; Dr. Wise insisting that the walls were defective, that cracks were showing, and patches dropping off, and that the work was not complete, and finally the mason Poole did some patching up, and the architect Sparry gave the final certificate for the payment of the balance of the contract price.

30 At the completion of the building, in September, 1912, a final certificate was given by the architect, and the contract price was paid. Some time after the completion of the work, and the final certificate of the architect and the payment of the contract price, further cracks appeared in the walls and patches of plaster fell, and a number of the ceilings fell, and upon an examination by an architect, one Green, of the walls, he reported they were defective; that the plaster was bad, the work improperly done, the walls had come loose from the lathing, and it was necessary, in his judgment, to remove the walls and replaster the house, which was done.

40 Before doing this work the plaintiffs called upon the de-

fendant to make good the defective work, which he refused to do, and after the walls were restored, under the direction of the architect Green, and the refusal of the defendant to pay for the same, this action was brought.

The evidence shows, that in the plastering of the house the work was defective, and the materials improper, and that the plastering had not been done in a good, substantial and workmanlike manner, with good and proper materials, as contemplated by the contract, and from the evidence for both plaintiffs and defendant, plaintiffs were entitled to a verdict 10
for something.

At the close of plaintiffs' case they had made out a case which entitled them to recover some damages, and the testimony of the defendant and his witnesses, Monroe V. Poole and George Poole, his son, and the architect Sparry, also showed that the plaintiffs were entitled to recover for something.

The defendant testified that in 1915 he went to the house at the solicitation of Dr. Wise, and went over it with Mr. George Poole, and that they saw there were certain cracks and defects in the plaster which they should repair, but that 20
there were additional cracks in the plaster due to the settlement of the house, which defendant insisted was not his fault, and which Poole wanted \$150.00 to repair. On page 177 he says:

"Mr. Poole went over it, and he agreed to do it for one-half the cost, and if I remember right Mr. Poole's figure of the entire cost was \$150."

Monroe V. Poole, the mason, was willing to repair his 30
work, but insisted that certain of the cracks were due to settlement, and estimated it would cost an additional \$50.00 to cover these cracks. (Printed case p. 201.)

George Poole, the son, testified \$150 would cover everything in his estimation, with what he would have done for nothing, that is, free of cost. (Printed case p. 206.) His language is:

"I said \$150 would put it in repair at the time I was there, including what I would do, what it would cost me to do 40

for nothing, which I offered to do. In other words, \$150 in my judgment at that time would put the job back, providing it didn't go no further."

The architect Sparry also testified that it would cost about \$150 to repair the walls, because of the defective plastering. (Printed case p. 252.) On page 241 he testified:

Q. Did you take up with Mr. Hughes after you learned
10 of Dr. Wise's claim, the matter of correcting these defects?

A. I did.

Q. Did he refuse to correct it?

A. I don't know, but as stated to me by Mr. Hughes he went to the building and examined the work with Mr. Poole and Mr. Poole suggested that there was more work to be done there in replacing this work than he claimed was his fault, and he wanted to be paid an additional amount at the time—I forget what the amount was—something in the neighborhood of a hundred dollars."

20

This testimony of the defendant Hughes, and the witnesses Poole and Sparry, shows they recognized there were defects in the walls which were the fault of the mason Poole, but they also claimed there were cracks due to the settling, not chargeable to him, and in order to restore the walls he required a payment to cover these defects which were not chargeable to him.

In view of this testimony the plaintiffs were entitled to a verdict for something, but the jury was influenced by the
30 erroneous charge of the court to render a verdict against them.

The plaintiffs, in replacing the walls, substituted for the three-coat plaster, a patented plaster or cement, and the court remarked that the plaintiffs had no right to substitute a patented plaster for a plaster provided for in the specifications.

