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Notice of Appeal and Grounds.

New Jersey Supreme Court.

JOHN B. ANDERSON AND EDWIN M.
JOHNSON, partners trading as
ANDERSON AND JOHNSON,

Appellee,

vs.

ODD FELLOWS HALL ASSOCIATION
OF JERSEY CITY,

Appellant.

On Appeal
from Supreme
Court.

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On Appeal
from Second
District Court
of Jersey City.
Notice of Ap-
peal and Speci-
fication of
Points.

20

To MELOSH & MORTEN,
Attorneys for Defendant-Appellant,
in Supreme Court.

PLEASE TAKE NOTICE that the plaintiff, appel-
lee in the Supreme Court, appeals to the New
Jersey Court of Errors and Appeals in the last
resort in all causes, from the judgment of the
Supreme Court reversing the judgment of the
Second District Court of Jersey City and speci-
fies the following grounds for appeal.

30

1. That the Supreme Court held that the trial
court should have directed a non-suit upon the
ground that the plaintiff made no attempt to arbi-
trate.

2. That the Supreme Court held that the trial
court should have declared the rule to be that
the defendant was entitled in recoupment to re-
cover the cost of placing the floor in the banquet

40

hall in the condition required by the contract and plans and specifications.

For the reason aforesaid the appellant asks that the judgment of the Supreme Court be set aside and that the judgment of the District Court be affirmed.

MERRITT LANE,
Attorney for Appellant.

Dated, Jersey City, N. J.,
October 16th, 1913.

10

Opinion of Supreme Court.

New Jersey Supreme Court.

NOVEMBER TERM, 1912.

20

JOHN B. ANDERSON, et al., part-
ners, etc.,

vs.

ODD FELLOWS HALL ASSOCIATION
OF JERSEY CITY.

Argued November Term, 1912. Decided February Term, 1913.

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On appeal from the Jersey City District Court.

MERRITT LANE, for the plaintiffs.

MELOSH & MORTEN, for the defendant.

(1) Where a building contract contained a clause by which the parties agreed to refer certain specified disputes to arbitration, HELD, that the reference to arbitration was thus made a condition precedent to the commencement of a suit to settle the questions agreed to be arbitrated.

(2) The rule of damages where a building has
40 been substantially completed according to con-

Opinion of Supreme Court.

tract, but is defective in some particulars, is declared by the Court of Errors and Appeals, in *Feeney v. Bardsley* (37 Vr., 240) to be the cost of making good the omitted or defective work, and a direction of the trial court that the damage allowable under such circumstances, was the difference in value between the completed work, and the work as it should have been performed under the contract HELD erroneous. 10

ARGUED BEFORE TRENCHARD AND MINTURN, J. J.

THE OPINION OF THE COURT WAS DELIVERED BY
MINTURN, J.

Suit was brought by the plaintiffs to recover from defendant, the amount of a claim for extra work alleged to have been performed by plaintiffs, and arising out of the erection of a hall upon defendant's land in Jersey City. 20

The contract for the erection of the building was in writing and under seal. Defendant filed a recoupment alleging failure of plaintiffs to perform their contract by failing to lay the floor of the banquet hall in the manner provided by the contract, and the plans and specifications.

The contract provided that the work should be performed under the direction of a committee of three men, appointed by the parties. It also contained a provision that in case of the failure of the parties to the agreement to agree "in relation to matters of payment, allowance or loss," the disputes should be referred to three arbitrators selected by the parties and the Committee. 30

Various questions were mooted at the trial, which have been presented to us by exceptions taken by the defendant against which judgment was awarded by the District Court. We are concerned with two only of the questions thus raised, 40

Opinion of Supreme Court.

10 because we have concluded that upon one at least the ruling of the trial court was clearly erroneous. The contract being in evidence, and this dispute being obviously a difference between the parties "in relation to matters of payment, allowance or loss," which under Article 12 of the contract was referable to arbitration, the defendant insisted that in as much as there was no evi-

20 dence in plaintiffs' behalf tending to show an attempt upon their part to comply with this provision of the contract, this action was not maintainable. The trial court refused the request to non-suit upon that ground, and the legal correctness of that ruling is before us upon exception. The question has never been squarely before the Courts of this State, although on at least two occasions it was inferentially dealt with by this

20 Court. In *Boyd v. Meighan* (19 Vr., 404), the question while presented by the record, and raised in the case was not made the basis of decision, as the Court found it unnecessary to say more than that such a clause did not apply to a condition where the owner ignoring his contract obligations refused to allow the contractor to proceed with the work; but was intended to apply only to "contingencies arising during the work

30 under the contract." *Wolff v. Insurance Co.* (21 Vr., 453) was a suit for damages upon a policy of insurance, to which the defendant pleaded the usual arbitration clause in such policies, and alleged a pending arbitration upon which no award had been made. This Court, by Chief Justice Beasley, upon demurrer to the plea sustained the plea, and said, "Such an agreement is both legal and rea-

40 sonable, and it is not perceived that any authority exists which holds a contrary doctrine. There

Opinion of Supreme Court.

are, it is true, decisions to the effect that a clause merely declaring that if the parties shall disagree as to the amount of the loss, such difference shall be arbitrated, does not create a condition precedent, but this is for the reason that it is not made such by the terms of the contract."

In the case at bar arbitration seems to be provided for throughout the contract and specifications, as the practical *modus operandi* of determining disputes between the parties. 10

It is indisputable that the policy of the earlier decisions of the courts was to discountenance arbitrations as conditions precedent to an action at law, upon the theory that the effect of such agreements was to deprive the ordinary judicial tribunals of the power of determining controversies, and thus practically superseding them in the disposition of litigation; but as the learned Editor in 3 Cyc., 586, remarks, "This hostility, however, has long since disappeared, and by reason of the fact that the proceeding represents a method of the parties own choice, and furnishes a more expeditious and less expensive means of settling controversies than the ordinary course of regular judicial proceedings, it is the policy of the law to favor arbitration." 20

To the same effect are the comments of Vice-Chancellor Van Fleet, in *Leslie v. Leslie* (50 N. J. Eq., 103). A thorough and concise review of the history of the law and the tendency and trend of modern legal learning upon this subject is presented in the opinion of Judge Grier, in the Federal Court of Appeals in *Fox v. Hempfield R. Co.*, Fed. Cases, 5010. 30

In that case the covenant between the parties provided for an arbitration which "shall be final and conclusive," and the parties expressly waived 40

Opinion of Supreme Court.

any right of action at law. The clear intent of the agreement, therefore, was to oust the courts of jurisdiction, by substituting for the legal forum, a system of arbitration. Under the earlier decisions such an agreement would be indubitably stamped with disapproval, as contrary to public policy.

10 But in the determination of the case, the Court quotes the language of Lord Campbell in *Scott v. Avery*, 8 Exch., 487:

20 "What pretence can there be for saying that there is anything contrary to public policy in allowing parties to contract that they shall not be liable to any action, until their liability has been ascertained by a domestic and private tribunal upon which they themselves agree? Can the public be injured by it? It seems to me that it would be a most inexpedient encroachment upon the liberty of the subject, if he were not allowed to enter into such a contract."

The Court characterized the old law as "an obsolete dogma" and concluded that such a covenant should be liberally construed, and not subjected to ingenuous criticism, in order to support the jurisdiction of courts of law, and encourage litigation.

30 We are not, however, in the case sub judice, required to go to that length or to consider that aspect of an arbitration which is intended, in haec verba, to oust the courts of jurisdiction; and we refer to it at all for the purpose of presenting the state of the judicial mind, and the trend of modern legal opinion upon the subject of the public policy, which while sporadic in character heretofore militated against it.

40 The agreement before us, however, contains no such language, but is intended simply to bring

Opinion of Supreme Court.

about a settlement of the respective claims of the parties, with the view of arranging a settlement of the same as a condition precedent to a resort by the parties to the courts of law. In the consideration of this phase of the question, the rule deduced from a consideration of the modern cases seems to be as follows: The parties to a contract may agree to impose as a condition precedent to any right of action, that with respect of the liability to pay, the mode of settling the amount to be paid, or the time for paying the same, an arbitration shall first be held, and that in respect to such agreements the rule is that if the agreement is in such terms that a reference is a condition precedent to the right of the party to maintain an action, he is not entitled to maintain it until that condition is complied with; but if the agreement is to pay with a subsequent agreement to refer the question to arbitration, contained in a distinct clause, collateral to the other, the agreement to refer does not oust the jurisdiction of the courts in the first instance.

3 Cyc., 596, and cases cited.

Construed in the light of this legal principle we think the 12th clause of the contract between the parties to this action contained all the essentials for a reference to arbitration, as a condition precedent to the institution of an action to recover the amount claimed, and that the trial court should have directed a non-suit upon that ground.

The contract must be read as an entirety. The principle of arbitration permeates the whole scheme and every section of it is so co-related and interwoven with one another, as to leave no doubt that what the parties contemplated in case of controversy such as this case presents, was its

Opinion of Supreme Court.

settlement by arbitration, at least before any resort would be made to the courts of law.

10 Another exception taken by the defendant was directed to the measure of damages. The Court excluded testimony offered by the defendant for the purpose of showing the cost of placing the floor in the banquet hall in the condition re-
quired by the contract, and the plans and speci-
fications; and testimony was offered substantially
to support the claim of recoupment, which the de-
fendant had alleged in its pleading; the conten-
tion being that the measure of damages was the
cost of placing the floor in the banquet hall in
the condition contracted for. We think this rul-
ing was erroneous and that the testimony should
have been admitted.

20 The Court of Errors and Appeals in an opinion by Mr. Justice Van Syckel, has declared the rule in such cases to be that if the contractor has sub-
stantially performed his contract, even though
he has failed to do so in some minor particular,
he is entitled to recover the contract price, less
what will be a fair allowance to the owner to
make good the defects as contemplated by the
contract.

Feeney v. Bardsley, 37 Vr., 240.

30 For these errors manifest in the record, the judgment must be reversed.

Judgment of Supreme Court.

Formal rule reversing judgment of Second District Court and directing judgment in accordance with foregoing opinion filed.

Judgment.

STATE OF NEW JERSEY, }
Hudson County, } ss.: 10
City of Jersey City. }

Second District Court of Jersey City.

Before :

JAMES S. ERWIN, Esq.,

Judge.

No. 36,605.

JOHN B. ANDERSON, et al.,
Plaintiffs, }
vs. } On Contract.
ODD FELLOWS HALL ASSOCIATION } Demand
OF JERSEY CITY, } \$500.
Defendant. }

20

30

Merritt Lane, Plaintiff's Attorney.

Melosh & Morten, Defendant's Attorneys.

Costs.	City.	Al.	
Summons and copy	\$1.50		
Service and return		60	
Mileage		10	
Trial fee	1.50		
3.70	3.00	70	40

Judgment.

	2.20	70
	1.50 ch.	3.70
	Attorney's fees	14.85
		18.55
	Five witnesses	4.25
10		22.80
	Jury	2.75
	Bond c	1.00

A summons was issued tested May 18th, A. D., 1912. Returnable May 24th, A. D., 1912, at ten o'clock in the forenoon.

- 20 The Constable returned the summons as follows, viz.: I served the within summons May 18th, 1912, on Odd Fellows' Hall Association of Jersey City, the defendant, by leaving a copy thereof with Victor Bank, Superintendent of the place of business of the defendant Association, whom I informed of the contents thereof.

ANDREW J. MELLOR,
Sergeant-at-Arms.

30

Plaintiff's demand was filed May 18th, A. D., 1912. Defendant's recoupment was filed June 17th, A. D., 1912. May 24th, A. D., 1912, this cause was called for trial at 10 o'clock in the forenoon and continued by adjts. to June 17, '12, at 2 p. m. May 22, '12, the defendant demanded a jury. A venire was issued June 10th, 1912, returnable June 17th, A. D., 1912, at 2

40

Demand.

o'clock in the afternoon to Andrew J. Mellor, Sergeant-at-Arms. June 17th, A. D., 1912, the plaintiff appeared and the defendant appeared and the trial of the cause was proceeded with as follows:

Said Sergeant-at-Arms returned said venire with the following jurors summoned, viz.: Bergen Gad-
dis, Bernard J. Reitze, Charles Cairns, Richard
Lahey, Charles Munch, William Glock, Clarence
Bruce, Michael Woolever, James J. Chauncey,
Gustav Kurzel, William Coleman and Leon Er-
win, who were severally sworn according to law. 10
Harry Schirmer was sworn as stenographer on
the part of the plaintiff. Edward Johnson and
John B. Anderson were sworn and testified.

On the part of the defendant, William A. Tilton,
Erasmus Nelson, Lawrence Kirchner, Robert W.
Eichmann, Joseph Moorecraft and Henry Melosh 20
were sworn and testified.

The Sergeant-at-Arms was sworn to attend
said jury, who retired, and after deliberation re-
turn and say that they find for the plaintiffs in
the sum of two hundred and ninety-seven dollars
(\$297), and so say they all.

Whereupon it is on this 17th day of June, A.
D., 1912, by this Court considered and adjudged
that said John B. Anderson and Edwin M. John- 30
son, partners trading as Anderson and Johnson,
plaintiffs, recover against said Odd Fellows' Hall
Association of Jersey City, defendant, the sum of
two hundred and ninety-seven dollars damages
and twenty-two dollars and eighty cents cost of
suit.

June 25, '12, notice and bond filed.

I do hereby certify that the foregoing is a true
copy of the judgment record in above entitled 40
cause in said Court, this 14th day of October,
A. D., 1912.

HOWARD R. CRUSE,
Clerk.

State of Demand.**Second District Court of Jersey City.**

JOHN B. ANDERSON and EDWIN
M. JOHNSON, partners, trading
as ANDERSON & JOHNSON,

Plaintiffs,

On Contract.
State of
Demand.

10

vs.

ODD FELLOWS HALL ASSOCIATION
OF JERSEY CITY,

Defendant.

20

The plaintiffs demand of the defendant the sum of five hundred dollars (\$500) for goods sold and delivered by the plaintiffs to the defendant, and for materials furnished and work and labor performed for the defendant upon the buildings on Bergen Square, in Jersey City, and built for the Odd Fellows' Hall Association of Jersey City by the said plaintiffs, all being extra work under a certain contract made upon the tenth day of February, A. D., 1911, between the plaintiffs and the defendant, such extra work having been ordered by the defendant, and the following is a bill of particulars.

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MERRITT LANE,
Attorney for Plaintiff.

40

Bill of Particulars.

1. Changing three windows on fire stairs to doors	\$80.00	
2. Stripping banquet hall to receive floor- ing	70.00	
3. Changing five rear windows to wire glass	15.00	
4. Cutting, opening and furnishing door and trim for lady's toilet of banquet hall	20.00	10
5. Mezzanine floor for lockers third floor rear	70.00	
6. Boxing of stairs of second floor.....	5.00	
7. Lengthening of pitts under ceiling	7.00	
8. Furring of iron beams not shown on plans	20.00	
9. Fire doors first floor made larger and 2 doors on south side, instead of 1 as shown on plans	10.00	20
10. Furring out outside walls for pipe re- cess	13.60	
11. 500 ft. of 2 member base around all lodge room platform	36.40	
12. Base around mezzanine floor first floor.	12.00	
Total	\$359.00	
Less	132.00	
	\$227.00	30

Judgment will be claimed for the sum of three hundred and fifty-nine dollars (\$359), with interest from the 28th day of October, A. D. 1911.

Trial will be demanded upon the return day of the summons.

MERRIT LANE.

Recoupment.**Second District Court of Jersey City.**

JOHN B. ANDERSON and EDWIN
M. JOHNSON, partners, trading
as ANDERSON & JOHNSON,

Plaintiffs,

On Contract
Recoupment.

10

vs.

ODD FELLOWS HALL ASSOCIATION
OF JERSEY CITY,

Defendant.

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The defendant hereby gives notice that at the trial of the above stated case it will seek to recoup damages from the plaintiffs, because of the failure of the plaintiffs to carry out the contract in the state of demand mentioned in the following particulars, to wit: No rough floor of No. 27/8 in. matched North Carolina pine, securely nailed with two nails to each bearing and closely fitted against all brick work, and laid diagonally on the beams, was furnished or laid on the floor of the first story, known as the banquet hall floor, by means whereof the plaintiff suffered the following item of damages, to wit, the cost of taking up the present maple floor, laying a diagonal floor, as provided for in the specifications, and relaying the maple floor therein provided, all of which will amount to the sum of six hundred dollars; and the defendant will seek to recoup damages from the plaintiffs, to wit, the difference between the said sum of six hundred dollars and the actual proven value of the work done by the plaintiffs for the defendant, for which the plaintiffs are entitled to be paid, the defendant hereby waiving, if necessary, any excess of damages to which it may be entitled from the plaintiffs over and above the sum of five hundred dollars.

MELOSH & MORTEN,
Attorneys of Defendant.

Second District Court of Jersey City.

JOHN B. ANDERSON, et al.,	}	On Contract.
<i>Plaintiffs,</i>		
<i>vs.</i>		
ODD FELLOWS HALL ASSOCIATION OF JERSEY CITY,		
<i>Defendant.</i>		10

Stenographer's Minutes.

Of evidence taken in the above entitled case this seventeenth day of June, nineteen hundred and twelve, at two o'clock in the afternoon, before James S. Erwin, Judge, and a jury, at the Court Room in the Jersey City Trust Company Building, Jersey City, in the presence of

20

MERRITT LANE, Esq.,
Attorney of Plaintiff.
MELOSH & MORTEN,
Attorneys of Defendant.

On motion of defendant Harry Schirmer was designated and sworn as stenographer.

Mr. Lane on behalf of plaintiff opens up to the jury.

30

40

Edward M. Johnson—Direct.

EDWARD M. JOHNSON, a witness called by and on behalf of the plaintiffs, after being duly sworn on his oath, testified as follows:

DIRECT EXAMINATION BY MR. LANE:

Q. Mr. Johnson, where do you live? A. 198 Lexington avenue, Jersey City.

10 Q. You are a partner of Mr. Andersons's? A. Yes, sir.

Q. Did your firm do some work for the Odd Fellows' Hall Association? A. Yes, sir.

Q. On what buildings? A. On the Odd Fellows' Hall on Bergen Square.

Q. The operation of the work on those buildings was under the supervision of whom for the defendant?

20
Objected to on the ground that if there was any such direction it was evidenced by a writing and the writing should be produced.

Q. Have you got a contract, Mr. Johnson? A. It isn't a contract, but it probably has something to do with a contract; it is while the contract was going on.

30 Q. You did have a contract? A. Yes, sir.

Q. Is that the contract (handing witness paper)? A. That is the contract.

Q. Are these the specifications which were annexed to that contract? A. I believe they are; at least they appear to be the very same.

40
Contract and specifications offered in evidence subject to correction of mistakes, marked Exhibits P-1 and P-2 for plaintiff.

Q. Now, Mr. Johnson, who were the members

Edward M. Johnson—Direct.

of the committee that acted under that contract?

A. Well, Mr. Hansen, Mr. Kirchner, Mr. Nelson and Mr. Rodman.

Q. I show you a letter dated August 14, 1911, and ask you whether that is your estimate for some of this work? A. Yes sir.

Letter offered in evidence and marked Exhibit P-3 for plaintiff.

10

Q. Was that work done in pursuance of that estimate? A. Yes.

Q. I show you another letter dated July 24, 1911, and ask you whether that is your estimate in acceptance for some other of the work? A. Yes, sir.

Q. Was that work done? A. Yes, sir.

Letter offered in evidence and marked Exhibit P-4 for plaintiff.

20

Q. I show you a letter dated September 25, 1911, and ask you whether that is the estimate for some other of the work? A. Yes, sir.

Q. Was the work done under it? A. Yes, sir.

Letter offered in evidence and marked Exhibit P-5 for plaintiff.

Q. Now Mr. Johnson, the next item in your bill of particulars is for changing five rear windows to wire glass, \$15.00; is that covered by any written order? A. That I couldn't tell.

30

Q. Was that work done, Mr. Johnson? A. Yes, sir.

Q. Under what circumstances? A. What do you mean?

Q. Who ordered it? Mr. Rodman spoke to me about it—Mr. Rodman, chairman of the committee.

40

Edward M. Johnson—Direct.

Q. Is the sum of \$15.00 a reasonable price for that work?

Objected to on the ground that it is irrelevant at this time because it has not been shown that it was ordered as provided in the plans and specifications and contract.

10

Objection overruled. To which ruling of the Court counsel for the defendant prayed an exception, which was granted and signed and sealed accordingly.

Q. Is that a reasonable price for the work?

A. That is the price that the material men gave us.

Q. Actual cost? A. Yes, sir.

20

Q. Did the members of the committee see that work being done?

Objected to on the same ground. Objection overruled. To which ruling of the Court counsel for the defendant prayed an exception, which was granted and signed and sealed accordingly.

Q. Did they see it being done? A. Yes, sir.

30 Q. When was it done, do you know? A. I can't give you the date.

Q. Have you got your books? A. I could give it to you from the books.

Q. About when? A. Well, it was done at the same time as the other windows; those changes were made after the first windows were made.

BY THE COURT:

40 Q. When was that about? A. I couldn't tell you exactly.

Q. September or October? A. I don't know.

Edward M. Johnson—Direct.

BY MR. LANE:

Q. The next item is an item, boxing stairs, second floor, \$5.00; what is that? A. That is where the stairway is about a foot wider than shown on the floor.

Q. Who directed you to make it that way? A. Mr. Rodman and Mr. Tilton.

Q. Who is Mr. Tilton? A. He is supposed 10 to be the architect and builder.

Q. Is \$5.00 a reasonable price for that?

Objected to on the same ground as heretofore; there is nothing to show that the defendant is liable for that under the terms of the contract. Objection overruled. To which ruling of the Court counsel for the defendant prayed an exception, which was granted and signed and sealed 20 accordingly.

A. Yes sir.

Q. Lengthening of pits under ceiling, \$7.00?

A. It was all ordered done by Mr. Rodman and it was stopped.

Q. Is the price of \$7.00 a reasonable price?

Same objection. Objected overruled. To which ruling of the Court counsel for the defendant prayed an exception, which was 30 granted and signed and sealed accordingly.

Q. Did the members of the committee see that being done?

Same objection. Objection overruled. To which ruling of the Court counsel for the defendant prayed an exception, which was granted and signed and sealed according- 40 ly.

Edward M. Johnson—Direct.

A. Yes sir.

Q. Erecting two iron beams not shown on plans, \$20; what is that? A. That is an extra beam that was put in that was not on the plan and had to be taken care of.

Q. Who ordered it? A. Mr. Rodman.

Q. Did the members of the committee see that
10 being done.

Same objection. Objection overruled. To which ruling of the Court counsel for the defendant prayed an exception, which was granted and signed and sealed accordingly.

A. Yes, sir.

Q. Is \$20.00 a reasonable price for that work?

20 Same objection. Objection overruled. To which ruling of the Court counsel for the defendant prayed an exception, which was granted and signed and sealed accordingly.

A. Yes, sir.

Q. The next is fire doors on the first floor made larger and two doors on south side, instead of one, as shown on plans, \$10.00? A. That was
30 done.

Q. By whose orders? A. Mr. Rodman.

Q. Did the members of the committee see that being done?

Same objection. Objection overruled. To which ruling of the Court counsel for the defendant prayed an exception, which was granted and signed and sealed accordingly.

40 A. Yes, sir.

Q. Referring to outside walls and pipe recess,

Edward M. Johnson—Direct.

\$13.00; how did that come to be done? A. Well, the piping wasn't in recesses; they were outside the walls, they weren't boxed inside, and we had to do that.

Q. Who ordered it done? A. Mr. Rodman.

Q. Is \$13.60 a reasonable price for that?

Same objection. Objection overruled. To which ruling of the Court counsel for the defendant prayed an exception, which was granted and signed and sealed accordingly. 10

J. S. ERWIN,
J.

A. Cost.

Q. Work done under protest, 500 feet base; will you explain how that came to be done? A. Yes, sir; on the sectional plan—there was a sectional plan—the base was shown to run up against the platform on the third floor, and the committee wanted a base put up, so we done it under protest. 20

Q. What do you mean by under protest? What did you tell them? A. We told him it was extra work and we didn't want to do that under the contract. 30

Q. What did they say? A. To go ahead with it.

Q. Did they say they would pay you? A. They said it should be settled later.

Q. On these other items of work, did they say they would pay you? A. Yes, sir.

Q. This one they told you that they wouldn't agree to pay you, but they would settle that later? A. It was supposed to be done under the contract, but we couldn't find it. 40

Edward M. Johnson—Direct.

Q. Was it required by the contract? A. We couldn't find it that way.

Q. Is \$36.40 a reasonable price for that work?

10 Objected to as not ordered under the terms of the contract. Objection overruled. To which ruling of the Court counsel for the defendant prayed an exception, which was granted and signed and sealed accordingly.

J. S. ERWIN,
J.

Q. The next item is base along mezzanine floor, first floor, \$12.00; what is that? A. That is over a concrete floor, and a maple floor was to have gone on the south side of the building to rest in that way (indicating).

