INDEX

Supreme Court

of the

State of New Jersey

ESSEX COUNTY CIRCUIT COURT

ANTONIO GRANDI and FRANCESCO CRISCITELLI, Plaintiffs, vs. NICOLA BRUNETTI, Defendant.	On Mechanics Lien.

Notice of Appeal

(Filed, Oct. 5, 1916)

To Themistocles Mancusi-Ungaro, Esq., Attorney of Plaintiffs:

SIR:

Take notice that the defendant, Nicola Brunetti, hereby appeals to the New Jersey Supreme Court from the whole judgment of the Essex County Circuit Court rendered in the above stated action on the nineteenth day of September, Nineteen hundred and sixteen.

September 27th, 1916.

GAETANO M. BELFATTO,
Attorney of Defendants.

Summons

(Filed, January 18, 1914)

The State of New Jersey, To Nicola Brunetti:

You, Nicola Brunetti, builder and Owner, are summoned to answer the annexed complaint of Antonio Grandi and Francesco Criscitelli, the claimants in an action at law in the Circuit Court in and for the County of Essex, in which said Antonio Grandi and Francesco Criscitelli claim a building lien on certain buildings and lands of you, the said Nicola Brunetti, described in said complaint.

(Seal)

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

WITNESS, Frederic Adams, Judge of the said Circuit Court in and for the County of Essex, N. J., at Newark this Thirteenth day of January, nineteen hundred and fifteen.

JOSEPH McDONOUGH,
Clerk.

T. Mancusi Ungaro,
Attorney.

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

Daniel Demarest, Jr., Special Deputy Sheriff of the County aforesaid, being duly sworn, on his oath deposes and says that on the 15th day of

Jan., A. D., 1915, he delivered personally to the defendant, Nicola Brunetti, a true copy of the within summons and complaint, with a ten days' notice endorsed thereon.

DANIEL DEMAREST, JR.,
Special Deputy.

Subscribed and sworn to, this
15th day of January, A. D., 1915.
Alfred N. Dalrymple,
Master in Chancery of N. J.

Complaint

ESSEX COUNTY CIRCUIT COURT

ANTONIO GRANDI and FRANCESCO CRISCITELLI, Claimants, vs. NICOLA BRUNETTI, Builder and Owner.	On Mechanics Lien.

The plaintiffs residing in the City of Newark, County of Essex and State of New Jersey, claim from the defendant the sum of Ten Thousand Dollars due them as follows:

1. On May 11, 1914, the plaintiffs and the defendant executed a written contract, whereby the plaintiffs agreed to construct a building for the defendant in the City of Newark, of the kind and upon the terms mentioned in said contract, a copy

of which said contract is hereby attached and forms a part hereof, and which said building is on lands situate in the City of Newark, County of Essex and State of New Jersey, more particularly described as follows:

BEGINNING on the Northeasterly side of Bloomfield Avenue at the southeasterly corner of land now or formerly belonging to John R. Arbuthnot, thence running (1) Southeasterly along Bloomfield Avenue twenty-five feet; thence (2) Northeasterly parallel with the line of said Arbuthnot's land one hundred and eight feet and six inches more or less to the rear line of lots fronting on Rowland Street; thence (3) Northerly along the same twenty-three feet and nine inches more or less to the Northerly line of Lot No. 44 on the map of the Peter Mead property, in the Eighth Ward of the City of Newark; thence (4) Westerly along the said lot line twelve feet six inches to said Arbuthnot's land, thence (5) along his line southwesterly one hundred and seventeen feet and two inches more or less to the place of Beginning.

2. Thereafter and before the 31st day of October, 1914, plaintiffs duly performed all the conditons of the contract on their part, and also at the request of the defendant they furnished materials and did other work not included in said contract, a list of which said extra work and materials is also hereto attached and forms a part hereof, for which defendant promised to pay the amount of money as therein specified, in addition to the price named in said contract.

3. A reasonable payment to be made in ad-

dition to the price named in said contract for all the extra work and material, is $1398.36.

4. On the 31st day of October, 1914, and several times afterwards and before the commencement of this suit, and prior to the filing of the said lien, plaintiffs duly demanded of the defendant the sum of $4000.00 being the balance due on said contract, and also the said sum of $1398.36 for extra work a total of $5398.36.

5. No part of said sum so demanded has been paid.

6. The said debt is a lien upon said building and lands by virtue of the provisions of an Act entitled "an Act to secure to mechanics and others payment for their labor and materials in erecting any building."

7. On December 2, 1914, plaintiffs filed their claim of lien in the office of the Clerk of the County of Essex against the building and lands above described, to enforce which lien claim this action is brought.

The plaintiffs demand damages in the sum of $5398.36 together with interest and costs of suit.

THEMISTOCLES MANCUSI UNGARO,
Attorney of Plff.

Contract

Annexed to complaint

AGREEMENT FOR BUILDING

(Copy)

THIS AGREEMENT, made on the eleventh day of May in the year of Our Lord, one thousand nine hundred and fourteen, BETWEEN,

NICOLA BRUNETTI of the City of Newark, County of Essex and State of New Jersey party of the first part; and

ANTONIO GRANDI AND FRANCESCO CRISCITELLI of the City of Newark, County of Essex and State of New Jersey party of the second part:

WITNESSETH, FIRST, the said party of the second part do hereby for themselves, their heirs, executors and administrators, covenant, promise and agree to and with the said party of the first part, his heirs, executors, administrators or assigns that said party of the second part their heirs, executors, administrators or assigns, shall and will for the consideration hereinafter mentioned on or before the first day of October, 1914, well and sufficiently erect and finish the new brick building at No. 45 Bloomfield Ave., Newark, N. J., agreeably to the drawings and specifications made by Manfredi Mancusi Ungaro, Civil Engineer and Architect and signed by the said parties and hereunto annexed, within the time aforesaid, in a good workmanlike and substantial manner, under the direction of the said architect to be testified by a writing or certificate under the hand of the said architect as hereinafter mentioned, and also, shall

and will find and provide such good, proper and sufficient materials of all kinds whatsoever as shall be proper and sufficient for the completing and finishing of all the general works of the said Building mentioned in the plans and specifications for the sum of Twelve thousand dollars ($12,000).

And the said party of the first part does hereby for himself, his heirs, executors, and administrators, covenant promise and agree to and with the said party of the second part, themselves, their executors and administrators that he the said party of the first part, his executors and administrators shall and will, in consideration of the covenants and agreements being strictly performed and kept by the said party of the second part as specified, well and truly pay or cause to be paid unto the said party of the second part their executors, administrators or assigns the sum of twelve thousand dollars ($12000.00) lawful money of the United States of America, in manner following:

First Payment: When first story walls are up and second tier of beams is laid one thousand dollars	$1000.00
Second Payment: When roof is on, one thousand eight hundred dollars..	1800.00
Third Payment: When plumber is thru with the roughing, when floors are laid and partitions are set One thousand seven hundred dollars	1700.00
Fourth Payment: When electric wires are all tested, brown and white coats of plaster are on and plumbing fixtures are on the job, Two thousand dollars	2000.00

FIFTH PAYMENT: When trim is on and fixtures are set One thousand five hundred dollars	1500.00
SIXTH AND FINAL PAYMENT: When house is completed and accepted by proper authorities owner and architect Four thousand dollars	4000.00
	$12000.00

It is hereby agreed and understood that the party of the second part will furnish and set in place a Boynton square pot boiler and proper radiators for first floor only. Also they are to place a coal chute where desired by architect and that all the beams and glass of the old house are to be left by the owner.

PROVIDED, that in each of the said cases a certificate shall be produced, signed by the said architect to the effect that the work is done in accordance with said drawings and specifications, said certificate, however, in no way lessening the total and final responsibility of the contract neither shall it exempt the contractor from liability to replace work if it be afterwards discovered to have been done ill or not according to the drawings and specifications, either in execution or materials.

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

FIRST: The architect shall furnish the contractor all drawings or explanation of drawings as may be necessary to illustrate the work to be done, and the contractor shall conform to the same

as part of this contract, so far as they may be considered with the original drawings and specifications and all plans must be furnished to the contractor at the time of signing contract.

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

THIRD: Should the owner at any time during the progress of the said building request any alterations, deviations, additions or ommissions from the said contract, he shall be at liberty to do so, and the same shall in no way affect or make void the contract, but will be added or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation.

FOURTH: Should the contractor at any time during the progress of said work, refuse or neglect to supply a sufficiency of materials or workmen, the owner shall have power to provide materials and workmen, after three days' notice in writing being given, to finish the said works, and the expense shall be deducted from the amount of the contract.

FIFTH: Should any dispute arise respecting the true construction of meaning of the drawings or specifications, the same shall be decided by architect, and his decision shall be final and conclusive, but should any dispute arise respecting the true value of the extra work, or of the work omitted, the same shall be valued by two competent persons, one employed by the owner, and the

other by the contractor, and those two shall have power to name an umpire whose decision shall be binding on all parties.

SIXTH: The owner shall not in any manner, be answerable or accountable for any loss or damage that shall or may happen to the said work, or any part or parts thereof respectively or for any of the materials or other things, used and employed in finishing and completing the same.

SEVENTH: No alterations or extra work shall be done without a written order from the owner, approved by the architect and an express agreement in writing as to the cost.

EIGHTH: The owner will insure the building in the joint names and interest of owner and contractors against loss or damage by fire, in such sums as may from time to time be agreed upon with the contractor to cover work and materials used in the building and around the premises, and the policies to be made payable to owner and contractor, as their interest may appear. The contractor shall see to it that this insurance is satisfactorily effected.

NINTH: All work and material delivered on the premises to form part of the work, whether actually incorporated therein or not, are to be considered the property of the contractor until the same shall have been paid for, in accordance with the terms hereof, unless said contractor shall, after receiving a payment thereon, have refused to proceed with the work in accordance with the terms of this contract. And the contractor shall have free access at all reasonable times to the said

material and to the said work until the same shall have been fully paid for as provided for by this contract. The contractor shall remove all surplus material after the completion of the work.

TENTH: Neither the contractor nor the architect shall without the written consent of the owner, have authority to vary, alter amend or change this contract or any of the plans or specifications herein referred to.

ELEVENTH: Whenever building permits shall be required by any municipality, or be necessary under by law, ordinance or other regulation, to the erection alteration or repair of any building, the same shall be procured by the owner.

TWELFTH: In case this contract or a duplicate thereof, together with the specifications accompanying the same or a copy or copies thereof, be not filed in the office of the clerk of the county in which the above mentioned building is situated before any work is done or materials furnished for said building, then and in that case the said contractor shall produce and deliver to the owner the release of all persons who may then have furnished materials or done work on said building, who may have a lien on such building and the land wherein the same is erected, releasing their lien on said building and the land whereon the same is erected with an affidavit by said contractor thereto annexed, that no person or persons other than those named in said release have any lien upon such building on land for work done or material furnished for the erection thereof according to statue in such case made and provided.
words erased before signing.

In Witness Whereof, the said parties to these presents have set their hands and seals the day and year above written.

NICOLA BRUNETTI.
GRANDI ANTONIO.
FRANCESCO CRISCITELLI.