On this point the court said, in the presence of the jury, on the motion to non-suit. (Printed case p. 135):

"I will say now in respect to your first point, I think it
40 is established, the fact that they have restored this work as

contemplated by the original contract, but they used a different method, namely, a patent cement. Assuming that to be true, assuming they establish a violation of this contract, at least they would be entitled to nominal damages. Of course I am inclined to agree with you that they cannot substitute a cement other than that originally contemplated by the plans and specifications. But in this event, holding the view that I do, that there is a prima facie case thus far made with respect to the failure to observe the provisions of the contract concerning the plastering, than I should be obliged to hold 10 that at least they were entitled to nominal damages for the breach."

and in his charge to the jury on this same question, the court said (page 227):

"It so happened that the new plaster was of a different character from that originally contemplated by the plans and specifications. In other words, it was what is known as patented plaster. And I say to you that the plaintiff had no 20 right under the law to substitute a patented plaster for the plaster which had been provided for in the plans and specifications. Therefore he could not recover, assuming you should find the preliminary question which I shall presently propound to you adversely to the defendant, the plaintiffs could not recover for the reasonable cost of the patented plaster, for the obvious reason, which will appeal undoubtedly to your common sense, that if the plaintiffs after discovering the alleged defect, in the plaster which had been used, concluded that the proper plaster to use was a patented plaster, which had 30 never been contemplated by the specifications, they could not adopt such a plaster and require the defendant to pay for it.

Therefore, gentlemen, the rule which applies is this: If there was defective work with respect to the plastering performed by the contractor, the defendant in this case, the plaintiffs were entitled to have that replaced with the plaster under the terms of the specifications in order to make the work good as contemplated by the original contract, and to be paid by the defendant or to claim of the defendant a reasonable sum for the expense so incurred." 40

The fallacy of these statements is too apparent to require discussion. The defendant had supposedly completed his contract. That part of the construction, the plastering was found defective in material, the defendant refused to replace or repair it, and the plaintiff removed the defective work. He was not required in doing this to put on the same kind of plaster, but could only recover for what replacing the defective plaster by the same kind would cost. If he saw fit to put on a more expensive plaster, he could not charge defendant with the excess in cost. The situation presented was not that which arises when a contractor undertakes to erect a building and abandons it during the course of construction and the owner is forced to complete it. Under such circumstances, he might be required to complete it with the materials in the manner provided for by the specifications. The plaintiffs in this case undoubtedly had the right to use some other kind of plaster in restoring the walls and the charge of the court in the respect indicated in words amounting almost to a direction, was clearly erroneous and upon a very material and substantial question, and undoubtedly influenced the jury in arriving at their verdict adversely to the plaintiff, and is reversible error.

The trial judge also erred in his construction of the provision in the contract, that the contractor should provide an "approved brand of lime." The defendant taking the view, and the court holding, that the approved brand of lime contemplated in the contract was the brand of lime approved by the architect, instead of an "approved brand of lime" or "brand approved in the trade," and that a brand of lime which was not an approved brand or a brand approved in the trade, or a defective brand if approved by the architect, would absolve the defendant from liability for defective material in the construction of the walls.

The provision in the contract was a general provision used in all building contracts calling for an approved brand of lime such as is a brand approved in the trade, thereby calling upon the contractor to provide a proper or first-class material for the construction of the work. The duty of the architect was only to see that such approved brand was furnished as called for by the contract.

The court also charged the jury that cracks are not inconsistent with a good and workmanlike job. The testimony in the case is, and it is also common knowledge, that cracks in walls are indicative of defects, in this case of serious defects, and the evidence in this case is that when the cracks first showed, the mason Poole went back and pointed them up, he and the defendant both recognized then and later that the cracks in the walls in plaintiffs' house were defects in the walls, such defects as required repairing.

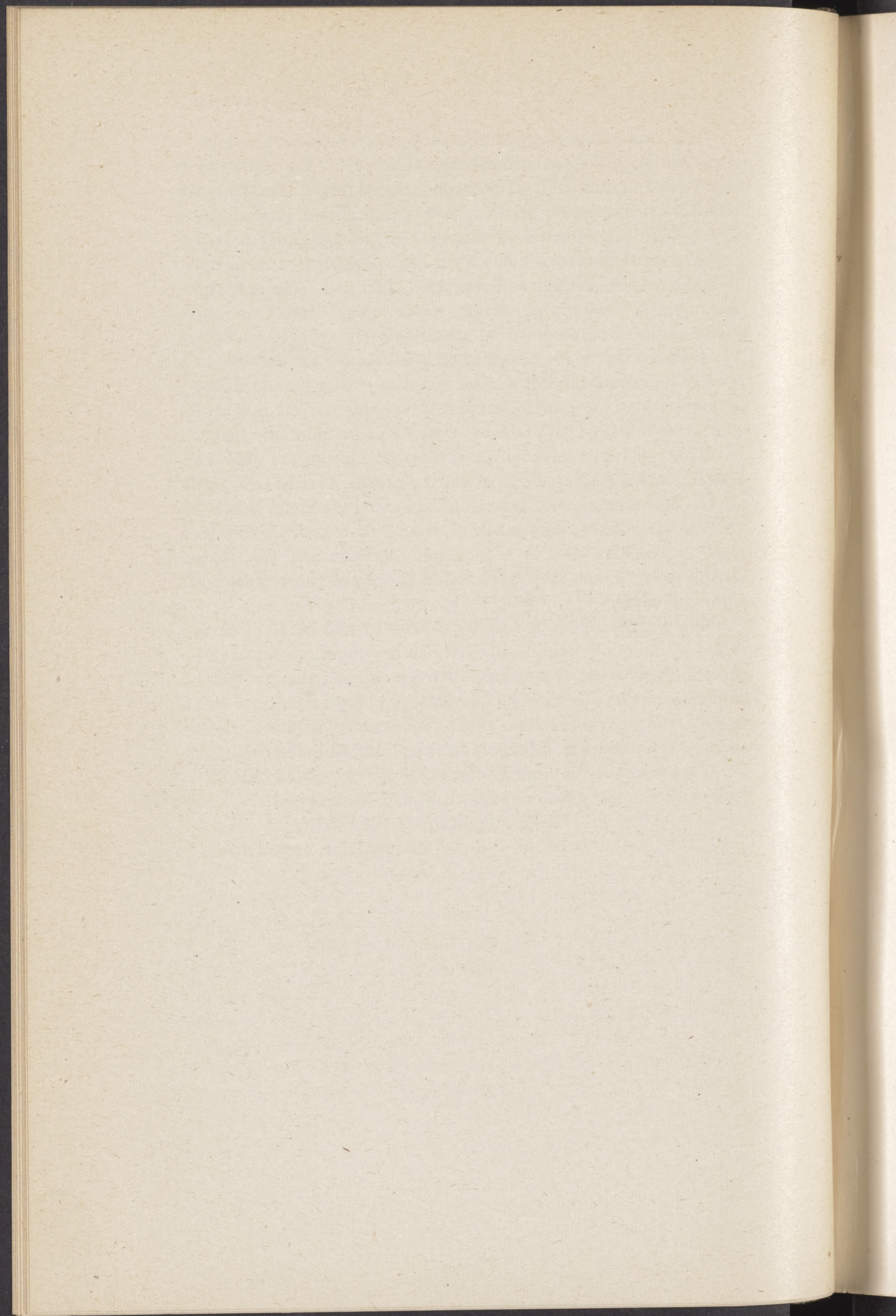
In many cases they are not only indicative of defects in the walls or material, but show a loosening from the lath, and they are one of the positive evidences showing defects in walls. The charge of the court in this respect was undoubtedly error. 10

The court also erred in omitting to charge the jury in connection with his remarks about the cracks, that in this particular house patches of the walls had fallen, which, in connection with the cracks spoken of, would show that the cracks were not consistent with a good and workmanlike job, and that in many places they were followed by the patches falling from the walls. 20

The portions of the Judge's charge to which attention is called, comment upon questions which are the very basis of the plaintiffs' right to maintain their action, and the erroneous instructions given influenced the jury to bring in their verdict against the plaintiffs. The charge was erroneous in the respects indicated; was injurious to the plaintiffs, influenced the verdict against them, and it is respectfully submitted that the judgment for the reasons assigned should be reversed.

DURAND, IVINS & CARTON,

Counsel for Appellants. 30



New Jersey Court of Errors and Appeals

ISAAC DRUMMOND and LESTER WISE, Executors, etc., <i>Plaintiffs-Appellants,</i>	}	<i>Action at Law.</i>
<i>vs.</i>		
RICHARD H. HUGHES, <i>Defendant-Respondent.</i>	}	

Brief of Defendant-Respondent.

History.

By a contract dated January 30th, 1911, Charles F. Wise, who in this suit is represented by his executors, Messrs. Drummond and Wise, made a building contract with Hughes for the furnishing and doing of certain mason work and plastering on a new house at Long Branch. On September 5th, 1911, Charles F. Wise deceased. His family moved into the house, the latter part of 1911 (see l. 12, p. 20), but before the house was entirely completed, which was in June, 1912 (p. 20, l. 20; p. 154, l. 13). The architect issued his final certificate, dated September 28th, 1912 (p. 152, l. 8), to Hughes, certifying that there was due Hughes \$1,702.50, which was paid by the executors of Wise October 9th, 1912 (p. 152, l. 12). In 1915 (p. 31, l. 25) the executors being dissatisfied (p. 28, l. 19) caused all the plastering throughout the entire house to be removed, and another kind of plaster put on, alleging that the walls had cracked and the plaster had fallen off to such an extent that this course of procedure was necessary, although it is to be noted (p. 24, l. 20) that in 1912 the executors say

that the plastering "seemed to be all right; seemed to be in first-class condition." The plaintiffs say the reasonable cost of this work was the sum of \$4,227.28, although the original plastering, according to the terms of the contract, was sublet and done for the sum of \$1,189.80, which allowed the sub-contractor a profit of ten per cent. (p. 190, l. 39 and 191, l. 21).

Plaintiffs say (bottom of p. 31 and top of 32), that they had complained to the architect about these walls before the issuance of the final certificate and making of the final payment. Yet with full knowledge, they paid the \$1,700 (p. 33, l. 20).

The answer to all the plaintiffs' contentions is that under the terms of the contract, Hughes was obliged (p. 7, l. 30) to do everything the architect directed; that the architect was the supreme and final arbiter (p. 8, l. 22); that no material or work was furnished for the job excepting such as was called for by the contract and approved by the architect (p. 187, l. 30; p. 188, l. 25; p. 237, ll. 30 to 40; p. 238 top; 248; p. 143, l. 30; p. 144, l. 15; p. 145, l. 17; p. 146, l. 16; p. 146, l. 19; p. 146, l. 36); that only some of the walls cracked, and that where the cracking or falling of plastering was serious, it was due to the fact that a supporting timber or girder was of insufficient strength to sustain the load it was designed to carry (pp. 72-73-147, l. 27; p. 149, ll. 17 to 30; p. 186, l. 20; p. 203; p. 147, l. 11; p. 149, l. 8; p. 176; p. 183, l. 22), but that this timber or girder was in strict compliance with the one specified in the specifications, and was put in under the direction and approval of the architect (p. 39, l. 20); that under the terms of the contract, the final certificate was to be "conclusive proof" of the strict compliance

with and performance by the contractor of the provisions of the contract (p. 10, l. 40) and that such certificate was issued and accepted (p. 239) and the final payment made, with full knowledge upon the part of the owners of the presence of the cracks of which they now complain (p. 32, l. 17), and that therefore, the payment having been made voluntarily, it may not be recovered back. Nor may plaintiffs recover anything for damages in connection with the work included in such payment.

The certificate was given honestly (p. 254, l. 6).

A verdict was rendered in favor of the defendant, declaring that the plaintiffs had no cause of action.

The plaintiffs, among other things, allege in their brief (p. 5), that the Court in its charge erred in defining the measure of damages, especially in dealing with the fact that the plaintiffs had replastered the house with a *patented plaster* instead of that called for by the contract with Hughes, in effect saying that the plaintiffs *could not recover the reasonable cost of the "patented plaster,"* p. 5 of brief, l. 26. This was literally true, and at the bottom of that page the Court says in effect that the defendant should be charged a sum *representing* what it would cost to put on the *kind of plaster mentioned in the Hughes contract.*

This matter was brought to the attention of the jury so frequently during the trial that there could be no misapprehension on its part that the judge meant to say and did say, that while the defendant could not be made to pay for a "patented plaster," he should be charged (if at fault), with the cost or value of replastering

with the kind specified in the Hughes contract, and we refer the Court to various portions of the state of the case in proof of this assertion. See p. 140; p. 139, l. 10; p. 137, l. 19; where the Court deals expressly with the subject. See Court's charge, p. 227, l. 30; and top of p. 228. See particularly p. 229, ll. 20 to 25; p. 230, l. 27.

THE PLAINTIFFS ALSO COMPLAIN that the Court erred, see p. 6 of plaintiffs' brief, l. 23, in its definition of "approved brand" of lime.

The part of the charge dealing with this subject is found on p. 229, l. 25, where we think the Court correctly stated the law, because who beside the architect was to determine what was an "approved brand of lime"? It was to be a brand or kind of lime which was to be approved by the architect, and under the terms of the contract, see paragraph 4, p. 8, defendant was obliged to follow the architect's decision on the quality of lime, as well as the quality of all other materials. He was placed in this position by a contract prepared by the plaintiffs, in which they selected a person, viz., the architect, whose decision was to be absolutely binding upon Hughes, and the evidence shows beyond all question that this lime was known as "Rockland," and that it was purchased by the express direction of the architect who insisted upon having this particular kind of lime.

Complaint is also made, see p. 7 of plaintiffs' brief, that the Court erred in saying in effect that cracks are not inconsistent with a good and workmanlike job. The Court's comments upon such subject is found at p. 228, l. 12, in its charge, in which it was left to the jury to determine whether these cracks were the ordinary and usual cracks, or were evidence of defective workmanship and material.

See also p. 231, l. 22; p. 234, l. 14, where the jury was distinctly told it was not to be bound by his opinion as to the significance of cracks. Therefore, we say on this subject the plaintiffs were not harmed.

The allegation of neglect in the condition of this work was fairly left to the jury, and upon the evidence it found in favor of the defendant, and therefore, the judgment should be affirmed.

But we think if there could be any doubt about the correctness of the rulings of the trial Court, that the judgment should be affirmed for the reason that by Article 10 of the Contract, under which the work was done, it was provided that the final certificate which the defendant secured from the architect "*was conclusive evidence of the performance of the contract.*"

Our proposition is that as a matter of law, the parties to this contract mutually agreed that the architect Sparry should have the entire charge of the work. He was to construe the drawings and specifications (See Article 2 of the contract, which is found on p. 7 of the state of the case).

By Article 3 he was given the sole authority to order alterations.

By Article 4 he was given sweeping power to condemn material furnished by the contractor.

By Article 9 it was provided that payments were to be made to the extent of eighty per cent. of the value of the work done, which was to be estimated and certified by the architect, and that all payments should be due when the certificates were issued, *excepting that the final payment*, see p. 10, l. 26, should be made within ten days after the completion of the work.

By Article 10, found at the bottom of p. 10 of the state of the case, it is stated "it is further mutually agreed between the parties hereto that no certificate given, or payment made under this contract, *except the final certificate, or final payment*, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no *payment* shall be construed to be an acceptance of defective work or improper materials."

We have used italics for the words upon which we desire to lay especial emphasis.

We urge that this 10th Article says that the final certificate or the final payment, or both of them, should be *conclusive evidence* of the performance of the contract; that the balance of the clause saying that no payment shall be construed, etc., relates to "payments" only, and not to the final certificate, and when it says no payment shall be construed to be an acceptance of defective work, it does not refer to the final payment, but refers to the *intermediate payments* mentioned in Article 9 where it is expressly stated "that all payments shall be due when certificates for the same are issued."

We urge that to place any other construction upon this Article 10, is to say that there never was intended by the parties to be a *final certificate*, which would be conclusive evidence. That to hold that the latter part of Article 10 saying no payment shall be construed to be an acceptance, applies to the final payment or the final certificate, is to render meaningless all the previous language in Article 10, doing violence to the well-known canon of construction that if possible, the contract shall be construed so as to give effect to all and every part of it.

It is inconceivable that any builder could be induced to sign a contract in which he would agree, as he did in this, under Article 2, that the work is "to be done under the direction of the architect"—where he makes his judgment absolutely subordinate to that of an architect of the owners' choosing—where he agrees to accept without dispute or questioning, the direction of the architect—and yet never provide for the final termination of his responsibility.

Is it conceivable that a reasonable person, and will this Court assume that reasonable persons would contract in such way, that they would be absolutely under the dominion of the representative of the owner and yet never provide a means of determining their responsibility?

We respectfully urge that the final certificate was designed by the parties to be exactly what the language of paragraph 10 says it shall be, namely, "conclusive evidence of the performance of this contract." It may well be that during the construction of this building, defects would creep into it which would not be obvious at the time of the issuing of the intermediate certificates, and making of the intermediate payments, and it was wise to say that no such payments should be construed as an acceptance, but it would be nonsense to say that after the property was turned over to the owner and accepted by him, approved by the architect and a final certificate given, that that final certificate should be given only the force of the intermediate certificates mentioned in par. 9.

In this case, the owners occupied the house in June, 1912; the final certificate was given the 28th of September, and a couple of weeks later they paid the balance called for by the certificate. It is true that there had been some dis-

cussion as to the condition of the plastering, but it shows conclusively that when the final payment was made, it was made with full knowledge of the true situation. There was no concealment of facts; there was no mistake of facts; the payment was voluntary, and even if the certificate did not possess the conclusive character for which we contend, that a payment under such circumstances was voluntary and may not be recovered back, and we think by analogy neither can the owner recover for the expense he undergoes in an attempt to correct or change the subject of the voluntary payment.

Unfortunately, the appellants have not printed the "General Conditions" which were attached to and formed a part of this contract, and which would show the practically unlimited power of this architect.

We respectfully refer the Court on the legal effect to be given Article 10, to the following cases:

Anderson v. Oddfellows, 1 Gummere, 275;
Welsh v. Hubschmidt Co., 32 Vr., 65;
Gerrish v. Herald, 53 Vr., 605;
6 Cyc., page 40,

and also to the Court of Errors and Appeals case of

Ferber Construction Co. v. Board of Education, etc., 100 Atl. Rep., page 329,

where this identical language of par. 10 is construed, and at page 331 where in speaking of this particular clause (because we have seen the state of the case, and it is identical with the clause we are now discussing), the Court says, "a perusal of the provisions of the contract in question discloses that thereby the architect had

power, by his certificate, to determine conclusively that the contract had been completed.”

In the case at bar, the architect did so determine, after months of delay, and the owners thereafter, without any hesitation or complaint, honored that certificate by paying it. There is not the slightest evidence that the certificate was obtained by fraud or deception. It was the deliberate, unrestricted act of the arbiter, selected by the parties to this contract, and it would be a strange situation if after these owners had accepted the property, recognized the certificate, made the final payment, could live in this house from 1912 to 1915 and then rip off its entire interior and hold Hughes responsible.

To do so would mean that there never should come a time when the contractor who did the work, who furnished the material absolutely under the direction of the architect, could ever be relieved of responsibility.

Therefore, we earnestly urge in the first instance that the trial Court erred in submitting the question of fact to the jury; that it should have non-suited the plaintiff upon the proof of the issuance of the final certificate, but after having failed so to do, it submitted the case to the jury, upon its merits, regardless of the certificate, and upon that issue, the jury found for the defendant.

We respectfully urge that the plaintiffs have been most considerately treated by the trial Court; no error prejudicial to them was committed, and therefore this judgment should be affirmed.

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