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Vol. I Pages 1-238
(In Two Volumes)

Record No. 6873

In the Supreme Court of Appeals of Virginia at Richmond

M. H. SHARLIN

v.

NEIGHBORHOOD THEATRE, INCORPORATED

FROM THE CIRCUIT COURT OF ARLINGTON COUNTY

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a.m.; Adjourns at 1:00 p.m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6873

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 15th day of January, 1968.

M. H. SHARLIN, Plaintiff in error,

against

NEIGHBORHOOD THEATRE, INCORPORATED, Defendant in error.

From the Circuit Court of Arlington County
Paul D. Brown, Judge

Upon the petition of M. H. Sharlin a writ of error is awarded him to a judgment rendered by the Circuit Court of Arlington County on the 28th day of April, 1967, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Neighborhood Theatre, Incorporated, was defendant; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of $300, with condition as the law directs.

RECORD

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MOTION FOR JUDGMENT

TAKE NOTICE that the undersigned will move the Court for judgment against you in the amount of THIRTY SEVEN THOUSAND, SIX HUNDRED and THIRTY-EIGHT and 27/100 ($37,638.27) DOLLARS for the following reasons, to-wit:

1. The defendant, Neighborhood Theatre, Incorporated is a Virginia Corporation organized and doing business under the laws of Virginia.

2. That on the 9th day of February 1944 by a lease in writing and by an addendum to that lease dated 1 April 1945 which was in writing, both made between plaintiff and defendant, plaintiff leased to defendant for the period of 20 years at an annual base rent of $10,920.00, certain premises to be used as a movie theatre situated in Arlington County, Virginia, fronting on Glebe Road, and designated as lots numbers 1 to 8, inclusive, on a certain plat of J. W. Kephart and Samuel Hersperger Subdivision dated November 1, 1943 and recorded in the land records of Arlington
page 2 } County, Virginia; a copy of said lease is attached hereto, and made a part hereof as if fully pleaded herein.

3. That said lease contained a covenant whereby defendant, lessee, covenanted and agreed that he would, at its own cost and expense, during the term, do all necessary interior and exterior painting and decorating and would maintain the building in good order and repair.

4. That said lessee further covenanted and agreed in said lease that they would surrender the demised premises at the expiration of the lease in the same good order and condition as when delivered, excepting ordinary wear and tear and damage by fire or other casualty.

5. That the defendant entered on the premises and occupied the same during the term under said lease; that he failed to keep the building and fixtures in good order and repair and has failed to leave them in the same good order and condition as he received them, reasonable wear and tear

excepted, but on the contrary allowed the building and fixtures to fall into and remain in a condition of dilapidation and disrepair all of which required the plaintiff to expend substantial sums of money for plastering, painting, replacing and repairing wiring throughout the building, replacing exit doors, removing air conditioning equipment left on the premises by the defendant, replacing heating system which was ruined by the defendant's failure to keep in repair; replacing toilet fixtures, radiators, and lighting fixtures.

6. That the lease contained a covenant whereby defendant agreed that during the term of said lease, the de-
page 3 } fendant would at its own cost and expense maintain the parking spaces and facilities in suitable condition for the parking of automobiles.

7. That plaintiff was further forced to expend substantial sums of money in order to repair and repave the parking space in order to put the parking area in a suitable condition for the parking of automobiles.

8. By reason of the defendant's failure to maintain the premises in good order and repair and for failure to deliver the premises in the same good order and condition as when delivered, ordinary wear and tear excepted, the plaintiff has been damaged in the amount of $37,638.27.

WHEREFORE plaintiff prays the Court award damages in the amount of THIRTY SEVEN THOUSAND, SIX HUNDRED and THIRTY-EIGHT and 27/100 ($37,638.27) DOLLARS plus interest from 1 May 1965 plus costs.

H. M. SHARLIN
by Counsel

HARRIGAN AND MORRIS
By THOMAS J. HARRIGAN
Attorney for Plaintiff

Filed in the Clerk's Office the 14th day of April, 1966.

Teste:

H. BRUCE GREEN, Clerk

VIRGINIA C. GREEN, D.C.

* * * * *

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ANSWER AND GROUNDS OF DEFENSE

Now comes the defendant Neighborhood Theatre, Incorporated, by counsel, and for answer to the motion for judgment filed herein states as follows:

ANSWER AND FIRST GROUNDS OF DEFENSE

As to the numbered paragraphs of the motion for judgment the defendant says:

1. It admits the allegations of paragraph numbered 1.
2. The terms of the lease speak for themselves.
3. The terms of the lease speak for themselves.
4. The terms of the lease speak for themselves.
5. The defendant admits occupying the premises during the term of the lease and denies each and every other allegation of paragraph 5.
6. The terms of the lease speak for themselves.
7. The defendant denies the allegations of paragraph 7.
8. The defendant denies the allegations of paragraph 8.

SECOND DEFENSE

The defendant fully performed all the terms of said lease required by it to be performed.

THIRD DEFENSE

The defendant was entitled, pursuant to the page 10 } terms of the lease, to remove all property which it did not remove upon surrender of the real estate.

FOURTH DEFENSE

The defendant denies that the plaintiff has been damaged in the amount of $37,638.27 or in any amount whatsoever.

NEIGHBORHOOD THEATRE,
INCORPORATED

By JAMES H. SIMMONDS
Its Attorney

Filed May 6, 1966.

H. BRUCE GREEN, Clerk
Circuit Court, Arlington County, Va.

By V. G., Deputy Clerk

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MOTION TO SET ASIDE THE VERDICT AS CONTRARY TO THE LAW AND EVIDENCE AND MOTION FOR A NEW TRIAL

COMES NOW, the plaintiff and moves the Court to Set Aside the Verdict as Contrary to the Law and Evidence and Motion for a New Trial on the following grounds, to wit:

1. The verdict of the Court was not based on the correct application of the law and was insufficient as a matter of law based on the evidence.
2. The Court erred in construing paragraph 2 of the lease to mean that the word "fixtures" was not limited to the specific fixtures or class of fixtures previously specifically enumerated in said paragraph of the lease.
3. The Court erred in allowing parol evidence to vary and contradict the written lease.
4. The Court erred in taking under advisement objections to the introduction of evidence and thereafter failing to enumerate its findings of fact and law regarding these objections.
5. The Court erred in holding that the defendant had the right to remove any fixtures which removal caused substantial damage to the building.

page 112 } 6. For other errors apparent on the face of the record.

Filed Mar. 8, 1967.

H. BRUCE GREEN, Clerk
Circuit Court Arlington County, Va.

By: V. GREEN, Deputy Clerk

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ORDER

THIS CAUSE came on to be heard on the 2nd day of March, 1967, on motion of the plaintiff, by counsel, and counsel for defendant being present, to correct an order heretofore entered on March 7, 1967 in the above styled cause, and

IT APPEARING that a judgment order heretofore entered on March 7, 1967, awarding judgment for the plaintiff in the amount of $1,517.24 with interest from March 2, 1967 should not have been entered and should be vacated and

IT FURTHER APPEARING that an order should have been entered merely reciting that the plaintiff is entitled to recover the sum of $1,517.24 with leave to the plaintiff to file a motion to set aside the verdict and motion for a new trial and continuing said cause pending filing and argument on said motions, therefore it is,

ORDERED, ADJUDGED and DECREED that so much of the Order entered on March 7, 1967 awarding judgment to the plaintiff in the amount of $1,517.24 with interest from March 2, 1967, be and the same hereby is rescinded and vacated and, it is further

ORDERED, ADJUDGED and DECREED that page 116 } said Order of March 7, 1967 is hereby amended to read that the Court finds that the plaintiff is entitled to recover the sum of $1,517.24 with interest from March 2, 1967, with leave to the plaintiff to file a motion to set aside the verdict and motion for a new trial by 3/8/67 and that said cause is continued to 3/16/67 pending filing and argument on said motion.

Entered this 22nd day of March, 1967.

PAUL D. BROWN, Judge

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MEMORANDUM

FROM: THE HONORABLE PAUL D. BROWN, JUDGE

TO: Thos. J. Harrigan, Esq., Counsel for *p*laintiff
James H. Simmonds, Esq., Counsel for Defendant

The Court is of the opinion that the plaintiff's motion to set aside the verdict and for a new trial should be denied; that judgment should be entered on the finding for the plaintiff; and that counsel for the defendant should prepare an order accordingly, to be presented endorsed and noting any exception taken thereto.

Plaintiff constructed the shell of a theater building according to plans of the defendant's design which was rented by the defendant. This suit is to recover damages for defendant tenant's alleged wrongful acts, at the end of the lease in removing items belonging to the landlord-plaintiff and in damaging the premises in quitting.

Paragraph numbered 2 of the theater lease agreement of February 9, 1944 reads:

"2. Said building to be erected as aforesaid, shall include adequate plumbing and heating facilities and ducts for a cooling system and also as a part of the completion of said building, Lessor agrees to provide for the use of Lessee, adequate water and sewerage facilities and connections and connecting pipes to serve the same. Lessee agrees to equip said building at Lessee's own cost and expense, with seats, booth equipment, sound equipment, carpets and necessary furniture for the operation of a moving picture theatre, and further agrees at its own expense and as soon as the same may become available, to install the necessary equipment such as motors, compressors and the like, for a cooling system. All such equipment, *fixtures* or furniture of whatsoever kind, so installed or *brought upon the premises by the Lessee whether or not the same may be affixed to the freehold,* shall all times *remain the property of the Lessee*, subject only to Lessor's liens for rent as provided by law." (Underlining supplied.)

page 118 } The evidence showed the limited structure the plaintiff was to build. It showed that the defendant bought the "attraction signs" in the marquee, the light fixtures, etc. The Court remains of the opinion that the lease as quoted permits removal of those items. The word "fixtures" underlined in the lease quotation is new and different from equipment the lessee agreed to supply. The lease further gives the *leasee* the right to remove not only items "so installed" but also "or brought" upon the premises by the lessee, whether or not the same may be affixed to the freehold. . .".

The finding includes, among other things, sums for cutting wires too close to conduits and area junction boxes and similar damages. The Court did not find it the tenant's duty to completely re-do the parking lot. The duty was to repair to a standard involving "ordinary wear and tear" under lease paragraph 14 and "in suitable condition for the parking of automobiles" under lease paragraph 17.

Some evidence was conditionally received pending ruling on the lease. Lacking a transcript or specification of such items as to a six day non-jury trial, the Court can only say it considered that evidence concerning fixtures the defendant-tenant paid for at the time of construction and the facts and circumstances existing at the time of execution of the lease as distinguished from what the parties would like to say were their intentions.

Specific objection is again urged as to the following:

1. D-1, the K-B Lease.
2. D-3, letter of Burka of K-B to Sharlin, of 12/15/65.
3. D-21 and D-22, Tabulation of records of defendant by Nunnally, office manager in charge of accounting.
4. Evidence concerning fixtures paid for by defendant.
5. Thalhimer testimony as an expert concerning custom to remodel in theater industry upon change of tenants.
6. Thalhimer testimony that in a discussion preliminary to execution of the lease it was understood defendant was to keep what it bought.

The foregoing items, 1 through 5, were received and the Court's opinion is unchanged that they were relevant and to be received for the purpose noted at the time.

As to item 6, the Court requested that the plaintiff remind the Court later of its motion to strike the question, and answer with authority on the point. This was not done. In any

event, the Court's finding is made without the necessity of including or relying upon the item of testimony.

April 11, 1967.

PAUL D. BROWN, Judge

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* * * * *

ORDER

This cause came on to be heard on the papers formerly read, upon the motion of the plaintiff to set aside the verdict and motion for a new trial, upon the argument of counsel on said motions, and

The Court having maturely considered the same and being of the opinion that the said motions should be denied for the reasons set forth in its memorandum dated April 11, 1967, and hereby made a part of the record, it is

ADJUDGED, ORDERED and DECREED that the motions of the plaintiff to set aside the verdict and the motion for a new trial filed herein be, and the same are hereby, denied, to which action of the Court the plaintiff, by counsel, excepted; and

It is further ADJUDGED, ORDERED and DECREED that the plaintiff, M. H. Sharlin, recover of and from the defendant, Neighborhood Theatre, Inc., the sum of $1,517.24 with interest from March 2, 1967, and his costs in this behalf expended, to which action of the Court the plaintiff, by counsel, excepted.

And this judgment is final.

Entered this 28th day of April, 1967.

PAUL D. BROWN, Judge

page 120 } SEEN:

HARRIGAN AND MORRIS
By THOMAS J. HARRIGAN
Attorneys for Plaintiff

SIMMONDS, CULLER, DAMM & COLEBURN
By JOHN M. SIMMONDS
Attorneys for Defendant

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NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

TO: H. Bruce Green, Clerk,
Arlington County Courthouse,
Arlington, Virginia

TAKE NOTICE that the undersigned will apply for an appeal and writ of error from the final judgment entered on the 28th day of April, 1967, in the above styled case.

ASSIGNMENT OF ERROR

1. The Court erred in that the verdict of the Court was not based on the correct application of the law pertaining to all items in dispute in that the Court erroneously applied the law relating to fixtures when the law of contracts should have been applied since the lease specifically controlled the right to remove all items.

2. The Court erred as a matter of law in ruling that the defendants had the right to remove items such as: wiring, electric light fixtures, marquee attractions panels and signs; where such items did not fall within the specific contract classification of seats, booth equipment, sound equipment, carpets, and necessary furniture for the operation of a moving picture theatre or motors, compressors and the like for a cooling system, as set out in paragraph 2 of the lease.

page 123 } 3. The Court erred in refusing to rule that the defendant was required to surrender the premises in the same good order as when delivered as required by paragraph 14 of the lease where paragraph 1 of the addendum to the lease stated the building was completed and ready for occupancy on 30 April 1945 and the testimony of the plaintiff and defendants witnesses show that all of the disputed items were on the premises as of the date of delivery to the lessee. (R. p. 37-39; p. 712)

4. The Court erred in allowing the attorney for the defendant to cross-examine the plaintiff on the question of who paid for the disputed items, to-wit: exit lights, foyer lights, marquee lights, attraction panels and Glebe sign, and wiring,

where such items did not fall within the contractual classification of paragraph 2 of the lease allowing their removal by the lessee. (R. pp. 134-140)

5. The Court erred in allowing testimony and evidence on custom and usage in the theatre business for reason (1) that the lease controlled what items could be removed and (2) custom and usage was not proper evidence nor is it the proper test even if the law of fixtures was applicable. (R. p. 139; p. 265)

6. The Court erred in allowing the attorney for the defendant to cross-examine the plaintiff in regard to how much he agreed to repay K & B Theatres on bills they had paid representing repair work done for reasons stated in the record. (R. pp. 71-76; 80-83)

7. The Court erred on receiving the evidence of Mr. Budena on whether he ordered lighting fixtures and had them installed and whether it was intended that those fixtures remain the property of Neighborhood Theatres Inc. page 124 } where such lighting fixtures were not within the contract classification of paragraph 2 of the lease permitting their removal; and that such evidence violated the parol evidence rule and that the witness was not a party to the contract. (R. pp. 275-279)

8. The Court erred in refusing to admit into evidence exhibits B-6, B-7, and B-8 which were work sheets containing labor and material breakdowns for work done at the plaintiff's theatre which information had been supplied by the witness, Mr. Dougherty, who was supervisor on the job. (R. p. 493)

9. The Court erred in allowing counsel for defendant to cross-examine the witness, Mr. Joseph Bunker, on exhibit D-14 which was a proposal to install new heating and air-conditioning equipment for reason that such cross-examination was outside the scope of direct examination and not relevant to any lease. (R. pp. 503-506)

10. The Court erred in allowing Mr. Thalhimer to testify as to custom and usage in the theatre business where the lease controlled the rights of the parties, and further evidence on custom and usage was not relevant even if the law of fixtures was applicable. R. pp. 753-758)

11. The Court erred in allowing the witness Mr. Thalhimer to testify as to his interpretation of the rights of the parties on the ground it violated the parol evidence *role* and was contrary to the provisions in the lease and for other reasons stated in the record. (R. pp. 758-760)

12. The Court erred in allowing the witness, Mr. Thalhimer, to testify concerning the type of wiring for aisle lights where

no foundation was laid as to his expertise or knowledge concerning wiring. (R. p. 780)

page 125 } 13. The Court erred in allowing the witness Leo Snarr to testify as an expert electrician where no foundation was laid concerning his expertise and erred in refusing to strike his testimony after he admitted having no expert knowledge on the subject. (R. pp. 645-656; pp. 676)

14. The Court erred in admitting into evidence exhibit D-18 which was a list of items purchased by Neighborhood Theatres in the amount of $39,875.35 which items did not fall within the contractual classification of paragraph 2 of the lease and for other reasons stated in the record. (R. pp. 289-296)

15. The Court erred in rejecting exhibit K-1 which was an estimate prepared by the witness representing the cost of removing the lessee's air conditioning equipment left on the premises. (R. pp. 497-502)

16. The Court erred in holding that because it found that Neighborhood Theatres Inc. had paid for the wiring from the panel to the equipment in the projection booth the plaintiff could not recover for removal of the wiring where the wiring was removed contrary to the lease. (R. pp. 888; 890)

17. The Court erred in refusing to award any damage for the condition of the paint throughout the theatre where the defendant failed to carry the burden of showing he was not at fault for the damaged condition. (R. p. 891)

18. The Court erred in holding that because plaintiff had not made a formal demand on defendant to remove the evaporator condenser from the roof, the plaintiff could not recover the cost of removal of said equipment. (R. p. 891)

19. The Court erred in rejecting evidence of the replacement costs of the two "Glebe" signs which were

page 126 } removed by the defendant contrary to the provisions of paragraph 2 of the lease, and for other grounds stated in the record. (R. p. 404-416)

20. The Court erred in ruling that the defendant had the right to remove the two "Glebe" signs either under the terms of the lease or under the law of fixtures. (R. pp. 404-416)

21. The Court erred in ruling that the defendant had the right to remove the attraction panels in the marquee either under the terms of the lease or under the law of fixtures. (Memorandum Opinion of Court)

22. The Court erred in refusing to award damages for the repair of the parking lot where the evidence proved that the defendant had not left it in a suitable condition for the

parking of automobiles as required by paragraph 17 of the lease.

23. The Court erred in ruling that the defendant was not liable for the repair of the defective sidewalk where the plaintiff's evidence showed the defect resulted from the fault of the defendant and the defendant's evidence did not show they were not responsible.

24. The Court erred in failing to award damages for all items in dispute where the cost for repairing wiring, replacing fixtures, replacing damaged doors, and painting, etc. was not shown to be unreasonable.

25. The Court erred in repeatedly allowing inadmissible evidence into the record over objection as indicated in the record with the understanding that he would sort it out at the end of the case, and then relying on such evidence in denying damages requested by the plaintiff.

26. The Court erred in ruling that the cost of
page 127 } replacing new fixtures for those fixtures removed
and refusing to rule that the cost of replacement of new exit doors was not a proper standard to consider as the measure of damages.

27. The Court erred in holding that the defendant had the right to remove wiring, marquee attraction panels, marquee signs or any fixtures where the removal caused substantial damage to the building.

28. The Court erred in refusing to set aside the verdict and award a new trial for the reasons set out in the Court's memorandum dated April 11, 1967 in that:

(a) The Court erred in finding the plaintiff agreed to construct a shell of a building for reason it failed to consider paragraph 1 of the addendum to the lease, dated 1 August 1945, wherein the parties agreed that the building was completed and made ready for occupancy on the 30th day of April, 1945, and the testimony of plaintiff and defendant's witness, Mr. Pearson, that all the items in dispute were in the building prior to April 30, 1945.

(b) The Court failed to apply the law of contracts and erroneously relied on a finding that "the defendant bought the attraction signs in the marquee, the light fixtures, etc." even though the items did not fall within the contract classification permitting their removal and for further grounds that even if the law of fixtures was applicable the test is not who purchased the items in dispute.

(c) The Court erroneously found as a matter of law that the word "fixtures" in paragraph 2 of the lease was not
confined to the specific fixtures or class of fixtures

page 128 } previously enumerated in said paragraph of the lease.

(d) The Court erred in constituting that "the lease further gives the lessee the right to remove not only items 'so installed' but also 'or brought upon the premises by the lessee, whether or not the same may be affixed to the freehold where the lease did not contain such language as "items", and if properly construed no such right to remove existed.

Filed Jun. 27, 1967.

H. BRUCE GREEN, Clerk
Circuit Court, Arlington County, Va.

By: V. GREEN, Deputy Clerk

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Thereupon,

HARRY M. SHARLIN was called as a witness in his own behalf, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Harrigan:
Q. State your name, please?
A. Harry M. Sharlin.
Q. You are the plaintiff in this action?
A. Yes, I am.
The Court: Other witnesses are not excused.
By Mr. Harrigan:
Q. You are the plaintiff in this action?
A. Yes, I am.
Q. I show you this lease that's been previously admitted into evidence as Plaintiff's Number 1. Is this the lease that you entered into with Neighborhood Theaters, Incorporated?
A. Yes, it is.
Q. I show you—

Harry M. Sharlin

The Court: No need to identify them if they are agreed.

By Mr. Harrigan:

page 36 } Q. Pursuant to that lease, did there come a time when you built a building or had a building built known as the Glebe Theater?

A. Yes, sir.

Q. And the plans and specifications, were they the plans or part of the plans and specifications that were used to—

A. Yes.

Mr. Simmonds: I'd like that question—He asked if they are plans or part of the plans—

The Court: Do you go against the stipulations that those were the plans and specs?

Mr. Harrigan: Yes.

The Court: I will put it this way: I have put them in evidence as the plans and specifications. Is it plaintiff's position there were more?

The Witness: These are the plans, but there may have been addendum changes. These are the original first plans for the building.

Mr. Simmonds: If your Honor please, it still leaves a little confusion. When he says the "original first plans," I'd like to know what we are working from?

Mr. Harrigan: I don't think we need to work from the plans myself.

By Mr. Harrigan:

Q. Mr. Sharlin, you did build a building or had a building built?

A. Yes.

page 37 } Q. Where was that building?

A. Glebe Road off Lee Highway.

Q. Calling your attention to the addendum to the lease, dated 1 August, do you recall when you turned over that building to Neighborhood Theaters?

A. April. 1945, I believe.

The Court: I think it speaks for itself. 30 April 1945, was it not?

The Witness: Yes, that is right.

By Mr. Harrigan:

Q. At that time what was the condition of the building?

Harry M. Sharlin

A. It was a new building, newly constructed.

Q. Did it have fixtures in it, lighting fixtures?

A. Everything was in place for the opening, yes, all lighting, everything required by the County and the State.

Q. All the wiring?

A. All the wiring, yes.

Q. Did it have a marquee?

A. Yes.

Q. What did it have on the marquee?

A. Well it was a complete marquee, it was operable signs.

Q. When you say "signs" what are you talking about?

A. Well, the identification of the theater.

page 38 } Q. The Glebe sign?

A. Yes. The attractions.

Q. How many Glebe signs were there?

A. There were two Glebe signs. I don't know if there's one on the front, and one on either side. There may have been three. I am not sure. There are two that I am certain of.

Q. And panels, were there panels in the sign, what they call attraction panels?

A. Yes, the marquee was complete. There were three sides to the marquee.

Q. Did they have any exit signs in the building?

A. Yes, wherever necessary for the Code, all exits, all doorways.

Q. In relation to exit signs, what type of exit signs were they?

A. In the majority, they were recessed, such as the one shown in Court here, with the exception of two surface-mount which showed outside doors right off the lobby.

Q. When you refer to the one shown in Court, you refer to the one on the wall?

A. Yes, the recess that goes into the—during construction the box for this type of fixture is put in as the construction is going up.

The Court: Are you saying that others beyond these two were all recessed?

The Witness: All were recessed with the exceppage 39 } tion of two which were called—They are just mounted to the ceiling. These are put in when the plaster is done but are necessary and before completion of the building,—

Harry M. Sharlin

By Mr. Harrigan:

Q. Were there any lights in the marquee?

A. Yes, the marquee had a number of recessed lights. Also fixtures that are put in prior to plastering and during the rough construction of the marquee. This is necessary before plastering.

Mr. Simmonds: Your Honor, may I interrupt just a moment? Do I understand that this testimony is to describe the building as it existed on April 30, rather than the parts of it that you put in and paid for?

Mr. Harrigan: As of April 30th the testimony is—

Mr. Simmonds: You are describing the building regardless of who put in the equipment and paid for it, is that correct-

Mr. Harrigan: That is right.

The Witness: These fixtures Mr. Harrigan asked about were installed in the building during construction.

By Mr. Harrigan:

Q. And did there come a time when Neighborhood Theaters did in fact move into the premises and start operating a motion picture theater?

A. Yes.

Q. How long did they stay on the premises?

A. Twenty years.

page 40 } Q. The expiration of the entire lease?

A. Entire lease, right to the last month.

Q. Did you ever have occasion to complain to them during the period of time as to the condition of the premises?

A. Well, I did complain about the lot, the parking area, the condition of it. The few times that I was called to the theater were because of the water seepage in on the right side of the building, which I had corrected. The number of times I went, I went as a patron at night and just didn't see anything particularly—wasn't looking for anything.

Q. Was there a parking lot to be used by the theater people?

A. Yes, the original paved area—I don't have the plat,—if I may—I believe it is number six and seven. If you have a plat I can use—the original paved area that was ready for the opening of the theater—

Mr. Harrigan: Let the record show he is looking at the plat attached to Exhibit P-1.

Harry M. Sharlin

The Witness: This one is not marked either, do you have one that shows the lots?

The Court: Do they show on that one?

The Witness: Well I can show the two lots facing Glebe Road were not paved and the rest was paved with the exception of a small section back here. (indicating) There were one or two trees which we left in originally because there was some gardening being done by the neighbors. Eventually that stopped, but there was a small portion of the
page 41 } back area. With that exception everything was paved. I believe it is lot six and seven on the front.

Q. Would you show to the Court where lot six and seven purport to be on that particular plot?

A. (indicating) I believe this is six and seven, if I am not mistaken and this is lot one, this section here at the tree was not paved. The rest of all of this was paved.

The Court: Keep your voice up.

Mr. Simmonds: Excuse me just a minute. Mr. Sharlin, would you point out to me where you said was not paved at the back?

The Witness: Yes, this section was not paved originally. This was asphalted, rather not asphalted, this was hard gravel. This section here was not paved, parking, one, that's the tree. (indicating)

Mr. Simmonds: That's in the northwest corner of the property?

The Witness: This is west. This is north here, it would be completely west—

The Court: Take Glebe Road as running north and south.

The Witness: It would be the western end to the alley.

The Court: Lee Highway is east and west.

The Witness: It would be west and northwest, the northwest section, the portion of it.

Mr. Simmonds: Did you say how that was paved?

The Witness: It wasn't paved.

page 42 } Mr. Simmonds: Excepting that.

The Witness: This was all asphalt, per the requirements necessary.

By Mr. Harrigan:

Q. Well, that section which you had identified, sections six and seven, which would be the two lots in the front and to the side of the theater?

Harry M. Sharlin

A. Yes. I didn't hear your question. I'm sorry.
Q. I haven't asked it.
A. Oh.
Q. Did there come a time when Neighborhood Theaters did, in fact, take over this six and seven and pave it?
A. Yes, they asked permission to pave it. The exact date slips my mind, it was sometime in the fifties. 1950's and I gave them permission to use it with the understanding that if anytime I wanted to build, they would have to—because this was not part of the lease—if I wanted to build they would have to relinquish this. Of course this was agreed on. I let them pave it and use it and there was no charge or anything for it.
Q. During the term did you make any repairs to the property?
A. Yes, I put a new roof on and prior to that the complaints of the water leaking into the building—I had that waterproofed, and the reason that I was given for the leakage was the parking area—it carried the water into the building instead of away from the building which now pres-
page 43 } sently exists, and the water was seeping down between the asphalt and the building, and of course into the auditorium, and I had a lot of complaints with water leaking into the storage area where they kept the candies and popcorn, which was the northwest corner of the front of the building, and this was due to advice that in paving the front, lots six and seven they did not pave—

Mr. Simmonds: Just a minute, your Honor. You said upon advice you were told that.
The Witness: I had had a waterproofing man and this was the reason given for why the water was seeping into the building.
Mr. Simmonds: I object.
The Court: Sustained.

By Mr. Harrigan:
Q. In any event sections six and seven were paved sometime back?
A. They were not paved right to the building, it was about eighteen inches or two feet from the building, which remained in the original state, which was gravel. And water was hitting this hard gravel and running around it to the corner which had broken down and the water was seeping in.
Q. Would that be running around toward the front of the building?

Harry M. Sharlin

A. Front of the building and water was seeping into this corner of the building, you could see it come in.

Q. Did you observe this condition yourself?

A. It's—

page 44 } The Court: I don't understand the location.

The Witness: If I may?

The Court: Was it fronting on Glebe Road?

The Witness: Yes, fronting Glebe Road, right here in front of the lobby, on the northwest section.

Mr. Harrigan: Will you show the Court the location of where this break in the paving was on sections six and seven?

The Witness: Yes, (indicating) this is the breakage here.

The Court: Counsel can't see. Don't use the point of the pen.

The Witness: Right in this corner, this is the area. This was not paved.

The Court: Don't mark it.

The Witness: No. This was not paved here. This is where it was hitting here and rushing—we had all of it repaired and waterproofed, and I got complaints about leakage from the roof. Of course we had a guaranty bond and the bond called for a certain type of roofing. We put a complete new roof on which, of course I paid for and naturally it was in my lease.

By Mr. Harrigan:

Q. You are responsible for the roof in the construction of the building?

A. Yes.

page 45 } Q. Calling your attention to just a short time, some months prior to the expiration of the lease, did you have occasion to get in touch with the Neighborhood people as to a renewal of the lease?

A. Yes, I wrote them a letter, and I had correspondence and a telephone conversation with them. All during the lease I had a number of offers which of course were not—couldn't be accepted, but during the last two years or the last year, I had a number of offers that were very interesting, but I felt an obligation to the present tenant and I wrote and they came up to visit, and I showed them the proposition I had, all they had to do was meet it and they could have continued on—but they didn't offer to, that was it. Their offer was not as good and of course I then gave them, I had a number of calls from Mr. *Thalheimer* in Richmond, changing the offers.

Harry M. Sharlin

I would say there were at least four calls and none of them were of any—met the offers that I had.

Q. How long was this before the lease was due to expire?

A. Well, this came up to the last sixty days or so.

Q. How long—

A. It was a year.

Mr. Simmonds: I didn't understand the question and answer, read that back.

Mr. Harrigan: The question was, "How long before the lease was to expire did these negotiations start?"

The Witness: Within a year, within the last year of the lease.

The Court: Is the *Thalheimer* that you referred page 46 } to Neighborhood Theaters?

The Witness: Mr. *Thalheimer* Senior, yes is Neighborhood Theaters.

By Mr. Harrigan:

Q. In any event after these various conversations—

Mr. Simmonds: If your Honor please, I'd rather the witness do the testifying rather than have Mr. *Harigan* testify or rephrase what he thought the witness said or to lead him into a new area.

Mr. Harrigan: I will rephrase it.

The Court: Proceed.

By Mr. Harrigan:

Q. Now, after these conversations that you just discussed, what transpired within sixty days before the lease was up?

A. Well, I gave them thirty days in which to give me a very definite answer, and during that thirty days I still didn't get the offer that was necessary and I advised them that I had accepted another tenant, that I had gone in to another lease.

Q. And did there come a time when the Neighborhood Theater people did in fact move out of the premises?

A. Yes.

Q. When was that?

A. I sent them a letter to complete their tenancy in accordance with the lease, and I had a phone call—

The Court: The question is, when did they move out?

Harry M. Sharlin

page 47 } The Witness: They moved out April of 1965, by the last day or two days before the end of April.

By Mr. Harrigan:

Q. End of April, last two days?

A. Yes.

Q. Did you have occasion to go into the theater shortly after they had, just prior to their moving out or just shortly after they had moved out?

A. Yes, I did. I had a visit from one of the K and B people who wanted to go into the theater and make some measurements for their work and he came to my office and said he had been run out of the building by Mr. Wade Pearson, the district manager, so I got in my car, with him, and went over to the theater and Mr. Pearson was there. There were a number of workmen around—I asked him what the idea was and he just shrugged and I reminded him of our lease, I said I didn't want any problems and that was it and I left. But this was when the work was going on. As I left the theater, I noticed some of the work going on and I cautioned him.

Q. When you say work going on what are you referring to, work his men were doing?

A. Yes, I saw the electrical contractors. I had already seen—this was part of the work being done—one of the fixtures. Of course I noticed the lobby fixtures had been taken out, and I noticed one of the exit-boxes had been taken out of the wall or the interior of it, I didn't get up and page 48 } inspect it, but I reminded him, Mr. Pearson—of the lease. That was all, and I left. I wasn't looking for any problems.

Q. Alright. When you say that you cautioned him and reminded him of the lease, did he make any response?

A. No response at all.

Q. None at all?

A. As a matter of fact I think he turned his back and walked away from me.

Q. Did there come a time when you went down after they had moved out?

A. Yes, I did. I checked on the day they left the building and I went through it and I was shocked at what I had seen.

Q. When was this?

A. This was the day following their completely leaving the building.

Q. And around what date was that?

Harry M. Sharlin

A. This thing—it was either the last, or the day before, the last day of April.

Mr. Simmonds: Excuse me, I didn't get the answer.

The Witness: It was either the last day of April or two days before the end of April. I am not certain of the exact date. I believe it was two days before the end of April. 65.

By Mr. Harrigan:

Q. In any event, you did go to the premises?

page 49 } A. Yes, I did.

Mr. Simmonds: If your Honor please, I don't like to interrupt him, but Mr. Harrigan gets in the habit of asking leading questions and you never can tell—

The Court: The immediate one was, "You did go to the premises?" Now the witness had given on his own before. That is overruled.

The Witness: There were—

By Mr. Harrigan:

Q. Wait a minute. On that occasion after they had moved out and you went to the premise and you arrived there, describe to the Court the condition of the marquee.

Mr. Simmonds: If your Honor please, I am anxious to pin-point whether what he is talking about is the occasion one or two days before the end of April?

The Court: I take it you refer to April 28 or the 30th, the witness doesn't know which?

Mr. Simmonds: Either one of those days, this is what you are referring to now?

The Court: The condition on the tenants leaving is the line of question, is my understanding. The immediate question is what was the condition of the marquee?

The Witness: The marquee,—I walked through the theater —

By Mr. Harrigan:

page 50 } Q. Lets take them one at a time. When you arrived there on that particular occasion, had the defendants moved out?

A. There was a door open. I went into the building first. I didn't go out to the marquee. I went into the building.

Q. What door was open?

Harry M. Sharlin

A. One of the side exit doors.

Q. Was anybody inside?

A. No one was inside at the time. The theater was dark. There were no lights. So I immediately left and I called the K and B Theater and told them the place was empty.

Q. What time of day was this?

A. This was during the afternoon, early afternoon, and I asked—told them the place was empty and they ought to get some people over there and secure it if they could. The next day I went over, there with some lights strung up. Temporary lights. I could look around and I was shocked at what I saw and—

Mr. Simmonds: If your Honor please, I object to the witness characterizing what he saw in such adjectives. He can testify to what he saw—not characterize it.

The Witness: How do you want me to—

The Court: We don't have a jury, I understand. The objection is sustained.

page 51 } The Witness: I looked around the building and other than what I call very poor housekeeping, it appeared to me that either, whether there was malicious, deliberate or no intent at all, that the damage that I saw kind of shocked me. I was sure surprised and I left the building immediately.

The Court: The question is what was the condition of the marquee? You have gotten right far from it.

Mr. Harrigan: I will withdraw that, answer these questions.

By Mr. Harrigan:

Q. Did you have occasion to observe the locations of the electrical fixtures and the exit signs?

A. Yes, I looked around. Every exit sign had been ripped from the walls—when I say "ripped" there was nothing there except a small frame. There was no—none of the parts of the fixture were existing. I didn't climb up on a ladder and examine the interior of it. I walked through the lobby. All fixtures had been taken off.

Q. When you say "all fixtures" what are you talking about?

A. All lighting fixtures, all fixtures, I noticed the side of the wall where they had Coming Attraction signs, these were ripped out of the walls, and these I could see where the wire and the lights had been closely clipped. That's the only thing I could see up close and I went upstairs into the supposedly

lounge, which was then the office, and the partitions had not been taken off the walls; they were pulled off the walls. Plaster was pulled with them. There were floures-
page 52 } cent fixtures at the time they had the office. These were pulled off, because the lead anchors or whatever they use to secure them—

Mr. Simmonds: The plaster holes were—just a minute, your Honor I don't see—

The Court: Just a minute, objection is given.

Mr. Simmonds: Your Honor, I object to Mr. Sharlin's testimony that they had been pulled out of the wall and ripped out of the wall when all he saw was the condition that existed after he got there, and I don't think he is entitled to explain that.

The Witness: I have to assume that—

Mr. Simmonds: I move—

The Court: Witness is instructed this way. Testimony is proper as to *donditions* seen as distinguished from conclusions as to how they got that way, unless you are an expert witness.

The Witness: Yes.

The Court: Therefore, you may describe what you saw, but not how you think it occurred.

By Mr. Harrigan:

Q. Let me ask you, Mr. Sharlin, what's your business?

A. Lighting is part of my business, lighting fixtures and I understand the installation of them and how they are mounted and how taken off a ceiling or a wall. I have been in the business thirty-five years.

Q. How long have you been in the lighting fixture business?

A. About thirty-five years.

page 53 } Q. Have you had occasion to put them on and take them off?

A. I myself, yes, when I was younger.

Q. Where is your business located?

A. On Lee Highway, Arlington.

Mr. Harrigan: I would submit Mr. Sharlin as an expert on fixtures, your Honor, and their removal?

Mr. Simmonds: And partitions, also?

The Court: What he has offered on these light fixtures, the Virginia definition is pretty broad and it sounds like he is pretty qualified by the Virginia definition. "One who knows

more than the ordinary person" is the practical—It is accepted.

The Witness: The lighting fixtures of this particular type, fluorescent, have to be mounted to secure and all I could see were holes in the plaster in the ends and sides of the fixtures, so I would assume they weren't taken out that they were pulled off after disconnected which would break plaster.

By Mr. Harrigan:

Q. How are they supposed to be taken out?

A. Unscrewed, there are screws that fit into the lead anchor. You unscrew after disconnecting it from the box.

Q. How do you disconnect the wires from the fixtures?

A. There is a wire nut or a safety feature, either tape or a wire nut is usually used, it is unscrewed and the wires are just unraveled and you leave the wires extended

page 54 } out of the box. Normally, this is the procedure.

Q. With the wires extending out of the box?

A. The ones I saw were not outside the box. They were cut in as far as you could get a pliers, which would be approximately an inch. You couldn't use it to rehang. You couldn't get your hands up to it.

Q. Now, throughout the building how many electrical fixtures were left in the building?

A. There was a light in the boiler room, some receptacles that I knew.

Q. No exit lights left?

A. None whatsoever.

Q. Any frames for exit lights?

A. There was a box—the original box was left in, that would have to be chopped out, I suppose, I don't know. It couldn't be removed.

Q. The actual lighting fixtures themselves also were hanging in the lobby and various other places, any of those in the building?

A. All taken out. The auditorium fixtures were the only ones that I saw that stayed, and of course that's a high ceiling. Forty-some feet.

Q. The ones way up in the ceiling?

A. Yes. They were still there.

Q. Now, this lounge area, what was that originally?

A. It was a lounge. The second floor ladies and mens room and a lounge. Whatever a lounge is used for, it is furniture and carpeting.

page 55 } Q. Did there come a time that Neighborhood Theaters changed that lounge?

A. Yes.

Q. In what fashion did they change it?

A. They put offices in.

Q. Do you know approximately when that was?

A. No, I don't. I happened to visit one day and I saw them and that's the first I knew. I was sure surprised and I just mentioned it, but I made no objection.

Q. In putting offices in did this entail any partition work?

A. Yes, they had an outer partition to a large office and another partition for an office for Mr. Pearson.

Q. You had seen where these partitions were up there?

A. Yes.

Q. The day you went up after they had moved out what, if anything, did you observe about this office area?

A. Well, the partitions had been removed. Of course all the plaster was broken where they had been in contact with the walls. The window sills, some of them were—everything was filthy dirty. The paint had peeled on all the woodwork. I'd just say it was very bad housekeeping. Other than the plaster, there was no damage to the place itself, other than dirty and lack of paint.

Q. Did you have occasion to walk through the theater?

A. Oh, yes.

Q. Did you have occasion to look at the various

page 56 } exit doors around the theater?

A. Well, yes, the doors—

Mr. Simmonds: Is this the same occasion you are talking about?

Mr. Harrigan: Any occasion.

By Mr. Harrigan:

Q. Same occasion?

A. No, it is not. It's the next day.

Q. When did you go down to look at the doors?

A. The following day, after what I had seen, I contacted someone who had drawn the lease who knows theaters, and I asked him to take a trip with me. It was the lunch hour, we went through the building and I asked what I should do with the condition of it. I just wanted the advice. The doors were swinging wide-open, they couldn't be—at the time the K and B hadn't probably gotten anyone there yet. The doors had been opened. Anybody can come in. Kids were running around.

Q. What was the condition of the doors?

Harry M. Sharlin

A. They were completely inoperable is the only thing I can say, through neglect and/or damage.

Q. How were they damaged?

A. Well, the condition of them was just—I am not an expert, but, well, paint I could see, but they—

Q. Would they close?

A. The back doors had been as if they had been hit with a blunt instrument. There were big marks all over page 57 } them. Could have been bricks, rocks, what the kids throw was what it was. They were in bad shape.

Q. Would they close?

A. They would not close when we tried to close them.

Q. Alright, did you have occasion—

A. I am sorry, they closed, but you couldn't lock them. We closed them, but they couldn't be locked.

Q. Did you have occasion to go out after Neighborhood had left to look at the marquee?

A. Well, that same day we looked at the marquee and there was nothing but the eye-beams from the building, that is the steel, that had been, from where I stood on the ground. Everything had been taken out or ripped out, it appeared.

Q. When you say "everything" what are you referring to?

A. Well, all the fixtures were taken out of that marquee.

Q. What type of fixtures?

A. Recessed lighting fixtures.

Q. Under the marquee?

A. Under the marquee.

Q. How many of those?

A. Twelve or fifteen I know.

Q. How were they put in under there?

A. It is a recessed fixture. They go in during construction of the marquee—it can, or the light itself goes up. page 58 } Has a plaster frame that goes in first, and when they plaster they plaster this and then your light can set into it. These had all been taken out and the plaster was all jagged and open—They are of no value, they have been there so long. I couldn't understand it. And everything was exposed. Of course there was plaster underneath, but you could see—

Q. What about the side of the marquee?

A. Everything was removed. It was completely—

Q. What is generally on the side of the marquee?

A. Well, there are attraction panels, glass usually, lights upon them. And they put their letters on top of them.

Harry M. Sharlin

Q. How are they attached to the marquee?

A. I suppose normally I see—they are bolted, what I could see—during the construction.

Q. Bolted on the marquee?

A. Yes, to the eye-beams, the steel.

Q. These are the panels where they take those letters and then hang them and so on?

A. Yes.

Q. And the letters come off and on?

A. That is right.

Q. Alright, were there any signs in the marquee?

A. No.

Q. That you saw?

page 59 } A. There was nothing there. It was all open.

Q. Just prior to Neighborhood moving out were there signs up?

A. Yes.

Q. What sign was that?

A. You are talking about a sign, it was the Glebe sign.

Q. How many of those?

A. Two, that I know of, one on either side of the marquee.

Q. Prior to the Neighborhood moving, did you have occasion to look at this marquee, Glebe sign, the attraction panels, etc.?

A. Prior to their moving out?

Q. Prior to their moving out?

A. I wouldn't have any reason to, but I go by there a lot. I did see it, yes.

Q. To your knowledge was it they were working properly, the lights?

A. Yes, that I know of.

Q. In the lease, they had a right to take out certain items. One of them was the seats, now did they take out their seats?

A. Yes, they did.

Q. Do the seats have a light on them?

A. There is an aisle light attached to the seat, every number of rows. This is fed—there is a conduit comes up through the floor and a box mounts on this conduit and this is where they feed for the aisle light.

Q. Did they take out the seats?

page 60 } A. Yes, the seats were taken out.

Q. How did they disconnect or unhook the wires from these aisle lights?

A. They didn't disconnect by unscrewing the screws attached to the device. The wire was cut down into the box.

Harry M. Sharlin

Q. When you say the box, are you referring to the conduit?
A. The conduit box.
Q. They weren't unscrewed?
A. No.
Q. How much wire was left sticking out of that conduit?
A. Well, you couldn't grab a hold of it. You could put your fingers on it, but you couldn't work with it.
Q. Was that rewired, those seats?
A. It necessitated rewiring, pulling new wires through all the conduits.
Q. In your business—

The Court: I don't understand, I realize counsel is *goint* to cross-examine later? As I understand there is a light fixture here on the aisle seat. There is thereafter a box and then a conduit to some master panel, is that correct?
The Witness: Yes.
The Court: Please don't tell me your way, sir, because I did not understand that before. Do it my way.
The Witness: Yes.
page 61 } The Court: Light fixture—some short line to—
The Witness: Conduit.
The Court: No, you called it a box, and then a conduit from the box to the master panel.
The Witness: Right.
The Court: Are you saying the wires were cut short between the light fixture and the box or between the box and the conduit?
The Witness: In the box. The box that is on the seat. The light sets on the box.
The Court: Then you are saying it was cut between the box and conduit?
The Witness: No, between the light and the box.
The Court: In other words, what I am trying to get at—
The Witness: The light sits on the box and the box is attached to—
The Court: Your answering a question I haven't asked you, sir.
The Witness: Oh, I am sorry.
The Court: Do I understand you to say that the wires were cut so close to the conduit that they had to be rewired all the way back to the main panel?
The Witness: Yes.
The Court: Just so I understand what you are saying.
The Witness: Yes.

Harry M. Sharlin

page 62 } The Court: Next question.
Mr. Harrigan: Just so we clear that up—
The Court: He did clear it up.

By Mr. Harrigan:
Q. There is a light and where is that in relation to the seat, or where was it?
A. The light is attached to the seat, there is a box on the seat.
Q. There is a box on the seat?
A. This is the box that sets on the conduit. I am trying to remember. The new seats have different lines.
Q. I want to know about the old ones.
A. The light is attached to the conduit with a device. Now, the wire was cut down—
Q. Where is this conduit in relation—
A. The conduit comes up out of the floor and it travels under the conduit to the service, wherever the service is.
Q. And where it comes out of the floor, that travels back to the main box or switch, whatever you want to call it, is that right?
A. Yes.
Q. In relation to where the conduit comes up out of the floor where were the wires cut?
A. Into, back to the conduit. Maybe a half inch.
Q. This is a conduit (indicating)?
page 63 } A. Maybe a half inch, yes.
Q. You testified they did remove the seats. Did they have some booth equipment in the theater?
A. Yes.
Q. Did they remove that?
A. Yes, they did.
Q. And their sound equipment, did they remove that?
A. Yes.
Q. And their furniture, carpeting and necessary furniture?
A. Yes.
Q. They removed all of that?
A. Yes.
Q. What about the screen?
A. That was removed too, but I assume that that was part of the equipment.
Q. Sound equipment. Now, in the booth, what damage other than—let me put it this way. Did you observe any?
A. There was no damage except they removed the exhaust fan from the top, the roof of the booth, which they should not

have done. This pulls the exhaust, the fumes out of the booth.

Q. That was removed?

A. Yes.

Q. That fan, where was that in relation to the—

page 64 } A. Well, it has duct work from the booth itself, close to the booth—it is outside the booth, not inside. It removes the fumes.

The Court: Counsel, I constitutionally am opposed to suggest to Counsel how to try a case. But in this particular situation, in fact this morning Mr. Simmonds said or made an objection, until he can clear it, what date your client was referring to. He also asked you, Mr. Harrigan, "then your client isn't saying who put the various items in?" And you said, "yes."

Mr. Harrigan: I know it your Honor.

The Court: So what you are giving me, as I follow you, is what things are removed; but I have no evidence of whether they were put in, what Mr. Simmonds calls, the shell of the building, or not. If I am to remember that for later on it's a little hard. What I am suggesting, when you cover different items, if you can ask your client if he knows or maybe by other witnesses—if as you go along if he knows whether that was put up by him or later by Neighborhood, I can make a little clearer set of notes as I go along.

Mr. Harrigan: What I am doing at this point—I am going over the general condition of the items. Then I intended to go back through witnesses.

The Court: As to whether he had put them in or not?

Mr. Harrigan: Whether he put them in, the type of work done to repair them, and replace them and so forth.

page 65 } The Court: That further testimony wouldn't repeat this though?

Mr. Harrigan: No.

The Court: All right.

Mr. Harrigan: Further testimony just crosses or calls back.

By Mr. Harrigan:

Q. Now, on this blower, was that part of the building?

A. Yes.

Q. Was there anything else done in the projection booth that you know of?

A. There are frames, as they call them, which is a part of the booth in construction, which were taken out. Four of them, they were removed. Window frames.

Q. Explain to the Court what they are.

A. Well, the projection equipment throws the picture through them, in other words this is the opening for projecting the picture, which is part of the wall.

Q. Did you have a new blower put in?

A. Yes.

Q. What about these frames, did you have them repaired?

A. They were reinstalled.

Q. Who repaired those?

A. I think they were done by Hamilton and Spiegel.

Q. What was the cost of those repairs?

page 66 } A. I don't remember the figure.

Q. I show you this bill, is that the bill or copy of the bill they sent you?

A. Yes.

Mr. Harrigan: Do you have copies of the bills up here which I can mark?

The Court: Off the record.

(discussion off the record)

By Mr. Harrigan:

Q. Did Hamilton and Spiegel repair this, furnish a new blower and put in these new frames?

A. To the best of my knowledge, yes.

Q. What was the cost of their bill?

A. Five hundred and some dollars.

Q. Is that a copy of the bill?

A. $487.

Q. Was that paid?

Mr. Simmonds: If your Honor please—

The Witness: To the best of my knowledge.

Mr. Simmonds: What did you say, "to the best of your knowledge?"

The Witness: Yes.

Mr. Simmonds: If your Honor please, I don't object to letting Mr. Sharlin, unless he can testify he paid

page 67 } for it. He is going far-a-field in testifying to that bill.

The Witness: The bill is paid.

The Court: Just a minute, Mr. Sharlin.

Mr. Simmonds: I say he is testifying right far-a-field when he states, "this seems to be the bill" and the bill is somebody

else's and he says it was paid. And I don't think this testimony is admissible unless it was paid by Mr. Sharlin and I move it be stricken.

The Court: I understood it to be said it was paid. This is a sole ownership building. I haven't seen the paper. It hasn't been marked for identification or anything. But I take the testimony to be the bill is something over $500; that it was paid. In other words, "did you pay the bill?" The answer is, "it was paid."

Mr. Simmonds: The bill is made out to K and B Theaters.

The Court: I see. I guess I can't rule on that until the paper is offered. I think before we get into a new line of questions we better take the lunch recess now rather than break in the middle of a question or the middle of an answer. We will continue at 1:30, gentlemen.

(Whereupon, 12:24 the case was recessed to reconvene at 1:30 the same day.)

page 68 } AFTERNOON SESSION

The Court: The Court is going to recess from 2:30 to 3:30. Mr. Wirtz' funeral is this afternoon. I did not know until lunch time he had died.

Mr. Harrigan: May we release Mr. Pratt until tomorrow?

The Court: If you don't expect to call him today. I am sure Mr. Simmonds will acquiesce.

Thereupon

HARRY SHARLIN a witness, previously sworn, resumed his testimony further as follows:

The Court: Next question.

Mr. Simmonds: Your Honor, had you ruled on my objection to his testimony about that bill from Spiegel-Hamilton?

The Court: I will overrule the objection. What I observe is, I am satisfied he has identified it as a bill in connection with the repair which he described. He was asked, was it paid. He said it was. And at this point it is not offered in evidence, and I figure you are between cross examination and any other witnesses—you will have an opportunity to raise the point later on.

page 69 } Mr. Simmonds: I would like to raise the point

because I feel there are some other—I thought he was going to offer the papers in evidence but he did not.

The Court: If I have misunderstood his statement that it was paid and that it was for this work, you can develop that on cross and renew the objection.

DIRECT EXAMINATION (continued)

By Mr. Harrigan:

Q. Mr. Sharlin, getting back to what you observed after the Neighborhood people had moved out, did you observe any other items in the building that were taken out that were part of the building?

A. Well, the fans in the rest rooms were taken out. I noticed those. At this moment that is about all I can remember.

Q. Now, these fixtures, electrical fixtures, the lighting that you have testified about, were replaced?

A. Yes.

Q. What company were those fixtures replaced by?

A. Dominion Electric Supply, Dominion Lighting.

Q. Is that your organization?

A. Yes, it is.

Q. Now, the electrical wiring, was that repaired?

page 70 } A. Yes.

Q. What company repaired that?

A. Souder Electric Company, The L. T. Souder Electric Company.

Q. Was the parking lot repaired?

A. Yes, it was.

Q. Which company repaired that?

A. That was The Gly Corporation.

Q. The putting of the walls in condition for decorating, was that done?

A. Yes, it was.

Q. Which company did that?

A. Sellers. I believe it was Sellers. I am not sure. He did a lot of the decorating—No, plastering. I would have to refresh my memory for this, Henderson, I believe.

Q. Was the marquee repaired?

A. Yes, it was.

Q. Which company did that?

A. Maryland Sign Company.

Q. This condenser that was on the roof, was that removed?

A. Yes, it was.

Harry M. Sharlin

Q. Who removed that?
A. United Industrial or United Industries, either one.

page 71 } Mr. Harrigan: That is all I have at this moment from this witness, your Honor.

CROSS EXAMINATION

By Mr. Simmonds:
Q. Mr. Sharlin, you mentioned just now the various contractors who did certain work on the building after the Neighborhood had vacated. You did not pay any of those bills, yourself, did you?
A. No, I did not pay those. The K & B Theater paid them.
Q. And all of those bills were made to K & B, were they not?
A. Yes, under the arrangement I had with them, yes.
Q. And you have not made any payment whatsoever toward, to any of the contractors, and you have not made any cash payments to K & B in reimbursement, have you?

Mr. Harrigan: Your Honor, on this point at this time I would like to interpose an objection on the question of who paid the bills. I feel that that particular question is not relevant in any way. The issue is whether the damage was in fact done, whether it was repaired and if someone else paid the bills, that is not relevant in this proceeding and I think the case authority indicates that the Neighborhood people would be responsible even if the work had
page 72 } not been done and case authority also states that even if someone else pays the bills, this does not negate the damage or the measure of damage. The measure of *damge* is the cost of putting the premises in their required condition under the covenant in the lease.

Mr. Simmonds: Now, if your Honor please, while I concede that the measure of damage is what it costs to put the premises in the condition in which they were supposed to be under the covenants of the lease in this particular case it seems to me that it would be highly improper not to admit the relations that existed between K & B and the landlord.

As I pointed out in my opening argument on which we will put on evidence as to the custom and usage in the theater motion picture industry of what a new motion picture tenant does for the building as a customary thing, and secondly, when we asked in the interrogatories for specifications as to

how thirty-nine thousand odd dollars they were suggesting was arrived at, the answer came back with these bills that were made to K & B in each and every instance.

Now the measure of damage is not what K & B paid, because they might have well gone 'way beyond what was necessary to put the property in the condition that the covenants required Neighborhood to leave them. As a matter of fact, they obviously did, and admittedly did, because page 73 } they did all this redecorating and renovating, put in a new system and all of that. All this having been done, and having been submitted as the particulars of their demand here, the K & B bills, we are certainly entitled to inquire into those bills and to how much of it K & B are paying and how much Mr. Sharlin is paying. And for us to not be able to do that, it could well be that we end up by paying a great deal more than is required under the terms of the Lease. And, apparently, by reason of having presented these bills with the interrogatories, they felt they were relevant; and if your Honor feels that any of this work and the charges to K & B are relevant, certainly we have this right to determine how much of these bills were being paid by K & B and how much by Sharlin.

Mr. Harrigan: Your Honor, on that point, he certainly has the right to inquire into the proper measure of damages in this particular case; but the fact of who made the arrangements and who the bills were billed to, I certainly believe does not help the Court.

The same type of situation has been ruled on in 80 ALR, 2d, page 1005, on this problem. It quotes many cases. One of them says: "In an action brought after expiration of the terms of lease to recover damages for breach of covenant to keep the premises in repair where it appeared that prior to the expiration of the defendant's term the prem- page 74 } ises had "been let to another who had subsequently and after the defendant's term had expired, made, at its own expense, certain repairs upon the buildings which were sufficient to put them in good condition, the Court said: 'The measure of damages used by the Referee, namely the cost of putting the demised premises into the state of repair, contemplated by the broken covenant, was proper and the damages were not affected by the subsequent act of the new tenant in repairing the building.' "

And the *Vaughan* v. *Mayo Milling* case, 127 Virginia, on this point, as to the measure of damages, it says, "Where the action is brought after the expiration of the term, the

measure of damages is the cost of putting the premises in the required state of repair, even though the repairs have not been made by the landlord, and he does not intend to make them."

Now, based on this authority, I fail to see how it would be material, the fact that the bills were billed to K & B, and K & B did pay the contractors, and then, to go into what arrangement he had to pay back K & B. I think the sole issue comes down to what was, in fact, the damage and what did it cost to repair that damage; and who paid the bill is not relevant.

Mr. Simmonds: If your Honor please, as I pointed out to you, I agree with the general rule of law that the measure of damages is what it would cost to put the prop-
page 75 } erty in the condition that Neighborhood was required to put it in, not what K & B wanted it.

Now, and I do not say it is conclusive as to the measure of damages, the amount that Sharlin is to pay or the amount K & B is to pay, but certainly it seems to me that it has a very substantial evidentiary value when there is an arm's-length transaction between Sharlin and K & B with respect to taking over a theater and we find K & B paying substantially all the bills; and an oral agreement between Sharlin and K & B as to which ones are chargeable to him, that that is the measure of damages because, obviously, K & B is not going to pay for any more than it had to pay for.

It seems to me that it is certainly relevant, certainly very material though not conclusive, and it certainly, as I say, is convincing evidence of what was required of K & B and what was required of Sharlin.

The Court: I do not think the plaintiff is to be denied proof that repairs were made which he alleges were required to be made simply because someone else paid the bill, so the witness is asked, "Where is your bill?'

Well, it was billed to somebody else. So, therefore, I offer you that bill—it is offered for the limited purpose, as I understand the plaintiff here and undoubtedly this
page 76 } line of testimony is conditioned on tying it to the allegations of the suit.

So, I think the plaintiff can show work was done by billing to K & B. It does open up the picture of the relationship of K & B to the plaintiff. That would be part of the normal cross examination to make sure, are you talking about repairs or are you talking about building a new theater.

Harry M. Sharlin

So, the objection to the line of questions is overruled, the Court taking the line of questions as being for a limited purpose, namely, to show that bills exist, that work was done to repair what the plaintiff claims was damaged.

But this will leave open to later inquiry, how much of those bills are applicable.

Mr. Simmonds: All right.

Mr. Harrigan: Exception on those grounds.

By Mr. Simmonds:

Q. Were any of these bills which you referred to in your answers to the interrogatories and to which you have just answered as asked by Mr. Harrigan with respect to the contractors, were any of those paid by a check from you?

A. Yes, some of them were. When you asked the question before that, I had forgotten. I paid some of the bills direct.

Q. Do you have those checks with you?

page 77 } A. No, I don't.

Q. Did you get the notice to produce those checks?

A. The information was given to Mr. Harrigan from my auditors.

Q. Did Mr. Harrigan give me a letter based upon your information, that you had paid none of these bills but there had been deducted from rent at the rate of $1,000 a month the sum of $4638.39, is not that correct?

A. I don't understand your question, Mr. Simmonds.

Mr. Simmonds: Read it back.

(Question read.)

The Witness: That was partial toward the fee.

Mr. Simmonds: Sir?

The Witness: That was partially the cost of the fee, expenses, yes.

By Mr. Simmonds:

Q. Now, I have reference to the ones which you have put in your interrogatories as being the claims that you are making against Neighborhood. Is there any money that was paid by you to K & B on those bills other than on the deduction of rent at the rate of $1,000 a month until $4638 was deducted?

A. Yes, there were other bills.

Harry M. Sharlin

Q. Paid by you?
A. Paid by me to—
page 78 } Q. Of those that were claimed in this suit?
A. Yes. The industrial—

Mr. Simmonds: Contrary to your letter?
Mr. Harrigan: I don't think he understood the question.
The Witness: The bills that I paid were the industrial, the air conditioning, removing of the compressor from the roof, boiler—I believe Mr. Harrigan has a letter to that effect—and the payments made.

By Mr. Simmonds:
Q. The checks that you are talking about are for work done at your expense which was not included in the suit, is that right?
A. They were included in the suit but you asked whether I paid for them, and I did, yes. A portion of it is included in the suit, not the entire bill.
Q. My question to you is, with respect to these items which you are now claiming in this suit against Neighborhood—
A. Yes.
Q. —have you paid anything other than the deduction from your rent of $4638.39?
A. Yes, I did, which is not a part of the suit. I have paid bills, yes.

Mr. Simmonds: Read my question back.
The Court: The question is: Did you pay bills
page 79 } which were part of the suit?
A. Yes, I did.
The Court: He has already said removing compressor from the roof.
The Witness: Removing the compressor and the boiler. These are the bills that I paid.

By Mr. Simmonds:
Q. Mr. Sharlin, I hand you a letter from Mr. Harrigan, your attorney, which was given to me; since you did not produce the documents at the deposition, and I would like to read it to your Honor, if I may. (Reading)

"Sharlin against Neighborhood Theaters." Dated February 10, 1961:

Harry M. Sharlin

"Dear Sir:

"Enclosed are the documents you requested. However, I would like it understood they are furnished to you over my objection and I shall raise the point of their use at the trial.

"With regard to the amounts Mr. Sharlin has reimbursed K & B Theaters, the sum of $1,000 was deducted from rent and that $4638.09 has been paid to date which included items in the *leas* of December 15 enclosed herewith.

"Other amounts were paid to Mr. Sharlin on
page 80 } work which was not chargeable to defendant for various items."

Is that letter correct?

A. Yes.

Mr. Simmonds: I ask this be received as Defendant's Exhibit No. 2.

The Court: Received as Defendant's Exhibit 2.

(Defendant's Exhibit No. 2 received in evidence.)

Mr. Harrigan: Over my objection as not being relevant to any matter in controversy.

The Court: Not what?

Mr. Harrigan: Not being relevant to any matter in controversy. It goes to the same objection I made before as to who paid the bill. I object.

The Court: Objection overruled.

Mr. Harrigan: Exception.

The Court: Admitted.

By Mr. Simmonds:

Q. Mr. Sharlin, you received a letter from K & B Theaters dated December 15, 1965 indicating the amount that was being charged to you of the bills that had been submitted to and paid by K & B, did you not?

A. Yes. May I see it, please? (Examining) Yes.

Q. You have the original of that letter in your
page 81 } file, do you not?

A. Yes.

Mr. Simmonds: May I have that letter of December 15, Mr. Harrigan? (Handed.)

Harry M. Sharlin

By Mr. Simmonds:

Q. Mr. Sharlin, I ask you if this is the original of the letter that you got from K & B Theaters on December 15, 1965?

A. Yes, it is.

Q. That purports to show a breakdown of the items which they are charging back to you of the bills that they paid, does it not?

A. These are some of them, yes.

Q. All right, sir. Now, the total that they are going to charge back to you according to that letter is $4141.65, is that correct?

A. This was the balance, yes, to close the matter; yes.

Q. The first item that they charged to you is the sum of $1388.89. Now, that was for the overpayment of rent for the first month, was it not?

A. Not particularly, the delay in finishing the theater created this problem, yes.

Q. Suppose you read the item if you will—read the item 1 there.

page 82 } A. "Two-thirds of the first month's rent amounting to $1,388.89. We had previously paid you $2,000 for the first month's rent."

Q. Finish reading if you will.

A. "The construction of the lease by Sol Grossberg, whose opinion you agreed to abide by was that we should have only paid you for one-third of the first month's rent."

Q. So that reduction of $1300-odd from your rent was not for payment of any of the work done?

A. Part of the agreement in the overall cost of redoing the theater, yes.

Q. I ask you if the $1300 had anything to do with the repayment by you of these bills that were billed to K & B?

A. I said it was involved in the overall arrangement, yes.

Q. Mr. Sharlin wasn't it that they had overpaid you on the first month's rent by that amount of money?

A. Because the theater wasn't in operation, yes.

Mr. Simmonds: I ask that that be admitted as Defendant's Exhibit No. 3.

The Court: Received.

(Defendant's Exhibit No. 3 received in evidence.)

Mr. Simmonds: If your Honor please, I would ask at this time that you read that letter. I think it has a very important

bearing on the whole case and all the demands that page 83 } are being made and that will be made.

By Mr. Simmonds:

Q. Now, Mr. Sharlin, by letter dated December 28, 1965, addressed to your accountant, from K & B Theaters, they said they had undercharged you on one of the invoices by $496.44.

A. Yes, I owed them an additional $496.44 as part of the repairs.

Q. What did that make the total they were going to claim against you?

A. The balance shows $4,638.09 at that point.

Mr. Simmonds: If your Honor please, I think perhaps that ought to be in evidence to clarify the letter of December 15, 1965.

May I have your letter of the 28th? I would like that to be admitted in evidence as exhibit 4.

The Court: It is received and marked Defendant's Exhibit 4 in evidence.

(Defendant's Exhibit No. 4 marked in evidence.)

Mr. Harrigan: Same objection.

The Court: The ruling is the same.

Mr. Harrigan: Exception.

By Mr. Simmonds:

Q. Mr. Sharlin, with respect to the time that you went into the theater building at or about the expiration page 84 } of the lease and examined or inspected the building, I believe you said the first time you went in was when Mr. Sellers was attempting to measure the building?

A. Right, yes.

Q. And at that time you did not say anything to Mr. Pearson except to remind him about the lease?

A. I did not say that. I asked him why he would not let Sellers in.

Q. Yes.

A. And he did not, and I looked around and I said I want to remind you about your lease, Wade.

Q. Do you know what day of the week that was?

A. Yes, it was the early part of April—first week of so, of April.

Q. First week or so in April?

Harry M. Sharlin

A. Somewhere in the middle of April—they were just starting to remove most of the equipment, and I would say the middle of April—

Q. You pinpoint your time, then, that when Sellers was in there to measure the building to be in the first week but not later than the 15th of April?

A. Yes?

Q. What had been removed at that time?

page 85 } A. Well, they were working on the seats, and the contractors were there. There seemed to be a lot of commotion.

Q. What time of day was it?

A. I think it was in the morning. Mr. Sellers came to my office.

Q. They were working on the seats. What were they doing with the seats as far as you could determine?

A. I had no idea. There was just a lot of work going on.

Q. Had light fixtures been taken down?

A. It appeared to me—I noticed that some of them had been —yes.

Q. Where were these fixtures located that had been taken down?

A. I walked through the side door of the auditorium. I saw one exit fixture out. And I could see through the open door of the lobby that they had been removed. I did not inspect them closely at that time.

Q. Had any of the seats been removed?

A. They were working on the seats. I could not say whether they had been started, the removal, or not.

Q. Had the screen been removed?

A. I can't tell you. I did not look for that.

page 86 } Q. What did you have reference to when you reminded Mr. Pearson of the lease?

A. That he would not let Sellers come into the building. It is a privilege we have that is in the lease. I did not have to remind him, I thought, and when I saw this fixture taken out, this is what—

Q. When you reminded him of the lease, were you talking about the right to have Sellers come into the building before the expiration of the term or were you referring to removal of fixtures from the place?

A. Well, frankly, since you asked me, Mr Simmonds, his attitude was so bad. I did not know what would happen and that is why I reminded him.

Q. You heard my question?

Harry M. Sharlin

A. He would not talk to me, would not answer me and he walked away and I reminded him. At this point you ask how many fixtures, and so forth. I can't remember. But I know some of them had been removed and I can tell by what had been done that it was not right, and this is why I reminded him.

Q. Can you give just the location of any fixtures that had been removed at that time?

A. Yes, I can remember one exit light in the auditorium.

Q. Where was that located?

page 87 } A. Over the left door, left door facing out of the theater. It would be the right entrance coming into the auditorium.

Mr. Harrigan: Your Honor, for the record I object to this line of questioning. I don't see what relevance it has unless Mr. Simmonds contends the fixtures were never taken out, which I don't think he seriously does, and what difference does it make whether they were taken out then or a week later?

Mr. Simmonds: I am trying to tie—

The Court: I see a reason. Objection overruled.

By Mr. Simmonds:

Q. Mr. Sharlin, what else did you observe on that occasion that you testified here to about things being removed which you imply should not have been removed?

A. Well, I wasn't looking for anything, I was only trying to see that Mr. Sellers was given the opportunity he was supposed to have and I had to get back to my office. I mentioned this to Wade. He turned his back and walked away from me. That was it. I walked out of the theater.

Q. I understood you to say this morning that the next day you went back in the theater with a lawyer, am I wrong about that?

page 88 } A. I don't recall saying the next day. I said toward the end of the month.

The Court: He said someone for advice. He did not say what his occupation was.

By Mr. Simmonds:

Q. Who was the person that you went in with at that time?

A. At the closing—when they left the theater. Mr. Sol

Harry M. Sharlin

Grossberg drew the lease for K & B Theaters and he has handled a number of theaters.

I believe he was involved in this particular lease when we started.

Q. Do you remember the date?

A. Yes. It was either April 28 or 29 that we were in there.

Q. Mr. Sharlin, when you were on a deposition February 8, you said you could not remember the date you went in there with a lawyer but you knew it was after Neighborhood had surrendered possession, is not that correct?

A. Yes.

Q. And you at that time would not give me the name of the lawyer even though I told you the purpose of it was to try to find out the date; is not that correct?

page 89 } A. I did not want to involve him because he was not being used as a witness, was he—I used him for my own personal advice and I felt it was unfair to bring him into it.

Q. But you were unwilling fifteen days ago to give us that information because, as I pointed out to you, I wanted to know the name of the gentleman so I could try to ascertain the date, but you said at that time you did not know; is that correct?

A. I do not remember what I said. But between the time of the deposition and now, it is not too hard to refresh your memory with certain things. The reason I did not give his name, I did not want to involve him and I did not think he should be involved and I asked Mr. Harrigan's advice on that.

Q. Let me ask you this—

A. I did mention—not today—but I mentioned, if I can recall, that the Neighborhood people had left the theater. The date, whether it was the 28th or 29th or 30th, I could not remember, but I know they had vacated. I made that clear.

Q. How many days after they vacated was it that you went into the theater with Mr. Grossberg?

A. How many days afterwards?

Q. Yes.

page 90 } A. I don't know what day they vacated. I was given to understand they had left; someone advised me that they had left and it was the last two or three days of the month of April.

Q. Have you checked with Mr. Grossberg to ascertain the date he went through with you?

A. Mr. Who—Mr. Grossberg?

Harry M. Sharlin

Q. Yes.

A. No, I haven't talked to him at all. I ascertained the date by talking to the various contractors that went in because the date they went in, one of them—is the date Mr. Grossberg and I went into the building.

Q. On the date you and Mr. Grossberg went into the building, you saw some people working in the building?

A. I saw some people working, measuring—

Q. I believe you said you thought they were Sellers' men?

A. I did not know whose men they were.

Q. It was at least two days after they vacated?

A. I did not know the day the Neighborhood people went out. Mr. Pearson did not call me or anyone else. I believe I was advised by one of K & B's contractors.

Q. And your statement about the doors being open was when you went there two days or more after Neighborhood had surrendered possession, is that not correct?

page 91 } A. It could have been one day, it could have been two days. I don't know the exact day they left.

Q. Isn't it possible that kids could have opened the doors in that interim?

A. Well, if the doors were locked, they should not have been able to open them.

Mr. Harrigan Objection. I think it *cslls* for speculation—anything is possible.

Mr. Simmonds: I think he suggested that, himself. That the doors could have been done in by children.

The Court: It is a little more than that. The witness said earlier the doors were open and kids were running around. The question asked is, was it possible? It is easily done in argument. So the objection is sustained.

By Mr. Simmonds:

Q. The attorney suggested that you take some pictures, did he not, according to your testimony in deposition?

A. Not this attorney, because I needed a Virginia attorney and I made some approaches. Mr. Grossberg did not suggest it.

Q. When did an attorney suggest you take some pictures?

A. The following day that I visited an attorney.

Q. Was it Mr. Grossberg?

A. No.

page 92 } Q. Who was it?

A. It was a local Virginia attorney.

Harry M. Sharlin

Q. What was his name?

The Witness: Is it necessary, your Honor?
The Court: I look to your counsel to make any objections, but he does not.
Mr. Harrigan: Answer it.
The Witness: Mr. Campbell.

By Mr. Simmonds:
Q. Who?
A. Mr. Campbell.
Q. Did you take them?
A. Sorry, I did not.
Q. Did you have pictures taken?
A. I did not.
Q. Did you mention the fact that you went in there with two different attorneys, when you were being deposed about two weeks ago?
A. No, I did not. I only went in there with Mr. Grossberg.
Q. Didn't you state at that time that the attorney you went in with had recommended that you take pictures and you are sorry you did not?
A. That is not the one that recommended it.

page 93 } Q. Didn't you indicate that in your deposition?
A. I said an attorney suggested that I take pictures.

Q. Have you asked either Mr. Campbell or Mr. Grossberg to come and testify in this suit as to the condition of the building at the time?
A. I asked Mr. Campbell to handle the case at that time and that is the only conversation concerning the trial, and he at the time, his office was connected with Neighborhood Theaters and—
Q. I am afraid you did not understand my question—I said in connection with this trial—
A. The only conversation—
Q. —have you requested either Mr. Grossberg or Mr. Campbell to attend?
A. No, I have not.
Q. All right.

The Court: Did Campbell ever see the building with you?
The Witness: No, only Mr. Harrigan and Mr. Grossberg.

Harry M. Sharlin

By Mr. Simmonds:

Q. When did Mr. Harrigan come—the first time I heard him mention your name as far as the inspection is concerned?

A. They started working immediately after, right after May 1 or thereabouts and Mr. Harrigan came into page 94 } the case, was recommended to me and I turned it over to him.

Q. But you did not follow the advice of whatever attorney it was who told you to take pictures?

A. I wish I had.

Q. I wish you had, too, we would not be guessing.

A. We would not be in Court.

Mr. Harrigan: I move that that be stricken.

Mr. Simmonds: His replies, too?

The Court: I will strike both.

By Mr. Simmonds:

Q. I believe you testified, Mr. Sharlin, that you gave Neighborhood people an opportunity to meet the offer that you had received from another party?

A. Beg your pardon, I am sorry.

Q. That you had given the Neighborhood Theaters the opportunity of meeting the offer you had received from another outfit to rent the property—

A. Yes.

Q. —at the expiration of the lease?

A. Yes.

Q. When was that, that you gave them that opportunity?

A. I am sure, from memory, a few months. This actually started almost a year, I would say, a year, our page 95 } constant discussions—I had had the offer and they were aware of the offer, and I believe there is a letter on record that I wrote with the amount of the offer.

Q. I believe you said you kept that open until about sixty days before the term expired?

A. Until such time as I felt we had to close the matter, yes.

Q. My question was, didn't you testify this morning that you kept the matter open for Neighborhood until about 60 days before their term expired?

A. To the best of my knowledge, I gave them quite—I don't know—I said 60, it could have been three months or could have been thirty days, right to the last month. I am not sure.

Q. Somewhere between thirty days and three months?

A. Somewhere in there. I gave them sufficient time.

Mr. Simmonds: I ask you for the letter dated January 20, 1964.

The Court: Gentlemen, I will let you find that during the recess.

Mr. Simmonds: Are you going to recess?

The Court: I think we had better.

(At 2:25 p.m., a recess was taken until 3:40 p.m.)

page 96 } 3:40 p.m.

By Mr. Simmonds:

Q. Mr. Sharlin, I would like to go back for a moment to the matter of when you made the inspection of the Neighborhood Theater that you have referred to. Is it my understanding that you say the second visit you made there was about a day or two before the expiration of the lease and you were in the company of Mr. Sol Grossberg, is that correct?

A. I was with Mr. Grossberg, yes, after the Neighborhood Theaters had vacated the building and not notified me. The building was empty with the exception of a few workmen.

Q. Whose workmen, do you know?

A. I believe they were the K & B people. It was the last day or two days before.

Q. You didn't make any complaint to Neighborhood right away, did you, about the condition of the building?

A. I saw an attorney first, to find out what procedures to take.

Q. And is this June 17, 1965 the first time you wrote them about it?

A. Yes.

Mr. Simmonds: You saw that, didn't you?

Mr. Harrigan: No, I did not.

Mr. Simmonds: As a matter of fact, wasn't that

page 97 } letter written very shortly after you consulted in regard to the matter?

The Witness: No, I consulted attorneys immediately. The attorney I consulted would have been a conflict of interest and he could not handle it, and the one in Washington, of course, could not work in Virginia, and until I found Mr. Harrigan—

By Mr. Simmonds:

Q. You didn't need an attorney to compose this letter explaining the condition of the building, did you?

A. I wanted to act according to the lease, in my rights and I felt it was necessary to get an attorney.

Mr. Simmonds: Your Honor, I would like to admit this in evidence, that letter dated June 17, 1965 from Mr. Sharlin to Neighborhood, the Neighborhood Theaters.

The Court: The Neighborhood Group of Motion Picture Theaters, I take it to be the same.

Mr. Harrigan: No objection.

The Court: Exhibit D 5 will be admitted.

(Defendant's Exhibit 5 was received in evidence.)

By Mr. Simmonds:

Q. Mr. Sharlin, I show you a copy of a letter dated January 24, 1964, addressed to Mr. M. H. Sharlin, purport-
page 98 } ing to have been signed by Morton G. Thalhimer.

Mr. Simmonds: I call for the original of that letter but apparently counsel is unable to put his hands on it at the moment.

By Mr. Simmonds:

Q. I ask you if that is the copy of a letter that Mr. *Talheimer* wrote you?

A. Yes, for execution of the lease, yes.

Q. Mr. Sharlin, I will ask you to read that letter, if you will, to the Court.

A. (Reading) "It was nice to talk to you on the telephone today, also to know that you are not going to make any decision right away."

Q. This is a letter from Mr. Thalhimer to you?

A. To me.

"I fully agreed with you that you have plenty of time prior to the end of the lease before coming to a final decision.

"We will put our file forward until this summer and I will either call you or drop in to see you. I am sure if you want it to remain as a Neighborhood Theater, I will always cooperate and I trust be as good a tenant for the purpose as is available."

Q. Thank you.

page 99 } Mr. Simmonds: I would like to introduce this as Defendant's Exhibit D-6.

Mr. Harrigan: No objection.

The Court: Received.

(Defendant's Exhibit No. 6 received in evidence.)

By Mr. Simmonds:

Q. You had made a telephone call to Mr. Thalhimer or he made one to you that 20th day of June, is that right?

A. We made a number of 'phone calls to each other, yes.

Q. You indicated to him at that time you were not ready to make a decision as to whether to convert the property to a different use, et cetera?

A. The decision was to whether I was to leave it as a theater or to convert. I had offers on both sides. I was deciding what to do.

Q. You indicated to him you were going to hold up on your decision for a while?

A. Yes, and when I decided he had plenty of time to decide.

Q. Mr. Sharlin, I would like you to look at defendant's exhibit No. 1, if you please—

Mr. Simmonds: Your Honor please, it is a K & B lease.

page 100 } By Mr. Simmonds:

Q. Mr. Sharlin, I show you Exhibit D-1, which purports to be a lease made by Meyer H. Sharlin, landlord, and K & B Theaters, Tenant, and I ask you what is the date of that?

A. January 17, 1964.

Q. It is dated three days after that letter and your conversation, is it not?

A. I do not know about the conversation but it is before the date of that letter.

Q. And your acknowledgment appears—

A. Yes, sir.

Q. —appears on—you acknowledged this on the 20th day of January, did you not?

A. That is exactly right.

Q. So you had actually made a deal with K & B at the time you had the telephone conversation with Mr. Morton Thalhimer, right?

Harry M. Sharlin

A. I had a conversation with Morton Thalhimer before this and letters, many letters and many telephone conversations.

Q. But on the very day that you told him on the telephone that the matter could go *ofer* for—

A. I did not tell—

Q. — you had already made the deal with K & B?

page 101 } A. I did not tell him on the telephone. I sent a letter that I had made a deal.

Q. I am talking about on the 20th. I asked you a while ago.

A. I sent a letter, yes, but I did not have a conversation on the telephone.

Q. You did not have any conversation as indicated in this letter I just showed you?

A. Not the same day as the letter. Let me refresh my recollection.

Q. I believe my question to you was, did you not have a telephone conversation with Mr. Thalhimer on January 20th?

A. Good.

Q. Before you wrote that letter?

A. Yes, I did.

Q. And at that time you had already signed the lease with K & B, had you not?

A. Yes.

Q. And that bears the date of about 15 months before Neighborhood's lease was to expire, does it not?

A. April, 1965, yes. That would be 13 months.

Q. So you were somewhat mistaken when you said you had left the matter up for Neighborhood until about 30 to 90 days before the expiration of their lease?

page 102 } A. I am trying to remember the *dstes*. I couldn't, but I certainly had a lot, a number of conversations, telephone and correspondence prior to this January in which the people refused to meet the terms. The terms are in the lease, there is no lie about that, and I received so many phone calls, I just probably sent the letter trying to be kind about it, I suppose, I don't know, but the lease was made. I see by the date and I am satisfied with that.

Q. Mr. Sharlin, you actually notified Neighborhood Theaters that you were expecting possession on the last day of April by a letter dated March 12, 1965, did you not (showing.)?

Harry M. Sharlin

Is that a letter that you wrote to Neighborhood Theaters on March 12, 1965?
A. Yes.

The Witness: Your Honor, may I please revert back to the January 20th and the 17th lease. It takes a little time for your memory to come back, that refers to that.

(The Court hands documents to witness.)

The Witness: The reason I gave sufficient time for Neighborhood Theaters to lease this theater—the reason I told them that or I did not tell them about the lease—I was afraid of the condition of the theater between this
page 103 } time and the actual taking possession. This was my feeling about it, besides discussing it with people that I felt important. I would not like to be in the theater knowing I could not have it. I don't know. The theater could have been left in good condition, obviously it was not. In a few months that we did not do any business, the condition of the theater, I feel kind of bad—it would be a little rough after a year and a half, I was protecting my own interest in this particular case. I did not notify them, of course they did not take the option.

Q. And you did lead them to believe that then you were still dickering.
A. For those reasons, yes, and I am very happy I did.
Q. I show you again this letter dated March 12, 1965.
A. That is mine.
Q. Notifying them of the expiration of their lease at the end of April and telling them you expect possession.
A. They knew the place was leased. It was a month before—this was notice.
Q. I ask you to read the last paragraph of that letter, if you will.
A. I wrote this letter.

"Calling your attention to the date of the expiration of your lease of the theater property located at
page 104 } Glebe Road, Arlington, Virginia, in which the undersigned is the lessor. The terms of this lease expire the last day of April, 1965.
"As I previously informed you, I have entered into a new lease of the premises with others, the terms of which are to

commence the date following the expiration period of your tenancy. Since we are not committed, I expect possession of the premises on the date required of the premises.

"I would like to thank you and say it has been a wonderful experience being associated with you the last twenty years."

Q. Do you really mean that last paragraph?
A. Yes. Before I saw the theater I would say so.

Mr. Simmonds: I would like this to go in evidence as Defendant's Exhibit No. 7.
The Court: Received.

(Defendant's Exhibit No. 7 received in evidence.)

By Mr. Simmonds:
Q. Mr. Sharlin, I show you a copy of letter dated March 17, 1965, *purporing* to be typed by Sam Bendheim, Jr. addressed to you and ask you if you received the original of that letter.
A. I don't remember this letter.
page 105 } Q. You don't recall it?
A. I don't recall it.

Mr. Simmonds: Your Honor I have called upon the plaintiff for the production of the original and they do not find it among the papers. I now ask that the copy be admitted in evidence.
Mr. Harrigan: Let me just look at it again. (Handed.)
No objection.
Mr. Simmonds: I ask that be admitted as Defendant's Exhibit No. 8.
The Court: Received.

(Defendant's Exhibit No. 8 received in evidence.)

By Mr. Simmonds:
Q. Mr. Sharlin, there was trouble with leaking of the roof and the walls and seepage into the basement from time to time, was there not?
A. Yes. There was a few times, yes.
Q. That was your responsibility, wasn't it?
A. The roof was, yes.
Q. And I believe you replaced the roof in 1959, did you not?
A. I did.

Q. All right, sir.

page 106 } A. Also waterproofed the foundation.

Q. At the same time?

A. No, at different times—there is mention of plans on this letter. The plans were sent up for the waterproofing man to study the structure. I don't remember the letter. But I remember a set of plans.

The Court: Before you get too far from it, did you identify who Sam Bendheim, Jr., is?

The Witness: He is associated with Neighborhood Theaters.

By Mr. Simmonds:

Q. I show you a letter or copy of a letter dated January 20, 1964 addressed to you on the letterhead of Neighborhood Picture Theaters, signed by Lee Rigby, Manager, and ask you if you received the original of this letter from Mr. Rigby complaining about the seepage?

A. I received it and I had the waterproofing taken care of.

Mr. Simmonds: I would like that admitted in evidence as Defendant's Exhibit 9, please.

Mr. Harrigan: I have no objection. I don't know what relevance that has to the case or to our particular claim.

The Court: In the opening remarks I heard counsel talk about a wall—is this—

page 107 } Mr. Harrigan: I understand that is from the seepage from the basement, is that correct, into—

The Court: It does not precisely say. It refers to "ruining our aisle carpet, necessitates blocking off 30 or more seats."

"Also the entire basement floods on the right side" and it says "These conditions" plural, so is it offered as related to the roof?

Mr. Simmonds: No, it is offered relating to the parts of the building that were Mr. Sharlin's responsibility to keep in good repair and one of the claims that he is making is that for having to replace a sump pump in the basement. And our evidence will be—and this will bear it out—that sump pump was overworked, worn out and had to be replaced several times because of conditions chargeable to Mr. Sharlin.

The Court: It is admitted as Exhibit D 9.

(Defendant's Exhibit D-9 received in evidence.)

Harry M. Sharlin

By Mr. Simmonds:

Q. Mr. Sharlin, after you received that letter dated January 20, 1964 from Mr. Rigney, you wrote to Wade Pearson on January 24, 1964 and asked him for the plans, presumably so you could go about fixing that—

page 108 } A. This is for waterproofing of the area. The sump pump is in the far side of the basement and had nothing to do with this seepage into the so-called area of carpeting.

The waterproofing man wanted the plans to inspect the foundation because we did a very thorough job so there would be no further leaks.

That is why the plans—and it was done, taken care of.

Q. When you got those plans, did you turn them over to the waterproofing man?

A. Yes.

Q. Did you also later turn them over to K & B Theaters?

A. No.

Q. Did you ever turn them over to K & B?

A. No, those plans that they gave me were given to the waterproofing man and I did not turn over any plans to K & B Theater.

Q. What became of the plans, sir?

A. Who knows, in those types of things?

Q. You were asked a number of times to return them, were you not?

A. But I did not have them, how could I return them? As a matter of fact, I did look for them.

page 109 } Q. You acknowledged receipt of them and were responsible to Neighborhood, were you not?

A. Of course I used them with the waterproofing man but I do not know what happened to them.

Mr. Harrigan: I fail to see the fact, why he did not return the plans when there are two sets available here, has anything to do with the case or how important it is and I object to it as immaterial.

The Witness: I don't know what I would do with them.

The Court: How would this line of questioning help me to decide the case if there is a set of plans here?

Mr. Simmonds: There finally has got to be a set here but we tried our best to get a set after this suit was instituted and could not do it. I think this is just another indication of the treatment that was being given Neighborhood by Mr.

Sharlin who is now complaining of the treatment Neighborhood was giving to him.

Mr. Harrigan: If that is his reason, your Honor, I move that the whole line of questioning be stricken. I don't think that is a valid reason—just interjecting something in the case which has no bearing or relevancy on any matter in controversy, and the record of the case speaks page 110 } for itself. They got the plans. They asked for them and they got them. And they had a copy of their own all the time, anyway.

The Court: The motivations of the parties bear upon the issue, so I will suggest that there are many other things that are more to the issue but it is overruled. I will take notice that neither party has great love for the other at this stage, if counsel want me to.

By Mr. Simmonds:

Q. Mr. Sharlin, at the time the Neighborhood Theaters surrendered possession of the theater, the roof was still giving trouble, was it not?

A. At the time they gave the theater up? The lease—I did not get your question.

Q. Yes, at the time the theater was surrendered at the termination?

A. There was no problem. We had a complete new roof put on. It was not patched.

Q. That was after they surrendered possession?

A. No, prior to it. The only work after they surrendered was a complete checkup and any necessary maintenance problem for the new tenant. There was a new roof put on.

Q. Didn't you have some bills totaling over $2,000 that you paid in connection with either waterproofing page 111 } or repairing the roof at the time these other repairs were made to K & B?

Mr. Harrigan: I think I have copies of that.

The Witness: I have got some—

The Court: The witness wants to refer to the sheet, Mr. Simmonds. Any objection?

The Witness: These are bills I paid.

Mr. Harrigan: Here is the bill you paid here. That is not the bill.

The Witness: The Washington Waterproofing was an expense, bill of $2970 was for waterproofing the walls of the building which was not the structural part of the building.

Harry M. Sharlin

There were some holes and nails put into this building that we felt it necessary, just to protect any future—

Mr. Simmonds: Was that on the outside or inside?

The Witness: That is outside, and I paid that bill. It had nothing to do with the foundation or structure of the building. There was no roof work done—we have a bill from Virginia Roofing for a vent that was badly damaged in the side of the building alongside one of the exits which was left and had never been replaced or fixed.

It was torn apart. So we replaced that. I did. This was a part —should have been part of the Neighborhood.

page 112 } The Court: What was the item damaged?

The Witness: It was an air vent necessary for the basement.

The Court: Duct?

The Witness: Yes, and it was right off and above the parking area alongside an exit. I just had it replaced.

Mr. Simmonds: The purpose of the waterproofing for which you paid approximately $2,000 was to keep water from seeping through the walls?

The Witness: There was no water seeping through the walls, the upper walls. This was something we did as a preventative measure, which should have been done, I believe, by the lessee, because it had nothing to do with structure. The waterproofing of foundation was mine which I did earlier. I did this because I felt it necessary to keep the building in good shape.

By Mr. Simmonds:

Q. Will you please read to the Court what you paid for repairs to the roof at about the time, shortly after the time Neighborhood surrendered—

A. Yes, the roof did not need repair.

Q. Read the items.

A. Install one new extruding aluminum louver at the right side of the building which I just mentioned, to replace an old galvanized louver and insect screen. This is not the roof.

page 113 } Q. There is another item there.

A. Install one new, 26 gauge galvanized downspout on left front high roof and repair existing galvanized gutter and spout off around new vent which was run through the main roof and install one new 26 gauge galvanized 2-vent collar to cap off existing roof using steep asphalt.

This was repair to the new equipment coming up like air

conditioning, spout. They repaired around it. This had nothing to do with the old roof because it was a new one.

Q. What are the dates of these bills?

A. June 24, 1965.

Q. Both of them?

A. This is preventative work that I had put in. Downspout was badly damaged and I had a new one put on.

Q. What was the amount and date of the bill for waterproofing?

A. Waterproofing was—the bill was paid—August 24. So it was done prior to that. It was probably April or May.

Q. And what was the amount again?

A. $2970.

Q. Mr. Sharlin, in connection with the new air conditioning and heating system that was put in, the system

page 114 } was different from existing system, was it not?

A. It was improved. It was a heavier system. The one in there just did not—the engineers went through and they felt—it was a new system, let's say that, sufficient to cool the theater.

Q. It was a new heating plant and new air conditioning?

A. New heating and new cooling, yes.

Q. Under the terms of the lease with K & B, they were to pay one half of the cost of that up to—

Mr. Harrigan: Your Honor, I think the lease of K & B speaks for itself. I object to the witness testifying.

The Court: Sustained.

Mr. Simmonds: In this contract that you had with them, there was a maximum price of $19,810, was there not?

The Witness: That's right.

By Mr. Simmonds:

Q. And don't the bills that finally come out on that indicate that the cost would have exceeded that price except for the maximum top that the bid put on it?

A. I don't understand that question.

Q. Didn't the invoice that was sent out after the work had been completed show that the cost of the

page 115 } work done and materials furnished was in excess of $20,000?

A. No.

Q. That is not so?

A. The contract was $19,810 which included—and was billed to me—which included the removal of the piece of equipment that was left over—

Harry M. Sharlin

Q. Let us keep to the question. I asked you the bill that finally came out indicated a price—

Mr. Harrigan: If Mr. Simmonds has a bill right in front, why doesn't he show him? Then everybody would not have to guess.

The Court: It is up to counsel to present his own—

Mr. Simmonds: Where is the other bill? It was here this morning when I asked for production.

I might come back to that as soon as I locate the bills.

By Mr. Simmonds:

Q. Mr. Sharlin, getting down to some of the specifics of what was put in and—

Mr. Simmonds: Oh, here it is, thank you.

By Mr. Simmonds:

Q. Did you answer my question when I asked you if the contract price on that was a guaranteed maximum of $19,810?

A. If I had the contract, I could tell you.

page 116 } It speaks for itself. I will bring the canceled checks tomorrow on all these bills that I have paid.

Q. Well, I show you the bill that is dated August 25, 1965, to you from United Industrial Associates, Inc.

A. Yes.

Q. That shows, does it not, the—

A. $20,167.00.

Q. And then it states above that—"Not to exceed $19,810"?

A. They may have put an extra piece of equipment in that that was not in the original contract. We can find out.

Q. What I am getting at, they are only charging you $19,810, even though the cost exceeded that price, isn't that so?

A. *Yere* is the bills I paid. If it amounts to $19,810, that is correct.

Mr. Simmonds: I would like that to be marked in evidence as Defendant's Exhibit number next in order.

The Court: This consists of three bills, one dated May 24, 1965. One dated June 25, 1965, one dated August 25, 1965, addressed to Mr. M. H. Sharlin, from the Industrial Associates, Inc. The top and last bill is the one from which Mr. Sharlin has been testifying.

I would like that to be marked as Defendant's Exhibit 10.

The Court: Stapled together will be D-10 as a unit.

page 117 } Mr. Simmonds: All right.

The Court: That is received.

(Defendant's Exhibit No. 10 received in evidence.)

By Mr. Simmonds:

Q. Who paid for the installation of the initial parking lot?

A. I did.

Q. Did Neighborhood pay for any part of it?

A. No, sir, not the initial one.

The Court: I am sorry. What initial what?

The Witness: Initial parking lot. Original parking lot.

Mr. Harrigan: On this question of who paid for the initial parking lot and so forth, Your Honor, I would object to that. I don't think that it is relevant as to—the lease controls that.

The Court: Doesn't your claim say the premises are governed by the lease, leaving it subject to normal wear and tear as received?

Mr. Harrigan: Not the parking lot, your Honor. The parking lot is paragraph 14 of the lease and it says "shall maintain parking lot in suitable condition for parking of automobiles."

page 118 } The Court: He received it on a gravel basis, a gravel lot?

Mr. Harrigan: No, I don't think he received it as a gravel lot.

The Witness: No.

The Court: Wait a minute until Mr. Simmonds finds his papers.

Mr. Simmonds: What is your objection?

Mr. Harrigan: I think the issue, your Honor, is in what condition it was left pursuant to the standards that they had kept it in.

The Court: Your premise is that if the tenant improves the parking lot, it must be left in that improved condition and it must not be allowed to deteriorate. Mr. Simmonds' contention as I followed, in opening arguments, it was never paid for by your client and the most they would have to leave it in is as to gravel—

Mr. Simmonds: That is correct, paragraph 14 of the lease.

The Court: If that is correct, straighten me out. If not—

Harry M. Sharlin

Mr. Simmonds: "Shall be delivered in the same good order and condition as when delivered to the tenant,
page 119 } ordinary wear and tear excepted."

Mr. Harrigan: Better read paragraph 14 again. That is 14, the ordinary wear and tear.

Mr. Simmonds: Paragraph 14 is the one I have reference to, if your Honor please.

Mr. Harrigan: 17 is the one that deals with the parking.

Mr. Simmonds: I appreciate it deals with the parking lot, too, but we are talking about the condition in which it is to be redelivered.

The Court: The lease, in neither paragraph 14 nor 17 which I have just read, refers to paving. The witness has testified something about paving but since it is an issue and if it is an issue, the line of questions is relevant.

The objection is overruled.

The weight we will get to later.

By Mr. Simmonds:

Q. Mr. Sharlin, I show you a letter or copy of a letter purported to be signed by you, addressed to Mr. A. O. Budina, Neighborhood Theaters, Inc., dated May 10, 1945, in which you purport to enclose a statement from the Virginia Contracting Equipment Company.

A. (Reading) Yes, it is my letter.

page 120 } Q. Please read that letter and again read the date, if you will.

A. "Enclosed please find statement from Virginia Contracting Equipment Company. As you will notice, I have marked the amounts to be paid by Neighborhood Theater and Dominion Electric Supply."

Q. All right, sir. Now, I ask you if this is not a copy of the statement that was enclosed in the lease together with your handwriting as to which part of the bill was identified by Dominion Electric and which was owed by Neighborhood?

A. This was not the parking lot, Mr. Simmonds. This was for a drainage ditch under the property after the—

Q. Let us identify these and I will let you explain them.

A. Yes.

Q. Then I will let you explain them. That is a document that was enclosed in the lease?

A. In the lease, yes.

Mr. Simmonds: If your Honor please, I ask these be admitted into evidence as Defendant's Exhibit, whatever the

next number might be. It consists of two sheets of paper, one of them the letter which I have just identified and the other a copy of a statement of the Virginia Con-
page 121 } tracting Equipment Company, Alexandria Virginia, dated May 3, 1945, on which there is written in Mr. Sharlin's handwriting, over the sum of $6,130.39, the word "Neighborhood" and over the sum of $1,675, and odd cents, the words "Dominion."

Mr. Harrigan: Is he admitting it?

The Court: Offering it?

Mr. Harrigan: I would object to its admission unless and until he at least ties it up. So far we have a bill which says "Neighborhood" and "Dominion" with figures on it and no testimony as to what it even relates to.

The Court: I will look at it, as Judge as distinguished from decider of the fact.

Mr. Harrigan: An additional ground, your Honor, that the fact of who pays for improvements initially has absolutely nothing to do with the condition they have to be left in at the end of the term.

The Court: Unless I am mistaken, it gives all indications it is going to be offered to show that the paving was done by the tenant, is the gist of it that?

Mr. Simmonds: The work, it wasn't the actual paving—it had to do with the lot and also this grading situation Mr. Sharlin was about to tell about. I will inquire about that before I formally submit it, if you prefer.

page 122 } The Court: All right. No ruling at this point.

By Mr. Simmonds:

Q. Mr. Sharlin, you say this bill was sent to you and you indicated to Neighborhood that they owe the part of it that totals $6,100-odd. Will you explain what that work was that you were asking Neighborhood to take care of?

A. The drainage off the property, it was paved and improved and the water flowed onto the next property which was the Ball property, and Mr. Ball called me and objected to the condition of the water from the asphalting onto his property, and I took it up with Neighborhood at the time feeling that something had to be done about it, and we agreed to this arrangement. The drain was put in and carried under the Ball property and they made the arrangements for it and the bill was sent to me and that was it.

It had nothing to do with the parking lot other than dump-

ing water onto the next property. Mr. Ball was raising flowers, gardens, and so forth.

Q. How about the parking you had charged to yourself as —you say contract No. 1 is charged to Neighborhood and Contract No. 2 is charged to you. What were your arrangements?

A. At that time I do not remember. That is 20 page 123 } years, but we did have that understanding and that was it. But the parking had been put in, it was operating.

Mr. Simmonds: I ask that this be admitted in evidence as Defendant's No. 11, if that is what the next number is.

The Court: That is the number and its purpose is to show—

Mr. Simmonds: We might add some further testimony about it.

Mr. Sharlin has explained it as the cost of taking care of the drainage from the parking lot—

The Court: —once it had already been built.

Mr. Simmonds: What is the date on the bill?

The Court: May 3, 1945.

Mr. Harrigan: I would move the same objection there. I just do not see the point of cluttering up the case with documents which at this stage—

The Court: Until it is further tied in, I will only mark it as D-11 for identification.

(Defendant's Exhibit No. 11 marked for identification.)

Mr. Simmonds: I might say this: A part of this contention is we violated the obligation to keep the page 124 } property in repair. It would seem to me that even with Mr. Sharlin's explanation of that, that is certainly admissible to show that Neighborhood spent six thousand odd dollars in keeping the property in repair, which even though it had to be done on someone else's property, in effect, it is a repair of the parking lot.

The Court: For that purpose, it is received.

(Defendant's Exhibit No. 11 received in evidence.)

Mr. Harrigan: Exception, your Honor.

The Court: All right.

Harry M. Sharlin

By Mr. Simmonds:

Q. Mr. Sharlin, you have on two or three occasions stated that you had the parking lot asphalted and paid for it initially, is not that correct?

A. I believe it was part, to the best of my knowledge, part of the other construction.

Q. Can you show me the bill or check or any other document to indicate that you put asphalt paving on that parking area?

A. Mr. Simmonds, I could not show you a bill for the theater and I paid for it.

page 125 } Q. So, you are not in a position to show us any receipt, or bill or check?

A. I know it was a part of the plans. I believe, if you look at the plans, you might find it. I am not sure. But it was part of the overall construction costs.

Q. Can you find in the *Apecifications* or the Plans, either one, any requirement on you to put down an asphalt parking lot?

A. Mr. Simmonds, if I did not put it in, I do not know who did.

Q. Well, I can suggest who did.

Q. If you can show me a bill the Neighborhood Theatre put in and paid for the theatre parking, I would be very happy. It is my impression, my understanding, I paid. It was part of the original costs.

Q. Mr. Sharlin, I want to say to you that there will be considerable testimony to the effect that the parking lot that was turned over to Neighborhood in 1944-45 was bank gravel only, and did not have any asphalt topping on it and that the first asphalt topping was put on and paid for by Neighborhood, and I will show you a quotation dated September 29, 1955 of the Asphalt Driveways Company addressed to the Glebe Theatre, and ask you to read that, if you page 126 } will, including the date on it.

The Witness: Your Honor—

Mr. Harrigan: Your Honor, on this point—

The Witness: Jimmy, I can answer this.

Mr. Harrigan: I understand that. I would object to showing documents from somebody else addressed to someone else, to the witness and trying to have him explain it, as it happened back in 1955—

The Court: If the witness can—

The Witness: I know about it. I showed this to the Judge.

Harry M. Sharlin

The Court: The question is, on the line of questions, who paid for the parking lot, collateral documents showed the witness was asked if that does not help him figure it out.

Mr. Harrigan: If he wants to answer.

The Witness: If I may have the plat, please, as I explained to you earlier, this work, Mr. Simmonds, was done you pointed out in 1955. The only paving of the lot was lots 1, 2, 3, 4, 5 and not 6 and 7. In 1955 this was gravel right up to 1955.

Mr. Simmonds: What you say 6 and 7?

The Witness: 6 and 7. This was paved with the building as part of the building.

page 127 } The Court: He puts his hands on the lower numbered lots.

The Witness: Six and 7 were done by Neighborhood Theaters. They asked permission. This was zoned commercial. I intended to improve the property and I didn't and I gave them permission to do it. That is the paving they did only.

By Mr. Simmonds:

Q. Now, sir, would you mind just reading that document that I handed you and then we will ask a few more questions about it.

"Application of plant mix asphalt over the 4,200 square yards of the entire lot, patching of existing asphalt"—if you measure 6 and 7 you will find it is about 4,000 feet, not the entire lot. That is a little over an acre.

By Mr. Simmonds:

Q. Doesn't that say 4,000 yards?

A. 4,000 yards, yes. You have 8 inches of asphalt, you are going to have—when they say yards, they measure the amount of the thickness.

Q. Does that say square yards?

A. That is right.

Mr. Harrigan: I am going to object to everybody testifying as to what is going on; Mr. Simmonds and Mr. Sharlin—

page 128 } The Court: The objection is overruled.

Mr. Simmonds: I am just asking him to read the document.

Harry M. Sharlin

The Witness: Asphalt in the corner of it, not treated, patching of existing asphalt in corner but not treated—it is already fixing—Total cost to owners $4250.

"It is agreed and understood, if contractor waits until September 29, 1957 for $250, a guaranteed period"—I do not understand that. It is patching and doing.

By Mr. Simmonds:

Q. Is it your testimony, sir—

A. It says 4200 square yards.

Q. One square yards has 9 square feet, does it not?

A. Yes.

Q. That would indicate that you had in lots 6 and 7 alone, if this was to cover asphalting 6 and 7 alone, would indicate about 40,00 square feet, is not that right?

A. You mean the total property?

Q. Sir, you indicated the total property was about an acre.

A. The total property is a little over an acre, over an acre and a half. The total property is an acre and a half, 65,000 square feet I believe.

page 129 } Q. Do I understand you to tell us now that you are positive in your own mind that you put down and paid for asphalt paving at the beginning of the lease?

A. I am, definitely.

Q. And it covered everything except lots 6 and 7 where the building is located?

A. I am very definite that the asphalt was there when the building was open.

Q. Are you definite you paid for it?

A. Well, how it was paid for at this time I cannot remember, whether it was part of the building or a separate bill I cannot answer but it was there.

Q. In connection with your claim for paving the parking area at the termination of the lease, was just part of the lot paved or was the entire lot paved?

A. Without it to refresh my memory, I cannot say.

Q. Can't you recall what was done?

A. I believe it was the entire lot, the section where the trees were, I believe everything was paved, but I would have to look at the bills and refresh my memory.

Mr. Simmonds: If your Honor please, do you have the bills up there for the paving? I do not think he has put them in evidence yet, his claims on paving—

page 130 } The Court: Bills presented on interrogatories.

Mr. Simmonds: Yes, your Honor, it looks like this (indicating).

By Mr. Simmonds:

Q. Mr. Sharlin, I show you a paper which was filed by your counsel with your interrogatories which were sworn to later as being correct, a bill presumably on the letterhead of GLY Construction Corporation, addressed to Fred Burkaw, dated June 4, 1965, showing 14 various items done by that concern. I ask you to refer to item 10 and read exactly what it says there under Item 10.

A. "Resurfacing 10, 4,200 square yards, $1.40, $5,880."

Q. That is the exact amount of square yards that were in the paper I showed you a moment ago, is not that correct?

A. Yes, but this is not all of it.

Q. Is there any other repavement on there other than amounts of more than or less than $1,000.

A. Well, they obviously did not pave all of it. I think some of it was in fair condition.

Q. I thought you just a while ago said they did.

A. Resurfacing paving lot on gravel base, there has been 870 square yards which is additional so obviously, it is not the entire lot, Mr. Simmonds, but I am not an expert

page 131 } on this.

I know the work was done. I cannot read off of that. You will have to have testimony of the man that did it—tell you exactly what part was put in. I know that it was in bad condition. There were pot holes. It was a hazard.

Q. Mr. Sharlin, when you were testifying about the fixtures being ripped out of the walls, was that on the first visit there or the second visit with the attorney?

A. As I testified, I believe definitely the second visit they were all out.

Q. Now, I believe you said that these recessed fixtures such as the exit fixtures were placed in there during the construction of the building?

A. Yes.

Q. And so that they went in before the plaster was put on?

A. Yes.

Q. Don't they use something called plaster rings to put in buildings?

A. Not for exit fixtures.

Q. Do they do it for other kinds of fixtures?

Harry M. Sharlin

A. They do for ceiling fixtures if they are plasters. There are many different types of ceilings. For that type of work the exits, they do not. They put the box in. The
page 132 } plaster is to the box and the frame and everything goes on.

Q. I show you a bill on the bill head of Dominion Electric Supply Company, addressed to Neighborhood Theaters, December 12, 1944, and ask you what is billed to Neighborhood on that invoice?

A. This is plaster rings for flush fixtures and it is marked Center Theater, care of Ford Electric.

Q. "Center" is scratched out, is it not?

A. I did not scratch it out. It says "Center" on your billing.

Q. Down here doesn't it indicate it was paid for by Glebe?

A. This could be used in Glebe. This could be for any theater. These could be for the auditorium, plaster frames way up high, 19—too many. That is probably where they were used.

Q. Isn't that scratched out and another figure put in?

A. Yes.

Q. What is this other item that you have got down here?

A. "Three lathe ring fixtures", I do not know what that is.

Q. Was that sold by your concern?

A. 7 and 7 and 7. It is our bill. It has to be
page 133 } ours but they are ringed fixtures, a 3-light fixture. They are not exits and not the marquee. I don't know where they would be used.

Three light, recessed fixture—unless there is somebody in the Court here that could answer it. I could not. These are not fixtures that we are talking about, but there are 4 and 3-light fixtures wherever they would be used. It says "3-light."

Q. Who paid for the light fixtures that went into the building of the Glebe theater initially?

A. Well, all the recessed fixtures with the exception of the surface mounts in the lobby—I believe the Neighborhood furnished their own and I do not know why they did not buy them from me. But all the fixtures that were mounted into the walls or ceiling were furnished by us for the construction. I believe they furnished a few of the lobby fixtures, etc.

Q. With the exception of the exit lights, can you mention any fixtures that you saw that were taken out of the building that had been paid for by you when the building was constructed?

Harry M. Sharlin

A. Yes, the marquee fixtures, the fixtures over the exit doors on the outside of the building, everyone of them was torn off.

page 134 } Q. I said excluding the exit lights.
A. That is what I am talking about.

Mr. Harrigan: On this line of questioning I would like to put my objection in for the record. I do not think the test is who paid for the fixtures whether they had the right to take them out or not. It never has been the test and certainly is not the test in Virginia.

The test is the permanency, whether attached, and in this particular case, I think the lease controls specifically what they could take out and what they could not.

The Court: It does not say they take out everything they put in—a very broad—

Mr. Harrigan: It does not, your Honor.

Mr. Simmonds: I think it says in the last sentence. Any such thing * * * * may remain the property of the lessee.

The Court: What section?

Mr. Simmonds: 2.

The Court: Let me read it. (Pause)

It is always when there is litigation you wish somebody would have written more in the lease, and at this point I am going to have to read the whole lease to get the full feel of it.

"The building has got to have in it plumbing and heating facilities and ducts for cooling system and ade-
page 135 } quate sewer and water facilities, and connections and connecting pipes to serve the same."

That immediately is out of the order.

"Lessee agrees to equip said building at lessee's cost and expense" with what?

Then it is listed, "Seats, booth equipment, sound equipment, carpets and necessary furniture for the operation of a moving picture theater. And further agrees at its own expense and as soon as the same may become available, to install the necessary equipment such as motors, compressors and the like for a cooling system. All such equipment, fixtures and furniture of whatsoever kind, so installed or brought upon the premises by the lessee, whether or not the same may be affixed to the freehold, shall at all times remain the

property of the lessee subject only to lessor's liens for rents as provided by law."

The named things are fairly specific:

"All such equipment, fixtures or furniture of whatsoever kind, whether affixed or not shall at all times remain the *propert* of the lessee."

page 136 } Mr. Harrigan: May I make one comment on that terminology, your Honor?

The Court: Right now I am going to say my starting point is that there seems to be an intention to have a shell of a building and that some kind of trade fixtures may be removed.

Now, the custom in the trade has already been suggested as a matter of proof to be forthcoming, so I am going to have to wait until I hear some of that to know the custom in the trade.

Mr. Harrigan: I don't think that applies. I don't even think that it is in issue, for a very specific reason, your Honor.

The Court: All right. Let me hear.

Mr. Harrigan: All leases and matters of construction of this type are construed in accordance with the maxims of *noscitur a sociis* and *ejusdem generis*. The Court is aware of both of these.

In 198 Virginia, *Sellars* v. *Bles*, page 49, this was a contract which construed the word 'improvements' and the Court in construing that word stated,

"The two cannons of construction, *noscitur a sociis* and *ejusdem generis*, indicate that the general words 'any improvement' which follows several specifically-
page 137 } enumerated "things, all of which are modified by the words 'construct' or 'construction' were intended to include only undertakings which were to be accomplished through construction.

The maxim *noscitur a sociis* is frequently discussed in connection with the maxim *ejusdem generis*, and under these doctrines where there are general words following particular and specific words, the general words must be confined to matters of the same kind as those specified."

I think that is the only rule of construction that the Court can use in this particular case, and in this situation, it falls

right in. It says the lessee has to equip *tith* seats—which is very specific; "booth equipment" which is very specific; "carpets," very specific, and "necessary furniture for the operation of the movie." There are the four things that the lessee is to put in, and of course, air-conditioning equipment.

Then, it goes on to say, "all such equipment.*.*.*." "All such" refers back to the equipment previously mentioned. "Fixtures or furniture of whatsoever kind",—and that must refer back to the kind specifically enumerated—"may be removed."

page 138 } There is nothing in there that says they can remove marquee lights and marquee panels or electrical fixtures out of the wall or anything of that nature. I think that "all such equipment, fixtures and furniture" has to refer back to that item specifically enumerated in the lease; and to interpret it to mean that everything that they put into the building, they can take out would not be a proper construction. And under the law, and under the doctrine of *noscitur a sociis* and *ejusdem generis,* it would fly in the face of a well-established rule of construction, which is almost universally recognized in construing leases of this type.

Mr. Simmonds: If your Honor please, I think as you suggest, that it might be a little premature to rule on this at the present time in view of the testimony in which we say that this lease must be read in the light of the custom and usage in the industry; and secondly, in connection with the plans and specifications that were to carry out the intent of the parties to the lease.

The next question I was going to ask Mr. Sharlin was to point out any place in the specifications or in the plans that required him to furnish a single light fixture other than Exit Lights.

page 139 } Mr. Harrigan: Well, on that point, your Honor, if this is resolved, this issue, it will eliminate a great many questions as to who paid for this fixture, who put the seats in and—We know that they could be taken out—and who put the fans in, whether a fan could be taken out under this type of construction, and whether dimmers could be taken out, and so forth. And I think the construction is very clear, and the law is very clear as to when you have general words following specifically-enumerated items, and those general words are not words of art, and you don't know what a fixture is by saying "fixture"—a fixture could be almost anything attached to the freehold; it has no color at all and it has to take its color from somewhere—and under

this doctrine, it's clear that it must take its color from the items which they enumerated in the lease itself; and any other construction, other than that would disregard the plain intent of the lease.

The Court: Well, I am still going to hear evidence of any established custom or practice in the leasing of theatres as to the general period when this lease was entered into, because people do enter into agreements in the light of known customs, if there be such, and I will hear evidence to see if there was such.

page 140 } My point is this: If your client knows and says that something was in the building before the tenant took it over, then I am not going to have to worry about it. If I believe him, and it was taken, and he put it in and paid for it before the building was rented, then the defendant could not take it out. So, it helps narrow the issue in the Court's mind.

I will grant you that there is more to it than that; but I think the line of questioning is quite proper. I don't make final rulings. Fortunately, I don't have a jury to let hear some evidence and then perhaps later say, "Well, no custom was shown, and something else happens, so ignore it. I don't have to worry about that in this case, but the objection is overruled.

Mr. Harrigan: Exception on the grounds stated.

Mr. Simmonds: The last question—

The Court: We'll adjourn till 10:00 in the morning.

Mr. Harrigan: Could I have my witnesses sworn now and recognized?

The Court: All right, before the adjournment.

(Witnesses sworn.)

(Whereupon, at 5:00 p.m., the hearing was recessed to reconvene the following morning, February 24, 1967, at 10:00.)

* * * * *

page 143 } PROCEEDINGS

The Baliff: The Circuit of Arlington County is now in session, the Honorable Paul D. Brown presiding.

The Court: All right.

Thereupon,

HARRY M. SHARLIN resumed the stand and testified further as follows:

CROSS EXAMINATION (Continued)

Q. Mr. Sharlin, I believe at the close of yesterday's session, I had asked you if you have any invoices for any electric light fixtures that were installed in the Glebe Theatre.

A. Do we have invoices?

Q. Yes, sir.

A. Yes, we have them. My attorney has them, for fixtures installed.

Q. Installed in '44 and '45?

A. Installed in '44 and '45.

Q. Yes, sir, when you built the building.

A. I'm not certain about that. If we do have them, Mr. Harrigan has them.

Mr. Harrigan: No, we don't have any bills at all dating back to '44.

By Mr. Simmonds:

page 144 } Q. Can you show me anything in the plans that required you to install electric fixtures, electric light fixtures?

A. Well, there is nothing in the plans—in these plans—but there are addendums to plans on electrical work, usually because the requirements are different in every city.

Q. Do you have such addendum?

A. No, I wouldn't have it after 20 years. I didn't have these either (indicating).

Q. Well, if you look at those numbered E-1 and E-2 of the plan and see if there is anything on those two pages that call for the installation of electric lighting fixtures?

A. There are fixtures on this plan.

Q. What are they?

A. The fixtures are here listed on the plan. These are the fixtures; these are the outlets.

Q. They are the outlets?

A. That's right.

Q. But not fixtures?

A. The surface mount fixtures are never shown, but the

recess fixtures are shown. The fixtures are never shown on the plan, just the outlets.

page 145 } Q. All right, sir. That shows the outlets.

A. Shows the outlets where fixtures are supposed to be.

Q. Now, you look in the specifications and see if there is anything that required you to—

A. No, there is none there, as I repeated. When I asked for these from Mr. Harrigan, these prints are usually—The specs are used in most theatres and they have addendums to fit each particular problem, which would be this one.

Q. Do you have any addendum to the Specs?

A. I don't have it. I don't have any addendums other than these prints.

Q. Mr. Sharlin, do you have any bills or invoices showing that you purchased the attraction panels and the Glebe sign that was on the theatre?

A. No. The Glebe sign was purchased by the Neighborhood Theatres, and attached to the building. The marquee was a part of the building during construction.

Q. I have reference to the attraction panel.

A. That's part of the marquee.

Q. Did you purchase the attraction panels?

A. I didn't purchase anything; I paid the bills for the entire theatre.

page 146 } Q. Were the bills for the attraction panels included in the bills that you paid?

A. I would assume the marquee was a part of the theatre because the building was built and completed with it and I can only assume that the cost of construction included the marquee.

Q. Well, I'm talking not about the marquee, but the attraction panels.

A. Well, there wouldn't be a marquee without the panel in it. It would just be partially finished. It would be just I-beams. (Eye-beams)

Q. The marquee has a structural attachment to the building, does it not?

A. It would be the same as the steel work of any building has to be.

Q. Any attraction panels are attached to that steel framework, is that right?

A. The features shown in part of the marquee, which is added to the side panels would be in the theatre operator's—

Harry M. Sharlin

Mr. Simmonds: I would like, your Honor, to have this marked Defendant's, whatever the next number is, for identification, please.

The Court: D-12 for identification.

page 147 } (Document marked Exhibit D-12 for identification.)

By Mr. Simmonds:

Q. I show you D-12 for identification which is an invoice on the letterhead of Regal Neon Signs, dated March 28, 1945, and ask you if that does not show the attraction panel signs being charged to Neighborhood Theatres?

A. This bill shows Neighborhood Theaters, yes.

Q. All right, sir. And does it also show the purchase of a Glebe sign?

A. Shows the Glebe sign, yes.

The Court: Is that one or two Glebe signs?

The Witness: Two.

By Mr. Simmonds:

Q. What's the total of it?

A. $2735.

The Court: Are you leaving it for identification?

Mr. Simmonds: Yes, not to be put in evidence.

I would like to have this marked Defendant's No. 13 for identification.

The Court: So marked.

(Exhibit D-13 was marked for identification.)

page 148 } By Mr. Simmonds:

Q. Mr. Sharlin, I show you what has been marked Defendant's 13 for identification which is billhead of Lightolear, bearing date of February 10, 1945, and ask you if that bill does not cover electric light fixtures.

A. This bill is for lighting fixtures for a portion of the fixtures that are in the theatre.

Q. What fixtures would that be?

A. These are fixtures that were hanging in the lobby; they are small brass fixtures. You have a small porcelain fixture in the manager's office; you have a small surface-mount fixture in the stairway; you have an Exit ceiling piece hanging from the ceiling, and you have the mezzanine floor which are sur-

face-mounted fixtures. Just as I stated before, these are all surface-mounted fixtures. These are not the ones that went in during construction. Every one of these fixtures have been replaced with a similar type. They are inexpensive; they hang from the ceiling.

Q. What's the amount of that bill?

A. $569.00.

Q. Mr. Sharlin, when you testified yesterday about work done by Hamilton & Spiegel, Incorporated, I didn't understand exactly what work you said they had done.

page 149 } A. Work I understand that had to be done was new exhaust fan put on top of the booth for removing the fumes and new frames in the projection booth of the wall, facing the auditorium or the screen.

Q. Do you know where that exhaust fan exhausted to?

A. Where it exhausted to?

Q. Yes.

A. Through duct work. I'm not familiar with where and how it exhausts. I know it's necessary and had been taken out.

Q. The frames you referred to are the frames over the openings in the projection booth, through which the films are projected?

A. Correct, yes.

Q. Do you know what the purpose of those frames is?

A. I have no idea. *I* all I know is, they were taken out; they had to be replaced. I don't know the purpose of them.

Q. Do you know the breakdown in the cost of the exhaust fan alone?

A. I believe it's on the bill, that Mr. Harrigan has.

Q. I'm asking you if you know.

A. No, I don't remember off-hand.

page 150 } Q. You don't remember what the amount for the frames would be?

A. No, I do not.

Q. You don't know what the exact amount of the total—

A. No, I don't remember.

Q. Mr. Sharlin, I hand you a document which is entitled "contract" on the letterhead of the United Industrial Associates, Inc., which purports to be a proposal dated April 9, 1965 re the Glebe Theatre and addressed to you regarding removal of the existing heating and air-conditioning equipment and the installation of a new system. I ask you if that is a copy of the Proposal that you accepted in connection with new air-conditioning and new heating work that was done on the theatre?

Harry M. Sharlin

A. Yes, this is the contract.
Q. State what work is to be done there?
A. "Remove existing heating and air-conditioning equipment; furnish and install new equipment so as to provide year-round air-conditioning at the subject location, completely in accordance with seller's letter of Proposal dated March 29, 1965, which becomes a part—In accordance with our agreement we shall perform this work on a cost-plus, ten percent overhead, plus ten percent profit basis, with a
page 151 } " total amount not to exceed price listed below, time and material not to exceed $19,810."

Mr. Simmonds: Thank you. I would like that to be admitted Defendant's 14.
The Court: D-14 in evidence.

(Document, Exhibit D-14 was admitted into evidence.)

Mr. Simmonds: That is all.

RE-DIRECT EXAMINATION

By Mr. Harrigan: Your Honor, could I look at those D-12 and D13?

By Mr. Harrigan:
Q. Mr. Sharlin, calling your attention to this Glebe sign and these attraction panels, the date on that is March 28, 1945. Was all of that equipment installed in the theatre prior to your delivering it to Neighborhood on 30 April?
A. Yes.
Q. Calling your attention to these figures dated February 10, 1945, were all those fixtures in the theatre on April 30th when it was delivered to the Neighborhood people?
A. Yes.
Q. they were?
A. Yes.

Mr. Harrigan: I would like to introduce both
page 152 } of these into evidence. They are his exhibits but—
Mr. Simmonds: All right.
The Court: They are received in evidence.

(Exhibits D-12 and D-13 were received into evidence.)

Harry M. Sharlin

Mr. Simmonds: Are they going to bear the defendant's numbers—I take it?

The Court: I will do this: While they were marked for identification by Mr. Simmonds, they will become P-5 (formerly D-12) and P-6 will be what formerly was D-13.

(Exhibits P-5 and P-6 were formerly D-12 and D-13, received in evidence.)

By Mr. Harrigan:

Q. Getting back to the point, that Mr. Simmonds raised yesterday, when was the first time that you contacted Neighborhood Theatres regarding the re-letting of the building.

A. May I, your Honor, refresh my memory with this copy?

The Court: All right.

The Witness: 1961, November.

By Mr. Harrigan:

Q. I show you a letter marked September 5, 1961.

Mr. Simmonds: If your Honor please, I think this was brought up in direct examination yesterday by Mr. Sharlin. I don't know why it now becomes the subject of

page 153 } redirect examination.

The Court: This is to show what?

Mr. Harrigan: Your Honor, he had extensive cross-examination on this point, and I believe he left the Court with the impression that when Mr. Sharlin entered into the Lease with K and B, in '64, he had not contacted Neighborhood and in fact, this will show for some two or three years, he had been negotiating with Neighborhood to no avail, prior to entering into that 1964 lease.

Mr. Simmonds: If your Honor please—

Mr. Harrigan: —and made a full disclosure to Neighborhood prior to entering into the lease with K and B.

Mr. Simmonds: If your Honor please, that was not the purport of the testimony, nor the purpose of the testimony. I think Mr. Sharlin made it clear that he had been negotiating with them in 1963 and earlier, and that he testified that in January of 1964 he still indicated that he would give them the first opportunity to rent it, and I don't see it needs any clarification about prior offerings of the property to Neighborhood.

Harry M. Sharlin

The Court: On direct, he said that Neighborhood had failed to meet the offer of K and B which he had shown. On Cross, Mr. Simmonds developed that that cate-
page 154 } gory of negotiations went down to within 30, 60 or 90 days from the end of the Lease, April 30th. Then, on Cross, the *witnes* said, "Well, yes, the Lease with K and B was signed on January 17th, acknowledged January 20th," and "Yes, I did get this letter from Mr. *Thalheimer,* yes. I had a phone call that refers to January 20th."

Then, a little testimony about why—"feared an upset tenant, the condition of the premises."

Now, as I understand, this is to show that there was an offer.

Mr. Harrigan: A full disclosure.

The Court: An offer before this period of January 17th or 20th?

The Court: And I think, therefore, it may come in, so objection is overruled.

By Mr. Harrigan:

Q. Will you read that letter? For the record he is referring to letter dated September 5, 1961:

A. "Mr. Wade Pearson:

I would very much like to discuss the probable renewal of lease of Glebe Theatre with your principals in Richmond. There have been certain changes in the area, and
page 155 } I have been approached by others with the possibility of doing business when the Lease is up. If you could convey my wishes to the *Thalheimers* in Richmond, if they are interested, I would like to drive down and discuss the matter.

Very truly yours."

The Court: Off the record.

(Discussion off the record.)

Mr. Harrigan: I would like to offer this letter into evidence.

Mr. Simmonds: What's the date of it, September 5, 1961?

Mr. Harrigan: Carbon copy.

The Court: This is P-7.

(Exhibit P-7 received in evidence.)

Harry M. Sharlin

The Court: Mr. Sharlin, it's your testimony that this letter, now known as P-7 was signed by you and sent?

The Witness: Yes, your Honor.

Mr. Harrigan: May I have this marked for identification, letter dated November 13, 1961?

The Court: P-8 for identification.

(Document marked P-8 for identification.)

page 156 } By Mr. Harrigan:

Q. I show you that letter dated November 13, 1961. Can you identify it and explain what it is? Read it.

A. It is addressed to Mr. Sam Bendheim, Jr., Neighborhood Group of Motion Picture Theatres,

"Dear Sam:

Thank you for your letter of the 8th. As a matter of fact, Wade Pearson called the day before and suggested we set up an appointment. Might I say at this particular writing that since sending Wade the letter, I have been advised that it would be to the advantage of all parties to wait for a date in the future that is closer to the expiration of the lease, at which time, we would all be in a better position to decide.

"May I respectfully suggest that a report be sent to me in accordance with our lease on the business for the year when such report is ready."

Q. That letter is dated in 1961?

A. Yes.

Mr. Simmonds: Which one?

Mr. Harrigan: November 13th, 1961.

Mr. Simmonds: That's P-7?

The Court: P-8 for identification.

page 157 } Mr. Harrigan: I would like to offer this, your Honor.

The Court: The words "for identification" are stricken. It's in evidence.

(Plaintiff's P-8 was received in evidence.)

The Court: Do you have a whole series of things there? Could you show them all to Mr. Simmonds and show them to the witness. Maybe you can't short-cut it, but if you have ten items, let's see how much can be agreed.

Harry M. Sharlin

Mr. Simmonds: We have no objection to any of these letters. We concede that there were negotiations that went on in '63 regarding it.

The Court: The ones on top that you propose to put in? This group is the one Mr. Simmonds saw. He didn't see the one with return receipt.

The Court: The items offered as conceded will be marked P-9, November 14, 1961, Bendheim to Sharlin; P-10, November 8, 1961, Bendheim to Sharlin; undated letter to *Thalheimer,* to be marked P-11. I take it sent by Mr. Sharlin?

Mr. Harrigan: Yes, your Honor, sent by Mr. Sharlin. The next letter refers to it. That's why I put it in that
page 158 } order.

The Court: P-12, February 1, '63, *Thalheimer* to Sharlin; P-13, August 22, 1963. *It* take it to be from Sharlin to *Thalheimer,* shows copy to Bendheim; P-14, August 26, 1963, Craft, Secretary to *Thalheimer,* to Sharlin, copy to Bendheim.

P-15, October 29, '63, *Thalheimer* to Sharlin and P-16, October 31, '63, again I take it to be Sharlin to *Thalheimer.* We will pause a minute while I read them.

(Judge read.)

Mr. Harrigan: I think we left off with P-8.

(Plaintiff's Exhibits P-9, P-10, P-11, P-12, P-13, P-14, P-15 and P-16 were marked for identification.)

The Court: If Mr. Simmonds concedes the point, and the letters speak for themselves, what more do I need to hear?

Mr. Simmonds: We admit the negotiations went on prior to January 1964.

By Mr. Harrigan:

Q. Just for the record, showing you this letter of October 31, '63, would you read that into the record?

A. "Mr. Morton G.—

The Court: They are all in evidence. No need to read it, Mr. Sharlin.

(Exhibits P-9 through P-16 were received in
page 159 } evidence.)

Harry M. Sharlin

By Mr. Harrigan:
Q. Did there come a time after you had informed them of your opportunity to lease that you did lease the premises?
A. Yes.
Q. That was in February of 19—

Mr. Simmonds: That's objected to.
Mr. Harrigan: That's already in evidence.
Mr. Simmonds: Are you talking about the notice to vacate?
Mr. Harrigan: I'm talking about the notice to K and B.
The Court: I didn't hear the question clearly.

By Mr. Harrigan:
Q. After October 1963 when did you lease the premises to K and B?
A. January 17, 1964.
Q. You didn't tell Neighborhood that you had leased it?
A. No, I did not.
Q. Why not?

Mr. Simmonds: He explained that yesterday.
The Court: He explained that yesterday. Sustained. It's repetitious.

page 160 } By Mr. Harrigan:
Q. Mr. Sharlin, directing your attention back to the light fixtures that were torn out, taken out of the building—

Mr. Simmonds: I object to the characterization of counsel. Well, he changed it. All right.

By Mr. Harrigan:
Q. —light fixtures that were taken out of the building. To the best of your knowledge, how many of those fixtures were in the building at the time you delivered it to the Neighborhood Theatre Group, in April 1945?
A. Well,

Mr. Simmonds: If your Honor please, I think Mr. Sharlin is testifying to the best of his belief, but he is supposed to testify to facts.
The Court: I think the question must be rephrased.

By Mr. Harrigan:
Q. How many of the fixtures were in the building?

Harry M. Sharlin

A. All fixtures would be in a building and all complete in place before you could get occupancy permit. You have to have all outlets covered before you go into operation. Twenty years is a long time to—I know they were in.

Q. There was some discussion as to the parking lot.

Mr. Harrigan: Do you have a copy of the page 161 } Lease, your Honor?

By Mr. Harrigan:

Q. Directing your attention to Plaintiff's Exhibit 1, Plat attached to the back of it, with relation to the lines that criss-cross the parking lot, how much, if any, of the parking lot was paved in 1945 when you delivered the premises?

A. All of the lot was paved with the exception of the small portion of Lot 1 and Lots 6 and 7 were not paved. Everything else was paved.

Q. Did there come a time when request was made to improve Lots 6 and 7?

A. Yes.

Q. Do you remember when that was?

A. 1957 or 1959.

Q. That's when it was done, but do you remember—

A. "55 or—

Q. Let me show you this letter. Is that your signature?

A. Yes, it is.

Mr. Harrigan: May I have this marked, your Honor, for identification.

The Court: P-17 for identification.

(Exhibit marked P-17 for identification.)

page 162 } Mr. Simmonds: May I see it, please?

By Mr. Harrigan:

Q. Would you read that letter?

A. It is dated July 17, 1964,

"Neighborhood Theaters,
Mr. Bendheim:

The Court: From whom to who?

The Witness: From me to Neighborhood Theatres, attention of Mr. Bendheim:

Harry M. Sharlin

"You have my permission to improve the grounds adjoining the theatre for the purpose of parking only until such time as we will use the above-mentioned property for development."

By Mr. Harrigan:
Q. Now, the grounds adjoining the theatre that you are going to develop were which sections?
A. 6 and 7.
Q. Is that the sections that were not paved?
A. Originally, yes.

Mr. Harrigan: I would like to introduce this letter in evidence.
The Court: It's received by striking the words "for identification."

page 163 } (P-18 was marked and received into evidence.)

By Mr. Harrigan:
Q. One last question: With regard to the marquee, as of April 30, 1945, was the marquee completed or incompleted?
A. Yes, completed.
Q. And when you say "completed," what did it have on it, with relation to the Glebe sign?
A. Beg pardon.
Q. With relation to the Glebe sign, what did it have on?
A. The marquee was completed, ready for announcing of the performances or the shows.
Q. Did it have the Glebe signs on it?
A. Yes, it had the Glebe signs on it.
Q. Did it have the attraction panels on it?
A. Yes, it had the attraction panels on it.

Mr. Harrigan: That is all.

RE-CROSS EXAMINATION

By Mr. Simmonds:
Q. Mr. Sharlin, you mentioned that the Glebe signs and attraction signs were up on April 30th. I take it, then, that Neighborhood had access to the building prior to
page 164 } April 30, 1945 for the purpose of installing the equipment and things that it did install, is that correct?

A. Yes, they had access to the building to put their equipment in.

Q. They had possession for the purpose of installing the part of the building or equipment they were supposed to install, isn't that correct?

A. Yes.

Mr. Harrigan: Well,—

The Court: Step down.

* * * * *

Thereupon,

PATRICK DOUGHERTY was called as a witness on behalf of the Plaintiff, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Harrigan:

Q. State your name please?

A. Patrick Dougherty.

Q. Where do you live?

A. Lanham, Maryland.

page 165 } Q. Where do you work, Mr. Dougherty?

A. For the L. T. Souder Company, in Washington.

Q. Where is that located in Washington?

A. 3219—12th Street, Northeast.

Q. What type of organization is L. T. Souder, Inc.

A. Electrical contractor.

Q. How long you worked as an electrical contractor with them?

A. I have been with Souder for six years.

Q. Calling your attention to 1965, approximately in May of 1965, did you have occasion to go to the Glebe Theatre in Arlington, Virginia?

A. Yes, we did the electrical work.

Q. Did you go there yourself?

A. Yes.

Q. When you arrived at the Glebe Theatre, would you explain to the Court the condition of the electrical equipment in the theatre?

A. Well, pertaining to the seat lights, we found in most cases—

The Court: Limit your testimony to what you saw, not what you found. See the difference? The things you saw.

page 166 } The Witness: I found, or saw that in most cases, the cables were cut down into the floor boxes, and the ceiling lights, the same thing. We had to replace that.

Mr. Simmonds: I don't quite understand about the ceiling lights. Say that again.

The Witness: The electrical ceiling fixtures were removed and the wires were cut too short for us to make the joints up again, to rehang new fixtures.

By Mr. Harrigan:

Q. When you refer to the electrical ceiling fixtures, in what parts of the building did you observe this?

A. Well, in the lobby, upstairs in the, I guess it's the lounge up there, and the canopy lights were all removed. It's the same case there.

Q. Canopy lights?

A. Yes, the marquee, on the under-side of the marquee.

Q. With relation to fuses and boxes that they come in, service equipment, did you have occasion to look at any of that?

A. Well, we had to replace—

Q. I want to know what you saw.

A. Well, the circuits were disconnected in some cases; others they weren't.

Q. All right.

page 167 } A. We replaced what was necessary.

Q. Do you have the bills that you worked on on that job?

A. Yes. (Handing)

Mr. Harrigan: I would like to have these bills marked for identification, your Honor. Those bills, your Honor, I have marked in the order they are marked on the Interrogatories—B1, B2, B3, B4, B5 and B6.

The Court: At this point let the record show that Counsel agreed to mark exhibits in the same fashion they were referred to in Interrogatories, so those markings will be adopted, and the use of a parenthesis indicates it was a defense matter and no parenthesis indicates it was a plaintiff's

matter. So, it will be B-1 through B-6 are now marked for identification.

Mr. Simmonds: That's correct.

(Exhibits B1 through B-6 were marked for identification.)

By Mr. Harrigan:

Q. I show you Plaintiff's Exhibit B-1 which is a bill for $3,595.83. Would you explain to the Court the condition which you found the equipment relating to that bill and the work that you did which made up the labor and materials constituting that bill?

Mr. Simmonds: Would you read that question
page 168 } back, please. I didn't quite understand it.

(Last question was read back by the reporter.)

The Witness: Well, it was wire for the equipment and the dimmers had to be installed. There weren't any dimmers there when we arrived.

Q. What's a dimmer?

A. It's used to dim, raise and lower the intensity of the house lights.

By Mr. Harrigan (Continuing):

Q. Would you explain exactly what you did in relation to the dimmers and any other items which make up that bill?

Mr. Simmonds: If your Honor please, may I inquire first if there isn't a breakdown of this bill. It seems to be a rather large bill, just to present to K and B Theaters with no more specifics than "wiring for booth," "connecting equipment, furnishing and installing motorized dimmers,"—

Mr. Harrigan: Your Honor, he is going to testify now as to the breakdown exactly what it is comprised of.

Mr. Simmonds: I'm talking about a written records breakdown. It seems to me that would be the best evidence rather than just independent testimony.

The Court: Mr. Dougherty, was there a breakdown made of the bill?

page 169 } The Witness: Oh, yes, we have—

The Court: This particular one, B-1?

The Witness: Yes, we have a record of the cost of the equipment, the wiring and the labor.

The Court: Was there ever a bill submitted which showed the different elements?

The Witness: No, sir.

The Court: None exists, Mr. Simmonds.

Mr. Simmonds: If it wasn't submitted to K and B, I think we are entitled to have that breakdown to learn if any part of that bill is attributable to any default of Neighborhood. Certainly, we are entitled to know what they did.

The Court: I think you can get to it on cross.

Mr. Simmonds: May I have an exception.

The Court: Noted.

By Mr. Harrigan:

Q. Explain exactly what you did in relation to that bill.

A. Well, it was wiring for the new projectors in connection with the equipment, furnishing, installation of the dimmers; the dimmers were mounted on racks in a room adjacent to the projection booth—you might call it the mechanical equipment room and it had air-conditioning equipment in it,

page 170 } the wiring for that, the fan, the exhausters off of the projection equipment and just the general wiring there.

Q. You said you installed a dimmer?

A. Yes.

Q. What was the condition of the wiring? What wiring did you have to do in order to install the dimmer?

A. We had to run the circuits for the dimmers.

Q. What do you mean by that?

A. The wiring, the conduit.

The Court: Are you saying there was insufficient electrical service there to service what you were putting in?

The Witness: There wasn't any service.

The Court: Then, it was a new item unrelated to what had been in the theatre before?

The Witness: No, I don't know where the dimmers were or—Actually, I suppose they had dimmers. I don't know whether they did or did not. I assume they did, but the wiring wasn't there.

By Mr. Harrigan:

Q. How many theatres have you worked on, Mr. Dougherty?

A. We do all the work for K and B.

Q. Have you ever been in a theatre that didn't have a dimmer?

A. No, I haven't.

page 171 } Q. Where did you install this dimmer that you put in?

A. Up next to the projection booth.

Q. What type of installation is necessary to install a dimmer?

A. Well, usually you build a rack or some kind of a frame and set them—these were built on a channel.

Q. Was this loose or bolted somewhere?

A. Yes, it's bolted to the wall and the equipment is fastened to that.

Q. What is necessary in order to wire it up?

A. Well, run the power from the electrical panel to make the connection.

Q. Were there any loose wires in the projection booth and the other room?

A. Yes. The equipment that had been there before that I suppose was where the projectors were.

Mr. Simmonds: Excuse me. Please read that question and answer.

(Question and answer read by reporter.)

By Mr. Harrigan:

Q. What was the condition of the wiring that was left that runs to the projectors themselves?

A. I believe that was all right.

page 172 } Q. Did you use that to hook up the projectors?

A. Yes. To the best of my knowledge we did.

Mr. Simmonds: Now, if your Honor please, I make the same objection. This gentleman is supposed to testify to fact, not to the best of his knowledge. I don't think it's satisfactory.

The Witness: I would say yes.

By Mr. Harrigan:

Q. Did you do the work, supervise the work?

A. Yes.

The Court: The answer is received. The objection is moot.

Patrick Dougherty

By Mr. Harrigan:

Q. Ordinarily when you go into a booth to wire up a booth, what is there—

Mr. Simmonds: I object to that, if your Honor please. We are dealing with a particular situation.

The Court: How would this help me to know the issue in the case as distinguished from new equipment that a new tenant was going to install?

Mr. Harrigan: For this reason, your Honor: As I understand it, generally, the wiring is all put in and the new tenant generally has to come in and wire up his own
page 173 } projectors or bear the expense of wiring, and I understand that wiring up the new projectors is included in this bill; and it's an item which should not be charged against Neighborhood since it is the ordinary expense of the new tenant.

Mr. Simmonds: Now, if your Honor please—

The Court: Are you offering evidence that the bill should be in, less new things, or are you going to show costs related to those complaints in the Motion for Judgment?

Mr. Harrigan: Well, I'm going to show costs related to the Motion for Judgment.

The Court: Then, should I concern myself with hearing any evidence of what new things cost, *per se?*

Mr. Harrigan: All right, your Honor.

The Court: If you approach it the other way round, that's the heart of the case.

Mr. Simmonds: If your Honor please, I think the problem which the plaintiff is faced with right now goes to the heart of my motion, that we should have records to indicate how much of this bill was for the purchase of dimmers, how much was for the installation of the projectors, how much for the installation of the dimmers, and were there any new services run, and how much was that? It's just a guessing
page 174 } game now, as it is, as I see it.

The Court: The witness has testified in answer to my question that there was no breakdown bill submitted to the customer.

Mr. Simmonds: That's right.

The Court: So, plaintiff is not to be denied showing what cost is applicable to this suit. I haven't ruled on whether one is admissible. It is only so far for identification; but the testimony relates to a bill which is admittedly, by both sides,

larger than that claimed in this suit, if I understand it correctly.

Mr. Simmonds: Well, if your Honor please, my objection at this time, of course, is not to the bill itself, because it hasn't been offered; but to his testifying from his memory, so to speak, where there are records to indicate precisely what the charge is or the particular items that might be chargeable to the defendant in this case.

As I say, we are certainly entitled to that evidence, which, as I say, is the best evidence or at least, it's better than his oral testimony.

The Court: Do you make up the bills, Mr. Dougherty?

The Witness: No, I do not.

The Court: How do you turn in your time, or
page 175 } whatever it is, so a bill can be created?

The Witness: It's turned in to Mr. Hampton, president of the corporation. He makes the bills and keeps the job sheet.

The Court: Do you turn in time slips or simply telephone them, or what—that is, with regard to this job.

The Witness: We just call the time in and give them a listing of the materials that are used, and he puts this in a job sheet; it's carried there.

The Court: I see.

The Court: Do you determine the amount that's charged for your time, or someone else?

The Witness: You mean—

The Court: To the customer.

The Witness: The monetary.

The Court: The boss makes up the bill, doesn't he, rather than you?

The Witness: Yes, but we are paid a certain wage.

The Court: Then, do I correctly estimate that your knowledge of dollar amounts only comes from what the boss computed after you turned in your time, is that a fair statement?

The Witness: Yes, I would say, yes.

Mr. Harrigan: Could I ask him a question, your Honor?

page 176 } The Court: Well, in the light of this, it seems the witness may testify as to what he saw and what he did. I assume all these commercial operations—and apparently it is a company of some size, so it takes more than one witness to get the evidence to the tally before the Court, so I don't think I can sustain the objection, but I see the area to which it is—

Mr. Simmonds: If your Honor please, I believe this gentleman is going far beyond his knowledge when he tries to put dollar figures down for particular things. All he has is a bill for the total which is made up of many items, some of which are admittedly not chargeable to this defendant, so the total bill means nothing to it.

He has said that he does not know the particular amounts that are put on the bill or in this record sheet for the particular work he has done.

Mr. *Harrington*: Your Honor, he hasn't said that at all.

Mr. Simmonds: I thought he said—

Mr. Harrigan: Could I ask him some questions on this line? This seems to be the problem.

The Court: Yes.

By Mr. Harrigan:

Q. Mr. Dougherty, who was the supervisor on the job?

page 177 } A. I was.

Q. Who supervised the men in the number of hours they work there?

A. I did.

Q. Who supervised the work and the materials they put in?

A. I did.

Q. Who submitted the list of the materials and the hours to the front office?

A. I did.

Q. Are you familiar with the costs on materials and items?

A. Yes. I do most of the estimating in the shop.

Q. Who estimated the job here?

A. There wasn't any estimate for the job.

Q. In other words, it was just go in and do it, that type job?

A. Yes.

Q. Would you have any difficulty testifying as to the accuracy of these bills, dollar amounts, from your knowledge, your own, first-hand knowledge?

Mr. Simmonds: Which bill are you talking about, Mr. Harrigan?

page 178 } Mr. Harrigan: Any of them.

Mr. Simmonds: You mean of the B-1 through -5?

Mr. Harrigan: That's right.

Mr. Simmonds: That still does not tell us what the bill is for.

The Court: I am going to let Mr. Harrigan proceed.

Mr. Harrigan: Would you answer the question?

The Witness: I don't remember it.

(Last question was read.)

Mr. Simmonds: I don't know what that question means, if your Honor please, frankly.

Mr. Harrigan: Reasonableness, that's what it means.

Mr. Simmonds: If your Honor please, I don't want to test the patience of the Court on this thing, but this is extremely important because, under the terms of the lease, the tenant had the right to remove all the projection equipment and everything that was in the booth, so what he put back in the booth, and the cost of putting that back, is certainly not a charge against this defendant. The very most it could possibly be is if the service to the booth had been disturbed. This $3500 bill obviously includes a greater amount of things that relate not to that, and it just doesn't help us page 179 } any if he says, "Yes, this is an accurate bill for the whole thing."

I will go ahead, if your Honor please, but I would like to reserve my objection to—

The Court: Your exception to my ruling is noted.

Mr. Harrigan: All right.

By Mr. Harrigan:

Q. When you went in the booth upstairs, tell the Court exactly what you did from the first time you went in, all the work you did until you left.

The Court: —that you haven't already told me about.

By Mr. Harrigan:

Q. —that you haven't already told about.

A. That's about everything I have already said was what we done, the installation of the dimmers or the rack for the dimmers; the connection, the wiring of it, the wiring of the booth, equipment such as projectors, exhaust fan and some fixtures in there, I believe, there were. I know there were.

Q. What is the normal cost for hooking up a projector? What was the cost for hooking up this particular projector to the wiring?

Mr. Simmonds: I object. It's not charged to the defendant.

page 180 } The Court: In the witness's job, he is estimator also for the company, so he is asked for the charge for something.

Mr. Simmonds: My point is, it's not chargeable to this defendant. It's immaterial and irrelevant as far as this case is concerned to hook up the projector.

The Court: I think maybe that's right because he said he found the projector wire there and did not have to change any—

By Mr. Harrigan:

Q. Was there cost in that bill for hooking up the projector?

A. Yes.

Q. How much of that cost represents cost of hooking up the projector?

A. Fan? I don't know. I would be surmizing.

Q. I don't want you to surmise.

Mr. Simmonds: I object to surmising, if your Honor please.

By Mr. Harrigan:

Q. Who knows, in your company?

A. Well, Mr. Hampton would have the records.

page 181 } Mr. Harrigan: All right.

By Mr. Harrigan:

Q. Directing your attention to Exhibit B-4 which is a bill in the amount of $658.41, what was that for?

A. Replacing the wiring for the seat lights.

Q. Explain to the Court exactly why that wire had to be replaced and how it was done?

A. We couldn't make the splices in the floor boxes.

Q. Why?

A. The wires were too short.

Q. When you're talking about floor boxes, where is a floor box?

A. The floor box is set in the concrete.

Q. In the concrete?

A. Yes, flush-type.

Q. Flush against the concrete. How long were the wires extending out of the floor box?

A. About an inch or two—much too short to make a joint.

Q. What did that necessitate your doing in order to hook up the new seat lights?

A. We had to pull the wire out and reinstall new wiring.

Q. Pull it out from where?

A. From the box that run into the conduit.

page 182 } Q. That's one end. Where was the other?

A. It would loop maybe from one floor box to another and then a home run.

Q. Is that stringing new wire?

A. Yes, it's pulling new wire in the pipe.

Q. Did you have to pull this new wire through for all the seat lights?

A. Yes.

Q. And the major portion of that bill, what does that represent?

Mr. Simmonds: I object to the leading question, if your Honor please.

Mr. Harrigan: Let me ask you this: What does the bill represent in regard to equipment and labor?

Mr. Simmonds: —if he knows.

The Witness: Mostly labor. I would say it's probably,—

Mr. Simmonds: Unless it is for the majority to the defendant; I don't think it's proper for him to estimate.

Mr. Harrigan: Our position is, both of them are chargeable—just the wire and the labor on the bill, your Honor. It necessitated pulling new wire through, and labor pulling it. That's all the bill represents.

page 183 } The Court: Objection overruled.

Mr. Simmonds: Exception is noted.

By Mr. Harrigan:

Q. What costs does the bill represent in regard to labor and wiring?

A. Percentage-wise?

Q. Is it new wire and labor and that's it, or what is it?

A. New wire and labor, and there were some floor box covers, some brass covers that had to be put back, but they weren't there.

Q. They were missing?

A. Right.

Q. Have you disconnected the seat lights before, yourself?

A. Oh, yes.

Q. Would you tell the Court, in your opinion, the fashion in which these seat lights were disconnected?

Mr. Simmonds: I object to that, if your Honor please. I don't think that question relates to the situation we have here. It hasn't been described, just what kind of floor boxes they were and what kind of connections they were in his theatre to indicate they were similar to all
page 184 } theatres, and I just think it is a question beyond the man's ability to answer.

The Court: I don't think there is sufficient foundation for the question at this point. Sustained.

By Mr. Harrigan:

Q. How are you supposed to disconnect seat lights from floor boxes?

A. You'd normally—You wouldn't disconnect the seat light from the floor box. The floor boxes sit in the concrete, with a piece of greenfield which is a flexible conduit from the floor box to the seat. The wires are drawn in that, and there is a connection made in the seat and a connection made in the floor box.

Q. In this particular case, were these seat lights connected in the normal manner, then?

A. No.

Q. Or disconnected in the normal manner?

A. No. The greenfield wasn't there.

Q. In what fashion was that disconnected?

A. They removed the flexible connection from the floor box. I would say that they just left the "flex" on the seats when they took them out, rather than leaving it connected to the floor box.

page 185 } Q. How did they disconnect it?

A. Disconnected it at the floor box and just cut the wires.

Q. Cut the wires, all right. Would any of this bill, would you have had to do any of this work if the seat lights had been disconnected properly?

A. I would say no.

Mr. Harrigan: I would like to offer this bill into evidence, both of these bills into evidence.

Mr. Simmonds: I object to both of them. I think I have indicated on two or three occasions my objection to the one that's marked B-1.

The Court: B-1 is rejected. It's too remote from the claim. It's got so many other things.

Mr. Harrigan: We'll have to come back to that.

The Court: The question of B-4, is there anything you want to say to that, Mr. Simmonds?

Mr. Simmonds: Well, I would like to ask a number of questions before that bill is admitted, unless you prefer to admit the bill and if I can indicate that it should not have been admitted, then it can be stricken.

The Court: I will do that. So far, the testimony is that it was the cost of labor and materials, plus some unstated number of brass floor box covers which were sup-
page 186 } plied. But other than that, on its face, it relates to Plaintiff's Claims, so B-4 is received.

(Plaintiff's Exhibit B-4 is received into evidence.)

The Court: I will strike the "I" for identification.

By Mr. Harrigan:

Q. I show you Exhibit B-5 which is a bill for $2,358.54. Tell the Court exactly what that's for.

A. Well, it's the installation of the fixtures throughout the theatre, and the marquee or canopy outside, the Exit lights and wiring that had to be installed in the conduits, and there were places where we had to install conduits where we couldn't pull it through the old conduit.

Mr. Simmonds: I am having a little difficulty hearing Mr. Dougherty.

By Mr. Harrigan:

Q. Speak up a little. You first mentioned that it was for the installation of fixtures. Where did you get the fixtures from?

A. They came from Dominion.

Q. Dominion?

A. Yes.

Q. Those are the fixtures you installed?

A. That's right.

page 187 } Q. You mentioned you had to make some installation in the marquee. Where is the marquee?

A. The under side, in the recessed fixtures, round, type 17.

Q. What was the condition of the wiring in the marquee, where these fixtures had been removed?

A. It couldn't be reused.

Q. Why?

A. It was just cut.

Q. Where was it cut?

A. Up in the junction boxes.

Q. Is that the normal way for an electrician to remove fixtures?

A. No. I don't say that an electrician removed the fixtures. I'm not saying that. Anyone could remove them.

Q. But they were cut.

A. That's right.

Q. Could you re-use the old wire or hook something on it?

A. No, we couldn't connect it fixtures to the old wire; we had to draw new wire in all but, maybe, 20 percent of it.

Q. Did you use the old wire?

A. No. When you pulled it out, it's usually not re-used.

Q. I don't mean that. Was there any left in

page 188 } there that you could still use?

A. Oh, yes, there was a small amount.

Q. Did you use that?

A. Yes.

Q. You didn't replace that which you could use, is that right?

A. That's right.

Q. In the Exit lights, what did you have to do in the Exit lights?

A. Let's see, the Exit lights, they just—the wiring, the sockets were gone; the sockets were installed in them and new outer frame and glass.

Q. When you say that the sockets were gone, in what fashion were they removed?

A. They were just gone.

Q. What was left?

A. Just the shell, the can.

Q. What else?

A. That's all.

Q. What was the condition of the wire?

A. The wiring was all right.

Q. How were they removed? Were they unfastened or cut?

A. They were cut, but there was enough wire to make them—

page 189 } Q. So,—

A. We used that. We reused that.

Q. You re-used those wires?

A. Right.

Q. Tell me—what about switches and plugs, other devices?

A. There were a few that were removed.

Q. In what fashion were they removed?

A. They were cut.

The wire was all right on that, I believe. Yes, I know the wire was.

Q. When you're talking about switches, what are you referring to?

A. Wall plugs or wall switches for the light.

Q. Directing your attention to that switch on the back of the Courtroom, is that switch similar to that?

A. Yes.

Q. They were removed?

A. I don't believe any switches were. There were some receptacles removed.

Q. Receptacles. All right.

The Court: Isn't the receptacle behind the switch? How could the switch be there and the receptacle be gone?

The Witness: That's the box; the receptacle
page 190 } is the *the* plug.

The Court: A wall plug?

The Witness: A wall plug.

The Court: As on the front bench (indicating)?

Mr. Simmonds: I still don't understand.

The Court: An electrical outlet, in layman's terms, as distinguished from a switch to turn something off and on, is that right?

The Witness: Yes, your Honor.

The Court: All right. I'm with you now.

By Mr. Harrigan:

Q. In what fashion, after reviewing all of these fixtures and plugs and the way they were taken out, how would you characterize the manner in which these items were removed from the premises?

Mr. Simmonds: I think, if your Honor please, the only thing he can testify to is the condition that he found them in when he got there, not as to the manner in which they were removed.

The Court: I'm sure an electrician can say "these things were cut" because as a layman, I know this. Just the way the wire is clipped on the end, and so on, the cleanness of it;

and I think the electrician can say something was
page 191 } pulled, from his understanding, because this is
more expert than laymen.

The question, I think, is too broad, though, because you're asking a question about everything in the whole building, and

you want a generalized statement, and the case is founded on specifics in several areas. You have to break it down. To that extent, it's sustained.

Mr. Harrigan: All right.

By Mr. Harrigan:

Q. Mr. Dougherty, in these areas where the wire was cut so far down, they could not be reused, in your experience as an electrician, how would you characterize this manner of taking these fixtures out?

Mr. Simmonds: If your Honor please, I don't think this has anything to do with this case, what bearing his testimony might have as to the fixtures that he found he could not use the wires on. I think we should be told how many there were and the cost of each one of them. But just a generalization of the manner in which they appeared to have been taken out does not move us along at all. I object to the question.

The Court: I thought we already covered—He said in many places he found the wires cut too short to use again, too close to the conduit. Do you want to develop it further?

page 192 } Mr. Harrigan: I just want to ask him whether in his opinion it was a malicious, deliberate, systematic attempt to—

Mr. Simmonds: I object to that.

The Court: Sustained.

Mr. Harrigan: All right.

By Mr. Harrigan:

Q. What work did you have to do in the marquee other than the recessed lighting?

A. Circuits for the sign.

Q. Tell the Court exactly what you did and the condition of the circuits as you found them. Tell him the condition as you found it, and then what you had to do.

A. They were just burned off, the cables that were going to the sign, I guess when the sign was removed. We had to splice them and extend the cables back to where they could be connected.

Q. Is this the normal way to take fixtures off, to burn them off?

Mr. Simmonds I object to that.

The Court: There is insufficient foundation at this point.

Mr. Harrigan: All right. I'll withdraw it.

page 193 } By Mr. Harrigan:

Q. So, cuts were burned off and what did you have to do with them, splice them?

A. And extend them over.

Mr. Simmonds: What's that?

The Witness: Extend them over to where they could be connected to the new sign.

By Mr. Harrigan:

Q. Does this bill consist of the total amount for repairing and replacing these damaged items that you mentioned?

A. That's right.

Mr. Harrigan: I'd like to introduce this into evidence, B-5.

Mr. Simmonds: If your Honor please, I object to the admission of that in evidence. It shows on the fact that it covers many items that are not in any sense chargeable to the defendant, "installing of new fixtures" would certainly not be; "conduit and 80 percent new wire for canopy" may or may not; "footlights" certainly is not chargeable to the defendant. "general lighting and devices throughout the entire theatre."

Now, there is no way in the world for us to page 194 } determine what part of that bill, if any of it, is properly chargeable to this defendant. He hasn't specified how many of these switches—I don't know if he said the switches were gone or not, but the receptacles being removed. He hasn't stated how many; he hasn't stated how many Exit lights he had to do. And it's just absolutely a guessing game as to what, if any, of it is chargeable to us. It would be most improper to put this bill in which obviously includes a lot of other matters.

Mr. Harrigan: Your Honor, I think he has testified that that represents labor and materials for installing the fixtures and repairing the damaged condition throughout the entire theatre. There is no new work included in that bill at all.

Mr. Simmonds: The bill speaks for itself on that part of the thing, if your Honor please.

The Court: The item offered says "installing new fixtures." I really heard no evidence on that.

Mr. Harrigan: He testified, your Honor, that the fixtures were received from Dominion, all the fixtures he installed.

The Court: I don't know what fixtures, where they were, whether they were new chandelier lights or what, "and general lighting and devices throughout the entire
page 195 } theatre." I don't know how many were new or how many were because of claimed damage on old. Objection sustained.

Mr. Harrigan: I'll recall Mr. *Doroughty* later. That is all now.

CROSS EXAMINATION

Mr. Simmonds: I'd like to ask a few questions, if I may, if your Honor please.

By Mr. Simmonds:

Q. Mr. Dougherty, when was the first date you went to the building, the Glebe Building?

A. About the first week in May.

Q. Do you know what day in May?

A. No, I do not.

Q. Was the building open when you went there?

A. Yes.

Q. Who else was in the building at the time?

A. I believe Mr. Sellars, William Sellars Company people were—and United Industrial Associates.

Q. Who obtained the electrical permits to do the work that Souder did?

A. I did.

Q. I hand you an electrical permit, Number 13505, bearing date of May 4, 1965, an application bearing the
page 196 } same number, the same date, and signed by you, signed "Patrick J. Dougherty," and ask you if that is the application you made for the permit and the permit that was issued on that application?

A. That's right.

Mr. Simmonds: I ask that that be admitted as Defendant's No. 1.

The Court: As stapled together, received as Exhibit D-15.

(Exhibit D-15 received in evidence.)

By Mr. Simmonds:

Q. I show you copy of electrical permit number 13762 dated May 20, 1965, which is stamped "Copy of an application"

bearing the same number and the same date, and purporting to be signed by Frank W. Sear. I ask you, do you know whether or not that permit was issued to the Glebe Theatre property?

A. Yes, this was for air-conditioning, in the boiler; the work had been done prior to that.

Q. Did you do any of that work?

A. Nope.

Q. That's not covered in any of your bills?

A. No, sir.

page 197 } Q. Here is another electrical permit, number 13911, signed by "Charles Shein." Do you know anything about that application and that permit?

Let me put it another way: Was that for any work performed by you or your company, Mr. Souder's, on your contract?

A. No, it's not.

Q. I show you a copy of a permit, number 149098, dated 6/14/65 to which is attached copy of application for permit bearing same number and same date, and purporting to bear your signature. I ask you if you obtained that permit?

A. Yes.

Mr. Simmonds: I ask that be admitted as D-16.

The Court: As stapled, is admitted as same number—D-16.

(Exhibit D-16 was admitted into evidence.)

By Mr. Simmonds:

Q. Could you tell us please, which permit covered the work of attaching the service to the seats?

The Court: By Exhibit number—neither one.

Mr. Simmonds: Your Honor, I believe has not admitted it.

page 198 } The Court: Only B-4 in that series. That's it.

Mr. Simmonds: That's the one that related to the attachment to the seats.

By Mr. Simmonds:

Q. Mr. Dougherty, in connecting with this cutting of wiring to the seats, what is this greenfield that you referred to?

A. It's a flexible conduit; it's a requirement in any auditorium or theatre of a seating capacity above 200.

The Court: I know what Romex and BX is. Where does this fit in?

The Witness: It looks like BX. It's an empty, flexible conduit.

The Court: It's a conduit itself?

The Witness: It's a flexible conduit, yes.

By Mr. Simmonds:

Q. And the wires go through that greenfield?

A. That's right.

Q. The greenfield, I take it, is connected in the junction box to the service wire that comes into the junction box?

A. That's right.

Q. How is the greenfield attached to the service line that comes into the junction box?

A. It's spliced by wire nuts, or tape.

page 199 } Q. The greenfield is spliced in the junction box to the service line?

A. The conductors are, that are in the greenfield. The greenfield is connected through an opening in the junction or floor box cover—usually an angle connector, what the trade calls an angle connector, a 90-degree connector.

Q. Do I understand the greenfield conduit goes into the junction box and within the greenfield is a wire?

A. That's right.

Q. And within the junction box, the wire that's in the greenfield is attached to the wire coming to the junction box?

A. That's right.

Q. Just exactly where was the greenfield cut with relation to the junction box?

A. There wasn't any greenfield there.

Q. Was the greenfield completely removed?

A. Yes, sir.

Q. Was that true in every case?

A. I don't recall. It was, maybe 2 or 3 pieces of it still there, I believe.

Q. In those 2 or 3 instances, can you tell how far it was cut from the junction box?

A. No, I could not.

page 200 } Q. Mr. Dougherty, when the seats were installed initially, it was necessary to tie in the wire in the greenfield to the service line, was it not?

A. That's right.

Q. Well, now, this wire which was cut, or the greenfield

which was cut, you still had the service line into the junction box, didn't you?

A. Yes.

Q. Why didn't you splice the new greenfield into the service line just as it was done initially?

A. Those are the lines that were cut close to the bushing in the box.

Q. Do I understand that the junction box top was taken off, and they were cut within the box?

A. That's right.

Q. I thought you said they were cut on the outside very close? Maybe I misunderstood.

A. No. I said they were cut in the box.

Q. You mean, somebody took the junction box top off?

A. That's right.

Q. —and cut not the greenfield, but the service line?

A. If there was greenfield there, they removed it. Now, 20 years ago, it's possible they did not require greenfield. They might have come up with a piece of Romex, page 201 } for all I know. I wasn't there when the theatre was opened.

Q. I thought you told me that the greenfield had been cut when they removed the seats.

A. I said it wasn't there. That's what I said. I believe it was probably still attached to the seat when removed, if it was greenfield—that's a trade name. They could have been connected with rubber cord, but I don't know that.

Q. Did I understand you to say there was absolutely no wires or cables or greenfield or anything extending out of the junction box toward the seats?

A. In most cases, that's right. There was maybe an inch, 2 inches or 3 inches of the conductor in the box.

Q. Could you tell whether the box had been removed, the top of the box had been removed and the service line cut rather than the greenfield?

A. I would say the service line was cut, yes, and there were some boxes, covers—some covers were removed. Some were laying on the floor near the boxes.

Q. And you observed this on what day, sir?

A. The early part of May, in the first week in May.

Mr. Simmonds: If your Honor please, when we have a break, sir, I would like to have read back the testimony. I must have misunderstood. I certainly thought page 201-A } he testified that the cutting of the wires from the seats was in the greenfield.

The Court: I did not hear it that way. I took him to say the wires were cut so close to the conduit that they had to be repulled.

Mr. Simmonds: The conduit is—

The Court: He went from the four-seat junction box, from loop to loop, to junction box, and then eventually to a panel, I guess. That's what I recall him saying.

By Mr. Simmonds:

Q. Is it your testimony now that, with a few exceptions, there was no greenfield there at all and that service wire within the junction box had been cut?

A. That's right.

Q. Did you replace the wire within the service line, with the same kind of wire that you pulled out of there?

A. Did I replace it with the same type?

Q. Yes.

A. You mean by installation or—Is that what you're speaking of?

A. There's a certain kind of wiring in there that you pulled out, did you not? I understood you to say you pulled the line out of the service lines.

A. That's right.

page 202 } Q. What were they? What was the service line encased in? Was there a conduit or—

A. It was in a conduit.

Q. A metal conduit. A BX cable or within a metal tube?

A. I don't follow you.

The Court: You're using electrician's terms. What's a conduit?

The Witness: A conduit is a pipe that's installed in the concrete.

By Mr. Simmonds:

Q. And the service line comes through that pipe?

A. Drawn through that, yes.

Q. My question is: Did you, when you drew new wire into that conduit, was it the same type of wire that you pulled out of the conduit?

A. Well, believe it was the THWN that we installed and that wasn't made—

Q. Is that a heavier wire than the wire you pulled out?

A. Probably the same size, I believe.

Q. Is it a better wire?

A. I would say yes.

Q. In what respect?

page 203 } A. Well, it's newer; the copper was the same size, the same capacity.

Q. In the cases where the greenfield still was there, did you pull new wire through or not?

A. I believe we did pull it through.

Q. Do you know whether you did or not?

A. Not offhand.

Q. But you think you did put, even in the cases where you could have attached them to the seats, you pulled new wire through?

A. Yes, not positive, but I believe.

Q. Weren't the instructions that you had with respect to those seating lights, to install all new wires in the service lines?

A. No, we would have—we were to reconnect them.

Q. Did you do the work yourself or was it done by someone under your supervision?

A. Someone under my supervision.

Q. You did none of the work on the line itself?

A. I did some of the work. You're speaking of the seat lights?

Q. Yes.

A. No, I did not do anything other than just

page 204 } check what was there, told them what to replace it with.

Q. Did you make a count as to the number of junction boxes in which there was no greenfield at all?

A. No, I had no reason to. If I could take a minute—We have been doing the work of the K & B Theatres for years; these bills were made out the same way; there was no question about it; these bills are made out—there was no question to do it different on this job.

Q. I didn't say there was any reason to; I just asked you whether you had done all the service line or just some of it. Apparently, you think you—

A. I believe all of it.

The Court: Mr. Simmonds, I have a question bothering me. Did you ever look in—we are talking about the same junction boxes we are talking about, the floor lighting for the seats—did you ever see a junction box before work began by your company so you can describe to me whether or not

there was a connection of wires in that box, for example, by a wire nut, from a wire out of a conduit, and a separate wire that leaves the junction box, goes through the greenfield, and up to the seat? Did you ever see one to be able to tell me from one or more what was there?

The Witness: I did see them, but I don't recall
page 205 } today, your Honor. I work on a number of jobs.
I don't like to take my jobs home with me.

The Court: All right. Thank you.

By Mr. Simmonds:

Q. In other words, you can't tell us now just how many, if any, they were—not connected?

A. No.

Q. Well, now, in doing jobs for K and B, have you rewired the seats, aisle lights for seats in other theatres?

A. Rewired them?

Q. Yes.

A. Not for K and B.

Q. Have you done it for other theatres?

A. Yes, we have.

Q. Is that where there was a new installation of seats, just a new installation of seats?

A. New installation of seats.

Q. Did you pull the wire through the service conduits in those cases?

Mr. Harrigan: I object to this line of questioning. I don't know what it has to do with this case.

Mr. Simmonds: To see if it's a new installation or repairing what we've got.

Mr. Harrigan: If he can show the wires were
page 206 } cut in other theatres the same way; but where
they were necessary to pull them through—If he's implying they pulled them through and hooked them up just for the fun of it—

The Court: The question is, Is it normal to replace all conduit wires anyhow? I don't think Mr. Simmonds wanted to ask it that bluntly, but on that basis, he may ask it.

The Witness: I don't know. I know we reconnected seat lights in the theatre. That's all I can remember.

By Mr. Simmonds:

Q. You were working most of the time on some of the other electrical work at the Glebe Theatre rather than on the seats, weren't you?

A. Oh, yes.

Q. As I say, you spent no time at all actually doing the work on the seats, is that correct?

A. I didn't physically connect or pull any of the wire.

Mr. Simmonds: All right.

* * * * *

page 207 } Thereupon,

NATHAN PLATT was called as a witness on behalf of the Plaintiff, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Harrigan:

Q. State your name please.

A. Nathan Platt.

Q. What organization are you with, Mr. Platt.

A. Harvey Construction Company.

Q. Where is that located?

A. 10609 Concord Street, Kingsington, Maryland.

Q. Generally, what type of work do they do?

A. We are basically general contractors and do heavy construction, general contracting, warehouses, homes, engineers and consultants.

Q. So, you do the whole line of construction work?

A. Yes.

Q. What sort of jobs does your organization usually work on?

A. Well, we build apartments or buildings up to a million dollars.

page 208 } Q. Calling your attention to the early part of May, 1965, did you have occasion to go to the Glebe Theatre on Glebe Road, in Arlington?

A. Yes, on May 5th I met Mr. Goldman of K-B Theatres, and he let us in so that we could secure the outside doors.

Q. When you went in, on that occasion what did you observe about the doors?

A. Well, we entered through the front doors, which were in fine condition. The two side doors, the upper end towards the front, were closed but the light would shine through because they didn't fit well and there was no security to those doors.

Nathan Platt

Q. When you say "no security," what do you mean?

A. Anyone could pull them hard from the outside and pull them open, with a tug.

Q. All right. What about other doors, were there other doors?

A. Well, that one day, we only worked on the two doors.

Q. What did you have to do on those doors?

A. We had brought 2 by 4's which is a type of framing lever, with us, and we used it as framing. We put the 2 by 4's inside the panic bar, and they were anchored then as a cross-bar to make it sort of a cross inside the building so page 209 } that anyone coming, pulling from the outside could not open the doors.

Q. Was that all you did on that one occasion?

A. On that one day.

Q. Did you have occasion to go back?

A. We came back the following Friday with more material. Mr. Goldman had asked me then to secure the two rear doors of that same building, and then had laid out other work he wanted done while we were there.

Q. What was the condition of the two rear doors?

A. The two rear doors were in better shape than the two up front, but they also lacked security in that they would close, but anyone could pull them hard and open them.

Q. What was the general appearance of the doors and the kick-bars and so forth?

A. In the rear?

Q. The side and the rear.

A. They were metal-clad doors in rather poor shape. They had been beat; the panic bars were bent. The panic bar is a vertical bar that usually fits into a hole—It missed a little bit. They looked like they had had a lot of use.

Q. Did you do anything else on that occasion?

A. I instructed certain workmen to start making two holes in the projection room as Mr. Goldman had page 210 } pointed out where he wanted them.

Q. All right. Do you have some records before you, bills and so forth?

A. Yes.

Q. Calling your attention to your bill, August 3, 1965, you have a portion of your bill broken down, interior and exterior. Calling your attention to the exterior portion of the bill, would you explain what that consists of and what work was done and why?

A. The first item is Ceco Steel, which is a national com-

pany which furnished us frames and doors, metal-clad and metal-covered frames, plus the hardware that would go in the interior, which consisted of panic bars, door frames, door closers, kick plates, astragal and door butts and the hardware necessary to make a door operable, starting from new.

Q. All right.

A. And then when they were not able to make delivery because of a misplacement of a shipment, we were able to buy some of the doors from a local supply house here called Columbia Building Supply, but those two items were basically covered by the four exterior doors.

page 211 } Q. Four exterior doors. How many of the four exterior doors had to be replaced?

A. All four openings, and each opening has two doors, were replaced. But only the frames of two openings were replaced. The two frames at the upper ends were, in my opinion, good enough to be reused and we reused them. We never took them out.

Q. When you talk of frames, what are you talking about?

A. The frame such as the door back there (indicating), metal frame or jam, in which the door fits into the opening so that a door won't swing past it. It contains the door. The door hangs on the frame.

Q. What was the condition of the frames?

A. The two rear frames were made of wood; they had been badly deteriorated; they had been cracked up to the point that trying to hang a new door on that frame would have been a waste of time and money, they were so badly eaten away, so we took them off.

Q. Was there any evidence of maintenance on any of those doors or frames in the back?

Mr. Simmonds: I don't know whether the witness is in a position to answer a question like that—any evidence of maintenance.

page 212 } The Court: We will take it up right at the end of the lunch recess. It will be 1:45 I expect.

(The Court hearing, then at 12:35 p.m. was recessed to reconvene at 1:45 p.m. the same day.)

page 213 }

* * * * *

Thereupon,

NATHAN PLATT witness on behalf of plaintiff, resumed the stand and testified further as follows:

The Court: There was a question and then an objection, so if it could be read back.

(The last question was read back as follows:

"Q. Was there any evidence of maintenance on any of those doors or frames in the back?"

Mr. Simmonds: That's a rather odd question, "was there any evidence of maintenance on those doors." I don't know exactly what he is driving at.

The Court: Suppose the witness said, "I saw chipped paint" which indicated there had been ten layers. I can see an answer.

Mr. Simmonds: I will withdraw it.

page 214 } The Court: You may answer: "Was there any evidence of maintenance on those two door *drames,* the wooden ones?"

The Witness: No, they were badly deteriorated.

DIRECT EXAMINATION (Continued)

By Mr. Harrigan:

Q. How was the paint on the frames?

A. Are we speaking now of the rear doors or the side doors?

The Court: The two you replaced. They are the rear, are they not?

The Witness: Practically no paint on them. Practically exposed to the bare wood, and rotted away.

By Mr. Harrigan:

Q. Is this the bill that you have for the replacement and repair of the doors and the exterior work and the interior work?

A. Yes, that's the bill.

Mr. Harrigan: Could I have that marked, your Honor?
The Court: Are you offering it in evidence?
Mr. Harrigan: No, not yet.
The Court: It is marked J-1 for identification and is apparently one of the interrogatories.

page 215 } (Plaintiff's Exhibit J-1 was marked for identification.)

Mr. Harrigan: I believe it is one of the interrogatories.
The Court: So, J-1, for identification.

By Mr. Harrigan:
Q. Mr. Platt, directing your attention to the portion of the bill marked "Exterior," would you tell the Court what you did and the materials and labor that were used in that particular portion of the bill?
A. The exterior work combines three phases: replacement of the doors and frames of the exits; putting up blinds or shutters on the outside windows; and replacing the metal sidewalk scuttle-doors that were on the side of the building, plus some new work of placing "Coming Attraction" cabinets into the existing framework that was there. That would be four phases.
Q. Now, directing your attention to the first phase of that, the replacement of the doors and frames, would you go through this bill and explain to the Court what materials were used and where, in replacing and repairing these frames and doors?
A. Material-wise there were two sets of frames, 8 doors, 8 sets of complete hardware, which again were
page 216 } panic bars, door closers, kick plates, door butts and labor necessary to put them up.

The Court: What are door butts?
The Witness: Door butts are the hinges that they hang on. If they are heavier than a hinge, they are a door butt.

By Mr. Harrigan:
Q. Which bill represents the cost of the two sets of frames?
A. The bill from Ceco Steel represents two sets of frames and four doors, because each opening has two doors.
Q. What was the cost of those two sets of frames and four doors?

A. $1,105.96. That includes, though, the hardware for eight doors.

Q. When you say "includes the hardware," what do you mean by the term "hardware"?

A. The panic bars, the door closers, the kick-plates and the door butts for all four openings.

Q. Now, that is simply materials, is that correct?

A. That was the purchase from Ceco Steel—that was that one purchase. Then, four individual doors were brought from Columbia Building Supply for $160. That, coupled with Ceco Steel, basically represented the entire cost of the replacement of the doors and frames—plus the labor.

page 217 } Q. How much was the labor for the replacement?

A. The labor was $700.

Q. What portion of this would be considered profit, it any?

The Court: Considered what?

Mr. Harrigan: Profit.

The Witness: Our invoice called for 10 percent overhead and 10 percent profit.

The Court: On top of the labor bill?

The Witness: Yes, sir.

The Court: Or is it on top of labor and costs, or what?

The Witness: When we add all the material and labor together, then it is 10 percent overhead and 10 percent profit of that total.

The Court: So, that's over $1965.96, is that right?

The Witness: Yes.

The Court: All right.

By Mr. Harrigan:

Q. Now, there are several items in there, one for $3.29 from Shell Hardware. What is that?

A. Miscellaneous hardware. It could be a bit, some excrusion, odds and ends of hardware.

page 218 } Q. Was this hardware necessary in this replacement and repair?

A. I wouldn't know.

Q. You have an item from Mizell Lumber Company of $5.40.

A. That was a piece of millwork we used in building around the Coming Attraction cabinets.

Q. Was that your total cost as represented by this bill for the interior of the building, that you did?

A. I didn't get that question.

Q. The figures that you have testified about were $1,105.96, and the other figures on your bill represent total cost of—

Mr. