

12932

No. _____

Supreme Court of Illinois

^U
Waxghop

vs.

Weeks et al

71641  7

SUPREME COURT—STATE OF ILLINOIS.

JOHN W. WAUGHOP,
Plaintiff in Error,
VS
BENJAMIN WEEKS and
CALEB D. WEEKS,
Defendants in Error.

APPEAL FROM COOK COMMON PLEAS.

This action was assumpsit, brought in Cook county Court of Common Pleas, at the November term, A. D., 1858, and was tried before court and a jury.

See Record pp 3 4 The plaintiffs below declared in indebitatus assumpsit, on common count, for work and labor, and materials furnished.

5 and 6 The Defendant below pleaded the general issue, with notice that work and labor and materials furnished to defendant by plaintiffs, were furnished under special contracts, in writing, between said plaintiffs and defendant, and that plaintiffs had not fulfilled their part of said contract; also notice and account of set off (and sets out the contracts.)

12 The plaintiff then introduced Charles Nelson, whose testimony is set out at page 12, &c., of record. He testified among other things that the work and labor and materials furnished, were furnished under a special contract.

The contracts were a special contract, and a supplemental contract, ^{under seal} ~~both under seal~~, and executed by the plaintiffs below in the name of B. & C. D. Weeks.

13 The plaintiffs below introduced in evidence the said contracts, the parts of which, material to the questions involved in the assignments of error in this case, are as follows, to wit:

14 DUTIES OF CONTRACTOR He shall be strictly held to make such work and to use such materials as hereinafter subscribed, and to work up the building to the given design and in all cases where the drawings are figured, the figures must be taken by him as the given dimensions without

reference to what the drawing may measure on its scale. He will be further held to submit, as to the character of the materials used and the work done to the judgment of the Superintendent, and to procure from them all necessary interpretations of the design, and all necessary certificates regarding his payments."

15 "SUPERINTENDENTS AND THEIR DUTIES. Wm. W. Boyington or his assistant architects are declared to be the Superintendents of the work for the owners their duties will consist in giving on demand such interpretations, either in language, writing or drawing, as in their judgment the nature is the work may require, having particular care that any and all work done and material used for the work be such as hereinafter described, and in giving on demand any certificates that the contractor may be entitled to and in settling all deductions of or additions to the contract price which may grow out of alterations of the design, after the same is declared to be contract also determining the amount of damages which may occur from any cause, and to particularly decide upon the fitness of all material used and work done."

15 "The contractor being bound in all cases, to remove all improper work or materials upon being directed so to do by the Superintendents."

* * * * *

15 "And it is hereby expressly provided that in case the contractor should feel aggrieved by the decision of the superintendents an appeal may be taken from such decision, to an arbitration chosen indifferently, and whose decision in the matter shall be final and binding on all parties."

16 "The owner reserves the right to alter or modify the design and to add to or diminish from the contract price the difference to be adjusted as provided above."

16 "The owners being bound in all cases to recognize the acts of the Superintendent's, not only as regards extra work, but also to the sufficiency of the design."

16 "All payments made upon the work during its progress, are on account of the contract, and shall in no case be construed as an acceptance of the work executed : but the contractor shall be liable to all the conditions of the contract, until the work is accepted and finished and completed."

TIME.

22 "Owner to give possession of the ground on or before the first day of April. A. D., 1856, contractor must agree to build the walls and chimneys ready for roof on or before the first day of September, 1856, and fully complete the plastering of the building within forty-five days after the same is declared by the Superintendent ready for lathing, and must complete the whole job of masonry within days after the above mentioned time. Said work in no case shall be considered as finished, unless the same is so reported to the Superintendent, and accepted by him.

DAMAGES.

- 23 "And in order to secure the execution of the work in the manner and at the time specified, it is hereby distinctly declared that the damages arising from the non-fulfilment of the contract, as regards time, shall be a fair rent of the premises, for each and every day the work remains unfinished, and which sum of damages shall be deducted from the contract price."

PAYMENTS.

- 23 "To be made on the work, as hereinafter agreed."

- 23 "These Articles of Agreement, made and entered into this nineteenth day of April, A. D., 1856, Between Messrs. B. & C. D. Weeks, of the first part, building masons, of the city of Chicago, and J. W. Waughop, Esq., of the same place, of the second part, Witnesseth that the said B. & C. D. Weeks, or their executors, administrators and assigns, for and in consideration of the payment hereinafter to be made to them by the said J. W. Waughop, or his executors. do, on their part, contract and agree to build, finish and complete in a careful, skillful and workmanlike manner to the full and complete satisfaction of W. W. Boyington, or his assistant superintendent, and by and at the time mentioned in the foregoing specifications. The masonry work of two marble front dwellings that is to be erected on the cor. Wabash Avenue and Washington street, as aforesaid, so as to fully carry out the design of said work, as it is set forth in the foregoing specifications, and the plans and drawings therein especially referred to, said specifications, and plans and drawings being hereby declared part and parcel of this contract. And the said J. W. Waughop, or his executors, administrators or assigns, for and in consideration of the said B. & C. D. Weeks furnishing materials, and fully and faithfully executing the aforesaid work, so as fully to carry out the design for the same, as set forth by the specifications, and according to the true spirit, meaning and intent thereof, and to the full and complete satisfaction of W. W. Boyington, or his assistant superintendent, as aforesaid, and at the time mentioned in the foregoing specifications, doth hereby agree to pay to the said B. & C. D. Weeks the sum of ninety-eight hundred (\$9,800) in the following manner:"
- 24

"As the work advances the Superintendent is to make out estimates of the work and materials furnished, and inwrought into the building, and and upon a presentation of a certificate of eighty-five (85) per cent on said estimate, the said J. W. Waughop is to pay the amount, and the balance fifteen per cent, will be paid in full on the completion of the contract, Provided the said Superintendent shall certify in writing, that they are entitled thereto."

"In witness whereof, the parties hereto have set their hands the day and year last above written."

(Signed,)

B. & C. D. WEEKS, { ~~SEAL~~ }

J. W. WAUGHOP, { ~~SEAL~~ }

"SUPPLEMENTAL AGREEMENT."

25 A "It is hereby agreed by and between the parties to the annexed contract, that the terms and conditions thereof be so varied that the said J. W. Waughop shall hold back and retain fifty per cent of the whole contract price therein mentioned, instead of fifteen per cent, as provided therein, to secure the completion of the work, to be done according to specification, and to cover all damages for any failure in time, quality or workmanship, until the whole work is done, and completed, and in case the work shall be so delayed as to endanger the building, by being left open to the frosts of winter, the said B. & C. D. Weeks shall forfeit the full penalty of fifty per cent on the whole work, and in no other manner is this to be construed to alter in any respect the original contract, except as written above."

"Witness our hands and seals this twenty-second day of September, A. D. 1856."

B. & C. D. WEEKS, { SEAL }

J. W. WAUGHOP, { SEAL }

The Plaintiffs then offered and read in evidence the following certificate by W. H. Boyington the Architect and Superintendent, dated October 25th, 1858, the signature to the same being admitted to be genuine.

"CHICAGO, OCTOBER 25, 1858.

"To B. & C. D. Weeks, Gentlemen.

I hereby certify that you finished your contract with J. W. Waughop Esq., for erecting and building two dwellings for said Waughop located on the corner of Wabash Avenue and Washington street in the city of Chicago, but the said dwellings were not furnished until six months after the time mentioned in said contract for finishing the same. Said contract provides that you shall pay a fair rent of the premises for all such delays the amount of which is to be deducted from the contract price, after determining and deducting a fair rent of said dwellings for the six months delay according to contract and deducting what the said Waughop has paid you on said contract, and also deducting twenty-five dollars for not setting Washboilers in basement (omitted), you will then be entitled to the balance, if any, due according to contract.

25 B

Reply, Yours.

WM. W. BOYINGTON,
SUPERINTENDENT."

25 B The Plaintiff's then offered and read in evidence two certificates to J. W. Waughop, dated November, 18, 1857 and Nov. 28, 1857, made by said Boyington the Architect and Superintendent, the signatures to the same being admitted to be genuine, which said certificates are in the words following to wit:

"CHICAGO, Nov. 18, 1857.

25 B Mr. J. W. Waughop,

Dear Sir.

26 Having looked over the contract between yourself and Messrs B. & C. D. Weeks for building two Dwellings on cor. Washington street and Wabash Avenue, I hereby certify that Messrs. B. & C. D. Weeks have delayed the finishing of said dwellings at least six months beyond the time stipulated in said contract and that you are entitled to a fair rent of the premises for the time of delay as provided in the contract.

My judgment is that a fair rent of the corner house would be \$1.500 per annum, and at the rate of \$1.000 per annum for the interior house, six months rent for both dwellings would be \$1.250

You are further entitled to a deduction of \$25.00 for not setting Wash-boilers in basement making \$1275.

From the above deduction Messrs Boggs & Smith claim of you the sum of Three hundred and fifty dollars for delays to them as provided in their contract with you.

Yours most respectfully,

WM. W. BOYINGTON,

SUPERINTENDENT."

" NOVEMBER 28, 1857.

J. W. Waughop, Esq.

Dear Sir :

27 In making up my estimate for delays as stated above. I based my calculations upon what the dwellings would probably rent for at the present time. Had I made my calculation for the rates of rent for such class of dwellings at the time the contracts provided for finishing them, I should have rated the corner house at \$1.800 per annum, and the interior house at \$1.500, making \$400 more that you would be entitled to for delay than by the first calculation.

The reasons I did not consider these rates in the first place was that I have been accustomed to calculate at the date of making my report, but upon reflection I think you are entitled to the rates of rent you would get provided the buildings had been finished in time.

In haste yours,

WM. W. BOYINGTON."

The plaintiffs by their counsel then offered to introduce as a witness on their part Mr. H. B. Weeks, to whose examination the counsel for the defendant did then and there object and offered to prove the interest of said witness in the result of this suit by W. W. Boyington who being sworn testified as follows.

I know Mr. Hiland B. Weeks. the old gentleman (meaning said H. B. Weeks) remarked when I asked him (Mr. Weeks) why he changed the mode of executing contracts, that it was in consequence of some unsettled matters of his own in New York, but that the work would be done as satisfactorily, that he should superintend the work, as though executed in

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The reasons I did not consider these rates in the first place was that I have been accustomed to calculate at the date of making my report, but upon reflection I think you are entitled to the rates of rent you would get provided the buildings had been finished in time.

In haste yours,

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27 his own name. Some times the young men took the certificates; sometimes himself, whenever I wanted anything done I usually consulted with the old gentleman. He did not particularise what his difficulties was, but gave me to understand that they would come down on him for anything left unsettled in his hands.