Signed, sealed and delivered
in the presence of

Statement of Extra Work

Extra Concrete

Footing course 32 yards. Stairway to west inner court, 3 yds. total..35 yds., @ $7 per yd. 245.00

Extra Brickwork

Wall in cellar 20′ 0″ x 12″ x 9′ 0″. 3780 bricks. Basement made 1′ 0″ higher 100 lin ft. wall 2800 bricks, Parapet wall 1′ 0″ higher all around 2100 bricks, stairway to west inner court, 900 bricks; Rear stairway—200 bricks, change in front stairway—1500 bricks total 11280 bricks @ $22 248.16

22 yards of plaster @ 60¢ 13.20

Extra Fill in Yard

71 yards @ $1.00 per yd. 71.00

Extra Stone

Six front steps, five steps in west court 15.00

Extra Cement

By changing front stairway 5.00

Extra Steel

Including enlargement of rear piazza. Vault light in front and railing at front stairway 200.00

EXTRA CARPENTER WORK	
35 beams changed from 2x10 to 3x10	23.00
One sash door and frame in cellar	13.00
Two Cypress doors and frames in brick partition in cellar	24.00
One sash door with plate glass in basement store front	44.00
Two fireproof doors in cellar	15.00
Two extra coal bins	12.00
Two extra birch doors on 1st floor	26.00
Extra trim in dining room	5.00
PLUMBER'S EXTRA	
Chandeliers as ordered by owner	200.00
Basin in store toilet as ordered by Board of Health. Sink cellar ordered by owner	25.00
Roughing for urinals in store toilet ..	12.00
Changing wash trays and sinks as ordered	60.00
16 extra stops @ $4.00	64.00
Extra gas lights as ordered by Owner	10.00
Building department permit	23.00
Survey	10.00
Total of Extra work	$1398.36

Affidavit of Defense

(Filed, Jan. 22, 1915)

ESSEX COUNTY CIRCUIT COURT

ANTONIO GRANDI and FRANCESCO CRISCITELLI, Claimants, vs. NICOLA BRUNETTI, Builder and Owner.	On Mechanic Lien. Affidavit of Merits.

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

Nicola Brunetti, being duly sworn on his oath, says that he is the defendant in the above stated cause, and that he believes that he has a just and legal defense to said action on the merits of the case.

NICOLA BRUNETTI.

Sworn to and subscribed before me, this twenty-second day of January, nineteen hundred and fifteen.

Gaetano M. Belfatto,
Master in Chancery of New Jersey.

Joseph McDonough,
Clerk.

Answer

(Filed, Jan. 29, 1915)

ESSEX COUNTY CIRCUIT COURT

ANTONIO GRANDI and FRANCESCO CRISCITELLI, Claimants, vs. NICOLA BRUNETTI, Builder and Owner.	On Mechanic Lien.

Defendant residing at 45 Bloomfield Avenue, in the City of Newark, County of Essex and State of New Jersey says that:

1. He admits the first paragraph.
2. He denies the second paragraph.
3. He denies the third paragraph.
4. He denies the fourth paragraph.
5. He admits the fifth paragraph.
6. He denies the sixth paragraph.
7. He admits the seventh paragraph.

DEFENSE

1. The plaintiffs and the defendant on the 11th day of May, 1914, entered into a written agreement whereby the plaintiffs in consideration of the sum of $12,000 to be paid them by defendant in manner as in said agreement set forth, agreed to do all the work and furnish all the materials for the erection and construction of a four story brick building at No. 45 Bloomfield Avenue, New-

ark, N. J., in a good workmanlike and substantial manner and according to the plans and specifications made by Manfredi Mancusi Ungaro, architect under the direction of, and to be certified in writing by said architect. Said building to be completed on or before October first, 1914.

2. That after the execution of said contract plaintiffs entered into the performance of work at said building but totally failed to build said building in a substantial and workmanlike manner and according to the terms of said contract, plans and specifications, for the following reasons:

1. Twenty-one inches more fill on rear of building to make 5′ 0″ to top of beams in order to meet requirements. About thirty yards of earth needed.

2. Door to cellar at the foot of stairs is left out entirely.

3. Front area stairs not made properly.

4. Ventilating pipe in front area should be changed.

5. Damp proofing around walls left out.

6. Cellar in the rear of basement store is 7′ 6″ instead of 7′ 3″.

7. Water table broken off and pieced out.

8. Iron beams in cellar substituted by brick wall making store smaller.

9. Switch board should not cover chimney flue in basement.

10. Soil pipes in basement not boxed in.

Answer

11. Trim and doors in basement very rough, plain heads used instead of cabinet heads.

12. Hand rail of cellar stairs left out.

13. Front of building not washed down properly.

14. Fitting on brass rail on front left out.

15. Metal cornice work very improperly done.

16. Brick work behind ranges not washed.

17. Picture moulding in kitchens only partly done.

18. Bathroom in first floor front too small.

19. Brick pilaster in bathroom should be removed.

20. Front area step is of concrete instead of blue stone.

21. Blue stone sills are 3″ instead of 5″.

22. Ten-inch blue stone lintels to all rear doors left out.

23. Chimney caps are 2 1/2″ instead of 4″.

24. Joints of lime stone coping spauld on top not properly done.

25. Scuttle and iron ladder on porch roof left out.

26. Keens cement in kitchens marked off to imitate tile left out.

27. Tile work in baths not complete, defectively done.

28. Sanitary base parts missing.

Answer

29. Covers of cleanouts pits with blue stone left out.

30. Mesh to louvres left out.

31. Metal doors to entrance between ceiling rafters and roof beams not hung.

32. Angle iron frames to dumb waiters left out.

33. Wire netting in dumb waiter shaft for top and bottom not put on.

34. Springs to dumb waiter doors are not self closing and latches are missing.

35. Two bolts on bulkhead door left out.

36. Bulkheads are of brick instead of metal.

37. Chair rails are incomplete and very crooked.

38. No steps shown on first floor stair.

39. China closets left out.

40. Newels are turned, instead of built up.

41. Hardware in very bad condition.

42. Shelves for gas meters or electric meters left out.

43. Two-inch covers for traps and pits, left out.

44. Door knobs of inferior quality, some are loose and others off.

45. No brackets to dining room plate rack put on.

46. Morticed bolts to all hall doors left out. Eleven doors.

Answer

47. Beam ceiling in dining rooms left out.

48. All broken glass to be replaced.

49. Wooden columns are not plumb, bases too small.

50. One shelf in clothes closets instead of two.

51. Pilaster should be 5′ with cap moulding, only 4′.

52. Fence in 5′ 0″ without cap moulding, should be 6′ 0″ with cap moulding.

53. Casings where lavatories are placed to be repaired.

54. Cornice on rear gutter is wood instead of galvanized iron.

55. Only five hooks in clothes closets instead of eight, and wood hanging strip in each, missing.

56. Cap moulding to basement trim not on.

57. Leaders are of galvanized iron instead of cast iron.

58. Flashings are of felt instead of galvanized iron.

59. Only one riser for all apartments instead of separate riser for each apartment.

60. Smoke pipe should have damper.

61. Range is 268 E instead of 682 R. & B.

62. See imperial waste for 5′ Bath stand, Meno Bath.

63. No nickel plated supply put on in bathroom.

Answer

64. Floor plates to risers for steam pipes left out.

65. No pipe covering to steam pipes.

66. Pipes in first floor bath should be against wall.

67. Wash tray should be changed so door can open straight.

68. Gas range outlet should be changed so it can be used.

69. Stove pipes defectively put up.

70. Tanks in toilets leak.

71. Wash bowls should be set against wall.

72. Rear porch leader should be connected to sewer.

73. Ventilating pipe only 10″ above roof, should be at least 3′.

74. Areaways and iron gratings to cellar windows left out.

75. To lower floor on first floor of building to make it level with street.

76. Step to first floor store is not shown on specifications and it cannot be removed.

77. Rear porch flags are steel plate instead of reinforced concrete.

78. 5/8″ tap put in instead of 1″ tap.

79. Medicine chest in bath rooms left out.

80. Fire escapes not properly put in.

3. That on or about the 16th day of October, 1914, the defendant notified the plaintiffs, that the work at said building had not been done according to the terms of said contract plans and specifications, and requested them to proceed with the work and correct all the defects and supply all the omissions existing in said building, but plaintiffs refused and still refuse so to do.

4. Defendant paid the plaintiffs the first, second, third, fourth and fifth payments amounting in all to $8,000, on account of said contract.

GAETANO M. BELFATTO,
Attorney of Defendant.

Joseph McDonough,
Clerk.

Rule of Reference

(Filed, February 4, 1916)

ESSEX COUNTY CIRCUIT COURT

ANTONIO GRANDI and FRANCESCO CRISCITELLI, Claimants, vs. NICOLA BRUNETTI, Builder & Owner.	On Mechanic's Lien.

The above entitled cause being regularly upon the calendar at this December term, 1915, and it appearing to the Court that matters of account are involved in said cause and that the same should be referred to a referee, and the Honorable Themistocles Mancusi-Ungaro, attorney of the plaintiff, and the Honorable Gaetano M. Belfatto,

attorney of the defendant, having in open Court agreed to the appointment of Philip J. Schotland, Esquire, It Is Ordered that the same be referred to Philip J. Schotland to take and state the account between the parties and to report the same to the Court.

Let this rule be entered in the minutes.

NELSON Y. DUNGAN,
Circuit Court Judge.

Rule actually entered Feb. 4, 1916, on motion of Themistocles Mancusi-Ungaro, Attorney of Plaintiff.

JOSEPH McDONOUGH,
Clerk.

Reservation and Dissent

(Filed, April 22, 1916)

ESSEX COUNTY CIRCUIT COURT

Antonio Grandi and Francesco Criscitelli, Claimants, vs. Nicola Brunetti, Builder & Owner.	On Mechanic's Lien.

Defendant dissents to the making of the order of reference in the above stated cause, and reserves to himself the right to trial by jury.

GAETANO M. BELFATTO,
Attorney of Defendant.

Joseph McDonough,
Clerk.

Notice of Demand For Trial by Jury

(Filed, June 19, 1916)

ESSEX COUNTY CIRCUIT COURT

ANTONIO GRANDI and FRANCESCO CRISCITELLI, Builder-claimants, vs. NICOLA BRUNETTI, Defendant-Owner.	On Mechanics Lien.

Messrs. T. & A. Mancusi Ungaro, Attorneys for the claimants:

GENTLEMEN:

Take notice that on Friday, June 23d, 1916, at the hour of nine o'clock in the forenoon or as soon thereafter as counsel can be heard, before Hon. Willard W. Cutler, Judge, holding the Circuit for the County of Essex, I shall ask for a trial by jury of the above stated cause according to the law in such cases made and provided, on the ground that the report filed by Philip J. Schotland, Esq., to whom the case was referred by the Hon. Nelson Y. Dungan, on or about February 4th, 1916, is contrary to law and the weight of evidence.

Take further notice that the hereto annexed is a copy of the exception taken at the trial before said referee.

Yours truly,

G. M. BELFATTO,
Attorney of Defendant.

Service of the within notice and a copy of the exception is hereby acknowledged this nineteenth day of June, nineteen hundred and sixteen.

T. MANCUSI-UNGARO,
Atty. of Pltff.

Joseph McDonough,
Clerk.

Testimony

(Filed August 4, 1916)

ESSEX COUNTY CIRCUIT COURT

ANTONIO GRANDI, *et als.*, Plaintiffs, vs. NICOLA BRUNETTI, Defendant.	On Mechanics Lien.

A. T. Sweeney, counsel for plaintiffs.
G. M. Belfatto, counsel for defendant.

This case came on for trial at the December Term of 1915, of the Essex Circuit, and was referred by his Honor Nelson Y. Dugan, to Philip J. Schotland, under Section 155 of the Practice Act of 1903, found in Vol. 3 of Compiled Statutes on page 4401.

Neither party at the time of the order of reference, entered in the minutes his reservation of a right to trial by jury.

Testimony

The parties began taking testimony before the Referee on February 9, 1916. On the twenty-second day of April, 1916, a rule was entered in the minutes of the Court on behalf of the defendant, reserving his right to trial by jury. The Referee filed his report on the ninth day of June, 1916; the defendant filed exceptions to the report on the nineteenth day of June, and afterwards demanded a trial by jury, which demand is opposed by the plaintiffs.

The plaintiffs gave ten days' notice that they would apply to have the Referee's report confirmed, and this motion is opposed by the defendant.

The question now to be decided is whether the defendant is entitled to a trial by jury.

In 1855, the Legislature passed an act entitled "An act to simplify the pleadings and practice in Courts of law," which act was approved March 17, 1855. Laws 1855, page 288.

Section 81 of this act is somewhat similar to Section 155 of the present Practice Act, the difference being that the act of 1855 provided that judgment should be "entered thereon and execution issued in the manner now provided by law in case of reference," while the act of 1903 leaves out the words "in case of a reference." The act of 1855 provided for entering "dissent therefrom," while the act of 1903 omits these words and substituted therefor the words "his reservation of a right to trial by jury." The act of 1855 does not contain the portion of the present 155 section, beginning "if no such reservation had been entered * * *."

This section of the act of 1855 continued in force

until it was superseded by Section 155 of the Practice Act of 1903.

It will be noted that there must have been entered in the minutes a dissent from the reference as provided for in that act of 1855, or a reservation of the right to trial by jury as provided for in the act of 1903, to entitle either party to a jury trial, and both acts provide that this must be entered in the minutes at the time of ordering such reference.

There have been few decisions on the question, when the dissent or reservation must be entered.

The case of Nugent vs. Downing, reported in 10, N. J., Law Journal, on page 143, case was referred, no dissent was entered by the defendant in the minutes, but dissent was entered by the plaintiff. Report was filed and exceptions taken, and a rule to show cause was entered. Plaintiff moved to discharge the rule and thereupon the defendant applied for a rule to enter dissent *nunc pro tunc,* or to amend the rule originally entered so as to include defendant's dissent. The Judge's book showed a dissent. The question before the Court was whether a dissent in open Court entered in the Judge's book is sufficient under the statute.

Judge Depue, holding the Circuit in deciding the question said:

> "I find on consulting my associates that the course of practice has been uniform, and I do not see how any other decision could be made without repealing the statute. (Statute quoted.)
>
> "Finality is given to the reference and report provided that either party may enter in the minutes of the Court a dissent.

the Statute is too plain for any construction. Judicial construction would amount to a repealer. The object of the Legislature is plain to make it a matter of record that the parties may rely on.

"The language is 'at the time of entering the reference.' Not necessarily the same day. Perhaps at any time during the term would be enough.

"The matter has been decided here a number of times, and I have uniformly held that the Statute is not directory, but the entry is a condition upon which the Court may act.

"The rule is discharged without costs, because the practice, if not unsettled, is at least not understood.

"Leave is given to move to set aside the report as against the weight of evidence."

This is the only case I have found where it was held that it was not necessary to enter a dissent or reservation at the time of ordering the reference.

In the case of Halsey vs. Paulison, 36 Law page 406, the Court held that an application for a jury must be actually made to the Court, and that an entrance on the minutes was not sufficient, but the question when the dissent must be entered was not decided.

In the case of Adams vs. Board of Education of Montvale, reported in 83 Law on page 489, a reservation of the right to trial by jury was filed with the Clerk at the time the reference was discussed before the Court, but the order of reference was not actually made until the following day, and the reservation was not entered by the Clerk in the minutes.

The Court held that the plaintiff was entitled to a trial by jury.

Justice Swayze in delivering his opinion says:

> "The only remaining objections are, first that the dissent was filed in advance of the order of reference, second that it was not entered in the minutes. We think the first objection too technical. The Statute requires that the reservation of the right to trial by jury be entered in the minutes at the time of ordering the reference, but we see no objection to a party filing his dissent as soon as it is suggested that the case be referred in order that the Clerk may make proper entry on the minutes as soon as the reference is in fact ordered."

There is nothing in this opinion intimating that a reservation to trial by jury can be made after the ordering of the reference.

In the late case of Thomas Harrington Sons Co., vs. United States Express Co., reported in 87 N. J., Law page 154, Chancellor Walker in delivering the opinion of the Court of Errors and Appeals among other things said:

> "There is nothing in the record to show that the reference was made on motion or on behalf of the defendant-appellant. On the contrary it appears to have been made of the Court's own motion, and, as stated, the reservation was written upon the order by both parties, as of the same date. If the plaintiff-respondent had any objection to the defendant-appellant's reservation of the right to trial by jury, it should have been made at the time it was entered. But

> that objection could not have been efficatiously made at any time, for the Statute says that either party may at the time of ordering such reference enter in the minutes his reservation of a right to trial by jury."

After considering these latter decisions in connection with the wording of this section of the Statute, I have reached the conclusion that the defendant lost his right to trial by jury, by not entering his reservation in the minutes, or by filing the same with the Clerk with instructions to enter the same on the minutes, for more than two months after the reference was made, and until after the beginning of the next term of Court.

In 1873 the Supreme Court adopted the following rule:

> "All rules of reference entered by consent of parties in the Court or in the circuit may state whether the award of the Referee is to have the effect of a finding of arbitrators or merely the force of a verdict, in the absence of such statement, the award shall be treated as a verdict."

and while rule is now known as Rule 99.

In the case of Harper Machine Co., vs. John A. Sinclair, reported in 76 Law, page 99, Jutice Reid in announcing the opinion of the Supreme Court says:

> "No entry was made at the time by either party to the reference of a reservation of right of trial by jury. The reference stands as one made by consent.
>
> "The Refeee made his report which was affirmed and a *postea* signed according to

Section 155 and 156 of the Practice Act and judgment was rendered thereon.

"In absence of any statement in the rule of references by consent whether the award of the Referee was to have the effect of a finding by arbitration or the force of a verdict, it must be treated as a verdict. Rule of Supreme Court No. 80.

"The remedy for a dissatisfied party is to move to set aside the award as a verdict and grant a new trial."

In this case a number of exceptions are to rulings of the Referee, but they cannot be reversed on appeal.

In the case of Hoboken vs. Lafferty, reported in 60 N. J., Law, page 86, Justice Magee said;

"It is proper to add that the Referee's report and the evidence taken before him are no part of the record. Even if they can be brought here by certiorari as out-branches of the record it would not avail the plaintiff in error because not open to review."

referring to the case of

Beatty vs. David 11 Vr., 102.

Runyon vs. Hodges, 17 Vr., 359.

Children's Home Association vs. Hall, 18 Vr., 152.

Clayton vs. Levy, 20 Vr., 577.

I refuse to grant the application of the defendant a trial by jury, but following the practice indicated by Justice Depue, I will allow him (if he so desire), to apply to have the report set aside as against the weight of evidence, or for any other legal cause.

Dated, Aug. 3, 1916.

WILLARD W. CUTLER,
Circuit Court Judge.

Order Setting Aside Referee's Report and Granting New Tral

(Filed August 23, 1916)

ESSEX COUNTY CIRCUIT COURT

ANTONIO GRANDI, *et al.*, Plaintiffs, vs. NICOLA BRUNETTI, Defendant.	On Mechanics Lien.

Philip J. Schotland, Esquire, to whom the above matter was referred having made his report, and the defendant now applying to have the report set aside and a new trial granted.

And the Court having heard the argument of Mr. G. M. Belfatto, counsel for the defendant, and Mr. A. T. Sweeney, counsel for the plaintiffs, and duly considered the same, and also the evidence taken by the referee and returned with his report.

And it appearing that the amount awarded the plaintiff should not have been over the sum of $3,447.26.

It is ordered that the report of said Referee be set aside and a new trial granted, unless the plaintiffs file their consent on or before August 28th, 1916, to reduce the amount awarded them by the said referee from $4,621.72 and interest from June 5, 1916, to $3,447.26 and interest from June 5, 1916.

Let this rule be entered.

August 21, 1916.

WILLARD W. CUTLER,
Circuit Court Judge.

Memoranda on Motion to Set Aside Report of Referee

(Filed, August 24, 1916)

ESSEX COUNTY CIRCUIT COURT

ANTONIO GRANDI, *et als.*, Plaintiffs,
vs.
NICOLA BRUNETTI, Defendant.
On Mechanics' Lien.

CUTLER, Judge:

This case was referred by the Circuit Court to Philip J. Schotland, Esq., who, after hearing the witnesses, has filed his report as such referee.

No reservation to the right of a trial by jury, was entered within the time required by law by either of the parties.

One of the parties, however, entered such a reservation at the next term of Court after the reference, and upon the coming in of the referee's report filed exceptions, and demanded a trial by jury, which application was refused.

A motion is now made by the defendant, to set aside the report of the referee.

The Court has the right to control this report as the verdict of a jury, and the dissatisfied party's remedy is to move to set it aside, and for a new trial.

Beattie vs. David, 40 N. J. Law, 102.
Harper Machine Co. vs. Sinclair, 76 N. J. Law, 99.

Memoranda on Motion to Set Aside Report of Referee

Children's Home Association vs. Hall, 18 Vr., page 152.

The same grounds that govern the setting aside of a verdict of a jury, apply equally to the setting aside of the report of a referee.

Runyon vs. Hodges, 17 Vr., 359, etc.

If the report is unsupported by the evidence before the referee, or if the referee must have contravened some rule of law in reaching his conclusion, the report should be set aside.

Fitch vs. Archibald, 29 Law, page 160.

It is not enough that there appears to be a preponderance of proof in favor of a reduction of the verdict. It is only where it is so evident that the jury have erred as to convince the Court that there has been a mistake and that the verdict is the result of misapprehension, prejudice or partiality that a Court will interfere.

Merret vs. Harper, 44 N. J. Law, page 73.

An examination of the record accompanying this report shows that the case was carefully prepared and tried by both the counsel for the plaintiff and the counsel for the defendant, and it is also evident from the questions asked by the referee that he was thorough and painstaking, and there is nothing that would indicate in the slightest degree either prejudice or partiality on his part.

Does the evidence and the law applicable to the case sustain the finding of the referee?

It is unfortunate that the referee does not go into the details more fully in his report, for it is impossible with any certainty to tell what items

he has allowed for extra work, what items he has considered omitted, or what work was improperly done.

The report does show that items amounting to $806.04 of the amount claimed by the plaintiff as extra work, was allowed, and that part of the contract was either ill-performed or not performed and that by reason thereof the defendant was entitled to a credit of $579.50.

If the law and evidence sustains this finding, the present application should be refused and the report confirmed.

An examination of the pleadings and evidence show that the plaintiff's claim against the defendant is

For extra work and alterations in the erection of a tenement house, amounting to $1398.36

Balance due on a contract for the erection of the house 4000.00

Making the total claim of the plaintiff $5398.36, together with interest.

The defendant denies that he owes the plaintiff anything.

Let us consider the claim for extra work, and the claim for the balance upon the contract separately.

The building was constructed under a contract, which contained, among other provisions, the following:

> "SEVENTH: No alterations or extra work shall be done without *a written order* from the owner approved by the architect, and *an express agreement in writing as to the cost.*"

Memoranda on Motion to Set Aside Report of Referee

I do not find from the evidence that any such order was given.

The plaintiff contends that the defendant ordered the extra work verbally and therefore the defendant should pay for it, and also that defendant agreed to pay for it.

Ordering extra work by the defendant without a *written order,* must not be construed as evincing an intention to alter or vary the contract, but rather that such action was taken in conformity with its terms.

Landstra vs. Bunn, 81 Law, 680.

Parties to a contract are at liberty, subsequently, to contract differently in variation of the original contract, but the mere performance of extra services without such written authority *will not* give rise to an implied waiver of the provisions of the contract in that respect.

As this contract in question expressly provides that *no alterations or extra work* should be done without a written order from the owner, the plaintiff much show by satisfactory evidence that the defendant distinctly agreed that the alterations should be deemed extra work, and definitely agreed to pay for it, as extra work.

Headley vs. Cavileer, 82 Law, 635 on 642.

In *Sheyer vs. Pinkerton Construction Co.,* 59 At., page 462, it was held:

> "But it is clear that without such order, or waiver of the stipulation requiring it, or proof that the plaintiff had been fraudulently lured into doing the work without it, there can be no recovery for the costs of the alterations."

Cited in 81 Law, page 680.

Memoranda on Motion to Set Aside Report of Referee

Was there any evidence that the defendant had ordered these changes and alterations, and if he did, was there any evidence that he ever agreed that he would pay for them, or any of them, as extras in addition to the $12,000 he had agreed to pay the plaintiff for the construction of the building?

It is not the province of this Court, on this application, to pass upon the merits of the case, but to say whether the evidence submitted to the referee would support his finding, not whether this Court might have found differently upon this evidence, but whether there is any evidence that will support the finding under the rules of law governing this case.

The defendant admits that he ordered the cellar door changed, 5 steps to west court, gas light in cellar, 2 additional coal bins, railing and door to yard, and a door put in belonging to him, but denies that he ordered any other work done.

In addition to this I am satisfied that the referee had evidence that would justify him in finding the change in the height of the cellar, substituting the brick wall for the iron beam, plastering the cellar, changing the cellar beams and the cellar front were ordered by the defendant as extras, and to be paid for as such, but I do not find any distinct agreement on the part of the defendant that he would pay for the balance of the work in addition to the contract price, even if he ordered it.

The Court held in the case of *Headley vs. Cavileer,* reported in 53 Vr., page 635, on page 643.

Memoranda on Motion to Set Aside Report of Referee

> "If the evidence satisfactorily shows that the parties distinctly agreed that the alterations should be deemed extra work, and that the owner definitely agreed to pay extra for it, and especially if a definite price was fixed in that agreement, this would be sufficient to establish an express contract for such extra work outside of the original contract or a modification of the contract to the extent of such agreed extra work and would justify a recovery therefor regardless of the restrictive clause."

Work done for the owner by his request and without any specific agreement that it is to be paid for extra should be excluded where the contract calls for a written order.

The evidence of the plaintiff, the architect and the other witnesses fail to show such a distinct agreement on the part of the defendant to pay for the other items charges as extra work as would allow a recovery by the plaintiff in the absence of a written order as called for in the contract.

But the plaintiff would be entitled to the extra depth of the foundation wall at $7.00 per cubic yard as called for in the contract.

The total amount of extras which can be allowed under the evidence, at the prices claimed by the plaintiff, including the extra depth of foundation, amounts to the sum of $495.96, for there must not only be an ordering of the work, but also a distinct and definite agreement to pay for the same in addition to the contract price.

The contract calls for the erection of a dwelling house for tenants, according to certain plans

and specifications, for which the owner of the land was to pay the sum of $12,000.

The contract is in writing and provides among other things as follows:

> "SIXTH AND FINAL PAYMENT. When house is completed and accepted by proper authorities, owner and architect, four thousand dollars ($4,000). * * *
>
> "Provided that in each of the said cases a certificate shall be produced signed by said architect to the effect that the work is done in accordance with said drawings and specifications, said certificate, however, in no way lessens the total and final responsibility of the contractor, neither shall it exempt the contractor from liability to replace work if it be afterwards discovered to have been ill done or not according to the drawings and specifications, either in execution or material."

The contract further provides:

> "THIRD: Should the owner at any time during the progress of said building request any alterations, deviations, additions or omissions from said contract he shall be at liberty to do so, and the same shall in no way effect or make void the contract, but will be added or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation. * * *
>
> "TENTH: Neither the contractor nor the architect shall without the written consent of the owner, have authority to vary, alter, amend or change this contract or any of the plans or specifications herein referred to."

Memoranda on Motion to Set Aside Report of Referee

The owner has paid the first five payments called for in the contract, upon the certificate of the architect, amounting to $8,000, but refuses to make the last payment, although the architect has given his certificate.

It clearly appears that the house was not completed as called for in the plans and specifications, but the plaintiff contends that the changes were made with the consent of the defendant.

The owner is entitled to have the house he wanted and contracted for, and the contractor cannot satisfy his contract by erecting a house materially different, even though it be better.

Bradner vs. Roffsell, 57 Law, 412, on page 418.

If there has been a substantial compliance by the plaintiff with the terms of the contract, he would be entitled to recover the contract price, less a fair allowance to make good defects in the performance of the contract.

Isetts vs. Bliwise, 72 Law, page 102.

Feeney vs. Bardsley, 66 N. J. Law, 239.

"The acceptance of the building by the owner 'may be express or implied from his conduct. It seems well settled that mere occupancy of the building while appropriate, is neither presumptive nor conclusive evidence of acceptance.' "

Bozarth vs. Dudley, 44 Law, 304, on page 312.

It does not appear from the report of the referee whether he found the changes and alterations were made with the consent of the owner, by abrogating the old contract and making an-

other, or whether there had been a substantial compliance with the contract, in any event the defendant is entitled to a fair allowance for parts of the contract not completed, and also a fair allowance to make good defects, in the performance of the contract.

I think it conclusively appears from the evidence that the following work called for in the contract was not done.

The lot was not graded.

Area ways not built around cellar windows and no gratings for the same.

Iron beam was not put in cellar.

Water pipe was not put in from house to street main.

Sewer was not put in from house to street sewer.

Brackets were omitted from dining room.

Kitchen wall not marked off in shape of tiles.

Stones on top of parapet wall not furnished as called for.

Wiring omitted from Louves.

Three risers omitted.

Waco furnace substituted for a Boynton.

Other ranges substituted for those called for.

Outer covering of cellar wall not treated as called for.

Back fence not built.

Difference in tile vestibule.

Angle iron, etc., lacking from dumb waiter shaft.

Water table broken.

Meters improperly placed.

Newells defective in kind.

Memoranda on Motion to Set Aside Report of Referee

Windows changed.

Change in stone work.

Stairs not as called for.

There are a number of items where the work is said to be defective, but where the architect says it is not, and in those cases there was evidence which would allow the referee to ignore the claim of the defendant and say that the work was properly done.

Under this class of items would be flashing on roof.

Location of pipes through bath rooms.

Leaders.

Defects in hardware.

Doors out of plumb, and many other items.

The plaintiff would not be responsible for changes made necessary by reason of the action of the tenement house authorities whereby the size of the rooms was made smaller or for the small size of the bath room which appears to have been built according to the plans in size, except if made smaller by the tenement house authorities in changing the size of the light shaft.

The plaintiff should, however, be charged with the $60 the defendant had to pay to have the plaster boards replastered.

There is a difference in the evidence as to what the allowance for the items omitted should be, but allowing the minimum figures where there has been a difference, I think the law and the evidence warranted the allowance of $1338.15 to the defendant (which includes the $60) from the balance of the contract price of $4000 still due.

Memoranda on Motion to Set Aside Report of Referee

Plaintiff is entitled to	
Balance due on contract	$4000.00
Alterations as extras	495.96
	$4495.96
Less deductions	1338.15
	3157.81
Interest from Nov. 15th, 1914 to June 5, 1916	289.45
Total due plaintiff with interest on that sum from June 5, 1916.	$3447.26

As this sum is less than the amount found due by the referee the report will be set aside and a new trial granted, unless the plaintiff file a consent on or before August 28, 1916, to reduce the amount awarded from $4621.72 and interest from June 5, 1916, to $3447.26 and interest. Upon filing such consent the motion to set aside will be refused and judgment will be entered for $3447.26 and interest from June 5, 1916, and costs.

Rule to Extend Time

(Filed September 9, 1915)

ESSEX COUNTY CIRCUIT COURT

ANTONIO GRANDI, *et als.*, Plaintiffs, vs. NICOLA BRUNETTI, Defendant.	Rule to Extend Time.

Application being made on August 28th, last by the counsel of the plaintiffs to reargue the motion to set aside the report of the Referee, and which application has been continued from time to time until the present time, being opposed by the attorney of the defendant, and the counsel for the plaintiffs now consenting that his application for a reargument be refused and applying for an extension of time to file a consent to reduce the amount awarded by the Referee to $3447.26, with interest from June 5, 1916, and the Court having heard the argument of A. T. Sweeney, of counsel, with the plaintiffs and G. M. Belfatto, of counsel, with the defendant, and duly considered the same.

IT IS ORDERED that the application to reargue the motion to set aside the Referee's report be refused.

And it is further ordered that the plaintiffs' time to file their consent to reduce the amount of the award to $3447.26 with interest from June

5, 1916, be extended to and including September 20, 1916.

WILLARD W. CUTLER,
Circuit Court Judge.

Consent and Reduction of Amount Awarded by Referee

(Filed September 19, 1916)

ESSEX COUNTY CIRCUIT COURT

ANTONIO GRANDI and FRANCESCO CRISCITELLI, Plaintiffs, vs. NICOLA BRUNETTI, Defendant.	On Mechanics' Lien. Consent to reduction of amount awarded by Referee.

In conformity to rules directed by the Honorable Willard W. Cutler, one of the Judges of this Court, entered on the twenty-first day of August, 1916, and September, 1916, respectively the plaintiffs herewith file their consent that the amount awarded them by the Referee heretofore appointed in this suit be reduced from $4621.72 and interest from June 5, 1916, to $3447.26 with interest from June 5, 1916.

THEMISTOCLES MANCUSI UNGARO,
Att'y Plaintiffs.

Memoranda on Motion Fixing Referee's Fees

(Filed September 25, 1916)

ESSEX COUNTY CIRCUIT COURT

ANTONIO GRANDI, *et als.*, Plaintiffs, vs. NICOLA BRUNETTI, Defendant.	On Motion to Fix Referee's Fees.

CUTLER, J.:

The reference in this case was made under the provisions of Section 155 of an act entitled "An act to regulate the practice of Courts of law (Revision of 1903)" Compiled Statutes Vol. 3, page 4101, and the application now before the Court is for a rule making an allowance to the Referee for his services.

Section 157 of this act requires the Court not only to make a just allowance to the Referee for his services but also, the manner the amount so allowed shall be paid.

It is admitted that the evidence given by the witnesses before the Referee was taken by a stenographer and after being written out was filed by the Referee with his report.

It is contended by the plaintiffs that they have paid this stenographer $161.40 for the services so rendered and that the amount so paid should be included as an expense of the Referee and made part of his allowance.

Memoranda on Motion Fixing Referee's Fees

Chief Justice Hornblower in an Anonymous case reported in 20 N. J. Law, on page 112, among other things says:

> "We must not forget that costs are given by statute, and are not to be increased or diminished at the discretion of the Court; or the taxing officr. It is true there are many services, incidentally arising in the progress of a cause and in some species of actions more frequently than in others, that are not specifically provided for in the fee bill, and for which there ought to be a reasonable compensation; but we are not at liberty to fix that compensation, or to extend the provisions of the statute to reach such cases,"

so unless there is some law which allows the Court to include stenographers in the allowance to be made the Referee, they will have to be excluded.

No express authority is given the Court under this Section 157, to include in the allowance to be made to the Referee for his services, any expenses incurred by him.

Section 5 of an act entitled, "An act for regulating references and determining controversies by arbitration," Compiled Statutes, Vol. 1, page 106, provides among other things as follows:

> "And there shall be allowed to every such referee, One dollar for every day necessarily spent in the business of the reference, besides a reasonable allowance for his expenses, which, in the first instance, shall be paid by the prevailing party, and shall afterwards be allowed to such party

in the taxation of costs where costs are recoverable."

This section does not apply to the present case for the Supreme Court in the case of *Tunison vs. Snover* reported in 56 N. J. Law, page 41, held as follows:

"By the provisions of section three of 'An act for regulating references and determining controversies by arbitration' approved April 15th, 1846 (Rev. p. 34) which is in substance the same as the act of like title passed December 2d, 1794 (Pat. L., p. 141), any pending cause may be referred by rule of Court. This seems to be a regulation of the power in this respect possessed by Courts under the common law. But it is entirely settled that the power to refer causes, either at common law or under the last named act, arises only upon the submission and consent of the parties to the cause. 2 Tidd. Pr., 743; 2 Sell. Pr., 246; *Paulison vs. Halsey,* 9 Vr., 488. No Court can make an order *ex mero motu.*"

See also case of *American Saw Company vs. First National Bank, etc.,* reported in 58 N. J. Law on page 438, etc.

An examination of the act entitled "An act to regulate fees" Compiled Statutes, Vol. 2, page 2277, etc., fails to show any authority to include the expenses of a stenographer as part of the Referee's allowance in this case.

Chapter 366 of the laws of 1911 entitled "An act concerning fees and costs and the taxation thereof in the Courts of law in this State," laws of 1911, page 756, etc., provides among other

things that certain disbursements therein enumerated may be included in the bill of costs of the party to whom costs are awarded.

Among the items of disbursement so enumerated are:

> "The legal fees of witnesses, referees, commissioners and other officers. The fees for taking depositions as provided by law."

Similar provisions appear in an act entitled "An act concerning the fees and costs and the taxation thereof in the Courts of law in this State," laws 1910, page 211, etc.

Neither of these acts include stenographer's services for taking testimony among the disbursements allowed.

This bill of the stenographer cannot be included under "fees for taking deposition as provided by law," as I do not find any law which authorizes a referee to take depositions or requires him to return the evidence of witnesses to the Court. His duty is to "state and report an account between the parties and the amount that may be due from either party to the other."

Justice Swayze in the case of the *New York Metal Ceiling Co. vs. Kierman,* reported in 73 Law, p. 763, speaking of a Referee's report says:

> "If the referee's report was in compliance with the statute it was *prima facie* evidence of the facts therein found and reported. I think it may well be doubted whether a general conclusion in favor of the plaintiff couched in the language of this report, is a finding of facts within the meaning of the statute in view of its apparent object to sift out from a number of

> items of an account those which are undisputed and to narrow the controversy to be presented to the jury. *(Paulison vs. Halsey,* 9 Vr., 488, 494; *Boody vs. Pratt,* 39 Ld., 295), but this also we leave undecided in view of the fact that the judgment must be reversed upon another ground."

It was argued on the argument that as testimony taken stenographically and written out for the use of the Court may be included as part of the taxed costs in the Court of Chancery, it was a precedent for including the services rendered in this cause by the stenographer as part of the Referee's allowance.

The authority to allow such expenses in the Court of Chancery as part of the taxed costs is given by statute.

Section 98 of an act entitled "An act respecting the Court of Chancery (Revision of 1902)," Compiled Statutes, Vol. 1, page 447, reads as follows:

> "It shall be lawful for each Vice-Chancellor to employ a competent stenographic reporter to take down the evidence of such witnesses as may be examined before him, for the use of the Court and the parties in the cause, or matter; and to fix, allow and tax the fees of such reporter for writing out such evidence, and to apportion the same between the parties; and each party shall forthwith pay the part so apportioned to him, which shall be part of the taxed bill of costs in the cause."

And section 109 of the same act (Vol. 1 Compiled Statutes, page 449) confers the same power

on the Chancellor when he shall hear the evidence of witnesses orally in any case.

I do not find that such power is given to a Referee.

It is laid down in Cyc Vol. 11, page 125, title P. Stenographer's fees:

> "Stenographer's fees are not taxable as costs in the absence of a statute or some special agreement between the parties authorizing it."

There being no statute authorizing such an expenditure by the Referee or authorizing him to take depositions, I cannot consider this item in determining the allowance to be made the referee for his services.

The Court is however, authorized to make a just allowance to the Referee for his services.

In this case there were a number of hearings before the Referee when the evidence was taken, but on only three occasions was a whole day occupied in taking testimony. On the other occasions the hearings only lasted part of a day. While the Referee must have a just allowance made him for his services, it would not be just to the litigants to allow the Reference compensation for a full day when the hearing only lasted for a few hours.

It is urged that the Court should consider the fact in making this allowance to the Referee that he spent considerable time in reading over the evidence in order to arrive at a conclusion.

While the evidence returned is voluminous, and inspection of it does not show that any questions not pertinent to the issue were asked by the Referee. It is unfortunate that the statute does not

fix a per diem for the Referee, but as it does not, I have determined from the facts presented that $200 is a just allowance to be made the Referee in this case.

The only question remaining to be decided, is how shall it be paid.

Section 229 of the act entitled "An act to regulate the practice of Courts of law (Revision of 1903)," Compiled Statutes, Vol. 3, page 4123, provides among other things:

> "If the plaintiff in any action shall recover debt or damages, he shall have judgment to recover his costs against the defendant to be taxed in the manner prescribed by law."

Section 230 of the same act Compiled Statutes, Vol. 3, page 4124, provides:

> "If an action commenced in the Supreme Court the plaintiff shall not recover above two hundred dollars exclusive of costs he shall not be entitled to costs, but this section shall not extend to any action in which the title to lands may in any wise come in question nor to any action in which the amount recovered exclusive of costs exceeds one hundred dollars, if any defendant does not reside in the same county as the plaintiff."

This is the general rule, to which there are some exceptions such as in actions for assault, battery or imprisonment or for slander and libel, if the plaintiff shall not recover damages for the amount of $50 he shall recover no more costs than damages.

Compiled statutes 4126, section 239.

In cases of certiorari from a small cause Court where the judgment is affirmed in part and reversed in part, neither party recovers costs against the other, unless upon express order of the Court therefor.

Compiled statutes 3010, section 98.

I find nothing that would authorize the Court to charge the payment of this allowance, or any part of it against the plaintiffs, especially as Section 1 of the act of 1911, heretofore referred to, reads as follows:

> "Section 1. The prevailing party in any action, motion or proceeding in the Courts of law in this state shall be entitled to costs, except where otherwise provided by law, and unless the Court or judge before whom said action, motion or proceeding shall be taken shall order otherwise."

It was evidently the intention of the Legislature that the Referees allowance should be paid by the defendant for Section 155 of the act under which this reference was made provides among other things:

> "And at the same term in which the report is filed may demand a trial by jury, in which case the action shall be tried by a jury, the costs of the reference to abide the result * * *."

I do not find that the Courts have placed any other construction on the law.

The early case of *Anderson vs. Exton* reported in 1st, Southard (Star, page 173), where the defendant was required to pay one-half of the taxed costs, does not apply to the present case, as in that case the referees were chosen by the parties and their agreement made a rule of Court.

Memoranda on Motion Fixing Referee's Fees

In the case of *Robinson vs. Hedges,* reported in Pennington, star, page 689, a judgment of the Common Pleas on appeal from the Justice Court was removed to the Supreme Court on certiorari. The Court said:

"Judgment in this case was recovered before the justice for 97 dollars, 31 cents, on which, the defendant below, the plaintiff in certiorari, appealed to the Common Pleas. The Common Pleas, on hearing the case, reversed the judgment of the justice, and thereupon rendered a new judgment for the plaintiff for 65 dollars, 93 cents, with costs of the appeal.

"It appears to me, that neither the act of Assembly authorizing appeals, nor the reason or justice of the case, will justify a judgment in the Common Pleas for costs against the defendant in that Court under the circumstances of this case. He is actually the successful party. The plaintiff held against him a judgment not founded in justice; he was compelled to appeal to the Common Pleas to have that judgment corrected. Shall he then pay costs to his adversary on this appeal? The more reasonable rule would be, that his adversary pay costs to him; but I believe the practice in such cases has been for neither party to recover costs; founded, I presume, on this principle, that the error in the judgment of the justice, is an error of the Court, and not the fault of the plaintiff. If, therefore, I am correct, that no costs can be recovered in this case, the judgment of the Court of

> Common Pleas must be reversed as to costs, and affirmed as to the debt. As no judgment for costs ought to have been rendered, the judgment for costs must be considered a separate and distinct judgment from the debt, and comes, in my opinion, within the cases where the judgment may be reversed in part, and affirmed in part."

The case of *Housel vs. Higgins,* 47 Law, page 72, was also a judgment of the Common Pleas on appeal, removed to the Supreme Court on certiorari. The Court said:

> "In the present case the plaintiffs have appealed from their own judgment, and a judgment of affirmance has been entered in the form prescribed in *Hendricks v. Craig,* for damages, costs below and costs on appeal. The amount of the judgment for damages has not been reduced, and they may therefore hold the costs below, but the amount has not been increased, consequently they are not the successful party on the appeal, in fact, and should recover no costs. There should be judgment of affirmance but no costs allowed the plaintiffs on appeal."

In the case of *Redstrake vs. Swayze,* 52 Law, page 129, which was also a case where the judgment of the Common Pleas, on appeal from the small cause Court, was removed to the Supreme Court on certiorari; the Court said:

> "The judgment recovered before the justice having been set aside, and a judgment entered for a less amount, the plaintiff was not entitled to costs in the Court of

Common Pleas, where he was unsuccessful in maintaining his judgment for the full amount, but he was entitled to retain the costs awarded him in the Court for the trial of small causes where he was successful in obtaining a judgment."

After an examination of the law and the reported cases, I have reached the conclusion that the amount awarded the Referee for his services should be included as a part of the plaintiffs' bill of taxed costs and paid by the defendant.

I will sign a rule drawn in accordance with this finding.

Order Reducing Amount Awarded by Referee

(Filed October 5, 1916)

ESSEX COUNTY CIRCUIT COURT

ANTONIO GRANDI, *et als.*, Claimants, vs. NICOLA BRUNETTI, Builder and Owner.	On Mechanic's Lien.

The Referee in the above-entitled cause having made and filed his report, to which the said Nicola Brunetti filed exceptions and demanded a trial by jury, which application was refused, because the "reservation to a right to trial by

jury'' was not made or entered within the time required by law.

And the counsel for Antonio Grandi and Francesco Criscitelli moving to confirm said report, and the counsel for said Nicola Brunetti moving to set aside the report, and the Court having heard the argument of counsel thereon and duly considered the same, ordered that the report be set aside and a new trial granted unless the said Antonio Grandi and Francesco Criscitelli file their consent on or before August 28, 1916, to reduce the amount of the award found by the said Referee in their favor from forty-six hundred and twenty-one dollars and seventy-two cents ($4621.72) together with interest from June 5, 1916, to thirty-four hundred and forty-seven dollars and twenty-six cents ($3447.26) with interest from June 5, 1916.

And application having been made by the counsel of Antonio Grandi and Francesco Criscitelli, for a reargument of the motion to set aside the Referee's report which application was afterwards, with the consent of the said counsel of the said Antonio Grandi and Francesco Criscitelli, refused, and the time for filing the consent to accept the reduced amount instead of the amount of the award of said Referee was extended until and including September 20, 1916.

And the said Antonio Grandi and Francesco Criscitelli having by their attorney filed their consent within the time so extended, to accept the aforesaid sum of thirty-four hundred and forty-seven dollars and twenty-six cents ($3447.26), with interest from June 5, 1916, instead of the sum awarded by the said Referee, and the allow-

ance of the Referee for his services having been fixed at the sum of two hundred dollars ($200) and which sum was ordered included as a part of the taxed bill of costs of Antonio Grandi and Francesco Criscitelli, and to be paid by the said Nicola Brunetti; And due notice of this motion having been given, and the said Algernon T. Sweeney of counsel for Antonio Grandi and Francesco Criscitelli and Gaetano M. Belfatto of counsel for said Nicola Brunetti, appearing before me on September 30, 1916, and the Court having duly considered the matter;

It is Ordered, that the amount of the award of Philip J. Schotland, Referee in the above-entitled cause, be reduced from forty-six hundred and twenty-one dollars and seventy-two cents ($4621.72) with interest from June 5, 1916, to thirty-four hundred and forty-seven dollars and twenty-six cents ($3447.26) with interest from June 5, 1916, the said Antonio Grandi and Francesco Criscitelli, by their attorney having consented to accept such reduced amount, and that the report of said Referee, reduce in amount to thirty-four hundred and forty-seven dollars and twenty-six cents ($3447.26) with interest from June 5, 1916, be confirmed, and that Judgment be entered in favor of the said Antonio Grandi and Francesco Criscitelli (the claimants) and against the said Nicola Brunetti (the builder and owner), for thirty-five hundred and sixteen dollars and sixty-one cents ($3516.61) with the plaintiffs costs to be taxed.

Dated, October 4, 1916.

WILLARD W. CUTLER,
Circuit Court Judge.

Notice of Motion That Stenographers' Fees be Allowed to the Plaintiff

(Filed October 5, 1916)

ESSEX COUNTY CIRCUIT COURT

Between ANTONIO GRANDI and FRANCESCO CRISCITELLI, Plaintiffs, and NICOLA BRUNETTI, Defendant.	On Mechanic's Lien.

To Gaetano M. Belfatto, Attorney of Defendant:

TAKE NOTICE that on Saturday, the 30th inst. at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard I shall move that the costs of the stenographers' fees in this case amounting to $161.40 paid to Miss Hattie Allen and $3.60 paid to Miss Helen Jedell be allowed to the plaintiffs as part of their costs against the defendant according to stipulation and agreement entered into before the Referee before any testimony was taken and before either of the stenographers were engaged.

AND TAKE FURTHER NOTICE that upon this motion I will use in support thereof affidavits, true copies of which are annexed hereto and made a part of this notice.

Dated, Newark, N. J., September 26, 1916.

THEMISTOCLES MANCUSI-UNGARO,
Attorney of Plaintiffs.

Affidavit of Algernon T. Sweeney

ESSEX COUNTY CIRCUIT COURT

Between ANTONIO GRANDI, *et al.*, Plaintiffs, and NICOLA BRUNETTI, Defendant.	On Mechanics' Lien.

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

Algernon T. Sweeney, being duly sworn on his oath deposes and says that he is an attorney-at-law of this state and counsel in the above stated cause; that at the request of Judge Ungaro, attorney of plaintiff, he conducted the case for the plaintiff before the Referee, Philip J. Schotland, Esq., that on the day of first hearing before any testimony was taken the Referee, in the presence of the defendant and his attorney and the plaintiffs and their attorneys, offered a suggestion that the testimony would probably be voluminous on account of so many witnesses speaking through interpreters and that he would be willing to take extensive notes and save the costs of a stenographer if that was agreeable to all parties; that thereupon Mr. Gaetano M. Belfatto, attorney for the defendant, in the defendant's presence, very strenuously and vociferously objected and insisted that instead of having no stenographers he wanted two stenographers in exactly the same manner and to the same effect as his statements

in open Court before the Judge at the time of the discussion of the subject of taxing the stenographers' fees; that it was thereupon agreed between the parties that Miss Helen Jedell of the Referee's office should take the first day's testimony, and that thereafter Miss Hattie Allen, a regular Court stenographer, should be engaged to take the testimony thereafter; and it was also then and there agreed and stipulated between the parties that the fees of the stenographer should be paid by the plaintiff in the first instance and that their final payment should abide the result of the suit, and that this arrangement was not only agreed to at that time but always thereafter when the matter was referred to and at the time of the payment by the plaintiffs of the fees of Miss Helen Jedell amounting to $3.60, and Miss Hattie Allen amounting to $161.40.

ALGERNON T. SWEENEY.

Sworn and subscribed to before me
this 26th day of September, 1916.
H. C. Beecher,
Master in Chancery of New Jersey.

Affidavit of Arnold Mancusi-Ungaro

ESSEX COUNTY CIRCUIT COURT

Between, ANTONIO GRANDI, *et al.*, Plaintiffs, and NICOLA BRUNETTI, Defendant.	On Mechanics' Lien

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

Arnold Mancusi-Ungaro, being duly sworn according to law upon his oath deposes and says; that he is an attorney at law of this State; that at the request of Judge Ungaro, Attorney of Plaintiff, he helped to conduct the case for the plaintiffs before the referee, Philip J. Schotland, Esq., that on the day of the first hearing before any testimony was taken the referee in the presence of the defendant and his attorney, and the plaintiffs and their attorneys, offered a suggestion that the testimony would probably be voluminous on account of so many witnesses speaking through interpreters, and that he would be willing to take extensive notes and save the costs of a stenographer if that was agreeable to all parties; that thereupon Mr. Gaetano M. Belfatto, attorney for the defendant, in the defendant's presence, very strenuously and vociferously objected and insisted that instead of having no stenographers he wanted two stenographers in exactly the same manner and to the same effect as his statements in open court before the judge at the time of the dis-

cussion of the subject of taxing the stenographer's fees; that it was thereupon agreed between the parties that Miss Helen Jedell of the referee's office should take the first day's testimony and that thereafter Miss Hattie Allen, a regular Court stenographer should be engaged to take the testimony thereafter; and it was also then and there agreed and stipulated between the parties that the fees of the stenographer should be paid by the plaintiff in the first instance and that their final payment should abide the result of the suit; and that this arrangement was not only agreed to at that time but always thereafter when the matter was referred to and at the time of the payment by the plaintiff of the fees of Miss Helen Jedell amounting to $3.60 and Miss Hattie Allen amounting to $161.40.

ARNOLD MANCUSI-UNGARO.

Sworn and subscribed to before me this
twenty-sixth day of September,
nineteen hundred and sixteen.
Walter T. Dempsey,
Notary Public of New Jersey.

Affidavit of Manfredi Mancusi-Ungaro

ESSEX COUNTY CIRCUIT COURT

Between, ANTONIO GRANDI, *et al.*, Plaintiffs, vs. NICOLA BRUNETTI, Defendant.	On Mechanics' Lien.

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

Manfredi Mancusi-Ungaro being duly sworn upon his oath deposes and says that he is a practicing architect in the City of Newark, County of Essex, New Jersey; and that at the request of Judge Ungaro, Attorney of Plaintiff, he attended all of the hearings before the referee, Philip J. Schotland, Esq., in the above stated cause; that on the day of the first hearing before any testimony was taken the referee in the presence of the defendant and his attorney and the plaintiffs and their attorneys, offered a suggestion that the testimony would probably be voluminous on account of so many witnesses speaking through interpreters, and that he would be willing to take extensive notes and save the costs of a stenographer if that was agreeable to all parties; that thereupon Mr. Gaetano M. Belfatto, attorney for the defendant's presence, very strenuously and vociferously objected and insisted that instead of having no stenographer he wanted two stenogra-

phers; that it was thereupon agreed between the parties that Miss Helen Jedell of the Referee's office should take the first day's testimony and that thereafter Miss Hattie Allen, a regular court stenographer, should be engaged to take the testimony, and it was then and there agreed and stipulated between the parties that the fees of the stenographer should be paid by the plaintiff in the first instance and that their final payments should abide the result of the suit and that this arrangement was not only agreed to at that time but always thereafter when the matter was referred to.

MANFREDI MANCUSI-UNGARO.

Sworn and subscribed to before me this
twenty-sixth day of September, 1916.
Julius Gordon,
Notary Public,
of New Jersey.

Affidavit of Leslie Del Tufo

ESSEX COUNTY CIRCUIT COURT

Between, ANTONIO GRANDI, *et al.*, Plaintiffs, and NICOLA BRUNETTI, Defendant.	On Mechanics' Lien.

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

Leslie Del Tufo being duly sworn upon his oath deposes and says that he is a plumber by trade; that he resides and does business in the City of Newark, County of Essex, State of New Jersey;

and that at the request of Judge Ungaro, Attorney of Plaintiff, he attended all of the hearings before the referee, Phillip J. Schotland, Esq., in the above stated cause; that on the day of the first hearing before any testimony was taken the referee in the presence of the defendant and his attorney and the plaintiffs and their attorneys, offered a suggestion that the testimony would probably be voluminous on account of so many witnesses speaking through interpreters, and that he would be willing to take extensive notes and save the costs of a stenographer if that was agreeable to all parties; that thereupon Mr. Gaetano M. Belfatto, attorney for the defendant, in the defendant's presence, very strenuously and vociferously objected and insisted that instead of having no stenographer he wanted two stenographers as he wanted to use the testimony taken by such stenographers in an appeal; that it was thereupon agreed between the parties that Miss Helen Jedell of the Referee's office should take the first day's testimony and that thereafter Miss Hattie Allen, a regular court stenographer, should be engaged to take the testimony and it was then and there agreed and stipulated between the parties that the fees of the stenographer should be paid by the plaintiff in the first instance and that their final payments should abide the result of the suit and that this arrangement was not only agreed to at that time but always thereafter when the matter was referred to.

LESLIE A. DELTUFO.

Sworn and subscribed to before me this
twenty-sixth day of September,
nineteen hundred and sixteen.
Julius Gordon,
Notary Public of New Jersey.

Notice of Appeal

(*Filed, October 11, 1916*)

ESSEX COUNTY CIRCUIT COURT

ANTONIO GRANDI and FRANCESCO CRISCITELLI, Plaintiff, vs. NICOLA BRUNETTI, Defendant.	On Mechanics Lien.

To Themistocles Mancusi Ungaro, Esq., Attorney of Plaintiff:

Dear Sir:

Take notice that the defendant, Nicola Brunetti hereby appeals to the New Jersey Supreme Court from the whole judgment of the Essex County Circuit Court, rendered in the above stated action.

Newark N. J. Oct. 10th, 1916.

GAETANO M. BELFATTO,
Atty. of Defendant.

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

Anthony F. Minisi being duly sworn on his oath says that on the 10th day of October, 1916 he called at the office of T. Mancusi Ungaro, attorney for the plaintiffs in order to serve a copy of the above notice of appeal. That Arnold Mancusi

Ungaro, who is a partner of said plaintiffs attorney refused to acknowledge service of said notice, stating that deponent should come later and see his brother Themistocles, the attorney of record for said plaintiffs. That on the 11th day of October 1916, the defendant again called at said office in order to obtain the acknowledgment of service of said notice and upon being refused again by said Arnold Mancusi Ungaro and not finding T. Mancusi Ungaro, left a copy of said notice at the office of said plaintiffs attorney in the Metropolitan Building, Newark, N. J.

ANTHONY F. MINISI.

Sworn to and subscribed before me this
11th day of October, 1916.
Egidio W. Mascia,
Atty. at Law of N. J.
Joseph McDonough,
Clerk.

Appeal Bond

(*Filed, Oct. 16, 1916*)

KNOW ALL MEN BY THESE PRESENTS, that we Nicola Brunetti, Luigi Daddario, and Vitale Ippolito of the City of Newark, County of Essex, and State of New Jersey, are held and firmly bound unto Antonio Grandi and Francesco Criscitelli in the sum of $8000 for payment of which sum we bind ourselves our heirs, executors, and administrators, jointly and severally firmly by these presents.

Appeal Bond

Sealed with our seals and dated this 13th day of October nineteen hundred and sixteen.

Whereas a judgment was rendered in the Circuit Court of the County of Essex on the fifth day of October, 1916 in a suit therein depending wherein Antonio Grandi and Francesco Criscitelli are plaintiffs and Nicola Brunetti is defendant for the sum of $3516.61 damages and $270.44 costs of suit, and the defendant Nicola Brunetti is about to appeal from said judgment of the said Essex County Circuit Court to the New Jersey Supreme Court.

Now the condition of this obligation is such, that if the said Nicola Brunetti shall pay the costs of the said appeal whatever be the result thereof, and shall pay the said Antonio Grandi and Francesco Criscitelli the judgment of the Essex County Circuit Court so as aforesaid rendered against the said Nicola Brunetti if the said appeal be not prosecuted by the said Nicola Brunetti or be dismissed, then this obligation to be void, otherwise to remain in full force and virtue.

NICOLA BRUNETTI, (L. S.)
LUIGI DADDARIO, (L. S.)
VITALE IPPOLITO, (L. S.)

Signed, sealed and delivered
in the presence of
Jacob L. Newman.

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

Luigi Daddario being duly sworn on his oath says that he is the surety in the within named bond; that he is a freeholder in the County of Es-

sex and has property subject to execution worth the sum of four thousand dollars, over and above all his just debts and liabilities.

LUIGI DADDARIO.

Subscribed and sworn to before me this
13th day of October, 1916.
Jacob L. Newman,
A Supreme Court Commissioner,
of New Jersey.

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

Vitale Ippolito being duly sworn on his oath says that he is the surety in the within named bonds, that he is a freeholder in the County of Essex and has property subject to execution worth the sum of four thousand dollars, over and above all his just debts and liabilities.

VITALE IPPOLITO.

Subscribed and sworn to before me this
13th day of October, 1916.
Jacob L. Newman,
A Supreme Court Commissioner,
of New Jersey.

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

Be it Remembered, that on this 13th day of October, nineteen hundred and sixteen, before me, the subscriber a Supreme Court Commissioner of New Jersey, personally appeared Nicola Brunetti and Luigi Daddario and Vitale Ippolito, to me known to be the parties who executed the foregoing bond, and I having first made known to

them the contents thereof, they severally acknowledged that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

JACOB L. NEWMAN,
A Supreme Court Commissioner,
Of New Jersey.

Clerk's Certificate

ESSEX COUNTY CLERK'S OFFICE

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

I, Joseph McDonough, Clerk of the Circuit Court, in and for the County of Essex in the State of New Jersey.

Do Hereby Certify that the foregoing is a true and correct copy of all the pleadings and proceedings together with a copy of the Notice of Appeal filed in the case of Antonio Grandi and Francesco Criscitelli vs. Nicola Brunetti and the same is taken from and compared with original records on file and as the same now remains on the files of said office.

In Testimony Whereof, I have hereunto set my hand and affixed the official seal of said Court and County at Newark, N. J., this 14th day of October A. D. 1916.

(Seal)

JOSEPH McDONOUGH,
Clerk.

Reasons of Appeal

ESSEX COUNTY CIRCUIT COURT OF NEW JERSEY SUPREME COURT

ANTONIO GRANDI and FRANCESCO CRISCITELLI, Plaintiffs-Appellee, vs. NICOLA BRUNETTI, Defendant-Appellant.	On Mechanics Lien.

To Themistocles Mancusi-Ungaro, Esq., Attorney of Plaintiffs:

Take notice that the following are the reasons upon which the defendant bases his appeal of the above stated cause:

1. The complaint filed in this cause alleges that the building was erected according to plans and specifications and therefore the plaintiffs were entitled to the final payment of $4000 under the contract besides $1398.38, as extra work.

2. The answer filed in said cause denies that the building was so erected and alleges a number of items of labor and materials which were omitted by the plaintiffs in the erection of said building and that said omissions are so substantial as to make it impossible to remedy them without disturbing the structure.

3. The mere fact that defendant failed to enter in the minutes his reservation of a right to a jury trial when the case was referred to the referee, did not preclude the defendant of said right,

said reservation having been filed long before the referee filed his report.

4. The report of the referee to whom the case was referred, having been set aside by the Circuit Court on the ground that it was contrary to the evidence and to law, a new trial should have been granted.

5. The Circuit Court was without power to reduce the finding of the referee after setting it aside, and a trial by jury should have been granted.

6. The plaintiff having failed to accept the finding of the Circuit Court within the ten days of the entry of the rule of said Court, a new trial should have been granted.

GAETANO M. BELFATTO,
Attorney of Defendant-Appellant.

The above reasons were served upon the plaintiffs' Attorney, on the 13th day of October 1916, as appears from the original on file in the office of the clerk of the Supreme Court of New Jersey.

Notice of Appeal to Court of Errors and Appeals

(Filed, Dec. 2, 1916)

NEW JERSEY SUPREME COURT

ANTONIO GRANDI and FRANCESCO CRISCITELLI, Plaintiffs-Appellees, vs. NICOLA BRUNETTI, Defendant-Appellant.	On Mechanics' Lien. Notice of Appeal from the judgment of the Supreme Court to the Court of Errors and Appeals.

To T. Mancusi-Ungaro, Esq., Attorney for Plaintiffs-Appellees:

Take Notice that the defendant-appellant, Nicola Brunetti, appeals to the Court of Errors and Appeals from the judgment of the New Jersey Supreme Court, entered in this cause, on the following grounds:

1. Because the New Jersey Supreme Court, erred in holding that the defendant's failure to enter in the minutes his reservation of the right to a jury trial, at the time of entering in the minutes the rule of reference, precluded him from this right to a jury trial, although said reservation was entered afterwards, long before the filing of the report of the referee.

2. Because the New Jersey Supreme Court refused to hold that the plaintiffs should not recover the last payment under the contract, they having failed to complete the building according to plans and specifications, and that the work omitted was so substantial, as to be incapable of remedy without disturbing the building.

3. Because the New Jersey Supreme Court erred in holding that the Circuit Court, having found from the evidence before the referee that the building was not completed according to plans and specifications, it had the power to deduct from the last payment the cost of the work thus omitted, instead of granting a new trial.

4. Because the New Jersey Supreme Court erred in holding that the failure of the plaintiffs to accept the finding of the Circuit Court within ten days of the entry of the rule in said Court, did not vest in the defendant the right to a new trial and that the Circuit Court had the power to extend the time to accept said finding without regular motion to that effect to have the said time extended, thus depriving the defendant of the only redress in the case namely a new trial.

Respectfully,

G. M. BELFATTO,

Attorney of Defendant-Appellant.

Rule of Affirmance and Remittitur

NEW JERSEY SUPREME COURT

ANTONIO GRANDI and FRANCESCO CRISCITELLI, Plaintiffs-Appellees, vs. NICOLA BRUNETTI, Defendant-Appellant.	On Appeal.

This cause having been argued at the November term, 1916, of this Court by the attorneys of the respective parties, and the Court having considered the same and finding no error in the record or proceedings in the Essex Circuit Court,

It is Ordered and Adjudged that the judgment of the Essex County Circuit Court removed by appeal in the above entitled cause, be affirmed, and that the record be remitted to the Essex County Circuit Court to be proceeded with according to law and the practice of said Court.

Entered, November 28, 1916.

On motion of

T. MANCUSI UNGARO,
Attorney of Plaintiffs.

I, WILLIAM C. GEBHARDT, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal filed and also of a rule entered in the minutes of the Court in the above-stated cause.

In Testimony Whereof, I have set my hand and the seal of said Court at Trenton, this nineteenth day of December, A. D., nineteen hundred and sixteen.

(Seal)

WM. C. GEBHARDT,
Clerk.

Joinder in Error

NEW JERSEY COURT OF ERRORS & APPEALS

ANTONIO GRANDI and FRANCESCO CRISCITELLI, partners, etc., Plaintiffs-Appellees,	At Law Mechanic's Lien.
vs.	
NICOLA BRUNETTI, Defendant-Appellant.	On Appeal.

The defendants (plaintiffs-appellees) join in error in the above stated cause.

THEMISTOCLES MANCUSI UNGARO,
Attorney for Antonio Grandi and Francesco Criscitelli.

Opinion

(Filed, Nov. 7, 1916)

NEW JERSEY SUPREME COURT

ANTONIO GRANDI, *et al.*, Respondents, v. NICOLA BRUNETTI, Appellant.	Nov. Term, 1916.

Appeal from Essex Circuit Court.
For the Appellant, G. M. Belfatto.
For the Respondents, T. M. Ungaro.

PER CURIAM:

The reasons for appeal present for our determination either matters of fact, which are not brought before us for consideration on a merely appellate proceeding or matters of law which have long been settled in this state, and settled adversely to the contention of appellant's counsel.

The judgment under review will be affirmed.

New Jersey Court of Errors and Appeals.

ANTONIO GRANDI AND FRANCESCO CRISCITELLI *Plaintiffs-Appellees,* VS. NICOLA BRUNETTI *Defendant-Appellant.*	*On Mechanics Lien*	10

BRIEF OF DEFENDANT APPELLANT

FACTS

This is an appeal from an order of the Supreme Court affirming a judgment of the Circuit Court in the above cause. 20

The record and proceedings before the Essex County Circuit Court shows that appellees brought suit against the appellant to recover the sum of $4000 balance due on a contract for the erection of the defendant's building, and $1398.36 for extra work. State of the Case page 3 to page 5. The appellant denies that the building was substantially completed and extra work was done thereto. 30

The Court referred the case to Philip J Schotland on the 4th day of February 1916. (Page 21 lines 20-30. On the 22nd day of April 1916, appellant filed his dissent to said reference. The evidence before the referee was taken stenographically and when reduced to writing was, together with the report filed in said Circuit Court. (Page 40

25 line 10-12, page 45 lines 30-40). Exceptions to the report were duly filed and a motion for a jury trial denied. (Page 23 lines 10-40).

Application was made to set aside the referee's finding on the ground that it was contrary to law and weight of evidence. The report was set aside and a new trial granted unless the appellees filed their consent on or before August 28th, 1916, to reduce the amount of the award from $4621.72 to $3447.26. (Page 31 lines 1-40, page 42 lines 20-30) Plaintiffs failed to file said consent and on September 9th, 1916 the Court gave them until September 20th, 1916 to file it (page 43 lines 1-40, page 44 lines 1-2).

The Circuit Court found:

a) THAT THE REFEREE DID NOT GO INTO DETAILS IN HIS REPORT AND THAT IT WAS IMPOSSIBLE WITH ANY CERTAINTY TO TELL WHAT ITEMS HE ALLOWED FOR EXTRA WORK AND WHAT ITEMS HE CONSIDERED OMITTED, AND WHAT WORK WAS IMPROPERLY DONE. (Page 33 lines 35-40, page 34 lines 4-7).

b) That the evidence before the referee failed to show any agreement on the part of the defendant to pay for work in addition to that done under the contract. (Page 36 lines 30-40).

c) That it clearly appeared that the building was not completed as called for in the plans and specifications. (Page 39 lines 10-12) and that many items of work had been omitted (page 40 lines 10-40

d) That the report of the referee failed to show that the changes and alterations were made with the consent of the owner. (Page 39 lines 35-40) or whether there had been a substantial compliance with the contract in any event. (Page 40 lines 4-6)

Article 5 of the contract provides that in case of dispute as to the true value of the extra work or the work omitted, the same shall be valued by two competent persons who shall have the prower to name an umpire whose decision shall bind all the parties. (Page 9 lines 30-40, page 10 lines 1-2).

Art. 7 of said contract provides that no alteration or extra work shall be done withoot the written order of the owner approved by the architect and an express agreement as to the cost. (Page 10 lines 15-20).

Article 10 of said contract provides that neither the contractor nor the architect shall without the written consent of the owner have authority to vary, alter, amend, or change this contract or any of the plans or specifications therein referred to. (Page 11 lines 8-13).

L A W

It is respectfully submitted that in the cases of Oakley v Emmonds 73 L 206 and Fritz, v Sayre 77 L 237 the Court held that a verdict otherwise liable to reversal cannot be maintained upon a theory of the law contrary to that upon which the case was submitted to the jury.

It is true that a long line of cases in this state hold that the report of a referee and the evidence

taken before him form no part of the record upon which error can be assigned. But in this case the Circuit Court found, THAT THE REPORT WAS NOT SUPPORTED BY THE EVIDENCE AND WAS CONTRARY TO LAW; THAT THE BUILDING WAS NOT BUILD ACCORDING TO PLANS AND SPECIFICATIONS AND THAT THE REFEREE HAD CONTRAVENED RULES OF LAW IN REACHING HIS CONCLUSION.

In the case of Feeney v Bardsley 66 L 230 the Court held that if a contractor contracts to erect a building he cannot recover even upon a quantum meruit unless he has substantially complied with the contract.

If the referee has proceeded illegally or decided erroneously, the remedy is the same as against a verdict similarly founded to set aside the report and grant a new trial. Fitch v Archibald, 29 L 160 Excelsior Carpet Co. v Potts 36 L 300, Runyon v Hodges 46 L 359, Bowell v Public Service 77 L 231.

In the case of Humphry v Mayor & Common Council etc. 48 L 588 it was held that, "The Court has the right to put in proper legal form a verdict, but cannot change it in substance.

The Circuit Court had no prower to amend its order of August 24th, 1916 whereby the defendant was given until August 28th, 1916 ~~whereby the defendant was given until August 28th, 1916~~ to accept the amount found due by the Circuit Court because said order if not subject to review was final and also because said amendment was made

without notice to appellant as provided by P. L. 1903 page 587 Sect. 190. Stein vs Goodenough 73 L 812, Den v Metlack et al, 17 L 354, (State of the case page 43 lines 38-40, page 44 lines 4-6).

A writ of error will lie to the Court of Errors and Appeals in all cases where the decision of the inferior Court is final and has not proceeded from a matter resting in discretion.

It lies from an order of the Circuit Court refusing to set aside an award where the proceedings have been entered on record in pursuance of the statute. Eames v Stiles 31 L 490 Defiance Fruit Co vs Fox. 76 L 487.

In the case of State v Mutual B & L Ass., 78 L 720, it was held, that the decision to be reviewable must have settled definitely in the suit or proceedings the rights of the parties.

But the Court will consider whether the facts found support the judgment. Blackford v Plainfield Gas Light etc., 43 L 438. Columbia Bridge Co. vs Geisse 38 L 39, City of Elizabeth v Hill 39 L 555, Bogert v Mc Chesney 77 L 797, Weger v Delran 61 L 224.

The Supreme Court erred in holding that there was no question of fact or of law for it to consider.

The judgment of the Supreme Court should be reversed and a new trial granded.

Respectfully submitted

GAETANO M. BELFATTO

Attorney of Defendant-Appellant

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

ANTONIO GRANDI and FRANCESCO CRISCITELLI, *Plaintiffs-Appellees,* *vs.* NICOLA BRUNETTI, *Defendant-Appellant.*	*Action for Enforcement of Mechanics' Lien.*

Brief for Plaintiffs-Appellees.

The defendant in this appeal seeks to reverse the long established elementary practice of the Courts of this State in three particulars:

First. The defendant contends, that he has a right to have this action tried by a jury, notwithstanding the fact, that upon this action being referred to a referee by the Circuit Court Judge under section 155 of the Practice Act, no reservation of a right to trial by jury was entered in the minutes by him until more than two and one-half months and in another term of Court after the order of reference, and after about a dozen hearings before the referee had been held.

Second. The defendant contends, that the Circuit Court Judge had no power to make the granting of a new trial conditional upon the plaintiffs accepting a reduced verdict.

Third. The defendant contends, that the Circuit Court Judge had no power by order to extend the time within which the plaintiffs could file their consent to such reduction.

The record shows that Antonio Grandi and Francesco Criscitelli instituted suit under the

Mechanics' Lien Act against Nicola Brunetti for the balance due them on a contract fully performed by them for the construction of a large apartment house on Bloomfield avenue, Newark, New Jersey, which work was finished by them and the house occupied by the owner November 1, 1914. Issue was joined in said action on Mechanics' Lien and upon its coming on for trial in the Essex County Circuit Court in regular course on the fourth day of February, 1916, the Circuit Court Judge on his own motion stated that as matters of account appeared to be in controversy he would, under section 155 of the Practice Act, refer said action to a referee to state and report an account between the parties. The attorneys for the respective parties in this action having agreed upon the appointment of Philip J. Schotland, as referee, the matter was referred to him by said Court by rule of reference entered on that day as appears on page 21 of the State of the Case. Neither party at the time of ordering said reference entered in the minutes his reservation of the right to trial by jury, but, on the contrary, on February 9th, 1916, proceeded with hearings before the referee, of which there were about twelve. On April 22nd, 1916, more than two and one-half months after the order of reference, and after the opening of a new term of Court, the defendant filed a dissent to the making of the order of reference. (See State of Case, page 22).

The referee filed his report on the ninth day of June, 1916, reporting in favor of the plaintiffs and that the amount due the plaintiffs from the defendant was the sum of $4,621.72. The attorney for plaintiffs gave the usual ten days' notice that he would apply to

have the referee's report confirmed, and the attorney for the defendant filed exceptions to the report of the referee, and gave notice that he would apply to the Court for order setting aside the report of the referee and demanding a trial by jury. As a matter of convenience the motions were considered at the same time and the application of the defendant for a trial by jury was refused for the compelling reasons set out in the memorandum of the learned trial Judge. (See pages 24-30 State of Case.) But leave was granted by the Court to the defendant to apply to have the report set aside as against the weight of evidence or for any other legal cause. (See State of Case, page 30.) Defendant availed himself of this privilege and after argument and consideration on motion to set aside the report as against the weight of evidence, the learned Judge, on August 23rd, 1916, filed a memorandum ordering that the report of the referee be set aside and a new trial granted unless the plaintiffs filed their consent on or before August 28th, 1916, to reduce the amount awarded them by said referee of $4,621.72 and interest from June 5, 1916, to $3,447.26 and interest from June 5, 1916. (See State of Case, page 31.) On the 28th day of August, 1916, counsel for the plaintiffs applied to the Court in the presence of the attorney for the defendant for leave to reargue the motion to set aside report of referee which application was granted and continued from time to time as appears by memorandum of the learned trial judge. (See State of Case, page 43.) Later, after the learned Judge had patiently and courteously heard the argument for and against said motion by the Counsel of the respective parties, but before any decision had been rendered thereon by the Court, Counsel

for the plaintiffs, acting upon instructions from them, suggested to the Court that he would consent to the denial of the motion to reargue the order setting aside the report of the referee and granting a new trial unless the plaintiffs consented to the reduction of the amount of the award from $4,621.72 with interest from June 5, 1916, to $3,447.26 with interest from June 5, 1916, and thereupon the learned Judge filed a memorandum denying application to reargue the motion as aforesaid, and further ordering that the plaintiff's time to file their consent to reduce the amount of the award to $3,447.26 with interest from June 5, 1916, be extended to and including September 20th, 1916. (See State of Case, pages 43-44.)

In conformity to the above rules the plaintiffs filed their consent to the reduction of the award, as directed by the Court, on September 19, 1916 (State of Case, page 44).

Afterwards, on motion to confirm the report so reduced and to fix referee's fees for the reason stated in memorandum filed February 5, 1916 (State of Case, page 45), the learned Judge on October 5th, 1916 (State of Case, page 55) signed an order that the report of the referee reduced in amount by consent of the plaintiffs to $3,447.26 with interest from June 5, 1916, be confirmed and that judgment be entered in the favor of the plaintiffs and against the defendant for $3,516.61 with the plaintiff's costs to be taxed, which taxed cost should include an allowance of $200 to the referee for his services.

The defendant appealed to the New Jersey Supreme Court from the judgment of the Essex County Circuit Court (see State of Case, page 66). The Supreme Court in a concise

but embracing paragraph (State of Case, page 77) affirmed the judgment of the Essex County Circuit Court.

To undertake a defense of the propriety and legality of the rulings of the learned trial Court and the judgment of the Supreme Court would be supererrogation.

The defendant has been in possession of the fruits of plaintiffs' labor since November 1, 1914.

The Supreme Court with commendable promptness finding the defendant naked of legal grievance affirmed the judgment under review immediately after the appeal had been presented by defendant's counsel.

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Attorney of Plaintiffs-Appellees.

ALGERNON T. SWEENEY,
Of Counsel.