20 Q. Did they tell you about that? A. Yes, sir.

Q. Is that another matter that they claimed to be included in your contract? A. Not that I know.

Q. Did they say they would pay you for it? A. They said they wanted it done.

Q. Is \$12.00 a reasonable price for that?

30 Objected to as not ordered in accordance with the terms of the contract. Objection overruled. To which ruling of the Court counsel for the defendant prayed an exception, which was granted and signed and sealed accordingly.

J. S. ERWIN,
J.

A. Cost.

40 Q. That makes a total of \$359.00 extra? A. Yes, sir.

Q. Did you complete your original contract, Mr. Johnson?

Edward M. Johnson—Direct.

Objected to as leading and calling for a conclusion as to whether it was completed or not.

Question withdrawn.

Q. I show you a certificate and ask you whether that is your final certificate on the work?
A. Yes, sir.

Certificate offered in evidence.

10

MR. MORTEN: We object to the certificate as being binding on the defendant company that the work had been completed or that the work had been completed in a workmanlike manner as provided by the contract. We do not deny that this was a certificate issued by the committee.

Objection overruled. To which ruling of the Court counsel for the defendant prayed an exception, which was granted and signed and sealed accordingly.

20

Certificate marked Exhibit P-6 in evidence.

Q. I show you one more written order and ask you what that refers to? A. That is a center floor they were talking about some time.

Q. Which one? A. Head center floor.

30

Q. Kitchen floor? A. I mean traps where they were put on the floor.

BY MR. MORTEN:

Q. The tenth item? A. Yes, sir.

Q. What is the date of this? A. September 1st.

BY MR. LANE:

Q Lengthening pits under ceiling, \$10.00; it

40

Edward M. Johnson—Direct.

covers something more there, does it not? A.
(No answer).

10 Letter offered in evidence. Objected to as not being signed or authorized as provided in the contract and specifications. Objection overruled. To which ruling of the Court counsel for the defendant prayed an exception which was granted and signed and sealed accordingly. Letter marked Exhibit P-7 in evidence.

Q. Does it relate only to the \$7.00 item, or does it also cover the boxing of the girder?

Objected to, as order speaks for itself.

BY THE COURT:

20 Q. Whose signature is that (indicating)? A.
Mr. Rodman's.

30 By consent of counsel Mr. Rodman was called and read the exhibit, as follows: "September 1, 1911. Anderson & Johnson. On the second floor rear extend pit across ceiling, also on first floor in banquet room, extend pit to rear wall, so in each case they will appear as boxed girder, and charge I. O. O. F. Hall Association. C. B. RODMAN, Chairman Building Committee."

Q. Was that work of lengthening the pit the cause of making any of this other work necessary? A. It made other work.

Q. By reason of the girder or anything of that kind? A. No.

Q. Separate and distinct? A. Yes, sir.

Edward M. Johnson—Cross.

CROSS-EXAMINATION BY MR. MORTEN:

Q. Now, Mr. Johnson, you have no written order for any of the work concerning which you have just testified, except that specified in the orders that you have produced; is that right? A. I don't know; I couldn't say; my partner is here and he can tell. Not to my knowledge.

Q. You don't know of any written orders other than those you have produced, do you, at the present time? A. No; I think not. I haven't seen them. 10

Q. Did you personally have charge of the work over at the building? A. Yes, sir.

Q. Do you remember the laying of the wooden beams in between the iron girders to receive the banquet hall floor? A. Yes, sir.

Q. Were you present there during that time? A. I was, sir. 20

Q. Did you have a foreman there? A. Yes, sir.

Q. How were these wooden beams laid in between the girders? A. In 4x6 iron angles, something like that.

Q. The beams were cut out to fit on the angle irons? A. Not cut out on the angle irons, but cut out against the flange.

Q. So as to be level with the flange of the iron girder? A. They were sticking up above the flange. 30

Q. But you have to cut away part of the beams so as not to have them too high above the beams? A. No, sir; we didn't cut anything. We made them fit by cutting against the flange.

Q. How much did you cut away? A. I couldn't tell you exactly. We only cut the upper edge—not the lower edge. 40

Edward M. Johnson—Cross.

10 Q. This item of \$70 for stripping banquet hall to receive the floor is an item charged by you for strips which you placed on the iron girders on the beams to receive the flooring, so as to make the floor one inch or one and one-half inches or two inches, whatever was necessary, above the iron girders, so that the pipes and piping throughout the building could go through the floor, is that right? A. No, sir.

Q. Then why was the stripping necessary? A. They say to me they wanted the floor to run five beams; they were running four and a half, and they wanted the floor to run the same way.

20 Q. They wanted the floor to run from the back to the front of the building? A. Yes, sir, the girder ran crossways and the beams ran fore and aft.

Q. The iron girders ran across the building? A. Have you got the second floor? They would have to lay across the building.

Q. Was there any reason why the beams could not have been re-set sufficiently well to fit the strips? A. They could not have been under the iron construction that was in there.

30 Q. There could not be? A. No, sir; except you block it over an inch.

Q. After the strip was put on the iron girders is there any reason then why you could not have laid the diagonal floor on the banquet hall first before laying the maple floor? A. That I don't know; that wasn't called for.

Q. You don't answer the question.

40 Objected to as immaterial, irrelevant and not proper cross-examination. Objection overruled. To which ruling of the Court counsel for the plaintiff prayed an exception, which was granted.

Edward M. Johnson—Cross.

Q. After the strip had been laid there, Mr. Johnson, is there any reason why the diagonal flooring could not have been laid on and then the maple flooring laid on top of that? A. It could have been done.

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

Q. You have charges in your state of demand for furring out outside of walls for pipe recesses; can you show us on the plans where that was? 10
A. I think I can tell you where it was, but it ain't shown on the plans.

Q. Can you tell us where they ought to have been on the plans? A. They should have been recesses in the wall which were not.

Q. Where was this furring on the outside walls done for which you have made a charge? A. There is one (indicating), there is one (indicating on the third floor plans a recess on the north side of the building next to the partition for the toilet.) 20

Q. Doesn't that pipe appear to be in the recess on the plans? A. Yes; but not outside the recess; this pipe is six inches outside the wall; it would have to be boxed in and lathed.

Q. Then this pipe which is on the soil pipe was not placed where shown on the plans, is that right? A. It was sticking beyond the walls at least four or five inches. 30

Q. Then it wasn't placed where shown on the plans? A. Not where it is shown on this plan; no, sir; the same occurred to this one on the platform right opposite (pointing to same plan on the soil pipe just opposite the platform in the rear thereof). (The first soil pipe is marked by the figure 1, and the second soil pipe marked by the figure 2 on the plans). 40

Edward M. Johnson—Cross.

Q. Was there any other furring for pipes which you have charged? A. There may have been one or two others.

Q. But you can't tell us now? A. I couldn't tell you except what I said.

Q. Can you tell us anything else without going to the building? A. That is, I know there
10 was two here (indicating) and one over there (indicating). I know of these two and one over there (pointing to pipes marked 1, 2 and 3 on the same floor plan).

Q. As those pipes were shown on the platform wouldn't they have to be covered with furring? A. Furring strips on the walls and lathed over.

Q. Yes. A. Which we have, besides the boxes.

Q. I direct your attention to page 4 of the
20 specifications, reading as follows, under the title, "furring": "All other furring; do all that may be necessary with 1x2 inch stuff, inclusive of around all exposed iron beams to met all requirements and 2x4 joists for third floor ceiling"; wouldn't that be sufficient to cover that item? A. Not 2x4 for the pipe; 2x4 for the ceiling we got in there and furring for the ceiling.

Q. 1x2? A. Yes sir.

30 Q. Wouldn't that specification cover that? A. Not to my understanding.

Q. Now, you have charged in your state of demand for the base board around the lodge room platforms and around the mezzanine floor, a total amount of \$48.50, making up the last two items of \$36.50 and \$12.00; wasn't that base board required under the specifications? A. We didn't think so.

40 Q. I direct your attention to page 5 of the specifications, under the title "Doors, base and

Edward M. Johnson—Cross.

trim": "Trim windows throughout with a moulded stoop and apron and set head and moulded casing and angle moulding on the face of the walls of all rooms, halls and passageways and elsewhere as required with eight-inch wide base trim and on the top with two-inch moulding"; after having your attention directed to that provision in the specification, don't you think that it required the base to be placed around the room? 10
A. Not if you look on the section plans; that shows an eight-inch piece.

Q. Have you the sectional plan with you? A. No, sir.

Q. I direct your attention to sheet entitled "Plans for Odd Fellows' Hall, Bergen Square, Jersey City, December, 1910, longitudinal section throughout center"; doesn't that show the base around the rooms? A. Not on the flat ones, here 20
is one right in against the step (indicating).

Q. The base in against the step? A. Not going on top of the platform.

Q. And this shows the longitudinal base board, does it not? A. This must be a platform on other rooms.

Q. And the platform? A. There is another platform and base board, too (indicating).

Q. Therefore, you thought that the base board 30
should stop at this step? A. Yes, sir.

Q. I am going to ask you the way that you left the job, so far as the base board was concerned, was the same as the base board around this room brought up to the platform right to here (indicating)? A. Yes, sir.

Q. On each side? A. Yes, sir.

Q. You put on base around the platform? A. 40
Not until we were ordered.

Q. Your idea is that the plans do not provide

Edward M. Johnson—Cross.

for base around the platform? A. Not according to the plans and specifications.

Q. You didn't put a piece there, although the specifications said that base should be put where required; is that right? A. I don't know; we put it around all the rooms.

10 Q. You didn't think that that base was required around the platform? A. Not according to the plans.

Q. Didn't the specifications provide that you shall put the base board "elsewhere as required?" A. Well, it also says according to the plans.

20 Q. I direct your attention again to page six; don't this provision in the specifications require you to put the base board around the lodge rooms on the face of walls and halls and passageways and elsewhere as required? A. Well—

Q. Doesn't it do that? A. Not to my understanding of the plans; that is all I can say.

Q. Don't you understand the plain English of this provision in the specifications? A. That calls—

Q. Doesnt that provision ssay that you shall put that baseboard elsewhere as required? A. That is part of it.

30 Q. Then the reason you didn't put it there was because you didn't think it was required? A. It doesn't show on the plans. All the rest it does, but not on the plans.

Q. Doesn't the contract and specifications provide that anything shown on the plans and omitted in the specifications or mentioned in the specifications and omitted in the plans shall be done as if required on both? A. That may be.

40 Q. Now, if that is so, then why didn't you put a base board around the platform? A. I stated to you, sir, that it ain't shown on the sectional plans.

Edward M. Johnson—Re-Direct

Q. And therefore, inasmuch as it wasn't shown on the drawings, you didn't put it there, even though required under the specifications? A. Because it wasn't put there; it wasn't shown.

Q. The reason you didn't put it there was because it wasn't shown on the plans, although it was in the specifications? A. Yes; I don't know about the specifications. 10

Q. You had a copy of them, didn't you? A. Yes, sir.

RE-DIRECT EXAMINATION BY MR. LANE:

Q. Is that part of the work, Mr. Johnson, that the committee, or Mr. Rodman, agreed to pay you for, or is it part of the work that they ordered you to do and adjust it later? A. Yes, sir; that is the part. 20

Q. That is the part they ordered to be adjusted later? A. Yes.

Q. The dispute between you and the committee was whether it was called for by the plans or not? A. Yes, sir.

Q. That applies to both of the items? A. Yes, sir.

Q. The provision used in the specification "Elsewhere as required" do you consider that to mean anywhere or elsewhere except as required by the plans? 30

Objected to as calling for a conclusion.
Objection sustained.

PLAINTIFF RESTS.

Motions.

10

MR. MORTEN: If the Court please, I move for a nonsuit on the ground that the contract itself provides that any dispute between the parties is to be submitted to a board of arbitration as provided in Article 12, and that therefore the plaintiff cannot maintain this action until they have complied with the terms of their own contract entered into between the parties, which is, that the matter shall be submitted to arbitration.

Motion denied, to which ruling of the Court counsel for the defendant prayed an exception, which was granted and signed and sealed accordingly.

J. S. ERWIN,
J.

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30

MR. MORTEN: If the Court please, I now move to strike out the evidence relating to the items—there are twelve items in the state of demand—I move to strike out all evidence relating to items 6 for \$5.00, item 7 for \$7.00, item 8 for \$20.00, item 9 for \$10.00, item 10 for \$13.60, item 11 for \$36.40, and item 12 for \$12.00, on the ground that it does not appear that any of this extra work was ordered in accordance with the terms and provisions of the contract.

Motion denied. To which ruling of the Court counsel for the defendant prayed an exception, which was granted and signed and sealed accordingly.

J. S. ERWIN,
J.

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Mr. Morten opens to the jury for the defendant.

William A. Tilton—Direct.

WILLIAM A. TILTON, a witness called by and on behalf of the defendant, after being duly sworn, on his oath testified as follows:

DIRECT EXAMINATION BY MR. MORTEN:

Q. Mr. Tilton, you are an architect by profession? A. Yes, sir.

Q. And have been how long? A. Probably 20 10 years.

Q. And you drew the plans and specifications for the Odd Fellows' Hall? A. Yes, sir.

Q. Occasionally did you visit the hall? A. Yes, sir.

Q. Do you remember visiting this hall on one occasion and noticing a strip on what we call the banquet hall? A. Yes.

Q. Did you see the floor beams when they were 20 being laid between the girders? A. I did, sir.

Q. Did you have any conversation with the plaintiffs or their foreman regarding the laying of this floor? A. One time.

BY THE COURT:

Q. Did you have any conversation? A. I did, sir.

BY MR. MORTEN:

Q. Do you recall when it was? A. It was— 30 yes, it was prior to the—I am not sure whether there was a section of the beams down or put in.

Q. On the banquet hall floor? A. On the banquet hall floor; and I called attention that I saw the beams were laying—I called his attention—that is, the foreman's attention—and he thought that they were low and that they were set for higher; that is all I said to him. Of course I had no authority to order it. 40

Q. Were the beams set higher? A. No.

Q. What was done with the beams? A. Afterwards?

William A. Tilton—Direct.

Q. No; was there any part of them cut away?

A. Oh, they were sized; yes, sir; what they call sized; I just don't know the depth to which they were sized, but they were sized lengthwise and cut out underneath on the shelf below to produce a level line on top.

Q. How should the beams have been laid?

10

Objected to on the ground that it appears that the committee ordered this stripping as extra work, and the amount of \$70 was fixed, and it is immaterial and irrelevant as to what preceded the making of a written proposition.

Objection overruled. To which ruling of the Court counsel for the plaintiff prayed an exception, which was granted.

20

A. They should have been laid at least one inch higher than the flange of the iron beams—at least one inch.

Q. Why was that necessary? A. To allow for the proper clearance for the pipes, water pipes, gas pipes and electric wire pipes to pass over, so that the floor would pass over the pipes when the floor was properly laid.

30

Q. Did you call the attention of the foreman that the beams were not laid properly, as not to leave any room remaining for the pipes? A. They seemed to continue on the same way; they seemed to pay no attention to the construction.

Q. As the item has been charged, \$13.60 for furring outside walls for pipe recess, I call your attention to the plans and to page 4 of the specifications—do you wish them, Mr. Tilton, up there, or do you recall? A. I think I can recall them.

40

Q. Was that furring required under the plans and specifications as they were drawn? A. Yes, sir; they were.

William A. Tilton—Cross.

Q. I also call your attention to the item of \$36.40 for base around the lodge room platform, 12 feet base around mezzanine floor on the first floor; was the base required under the plans and specifications as annexed to the contract? A. Yes, sir; it was my intention to have base around all floors.

Q. And the base is shown on the longitudinal section of the plans, is it not? A. Yes, sir.

Q. Was there any diagonal flooring laid on the banquet floor to receive the maple flooring? 10

Objected to as incompetent and irrelevant.

Objection overruled. To which ruling of the Court counsel for the plaintiff prayed an exception, which was granted.

A. None that I saw.

Q. Did the plans provide for it? A. I am quite sure they did. 20

CROSS EXAMINATION BY MR. LANE:

Q. Now, Mr. Tilton, is it not a fact that these beams that you have been talking about were laid on the angle irons? A. Yes, sir.

Q. And don't you know that they could not be laid higher and be laid on the angle iron? A. I know they could have been laid higher.

Q. How, except by blocking? A. That I couldn't 30 say.

Q. Don't you know that it is forbidden by the rules of the building and loan association? A. Not if properly done.

Q. To block up? A. Not if properly done.

Q. Well, by the building inspector or by the building code? A. No; that would not be objected to if properly done.

Q. You think, then, that you can have your 40 beams laid on the angle irons and a block put in

William A. Tilton—Cross.

between the iron beams to make it higher? A. Yes.

Q. You know that is not the base kind of construction? A. It would not be.

Q. Don't you know that beams are usually supposed to be laid on angle irons? A. Yes, sir.

Q. Then the contractor did what he ought to and was supposed to do? A. No; he was—

Q. Why not? A. In the way that he cut away his beam to the angle iron; he was supposed to have the pipe nine inches below the flange of the beam; they cut the beams down nine inches leaving the beams flush with the angle, when they should be laid one inch higher than the full width of the beam.

Q. They would have been obliged to block to carry out your claim, wouldn't they? A. No, not necessarily so; because they cut away an inch of the beam.

Q. Are you sure they did? A. I know they did.

Q. Did you see them do it? A. I did.

Q. Are you sure they cut anything underneath the beams? A. I am sure they did, sir.

Q. It is not a fact that the base is shown upon the platform on the plans, is it? A. On the longitudinal sheets, it is, yes, sir; it has bases over the platform where the platform runs along the bases.

Q. Let me see where you show it on the plans over the platform? A. Here is the platform; here is the base line along here (indicating).

Q. What platform is it that it is said has no base on? A. This one here (indicating), or this one here (indicating).

Q. How do you say that the base runs—shows on this platform? A. By this here (indicating).

Q. Does it? A. It certainly does by the specifications.

William A. Tilton—Cross.

Q. We are not talking about the specifications.
A. If they are omitted on the plans the specifications certainly call for it.

Q. I didn't ask you that. Mr. Morten asked you whether they were shown on the plans, and you said they were. A. The line has been omitted in the sectional drawing.

Q. Then they are not shown on the longitudinal plan, and when you said they were you made a mistake? A. I maintain they are shown on the plans. 10

Q. You just said a line had been omitted? A. You said a line was omitted; I said some were omitted and some were there. It was the intention that the base should go around the platform.

Q. I didn't ask what the intention was. A. The specification calls for it.

Q. The specification calls for base on sides and along the floor? A. The platform becomes part of the floor here. 20

Q. Is there base along the walls of all those rooms that were built in this house? A. Supposed to be.

Q. What? A. On all the rooms.

Q. There wasn't any place in the whole building that wasn't supposed to be based? A. Not around the floor; no, sir. 30

Q. Mr. Tilton, you said that the diagonal flooring that you referred to, or the rough flooring, was called for by the specification. Don't you know, as a matter of fact, that these specifications contain what is called an addendum under the title of "Addendum," on the last page; it is provided "Lay tongue and grooved flooring between the beams of the entire section of the banquet hall floor, and to be sound, merchantable stuff commercially known as roofers, set three inches throughout the 40

William A. Tilton—Cross.

room; don't you know that that floor was intended to take the place of the rough floor under the title "flooring"? A. I have no recollection if it was.

Q. You don't know whether that was so or not?
A. I have no recollection of it.

Q. Don't you know that the committee and Messrs. Anderson and Johnson had a conversation
10 before they started this work at all in respect to that? A. Not with me.

Q. Who ordered that addendum put in there, Mr. Tilton? A. The committee ordered that.

Q. When? A. It was done prior to the signing of the contract, I think; that was my recollection.

Q. Don't you know, Mr. Tilton, that it was to take the place of the rough floor? A. I don't know; no, sir. I have no recollection of it.

Q. Then there were to be three floors on the
20 banquet hall? A. That is not the flooring.

BY MR. MORTEN:

Q. You said that is not flooring; what is it? A. That is boxing the foundation or support for the concrete that was to be put in.

Q. You mean addendum is not flooring? A. It is not intended for flooring.

BY MR. LANE:

Q. Tongue and grooved flooring, and flooring is
30 not a floor? A. (No answer.)

Q. Is it not a fact, Mr. Tilton, that it never was the intention to have this rough flooring referred to in that specification of North Carolina pine on the banquet floor?

Objected to on the ground that the specification speaks for itself. Objection over-
40 ruled. To which ruling of the Court counsel for the defendant prayed an exception,

William A. Tilton—Cross.

which was granted and signed and sealed accordingly.

A. I can only answer that by saying this, that whatever the committee did afterward that I had no knowledge of it. It may have been after this, but certainly with me there was no place that I noticed where I made any change in the specification relating to a double floor. That diagonal flooring was not put in to carry the concrete. 10

Q. Was the rest of the floor concrete? A. No.

Q. That was the only concrete floor? A. And that was an after consideration.

Q. Concrete was an after consideration? A. Yes, sir.

Q. And the fact that they were going to put in concrete rendered it necessary to have a different kind of flooring? A. Not necessarily so. It was simply going to carry the concrete. 20

Q. It rendered different construction of floor necessary? A. No; not different construction—additional.

Q. Then you were going to have this rough flooring, or whatever it was, then you were going to have concrete, then you were going to have this diagonal flooring of North Carolina pine? A. Yes.

Q. Then you were going to have this maple flooring on top of that? A. Yes, sir. 30

Q. That would be the construction of your specification, at any rate. Don't you know that when you come to do that you change the construction of your floors entirely? A. I don't know why.

Q. I don't know why, either; but don't you? Didn't you see that floor going in on the banquet hall? A. I presume I did. It wasn't put there with my knowledge. 40

William A. Tilton—Re-Direct

Q. You did not object to it, did you? A. I had no right; I had nothing to say.

Q. Didn't you see Rodman there? A. I did.

Q. Rodman didn't object? A. He said nothing particular about it that I know of.

Q. He was on the job, wasn't he? A. I suppose he was.

10

RE-DIRECT EXAMINATION BY MR. MORTEN:

Q. Mr. Tilton, these plans call for a bowling alley in the basement, don't they? A. Yes, sir.

Q. And this addendum was put in there under the head of addendum for the deafening of the banquet hall floor? A. Yes, sir.

Q. That deafening was because of the bowling alleys? A. To stop all noises.

20

Q. You were subpoenaed here to-day, weren't you? A. Yes.

Q. By whom? A. I am sure I don't know; by the plaintiff, I think.

Q. You have no interest in this controversy in any way? A. None whatever, sir.

Q. All your responsibility, so far as the plans and specifications are concerned, and so far as the construction of the building was concerned, ended when you delivered the plans; is that right? A. Yes; my moral responsibility, I presume, just a little.

30

Q. Your official responsibility as architect? A. My official responsibility ended when I delivered the plans over to the committee.

BY A JUROR:

Q. Does the plan call for the deafening? A. No, sir.

40 Q. Did they put in this deafening floor in lieu

Erastus Nelson—Direct.

of this other floor? A. Afterward the deafening was added; after the plans were drawn. I can explain that in this way. They thought the noise of the bowling alleys was going to interfere with the banquet hall floor in case of a lecture or anything of that kind, and they decided afterward to put this deafening in between the beams to stop that noise, if possible; I think there was paper to go in between the floors, and everything was provided to completely deafen the floor. 10

BY MR. MORTEN:

Q. Was that portion put in the specifications before the contract was signed? A. I think there was paper provided for in the—

Q. Was it put in at the time you delivered the specifications to the committee? A. That addendum?

Q. Yes. A. Of course it was at that time. 20

Q. Then it was before the contract was signed?

A. It was before the contract was signed; yes, sir.

ERASTUS NELSON, a witness called by and on behalf of the defendant, after being duly sworn on his oath, testified as follows:

DIRECT EXAMINATION BY MR. MORTEN: 30

Q. Mr. Nelson, you are a member of the building committee of the Odd Fellows' Hall Association? A. Yes, sir.

Q. I show you final certificate marked Exhibit P-6 and ask you if your name is affixed to that certificate? A. Yes, sir.

Q. Did the committee ever receive any authority from the Odd Fellows' Hall Association to waive the diagonal flooring on the second floor? 40

Erastus Nelson—Direct.

Objected to as immaterial. Objection overruled. To which ruling of the Court counsel for the plaintiff prayed an exception, which was granted.

A. No, sir.

Q. After you signed this certificate, Mr. Nelson, to whom did you give it? A. To Mr. Rodman.

10 Q. Mr. Charles B. Rodman? A. Yes, sir.

Q. Was it signed by Mr. Kirchner at that time? A. Yes, sir.

Q. You both signed it at the same time? A. To the best of my knowledge.

Q. Where was it signed? A. In the club room, where they keep the papers.

20 Q. At the time when you gave this certificate to Mr. Rodman under what conditions did you give it to him? A. Just the certificate was signed in advance, with the understanding that Mr. Rodman should not issue the certificate until everything was satisfactory according to the plans and specifications.

Q. Did you ever give him any other authority to issue the certificate? A. No, sir.

30 Q. At the time when this certificate was signed by you, did you know whether or not the diagonal flooring had been laid on the banquet hall floor? A. I didn't see any diagonal flooring laid.

Q. Did you know it at the time you gave the certificate? A. Well, I didn't notice that there was any flooring at the time; it was an oversight about this double flooring which I ascertained afterwards when my attention was called to it.

40 Q. When was your attention first called to it? A. I couldn't remember exactly the date, but it was later, after the certificate had been issued.

Q. What is your business? A. I am a retired restaurant keeper.

Erastus Nelson—Cross.

Q. Were you ever an architect or builder? A. No, sir.

Q. Can you give us the month when the fact that the diagonal flooring had not been laid was called to your attention? A. (No answer.)

Q. Can you give us the month when you discovered that this diagonal flooring had not been laid? A. I couldn't recall the exact time.

Q. Do you know the month? A. I think it was somewhere in March. 10

Q. Of this year? A. Yes, sir.

CROSS EXAMINATION BY MR. LANE:

Q. Mr. Nelson, you saw this building being built, didn't you? A. Yes, sir.

Q. And you saw the floors being laid in the banquet hall, didn't you? A. Yes, sir. 20

Q. And you saw there was no diagonal flooring being laid there? A. Yes, sir.

Q. The floor was of North Carolina pine, wasn't it? A. Yes.

Q. No objection was made to the way the contractor was doing the work, was there? A. I didn't know that there was anything wrong, but the superintendent had to look after the particular points of them.

Q. Who was the superintendent? A. Mr. Rodman. 30

Q. A member of the committee? A. Yes, sir.

Q. What you mean to say is that you didn't realize that it was called for, that this diagonal flooring was called for on this banquet hall by the specifications until some time in March of this year? A. I didn't realize at the time it was laid.

Q. You didn't realize it until Mr. Melosh suggested it to you, did you? A. When I read the specifications I understood it was there. 40

Erastus Nelson—Cross.

Q. Mr. Nelson, is it not a fact that when you were originally planning for the floors of this building your plan was to have all the floors alike, the banquet hall and the other floors the same kind of flooring? A. There was to be a specification.

10 Q. No; didn't the specifications, when you originally drew your specifications, originally contemplate the building of all the floors to be the same way, and then you changed to putting in concrete floors in the banquet hall? A. I don't remember whether they were to be yellow pine. I can't keep track of those things.

Q. You do remember, Mr. Nelson, that you did change the banquet hall floor? A. Yes, sir.

Q. So that you were going to put a concrete floor in? A. Yes.

20 Q. The specification was changed to provide for that? A. Yes.

Q. Don't you know, Mr. Nelson, that this addendum which provides for the tongue and grooved flooring between the beams of the entire section of the banquet floor includes all the space to be occupied by the stage, etc., was to take the place of the rough floor in the other part of the building? A. I don't understand that that was put in for an addition.

30

Q. Didn't you just discover that after this building had all been completed? A. I didn't know; yes.

Q. You didn't know that when you saw this floor being put in? A. I am not an architect, and therefore I don't know the details of all those things.

40 Q. Did you take the word of your superintendent, Mr. Rodman, that everything was all right? A. Yes, sir.

Q. Mr. Rodman was on the job almost every day, wasn't he? A. Yes, sir.

Lawrence Kirchner—Direct.

LAWRENCE KIRCHNER, a witness called by and on behalf of the defendant, after being duly sworn on his oath, testified as follows:

BY THE COURT:

Q. Where do you live? A. Greenville.

Q. Whereabouts? A. Boulevard and Pearsall Avenue.

10

DIRECT EXAMINATION BY MR. MORTEN:

Q. What is your business? A. Butcher and grocer.

Q. Have you ever been an architect? A. No.

Q. Or builder? A. No; but I had quite some business done on my place.

Q. Have you ever been an architect? A. No.

Q. All the building that you have done was for yourself? A. I had business done for myself.

20

Q. You were a member of this building committee of the Odd Fellows' Hall Association? A. Yes, sir; I was appointed.

Q. That is your signature on Exhibit P-6? A. This is my signature, yes.

Q. After you signed this certificate to whom did you give it or to whom was it given? A. Well, it was left in the drawer.

30

Q. With whom? A. In the drawer in the club room.

Q. With whom? A. It was laying alone there. Mr. Rodman would tell us to go inside and sign a few certificates.

Q. Was this certificate signed by you and Mr. Nelson before the work was completed? A. Why, certainly; it was done a couple of months before that.

40

Lawrence Kirchner—Cross.

Q. When you gave this certificate to Mr. Rodman under what conditions did you give it to him? A. To use his best judgment when the work is done; when the work was properly done, because Mr. Nelson and me wouldn't be there only once or twice, and Mr. Rodman was paid for being there acting as superintendent of the job, and we authorized him to use his own judgment, to watch if the work was done properly.

Q. If the work was done properly, what was he to do with this certificate? A. He was to pay for it.

Q. You mean— A. If the work was properly done, according to plans and specifications.

Q. Who was Mr. Rodman to give this certificate to when it was done? A. To the contractor.

Q. You mean Anderson & Johnson? A. There was different other ones that got their payment, too.

Q. When did you first discover that the diagonal flooring was not laid on the banquet hall floor? A. Well, in the summer or in the fall once or twice I walked over there with Mr. Nelson, when I seen there wasn't any flooring over the concrete.

Q. Was that after you gave the certificate? A. Afterward; everything was left to Mr. Rodman; whatever he said was to go.

CROSS-EXAMINATION BY MR. LANE:

Q. That is in August or September? A. Last fall.

BY MR. MORTEN:

Q. You mean in August or September of what year? A. 1911.

Lawrence Kirchner—Cross.

BY MR. LANE:

Q. What happened in August or September? A. When I seen that the concrete wasn't put there on the floor.

Q. Was that in September? A. It was in the fall; it might have been November, for all I know.

Q. Was that after you gave the certificate? A. The certificate was signed about a month or two before that. 10

Q. These certificates were signed before you discovered that? A. Yes.

Q. Was that certificate signed on the day it was dated? A. Oh, no.

Q. Was that signed by you on the day of its date? A. No; he always signed it and gave it to whom he pleased.

Q. When was this signed; do you know? A. I couldn't say when we signed. I know it was signed quite some time previous, before it was given out. 20

BY A JUROR:

Q. Did you sign a blank paper? A. Certainly we signed the blanks, and Mr. Rodman gave it to us and he was to use his best judgment.

BY MR. LANE:

Q. You didn't object to the way the contractors were doing the work, did you? A. I had no authority. 30

Q. Oh, yes; you had authority under your appointment as a member of the committee; you are the only ones that had that? A. Mr. Rodman had all the authority.

Q. You let Mr. Rodman act for you? A. Yes, he was the chairman.

Robert W. Eichmann—Direct.

ROBERT W. EICHMANN, a witness called by and on behalf of the defendant, after being duly sworn on his oath, testified as follows:

DIRECT EXAMINATION BY MR. MORTEN:

Q. Where do you live? A. 234 Summit Avenue.

Q. What is your business? A. Carpenter and
10 builder.

Q. How long have you been in that business?
A. I have been a contractor for twelve years; I have been in the business twenty years.

Q. Have you examined the banquet hall floor of the Odd Fellows' Hall, Jersey City? A. I have.

Q. Have you made an estimate to determine how much it would cost to take up the present floor, lay diagonal flooring and then lay a maple floor
20 there in that building? A. I have.

Objected to, first, on the ground that it is apparent from the proof now in that the defendant is not entitled to any credit for the fact that the floor is there, and second, that the measure of damages is not how much it would cost to take up the floor that is there now, and put in a diagonal floor, in view of the fact that this company accepted
30 this building and is using it. That is not the proper measure for damages. If there is any measure of damages it is the difference in value between the floor as laid and the floor as it would have been laid under the contract.

MR. MORTEN: I will insist, if the Court please, that the measure of damages in this case is what it would cost to place the floor in the banquet hall in the condition which the plans and specifications and contract
40

Robert W. Eichmann—Direct.

provide, and I ask to be allowed to submit proof accordingly.

Objection sustained. Motion denied. To which ruling of the Court counsel for the defendant prayed an exception, which was granted and signed and sealed accordingly.

J. S. ERWIN,

J. 10

Q. Mr. Eichman, what would it cost to lay the diagonal flooring required by the plans and specifications; what is the value of the material and the time which it would require to lay it? A. In the banquet hall at Odd Fellows' Hall?

Q. Yes. A. Just the diagonal flooring?

Q. Just the diagonal flooring, the material and labor required to lay it. A. On top of the present floor?

20

Q. No; on the beams, as it was contemplated.

MR. LANE: But not anything for taking out the floor that is there now.

Question withdrawn.

Q. What would be the cost of laying a No. 2 7-8 inch floor, matched North Carolina pine, diagonally on the banquet hall floor as contemplated by the plans, specifications and contract in this case?

30

MR. LANE: I object to that, if your Honor please, because it contains an assumption that it is contemplated and called for by the plans and specifications.

THE COURT: Assuming it were included in the plans and specifications; of course you mean that?

Q. Oh, yes. Assuming that it is required by the plans and specifications and in the contract? 40
A. I will furnish and lay a diagonal floor on

Robert W. Eichmann—Cross.

beams of a hall the size of the Odd Fellows' banquet hall for the sum of \$263.

Q. Is that a fair price for the doing of that work? A. In my estimation it is.

CROSS-EXAMINATION BY MR. LANE:

Q. Just give us the details of that estimate, will
10 you? A. Required, 3300 square feet of 7-8 inch
by 6 inch North Carolina flooring.

Q. Yes. A. To lay it diagonally.

Q. What did you put down for cost of material?
A. \$30 a thousand.

BY THE COURT:

Q. What are the other items? A. I find nails,
\$8.00.

Q. Yes. A. I find furring at the ends of the
20 walls to carry the ends of the diagonal flooring,
\$15.00; I find an item of labor of \$88.90.

BY MR. LANE:

Q. What goes into that item of labor? A. I
find it cost me about \$3.20 a square to lay this
diagonal flooring.

Q. 320 square feet? A. A square of 100 feet.

Q. 10x10? A. Yes.

Q. How about that price of \$30 a thousand; do
30 you think that is a reasonable price? A. If you
want to get good stuff you have to pay for it.

Q. When did you buy any for that price? A. I
bought it quite often.

Q. When, last? A. About the time that this
contract was going on I have done that.

Q. Don't you know that you could buy that for
\$21 and \$22 a thousand? A. I never bought it
40 for \$21 or \$22 a thousand.

Q. You never paid \$22 for it? A. No, sir.

Robert W. Eichmann—Cross.

Q. What have you paid, the lowest? A. \$26.

Q. How large lots did you buy in? A. Anywhere from 100 to 10,000.

Q. You think that you pay \$26 for 10,000? A. It all depends on the market.

Q. 10,000 feet isn't so much, is it? A. No.

Q. That is rather a small order, is it not? A. All depends on how you look at it. 10

Q. You got 3300 in one room? A. 3300 what—3300 feet?

Q. Yes. A. That is a small order. You don't get as good a price on a small order as you do on a large one.

Q. Are you giving us the benefit of a high price for a very small order or are you assuming that it is a contractor who had some other work rather than flooring—of this particular floor? A. Well, 20 I am striking an average.

Q. You think the average is \$30.00? A. Oh, yes.

Q. Have you ever bought 10,000 lots at \$26.00? A. Yes, sir.

Q. How much does that amount to now, as you have figured it up now? A. I make them amount to \$200.

Q. Came down a little bit. A. No, sir. I have 30 not; the other is the profit.

Q. How much is your profit? A. Well, I will try to make a profit of \$63 on that.

Q. You are making how much per cent. on that job? A. Give me a little time and I may be able to figure it out. About 22 per cent.

Q. Didn't you give us a price of \$261 a few minutes ago? A. 263.

Q. Then you are getting more than 21 per cent. 40

Robert W. Eichmann—Cross.

aren't you? You are getting a profit of 31 per cent. on the cost of your labor and material, aren't you? A. I can't figure that.

Q. \$200 is the cost of labor and material and \$63 is your profit, or approximately 30 per cent., isn't it—the profit? A. (No answer.)

10 Q. Did you figure profit that way, Mr. Eichmann? A. In the building business you will find that there is a gamble between getting less than 30 per cent. and making 30 per cent.

Q. You are going up higher here. A. On a chance of coming out whole.

20 Q. Is it not a fact that you did not figure any such profit; that you figured your price higher than you are able to justify, and when you got on the stand you put the rest in as profit? A. No, sir.

Q. Let me see the figures you used in making the figure \$263? A. This was made up since I sat in this chair. There is the item of lumber (indicating).

Q. That is \$199.90. A. No, sir.

Q. You got \$73 profit on a \$190 job, haven't you? A. Yes.

30 Q. Didn't you put ten dollars in there for profit and call the whole business \$200? Where are the figures that you used in making your \$261, or did you guess at that? A. (Witness indicates figures on paper before him).

Q. Labor and material laid diagonally, about ten cents a square foot, \$265? A. Yes, sir.

40 Q. When you come to figure it out you come to \$190.90, and you are not very certain of those figures, are you? A. I am not anxious to take the job at the figures.

Q. Would you take the job at \$263? A. You

Joseph Morecraft—Direct.

understand in this case I was simply figuring on a floor laid diagonally in the flooring that is not under the specification; you can't do it cheaper.

Q. You have taken into consideration the fact that the building is all completed? A. Certainly; yes, sir.

Q. Suppose the building was going up, would it cost somewhat less? A. Yes, sir.

10

Q. Half of it? A. No.

Q. Is it not a fact that you are about three times higher than you ought to have been? A. No, sir.

JOSEPH MORECRAFT, a witness called by and on behalf of the defendant, after being duly sworn on his oath, testified as follows:

20

DIRECT EXAMINATION BY MR. MORTEN:

Q. Where do you live? A. 1042 Avenue C, Bayonne.

Q. What is your business? A. Carpenter and builder.

Q. How long have you been in the business? A. About two years.

Q. You live in Bayonne? A. Yes, sir.

Q. Are you a member of the Odd Fellows? A. No, sir.

30

Q. Have you examined the floor of the Odd Fellows' Hall in Jersey City? A. I have.

Q. Can you give us an estimate as to what it would cost to lay the diagonal flooring referred to on page three of the specifications of No. 2 7-8 matched North Carolina pine securely nailed with two nails to each bearing, closely fitted and laid diagonally; can you estimate? A. Yes, sir; I can.

40

Joseph Morecraft—Cross.

Q. What would be a fair price for the laying of that floor? A. If I was constructing the building, if the building was going up at that time, I would make the price of about \$200. If I had to take it outside, and the building was up, and I wasn't constructing the building, it would be more.

10 CROSS EXAMINATION BY MR. LANE:

Q. What are the details of your figure, that you figure \$200? A. Well, in the first place, it would take about 3600 square feet of North Carolina to start.

Q. Did you measure at the same time as your friend Eichmann measured it? A. I never saw the gentleman before until I came here.

Q. You think your figures of 3600 feet are right?
20 A. 72x40.8.

Q. Don't you know, as a matter of fact, that the actual square feet covered with diagonal flooring is about 2600 feet? A. It is about 2990 I think you allowed, and here the waste would make it about 3600.

Q. Do you figure on so much a thousand? A. I do; that is what I figured.

Q. At how much? A. I can buy it at \$25, but
30 I wouldn't put it up for you at that.

Q. How many times do you add profit? A. Once when I get a chance.

Q. Don't add profit now; just give it to us at \$25. A. All right.

Q. What is the next item? A. Labor and nails.

Q. How much? A. Well, \$100. I wouldn't do it for less than \$100.

Q. Give me something on which you work; how
40 did you figure that? A. By the quantity of material.

Joseph Morecraft—Cross.

Q. What is your basis for making that figure \$100? A. I would figure that I had to buy nails and figure 4000 square feet at \$25 a thousand to handle on the floor.

Q. Then you make your labor at \$100? A. Yes, sir.

Q. What is the next item? A. Nails.

Q. How many nails? A. Well I can get nails 10 by the key at 2.20.

Q. You don't thing Eichmann needed \$8 worth of nails? A. No, sir.

Q. What is the next item? A. I may be low on them nails, you know, but I put it right down where it belongs.

Q. Go on to the next item. A. You see you got the lumber—I got lumber, labor and nails; I get \$102.50. A. What did I give you, \$210? 20

Q. You gave me \$200? A. I gave the materials at \$100, didn't I?

Q. You did not. A. I gave you 3600 square feet at \$25 a thousand.

Q. You gave the material and labor at \$100? A. Oh, no; if I did I must be awfully mistaken.

Q. I thought you did. A. I gave you 3600 square feet of North Carolina tongued and grooved boards at \$25; for that I would say \$100. 30

Q. Why? A. \$100?

Q. Why? A. At the time I made my breakage and cartage it would reach over that.

Q. Don't you know how much that is? A. It would take 3600 square feet net.

Q. You figured this, didn't you? A. Figure it up 1-2x78, allowing for laps providing 100 feet 10-inch board; you pay for 100 feet No. 2, but you only get nine, for the floor lays diagonal and you 40 lose about one-third.

Joseph Morecraft—Re-Direct—Re-Cross.

Q. Isn't the hall 48x59? A. I measured it as shown on the plan and the figures were 40.8 by 72; if it is smaller I figure accordingly.

Q. How much labor? A. I gave you that at first; I allowed \$25 a thousand.

Q. You want another hundred for labor? A. I certainly think so; I ain't working for nothing.

10 Q. How much have you got in there for profit? A. Profit, five dollars a day; and I wouldn't take that from you.

Q. How much in dollars and cents? A. Just as I get it; it is \$4.50 a day, and I pay myself \$5 a day.

Q. How much have you in that as profit? A. Not one dollar, because I am figuring for the Odd Fellows and I can expect a reward or other work.
20 That is why I wrote it down at those figures.

Q. You got these figures now where you are giving us the price without any profit at all? A. That is what I am giving.

Q. You think that is what Mr. Morten wanted you to do? A. I think Mr. Melosh wanted the real figures. He wanted me to figure it right down for the Odd Fellows just as cheap as possible.

30 RE-DIRECT EXAMINATION BY MR. MORTEN:

Q. If this job cost \$200 actual cost to you, about what percentage do you figure on profit on an estimate? A. On any large job I allow ten per cent. and on small jobs twenty per cent.

Q. How much profit would you figure on this job? A. \$20.

RE-CROSS EXAMINATION BY MR. LANE:

40 Q. You don't call this a large job? A. A very small job.

Henry J. Melosh—Direct.

Q. He just asked you to put on profit? A. I would take it because I need the money.

BY A JUROR:

Q. How many days would it take two men to lay that floor, about? A. I wouldn't figure that way. I say there are no two men that figure alike. That isn't my way of figuring.

Q. About how long would it take two men, in your experience, to lay the floor? A. Well, I would need two weeks. Of course, there is such a thing, but it has to be laid right. 10

HENRY J. MELOSH, a witness called by and on behalf of the defendant, after being duly sworn on his oath, testified as follows:

DIRECT EXAMINATION BY MR. MORTEN: 20

Q. Mr. Melosh, you are a witness to this contract? A. I am.

Q. At the time when this contract with Anderson & Johnson was drawn was that addendum appearing on page 11 in the contract? A. It certainly was.

Q. You are a mortgagee of this building? A. I am. 30

Q. Have you ever accepted this building? A. No, sir; I did not.

Q. When did you first discover that this diagonal flooring was not laid on the banquet hall floor?

Objected to. Objection overruled.

A. Between the first and fifteenth of March, this year.

Q. Whom did you speak to about the matter, if anybody? A. Mr. Anderson came to me, and with 40

Henry J. Melosh—Cross.

10 the deductions as claimed by the association I offered him a check for \$227, and he admitted all credits except the \$70 item, and I told him that if he would come up to the hall association two or three days afterward on a Friday night when the Building Committee and the Finance Committee would be there and we could talk it over. He came there and we went on the floor, the banquet floor—
20 the maple floor had cracked in a good many places; in one place near the middle of it there was an open seam that I could put my finger in. I said Mr. Anderson, I do not call this a good job; do you? Why don't the rough flooring keep this from getting this way. He says, There is no rough flooring there. This was done in the presence of Mr. Taylor, the vice-president, and President Hanson of the Building Committee and the Finance Committee. You can see there is no rough flooring
20 there, and the Finance Committee immediately gave me orders not to pay the \$227. Of course, I, speaking for myself, was under the impression that the North Carolina flooring was beneath the maple flooring.

Q. At the time when you signed Exhibit P-6, which bears your signature, had you any knowledge that the North Carolina flooring was not laid in the banquet hall as provided for in the plans
30 and specifications? A. No; the first information I had was when Mr. Anderson admitted it there in March of this year.

CROSS-EXAMINATION BY MR. LANE:

Q. Are you a lawyer? A. I am.

Q. You drew this contract? A. Yes, sir, I drew all the contracts.

40 Q. Which contains a provision that the building shall not be paid for until the building is accepted by the owner? A. Yes, sir.

Henry J. Melosh—Cross.

Q. And by the mortgage? A. Yes, sir.

Q. And that he building should be under the direction of a committee appointed by the owner?
A. Yes sir.

Q. Rather an unusual form of contract, is it not?
A. That is what the Board of Directors by resolution provided for.

Q. Did the Board of Directors provide for the insertion of the provision that it should be also accepted by the mortgagee? A. That is one of the reasons why I am on that certificate. 10

Q. You did sign this certificate P-6? A. Yes, sir.

Q. And you did deliver it? A. Delivered it?

Q. Yes. A. I returned it to the secretary.

Q. Who brought it to you for signature? A. Mr. Rodman brought it to me. 20

Q. And you signed it, knowing Rodman was going to take it and give it to the contractor? A. No, sir.

Q. What did you think he was going to do with it? A. Give it to the secretary.

Q. Why give it to the secretary? A. Because the secretary would have then had the check drawn when the certificate was delivered, and that certificate ought to have been returned to the association. It seems to me a matter of grave suspicion why that certificate should have been delivered to the contractor. 30

Q. That is a mighty good thing we have got it.
A. You have no right to it.

Q. We are going to keep it until we are paid.
A. In view of letters that passed between several officers in this town —

Q. That certificate was delivered by you to Mr. Rodman, knowing that he was going to take it 40

Henry J. Melosh—Cross.

down to the association and have a check drawn for the final payment to be made; isn't that true?

A. Yes, sir.

Q. And that final payment was made, was it not? A. I don't know.

Q. Don't you know, as a matter of fact, it was?

10 A. I didn't see the check passed. I know they don't claim any part of the final payment, so I presume it was.

Q. Have you got any idea when it was paid?

A. No, sir.

Q. At the time this certificate was delivered to Anderson & Johnson did you have any conversation with either Mr. Anderson or Mr. Johnson?

A. On December 21; no sir.

20 Q. Or at the time it was delivered, or about that time? A. No, sir.

Q. Don't you know that at the time that you had this conversation in your office—not at your office, but up at the hall—when you had the conversation as to this floor not being in there, that the committee said that they had seen the floor put in there and let the contractor go on and do it in the way he did? A. No, sir; that isn't so.

DEFENDANT RESTS.

30

40

John B. Anderson—Direct.

JOHN B. ANDERSON, being duly sworn as a witness on behalf of the plaintiffs in rebuttal, testified as follows:

DIRECT EXAMINATION BY MR. LANE:

Q. Where do you live? A. 19 Delaware Avenue.

Q. Do you remember when this floor was being laid on the banquet hall? A. Yes, sir. 10

Q. In the first place, let me ask you about this specification. You know about the provision with respect to floors? A. Yes, sir.

Q. And also the addendum with respect to the banquet hall? A. Yes, sir.

Q. Did you have any conversation with any members of the Building Committee before you put in your bid on this job? 20

Objected to on the ground that any conversation had before the execution of the contract is immaterial and incompetent.
Objection sustained.

Q. Mr. Anderson, did you ever talk with any member of the Building Committee while this floor was going in?

Objected to on the ground that if there was any variation it must be in writing. 30

A. I had; not particularly about that; no.

Q. (Question read.) A. No; not necessarily; it was not necessary.

Q. Did you have a talk at any time with respect to what it was done for? A. Yes.

Q. When? A. When this question come up.

Q. When the question came up? A. After.

Q. After the contract? A. Yes. 40

Q. What was the conversation?

John B. Anderson—Direct.

Objected to on the ground that you can't vary a written contract by any conversation.

Objection overruled. To which ruling of the Court counsel for the defendant prayed an exception, which was granted and signed and sealed accordingly.

10

J. S. ERWIN,
J.

Q. Who was the conversation with? A. Mr. Rodman, after.

Q. The man who was here in the court room and who Mr. Nelson said was the superintendent, isn't he? A. Yes, sir.

20

Objected to on the ground that any conversation with Mr. Rodman is not binding on the defendant.

Q. A member of the committee? A. Yes, sir.

Objection overruled. To which ruling of the Court counsel for the defendant prayed an exception, which was granted and signed and sealed accordingly.

J. S. ERWIN,
J.

30 A. Why, it was simply about this flooring, and that it was understood—

Objected to.

Q. What was the conversation? A. The conversation was after all the builders could bid on these plans they were instructed—

Objected to.

A. To put in this rough flooring in between the
40 beams.

John B. Anderson—Direct.

Q. Did Mr. Rodman tell you that? A. Yes, sir; he told me that.

Q. Did the other members of the committee tell you that? A. No.

Q. Was Mr. Rodman there when the floor was put in? A. Yes, sir.

Q. Did he see the floor put in?

Objected to as immaterial and irrelevant. 10

Objection overruled. To which ruling of the Court counsel for the defendant prayed an exception, which was granted and signed and sealed accordingly.

J. S. ERWIN,
J.

Q. Were the other members of the committee there? A. No, sir.

Q. You didn't see any of them there? A. They 20
were there at different times; one from the committee would always be there.

Q. Did you hear any question raised with respect to this floor until after you made your claim for extras? A. No.

Q. Do you construe this specification, Mr. Anderson, to require this flooring, this third floor that we referred to—

Objected on the ground that the specifica- 30
tion speaks for itself.

Q. On the banquet hall?

Objected to. Objection sustained.

Q. Were you told, Mr. Anderson, that the addendum with respect to the banquet hall, the floor on the banquet hall was to take the place of the third floor? A. No.

John B. Anderson—Cross.

CROSS EXAMINATION BY MR. MORTEN:

Q. Mr. Anderson, your signature appears on the contract, right beneath the addendum, does it not?

A. Yes, sir.

10 Q. And when you put in your bill for extras at the time you speak of, when the committee was meeting, they agreed to pay you all but the following items; you agreed to waive the last \$30.40 and the \$12, and insisted upon the payment of \$70, didn't you? You told them at that time you didn't think the charge for the base was a proper charge? A. Yes, sir; because we were to make a settlement.

20 Q. That was the first time that the question of the floor in the banquet hall was ever discussed by you and the committee, was it not? A. Yes, sir.

Q. And that was the time that they came to talk about your not laying it, and the committee insisted that you should have laid it; was it not? A. Yes, sir.

RE-DIRECT EXAMINATION BY MR. LANE:

Q. You have been paid your final payment, haven't you? A. Yes.

30 Q. When were you paid your final payment? A. I haven't got the exact date, but I think it is within a few days after that certificate was issued—probably three days after.

Q. You didn't get the settlement that you were going to waive that forty dollars for, or whatever it was? A. No.

Q. You don't waive it now, do you? A. No, I do not.

Edward M. Johnson—Direct—Cross

BY A JUROR:

Q. Did you put in this deafening floor in lieu of the yellow pine? A. In place?

Q. Yes. A. Yes.

Q. You didn't charge for another floor? A. No, sir.

Q. What would be the difference in putting that floor in and a yellow pine floor? A. Difference in price? 10

EDWARD M. JOHNSON (recalled) in rebuttal.

DIRECT EXAMINATION BY MR. LANE:

Q. As a matter of fact, what would it cost to put in a yellow pine floor there? A. It would cost about \$110. 20

CROSS EXAMINATION BY MR. MORTEN:

Q. Why didn't you put it in? A. We didn't think it was part of the contract. We figured on putting in rough flooring, and I was directed by Tilton and Rodman to do so.

Q. According to your idea, it only cost \$110 to do it? A. Not my idea, but actual cost according to the plans of the floor.

Q. How much lumber would it take? A. 3100 feet. 30

Q. How many feet? A. About 3500 feet, with the platform.

Q. You made your maple floor to the platform, and under this platform wasn't included; why didn't you run the floor under the platform? A. This didn't call for it.

Q. Don't you put it under the platform? A. Not maple. 40

Edward M. Johnson—Cross.

Q. What floor did you put under the platform?
A. The rough flooring.

Q. The rough flooring under the platform and maple flooring outside; you didn't put the rough flooring—the underneath flooring—outside in the banquet hall; is that right? A. We put the flooring in between the beams.

10 Q. What kind of flooring did you put on top of the beams? A. I couldn't say which was on top of the beams.

Q. Don't you know there is a floor on the beams? A. I couldn't say.

Q. You are a contractor, also? A. Yes, sir.

Q. How many square feet underneath the platform? A. Approximately, 40 feet across the hall—well, it is 48 feet across the building.

20 Q. How wide? A. About 14 feet wide.

Q. How many feet would that make? A. I can get it just right if you wait a minute, please; I get it 672 feet without waste.

Q. And that would make pretty near 4000 feet, including waste? A. What do you mean?

Q. You say 600 feet underneath? A. 672 square feet.

Q. And you allowed about 3100 without waste?
A. Yes.

30 Q. When you give 600 feet, how much would you allow for waste? A. 100 feet.

Q. You would allow 3800 altogether for that floor, wouldn't you? A. I didn't figure it.

Q. If you are going to cover the whole floor, you would allow 3800 feet? A. The floor is covered.

Q. 3800 feet? A. Yes, sir.

40 Q. At how much a thousand? A. \$22 a throu-

Edward M. Johnson—Cross.

sand; the same material we buy; we have the bills for it and can show it to you.

Q. Then you figure \$83 or \$85 for the material?

A. I only figured by the platform.

Q. I am talking about the 3800 feet. A. \$22 a thousand I paid. I am only giving figures of it.

Q. How much would it be if you figured including the platform? A. It would be 700 feet 10 more.

Q. How much? A. About \$15 or 20 for material more. I can give it for what we paid on the job.

Q. How much nails would it require? A. It would require about fifty pounds.

Q. How much would that be? A. By the keg it would be about \$1.50 at the most; about \$1.30 at the rate of \$2.60 per keg. 20

Q. How much furring would it require around the edges? A. None.

Q. You wouldn't allow any, would you? A. No.

Q. Wouldn't you cut up the ends of the boards in diagonal floorings? A. By cutting the beams further apart, as we do on every building.

Q. That would hold them up, in your idea? A. Yes, sir. 30

Q. How much labor would it take? A. We figure on \$8 per thousand rough floor; that is what the other portion of the building costs me to finish it.

Q. And you figured you would do that job for about \$116? A. About that.

Q. How many days' labor would you require? A. That I haven't taken in.

Q. You don't know? A. I figured on \$8 per 40 thousand.

Edward M. Johnson—Cross.

Q. Can you tell how many days' labor would it take? A. At four dollars a day, yes.

Q. How many days' labor would it take? A. About six or seven days for one man.

Q. Six or seven days? A. Yes, sir; I can do it myself.

10

MR. MORTEN: If the Court please, I think we can shorten this so far as the items are concerned; we will admit all the items that Mr. Anderson agreed to settle for. We will let them stand at \$227, so far as the plaintiffs are concerned. We insist that the items of \$70, \$13.60, \$36.40 and \$12, amounting in all to \$132, should be allowed to defendant out of the items claimed in plaintiff's state of demand.

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MR. MORTEN: If the Court please, I submit in this case the defendant should sum up first on the items of the plaintiff's state of demand in dispute and the plaintiffs close thereon; that the plaintiffs sum up on the set off put in by the defendant and the defendant close thereon.

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Motion denied. To which ruling of the Court the counsel for the defendant prays an exception, which was granted and signed and sealed accordingly.

J. S. ERWIN,

J.

Mr. Morten thereupon sums up on behalf of the defendant. After which Mr. Lane sums up on behalf of the plaintiffs.

The Court then charged the jury as follows:

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Charge.

GENTLEMEN OF THE JURY: This case is one in which the statements of counsel admitting certain items leaves for your solution only a few questions. The plaintiffs' claim is for \$359 for extra work which they claim they did under their contract in the erection of Odd Fellows' Hall for the defendant, and the amount the defendant admits as correct are items amounting to \$227. 10
The defendant admits as correct all of the claims except the item of \$13.60 for furring outside walls for pipe, the \$70 item for stripping down banquet floor and flooring of the banquet hall, and the items of \$36.40 and \$12 for the 500 feet of two-inch base around all the lodge room platforms and the mezzanine floor base; these terms are disputed by the defendant on the ground that they were within the plaintiff's contract and should not be charged again; in addition, the defendant also 20
claims that by reason of the plaintiffs having omitted to put down the rough flooring under the banquet floor—the North Carolina flooring—it does not get all of the contract work, which the plaintiff agreed and provided to do, and therefore it is entitled to recover under its recoupment filed in this case an allowance for that flooring, to be deducted from the amount allowed plaintiffs.

In order to arrive at an understanding of the 20
case we have first to see what the arrangements between the parties were; in order to do that, what has been shown here by the evidence, and the contract and specifications between the parties, and also the letters of the committee and the final certificate on the work and the evidence as to how the committee acted in this matter.

The first thing, therefore, for the jury to consider would be whether the items which are disputed in the plaintiffs' claim—the \$70 item, the 40

Charge.

\$13.60 item, the \$36.40 item and \$12 item—are proper items to be allowed to the plaintiffs.

10 On that point the plaintiffs should satisfy you that the work was ordered or authorized or in some way contracted for by the defendant, or its agents, this committee, and was outside of the plans, specifications and the contract. Now, as to the item of \$70 for stripping the banquet hall floor, the plaintiffs offer you a letter signed by the committee as to the furring of \$13.60 and the \$48.40, the two items for the base; the defendant contends that these items by proper construction of the plans and specifications are all included within the contract work and therefore the plaintiffs are not entitled to extra work charges for those items. Here in that regard you have got to consider all the evidence, and if these disputed items of work are within the contract, plans and specifications the plaintiffs would have no claim here for these items as extra work. Some contention has been made that the plans do not show the proper lines or marks for the base, and that the furring strips are not shown on the plans or are within the specifications; the defendant contends that where the base it called for the line is shown on some parts of the plan and not on other parts, and it would leave the floor naturally unfinished, or in an unfinished state, so far as looks are concerned, if the base was not continued around the platforms. If the base was omitted from the plans and specifications the plaintiffs, unless they understood the base was within their contract work, would in fairness have a right to make a charge for the base.

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As to the furring strips, all the furring, defendant claims, is enclosed where not shown on the plans in the specifications, that item might not be

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Charge.

extra work; if not, the plaintiffs would have no right to charge same. When you reach the \$70 item, we have there the order in the shape of a letter, which was signed by the committee, authorizing the plaintiffs to take up this work for the defendant. The defendant contends, however, that this was included in the work under the contract and is proper work to be done under the contract of the plaintiffs. You have on one side the construction put upon the contract by the plaintiffs and that by the defendant. The plaintiffs say the committee of the defendant gave a written order for that work. The defendant says this work was within the contract aid it was an oversight or mistake on the part of the committee to give this order. If the committee made such a mistake intentionally, so as to defraud the defendant, and if they did give a written order, and the work was clearly within the contract, and plaintiffs so understood, the defendant would not have to pay for that work. If the committee, being the agent of the defendant, gave a written order for this work on their construction of the contract, then the plaintiffs should not suffer for the committee's act, unless plaintiffs knew the work was within their contract. In other words, the defendant would have to suffer for the mistake of their committee. I think that is all the Court can say about the four disputed items in the plaintiffs' claim.

Then you come to the claim of the defendant, the omission of the rough flooring in the banquet hall, for which the defendant asks an allowance. Here you have the evidence, contract, plans and specifications, and the addendum to the contract. The addendum, plaintiffs claim, was the result of a change, whereby defendant undertook to put in a

Charge.

concrete floor after the defendant had determined and submitted and both parties agreed to the original contract and specifications without a concrete floor. If that is a fact, and the defendant changed its plans so as to put in the concrete floor and tongue and grooved board floor in the place of the rough floor; if the construction put upon the contract by the parties was that the rough flooring of North Carolina pine was to be omitted, and the defendant saw the work going on with the flooring omitted and did not object to it, and afterwards was willing to and did make final settlement under the contract, with that flooring omitted, the defendant could not afterwards set up his claim. All the evidence must be considered by you of all the parties to this contract, and showing the plaintiffs and the defendant's construction of it as to this flooring; in other words, was this rough flooring of North Carolina pine on the first floor intended or not intended to go with the tongue and grooved floor, by reason of the change to provide for a concrete floor to deaden the noise in the bowling alleys; was the change made and understood by all the parties before the contract was concluded? On that point there is evidence on both sides. The plaintiffs contend that that flooring was purely omitted and was not within their contract; and that they completed their work without it, and within the terms of their contract. The defendant contends that it was intended to be there, the rough flooring and also tongue and grooved flooring, the cement flooring, and on top of that the maple flooring. It is for you to say whether, from the evidence and the contract and specifications, this rough flooring was intended to be there in addition to the other flooring required by the addendum clause in the contract, and was the addendum clause a part of the contract, originally,

Charge.

and if it was, and the plaintiffs so understood it, then they should make the defendant a proper allowance for what that rough floor would cost at the time that floor was to have been laid; in other words, the defendant did not get the value of the work it was entitled to receive under the contract. That value was put at \$163; another witness puts it at \$211.90, and the plaintiffs say it could be laid for \$110. If you conclude that the defendant is entitled to an allowance for that floor, then you must say which of these amounts you determine would be a proper sum to allow for the omission of that floor if the defendant is entitled to any allowance for this claim, then the amount allowed, reduces the amount of the claim of the plaintiffs to that extent. If you should determine that the plaintiffs are entitled to the whole amount of their claim, your judgment should be for them, for the sum of \$359. If you determine that the plaintiffs are entitled to recover except for the disputed items or any of them, namely, stripping the flooring, \$70; furring outside walls for pipe, \$13.60; base board around platform flooring, \$36.40, and mezzanine floor, \$12, then plaintiffs would be entitled to recover the difference between the amount you allowed for all or any of said items and plaintiffs' claim; if you conclude that the defendant is entitled to an allowance for the alleged omitted North Carolina pine flooring, then the amount you allow the defendant for that item is also to be deducted from plaintiff's claim. In other words, you must determine first, what if any amount, plaintiffs are entitled to recover, and then what allowances, if any, you will make to defendant for the disputed items above mentioned or for the flooring, and then strike a balance between the parties, and by your verdict say what

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Charge.

is the amount plaintiffs will be entitled to recover if the balance is in their favor and what the defendant should recover if the balance you determine upon is in its favor, and if the sum which you allow the defendant is less than the plaintiff would be entitled to, your judgment should be for the plaintiff for his claim less what you allow to the defendant.

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The plaintiffs have presented some requests to charge. One is: "That the committee ordered the stripping of the banquet floor and agreed to pay a price of \$70, and the jury cannot consider any evidence whether the work was necessary or not. In regard to that, gentlemen, I charge if you think this committee fraudulently or in collusion with the plaintiffs issued a letter authorizing that \$70, then the plaintiffs could not recover that item; if you conclude the plaintiffs performed that item of work without any fraud or collusion between them and the committee they would then be entitled to stand on the act of the committee, and insist upon receiving that \$70.

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Second request: "If the jury find that the owner let the contractor proceed to put down the flooring on that banquet floor without the rough flooring the owners cannot now have the benefit of that omission. If the owners stood by and made no objection to this and made a final settlement on their contract and omitted to make a charge for that when they saw the work going on they would be estopped from making any claim as to that item now. The contract provided that the final certificate of the committee should be the final and conclusive upon the defendant, and the defendant cannot go behind that certificate to the jury, but it is bound by the certificate. Whatever the provisions on the contract are in that respect, if that is to be

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Charge.

a final certificate, it is considered to be final and the defendant is bound by it." As to this, I charge you if defendant was defrauded by its committee or by the plaintiffs, and you determine there is fraud proved of that kind, then this final certificate, if it was obtained by fraud, would not entitle the plaintiffs to recover and defendant would be entitled to an allowance for the flooring. I do not see from the evidence that fraud was proved, nor does it appear that the certificate was obtained from the defendant by any oversight or in a loose manner, after it was signed by the mortgagee and then got into the hands of the plaintiff. If it was delivered and there has been an acceptance of this building by the defendant, the plaintiffs are entitled to the benefit of the final certificate or to any benefit under it. 10

You have heard all the evidence, the testimony of the various witnesses you have seen these plans and specifications. You must take all the evidence the plans and specifications and say whether from all the evidence the plaintiffs are entitled to recover from the defendant or the defendant from the plaintiffs, and to what the amount should be to the prevailing party. 20

Thh jury thereupon retired and in charge of the bailiff. 30

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Exceptions to Charge.

The defendant excepts to so much of the charge as was given to the jury pursuant to the first request of the plaintiff. Also to so much of the charge as stated in response to the plaintiffs' request that the defendant was bound by the certificate of the committee or whatever the Court said on that subject.

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Also to what the Court said respecting the liability of the defendant for the act or mistake of the committee; also to what the Court said respecting the addendum to the contract, and the change of the contract by the adding of the addendum; also to what the Court said respecting the allowance for the alleged omitted North Carolina flooring.

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Exceptions allowed and signed and sealed accordingly.

J. S. ERWIN,
Judge.

I, Harry Schirmer, a stenographer designated by the Court and sworn, do hereby certify that the foregoing is a true copy of the testimony of the proceedings on the trial of the suit of John B. Anderson, et al., plaintiffs, against Odd Fellows' Hall Association, defendant, in the Second District Court of Jersey City.

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Dated, June 17, 1912.

Harry Schirmer,,
Stenographer.

TO THE HONORABLE, THE CHIEF JUSTICE OF THE
SUPREME COURT:

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I hereby certify the foregoing transcript of the testimony and of the proceedings in the above-stated case made by the stenographer designated

by me and sworn, to be used on the hearing of the appeal herein.

Dated, June 17, 1912.

JAMES S. ERWIN,
Judge.

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Notice of Appeal.

To Merritt Lane,
Attorney for Plaintiffs.

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Take notice that the defendant hereby appeals to the New Jersey Supreme Court from the judgment of the Second District Court of Jersey City, entered in the above-stated action, on June seventeenth, nineteen hundred and twelve.

MELOSH & MORTEN,
Attorneys for Defendant.

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Specification of Points.

The appellant in the above entitled cause hereby specifies the determination or directions of the District Court with respect to which it is dissatisfied, in point of law.

1. The District Court erred in permitting the plaintiffs to offer evidence concerning the work done and the reasonableness of the charges made
10 of thirteen dollars and sixty cents, for furring out outside walls for pipe recess.

2. The District Court erred in permitting the plaintiff to offer evidence concerning the five hundred feet of two member base around all lodge room platforms and the reasonableness of the charge of thirty-six dollars and forty cents therefor.

3. The District Court erred in permitting the
20 plaintiffs to offer evidence concerning the base around mezzanine floor and the reasonableness of the charge of twelve dollars therefor.

4. The District Court erred in refusing to nonsuit the plaintiff at the close of the plaintiffs' case.

5. The District Court erred in limiting the damages to be recovered by the defendant, by reason of the plaintiffs neglecting to lay the diagonal flooring, to the amount insisted upon by the plaintiffs, to wit, "the difference in value between the
30 floor as laid and the floor as it should have been laid under the contract."

6. The District Court erred in refusing to permit the defendant to submit proof as to what it would cost to place the floor in the banquet hall in the condition which the plans and specifications and contract provide.

7. The District Court erred in permitting the
40 witness Anderson to testify in rebuttal concerning conversations had with a witness, Rodman, re-

Specification of Points.

specting the floor in the banquet hall and the addendum.

8. The District Court erred in denying the motion of the defendant respecting the order in which counsel should sum up to the jury.

9. The District Court erred in refusing to strike out the evidence relating to the items of thirteen dollars and sixty cents, thirty-six dollars and forty cents, and twelve dollars, when requested so to do by the defendant at the close of the plaintiffs' case. 10

10. The District Court erred in its charge, in assuming that the committee was a committee of the defendant, and in charging that if the committee made a mistake intentionally, so as to defraud the defendant and gave an order for work which was clearly within the contract and understood so to be by the plaintiffs, then the defendant would not have to pay for such work. And in charging that if the committee, being the agent of the defendant, gave an order for the work on their construction of the contract, then the plaintiffs should not suffer for the committee's act, and that the defendant would have to suffer for the mistake of its committee. 20

11. The District Court erred in charging the jury in such a way as to lead the jury to believe that the addendum of the contract was added after the plaintiffs had estimated on the original work and that the defendant changed its plans after the estimates had been put in by the plaintiffs and in leaving it to the jury to see whether from the evidence, contract and specifications, the rough flooring was intended to be placed in the banquet hall, in addition to the other flooring required by the addendum clause, and whether the addendum 30 40

Specification of Points.

clause was a part of the contract originally and was so understood by the plaintiffs.

10 12. The District Court erred in its charge to the jury, pursuant to the first request of the plaintiffs and in instructing the jury that unless fraud or collusion between the plaintiffs and the committee was shown, then the plaintiffs would be entitled to stand on the act of the committee and insist upon receiving the seventy dollar item in dispute.

20 13. The District Court erred in charging the jury that it was for the jury to determine whether there was any fraud proved in obtaining the final certificate and in stating to the jury that it did not see any evidence that fraud had been proved or that the final certificate was obtained by an oversight or in a loose manner, also in charging the jury that if there had been an acceptance of the building by the defendant the plaintiffs were entitled to the benefit of the final certificate.

MELOSH & MORTEN,
Attorneys of Appellant.

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*Exhibits.***Exhibit P-1.****ESSENTIAL PORTIONS OF CONTRACT.**

II. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said committee and that its decision as to the true construction and meaning of the drawing and specifications shall be final. It is also understood and agreed by and between the parties hereto that such additional drawings and explanations as may be necessary to detail and illustrate the work to be done are to be furnished by said architect, and they agree to conform to and abide by the same so far as they may be consistent with the purpose and intent of the original drawings and specifications referred to in Art. I. 10

It is further understood and agreed by the parties hereto that any and all drawings and specifications prepared for the purposes of this contract by the said architect are and remain his property, and that all charges for the use of the same and for the services of the said architect, are to be paid for by the owner. 20

III. No alterations shall be made in the work except upon written order of the committee, the amount to be paid by the owner or allowed by the contractors by virtue of such alterations to be stated in said order. Should the owner and contractors not agree as to amount to be paid or allowed the work shall go on under the order required above, and in case of failure to agree the determination of said amount shall be referred to arbitration, as provided for in Art. XII. of this contract. 30

X. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certifi- 40

Exhibits.

cate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

10 XII. In case the owner and contractors fail to agree in relation to matters of payment, allowance or loss referred to in Arts. III. or VII. of this contract, or should either of them dissent from the decision of the committee referred to in Art. VII., which dissent shall have been filed in writing with the committee within ten days of the announcement of such decision, then the matter shall be referred to a Board of Arbitration, to consist of one person selected by the owner and one person selected by the contractors, these two
20 to select a third. The decision of any two of this board shall be final and binding on both parties hereto. Each party hereto shall pay one-half of the expense of such reference.

Exhibit P-2.**ESSENTIAL PORTIONS OF SPECIFICATIONS.****DRAWINGS AND SPECIFICATIONS.**

30 Detailed drawings and figured dimensions are to take precedence over measurement by scale. Any indicated material or work shown on the drawings and not mentioned in the specifications, or vice versa, must be supplied by the contractor without extra charge and without question, and as if they were specified and shown in both the drawings and the specifications, and must correspond with the general character of the work incidental to that particular part.

Exhibits.

CHANGES AND EXTRA WORK.

Changes, if made, shall be adjusted by a fair and reasonable compensation or deduction as the case may be, or by off-set wherein the deduction may neutralize the charge over an addition. In either case it must be thoroughly understood before such changes are made as to the cost or deduction before proceeding with the work and by written statement handed to the owners by the contractor and by notification to the representative of the owners that such changes has been negotiated, setting forth the conditions of the transaction. It is to be understood that in no instance will the superintendent in charge of the work allow any change or deviation from the specifications or drawings, or make any change whatever upon his own responsibility. The conditions as above named shall be strictly observed; and furthermore, should the contractor assume to make any change, deviation or omission without instruction so to do, he will be required to take down the work and reconstruct the same in a proper way at his own expense.

FLOORS.

The floors are to be double except in the basement, which is to be of concrete. The rough floor of the first, second and third stories is to be of No. 2 7-inch matched North Carolina pine, securely nailed with two nails to each bearing and closely fitted against all brick work and laid diagonally on the beams.

FURRING.

The brick walls will not be furred, instead will be treated with R. I. W. waterproof paint. Of other furring do all that may be necessary with

Exhibits.

1 x 2 inch stuff, inclusive of around the exposed iron beams, to meet the requirements, and with 2 x 4 joist for the third floor ceiling, set 16-inch C-C securely hung to roof beams.

DOOR, BASE AND TRIM.

- 10 Furnish and set 7-8 inch door jambs, with a 2-inch rabbited strip nailed in, to all inside doors, of sizes marked. Trim all of the door openings with a flat casing 5 inches wide fitted with a back wall moulding and a moulded cabinet head, according to detail. Except the office and hall windows, which will trim same style as doors. Trim the windows throughout with a moulded stool, apron and stop bead, and a moulded casing and single moulding on the face of the walls of all room halls and passageways and elsewhere as required, with an 8-inch wide base trimmed on the top edge with a 2-inch moulding.
- 20

FINALLY.

Wherein any item shall have been omitted of mention in the aforewritten, but necessary to a full and complete finishing of the work, the same shall be done.

ADDENDUM.

- 30 Lay tongued and grooved flooring between the beams of the entire section of the banquet hall floor, inclusive of the space to be occupied by the stage. Flooring to be sound, merchantable stuff, commercially known as "Roofers," set 3 inches down from the top of the beam.