28 Mr. Hiland B. Weeks being then recalled by the plaintiffs counsel as a witness on their part, the defendants' did then and there object to his examination and testimony as incompetent to go to the jury, whereupon the matter was referred to the court, who being of the opinion that the said evidence was not incompetent to go to the jury, and the jury could decide as to his credibility.

The defendant by his counsel did then except to such opinion of the Court.

Hiland B. Weeks was then duly sworn and testified as follows to wit.

"I have no interest in the result of this suit. There was a disposition at first on the part of the plaintiffs to settle the matter in controversy with defendant, without reference to the architect. The plaintiffs tried to settle the matter with Mr. Waughop but could not do it, plaintiffs were dissatisfied with Boyington's decision, I afterwards on the part of the plaintiffs proposed to Mr. Waughop an arbitration, but he said there was nothing in it, nothing to arbitrate, and refused to arbitrate. That was late in the fall or early part of winter of '57; Mr. Waughop at that time had sold one of the houses to Col. Smith, Mr. Waughop was living in the other."

Cross examined by defendant.

29 "I am the father of those two plaintiffs; Mr. Waughop stated that he had received a certificate from Mr. Boyington, and was dissatisfied with the certificate, and has returned it to Mr. Boyington for his revision; I asked Mr. Waughop after that, to arbitrate; in relation to Mr. B.'s certificate, he said, I am dissatisfied with that report. I told him I wished he would choose an arbitrator, and the plaintiffs would choose another, and arbitrate the matter. He said there was "nothing of it," and refused to arbitrate. We had a conversation for perhaps an hour. We were talking about settling up our affairs. I told him we were dissatisfied with Boyington's decision, and wanted to arbitrate it; I do not recollect anything else; I called at another time after that to try and have him pay an acceptance; *I might have spoken of the matter as my own*; I have no power of attorney from my sons; we had a writing together; I gave it to Mr. King; It is signed by both parties, and dated before the contract; I did not receipt for this money in my own name; I might have receipted for money in my own name sometimes; I had general supervision of the business; I was employed on a salary; there were a number of contracts managed in the same way; no bank account was kept by us; Benjamin did the principal paying; I do not recollect of but one conversation in relation to arbitration; I never named any person as an arbitrator.

DIRECT-EXAMINATION RESUMED—

Plaintiffs' employed me as their agent and general superintendent; I

28

was their general superintendent, and managed this business as well as other business for them; the defendant knew the relation I stood to the plaintiffs all through from the time the contract was signed; he knew it then, and he knows it now; he knew all the way through that I had the general superintendence of the affairs of my sons; I am a builder: have been employed in that business 36 years; am a mason.

Plaintiff then called Asher Carter and G. P. Randall—as to what was extra work, what was called for by the contract, what change of plan or design, whose testimony was objected to by the defendant's counsel; the objection was overruled by the court, and the defendant, by his counsel, excepted.

30

ASHER CARTER, who being sworn, testified as follows, to wit: I am an architect; have been such for 18 years; in Chicago for 10 years.

The Plaintiffs, by their counsel, then asked the witness the following questions:

"Is there such a thing known as extra work in erecting a building, aside from a change of plans or designs?"

Objected to by defendant's counsel. Objections overruled, and exceptions taken.

Answer. "There is."

Question. "What is the distinction, if any, as understood by architects, between a change of plan or design, and extra work?"

Objected to by defendant. Objection overruled, and exception taken.

Ans. "There can be extra work without a change of plans or designs."

Ques. "In a contract for building or buildings, when there is nothing specified in relation to cornices or center pieces, where they are made by order of the Superintendent, would it be considered a change of design or plan, or extra work?"

Objected to by defendant. Objection overruled, and exceptions taken.

Ans. "It might be a change of design, and not a change of plan."

31

Ques. "When the contract and specifications call for common brick in some part of the edifice, and by direction of architect pressed brick are put in, should you as an architect consider that as a change of plan or design, or extra work?"

Objected to; objection overruled; excepted to.

Ans. "I should consider it extra."

Ques. "Stone coping used on the outside of the building, if not specified at all, should you consider it a change of plan, or extra work?"

Objected to; objection overruled; excepted to.

Ans. "If not called for by the plan or specifications, I should consider it as extra work."

Ques. "If a chimney be built strictly according to plans and specifications, but after completion found not to draw well, and taken down and rebuilt by order of Superintendent, or owner, is the rebuilding an alteration of plan or design, or extra work?"

Objected to; objection overruled; excepted to.

Ans. "I should think that would be an alteration of design."

The plaintiff's counsel then called G. P. Randall, who testified as follows:

The plaintiff's counsel then called G. P. RANDALL, who testified as follows:

32

"I am an architect; have been practising some ten or twelve years."

Ques. "Is there such a thing known among architects as extra work in erecting a building, aside from a change of plan or design?"

Ans. "Yes, there is."

Ques. "What is the distinction, if any, as understood by architects, between the terms 'change of plan or design,' and 'extra work'?"

Ans. "A change of plan or design is generally considered 'extra work,' where more work is to be done."

"A chimney, built according to plans and designs if ordered to be taken down and rebuilt, would be extra work."

When no centers or cornices are called for in the plans or specifications, but put up by order of the architect or superintendent, they would be extra work.

A change from common brick to pressed brick is extra work, as understood by architects, as we use the term.

Coping, not appearing in plans or specifications, is extra work."

Cross-examined. "I should consider the putting in cornices and center pieces as a matter to be under the supervision of the architect; all modifications in building is the proper subject for the decision of the architect, whether it is extra work, and the amount of pay to be given therefore, provided the contract so expresses it, cornices and centers are extra work; the architect is to pass upon all the work, if so agreed in contract; if more work is done than called for in plans or specifications, it is extra work; I should not consider the extra work a change of design."

33

HILAND B. WEEKS, recalled by plaintiffs' counsel, whose testimony is objected to by defendant's counsel.

The objection is overruled by the court, and defendant's counsel excepted.

Ques. "State as to the pressed brick?"

Objected to. Objection overruled. Excepted to.

Ans. "There was 15,000 pressed brick put in, worth \$22 per thousand more than the common brick; which were to be put in by the contract, being \$340 00."

Ques. "As to coping, and setting foundation?"

Objected to. Objection overruled. Excepted to.

Ans. There was 60 feet of coping, worth \$4 per foot, on east side of house on Wabash Avenue, which were extra, amounting to \$240. There was fourteen (14) feet of rear area coping worth ten shillings per foot, amounting to seventeen dollars and fifty cents, (\$17 50.)

* * * * *

Hiland B. Weeks was then re-called by the plaintiffs, whose testimony was objected to, but the court overruled the objection, and the defendant, by his counsel, excepted.

35

Plaintiffs then introduced Thomas White as a witness.

38

Plaintiffs then introduced James Lawrence as a witness.

38

Plaintiffs then introduced Daniel Goodman as a witness.

38

Plaintiffs then introduced P. F. Ruff as a witness.

39 Plaintiffs re-called Asher Carter as a witness.

Plaintiff there rested his case.

Defendant then introduced Peter Page, who testified as to the rent of said houses per annum.

Defendant introduced Asher Carter, who testifies to the same matter; also William Jones, who testifies to same matter.

Defendant then put in evidence the written receipts of said plaintiffs, of money had and received by them, of the defendant, for work done under said contract, amounting in the aggregate to \$7,660.

41 Defendant then called W. W. Boyington, whose testimony is on pages 40, 41 and 42 of record. He testified among other things as follows, to wit:

"I gave a notice either to the old gentleman, or one of the sons, of which this is a copy about the date thereof.

"CHICAGO, ILL., NOV. 7, '56.

Messrs. B. & H. Weeks,

Gents:

The block of dwellings now being erected by Mr. Waughop are ready to be plastered immediately. Will you give immediate attention to the same?

Respectfully Yours,

BOYINGTON & W. B.

"I met them every day and had conversations on this subject, and informed them when anything was ready. In getting the walls up there was 30 or 40 days back 1st of Sept.; I urged them repeatedly to urge the work forward, so that the work might be completed before winter."

Plaintiffs re-called Mr. Week, who testifies the foundation for the boiler was put in by plaintiffs.

43 Defendant re-calls Mr. Boyington, who testifies: I do not know whether foundation for the boiler was in or not. It would take a man two days to set the boiler, and from three to five hundred brick, and two tubs of mortar.

The testimony was here closed. The above is the substance of all the evidence in the case, and the bill of exceptions sets out all the evidence.

The defendant, by his counsel, moved the court to exclude from the consideration of the jury, the certificates in evidence by W. W. Boyington, the architect and superintendent, on the ground that said certificates did not constitute a final certificate, as required by the contract. The court refused to exclude said certificates from the consideration of the jury, to which refusal, the defendant, by his counsel then and there excepted.

This abstract sets out or refers to all the testimony which was given.

The court then gave the instructions to the jury, asked for by defendant, as set out at pages 44—45.

The jury found a verdict for the plaintiffs against the defendant, for \$1100

The plaintiffs abated \$84 interest allowed by the jury.

The said defendant thereupon filed his motion for a new trial, which the court overruled, and the defendant then and there accepted.

Grounds of motion for new trial set out.

46

The court rendered judgment for plaintiffs against defendants, upon said verdict, and defendant prayed an appeal, which was allowed, upon filing bond to be approved by clerk of court, which bond was filed within the order, and the appeal perfected.

Plaintiff in error assigns for error the following :

1st. The court erred in giving the judgment aforesaid for the said plaintiffs below, against the said defendant below, whereas by law, the said judgment ought to have been given for the said defendant below, against the said plaintiffs below.

2nd. The court erred in holding the letters, or certificates, signed by Wm. W. Boyington, dated respectively, to constitute such a final certificate as the contract aforesaid required.

3rd. In admitting improper evidence to go to the jury, on the part of the plaintiffs below.

4th. In excluding from the jury, evidence offered by the defendant below.

5th. In overruling the motion for a new trial, and the motion to exclude from the jury, the evidence of the plaintiffs below.

ARNOLD, LAY & GREGORY,

Attorneys for plaintiff in error.

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Wanghofs no (Prob)

Abstract

Filed April 25. 1857

L. Leland

Clerk

Prepared

State of Illinois }
Cook County . . } *to*

Pleas before the Honorable John W. Wilson Judge
Judge of the Cook County Court of Common Pleas
within and for the County of Cook and State of
Illinois at a regular term of the Cook County
Court of Common Pleas in and for said County
begun and held at the Court House in the City
of Chicago in said County on the first Monday
being the seventh day of February in the year of
our Lord one thousand eight hundred and fifty
nine and of the Independence of the United
States of America, the Eighty fourth

<u>Present</u>	The Hon: John W. Wilson . . . Judge
	Carlos Haven Prosecuting Attorney
	John Gray Sheriff

Alfred Walter Kimball, Clerk

Be it remembered that heretofore to wit on the
twenty eighth day of October A.D. Eighteen hundred and
fifty nine eight there was issued out of and under the Seal
of the Clerk of said Court Process Writ of Summons in the

words and figures following to wit,

"State of Illinois,

Cook County . . . } p

The People of the State of Illinois to the
Sheriff of said County, Greeting -

We command you that you summon John W. Haughy
if he shall be found in your County personally to be and
appear before the Cook County Court of Common Pleas of
said County on the first day of the next term thereof to be
holden at the Court House in the City of Chicago in said
County on the second Monday of November next to answer
unto Benjamin Weeks and Caleb D. Weeks in a Plea of
Trespass on the Case or promises to the damage of the said
Plaintiffs as they pay in the sum of Five thousand dollars.
And have you then and there this Writ with an endorsement
thereon in what manner you shall have executed the same.

Witness Walter Kimball Clerk of our said Court
(S.S.) and the Seal thereof at the City of Chicago in
said County this 28th day of October A. D. 1858.

Walter Kimball, Clerk."

Endorsed, 'Served by reading to the within named John
W. Haughy the 29th of Oct; 1858.

John L. Wilson, Sheriff

By John W. Dart, Deputy."

And hereafter on the nineteenth day of November A. D.
Eighteen hundred and fifty eight the said Plaintiffs filed

in the Office of the Clerk of said Court their Declaration in
the words and figures following to wit:

"State of Illinois } The Cook County Court of
Cook County . . . } P. Common Pleas for the November
Special Term A. D. 1858.

Benjamin Weeks and Caleb D. Weeks copartners in business
at the City of Chicago, County of Cook and State of Illinois
under the firm name and style of B & C. D. Weeks Plaintiffs
in this suit by King, Scott & Wilson their Attorneys Complain
of John W. Manghosi defendant in this suit of a Plea of—
Trespass on the case upon promises For that whereas the said
Defendant heretofore to wit on the first day of October in the
year of our Lord one thousand eight hundred and fifty eight
at the City of Chicago in the said County of Cook were
indebted to the said Plaintiffs in the sum of Five thousand
dollars lawful Money of the United States of America for
the work and labor care and diligence of the said Plaintiffs
by the said Plaintiffs before that time done, performed and
bestowed in and about the business of the said defendant
and for the said Defendant and at his special instance and
request, and also for divers materials and other necessary
things by the said Plaintiffs before that time found provided
and used and applied in and about that work and labor
for the said Defendant and at his like special instance &
request And being so indebted to the said Plaintiffs the
said Defendant in consideration thereof afterwards, to wit, on
the same day and year aforesaid and at the place aforesaid

Copy of Account Due on

Chicago Decr 3^d 1857

Mr. J. W. Haughrop

J. B. & D. Weeks

Dr.

To 280 Yds digging @ 2/-	\$ 40 . 00
" 675 ft Base " 3/-	253 . 12
" 1873 " Rubble " 20 ¢	374 . 60
" Cut Stone	4500 . 00
" Setting Out Stone	800 . 00
" 240,000 Brick - laying, lime, sand &c \$ 13	3120 . 00
" Setting furnaces &c materials	175 . 00
" 4246 Yards plastering @ 30 ¢	1274 . 00
" Lathing	20 . 00
" Cornices	275 . 00

over

A. D. 1858 8

(Seal) Isaac Claflin, Notary Public

John W. Haughrop

als

In the Cook County Court
of Common Pleas of the November

Benjamin Weeks & Caleb D. Weeks } Special Term A. D. 1858 .

And the said defendant by his Attorneys Arnold

undertook and then and there faithfully promised the said Plaintiffs well and truly to pay unto the said Plaintiffs the said sum of money last mentioned, when the said Defendant should be thereunto afterwards requested.

And whereas also afterwards to wit on the same day and year last aforesaid and at the place aforesaid in consideration that the said Plaintiffs had before that time, at the like special instance and request of the said Defendant done performed and bestowed divers other work and labor care and diligence in and about the business of the said Defendant, and for the said Defendant, and had before that time found provided, used and applied divers other materials and other necessary things in and about that business, the said Defendant undertook and then and there faithfully promised the said Plaintiffs that he the said Defendant would well and truly pay to the said Plaintiffs so much money as the said Plaintiffs reasonably deserved to have of the said Defendant for the same, when he the said Defendant should be thereunto afterwards requested And the said Plaintiffs aver that they reasonably deserve to have of the said Defendant for the same the further sum of ²Five thousand dollars of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the said Defendant afterwards, to wit, on the same day and year

3/4	Leaves	\$ 100.00
1	Anchor	370.00
1	Cutting Beam Stoles	25.00
"	120 feet Extra Stone Dwarf Walls @ 17¢	20.40
"	15000 Pressed Brick Extra on rear @ 15¢	225.00
"	60 ft. Coping setting foundations &c 4.00	240.00
"	111, rear area Coping and setting 10¢	17.50
"	Rebuilding Chimney	30.00
		\$ 11789.62

And thereafter to wit on the seventh day of December
A. D. eighteen hundred and fifty eight the said Defendants
filed in the Office of the Clerk of said Court his pleas to
said Declaration in the words and figures following, to wit:

"Benjamin Weeks and Caleb

D. Weeks
vs.

In the Cook County Court of
Common Pleas.

John W. Naughton

State of Illinois

Cook County

City of Chicago

vs. John W. Naughton being duly sworn
deposes and says that he is the Defendant
in the above entitled cause, and that he has a good and
substantial defense to the said action upon the merits thereof

Subscribed and sworn to before

me this seventh day of December

A. D. 1858

John W. Naughton.

(Seal)

Isaac Claflin, Notary Public

John W. Naughton

vs.

In the Cook County Court
of Common Pleas of the November

Benjamin Weeks Caleb D. Weeks

Special Term A. D. 1858.

And the said defendant by his Attorneys shoud

Say and Gregory comes and defends the wrong and injury when
it, and says that he did not undertake or promise in a
manner and form as the said Plaintiffs have above threat-
complained against him, and of this he puts himself upon
the Country &c.

Charles, Say & Gregory
To Benjamin Weeks Haleb D. Weeks,
or their Attorneys Messrs King, Scott & Wilson,
Gentlemen.

You will please take Notice that
on the Trial of the above entitled cause, we shall rely upon
and give in evidence certain Articles of Agreement and
Specifications hereto annexed made and executed by said
Plaintiffs and said Defendants.

Appended to which said Plea is a copy of the
Specifications & Contract as set forth in the Bill of Exceptions
in this cause. (see page 13 post)

That the completion of the work was delayed a long time,
contrary to said agreements and greatly to the damage and injury
of the said Defendants. That under and by virtue of certain
provisions of said Articles of Agreement the Defendant caused
the said Plaintiffs to construct and do certain additional work &
furnish certain additional materials, which did not exceed in
value the sum of Two hundred forty four dollars & forty six
Cents - and that the value of said extra work, by the terms and

conditions of the said Articles of Agreement did not become an additional indebtedness to said Plaintiffs from said defendant - That by the terms and conditions of the said articles of agreement the said Defendant has overpaid said Plaintiffs, and that the said Plaintiffs are now indebted to said Defendant in the amount of such overpayment to wit, One thousand dollars and as damages for the nonfulfilment of their said Contracts to the amount of Two thousand dollars - That the said Plaintiffs at the time of the commencement of the action against the said Defendant were and still are indebted unto him in the sum of Four thousand dollars of lawful money of the United States of America, for money before that time lent and advanced by the said Defendant to the said Plaintiffs and at the special instance and request of the said Plffs and for other money by the said Defendant before that time paid laid out and expended for the said Plaintiffs and at the like request of the said Plffs And for other money by the said Plaintiffs before that time had and received to and for the use of the said defendant.

~~And also that the said plaintiffs~~

of this action, accounted together with the said Defendant of
and concerning the demand of the said Plaintiffs against the
said Defendant and also of and concerning divers other sums
of money and accounts between the said Plffs and the said
defendant and upon such accounting the said Plffs were found
to be in arrear and indebted to the said Defendant in the further
sum of Two thousand dollars, of like lawful money, which



the said plaintiffs undertook and then and there faithfully
promised the said debt well and truly to pay unto the said
defendant, when the said plaintiff should be therunto afterwards
requested which said several sums of money or so much thereof
as will be sufficient for that purpose the said debt will set
off against the demand of the said plaintiff, to be proved at the
trial and have the balance certified in his favor.

Dated this seventh day of December A.D. 1858

Yours &c

Arnold. Say & Gregory

Attys for Deft.

Copy of part of Account filed in set off.

B. & C. D. Weeks. Masons

to J. W. Waughp. Dr

To payments on the work and materials for two Dwellings
Corner of Wabash Avenue and Washington Street

July 5/36	On estimates	\$ 500 " 00
Sept. 13	" "	1500 " 00
Sept. 22	" "	500 " 00
Oct. 13	" "	1400 " 00
Oct. 27	On an order to L. J. Douglas	70 " 00
Oct. 29	" do for receipt	100 " 00
Nov. 15	" a/c White & Thomas Order	150 " 00
Nov. 25	" " as per receipt	800 " 00
Nov. 10	" Order in favor of M. G. Ginnis	100 " 00
Dec. 1	" Order in favor of White & Thomas	150 " 00
Dec. 9.	" Order in favor of Mauran & Gibbs	1480 " 00

()

the Jury may separate and meet the Court tomorrow morning
at nine o'clock.

And afterwards on the Eighteenth day of March
(being yet of the said February term of said Court) A.D.
Eighteen hundred and fifty nine the following further proceedings
were had and entered of record in said Court, to wit

Benjamin Weeks and
Caleb D. Weeks ..

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John W. Traugott

Assumptio.

And now again come the said parties
to this Cause by their Attorneys aforesaid and the Jury
impanelled for the trial of this Cause on yesterday also
come and after hearing all the Evidence, arguments of Counsel
and instructions of the Court retire in charge of a sworn
Officer of the Court to consider of their Verdict and the hour
of adjournment having again arrived upon agreement of the
parties it is Ordered that the Jury, when they shall have
agreed upon a Verdict, may reduce the same to writing
sign and seal the same and afterwards separate and meet
the Court tomorrow morning at Nine o'clock.

And afterwards to wit on the nineteenth day of March
(being stile of the said February term of said Court) A.D.
Eighteen hundred and fifty nine, the following further and
other proceedings were had in said Cause and entered of
Record in said Court, to wit.

" Benjamin Weeks and
Caleb D. Weeks . . . }

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Solm Dr. Graughofer . .)

Assumpt.