**Supplementary Exhibits Printed at
Request of Appellee.**

Extracts from Contract.

A contract made on the 10th day of February, Nineteen hundred and eleven, by and between John B. Anderson and Edward M. Johnson, partners trading under the firm name of Anderson & Johnson, and the Odd Fellows' Hall Association of Jersey City, provides as follows:

Article 1: The contractors shall and will provide all the materials and perform all the work for the entire carpenter contract except the removal of the small building on the present site and referred to page 11 of the Specifications, for the erection of the Odd Fellows Hall on Bergen Square in Jersey City aforesaid, the estimate figures of such building having been eliminated and is made no part of this contract as shown on the drawings and described in the specifications preferred by William A. Tilton, Architect, which drawings and specifications are identified by the signatures of the parties hereto and become hereby a part of this contract.

The owner agrees to provide all labor and materials essential to the conduct of this work and included in this contract in such manner as not to delay its progress, and in the event of failure so to do, thereby causing loss to the contractors, agrees that it will reimburse the contractors for such loss; and the contractors agree that if they shall delay the progress of the work so as to cause loss for which the owner shall become liable, then they shall reimburse the owner for such loss. Should the owner and contractors fail to agree as to the amount of loss comprehended in this Article, the determination of the amount shall be referred to arbitration as provided in Article XII of this contract.

Exhibits.

CHARGES AND EXTRA WORK.

The owners reserve the privilege to make any change in the work they may deem of advantage to the building, either in additions or omissions without destroying the validity of the contract.

10 The contractor shall not have any claim against the owners for extra work except the same is ordered in accordance with the requirements herein before set forth.

FLOORS.

20 Cover the roof with $\frac{7}{8}$ in. x 8 in. North Carolina pine roofers. The finished floors of the second and third stories shall be of $\frac{7}{8}$ in. x $2\frac{1}{4}$ in. North Carolina pine, clear of pitch, grubs or knots, to be closely butted and underlaid with heavy rosin sized paper, rightly strained together and blind nailed. The finished floor shall not be laid until all of the other work is practically done. The floors of the offices and the kitchens shall be the same as specified for the second and third floors. The floors of the banquet hall and the floor of the entrance inside of vestibule shall be of clear $\frac{7}{8}$ in. x $2\frac{1}{4}$ in. face maple, tongued and butt tongued and blind nailed every 18 inches and all joints tightly strained together. Build 30 all of the platforms in the lodge rooms as shown, securely timbered and raised with risers not to exceed 6 inches in height, provided with nosed steps, and floor over with a single thickness of flooring suitable to the flooring of the main floor. The front rises of the main platform each side of the steps to have one panel in width moulded and trimmed complete.

*Exhibits.***P-3.**

CHARLES B. RODMAN,
Carpenter and Builder,
No. 6 West Street,

Jersey City, N. J., August 14, 1911.

Anderson & Johnson,

Dear Sirs:

10

Your estimate for changing glass in 5 rear windows of building to wire glass at \$3 per window duly accepted; also your estimate for shopping Banquet Hall with 1½ x 3-inch spruce strips D 15 and spaced 1 inch centers for \$70 duly accepted.

Bldg. Committee, } Charles B. Rodman,
I. O. O. F. Hall, } Lorenz Kirchner,
Jersey City. } E. Nelson.

20

Registered Architect.

P-4.

CHARLES B. RODMAN,
Carpenter and Builder,
No. 6 West Street,

Jersey City, N. J., July 24, 1911.

30

Anderson & Anderson,

Dear Sirs:

We accept your price for changing 3 windows on fire stairs to doors and transoms and putting in

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Exhibits.

one door complete on fire stairs for sums as stated,
\$80.

Bldg. Com.	} Charles B. Rodman,
I. O. O. F. Hall	
Bergen Sq.	
	} Lorenz Kirchner,
	} E. Nelson.

Registered Architect.

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P-5.

CHARLES B. RODMAN,
Carpenter and builder,
No. 6 West Street,

Jersey City, N. J., Sept. 21, 1911.

Anderson & Anderson,

Dear Sirs:

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We hereby accept your estimate for erecting of
mezzanine floor in costumeing room 3d floor rear
for seventy 00-100 dollars; also estimate for twenty
00-100 dollars for cutting through and furnishing
1 door jamb and trim in ladies' waiting room on
first floor.

Respectfully,

Odd Fellows Hall Association,

per Charles B. Rodman,

30

Chairman Bldg. Committee.

P-6.

Certificate I. O. O. F. Hall Association Building
Committee.

Jersey City, N. J., Dec. 21, 1911.

To the Odd Fellows Hall Association:

40 This certifies that Anderson & Johnson, con-
tractor for carpenter work on Hall Building, lo-

Exhibits.

cated at Bergen Square, is now entitled to final payment of four hundred and seventy-five 00-100 dollars, being amount due under contract dated February 10, 1911.

Amount of contract.....	\$7650	
Amount for extra work.....		
	—	\$7650
Amount received.....	\$6950	10
Hardware	225	
Amount of payment due.....	475	
	—	\$7650
Balance extra work.....		

Charles B. Rodman,	}	Building Committee.
Lornez Kirener		
E. Nelson,		

Attested:

Henry J. Melosh,

Received Payment.

20

30

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New Jersey Court of Errors and Appeals.

JOHN B. ANDERSON, et als.,
Appellants-Appellees Below,

vs.

ODD FELLOWS HALL OF JERSEY
CITY, a corporation,

Appellee-Appellant Below.

On Appeal from
Supreme Court
reversing judg-
ment of the 2nd
District Court of
Jersey City. Ac-
tion at law upon
contract.

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BRIEF OF APPELLANTS.

Statement of the Case.

A suit was instituted in the 2nd District Court of Jersey City to recover the sum of \$359, for extra work under a contract made between the appellants and appellee for the construction of a building (13). The State of Demand was for materials furnished and work and labor performed all extra work (12). The appellants had been paid the full amount of the contract price upon a final certificate of completion (23, 64). The appellee filed a notice of recoupment seeking to 30 recoup damages because of the failure of the appellants to carry out the original contract in the State of Demand mentioned with respect to a certain floor known as the Banquet Hall floor and specified that by reason thereof the appellee had suffered the following item of damages, to wit:

"The cost of taking up the present maple floor, laying a diagonal floor, as provided for in the specifications and relaying the maple floor therein provided, all of which will 40 amount to the sum of six hundred dollars."

And the Notice of Recoupment proceeded:

"And the defendant will seek to recoup damages from the plaintiffs, to wit, the difference between the said sum of six hundred dollars and the actual proven value of the work done by the plaintiffs for the defendant, for which the plaintiffs are entitled to be paid" (14).

Upon the trial the plaintiffs proved extra work to the amount of \$227 about which there was no
10 dispute, counsel for appellee stating, page 68:

"If the Court please, I think we can shorten this so far as the items are concerned; we will admit all the items that Mr. Anderson agreed to settle for. We will let them stand at \$227, so far as the plaintiffs are concerned."

It had already been proven in the case that each one of these items had been ordered by the appellee in strict accordance with the contract at a
20 price fixed in writing, so that there could not be under the contract any dispute. With respect to the additional item of \$70 it had been proven that this had been ordered in strict accordance with the contract by the defendant in writing at the price fixed of \$70 (p. 87, Exhibit P-3).

The claim of the appellee with respect to this was that part of it included work which should have been performed under the original contract.
30 But under the contract the work was in charge of a committee of the appellee consisting of three members. They saw the work being done under the original contract. They construed the plans and specifications as was their right while the work was being done. They issued the final certificate and final payment was made. They gave the order for the performance of the work covered by the \$70 item as an extra.

The contract provided, Exhibit P. 1, page 81:
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"It is understood and agreed by and be-

tween the parties hereto that the work included in this contract is to be done under the direction of the said Committee *and that its decision as to the true construction and meaning of the drawings and specifications shall be final.*"

And Article 3, page provided:

"No alterations shall be made in the work except upon written order of the Committee the amount to be paid by the owner or allowed by the contractor by virtue of such alteration to be stated in said order." 10

And Article 10:

"It is mutually agreed between the parties hereto that no certificate given or payment made under the contract, *except the final certificate or final payment*, shall be conclusive evidence of the performance of this contract."

It is insisted that with respect to this item under the contract between the parties they were bound by the decision of the Committee made during the progress of the work, that this was extra work and are bound by the written order given by the Committee to the appellants to do the work. 20

The Court, however, left the question to the jury in a way more favorable to the appellee than was proper. The Court charged:

"If the Committee, being the agent of the defendant, gave a written order for this work on their construction of the contract, then the plaintiffs should not suffer for the committee's act, unless plaintiffs knew the work was within their contract. In other words the defendant would have to suffer for the mistake of their Committee" (71). 30

Under the contract between the parties the decision of the Committee being made final and final payment or a final certificate being made conclusive evidence of the completion of the work in accordance with the contract, and the decis- 40

ion of the committee as to extra work being made final, in the absence of proof of fraud the appellee was bound by the action of its committee and there being no proof of fraud the Court should have directed a verdict in favor of the appellants.

10 There were two or three other items of extra work included in appellant's State of Demand for which there were no written orders, but which it was proven had been directed by the Committee during the progress of the work and agreement made to pay reasonable prices therefor and that the prices charged were reasonable. But a discussion as to these items is rendered immaterial because upon these issues the jury found against appellants. The amount of the verdict was \$297. It included the \$227 admitted by the appellee and \$70 work done under the written order of the Committee.

20 The sole defense attempted to be made by the appellee was that set up in its notice of recoupment that under a proper construction of the plans and specifications a certain kind of floor was required in the Banquet Hall which the appellants omitted and this notwithstanding the fact that final certificate and final payment had been made and that the contract provided that *either* final certificate *or* final payment should be conclusive evidence of the performance of the contract.

30 and the fact that the members of the Building Committee at the time the building was being built saw the floor put in, now claimed to have been omitted and at the time they gave their final certificate knew that the floor had been omitted and the fact that under the contract it is provided that the work should be done under the direction of the Committee and that its decision as to the construction and meaning of the drawings and

40 specifications shall be final.

The Supreme Court reversed the decision of the District Court upon two grounds (2) :

1st: That the appellants had not submitted their dispute to arbitration and that because of this fact the Judge of the District Court should have directed a non suit.

2nd: That the District Court erred in excluding testimony offered by the appellee for the purpose of showing—the cost of putting the floor in the Banquet Hall in the condition required by the contract, in the building as completed.

This last point was absolutely immaterial because the jury found that the appellee was entitled to nothing by reason of the omission of the floor. As a matter of fact the Court should have excluded from the consideration of the jury this omitted floor because of the final payment and final certificate and construction of the plans by the Committee and the fact that there was no proof of collusion, fraud or mistake. 10

I.

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AS TO ARBITRATION.

(a) If the dispute was within the arbitration clause of the contract, the appellee not having raised the point until the motion to non-suit, nor having offered itself to submit to arbitration, could not on the motion to non-suit raise this point.

In the case of *Smith v. Alker*, New York Court of Appeals, 102 N. Y., at p. 92, the Court said: 30

“Second: That the difference between the parties should have been submitted to arbitrators under the clause in the contract relating to arbitration. No evidence was given that the defendant took any steps for their selection. It was not more the duty of the plaintiff than that of the defendant to do so. We need not inquire, therefore, how far, if at all, the said defense would have availed.” 40

In the case of *Heidlinger v. Onward Construc-*

tion Company, 90 N. Y. Supp., at p. 120, the Court said:

"The claim that the matter should have been submitted to arbitrators was not made until during the trial of the action, and in the absence of any demand or request being made for or steps taken to secure, arbitrators by the defendant under the contract, the provisions in the contract for arbitration constitute no defense to the case. Citing *Smith v. Alker*, 102 N. Y. p. 92, 5 N. E. p. 791."

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This case was affirmed by the Appellate Division, 2nd Department, under the title of *Neidlinger v. Onward Construction Company*, 95 N. Y. Supp., at p. 1148 upon the opinion of the Court below. It was affirmed by the Court of Appeals under the same title in 188 N. Y. p. 571.

(N. Y. 1890).

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A provision in a building contract, that difference between the parties respecting the value of extra work shall be submitted to arbitrators selected as prescribed is no bar to an action to recover for such work, in the absence of evidence that defendant took steps for the selection of arbitrators. *Williams v. Shields*, 9 N. Y. Supp., 502, 16 Daly, 178.

(N. Y. 1895).

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Though a contract provide that, in case of dispute as to value of extra work, it shall be submitted to arbitration, one suing thereon for extras need allege or prove nothing as to arbitration, it not being raised by defendant, and defendant having refused to pay, not on the ground that the arbitration clause was not carried out, but for other reasons. *Porter v. Swan* (City Ct. Brook) 14 Misc. Rep., 406, 35 N. Y. Supp. 1037.

(Ky. 1905).

Where a building contract provided that the architect should make awards as to the value of

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extra work, etc., and that in case of dissent from such award arbitration should be had, if the owner was dissatisfied with the architect's decision it was his duty within a reasonable time to call for arbitration, and, not having done so, the absence of arbitration was no bar to an action by the contractor to recover for extra work, etc. *Conrad v. Humphrey*, 84 S. W., 313, 27 Ky. Law Rep. 4.

In the case at bar it was clearly the duty of the appellee to institute proceedings for arbitration. Its defense was that the original contract had not been properly performed. *The appellants had been paid and the suit was for the extra work.* All of the extra work allowed for by the jury had been performed under written orders specifying the amounts to be charged. There was no dispute so far as the appellant's claim for extra work was concerned within the arbitration clause (p. 81):

"Should the owner and contractors not agree as to amount to be paid or allowed the work shall go on under the order required above, and in case of failure to agree the determination of said amount shall be referred to arbitrators as provided for in Art. XII of this contract."

There was no dispute between the appellants and appellee as to the amount to be allowed for the extra work which had been furnished under orders distinctly specifying the amount.

Under the same clause of the contract it provided:

"No alterations shall be made in the work except upon written order of the Committee, the amount to be paid by the owner or allowed by the contractors by virtue of such alteration to be stated in said order."

If there was anything to submit to arbitration it was the claim of the appellee for recoupment and it took no steps to put in motion the scheme of arbitration provided for by the contract.

It would be manifestly unfair to permit a party to raise the question of non-submission to arbitration in the first instance upon a motion to non-suit. It might be that the action was not commenced until a short time before the expiration of the statute of limitations and a non-suit might mean that the plaintiffs would be out-lawed.

In the case of *Knaus v. Jenkins*, 40 N. J. L., p. 288, at p. 293, the Supreme Court said:

10 "The pendency of the arbitration proceedings does not stop the running of the statute of limitations."

It cannot be argued here that the right of action does not accrue until there is arbitration, for the agreement is not to pay the amount, fixed by the arbitrators when and not until the arbitrators fix the amounts. The covenant is to pay so far as the main contract is concerned a certain amount and so far as extras are concerned (so far
20 as relevant to the case sub judice) the amounts determined by the committee in its written orders. See for the distinction clearly drawn *Seward v. City of Rochester*, 109 N. Y., 164, 16 N. E., 348.

And this leads me to the 2nd point.

(b) The Supreme Court erred in directing the Court below to direct a non-suit.

30 At the most the appellees were entitled only to a stay pending arbitration or to an order striking out those items in the Bill of Particulars not covered by the written orders of the Committee. This last point being rendered immaterial because of the fact that the jury found against the appellants upon such issue.

Inasmuch as the proceeding in arbitration does not stop the running of the statute of limitations if the court is right that a non-suit should be
40 granted in case of a failure to arbitrate prior to commencement of a suit while the arbitration

proceedings are pending the statute of limitations might run.

In the case of *Knaus v. Jenkins*, the Supreme Court said (40 N. J. L., p. 293) :

"An agreement to submit to arbitration cannot be invoked to defeat an action or suit and the reasoning * * of the judges as to the effect that the remedy by arbitration is an imperfect one and the Courts will not strip themselves of jurisdiction and drive the party to an inadequate proceeding." 10

And further :

"I think the pendency of the arbitration proceedings did not deprive the parties of the right to bring or the right of the Court to hear the cause below."

But in the case at bar there were items for which the appellants sued which clearly did not come within the clause providing for arbitration. These clauses are as follows: 20

"No alterations shall be made in the work except upon the written order of the Committee, the amount to be paid by the owner or allowed by the contractors by virtue of such alterations to be stated in said order.

"Should the owner and contractors not agree as to amount to be paid or allowed the work shall go on under the order required above, and in case of failure to agree the determination of said amount shall be referred to arbitration as provided for in Article XII of this contract." 30

Article XII provides (p. 82) :

"In case the owner and contractors fail to agree in relation to matters of payment, allowance or loss referred to in Arts. III or VII of this contract, or should either of them dissent from the decision of the Committee referred to a Board of Arbitration, to be filed within ten days of the announcement of such decision, then the matter shall be referred to a Board of Arbitration, to con 40

sist of one person selected by the owner and one person selected by the contractors, these two to select a third. The decision of any two of this Board shall be final and binding on both parties hereto. Each party hereto shall pay half of the expense of such reference."

10 It is clear that so far as the appellants' demand was based upon orders of the Committee made in writing specifying the amounts to be paid and all of the appellants' demand which was allowed by the jury was so based, there was nothing in dispute between the contractor and the owner which called for the contractor to ask for arbitration. There could not, therefore, have been a non-suit.

20 I reiterate that if there was anything which could be submitted to arbitration it was the the demand of the appellee against the appellants for allowance for alleged defective work in the main contract for which final certificate had been given and payment made, and as to this it was clearly the duty of the appellee to institute proceedings for arbitration which it neglected to do, and the result of enforcing the arbitration clause would be to prevent the appellee from recovering upon its notice of recoupment.

30 (c) There was no dispute between the parties which came within the clause of the contract referring to arbitration.

Again I quote the clauses of the contract referring to arbitration:

40 "III. No alterations shall be made in the work except upon written order of the committee the amount to be paid by the owner or allowed by the contractors by virtue of such alterations to be stated in said order. Should the owner and contractors not agree as to amount to be paid or allowed the work shall go on under the order required above, and in case

of failure to agree the determination of said amount shall be referred to arbitration, as provided for in Art. XII of this contract."

Article XII:

"In case the owner and contractors fail to agree in relation to matters of payment, allowance or loss referred to in Arts. III or VII of this contract, or should either of them dissent from the decision of the Committee referred to a Board of Arbitration to consist 10
be filed within ten days of the announcement of such decision, then the matter shall be referred to a Board of Arbitration' to consist of one person selected by the owner and one person selected by the contractors, these two to select a third. The decision of any two of this Board shall be final and binding on both parties hereto. Each party hereto shall pay one-half of the expense of such reference."

Articles 7 and 8 of the contract have no bearing upon this case and are therefore not printed.

Remembering that the appellant's action is 20
based solely upon extra work for which the contractor had the written orders of the Committee specifying the amounts for so much of the work as the jury allowed them for how was there any dispute between the parties which could properly be said to fall within the third and twelfth clauses of the contracts, the only ones having any application.

The only time under Article III when arbitra- 30
tion is to intervene is when the owner and contractor do not agree as to the amount to be paid or allowed for extra work and this applies only where the Committee gave the order to proceed but there is no agreement as to the price, for under the first clause of Article III the amount to be paid by the owner may be stated in the order and then there is absolutely no question to be submitted to arbitration. Article XII does not 40
broaden the effect of Article III. It only provides for the appointment of arbitrators in case of fail-

ure to agree in relation to matters of payment or allowance or loss referred to in Article III. Not only was all of the extra work for which the appellants recovered ordered by the Committee in writing with the amount to be paid stipulated but the appellee expressly admitted in the case the \$227.00 (there, therefore could not have been a non-suit) and raised no question as to the \$70. item either being ordered by the Committee in writing, or the amount being reasonable, but insisted that the work was covered writing with the amounts to be paid stipulated by the original contract and specifications notwithstanding the written order directing the work and fixing the amount to be paid. There was no dispute.

Even a dispute with respect to this \$70. item was not such a dispute as comes within these clauses of the contract, because the clauses, so far as the extra work is concerned, do not apply unless there is an absence of a written order of the Committee fixing the amount. The presence of such an order rightly or wrongly given avoids the effect of the arbitration clause immediately following, which is: "Should the owner or contractor not agree as to the amount to be paid or allowed the work shall go on under the order required above," meaning that in case the amount is not fixed in the order because of lack of agreement between the Committee representing the owner and the contractor, the contractor shall nevertheless do the work and the value of the work shall be fixed by arbitration.

There is here no dispute whatever as to amount. The claim raised by the appellee is that the work was included within the original contract and that the Committee should not have made the order. This is not such a dispute as is referred to arbitration. In view of the contract provision:

"It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said Committee and that its decision as to the true construction and meaning of the drawing and specifications shall be final."

And Article 10:

"It is further mutually agreed between the parties hereto that no certificate given or payment made under the contract *except the final certificate or final payment* shall be *conclusive* evidence of the performance of this contract." 10

And Article 3 quoted above providing:

"That no alterations shall be made in the work except upon the written order of the committee";

it is submitted that the determination of the Committee and the final payment and final certificate except upon proof of fraud or collusion is final and binding upon the parties. 20

When the motion to non-suit had been made and at the close of the case there was not any evidence with respect to fraud or collusion. The appellants having been paid the full amount for the main contract it was not their duty to submit any question arising under this main contract to arbitration. The matter had been closed and completed. The appellee did not attempt to put in any motion any arbitration proceeding with respect to its claim of recoupment. 30

But if the question arising under the \$70. item was a question which should have been submitted to arbitration it was not a matter which could have been taken advantage of by a motion to non-suit because there was in the case the claim of the appellants for \$227. which was admitted by the appellee, separate and distinct items. The remedy of the appellees would have been to have moved 40

to exclude from the consideration of the jury the consideration of this \$70. item as a matter which should have been submitted to arbitration. No motion upon that ground was ever made. The sole motion made with respect to arbitration was to non-suit. If there is any part of the plaintiffs' claim valid the motion to non-suit must fail.

(d) Under the circumstances of this case the
 10 agreement to arbitrate was not a condition precedent to the maintenance of the case.

No dispute arose during the progress of the work. It was not until suit was brought that there was any dispute as to payment or amount.

The appellee had already paid the final payment upon the original contract and did not dispute the amounts asked for extra work.

In *Schmulbach v. Caldwell* 196 Fed. p. 16
 20 Circuit Court of Appeals for the 4th Circuit at p. 23 the Court said:

30 "While it is true that no arbitration was had in respect to differences of amount allowed for work done upon written orders it is apparent that at no time during the performance of the work did either party have any notice of a difference in respect to the value thereof; therefore no occasion arose for invoking an arbitration. We do not think the agreement to submit differences to arbitration precludes the party doing the work to sue for compensation. It is not a condition precedent to his right of action."

Under the title "Builder and Architect," 6 Cyc. p. 91, it is stated:

40 "A failure of the builder to obtain a certificate is a defense, but a refusal to submit a dispute as to value of work or materials to arbitration is not a defense, where the agreement neither expressly nor by necessary implication made such submission a condition precedent to the institution of an action."

In *Green et al v. American Cotton Company*,
112 Fed. Rep., p. 743, the headnote is as follows:

"Where a contract provided that, in case of disagreement, the matter was to be submitted to arbitration by mutual agreement, or, failing that, of exchange arbitration committee, but did not **in terms** prohibit the bringing of an action until arbitration had been had or offered, such condition is not necessarily implied, and a declaration for breach of such contract, which fails to allege 10
arbitration or an offer to arbitrate, is not demurrable on that ground."

And the Court in the course of its determination in that case said:

"A necessary implication is always quite as obvious from the terms of the contract as if the words expressed it in fact." Citing

Hawkins v. U. S. 96 U. S., 689, 697, 24
L. Ed. 607, 610.

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where the Court said:

"Implied promises or promises in law exist only when there is no express promise between the parties.—'*Expressum facit cessare tacitum*.' Hence says Chitty, a party cannot be bound by an implied promise when he has made an express contract as to the same subject matter."

And the Court further said:

"Here we have a contract which confessedly 30
does not say that the arbitration stipulated for shall be a condition precedent to the bringing of an action on the contract."

And further:

"The Court cannot enlarge this stipulation by any implication. That insisted upon is not a necessary one, because the stipulation may be fully carried out without such an enlargement as is wholly independent of this 40
and all the other clauses of the contract."

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And further:

"We are asked to make a new and different contract by implication, because one of the parties would now like to supply an omission by that implication."

And further:

10 "In *Smith v. Association*, (C. C.) 51 Fed., 520, 522, the learned judge, referring to a clause like this, states the principle which commends itself most strongly to my own judgment: 'It is silent as to the effect of a refusal by the assured to arbitrate. The court ought not to read into it a condition not written therein by the parties, which shall oust the court of its ordinary jurisdiction.' While I do not deny that such a stipulation may become a condition precedent by an intention implied for that purpose, I do say that the courts will not, on the above principle, favor such an implication, but reject it, except where it is imperatively a necessary one."

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That this is the law in New Jersey is indicated by the remarks of the Court in *Wolff v. Insurance Co.*, 50 N. J. L., 456, where the Court said:

30 "There are, it is true, decisions to the effect that a clause merely declaring that if the parties shall disagree as to the amount of the loss, such difference shall be arbitrated, does not create a condition precedent, but this is for the reason that it is not made such by the terms of the contract; but, in the present policy, the parties have stipulated that the award upon the submission shall precede the right to sue."

There is no such provision in the contract before the court and the case is to be decided as if there was a simple agreement to arbitrate. A simple agreement to arbitrate is never a bar to an action or a condition precedent.

40 In *Mitchell v. Harris*, 2 Ves. Jr., 136, 30 English Reprint, 560, the Lord Chancellor said:

"I have not been furnished with any authority, case, or even dictum, to show that an agreement to refer, where no reference has taken place, would stop a court of law; nor has there ever been any idea of a bill to enjoin a party from proceeding at law under a notion of giving specific effect to such a covenant as this, where the parties are proceeding at law."

In *Knaus v. Jenkins*, 40 N. J. L., 288, it is said:

"That the pendency of the arbitration agreed to could not be pleaded or invoked either in abatement or in bar of an action by the party after the submission, such an action having been commenced during the pendency of the arbitration proceedings." 10

"A simple agreement inserted in a contract that the parties will refer any dispute arising thereunder to arbitration will not bar a suit at law by either party upon the contract before an offer to arbitrate, unless arbitration is made a condition precedent to action by stipulation." 20

Cases cited in 4 American Digest, Cen. Ed.
Title "Arbitration and Award," sec. 30, p. 34.

The Court in its opinion below said:

"The parties to a contract may agree to impose as a condition precedent to any right of action that, with respect of the liability to pay, the mode of settling the amount to be paid, or the time for paying the same, an arbitration shall first be held, and that in respect to such agreements the rule is that, if the agreement is in such terms that a reference is a condition precedent to the right of the party to maintain an action, he is not entitled to maintain it until that condition is complied with; but if the agreement is to pay with a subsequent agreement to refer the question to arbitration, contained in a distinct clause, collateral to the other, the 30 40

agreement to refer does not oust the jurisdiction of the courts in the first instance."

3 *Cyc.*, p. 596, and cases cited.

This latter is precisely the contract which we have before us. The covenant to pay is a distinct and separate covenant. The agreement to arbitrate is distinct, separate and collateral.

There is nothing in the contract which makes the agreement to arbitrate a condition precedent.

- 10 The policy of the courts is against making it a condition precedent. Clauses precisely like those which are in this contract have been construed not to contain conditions precedent and it is difficult to find a case the other way.

- 20 The distinction is carefully drawn in *Seward v. City of Rochester*, 109 N. Y., 164, 16 N. E., 348, and it is about as follows: where the covenant to pay is to pay only such amounts as may be fixed by arbitration, then the fixing of the amounts is a condition precedent; but where as in this case the covenant is to pay a certain amount, as in the main contract, or the amounts fixed by the committee, in case of extras, as in this case, as all the amounts recovered for was so fixed, or a reasonable amount, if the parties did not agree, and that in case of disagreement the amounts showed be fixed by arbitration then arbitration is not a condition precedent.

- 30 Among some of the cases from other jurisdictions are the following:

(Md. 1909).

The right to resort to the courts for the determination of the rights of the parties will not be taken away by inference or anything short of a distinct agreement to waive it.

Aetna Indemnity Co. v. Waters, 73 Atl., 712, 110 Md., 673.

(D. C. 1901).

Where an article of a building contract provides that, in case of dissent by either party from the award of the architects as to allowances for alterations, submission shall be had to arbitrators, and another article provides that the owner shall provide all labor and materials not included in the contract in such a manner as not to delay the material progress of the work, and, in event of failure so to do, thereby causing loss to the contractor, that he will reimburse the contractor for such loss, and that the amount of such loss shall be fixed and determined by the architects or by arbitration, as provided for in the first-named article, an award by the architects or by arbitrators is not a condition precedent to the maintenance by the contractor of an action against the owner for a breach of the provisions of the second article.

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Fontano v. Robbins, 18 App. D. C., 402.

(Ga. 1905).

A stipulation in a building contract that if any damage shall arise by delay in completing the work and the parties are unable to agree the same shall be referred to arbitration, will not prevent a suit in the first instance for damages, unless it is unequivocally provided in the contract that the arbitration shall be a condition precedent to suit, or the only mode for the assessment of damages.

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Adams v. Haigler, 51 S. E., 638; 123 Ga., 659.

(Ind. App. 1900).

An agreement in a builder's contract that the price agreed on is to be paid in installments on certificates of the architects, as the work progresses, until the building is completed, and, in

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case the parties cannot agree on the value of any charge made or to be made, the same shall be appraised by the architects, does not make such appraisement a condition precedent to suing thereon.

Munk v. Kanzier, 58 N. E., 543, 26 Ind. App., 105.

(Ind. App. 1906).

- 10 Where a building contract provided that disputes should be settled by the architect, whose decision was to be binding upon the parties, except in certain cases, as to which "either party may appeal from the architect's decision to arbitration," an appeal from the architect was not a prerequisite to an action.

Maitland v. Reed, 77 N. E., 290, 37 Ind. App., 469.

- 20 (Ind. Super. 1873).

Where a contractor in a building contract which provides that payment shall be made only upon certificate of the architect, sues for work and labor done and materials furnished, and not upon a special contract, the production of the architect's certificate, or proof of a demand or refusal, is not a prerequisite to recover, if a case is made out entitling the contractor to recover in spite of a written contract.

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Crosby v. Adams, Wils., 342.

(Tex. Civ. App. 1902).

- Under a building contract providing that, if alterations were required, a valuation of the work added or omitted should be made by the architect, and the contract price increased or diminished thereby, as the case might be, and that, in case such valuation should not be agreed to, the contractor should proceed with the alterations on the written order of the architect, and
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the valuation be referred to arbitrators, an agreement as to the valuation of extras, or arbitration concerning them, is not a condition precedent to a recovery therefor, where the reasonableness of the charges made for them is not questioned.

Essex v. Murray, 68 S. W. 736, 29 Tex. Civ. App. 368.

(U. S. C. C. A., Mass, 1908).

A provision of a contract for the construction 10
of a sewer that, in case of any dispute arising, the engineer shall have the right to settle the same and to interpret the meaning of the specifications and contract, and that his decisions shall be final, does not deprive the parties of their right to a judicial construction of the contract after it has been performed, so far as such construction involves matters of law relating to the amount of compensation to which the contractor is entitled.

Gammino v. Inhabitants of Town of Dedham, 164 F., 593. 20

(Pa. 1908).

Arbitration clauses in building contracts are in derogation of the common-law right of trial by jury, and are not to be extended beyond the express covenants of the parties.

Hunn v. Pennsylvania Institution for Instruction of the Blind, 70 A., 812, 221 Pa. 403, 18 L. R. A. (N. S.), 1248. 30

(Pa. 1908).

The usual arbitration clause in a building contract is not to be construed as showing an intent that the arbitrators should have the right to finally determine questions involving their own failure in the performance of duties. 40

Hunn v. Pennsylvania Institution for Instruction of the Blind, 70 A., 812, 221 Pa. 403, 18 L. R. A. (N. S.), 1248.

(N. H. 1858)

An agreement to refer matters in dispute between the parties to a contract does not bar parties of their remedies by an action at law or suit in equity thereon, unless the contract makes an award a condition precedent to the right to recover.

Smith v. Boston, C. & M. R. R., 36 N. H., 458.

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(N. Y. 1859).

A stipulation, in a contract for work upon a railroad, that all matters in dispute, as to any matter connected with or growing out of the contract, should be submitted to and decided upon by the chief engineer and consulting engineers of the company, is no bar to an action upon the contract.

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Hart v. Lauman, 29 Barb., 410.

(N. Y. 1861).

An agreement in a contract to submit to arbitration questions arising out of it is no defense to an action to collect amount due on the contract, though plaintiff's refusal to abide by that condition may give defendant an action for damages.

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Sinclair v. Tallmadge, 35 Barb., 602.

(S. C. 1851.)

Plaintiff, an overseer, and defendant, his employer agreed that should either become dissatisfied, and wish to be relieved from the agreement, the plaintiff "shall receive what two disinterested persons shall agree for him to have, to be paid when the crop is sold." The defendant terminated the contract before the end of the year, and plaintiff sued for his services. Held, that it was

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of action that he should offer to refer the matter to two disinterested persons.

Gardner v. Williamson, 5 Rich. Law., 28.

(Tenn. 1892).

The parties to a building contract "agreed" that, in case any difference should arise between them as to the quality of work or materials or any other question, the same shall be settled by arbitration, each party selecting a good man, and, in the event of their disagreeing these two shall select a third party, and their decision shall be final." Held, that the refusal by one of the parties to submit to arbitration could not be pleaded by the other in bar of an action on the principal contract, as the agreement neither expressly nor by necessary implication made such submission a condition precedent to the institution of an action.

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Cole Mfg. Co. v. Collier, 91 Tenn. (7 Pickle), 525, 19 S. W., 672.

(Wis. 1886).

When a contract contains no stipulation not to sue for breaches until an award is made, a stipulation therein to refer controversies arising out of it to arbitration is no bar to an action by either party to recover damages for a breach of the contract.

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Oakwood Retreat Ass'n v. Rathbone, 65 Wis., 117, 26 N. W., 742.

(Wis. 1863).

A contract for the construction of a harbor provided that all disputes between the parties as to the gross value of extra work done and materials furnished by reason of a change in the plan of the harbor were to be decided by arbitrators. Much additional work was done and

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materials furnished in consequence of the alteration of the plans. Held, in an action for a balance due for work and materials, that, no arbitration having been had, the question should have been submitted to the jury upon evidence furnished by the parties as to the real value of such work and materials.

Hasbrouck v. Milwaukee, 17 Wis., 266.

10 (Vt. 1911).

A provision in a construction contract for submission of disputes to the owner's engineer for final decision does not cover disputes not concerning the work itself, but only whether the owner is bound to pay for the work after having received and accepted it.

Douglas & Varnum v. Village of Morrisville, 79 A., 391.

20 (Pa.)

Failure of a contractor to submit to arbitration a controversy arising mainly out of the wrongful conduct of the architect held not to deprive the contractor of his right to have the controversy submitted to a jury.

Smith v. Cunningham Piano Co., 86 A., 1067.

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The arbitration clause could have no application in the case at bar because the refusal to pay was not based upon the ground that there had been no arbitration but upon a distinct and separate ground.

(N. Y. 1894). A building contract provided that the owner might at any time during the progress of the work "make any alteration, deviation, addition, or omission in the work or materials hereby contracted for," the value of which should be added 10 to or deducted from the contract price, and that any dispute as to the value of such alterations, etc., should be determined by arbitrators. Held, that the provision for arbitration did not apply, where the owner refused to pay for the work on the ground that the contract had not been substantially performed.

Oberties v. Bullinger, 75 Hun, 248, 27 N. S. Supp., 19. 20

(e) If the clause to arbitrate is a condition precedent the result of the arbitration is final and conclusive, according to its terms, thus ousting the courts of jurisdiction and is void.

The Supreme Court said in its opinion below, (p. 6):

"We are not, however, in the case sub judice required to go to that length or to consider 30 that aspect of an arbitration which is intended, in haec verba, to oust the courts of jurisdiction; and we refer to it at all for the purpose of presenting the state of the judicial mind, and the trend of modern legal opinion upon the subject of the public policy, which, while sporadic in character, heretofore militated against it."

If the plaintiffs come within the clause to arbitrate and if arbitration is a condition precedent 40 it is hard to avoid the effect of the provision in paragraph 12 which is "The decision of any two

of this Board shall be final and binding on both parties hereto."

If this means what it says there is certainly excluded a review by any tribunal of the decision of the arbitrators. The Court, therefore, would be ousted of its jurisdiction.

The law is well settled that such a provision is void.

See "Arbitration and Award," 3 Cyc., 595 and 10 cases there referred to.

White v. Middlesex R. Co., 135 Mass., 216;

Cavanaugh v. Dooley, 88 Mass., 66;

Rowe v. Williams, 97 Mass., 163;

Wood v. Humphrey, 114 Mass., 185;

Pearl v. Harris, 121 Mass., 390;

Emerson v. Wadman, 122 Mass., 384;

Vass v. Wales, 129 Mass., 38;

20 *Haggart v. Morgan*, 5 N. Y., 422;

Kill v. Hollister, 1 Wils., 129;

Thompson v. Charnock, 8 T. R., 139;

Horton v. Sawyer, 4 R. & N., 643;

Gray v. Wilson, 4 Watts., 39;

Mitchell v. Harris, 2 Ves., 129;

Roper v. London, 1 Ell. (Q. B.), 825.

There is no necessity for multiplying cases upon this point.

30 The law is well settled and if it is to be changed it should be changed by legislation. When this contract was made any lawyer would have advised his client that a clause providing for submission to arbitration which would oust the Court of its jurisdiction would be void. He would have done so because it has been so settled by judicial opinion. This should not now be changed by judicial opinion so that contracts may now mean what they did not mean when they were made.

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It is submitted that the Supreme Court erred in holding the District Court should have directed a non-suit upon the grounds urged.

II.

AS TO DAMAGES.

The Supreme Court erred in holding that the District Court improperly excluded testimony of the cost of putting down the floor alleged to have been required by the specifications in the building as completed.

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(a) Because by reason of the final payment and final certificate and the building of the building under the direction of the Committee of the appellee and the construction of the Committee with respect to the specifications while the building was being completed the appellee was not entitled to recover in any event upon its notice of recoupment.

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Again I draw the Court's attention to that clause of the contract which provides that the work should be done under the direction of the Committee and that its decision as to the true construction and meaning of the drawings and specifications shall be final and to that clause which provides that nothing but the final certificate or final payment shall be conclusive evidence of the performance of the contract either in whole or in part. While this building was being built, the members of the Building Committee actively supervised it; they saw the floor which they now claim to have been required omitted, and at the time they gave their final certificate knew that the floor had been omitted. It is the contention of the appellants that when the addendum to the contract which provided for the change from wood to concrete was made it was understood that this floor should be omitted. That the addendum provided for a different kind of flooring on the

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Banquet Hall floor and that this was to take the place of one of the floors provided in the original specifications. The members of the Committee themselves testified, page 43. Mr. Nelson:

"Q. And you saw the floors being laid in the Banquet Hall, didn't you? A. Yes, sir.

"Q. And you saw that there was no diagonal flooring being laid there? A. Yes, sir."

The Committee considered that the specifications did not require this floor and their construction in the absence of fraud or collusion is final and binding upon the parties. It is final and binding to a greater extent than would be the decision of an architect. The Committee represented the owner. The contract deprived the contractor of the intervention of an architect between the owner and himself and provided that the work should be done under the direction of the Committee representing the owner and that its decision as to the true construction and the meaning of the drawings and specifications should be final.

The law is well settled that under such circumstances the decision is final.

Central Union Stock Yards v. Uvalde Paving Co., 87 Atl., 235, where the Court held that a decision of arbitrators would not be disturbed merely because they erroneously construed a provision of the building contract.

Trustees v. Adrew & Thomas (Md. 1911), 81 Atl., 113;

Gerisch v. Herold, 53 Vr., 605.

It was further provided in the contract that final payment or final certificate should be conclusive evidence that the work was properly performed.

All of the testimony with respect to how the certificate came to be issued was rendered im-

material by the fact that there was final payment. The contract did not provide that final certificate *and* final payment should be final and conclusive, but in the alternative that the final certificate *or* final payment should be final and conclusive. There was in this case both final certificate *and* final payment. The building had been accepted by the owner.

The appellee, therefore, not being entitled to anything under its notice recoupment could not complain of an erroneous instruction with respect to damages. 10

(b) The question of damages was entirely immaterial because the jury found against the appellee upon recoupment.

The jury found a verdict for the plaintiff for the sum of \$297. This included the \$227 of extra work admitted by the defendant and the \$70 item ordered in writing by the Committee. The result is that the jury finding against the appellee upon the notice of recoupment it cannot complain that there was an erroneous instruction with respect to damages. 20

(c) The Court properly excluded the testimony with respect to the amount that it would cost to put this building in the condition that it would have been in had it been built in strict accordance with the contract. 30

It is not admitted, of course, that the building was not built in strict accordance with the contract. It is submitted that the proofs show that it was so built. That the specifications as construed by the Committee and the owner did not require the alleged omitted floor. But if the floor was omitted under the circumstances the measure of damages was not what it would cost to put the floor into the building at the present time, but what it would have cost to have put it in at the time it was omitted, or the difference in 40

value between the building as completed and its value had it been completed in strict accordance with the contract.

It is true that in the case of *Feeney v. Bartley*, 37 Vr. p. 239, Mr. Justice Van Syckel, speaking for the Court of Appeals, said, obiter:

10 "But if the contractor has substantially performed his contract, even though he has failed to do so in some minor particulars, he is entitled to recover the contract price, less what will be a fair allowance to the owner to make good the defects in the performance of the contract."

20 This remark was not necessary for the determination of the cause. The judge had charged the jury that if the builder contracts to erect a two story and a half house and he erects a one story and a half house he cannot recover, although he has added value to the owner's property, and it was dealing with this charge that the learned judge made the remark above quoted.

30 But does the learned Justice lay down the rule as supposed by the Supreme Court. He says that the allowance is to be: "A fair allowance to the owner to make good the defects in the performance of the contract." Does he not mean a fair allowance to make good or whole the owner and is not such a fair allowance the difference in value between the building as built and as it would have been built had the contract and specifications been strictly complied with.

40 The rule as applied by the Court below cannot be a rule of universal application. It would mean that if a kind of cement was used in the foundation of a house different from that specified and the building was thereafter erected and completed, and it was then discovered that the cement was not in accordance with the contract although possibly just as good and the building not worth less, the owner would be entitled to an allowance of

the necessary amount either to tear down the building and rebuild it or to remove the foundation and put in a new foundation.

And if a large brick building is built and the mortar is not mixed in accordance with the specifications or made with the ingredients as specified, although the building as completed may be as good as if strict accordance with the specifications although it would have cost the contractor more, the owner is entitled not to the difference in value 10 of the building or the saving to the contractor, but to the cost of tearing down every brick and re-building the entire building.

If the doctrine be applied in cases where the facts of the present case are present it would mean that notwithstanding that the owner or its agents saw the concrete being put in the foundation otherwise as specified and saw the mortar being put in between the bricks otherwise than as specified, still the owner would be entitled to the cost of 20 putting the building in the condition that it would have been in had the proper concrete and mortar been used.

The doctrine cannot be so applied. In every other class of work it has been held that the measure of damages where a thing is bought or sold or built otherwise than as specified and is accepted, the measure of damages is the difference in value 30 between the thing furnished and the thing as specified there seems to be no reason why the same rule should not be applied in building cases.

In the case of *Otis Elevator Co. v. Headley*, 81 N. J. L. p. 173, the Supreme Court said:

"Having accepted it their right was to have an abatement of the contract price to the extent that the value of the elevator, as installed, was less than it would have been if it had corresponded with the contract."

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Bouker v. Randales, 2 Vr. 335;

Wakeman v. Illingsworths, 11 Vr. 431.

"In other words, having accepted it, they were bound to pay for it what it was reasonably worth."

Feeney v. Bardsley, 37 Vr. 239.

The Supreme Court seemingly construed *Feeney v. Bardsley* as holding as I have insisted, that the difference in value between the two things is the measure of damages and not what it would cost to put the thing in the condition that it would have been in had it been built in accordance with the contract. In other words the owner is to be made good.

It is universally held in other jurisdictions that this is the true measure of damages.

In the case of *Walter v. Hangen*, Supreme Court, Appellate Division, 1st Dept., 75 N. Y. Supp. 687, the Court speaking through Mr. Justice Ingraham said:

"Here the buildings were completed, and accepted as completed, by the plaintiff, and after such an acceptance, and after having been in the possession of the plaintiff for nearly a year, this action is brought. In such a case as we understand it, the measure of damages is not what it would cost to tear down the buildings and rebuild them, as required by the plans and specifications. What the plaintiff was entitled to is not what it would cost to replace the defective building by a new building, but a money award that will place her in the position that she would have occupied had the contract been complied with. In other words, she is entitled to a judgment for the amount of the damages she has sustained because of the failure of the defendant to give her the buildings that he contracted to give her."

In the case of *Olsen v. Henderson*, Supreme Court, Appellate Division, 2nd Department, 99 N. Y. Supp. 917, the Court speaking through Mr. Justice Gaynor said:

"The defendant's measure of damage was

not the expense of moving the house to the lines shown on the plan—she might never move it—but the difference in value of the property as it is and as it would have been if the house had been set according to the plan, and this was not proved.”

The rule is adopted by the courts of every other jurisdiction as will be indicated by a review of the following excerpts from the decisions:

(Ga. App. 1908).

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The true measure of damages, where a house has been substantially completed in accordance with the contract, is the difference between the value as finished and the house as it should have been finished under the contract and plans.

Small v. D. J. Lee & Bros., 61 S. E. 831.

(Mass. 1908).

Where concrete floors were not constructed according to specifications, the owner could recoup the difference in the value of the floors had they been built as designed and their value as built,

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Norcross Bros. Co. v. Vose, 85 N. E. 468,
199 Mass. 91.

(N. Y. Supp. 1907).

Where cloth delivered by plaintiffs to defendant to be sponged was returned in a damaged condition, the measure of damages was the difference between the value of the cloth in the condition in which it was delivered and its value in the condition in which it was returned.

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Miller v. Levy, 104 N. Y. S. 368.

(Cal. App. 1907).

Where, by a contract for the sale of land to plaintiff, defendant agreed to plant the land with certain vines, and planted inferior vines, plaintiff's measure of damages was the difference between the value of the land planted according to

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agreement and the value not so planted, at the time when plaintiff discovered the breach of the agreement or when with reasonable diligence, he could have made such discovery.

Waldteufel v. Pacific Vineyard Co., 92 p. 747.

(Ala. 1909).

10 In an action for the value of work and materials for the construction of a building, which were not included in the contract, the measure of defendant's damages on the counterclaim for omitted work and materials, called for by the contract, was the difference in the value of the building constructed or work done and that contracted for, and hence evidence of the market value of the building constructed was properly admitted.

Fleming v. Lunsford, 50 So. 921.

20 (Cal. App. 1905).

Where a building contract for the construction of stairwork, etc., provided for payment of the contract price before commencement of the work, such provision constituted an independent promise, and; the contract having been substantially performed, defendant's measure of damages for specified breaches suffered was the amount of detriment sustained thereby.

30 *Carpenter v. Ibbetson*, 81 P. 1114, 1 Cal. App.

(Ky. 1897).

Where the principal defect in a church building consisted in the spreading of the walls, which has to a large degree been remedied by some iron rods, at the expense of a few dollars, so that the building is safe, and in use by the congregation, the measure of damages recoverable by the building
40 committee against the contractor is the difference between the value of the building in its present

condition and the contract price, and not the cost of taking out all the work and material not done according to the contract and having it done over.

Short v. Moore, 43 S. W. 211, 19 Ky. Law Rep. 1225.

(Ky. 1899).

Where there was a substantial compliance with a building contract, the principal breach consisting in failing to make the inside of a brick wall as smooth as the outside, the measure of damages is the difference between the value of the building constructed as it is and what it would have been if constructed according to the contract, and not the cost of removing the wall, and replacing it according to the contract. 10

Taulbee v. Moore, 51 S. W. 564, 21 Ky. Law Rep. 378, 106 Ky. 749.

(La. 1851).

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A. suit may be maintained on a building contract, although the work be defective or unfinished, and the remedy of the defendant in such a case is for the reduction of the price agreed upon to the extent of the damages sustained by reason of the defective performance of the work.

Cairy v. Randolph, 6 La. Ann. 202.

(Mass.)

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Where the terms of a building contract have not been complied with, plaintiff may recover the contract price, deducting as much as the work is worth less on account of the departure from the contract.

(1828) *Hayward v. Leonard*, 24 Mass. (7 Pick.) 181, 19 Am. Dec. 268. See, also

(1852) *Gleason v. Smith*, 63 Mass. (9 Cush.) 484, 57 Am. Dec. 62;

(1858) *Veazie v. Hosmer*, 77 Mass. (11 Gray) 396; 40

(1872) *Clark v. Inhabitants of Russell*,
110 Mass. 133.

(Mich. 1899).

In an action for recovery on a quantum meruit for the construction of a building, which does not conform to the specifications, and cannot be made to without its entire demolition, and which is of less value than the one contracted for, the measure of damages, where defendant has taken possession, is the value of the building so completed not exceeding the contract price less the damages defendant sustained by plaintiff's failure to perform his contract.

Eaton v. Gladwell, 80 N. W. 292, 121 Mich. 444, 6 Detroit Leg. N. 531.

(Ind. 1889). Where plaintiff agrees to saw certain lumber for defendant, to be used for pump stocks, and saws it so unskillfully that it is not unmarketable for such purpose, the measure of defendant's damage is the difference between the market value of the lumber as sawed and its value if it had been sawed according to contract.

Sunman v. Clark, 120 Ind., 142, 22 N. E. 113.

(Mass. 1890). The measure of damages for breach of the contract of an aqueduct Company to furnish a town with water for domestic and other purposes, and to furnish a "full and ample" supply of water for the purpose of extinguishing fires, is the difference between the value of the supply of water actually furnished and of that which, by the contract, should have been furnished, estimated with reference to the uses for which it was furnished.

Wiley v. Inhabitants of Athol, 150 Mass., 426, 23 N. E., 311, 6 L. R. A., 342.

(Mich. 1879). The measure of damages for put-

ting up a steam boiler with such defects as to make it worth less than the contract price is the difference between its value in its defective condition and its value if completed in compliance with the contract.

White v. Brockway, 40 Mich., 209.

(N. Y. 1886). In an action by a dyer against a manufacturer for dying bunting, where the manufacturer sets up a counterclaim that part of the bunting was badly dyed and "pulled" and that, by reason, thereof part of it was returned by his customers, and had to be resold by him at a loss, the measure of the recovery on the counterclaim is the difference at the date of delivery of the goods between their then market value and the market value of the same goods properly dyed.

Barretts, P. and H. Dyeing Establishment v. Wharton, 101 N. Y., 631, 4 N. E. 344.

(Tex. 1889). Where work is improperly done, the measure of damages is the difference in its value as done and what its value would have been if properly done.

Fagan v. Whitcomb (App.) 14 S. W., 1018.

(Mass. 1870). In an action against a contractor for negligence in the construction of a cellar under the plaintiff's house, the measure of damages is the difference between the value of the work as performed by him and the value as it would have been if it had been performed according to the contract.

Moulton v. McOwen, 103 Mass., 587.

(Mass. 1890). The measure of damages for breach of contract to make a roof of such quality as would remain tight for two years is the difference between the value as constructed and as con-

tracted for, together with loss of the use of the premises, if naturally involved.

White v. McLaren, 151 Mass., 553, 24 N. E., 911.

(Mo. 1859). Where a contractor engages to construct buildings with pressed brick fronts and he uses a brick of inferior quality, the relative cost of pressed brick and the kind of brick used, is a proper matter to be considered by the jury on the question of damages.

Marsh v. Richards, 29 Mo., 99.

(N. Y. 1885). Where a building contract has been substantially complied with, the measure of damages to the owner is not the cost of making such changes as would make the building that called for in the contract, but the difference between the value of the building as constructed and the value which have had had the contract been followed.

Morton v. Harrison, 52 N. Y., Super. Ct. (20 Jones & S.), 305.

(N. C. 1819). Defendant agreed to construct for plaintiff a house of certain dimensions and form, and of good material. The house was built in the form and of dimensions agreed, but part of the material and work were defective. HELD, that plaintiff who refused to accept the house, and sued for a breach of the contract, was entitled to recover the difference in value between the house described in the contract and the house constructed by the defendant, together with his damages for the breach of the contract.

Twitty v. McGuire, 7 N. C. (3 Murph.) 501.

(Or. 1894). The measure of damages for failure to use the grade of plastering required by a building contract is the difference between the

value of the class of work contracted for and that furnished.

Chamberlain v. Hibbard, 26 Or., 428, 38 Pac., 437.

(Ind. 1864). In an action against a railway Company for a failure to properly construct certain cow pits according to contract, plaintiff is entitled to recover only the damages resulting from the improper construction of such cow pits, and not what it would cost to construct them properly and keep them in repair. 10

Indiana Cent. Ry. Co. v. Moore, 23 Ind., 14.

(Ky. 1911). The owner's measure for damages for the defective construction of cement walks, etc., was the difference between the value of the improvement as it was constructed, and its value if constructed as required by the contract. 20

Culbertson v. Ashland Cement and Construction Co., 139 S. W. 792, 144 Ky. 614.

(Ky. 1909). In an action for breach of a building contract for alleged improper construction, the owner's measure of damages is the difference between the value of the building when constructed and what its value would have been if constructed according to contract and with reasonably sound material and reasonably skilful workmanship. 30

Hartford Mill Co. v. Hartford Tobacco Warehouse Co., 121 S. W., 477.

The measure of recovery is the sum stipulated in the agreement, less the damages sustained by failure strictly to perform.

Kane v. Stone Co., 39 Ohio St., 1, affirm- 40
ing 4 Ohio Dec. Reprint, 509;

Aetna Iron & Steel Works v. Kossuth County, 79 Iowa, 40, 44 N. W., 215;
Mitchell v. Dunmore Realty Co., 126 App. Div., 829, 111 N. Y. Supp., 322;
Ryan v. Voelkl, 26 Misc., 840, 56 N. Y. Supp., 1065;
Vogel v. Friedman, 34 Misc., 775, 68 N. Y. Supp., 820;
Cook v. American Luxfer Prism Co., 93 Ill., App. 299.

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The effect of the contract was said in *Danforth v. Freeman*, 69 N. H., 466, 43 Atl., 621, to make the contract price the measure of the benefit which the owner would receive from a compliance with the contract. For a structure worth less to him, from the failure to comply with the contract, he was liable to pay only the advantage to him of such a house, compared with the one he should have had. Estimating his liability under the contract completely performed at the contract price, the benefit received for which he should pay on the basis of the contract was conveniently ascertained by deducting from the contract price the damage occasioned by the builder's failure to perform the contract. What elements were to be considered in estimating such damages depended upon the facts of the particular case, and the nature of the defect or failure. The question

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ordinarily was how much less was the building fairly worth to the defendant than it would have been if the contract had been performed.

When it is said that the contractor who has substantially performed his contract may recover on a quantum meruit or valebant, it is a mistake to suppose that a special contract cannot be established for any purpose. It measures the value of the work if done according to its terms. The contractor recovers whatever his work is worth less than the contract price. The work, if well

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done, should be estimated at the contract price, and then a deduction should be made for the difference in value between the work as it was done and as it should have been done.

Morford v. Ambrose, 3 J. J. Marsh, 690.

Where the action was on a contract for the building of a water tower and tank, it was held that the proper finding was not the amount of money it would take to make such tower and tank conform to the specifications, but the diminished value of said tower and tank, by reason of the failure to conform to the specifications. 10

Madisonville v. Rosser, 8 Ohio C. C. N. S., 387.

(Ala. 1910.) In an action to cancel warrants for cost of a bridge and to recover payments made, the measure of damages is the difference between the value of the bridge constructed, and its value if it had been constructed in accordance with the contract. 20

Converse Bridge Co. v. Geneva County, 53 So., 196.

There is no limit to the number of cases which may be cited.

In the case at bar we are in exactly the same position as confronted the Court in the case of *Walter v. Hagen* because in the case at bar the contract price has been paid; the building had been accepted; several months later then this action is brought by the appellants not to recover the contract price, but to recover for extras. The appellee endeavors to recoup because of defects in the performance of the main contract for which it has paid. It is, therefore, as was the plaintiff in the case last cited, endeavoring to recover back moneys already paid. 30

In the case at bar it must be borne in mind that 40

the building and work has been accepted by the owner. That when it was built it was built under the supervision of a Committee of the owner. That this Committee saw the floor omitted; that during the progress of the work they construed the specifications as not requiring the floor. This makes a totally different case from that of *Feeney v. Bardsley*. To tear up the floor which is now there and replace it with the floor alleged to have been specified would cost possibly in the neighborhood of five or six hundred dollars whereas the cost to the contractor to put in the floor at the time it was deliberately omitted to the knowledge of the owner would not have been \$100, and the difference in value between the building as completed and the building as it should have been completed is nil. No attempt was made to prove it. What it would cost to tear down the building to the extent necessary to put in the floor in accordance with the specifications has no bearing whatever upon the question as to what is the difference between the value of the building as now constructed and as it should have been constructed nor as to what it would cost the contractor to have put in the floor at the time it was put in. It is submitted that the true measure of damages in the case at bar, assuming defendant entitled to go to the jury upon this issue, by reason of the fact that during the progress of the work the Committee of the Appellee saw the building built in the manner it was and so construed the specifications, is the cost that it would be to the contractor to have put in the floor specified at the time the building was in process of construction.

E. The defendant could not recoup because suit was brought not upon the contract which had been completed and payment made, but for extra work under separate contracts in writing between the parties and under the case of *Winters v. Schoenfeld*, 78 N. J. L., 92, there could be no recoupment.

FINALLY.

Under the act concerning appeals from the District Court the Supreme Court is given the authority either to grant a new trial or order judgment for either party. It clearly appeared from the record that the plaintiffs were entitled to judgment for \$297, the amount awarded by the jury. If this be correct the Court should have affirmed the judgment no matter what errors were committed 10
by the trial court. It is perfectly apparent that even if the defendant was entitled to go to the jury upon the question of recoupment, which is denied, the jury found against it on this issue, hence, all the questions as to measure of damages are immaterial. This Court has the power to direct the Supreme Court to enter such judgment as should have been entered. If there is any question as to the \$70 item, this Court may direct judgment entered for the plaintiff less this sum. 20
How then can be such a question I cannot conceive. Under the new practice act this Court has absolute power to notwithstanding technical defects see that substantial justice is done. A new trial will not do this.

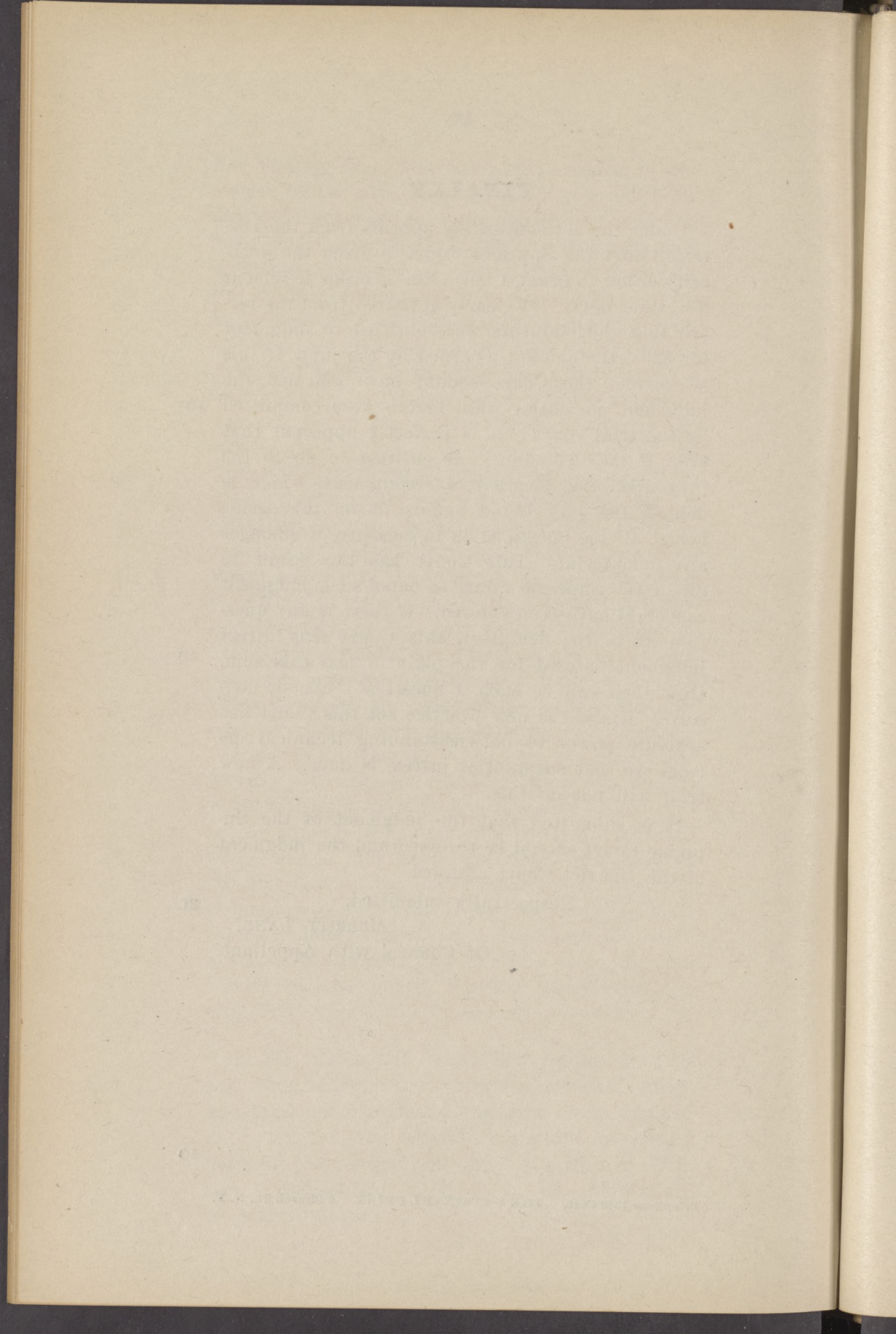
It is submitted that the judgment of the Supreme Court should be reversed and the judgment of the District Court affirmed.

Respectfully submitted,

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MERRITT LANE,
Of Counsel with Appellant.

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New Jersey Court of Errors and Appeals.

JOHN B. ANDERSON, *et al*,

Appellants.

Appellees below.

vs.

ODD FELLOWS' HALL OF JERSEY CITY,
a corporation etc.,

Appellee,

Appellant below.

On Appeal from
Supreme Court.
Action at Law
upon contract.

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BRIEF OF APPELLEE.

Facts.

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This is an action brought by the appellants, who were the plaintiffs in the District Court and are hereinafter referred to as the "plaintiffs" to recover from the appellee, hereinafter referred to as the "defendant", the amount of extra work alleged to have been performed by the plaintiffs under a certain contract for building made between the plaintiffs and defendant. The defendant filed a recoupment by which it sought to recover damages from the plaintiffs, alleging that the plaintiffs had not performed their contract in one particular, to wit, in that the plaintiffs had not laid the floor on the banquet hall in the manner prescribed by the contract and the plans and specifications therein referred to.

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Under the contract (81) it was agreed that the work should be done under the direction of a committee appointed by the parties, consisting of

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Mr. Rodman, Mr. Nelson and Mr. Kirchner, and its decision as to the true construction and meaning of the drawing and specifications should be final (Article 2), and that no alterations should be made in the work except upon the written order of the committee, the amount to be paid by the owner or allowed by the contractors, by virtue of such alterations, to be stated in the order.

10 In case of failure to agree upon the amount to be paid or allowed, the determination should be referred to arbitration as provided for in Article 12 of the contract. (Article 3).

The contract further provided that no certificate given or payment made except the final certificate should be conclusive evidence of the performance of the contract either wholly or in part, and that no payment should be construed to be an acceptance of defective or improper materials (Article 10).

20 It was further provided that if the owner and contractor failed to agree in reference to matters of payment, allowance or loss, or should either of them dissent from the decision of the committee, then the matter should be referred to a board of arbitration. (Article 12.)

30 The Supreme Court in reversing the judgment of the District Court was of the opinion that it was not called upon to decide various questions which were mooted at the trial and properly presented, inasmuch as two of the questions raised were sufficient to warrant the Supreme Court in concluding that upon one question at least, the ruling of the trial court was clearly erroneous. The questions upon which the Supreme Court held, that the District Court was in error, referred to (1) that clause in the contract which dealt with arbitration and (2) to the ruling of the trial court with respect to the measure of damages.

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I.

As to Arbitration.

The appellant in this court attacks the ruling of the Supreme Court that arbitration was a condition precedent to the instituting of this action in the court at law upon five grounds.

The New York cases cited to sustain his first contention are not parallel because an examination of those cases discloses that pleadings were filed and that the defendant did not raise the question of arbitration as a condition precedent in his answer, and the court therefore held that on a motion to non-suit, because of failure to submit to arbitration, the objection came too late and particularly as it was not within the issues raised. In our District Court there are no pleadings on behalf of the defendant by which this issue could be raised, and therefore the principles governing the cases cited from New York, do not obtain in actions instituted in our District Courts. 10 20

The appellant also argues that arbitration is not a condition precedent. We think that the opinion of the Supreme Court has laid down the principle which effectually disposes of this contention, namely, that arbitration permeated the whole scheme, and that the parties contemplated a settlement by arbitration before resort was to be had to the courts of law, and if arbitration was a condition precedent then the Supreme Court did not err in directing a non-suit. 30

There were ample disputes between the parties which under the agreement necessarily would have to be decided by arbitration, as appears on page 32 of the printed state of the case and from the plaintiffs' state of demand, which shows that they claimed \$359.00, in addition to which there was the dispute concerning the defective work in relation to the floor in the banquet hall. 40

The clause to arbitrate is a condition precedent and although the earlier authorities decided that such a clause was void, yet the trend of modern decisions is now to the contrary as pointed out by the authorities cited in the opinion of the Supreme Court in this case.

The contract in the case at bar was under seal, and it has been held that "where parties in making a contract under which disputes are contemplated as possible, agree under seal to submit any
 10 such disputes to private arbitration, in an action on the contract, plaintiff must either aver, and prove an award, or aver and prove such facts as excuses it."

Fox vs. Hempfield R. Co.,—*Fed. Cas.*
 5,010.

U. S. vs. Ellis, 14 Pac. 300.

The language in the contract upon which suit
 20 has been brought is that disputes arising from matters of payment, allowance or loss *shall* be referred to a Board of Arbitration.

We submit that if the placing of a clause of this character in a contract is not for the purpose of making a submission to arbitration a condition precedent, there is no reason why the word "shall" should have been used instead of "may". Parties to a contract using this language intend that all
 30 disputes shall be settled primarily by arbitration, without recourse to the courts, and it is for this purpose alone that this clause is inserted in the contract, otherwise it is useless, for the parties could at any time agree to submit disputes to arbitration, whether there was a clause in the contract providing for the same or not.

We therefore believe that the rule adopted in the cases above cited and as enunciated by the Supreme Court in this case is the true rule and
 40 should be followed in our State.

II.

As to Damages.

The rule for damages as laid down by the Supreme Court in this case was correct. The appellants rely upon the final certificate of the committee, but we respectfully urge as hereafter shown in point 10 that the delivery of this certificate under the conditions hereinafter pointed out, was a fraud upon the defendant as it was absolutely untrue in fact, and being a fraud it can in no wise prejudice the rights of the defendant. 10

The testimony on page 43 shows that Mr. Nelson, a member of the committee, was not aware of the omission to lay the diagonal flooring in the banquet hall, and on page 44 that he left everything to Mr. Rodman, and the testimony of Mr. Kirchner, the other member of the committee, is to the same effect on page 46. And therefore we cannot conceive how the appellants can successfully argue that the committee considered that the specifications did not require the floor, and as further proof of this, we call the Court's attention to the fact that the requirements of the specifications concerning changes and extra work, appearing on page 83 of the printed state of the case, were in no wise carried out. No allowance was made by the committee, neither was any notification of any contemplated changes ever given to the defendant. 20 30

If we are right in this respect, then it was not within the power of the jury to disregard the allowance to which the defendant was entitled under its recoupment, neither was the District Court right in excluding the evidence offered respecting the damages.

The appellant has devoted a considerable portion of his brief and cited a number of cases for the purpose of showing that the rule for the measure 40

of damages as laid down by the Supreme Court in this case, following the rule laid down by this Court in the case of *Feeney v. Bardsley*, is not the true rule.

We respectfully contend that the rule adopted by this court in the case of *Feeney v. Bardsley* is the rule in our State, and indeed there are a number of authorities supporting the rule laid down by this Court, in the case last mentioned.

- 10 The case of *Lambert v. Jenkins*, 71 S. E. 718, is a case absolutely parallel to the one now under consideration, where the Court held that if the floor laid down by the contractor was improper,

“the owner’s measure of damages was such sum, as it would reasonably take to make the floor conform to the contract.”

Where plastering was not done in accordance with the contract, it was held,

- 20 “That the owner’s measure of damages for the contractor’s breach is the cost of removing the present plastering and replacing it with the kind called for in the contract.”

Walter v. Huggins, 148 S. W. 148.

Cases in which the same principle has been upheld are as follows:

- 30 *Dornblatt v. Carlton*, 73 S. E. 1085;
Morgan v. Gamble, 79 Atl. 410;
Surety Co. v. Lyon, 97 S. W. 1080.

But whatever the true rule may be respecting the measure of damages in the cases, where there is no express provision therefor, it is of little importance to this case for here the contract itself provides for the measure of damages.

The regular form of contract was entered into to which the specifications were annexed.

- 40 Under Article I of the contract (85) the specifications are made a part of the contract and in the specifications, the following agreement is embodied:

"Should the contractor assume to make any change, deviation or omission without instructions so to do, he will be required to take down the work and reconstruct the same in a proper way at his own expense."

This clause in the contract between the parties to this suit effectually disposes of any contention on the part of the appellants that the measure of damages as laid down in this case by the Supreme Court was not correct.

The appellant also contends that the defendant could not recoup in this case, because suit was brought, not upon the contract, but for extra work. If we turn to page 12 of the printed case, we find that the appellant brought suit to recover for materials furnished and work and labor performed:

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"All being extra work, under a certain contract * * * ordered by the defendant."

And when we look at the case, we find that if the defendant is liable at all, for the extra work, it is liable under the terms of the contract, which gave the committee power to order the same.

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It is not claimed that any of the extra work was ordered by the defendant. It was all ordered according to the plaintiff's own case, by the committee under the power given to them in the contract.

It is therefore clear that this suit is a suit brought for extra work alleged to have been done by the plaintiff under this contract and therefore the case of *Winter v. Schoenfeld*, 78 N. J. Law, page 92, is not applicable to the case at bar.

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The appellant argues that the committee saw the floor omitted and that they construed the specification as not requiring it. There is nothing whatever in the evidence to justify this assertion. The appellant also argues that the floor was deliberately omitted, to the knowledge of the owner. Nowhere in the evidence can any proof of this assertion be found.

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In addition to the grounds upon which the Su-

preme Court placed the reversal of the judgment of the District Court, the defendant assigned a number of other reasons for the reversal of the judgment, which the Supreme Court, did not find it necessary to consider, all of which appear in the printed state of the case, on page 78, etc.,

We will briefly refer to them.

III.

- 10 The first error assigned was that the District Court erred in permitting the plaintiffs to offer evidence concerning the work done and the reasonableness of the charge made of \$13.60 for furring out outside walls and pipe recesses. (21)

- 20 The second error assigned was that the District Court erred in permitting the plaintiffs to offer evidence concerning the five hundred feet of two member base around all lodge room platforms and the reasonableness of the charge of \$36.40 therefor. (22)

The third error assigned was that the District Court erred in permitting the plaintiffs to offer evidence concerning the base around mezzanine floor and the reasonableness of the charge of \$12 therefor. (22)

- 30 No written order of the committee providing for these alterations were produced in evidence, and due and timely objection was made to the offer of all of this evidence upon the ground that it had not been shown that it was ordered as provided in the plans and specifications and contract or by the defendant. The objection of the defendant was overruled and exception granted.

- 40 We submit that the District Court was in error in permitting the plaintiffs to show that this work was done under the order of one member of a committee of three who had been agreed upon between the contracting parties to supervise the work, when the contract itself provided that the alterations should be made only upon the written order of the committee.

IV.

The seventh error assigned was that the District Court erred in permitting the witness, Anderson, to testify in rebuttal concerning conversations had with a Mr. Rodman, who was one of the members of the committee, respecting the floor in the banquet hall and the addendum.

Objection was made by the defendant's counsel on the ground that the written contract could not be varied by oral conversation with a member of the committee, inasmuch as the contract itself provided that alterations could be made only by the written order of the committee. The Court overruled the objection of defendant's counsel and allowed an exception. (62) 10

We respectfully submit that the action of the District court in overruling this objection of the defendant's counsel was erroneous, and particularly prejudicial to the defendant, inasmuch as it allowed the jury to conclude that conversations with one member of the committee were sufficient to alter the terms of the contract and to bind the defendant as liable for such alterations, although the contract provided otherwise. 20

V.

The eighth error assigned was that the District Court erred in denying the motion of the defendant respecting the order in which counsel should sum up to the jury. (68) 30

It is the usual rule that the party holding the affirmative should be allowed the final summing up before the jury. In the case at bar the plaintiffs had the affirmative upon the extra work for which they sought to recover, and the defendant had the affirmative upon its recoupment, and therefore under the usual practice it would appear that the defendant's motion should have prevailed, as it was 40

but fair to all parties. We have been unable to find any cases in which this point has arisen, but we believe that it is the proper practice and should be approved, and we therefore present it to the Court for consideration.

VI.

10 The ninth error assigned was that the District Court erred in refusing to strike out the evidence relating to the items referred to in the first, second and third assignments of error. (32)

If these items were not properly allowed in evidence, and the defendant was not liable therefor, inasmuch as they had not been contracted in the manner prescribed in the contract, it was clearly an error to refuse to strike out the evidence relating to these items, and the motion of the defendant's counsel should have been granted.

20 We submit that under the contract under which the work was done there can be no recovery for these items.

VII.

30 The tenth error assigned was that the District Court erred in its charge in assuming that the committee under whose supervision the work was done was a committee of the defendant, or rather to use the language of the Court, that "the committee was the agent of the defendant." (71)

We submit that nowhere throughout this case is there any evidence which justifies the Court in assuming that this committee was the agent of the defendant. It was a committee mutually agreed upon between the parties to supervise the work provided for in the contract, and the Court fell into error in assuming that the relation between the committee and the defendant was that of principal and agent, and permitting the inference that
40 the plaintiffs were not responsible for the acts of the committee just as much as the defendant.

It is conceded that the committee, who had the supervision of this work, gave a written order in the shape of a letter, directing the plaintiffs to lay the strips in the banquet hall to receive the floor, for which the sum of seventy dollars was to be paid, but the defendant insists that if the flooring as provided for in the contract did not require the laying of the stripping to receive the floor, and the laying of the strips was made necessary by reason of a mistake of the contractors in not properly laying their beams, then any action of the committee by which it sought to charge the defendant for the mistake of the contractor was erroneous, and even though the committee did order this stripping to be done, yet it was without power to charge the cost thereof to the defendant. 10

The architect who drew the plans testified that he saw the floor beams being laid, and that he called the attention of the foreman of the plaintiffs to the fact that the beams were not being laid properly, and that they were being laid too low and that they should be set higher; that the beams were not set higher; also that the beams had been cut out underneath and that they should have been laid one inch higher than the flange of the iron beams, and that even after he called the attention of the foreman to this fact they continued to lay the beams improperly. (34) 20

Mr. Johnson, one of the plaintiffs, admits that the beams were cut out against the flange so as to be level with the flange of the iron girder, as they were sticking above the flange. He is not able to tell how much was cut away, but he admits that they cut off the upper edge (25). If the beams were cut away on the upper edge, and it thereby became necessary to lay strips on top of the beams so as to bring the beams high enough to permit the gas pipes and other pipes to lay beneath the floor, this was an error or mistake on the part of the plaintiffs, for which the defendant 30 40

should not be held liable; and even though the committee did give an order for the stripping on top of the beam, it was without their power, because this was not an alteration, but was an order to perform work made necessary owing to the defective way in which the plaintiffs had performed their work.

10 We, therefore, submit that the error in the charge of the District Court is sufficient to warrant the affirmance of the judgment of the Supreme Court, reversing the judgment of the District Court.

VIII.

20 The eleventh error assigned was that the District Court erred in charging that the plaintiffs claimed that the addendum providing for the deafening of the banquet hall floor "was the result of a change whereby defendant undertook to put in a concrete floor after the defendant has determined and submitted and both parties agreed to the original contract and specifications *without* a concrete floor" (71).

Nowhere in the evidence is there any testimony to this effect, and nowhere did the plaintiffs claim that this addendum was a change in the contract after it had been signed.

30 And for the same reason the Court also erred in leaving it for the jury "to say whether from the evidence and the contract and specifications, this rough flooring was intended to be and in addition to the other flooring required by the addendum clause in the contract, and whether the addendum clause was a part of the contract originally."

40 There is no evidence whatsoever in the case which would justify this part of the charge of the Court, and it permitted the jury to find a fact against the defendant, which was indisputably in its favor.

IX.

The twelfth error assigned was that the District Court erred in charging the jury in response to the first request of the plaintiffs, that if the jury "think this committee fraudulently or in collusion with the plaintiffs issued a letter authorizing that \$70.00, then the plaintiffs could not recover that item; if you conclude the plaintiffs performed that item of work without fraud or collusion between them and the committee they would then be entitled to stand on the act of the committee and insist upon receiving that \$70.00" (74). 10

We respectfully insist that if the issuing of the letter authorizing the item of work for which \$70.00 is charged, was either by fraud or it was by mistake made on the part of the plaintiffs and the committee, as the evidence clearly shows, the defendant is not chargeable therewith, and that the plaintiffs are not entitled to recover, and that, therefore, the charge of the District Court was erroneous in this respect, and the judgment of the Supreme Court reversing the same should be affirmed. 20

X.

The thirteenth error assigned was that the District Court erred in charging the jury that it was for the jury to determine whether there was any fraud proved in obtaining the final certificate, and in stating to the jury that he did not see from the evidence that fraud was proved, and it did not appear that the certificate was obtained from the defendant by any oversight or in a loose manner after it was signed by the mortgagee and got into the hands of the plaintiffs. Also, that if there had been an acceptance of the building by the defendant, the plaintiffs were entitled to the benefit of the final certificate (75). 30 40

There was no evidence whatever that there had been any acceptance of the building by the defendant, unless it be the inference that is to be drawn from the execution of the final certificate. In the first place, it is shown that, without the knowledge or consent of the defendant, this final certificate was signed in blank and left with one of the committee for delivery, and it is not shown that this member of the committee was ever authorized either to waive the diagonal flooring provided for in the contract, or that they authorized the member of the committee with whom the certificate had been left to deliver it to the plaintiffs. (See evidence of Mr. Nelson, p. 42, and of Mr. Kirchner, p. 46).

The contract provides (81) that no payment should be construed as an acceptance of defective work or improper material. It is true that it also provides that no certificate, except the final certificate, shall be conclusive evidence of the performance of the contract, and while under ordinary circumstances this certificate might be conclusive, yet if it positively appears that the contract was not performed and that the defendant did not waive such non-performance, such certificate can in no wise become binding upon the defendant.

As to the fraud referred to in the charge of the District Court, if this certificate was issued by Mr. Rodman, a member of the committee, with whom it had been left, when the work was not performed according to contract, it was fraud upon the defendant, committed either consciously or unconsciously. Mr. Rodman was in court and could have been called by the plaintiffs had they chosen so to do, to testify as to whether or not the laying of this floor in question had been waived by the defendant, but the plaintiffs did not see fit to call him, and, therefore, it leads to the inevitable conclusion that the plaintiffs did not rely upon the fact that Mr. Rodman had been

authorized to issue the certificate, and that the non-performance of the contract in respect to the laying of the floor had been waived by the defendant. The burden was on the plaintiffs to show that this part of the contract had been waived by the defendant, and it was not on the defendant to show that it had not waived the same.

We, therefore, submit that the statement of the District Court that it did not see any evidence as to fraud was misleading to the jury, and an error which was prejudicial to the defendant. The statement of the Court that this certificate was not obtained by an oversight or in a loose manner is likewise prejudicial to the defendant, because it must be admitted that the signing of a certificate by two of the members of this committee long before the work was completed, and the leaving of it with the remaining member of the committee, who signed and delivered it without authority, was certainly sufficient to justify the conclusion that the certificate was obtained by the plaintiffs either by an oversight or in a loose manner, and the statement of the Court in this respect was, therefore, unfair to the defendant and undoubtedly misled the jury.

We, therefore, respectfully submit that judgment of the Supreme Court reversing the judgment of the District Court should be affirmed.

MELOSH & MORTEN,
Of Counsel with Appellee.

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New Jersey Court of Errors and Appeals.

JOHN B. ANDERSON, et als.,

Appellants-Appellees below,

vs.

ODD FELLOWS HALL ASSOCIATION,

Appellee-Appellant below.

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REPLY BRIEF.

The Court's attention is drawn to the fact that the judgment of the Supreme Court directs the District Court Judge to non-suit the plaintiff upon the ground that the plaintiffs did not comply with the terms of the contract with respect to arbitration. The result is, therefore, that if the Supreme Court is wrong with respect to its ruling upon the question of arbitration the judgment will still have to be reversed, although the District Court erred, and for some reason not rested upon by the Supreme Court the judgment of the District Court is erroneous and must be set aside and the record remitted for a new trial. It is only in case the judgment of the Supreme Court with respect to the effect of the arbitration clause is correct that the present judgment of the Supreme Court which directs a non-suit in the District Court can be sustained. So that whatever other error there may be in the record it is incumbent upon this Court to pass upon the question of the effect of the arbitration clause.

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A word with respect to damages. I think that there is only one rule which can be adopted that

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will work in all cases. Where the contract is substantially performed the owner is entitled to damages the measure of which is the difference between the value of the work as done and the work as it should have been done. In some cases this will be the value of the omitted work; for instance, if a porch has been omitted or there is any minor defect which may be cured without destruction. In other instance this will not be the case. As if there is a minor defect in the foundation which does not at all affect the stability of the house or its appearance, which is hidden, in such case it would be unfair to hold that the owner is entitled to the expense of cutting out the foundation and rebuilding it in strict accordance with the contract.

If the defect is such as would entitle the owner to damages of this nature, then the contract has not been substantially performed and the owner would be entitled to reject the building, in which case the contractor would get nothing or accept it, in which case the contractor could sue upon the common counts.

In the instance cited by Justice Swayze from the bench, of a contract to build a house of red brick, and performance building the house of yellow brick, there would be no substantial performance and the owner would be entitled to reject the building and sue the contractor for the expense of tearing it down and for damages for non-compliance with the contract, or he might accept the building, in which case he would be liable only for what the building was reasonably worth, never, however, more than the contract price. But assume that the building had been built half in accordance with the contract price, to wit, of red brick and the balance of yellow brick. There again there would be no substantial performance of the contract and the owner might reject the building and make the contractor either

build the building in accordance with the contract or sue him for damages for non-performance of the contract.

But if he accepted the building even though the contract had not been substantially performed he would not be entitled as damages against the contractor to the cost to the owner of destroying half the building and rebuilding it of yellow brick. Having accepted the building he would have put himself under the obligation to the contractor to pay him what the building was reasonably worth, never, however, more than the contract price. 10

Counsel in his statement of facts says that the work should be done under the direction of a committee appointed by the parties. It is true that in the sense that the parties agreed that the work should be done under the direction of a committee appointed by the owner, that the work should be done under the direction of a committee appointed by the parties. 20

From the testimony of Mr. Nelson (p. 41), and of Mr. Kerchner (p. 45), and from the exhibits (p. 3 and p. 4), particularly page 5 signed "Odd Fellows Hall Association, per Charles B. Radmann, Chairman Building Committee;" page 6 headed "Certificate I. O. O. F. Hall Association Building Committee;" the testimony of Mr. Johnson (p. 17), it is apparent that the Committee was a Committee appointed by the owner. Their names are not mentioned in the contract. 30

Counsel in his statement of facts would lead the court to infer that the clause with respect to arbitration applied to any differences whatever with respect to payment under the contract. Again I draw the court's attention to the fact that that clause (p. 82), only refers to matters of payment, allowance or loss referred to in articles 3 and 7 of the contract. Article 7 is not printed having no reference whatever to the mat- 40

ters in difference; article 3 (p. 81), providing for alterations only provides for arbitration in case of failure to agree upon the amount to be paid or allowed for extra work and in the case at bar the extra work for which the jury brought in a verdict was ordered in strict accordance with the contract and the amounts were fixed by written orders of the Committee and it was admitted in the case that the plaintiff was entitled to recovery for at least \$227 extra work (p. 68), so that there could not have been a non-suit, which was the only motion made with respect to arbitration.

II.

As to Damages.

The appellee states that plaintiffs rely on the final certificate of the Committee, and that because the final certificate was delivered under the circumstances set forth in the evidence it is not binding upon the defendant. We rely not only upon the final certificate but upon the final payment and I call the court's attention to the fact that paragraph 10 of the contract (p. 81), provides that "no certificate given *or* payment made under this contract, except the final certificate *or* final payment, shall be conclusive evidence of the performance of this contract."

Whatever may have been the knowledge of the members of the committee at the time they actually signed the final certificate, at the time it was delivered December 21st, 1911 and at the time of final payment, three or four days thereafter (p. 64, l. 30), all of the members of the Committee had knowledge that this floor had been omitted. If they had signed their final certificate prior to the completion of the work and left it to Mr. Rademan, one of the members of the Committee and the superintendent of the

work to deliver it when the work was complete, they could have recalled it prior to December 21st, could have directed him not to deliver it and if he did deliver it, they need not have made final payment.

There is no question but that the evidence discloses that all of the members of this Committee knew of the omission of this floor on December 21st, 1911 at the time of the delivery of the final certificate and before final payment. On page 43, line 18, Erasmus Nelson, one of the members of the Committee testified: 10

"Q. Mr. Nelson, you saw this building being built, didn't you? A. Yes, sir.

"Q. And you saw the floors being laid in the banquet hall, didn't you? A. Yes, sir.

"Q. And you saw there was no diagonal flooring being laid there? A. Yes.

"Q. The floor was of North Carolina pine, wasn't it? A. Yes." 20

Mr. Kirchner, another member of the Committee, testified, page 46:

"Q. When did you first discover that the diagonal flooring was not laid on the banquet hall floor? A. Well, in the summer or in the fall once or twice I walked over there with Mr. Nelson, when I seen there wasn't any flooring over the concrete.

"Q. * * * That is August or September? A. Last fall? 30

"Q. You mean in August or September of what year? A. 1911.

"Q. You mean in August or September of what year? A. 1911.

"Q. What happened in August or September? A. When I seen that the concrete wasn't put there on the floor.

"Q. Was that in September? A. It was in the fall; it might have been November, for all I know." 40

John B. Anderson, one of the plaintiffs, testi-

fied page 63 (and there is no denial and no evidence to the contrary) page 63, line 5, "Q. Was Mr. Rodman (the other member of the committee and the superintendent) there when the floor was put in? A. Yes, sir."

And on page 63, line 24, "Q. Did you hear any question raised with respect to this floor until after you made your claim for extras? A. No."

10 So that it is apparent that all of the members of this Committee at the time of the delivery of the final certificate and before final payment knew that this floor had been omitted and yet permitted the final certificate to be delivered, and permitted final payment to be made and under the contract either final payment *or* final certificate is made conclusive evidence of the performance of the contract.

20 Counsel has referred to a provision in the specifications "should the contractor assume to make any change, deviation or omission without instructions so to do, he will be required to take down the work and reconstruct the same in a proper way at his own expense" as fixing the measure of damages. This only applies to changes, deviations or omissions which may have been made and which are required to be remedied prior to final completion, delivery of final certificate, acceptance and payment.

30 It can have no effect where at the time the final certificate was made the agents of the owner know that the work had been omitted and notwithstanding that permitted the final certificate to be delivered and defendant to take possession of the building and final payment to be made. What stronger evidence of acceptance there could be I know not.

40 Counsel has raised in this court certain questions which he raised in the Supreme Court but which that court did not pass upon.

Whatever the ruling of this court may be upon

these questions or whatever the ruling of this court may be upon the question of damages unless the court holds that the Supreme Court was right with respect to arbitration there must be a reversal of the judgment of the Supreme Court because that court directs the District Court to non-suit the plaintiff.

I will briefly refer to the other points raised.

III.

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The first, second and third points assigned by the defendant go to the admission by the court in evidence of testimony as to the value of the work for which extras of \$13.60, \$36.40 and \$12 were charged, page 13.

The testimony was that the charge for \$13 was for an outside wall not called for by the specifications and plans.

Without objection it was testified that this work was done by order of the Chairman of the Committee, page 21, line 8. That the item of \$36.40 represented work which the contractor and committee differed on. That on this work they were told by the Committee to go ahead and it would be settled later, page 21, lines 20 to 40, page 22, lines 1 and 2. The item of \$12 is for the base around the mezzanine floor not called for by the plans and specifications and the Committee ordered this to be done and it was done, page 22.

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The proof was to the effect that the work covered by these charges was not called for by the plans and specifications, and that the committee ordered the work which was done and promised to pay for it and that the prices asked were reasonable prices. There was no objection made as counsel states in his brief to the offer of the admission of evidence that the work was ordered. The only objection was as to the evidence of the reasonable value of the work.

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But any error that may have been committed

by the Court with respect to these items is immaterial, because the jury disregarded them and found against the plaintiffs and in favor of the defendant upon this issue and allowed to the plaintiffs \$227. admitted by the defendant and the \$70. item for which there was a written order.

IV.

10 The seventh error assigned by the appellant is that the District Court permitted Anderson to testify in rebuttal concerning conversations had with Mr. Rodman who was one of the members of the Committee, respecting the floor in the banquet hall and the addendum.

20 Mr. Rodman was a member of the Committee, page 17, and the superintendent in charge of the work. Mr. Nelson, one of the members of the Committee, had testified, page 43, that he was the superintendent, and Mr. Kirchner also, page 47, that the active direction of the work was left to Mr. Rodman. He was the one actively in charge for the owner, and the testimony which was offered and admitted over objection was that after the contract there was a conversation with respect to the meaning of the plans and specifications, at which conversation it was agreed that this rough flooring was not to go in the banquet room hall, but that the flooring provided for in the addendum was to take care of it. But this evidence also 30 was immaterial and not harmful to the defendant, because subsequently and after all the members of the committee had seen the flooring go in, they delivered their written certificate of final payment which under the express terms of the contract became conclusive upon the owner and indicating that they all agreed in their interpretation of the specifications with Mr. Rodman.

40 The point made by the appellant that the action of the trial court was prejudicial to the defendant inasmuch as he allowed the jury to conclude that

conversations with one member of the committee was sufficient to alter the terms of the contract and to bind the defendant, is not well founded. In the first place the defendant did not ask the Court to charge the jury that conversations with one member of the committee would not bind the committee or the owner. The Court did not charge the reverse. Unquestionably the defendant had the right to prove the statements of all of the members of the committee. It had the right to start with the statements of Rodman, if it so desired. It had the right to show that by the delivery of the certificate the other members acquiesced in Rodman's interpretation. If it did not introduce such sufficient proof of admissions as would bind the defendant it was the duty of the defendant to make proper requests to charge. 10

V.

The eighth error assigned by the appellant is that the District Court erred in denying the motion of the defendant with respect to the order in which the counsel should sum up to the jury, page 60. 20

This is disposed of in the case of *Morris and Essex R. R. Co. v. Bonnell*, et al. 5 Vr., 475, where it was held in a condemnation case that it was the absolute right of a land owner to open and close the case, yet the Court said:—"A question of practice was also submitted, whether the "appellees—the land owners—should have the "opening and reply in the management and conduct of the case. This is a matter of discretion, "but it is important to have uniformity of practice." 30

The matter was entirely one of discretion. As a matter of fact the defendant did not admit all of the items upon which the plaintiff sued, but admitted the \$227, item but denied the rest. The plaintiff was therefore as a matter of right entitled to open and close. 40

VI.

The ninth error is that the District Court erred in refusing to strike out the evidence relating to the items of \$13.60, \$36.40 and \$12.00.

I have dealt with this matter previously.

10 The evidence was that the work covered by these charges was not included in the plans and specifications and that the plaintiffs were ordered to do it by the representatives of the owner. That the committee saw the work being done and promised to settle for it. But the matter is entirely immaterial because the jury found against the plaintiffs and in favor of the defendant upon this issue.

VII.

20 The tenth error argued in point VII of the defendant's brief is that the court erred in its charge in assuming that the committee under whose supervision the work was done was the agent of the defendant.

30 The only item upon which this is important is the disputed item of extra work, to wit, \$70. The defendant concedes that the committee which had the supervision of the work gave a written order in the shape of a letter directing the plaintiffs to lay the strips in the banquet hall to receive the floor for which the sum of \$70 was to be paid. The defendant, however, now insists that the flooring as provided for in the contract did not require the laying of the strips to receive the floor and the laying of the strips was made necessary by the mistake of the contractors and held that any action of the committee by which it sought to charge the defendant for the mistake of the contractor was erroneous and even though 40 the committee had ordered the strips it was without power to charge the cost thereof to the de-

fendant. What the court charged the jury was this, page 71:

"When you reach the \$70 item, we have there the order in the shape of a letter, which was signed by the committee, authorizing the plaintiffs to take up the work for the defendant. The defendant contends, however, that this was included in the work under the contract and is proper work to be done under the contract of the plaintiffs. You have on one side the construction put upon the contract by the plaintiffs and that by the defendant. The plaintiffs say that the committee of the defendant gave a written order for that work. The defendants say this work was within the contract and it was an oversight or mistake on the part of the committee to give this order. If the committee made such a mistake intentionally, so as to defraud the defendant, and if they did give a written order, and the work was clearly within the contract, and plaintiffs so understood, the defendant would not have to pay for that work. If the committee, being the agent of the defendant, gave a written order for this work on their construction of the contract, then the plaintiffs should not suffer for the committee's act, unless plaintiffs knew the work was within their contract. In other words, the defendant would have to suffer for the mistake of their committee."

Again I draw the Court's attention to the contract, Exhibit P-1, page 81:

"It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said committee and that its decision as to the true construction and meaning of the drawing and specifications shall be final."

Article 3, page 81:

"No alterations shall be made in the work except upon the written order of the committee, the amount to be paid by the owner or allowed by the contractors by virtue of such alterations to be stated in said order."

Article 10,

"It is further mutually agreed between the parties hereto that no certificate given or payment made under the contract, except the final certificate or final payment shall be conclusive evidence of the performance of this contract."

10 The evidence of the members of the committee, Nelson and Kirchner and the evidence of the architect Tilton, show that this committee was a committee appointed by the owner and acted for the owner. They were in no sense agent of the contractors, and they were in no sense arbitrators between the contractor and the owner.

As I have pointed out before they are referred to throughout as the "Building Committee of the defendant". See the orders for the performance of the work and certificates.

20 This contract was so drawn as to deprive the contractor of the supervision of the architect who is supposed to stand between the contractor and the owner and the direction of the work was put in charge of a committee appointed by the owner representing the owner. Under the terms of this contract the action of this committee in construing the drawing and specifications and in giving this order for the laying of the strips on the banquet hall and fixing the price at \$70 is binding
30 upon the owner and the charge of the court was stronger in favor of the defendant than it should have been.

VIII.

The eleventh error argued by the appellant under point VIII is that the district court erred in charging that the plaintiffs claim that the addendum providing for the deafening of the banquet
40 hall floor "was the result of a change whereby defendant undertook to put in a concrete floor after the defendant had determined and submitted and

both parties agreed to the original contract and specifications without a concrete floor."

As I have pointed out it was in evidence that this floor was built under the eyes of the committee and that after it was so built they gave their final certificate which under the terms of the contract became final and absolute and made final payment, which had the same effect, so that it is immaterial what the court charged upon this phase of the case. But it was unquestionably the claim of the plaintiffs that this change was made. See the evidence of Mr. Anderson, pages 62 and 63; evidence of Mr. Nelson, a member of the committee, page 44: 10

"Q. Do you remember, Mr. Nelson, that you did change the banquet hall floor? A. Yes, sir.

"Q. So that you were going to put a concrete floor in? A. Yes.

"Q. The specification was changed to provide for that? A. Yes." 20

The Court properly charged the jury as to what the contention of the plaintiffs were. This contention may be ill-founded but no error will lie upon such ground.

IX.

The 12th error assigned was that the district court erred in charging the jury in response to the first request of the plaintiffs that if the jury 30

"think this committee fraudulently or in collusion with the plaintiffs issued a letter authorizing that \$70, then the plaintiffs could not recover that item; if you conclude the plaintiffs performed that item of work without fraud or collusion between them and the committee they would then be entitled to stand on the act of the committee and insist upon receiving that \$70."

As I stated before under the terms of the contract the action of the committee bound the owner 40

in the interpretation of the plans and specifications and in the ordering of extra work.

But as a matter of fact there was no exception taken to the Judge's charge upon this ground. The exception taken appears upon page 76 and does not cover the point raised.

X.

10 The 13th error assigned is that the district court erred in charging the jury that it was for the jury to determine whether there was any fraud proved in obtaining the final certificate, and in stating to the jury that he did not see from the evidence that fraud was proved and it did not appear that the certificate was obtained from the defendant by any oversight or in a loose manner after it was signed by the mortgagee and got into the hands of the plaintiffs. Also that if there
20 had been an acceptance of the building by the defendant, the plaintiffs were entitled to the benefit of the final certificate.

The evidence was that this final certificate after the completion of the building signed by the three members of the committee and attested by Mr. Melosh, counsel for the Association and the mortgagee, was delivered to the plaintiffs; that they delivered the building to the defendant; they were paid the amount of the final certificate.
30 After it was signed by the members of the Committee, it was given to counsel for the Association, Mr. Henry J. Melosh, who was also the mortgagee, was delivered by him to Mr. Rodman, the superintendent and a member of the committee to give to the secretary so that check might be drawn for it. This was in December 1911, after the building had been completed and after all three members of the committee had full knowledge as to the way the floor had been built.
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The Association was in charge of the building,

(pp. 59 and 60.) This suit was not commenced until May, 1912, some months after the owner had gone into possession of the building. It was not until the time of the commencement of the suit that the question was raised as to this extra flooring. There was not a scintilla of proof that the certificate was delivered to the plaintiffs as a result of any fraud or of mistake on the part of the contractor or the owner.

But disregarding the final certificate there is no dispute that final payment was, after the delivery of the final certificate, made, and there is no claim that final payment was made under any mistake. Final payment has the same effect as the final certificate. 10

Again I draw the court's attention to page 43 of the original brief and insist that it being apparent that the plaintiffs were entitled to recover the \$227 without question, if there is any question at all with respect to the \$70 item the court should reverse the judgment of the Supreme Court and direct judgment to be entered either in the Supreme Court or District Court for the amount which this court thinks should be recovered. 20

Respectfully submitted,

MERRITT LANE,
Of Counsel with Appellants.

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