And now again comes the parties
to this cause by their Attorneys aforesaid, and the Jury here

before impanelled herein and who had retired to consider of their Verdict, appear in open Court, and submit their Verdict and pay to the Jury said issues for said Plaintiffs and assess their damages to the sum of Eleven hundred dollars.

And thereupon said Defendant by his Counsel to submits his Motion herein for a New trial in this Cause Whereupon said Plaintiffs permit the sum of Eighty four dollars on Verdict of the Jury aforesaid And Counsel being heard on said Defendants Motion for a New Trial and due deliberation being thereupon had and the Premises fully understood, it is considered by the Court that said Defendants Motion for a New trial be overruled, and the said defendant enters his Exceptions.

Therefore it is considered said Plaintiffs do have and recover of the said Defendant their damages of Eleven hundred dollars less the sum of Eighty four dollars amounting to the sum of One thousand and sixteen dollars in form aforesaid by the Jury here assessed and also their Costs and charges in this behalf expended, and have execution therefor.

And thereupon the said Defendant having entered his Exceptions, he prays an Appeal to the Supreme Court, which is allowed to him upon Condition that he file his Appeal Bond herein in the sum of Fifteen hundred dollars with security to be approved by Clerk of Court, Bond and Bill of Exceptions to be filed within ten days from this day.

And afterwards to wit on the twenty second day of March A.D. Eighteen hundred and fifty nine the said Defendant accordingly filed in the Office of the Clerk of said Court, his Appeal Bond in the words and figures following, to wit.

" Know all Men by these Presents that we John W. Manghrop and _____ are held and firmly bound unto Benjamin Weeks and Caleb D. Weeks in the penal sum of Fifteen hundred dollars lawful Money of the United States to the payment of which well and truly to be made we bind ourselves and our heirs executors administrators and every of them jointly severally and firmly by these presents.

Witness our hands and seals this twenty first day of March A.D. 1859.

The Condition of the above Obligation is such That whereas the said Benjamin Weeks and Caleb D. Weeks did on the nineteenth day of March A.D. 1859 at the February term of the Cook County Court of Common Pleas before the Honorable John W. Wilson recover a judgment against the above bounden John W. Manghrop for the sum of One thousand and sixteen dollars, from the judgment of the said Court in the rendition of the said judgment the said John W. Manghrop has prayed an appeal to the Supreme Court of the State of Illinois.

Now therefore if the said John W. Manghrop shall well and faithfully pay or cause to be paid, the amount of

the said judgment, costs, damages & interest in case the
judgment shall be affirmed and shall duly prosecute his
said Appeal herein then this obligation to be void otherwise
to remain in full force and virtue.

(signed) John W. Vaughan (Seal)

Julius Cron (Seal)

Approved by me and filed March 22. 1859.

W. Kimball. Clerk."

And thereafter to wit on the 28th day of March A.D.
Eighteen hundred and fifty nine the said Defendant filed
in the Office of the Clerk of said Court his Bill of Exceptions
in the words and figures following to wit

State of Illinois }
Cook County . . }

Cook County Court of Common
Pleas, February Term Anno
Domini 1859.

John W. Waughrop
— als —
Benjamin Weeks and
Caleb D. Weeks . . }

Be it remembered that on the trial
of this cause, the counsel for the plaintiffs to maintain
and prove the issue on their part introduced

Charles Nelson as a witness for said plaintiffs, who being first
duly sworn testified as follows, viz:

"I reside in Chicago. am acquainted with the
plaintiffs and Defendant. Was in employ of Plaintiffs in
1856 in erecting the buildings for defendant, corner of Wabash
Avenue and Washington Street, am a Mason. I came to
work on the buildings I think in July 1856. The buildings
were topped out ready for roofs from 9th to 12th October 1856

Question by defendants counsel.

Was there a written contract under which the plaintiffs
erected those buildings for defendant?

Ans. There was.

Question by plaintiffs counsel

What was the quality of the work done and materials
furnished and put in those buildings which plaintiffs erected
for Defendant at the corner of Wabash Avenue and Washington
Street?

Question objected to by defendants counsel on the ground that there is a contract between the parties and it should be introduced in evidence. The Court sustained the objection and refused to permit the witness to answer the question, and the Plaintiffs by their Counsel then and there duly excepted to the ruling of the Court in refusing to permit the witness to answer the question.

The Plaintiffs by their Counsel, then offered to prove by this witness, Charles Nelson, that the quality of the work done on the buildings, and the materials furnished and worked into the buildings were of the best quality and equal in every respect to the requirements of the Contract and first class in every respect.

To which offer the defendant by his Counsel objected and which objection was sustained by the Court. To which decision of the Court in sustaining said objection the Plaintiffs by their Counsel then and there duly excepted.

The Plaintiffs by their Counsel then offered and read in evidence the Contract with the Specifications made and entered into by and between the said Defendant and the said Plaintiffs - the signatures to the same being admitted to be genuine; Which said Contract is in the words following to wit:

"Specifications for the Masons work and materials required for the erection and completion of Two Marble front Dwellings that J. W. Naughton Esq. is about to have erected, one on the corner of Kalbash Avenue and Washington Street, and the other

the third from said corner.

Special reference will be had by the Contractor to the following specifications and the accompanying design as made by Mr. W. Borington, Architects, and which consists of the following drawings, viz:

Plan of Foundation and Sections

" " Basement

" " First Floor

" " Second "

" " Third "

" " Fourth "

Front Elevation.

Duties of Contractor. He shall be strictly held to make such work and to ^{use} such materials as hereinafter described, and to work up the building to the given design and in all cases where the drawings are figured, the figures must be taken by him as the given dimensions without reference to what the drawing may measure on its scale. He will be further held to submit, as to the character of the materials used and the work done to the judgment of the Superintendent, and to procure from them all necessary interpretations of the design, and all necessary certificates regarding his payments.

Superintendents and their duties. Mr. W. Borington or his assistant Architects are declared to be the Superintendents of the work for the Owner, their duties will consist in giving or demanding such interpretations, either in language, writing or drawing, as in judgment the nature of the work may require, having

particular case that any and all work done and material used for the work be such as is hereinafter described, and in giving on demand any certificates that the Contractor may be entitled to and in settling all deductions of or additions to the Contract price which may grow out of alterations of the design, after the same is declared to be Contract, also determining the amount of damages which may accrue from any cause, and to particularly decide upon the fitness of all material used and work done.

The Contractor being bound in all cases, to remove all improper work or materials upon being directed so to do by the ~~the~~ Superintendents.

But the Contractor, if after having been directed as above, to remove the same, should refuse or neglect so to do, shall not only suffer a deduction from the Contract price, of the difference in value of proper and improper work and materials, but shall also be liable for all damages of whatsoever nature or kind that may result from such cause. The above provisions, to apply in the same way to all materials or work used made or fixed, without the knowledge of the Superintendent.

And it is hereby expressly provided that in case the Contractor should feel aggrieved by the decision of the Superintendent, an Appeal may be taken from such decision, to an arbitration chosen indifferently, and whose decision in the matter shall be final and binding on all parties.

The Owner reserves the right to alter or modify the design, and to add to or diminish from the Contract price, the difference to be adjusted as provided above.

The owner being bound in all cases to recognize the acts of the Superintendents not only as regards extra work but also to the sufficiency of the design, the Contractor being in no case responsible for any accident resulting to the work from any defective Design, which fact must be determined by an Arbitration of three disinterested men chosen indifferently, and if found that the damages resulted from a want of proper care on the part of Contractor, then and in such cases the damages and loss shall be paid for and made good by him, but if found that the accident or damage resulted from an improper design, then and in such case, all damages shall be sustained by owners; which in all cases must be paid, and in no case Constructive Damages to be allowed.

All payments made upon the work during its progress, are on account of the Contract, and shall in no case be construed as an acceptance of the work executed; but the Contractor shall be liable to all the Conditions of the Contract until the work is accepted as finished and completed.

Dimensions of the Building as represented by, and figured on the drawings.

Heights -	Basement	Story	(Cellar)	to be same as balance of block
	Principal	do	do	" " " "
	Second	do	do	" " " "
	Third	do	do	" " " "
	Fourth	do	do	" " " "
	Fifth	do	do	" " " "

This Building is intended to be first class in every particular and must be finished throughout as hereinafter described, and anything shown by the Drawings, and not hereinafter particularly reserved or described, which is necessary to complete the Mason's work of the building, is to be done at the cost of the Contractor, notwithstanding such omission.

Grade of Building.

Top of first Floor of joist to be fixed so that each floor will correspond with the other parts of the block, that was built last season, and all other floors on the same level as the other portion of the building.

Excavations.

The entire Area of the proposed buildings, as required by Plans to be dug out the same below the present surface as the other portion of the Block. Excavation for footings of walls to be dug one foot below the first named excavation. All other excavations for drains and cisterns, and for foundation of Piers and for Vaults of Water Closets as required by Plans.

All the excavated earth is to be deposited in front and rear in proportion as it may be wanted to grade. Contractor to properly level off the earth so as to turn the water from the walls of the building and refill the Excavations for Drains, after the same is put in and properly fixed.

Rubble Stone Work.

All walls shaded blue to be of Stone, of dimensions & heights figured on the Drawings and composed of good quarry stone laid in the best manner with Mortar mixed of proper proportions.

of best lime and clean coarse sand, the whole to be well bedded and Bonded together and well faced on both sides.

Dwarf Walls to have stone foundations, same kind of work as described above and the same to be three feet deep and average sixteen inches thick.

Footings of walls, the bottom of trenches to be composed of large stone, and will be high and 3'6" by 3'2" wide, the first course or layer must not be less than eight inches thick by six feet square surface, and must be well settled in the earth with a heavy instrument of wood and sand in a mortar made as above described. The front wall upon this bottom course is to commence 2'6" thick & continue up to the bottom of the basement window sills being 5'11" high & 2' thick at the top. The rear wall will be of the same height as the front and four inches less than the above thickness - the side walls as marked on section and plan on foundation plan.

Piers in the cellar square and deep built of good square stones and the top of each to be covered with a Bearing Wall for the support of the front steps & areas to be the required depths, thicknesses & lengths for the support of the same, & below front, say at least three feet below the bottom of Area.

Cistern Walls to be built as shown by Plans. Plastered inside with two coats of Water Lime & made light on all sides and bottom.

Walls of Areas of the cellar windows to be of stone for height and thickness. See sections & plans.

All proper holes left for drains and gas pipes as directed or shown by Plans.

Cut Stone.

For the quality and kind reference will be had to the accompanying bills & drawings, where the same is plainly described and shown and must all be properly set; and after the walls are finished, to be properly cleaned off and pointed up - All the marble and wrought stone is to be furnished all and drilled for anchors, and delivered on the ground at the place of building by the Contractor for Masonry. After the stone are thus delivered the Contractor for the Masonry is to take charge of the same and must become responsible for any damages that may be done until the building is completed and accepted.

The stone work that is to be set by the Contractor for the Masonry, will commence with the front steps & the flagging and steps to basement & the flagging and curbing to area front & rear. And also stone work in the walls of the building.

Brick Work.

All walls shown red on the plans, are to be of bricks, of the thickness and size marked on plans laid in the best manner with solid head and bed joints and thoroughly plastered solid - The side walls will be party walls to the interior of building, and one party wall to the outside building, both streets will be faced with stone and thoroughly anchored and set. The rear walls to be faced with a good selection of Milwaukee Common brick.

All brick used for facing the outside walls must be

hard burned, all soft brick to be rejected from the work.

Fire walls to extend four inches above the roof and covered with Tin.

Owners will furnish at the time they are wanted, in all cases where the roof is to be of felt and composition a sufficient amount of 2x4 inch scantling to surround the whole roof of building and which must be built in the fire walls by Contractor in such manner as the lower side of the piece will be flush with the top of the roof boards.

All chimneys to be built as shown by drawings and when the smoke passes through the different floorings a projection of four inches is to be made on all sides but in no case allow less than six of brick work between the liners & smoke flues, all the flues to be smoothly plastered on the inside and have stove pipe thimbles with the stoppers as directed, and be finished above the roof, at least 12 inches above the highest point on the roof of the adjoining buildings.

Seasoned lath to be worked in the joints of the brick of the outside walls of the Stoves, one to each 13th course.

Contractor to locate all the Masonry and furnish the materials necessary for setting Coal grates and Hot Air furnaces and Cooking Range Wash Boiler & do the work for the same.

Iron grating for Areas.

N.B. All sand and for Mortar must be clear beach sand, no other will be accepted.

Iron Anchors

For each of the piers, and for at least every ten feet of the

dead walls to be carefully worked in the Masonry and secured to the timbers of each of the floors and roof.

The stone front will be anchored with strap anchors two to each block of stone, size $\frac{1}{8}$ by 1 inch. turned at each end and well fitted to the stone & well bound in the brick work. The first named Anchors will be all Pin Anchors, made two Pin 8 inches long of $\frac{1}{8}$ " round iron, the shank to be 20 inches long, properly welded around the Pin, and will be fastened to the timber with two spikes

Those for the stone lintel of fronts to be extra heavy & must be long enough to reach the second joist from the stone to be anchored. Straps of $\frac{3}{8}$ by $1\frac{1}{2}$ iron to be placed on the timbers of all the floor and roof where the piers lie upon and meet on division walls - these straps must be 20 inches long American Iron and have four spikes each

Plastering.

All throughout the building to be of the best quality Plaster of Paris finish, and all three coat work except in presses and fourth story, which will be good two coat work. The first coat must be well and proportionately mixed with clean sharp sand, quick lime and hair, and the second coat or brownie, the same and evenly laid & floated true to a straight edge, with plumb angles & corners and the last coat thoroughly polished.

The plastering and corniceing in the interior building will be the same as that of the buildings put up last season

The floors under all the Bath Rooms and Water closets

(Except basement) are to be thoroughly cleaned, also the partitions between water closets and rooms.

Finally the whole job to be fully completed in a careful, skillful and workmanlike manner and every material to be furnished therefor, and anything shown by the Plans relating to or is necessary to complete the Masonry of the building and not hereinbefore particularly reserved ~~and~~ described is to be done at the cost of the Contractor notwithstanding such omission.

Time.

Owner to give possession of the ground on or before the first day of April A.D. 1856. Contractor must agree to build the walls and chimneys ready for roof on or before the first of September 1856 and fully complete the plastering of the building within forty five days after the same is declared by the Superintendent ready for lathing, and must complete the whole Job of Masonry within days after the above mentioned time. Said work in no case shall be considered as finished unless the same is so reported to the Superintendent and accepted by him. The owner hereby agreeing to have in readiness all necessary Timber and Carpenters work as they may be wanted, so that in no case the masonry shall be hindered for the want of the same, and will put on each floor of joist on all the Building within days after the walls are made ready to receive the same, and in case he should fail to do so then and in such case he hereby agrees to extend the time for finishing said work in a Pro rata proportion for such delay and will also pay all damages resulting to the Contractor from such cause if

delay. Provided the Contractor shall at the time of such delay Notify the Superintendent in writing of the extent thereof and the damages to him arising therefrom, and if required by Award must prove the same.

Damages

And in order to secure the execution of the work in the manner and at the times specified it is hereby distinctly declared that the damages arising from the nonfulfilment of the Contract as regards time shall be a fair Part of the Premium for each and every day the work remains unfinished and which sum of Damages shall be deducted from the Contract price

Payments

To be made on the work as may be hereafter agreed.

These Articles of Agreement made and entered into this nineteenth day of April A.D. 1856 Between Messrs B & C. D. Weeks of the first part building Masons of the City of Chicago and J. W. Haughton Esq of the same place of the second part Witnesseth that the said B & C. D. Weeks or their Executors administrators and assigns for and in consideration of the payment hereinafter to be made to them by the said J. W. Haughton or his Executors do on their part contract and agree to build finish and complete in a careful skillful and workmanlike manner to the full and complete satisfaction of J. W. Boyington or his Assistant Superintendent and by and at the times mentioned in the foregoing Specifications The masonry work of Two Marble front Dwellings that is to be erected on corner Wabash Ave and

Washington St^{ns} as aforesaid so as to fully carry out the design of said work as it is set forth in the foregoing Specifications and the Plans and Drawings therein especially referred to. Said Specifications and Plans and Drawings being hereby declared part and parcel of this Contract. And the said J. M. Haughop or his executors administrators or assigns for and in consideration of the said B. H. D. Weeks furnishing materials and fully faithfully executing the aforesaid work so as fully carry out the design for the same as set forth by the Specifications and according to the true spirit, meaning and intent thereof and to the full & complete satisfaction of W. W. Boyington or his Assistant Superintendent as aforesaid and at the time mentioned in the foregoing Specifications doth hereby agree to pay the said B. H. D. Weeks the sum of Ninety eight hundred (\$9800) dollars in the following manner:

As the work advances the Superintendent is to make out estimates of the work and materials furnished & wrought into the Building and upon the presentation of a Certificate of Eighty five (85) per cent on said estimate the said J. M. Haughop is to pay the amount and the balance fifteen per cent will be paid in full on the completion of the Contract. Provided the said Superintendent shall Certify in writing that they are Entitled thereto.

In witness whereof the parties hereto have set their hands the day and year first above written.

(Signed) B. H. D. Weeks (Seal)
J. M. Haughop (Seal)

Supplemental Agreement.

It is hereby agreed by and between the parties to the annexed Contract that the terms and conditions thereof be so varied that the said J. W. Naughton shall hold back and retain fifty per Cent of the whole Contract price therein mentioned instead of fifteen per Cent as provided therein to secure the completion of the work to be done according to specification and to cover all damages for any failure in time quality or workmanship until the whole work is done and completed and in case the work shall be so delayed as to endanger the building by being left open to frosts of winter the said B & C. D. Weeks shall forfeit the full penalty of fifty per Cent on the whole work, and in no other manner is this to be construed to alter in any respect the Original Contract except as written above.

Witness our hands and Seals this twenty second day of September A. D. 1856.

B. & C. D. Weeks (Seal)

J. W. Naughton (Seal)

The Plaintiffs then offered and read in Evidence the following Certificate made by W. W. Boyington the Architect & Superintendent, dated Oct. 25th 1858, the signature to the same being admitted to be genuine, to wit:

"Chicago October 25: 1858.

To B & C. D. Weeks, Gentlemen,

I hereby certify that you finished your Contract with J. W. Naughton Esq. for erecting & building

two dwellings for said Waughor located on the corner of Wabash Avenue and Washington Street in the City of Chicago, but the said Dwellings were not finished until six Months after the time mentioned in said Contract for finishing the same. Said Contract provided that you shall pay a fair rent of the premises for all such delays the amount of which is to be deducted from the Contract price, after determining and deducting a fair rent of said dwellings for the six Months delay according to Contract and deducting what the said Waughor has paid you on said Contract. and also deducting twenty five dollars for not putting Washboilers in the basement (omitted) you will then be entitled to the balance, if any, due according to Contract.

Respectfully yours

Wm. W. Boyington
Superintendent."

The plaintiffs then offered and read in evidence two Certificates to J. W. Waughor dated November 18. 1857 & Novr 28. 1857, made by said Boyington the Architect & Superintendent the signatures to the same being admitted to be genuine, which said certificates are in the words following to wit.

"Chicago Nov. 18. 1857.

Mr J. W. Waughor: Sir,

Having looked over the Contract between yourself & Messrs B. & C. D. Weeks for Building two Dwellings in Cor; of Washington Street & Wabash Avenue, I hereby certify that Messrs B & C. D. Weeks have delayed the finishing of said

Dwellings at least Six Months beyond the time stipulated in paid Contracts and that you are entitled to a fair rent of the premises, for the time of delay as provided in the Contract—

My judgment is that a fair rent of the corner house would be at the rate of \$1500.00 per annum and at the rate of \$1000.00 per annum for the interior house, six Months rent for both Dwellings would be \$1250.00.

You are further entitled to a deduction of \$25.00 for not putting Washboiler in basement, making \$1275.

From the above deduction Messrs Briggs Smith claim of you the sum of Three hundred & fifty dollars for delays to them as provided in their Contract with you.

Yours most respectfully

Wm. H. Brington

Superintendent."

" Nov. 28. 1857.

J. W. Mangrum Esq

Dear Sir, In making up my estimate for delays as stated above, I based my calculation upon what the Dwellings would probably rent for at the present time— Now I made my calculation for the rates of rent for such class of Dwellings at the time the Contract provides for finishing them I should have paid the corner house at least \$1800. per annum and the interior house at \$1500 making \$400 more that you would be entitled to for delays than by the first calculation.

The reason I did not consider these rates in the

first place was that I have been accustomed to calculate at the date of making up my report. But upon reflection I think you are entitled to the rates of rent you would get provided the buildings had been finished in time,

In haste Yours

Wm. W. Boyington."

The Plaintiffs by their Counsel then offered to introduce as a witness on their part Mr. H. B. Weeks, to whose examination the Counsel for the Defendant did then and there object and offered to prove the interest of said witness in the result of this suit by W. W. Boyington who being sworn testified as follows.

"I know Mr. Hiland B. Weeks. The old gentleman (meaning said H. B. Weeks) remarked when I asked him (Mr. Weeks) why he changed the mode of executing contracts, that it was in consequence of some unsettled matters of his own in New York, but that the work would be done as satisfactorily that he should superintend the work, as though executed in his own name. Sometimes the young men took the Certificates sometimes himself - whenever I wanted anything done I usually consulted with the old gentleman. He did not particularly what his difficulty was, but gave me to understand that they would come down on him for anything left unsettled in his hands.

Mr. Hiland B. Weeks being then recalled by the Plaintiffs Counsel as a witness on their part, the defts Counsel did then

and there object to his examination and testimony for the reason that his testimony was incompetent to go to the Jury, where upon the matter was referred to the Court, who being of opinion that the said evidence was not incompetent to go to the Jury, and the Jury could decide as to his credibility - the Defendant by his Counsel did then and there except to such opinion of the Court.

William B. Weeks was then duly sworn and testified as follows to wit -

"I have no interest in the result of this suit. There was a disposition at first on the part of the Plaintiffs to settle the matters in controversy with Defendant, without reference to the Architect - The Plaintiffs tried to settle the matter with Mr Waughop, but could not do it, Plaintiffs were dissatisfied with Boyingtons decision, I afterwards on the part of the Plaintiffs proposed to Mr Waughop an Arbitration, but he said there was nothing in it, nothing to arbitrate, and refused to arbitrate. That was late in the fall or early part of winter of '84 - Mr Waughop at that time had sold one of the houses to Bob Smith - Mr Waughop was living in the other."

Cross Examined by the Defendant,

"I am the father of these two Plaintiffs - Mr Waughop stated that he had received a Certificate from Mr Boyington and was dissatisfied with the Certificate and has returned it to Mr Boyington for his revision - I asked Mr. Waughop after that to arbitrate. In relation to Mr B's Certificate, he said I am dissatisfied with that Report - I told him I wished

he would choose an Arbitrator, and the Plaintiffs would choose another and arbitrate the matter, he said there was "nothing of it," & refused to arbitrate. We had a conversation for perhaps an hour. We were talking about settling up our affairs - I told him we were dissatisfied with Boringtons decision and wanted to arbitrate it. I do not recollect anything else. I called at another time after that to try and have him pay an acceptance. I might have spoken of the matter as my own. I have no power of Attorney from my sons. We had a writing together. I gave it to Mr King. It is signed by both parties & dated before this Contract. I did not receipt for this money in my own name. I might have receipted for money in my own name sometimes. I had general supervision of the business. I was employed on a Salary. There were a number of Contracts managed in the same way. No Bank account was kept by us. Benjamin did the principal paying. I do not recollect of but one conversation in relation to arbitration. I never named any person as an arbitrator.

Direct Examination resumed

Plaintiffs employed me as their Agent and general Superintendent. I was their general Superintendent and managed this business as well as other business for them. The defendant knew the relation I stood to the Plaintiffs all through from the time the Contracts were signed. He knew it then and he knows it now. He knew all the way through that I had the general superintendence of the affairs for my sons. I am a Builder, have been employed in that business 36 years and a Mason.

The Counsel for the Plaintiffs then introduced as a witness on their part

Asher Carter. who being sworn testified as follows, to wit.

"I am an Architect, have been such for 18 years. In Chicago, for 10 years."

The Plaintiffs by their Counsel then asked the witness the following Question.

"Is there such a thing known as extra work in erecting a building aside from a change of plans or designs?"

Objected to by Defendants Counsel. Objection overruled and exceptions taken.

Ans: "There is."

Question "What is the distinction, if any, as understood by architects between a change of plan or design and extra work?"

Objected to by Defendant. Objection overruled. Exceptions taken.

Ans. "There can be extra work without a change of plans or designs."

Question "On a Contract for a building or buildings where there is nothing specified in relation to Cornices or Center pieces when they are made by Order of the Superintendent, would it be considered as a change of design or plan or Extra work?"

Objected to by Defendant. Objection overruled and exceptions taken.

Ans. "It might be a change of design and not a change of plan."

Question "Where the Contract and Specifications call for Common brick in some part of the Edifice, and by directions of Architect pressed brick are put in, should you as an Architect consider that as a change of plan or design or extra work?"

Objected to - Objection overruled

Excepted to.

Ans. "I should consider it extra."

Question "Stone Coping used on the outside of the building, if not specified at all should you consider as a change of plan or extra work?"

Objected to - Objection overruled

Excepted to.

Ans. "If not called for by the Plan or Specifications, I should consider as extra work."

Question "If a chimney be built strictly according to plans & Specifications, but after completion found not to draw well and taken down and rebuilt by Order of Superintendent or owner is the rebuilding an alteration of plan or design or extra work?"

Objected to - Objection overruled

Excepted to

Ans. "I should think that would be an alteration of design."

The Plaintiffs Counsel then called G. P. Randall who being sworn testified as follows

"I am an Architect have been practicing ^{some} ten or twelve years."

Question. "Is there such a thing known among Architects as extra work in erecting a building aside from a change of plan or design?"

Ans. "Yes, there is."

Question. "What is the distinction, if any, as understood by Architects between the terms 'change of plan or design' and the term 'extra work'."

Ans. "A change of plan or design is generally considered 'extra work', where more work is to be done."

"A chimney built according to plans and designs if ordered to be taken down & rebuilt, would be extra work."

"Where no Centres or Cornices are called for in the plans or specifications, but put in by Order of the Architect or Superintendent they would be extra work."

"A change from Common brick to pressed brick is extra work as understood by Architects as we use the term."

"Coping not appearing on plans or specifications is extra work."

Gross Examination.

"I should consider the putting in Cornices and Centre pieces as a matter to be under the Supervision of the Architect. All modifications in building is the proper subject for the decision of the Architect, whether it is extra work and the amount of pay to be given therefor, provided the Contract so expresses it. Cornices and Centres are extra work - the Architect is to pass upon all the work if so agreed in Contract. If more work is done than called for in plans & specifications

it is
Extra work. I should not consider the extra work a change
of design.

Harold B. Weeks recalled. by Plaintiff's counsel whose testimony
is objected to by Defs Counsel.

The objection is overruled by the Court
and Defs Counsel excepts.

Question. "State whether these cornices and centre pieces were put
in these Buildings?"

Objected to - Objection sustained.

Question. "State as to the pressed brick?"

Objected to. Objection overruled
Excepted to.

Ans: "There was 15000 pressed brick put in worth \$22
per thousand more than the Common brick; which were to
be put in by the Contract being \$340⁰⁰ -

Question. As to Coping & setting foundation

Objected to - Objection overruled.
Excepted to.

Ans. There was 60 feet of Coping worth \$4.8 per foot on
East side of house on Wabash Avenue, which was extra,
amounting to \$240. There was fourteen (14 feet) of rear area
Coping worth ten shillings per foot, amounting to Seventeen dollars
and fifty cents (\$17.50).

The Chimney was taken down and rebuilt in the
same manner but moved about eight inches - Mr. Naughton
asked me what it would cost to take down this Chimney &
rebuild it. I told him it would cost \$30. and he told

me to do it, and we did it. It was worth \$30 to do it.

About the 10th of Oct 1856 we had the building ready for the carpenters, for the roof, trimmers, so that we could work together, we commenced the lathing interior building from the 12th to the 15th Oct. We went on with that & got the lathing and brown Mortar on part one coat and part two coats - I think all brown mortared. In the forepart of November I came round one morning and found work stopped on interior building, the man who was plastering the building did not appear to be making his preparations for the hard finish. The interior building, the work was stopped.

In the corner Building Defendant said he would go on at one time and at another said he wouldn't. I don't have a distinct recollection of having a conversation with Mr. Waughop about the stopping of the work in the corner building. Mr Waughop told me sometime in the Spring of 1857 that he had sold ^{I should think it must have been the month of March, that he told me he} the inside house to Col^l. Smith. I don't recollect of having a conversation with either Mr Borington or Deft about the stoppage of work in either building. I am a plasterer, we could have done as good a piece of plastering at the time the building was stopped, as when it was done, or at any other time. Ten days or two weeks would have completed the interior house at that time I think. Two weeks perhaps would have finished the plastering. We wanted to proceed with the lathing & plastering of the corner house at the same time.

The Carpenters had not the corner building ready for lathing then.

Gross Examined by Defendants Counsel.

I did not make out this (showing account) I never made out such a one. I do not remember of being present when it was made out. About the Chimney the arrangement was made with Mr. Haughp alone. Mr. Haughp asked me what it would cost to change the Chimney. I told him \$30⁰⁰ and he ordered it to be done. I knew that the use of pressed brick was in this account.

Plaintiffs built a house for Charley Brown that same Summer. We got out of Milwaukee pressed brick that Summer and told Mr. Haughp that we wanted him to get some, he went to Milwaukee and got some, we were behind in time we made up in quality as much as we were behind in time and put in the pressed brick to offset what we might be behind in time. It was in reference to being behind that I made this arrangement I think I told Mr. Boyington I did not intend to make charge for sand brick. Plaintiffs paid for the brick and also paid Defendant for his time & expenses in getting them.

Taking down Chimney & rebuilding it would be about two weeks delay.

Thomas White being duly sworn testified as follows to wit:

I am a Plasterer, have the contract under the Plaintiffs for Plastering the buildings of Mr. Haughp. I commenced Plastering there, sometime in Oct '36. That fall I got two houses quite or very near done, brown Mortar.

The corner house was lathered that fall with the exception

of some little patches - The inner house was brown mortar
the last of November or first of December - We were stopped
then by the weather, and had been stopped a little before
that by the weather - Mr Haughrop asked my advice as to
delaying the matter till Spring - I think it was on the
sidewalk we had our conversation in front of the building
on Washington Street - The weather became the subject of
conversation - He asked me how we were getting along - He
asked me if it was not getting rather late - I told him that
I thought it was - He asked me if it was customary to
do work in the winter season in Chicago. I told him that
it was not - I told him that it might be done if he
had fires put in the house and do it up as we did it
in New York. I told him we did a great deal of work in
the winter season. I think he said that if we could
not go on with safety we had better stop, but that I
ought to be the best judge - I worked on till I had got
the brown mortar on the inside house and then stopped.
My partner took the job the ensuing season - he commenced
the 22^d Feby - There was some delay caused in the
chimney being taken down & rebuilt - I think there was
12 or 15 days delay in getting plaster from New York - I
advised Best to send to New York for plaster - It came
about the middle of June 1857 - I think - Mr Haughrop sent
to N. Y. for the plaster for my use - Mr Haughrop asked me
the difference between the Michigan and N. Y. plaster, I told
him he would have better work to get the N. Y. plaster

I think the Plaster arrived middle of June '57 I finished the house Bolt Smith bought of Deft. There were many alterations in Bolt Smith's house which delayed finishing the Plastering some three weeks. I cannot say when the Plastering of the corner house commenced. The Plaster sent for from N.Y. was put on the corner house only - the inside house (Bolt Smith's) was finished with Grand Rapids Plaster. We had seven Plasterers at work there. I know that the Plastering was delayed about three weeks by defendant's sending to N.Y. for Plaster, to finish the house in which he lives, the corner house, from the fact that the men were sent from there to another job we had on Lake Street.

There was 12 to 15 days delay for want of Plaster which Deft assumed to get. With the force I had on those buildings it would have taken from 8 to 10 weeks to finish them.

Question "What were you paid a yard for doing it?"

Objected to - Objection sustained.

Cross Examined

The first had frozen some of the Plastering at Bolt Smith's - I have no knowledge as to when the Plastering was finished in the corner house. It was necessary to have the N.Y. plaster to make the Plastering on the corner house of the best quality. I don't think we could have got better plaster in the world. It was soon after we got the plaster that the mason work was finished. It was also finished on both houses before the fourth of July, 1857.

Colt Smiths house was first class plastering
Ans: It was as good as could be done with that kind of
plaster, the difference between N.Y and Michigan Plaster is
that the former works hard under the tools of the workman
and the latter porous and spongy leaving the marks of
the tool upon it.

James Lawrence called and being duly sworn testified as
follows to wit - I am a Mason have worked at the
business since 1827 - 2 years in Chicago, prior to that in
N.Y. City. I understand plastering - setting the boiler
would not be worth more than seven dollars.

Plastering may be done in the winter, with heaters to
keep out the cold. I have done first class work. I have
done first class work in the winter and can do it again -
I have made a measurement of the pressed brick in the
rear of the corner house I made 15000, there was 60 feet
of coping in front - there is 14 ft of rear coping

Daniel Goodman being duly sworn testified as follows to wit

I am a Mason - have been 14 years in Chicago It is true
I know the buildings of Mr. Mangrove erected for him by
the Plaintiffs - the pressed brick were worth \$35 per
thousand - common brick were worth \$12 per thousand

P. J. Ruffman being duly sworn testified as follows - I am a
Stone Cutter. the coping was worth in \$6, the front coping
was worth 75 cents per foot delivered ready for setting
surface measure. I think it was 60 ft. long. The estimate
on that coping is \$168.75, lineal feet, not set. Don't know

what it is worth per.

Mr. Carter Architect recalled by plaintiffs, says, "Most of the plaster used in '56 & '57 was Michigan Plaster, ^{by the Michigan Plaster} would not be first rate - Nova Scotia Plaster is considered best - If it is ~~the~~ first quality, it would be good, but Nova Scotia would be best - Nova Scotia would be best, it is the same as N. Y. The N. Y. is whiter and clearer & makes a better looking plaster. I never called my attention to the fact that Michigan Plaster was spongy - I hardly think that it would require Nova Scotia Plaster, to make a first class job of plaster Paris finish.

Evidence for Defendant

Defendants' introduced

Peter Page, I reside in the neighbourhood of Mr Haughton's Houses. The corner house would rent for from 1800 to 2000 dollars per annum. In the fall of 1856 to July, 1857.

The third house, the one sold to Mr Smith would be worth 1500 or 1600 dollars per year. I own houses in that neighbourhood and have good means of judging what a fair rent would be from having rented houses myself. The rent of houses has risen in that neighbourhood, within a few years, and also fallen. Col^d Smith enlarged his house before the Plastering was finished.

Abner Carter, introduced by Defendant.

The rent of fall in '56. for the corner house would be about 2000 dollars and the others 1600. I judge

from other houses not so good being rented for \$2000. In not so good a location. I should think Mr Keazies houses were rented to Mr Johnson for \$2000 each for Boardinghouses. William Jones, introduced by Defendant.

I should think the corner house would be worth 1800 dollars and \$1500 for the other. I believe Mr Keazies houses are in a more desirable location. In 1856 Mr Waughrops houses I thought were more desirable. Mr Waughrops houses are wider than Mr Keazies. I think Mr Waughrops are finer houses. I should think the corner house would rent for as much as Mr Keazies. Mr Waughrops are finer houses. Keazies houses are a story higher than Waughrops and have more rooms I think. Defts houses are very beautiful houses - They are the very first class houses, Both the corner one where Waughrop lives and the one he sold to Coll Smith cannot be beaten."

The Deft then put in evidence the written receipts of paid sums of money had & received by them of the deft. for work done under said contract amounting in the aggregate to \$4660.

William H. Brington, was then called as a witness on the part of the defendant, and being duly sworn, testified as follows:

I was the Architect and Superintendent. I made the Certificate in evidence in this suit. I noticed the pressed brick. H. B. Weeks paid the plaintiffs did not expect to

change for the pressed brick. I asked what was intended to be done with them. The old gentleman Mr H.B. Weeks said that he intended to save with pressed bricks, but should make no change for them. When the Chimney was built a defective place or contraction was left and I remarked that it ought to be taken down, but did not order it to be done. I do not think that I should have reported the work finished till it had been corrected. As near as I can remember the houses were finished about July 1st 1857. The work did stop in 1856 about the 1st of December for the winter.

There might have been an arrangement by which the plastering might have been done and a good job done in the winter.

I gave a notice either to the old gentleman, or one of the Dons of which this is a copy about the date thereof

Chicago Ill. Nov 7. 56.

"Messrs B H. D. Weeks

Gents. The Block of Dwellings now being Erected by Mr Mangrove are ready to be plastered immediately. Will you give immediate attention to the same.

Respectfully yours

Bayington & W. P.B."

I met them every day and had conversations on this subject and informed them when anything was ready. In getting the wages up there was 30 or 40 days back 1st of Sept. I urged them repeatedly to urge the work forward so that the work might be completed before Winter, Because one reason

was that the families wanted to get in them before Winter - These Pliffs claimed that they ought to be allowed something for a Dwarf Wall, that is he made the remark. There was some demand for Cornices, but by mutual consent this was turned over to Mr White - The Plastering was done July 1st 1854 - The Plastering was finished as near as I can remember about July 1st - It is very probable that Mr Naughton could have realized, I have not the least doubt for his houses 2000 dollars per annum for the outer house and 15 to 1800 for the inner one - the difference between the Contract cost of such houses now is about 30 or 40 per Cent lower than at that time, and rents are as much lower.

Gross Examined

I never gave any directions to have the work stopped - Mr Naughton, never to my knowledge gave any such order, he never to my knowledge took the responsibility of stopping the work - Mr Naughton remarked to me that the masons had shut up the houses fearing that they could not make a good job in cold weather - Deft asked me if the Plaster could be done satisfactorily in winter - I told him that the Plastering better not be done in the winter, he thought so too, this was said in presence of the Plasterers - Certain portions of the Cornices were extra - White & Thomas were allowed \$315 Extra for Cornices and Centres.

There was Extra Coping done by the Plaintiffs in front of the buildings worth \$240 - Also extra Coping in rear worth \$17⁵⁰ - Also extra dwarf walls worth \$20⁴⁰

all of which was extra, and for which they should be paid by defendant.

Best by his Counsel admitted that the Coping in front worth \$240. and the Coping in rear worth \$17.50 and the Dwarf Walls, worth \$20.40. were all extra and done by Plaintiffs, and should be allowed to them. Waughop remarked some that Masons had ^{engaged to} shut up the houses for the winter. Mr Waughop may have said that he was fearful that the Masons could not make a good job of it. A portion of the Cornices were extra work. I went through the house and determined what was, and made the charges for extra work, which was never disputed. When I made the Certificate I had previously allowed for the Cornices & Centres \$315.96 to White & Thomas over the Contract. Weeks told me that all extras were to be paid to White & Thomas. I think the Dwarf Walls ought to be allowed \$20.40. I saw the pressed brick being put in.

Mr White recalled by Plaintiffs.

Plaintiff recalls Mr Weeks

The foundation for the boiler was put in by Plffs.

Defendant recalls Mr Brynighton.

I do not know whether foundation for Boiler was in or not. It would take a man 2 days to set the Boiler and from 3 to 500 brick and 2 Tubs Mortar.

The testimony was here closed. The above is the substance of all the testimony offered in the case.

The defendant by his Counsel moved the Court to exclude from the consideration of the Jury, the Certificates in evidence made by W. W. Borington the Architect and Superintendent on the ground that said Certificates did not constitute a final Certificate as required by the Contract - The Court refused to exclude said Certificates from the consideration of the jury, to which refusal the Defendant by his Counsel then and there excepted.

The Court at the request of Defendants Counsel ruled out and excluded from the consideration of the jury all testimony in relation to the corners and curves

To which ruling and exclusion the Plaintiffs by their Counsel then and there duly excepted.

And thereupon the Court at the request of defendant's Counsel gave the following instructions to the jury and instructed the jury as follows.

" If the Jury believe from the Evidence that the Plastering in the house sold by Waughrop to Smith was not completed within 115 days after notice that it was ready for Plastering, then for the length of time that elapsed therefrom before the plastering was completed, the defendant is entitled to a fair rent for every day said work remained unfinished, without regard to the sale to Smith, and to have the same deducted from the Contract price."

" If the Jury believe from the evidence that the pressed brick were used by the Plaintiffs voluntarily and without any request so to do, either by Mr Haugthorpe or Mr Boyington and if the Plaintiffs said when they used them that they did not intend to make any charge for them, then they cannot recover for such brick."

" If the Jury believe from the evidence that the pressed ^{Brick} were used by the Plaintiffs with the Declaration & understanding that no charge was to be made for them, but the point was to offset against damages for delay prior to 1st of August the Jury would not be authorized to allow it as a claim for damage accruing for delay subsequently to that time under the Contract in this case: the decision and determination of Mr Boyington is conclusive upon the parties upon all matters under the Contract, with the Exception of the time the building was delayed, the amount of rent and setting the boiler: upon these points the decision of Mr Boyington is not conclusive and the jury are at liberty to decide the question upon all the Evidence in the case; and they are at liberty if the Evidence in their judgment establishes the fact that the rent was reasonably worth more than was allowed by Boyington they should allow more."

To which ruling and decision of the Court in giving said instructions and each of them so given as aforesaid the said Plaintiffs by their Counsel then and there duly accepted.

And the jury having retired to consider of their

Verdict, afterwards returned into Court with the following Verdict
to wit.

"The the Jury find for the Plaintiffs and assess the
damages at \$1100."

The Plaintiffs by their Counsel duly abated from the
Verdict of the Jury \$84. which was all the interest allowed
by the Jury in their Verdict,

The Defendant thereupon filed his Motion for a new trial
which is in the words following viz:

"Weeks & Weeks

vs

Wroughton . . . The Defendant moves to set aside the
Verdict in this case and for New Trial on the following,
among other, grounds.

1. The Verdict is against the law and the evidence.
2. The Court erred in admitting incompetent testimony evidence.
3. The Court erred in excluding legal evidence offered by
Defendant
4. The Court erred in admitting the Certificate of the
Architect as a final Certificate.
5. The Court erred in permitting the Plaintiffs to recover
under the Contract without a final Certificate as required
by Contract.
6. That no offer to arbitrate was made after the Certificate
that was finished was obtained - and on other grounds
The Jury erroneously included interest in the Verdict."

Which said Motion for a New trial, after argument by Counsel the Court overruled, and judgment was thereupon rendered upon the Verdict of the Jury aforesaid and Defendant thereupon excepted to the decision of the Court and prayed his Appeal to the Supreme Court, and that these his exceptions might be signed and sealed and made a part of the record and it is accordingly done.

John M. Wilson (Seal)

March 19. 1859."

State of Illinois }
Cook County .. }
}

I Walter Kimball Clerk of the Cook County Court of Common Pleas within and for the County and State aforesaid Do hereby certify the foregoing to be a true and correct Transcript of the Process, Declaration, Plea, Apprais Bond and Bill of Exceptions now on file in my office, together with all orders entered of record in said Court in a certain suit therein, wherein Benjamin Weeks and Caleb D. Weeks are Plaintiffs and John M. Haugher is Defendant.

In testimony whereof I the said Walter Kimball have hereunto set my hand and affixed the Seal of said Court at Chicago in said County this twelfth day of April A. D. 1859,

Walter Kimball Clerk

Supreme Court
John W. Waughop
vs. Plff. in error
Benjamin Weeks &
Caleb D. Weeks,
Defts. in error

Assignment of
Errors

Afterwards, to wit,
at the April Term of the Supreme Court
A.D. 1839, before the justices of the said
Court, comes the said John W. Waughop by
Arnold, Lay & Gregory his Attorneys, and says
that in the record and proceedings aforesaid
and also in giving the judgment aforesaid
there is manifest error in this, to wit, the
Court erred in giving the judgment aforesaid
for the said Benjamin Weeks & Caleb
D. Weeks against the said John W. Waughop,
whereas by the law of the land the said
judgment ought to have been given for
the said John W. Waughop against the

said Benj. Weeks and Caleb A. Weeks:
also in ~~admitting~~ holding the letters
or certificates signed by said Wm. W.
Baynington and dated respectively Oct. 25.
1858, Nov. 18. 1857, Nov. 28, 1857, to
constitute such a final certificate as the
Contract aforesaid required; also in
admitting improper evidence to go to
the jury, on the part of the said plaintiffs below;
also in ~~admitting~~ excluding from the
jury evidence offered by the said
defendants below; also in overruling the
motion of the defendant below for a
new trial; and the motion to exclude
from the jury the evidence of plaintiffs
below -

And the said John W. Waughop prays
that the judgment aforesaid for the errors aforesaid,
and other errors in the record and proceedings
aforesaid, may be reversed, annulled and
altogether held for nothing, and that he may be
restored in all things which he hath lost
by occasion of the said judgment, &c.

Arnold, Lay & Gregory
Attorneys for plaintiff in error.

Supreme court.

Benjamin Weeks

& Caleb D. Weeks

Def^ts in error
ad.

Plaintiff in error

John W. Wanger

Plff in Error

And hereupon afterwards
to wit at the April Term of the Supreme court
AD 1859 - the said Benjamin Weeks and Caleb
D. Weeks by King - Scott & Wilson their attorneys
freely come here into court and say that there is
no error either in the record and proceedings
aforesaid, or in giving the judgment aforesaid - and
they pray that the said Supreme court of Judicature
before the aforesaid Justices thereof, now here,
may proceed to examine as well the record
and proceedings aforesaid as the matters aforesaid
above assigned for error, and that the judgment
aforesaid, in form aforesaid given, may be in
all things affirmed &c.

King - Scott & Wilson

Attorneys for Def^ts in Error

217
State of Illinois
Cook County Court
of Common Pleas.

B. & D. Weeks

vs

John W. Haughstrop

Record.

Filed April 19, 1837

L. Leland

Clerk

Grand \$111.50 J. L. Co J. W.

Haughstrop Haughstrop

Supreme Court
John W. Wanhope
vs.
Benjamin Weeks &
Caleb D. Weeks
Defts. in error.

It is hereby stipulated that the contract
set out in the Record in this Cause as under
seal, is not under seal. And its appearing
under seal in the Record is a mistake.
but the subsequent agreement was under seal
Ottawa, April 28, 1859.

Scates, McAllister & Jewett
for appellant
King, Scott & Willson
for appellee.

217.

58

Supreme Court

Wanghops

vs.

Wicks et al.

Good morning, friends

SUPREME COURT.

BENJAMIN WEEKS AND
CALEB D. WEEKS,
Defendants in Error.
ads.
JOHN W. WAUGHOP,
Plaintiff in Error.

POINTS
FOR
DEFENDANTS IN ERROR.

I.

This action was brought by the plaintiffs below to recover the balance due for erecting two buildings in the city of Chicago, and for extra work, &c.

The plaintiffs declared in *indebitatus assumpsit*.

A written contract was offered and read in evidence, *not under seal*, showing that the buildings were to be erected, &c., for the sum of \$9,800.00, of which 85 per cent. was to be paid as the work progressed, and the balance of 15 per cent. was to be paid on the completion of the contract, provided the superintendent should certify in writing that the plaintiffs below were entitled thereto.

See Record, p. 24.

A Subsequent Agreement reserved 50 per cent. till work was completed (p. 25.)
The superintendent gave the plaintiffs below a certificate that they had finished the contract, and were entitled to the balance due, as follows :
See Record, pp. 24, 25.

"CHICAGO, OCTOBER 25, 1858.

"To B. & C. D. WEEKS, GENTLEMEN :

"I hereby certify that you finished your contract with J. W. Waughop, Esq., for erecting and building two dwellings for said Waughop, located on the corner of Wabash avenue and Washington street, in the city of Chicago. But, the said dwellings were not finished until six months after the time mentioned in said contract for finishing the same, said contract provides that you shall pay a fair rent of the premises for all such delays, the amount of which is to be deducted from the contract price. After determining and deducting a fair rent

"of said dwellings for the six months delay, according to contract, and
 "deducting what the said Waughop has paid you on said contract, and
 "also deducting twenty-five dollars for not setting wash-boiler in base-
 "ment, (omitted) *you will then be entitled to the balance, if any, due*
"according to contract.

"Respectfully Yours,
 "WM. W. BOYINGTON, Superintendent."

The contract provided (see Record, p. 23,) that the damages arising from the non-fulfilment of the Contract, as regards time, should be a fair rent of the premises for each and every day to work remained unfinished, and which sum of damages shall be deducted from the contract price.

The contract price was	\$9,800 00	See Record, p. 24.
Extra work admitted by Def.,	277 90	" " 43.
	\$10,077 90	
Payments made,	7,660 00	" " 40.
Balance due,	\$2,417 90	

And plaintiffs below put in buildings 15,000 pressed brick in place of common brick called for by contract, which were worth \$22 per thousand more than the common brick, amounting to \$340.

The pressed brick were to offset against damages occasioned by non-fulfillment of contract as regarded time. See Record, pages 33, 35.

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The work was all done according to contract, and so certified by the superintendent; but not within the time prescribed by contract. And such being the case the plaintiffs below were entitled to bring their suit and recover upon the common counts.

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He further testified on cross-examination.—(See Record, pages 28, 29.) "I told him (Waughop) I wished he would choose an arbitrator, and the plaintiffs would choose another, and arbitrate the matter, he said there was nothing of it and refused to arbitrate."

II.

All the instructions asked for by the defendant below were given by the Court to the jury.

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Asher Carter and G. P. Randall, architects, testified as to what ^{was alterations of the design} ~~was~~ and what was ~~not~~ extra work. (See Record, pages 30, 31, 32, 33.) Their testimony was perfectly competent, and the defendant below took no proper exception thereto, even if it had been otherwise.

There was no error committed by the Court below against the defendant below.

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KING, SCOTT & WILLSON,
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Neither of the witnesses, Carter or Randall, testified to "what was called for by the contract," as stated on page 7 of abstract.

217.
Benjamin Weeks &
Caleb D. Weeks
Deft. in error.

vs.
John W. Waugh
Plff. in error.

Deft. Points &c.

Wing. Scott & Willson
Atty. for Deft. in error.

SUPREME COURT.

BENJAMIN WEEKS AND	}	POINTS
CALEB D. WEEKS,		
Defendants in Error.		
<i>ads.</i>		
JOHN W. WAUGHOP,	}	FOR
Plaintiff in Error.		
		DEFENDANTS IN ERROR.

I.

This action was brought by the plaintiffs below to recover the balance due for erecting two buildings in the city of Chicago, and for extra work, &c.

The plaintiffs declared in *indebitatus assumpsit*.

A written contract was offered and read in evidence, *not under seal*, showing that the buildings were to be erected, &c., for the sum of \$9,800.00, of which 85 per cent. was to be paid as the work progressed, and the balance of 15 per cent. was to be paid on the completion of the contract, provided the superintendent should certify in writing that the plaintiffs below were entitled thereto.

See Record, p. 24.

A subsequent Agreement reserved 50 per cent. till work was completed (p. 25.) The superintendent gave the plaintiffs below a certificate that they had finished the contract, and were entitled to the balance due, as follows :

See Record, pp. 24, 25.

"CHICAGO, OCTOBER 25, 1858.

"To B. & C. D. WEEKS, GENTLEMEN :

"I hereby certify that you finished your contract with J. W. Waughop, Esq., for erecting and building two dwellings for said Waughop, located on the corner of Wabash avenue and Washington street, in the city of Chicago. But, the said dwellings were not finished until six months after the time mentioned in said contract for finishing the same, said contract provides that you shall pay a fair rent of the premises for all such delays, the amount of which is to be deducted from the contract price. After determining and deducting a fair rent

"of said dwellings for the six months delay, according to contract, and
 "deducting what the said Waughop has paid you on said contract, and
 "also deducting twenty-five dollars for not setting wash-boiler in base-
 "ment, (omitted) *you will then be entitled to the balance, if any, due*
"according to contract.

"Respectfully Yours,
 "WM. W. BOYINGTON, Superintendent."

The contract provided (see Record, p. 23,) that the damages arising from the non-fulfilment of the Contract, as regards time, should be a fair rent of the premises for each and every day to work remained unfinished, and which sum of damages shall be deducted from the contract price.

The contract price was	\$9,800 00	See Record, p. 24.
Extra work admitted by Def.,	277 90	" " 43.
	\$10,077 90	
Payments made,	7,660 00	" " 40.
Balance due,	\$2,417 90	

And plaintiffs below put in buildings 15,000 pressed brick in place of common brick called for by contract, which were worth \$22 per thousand more than the common brick, amounting to \$340.

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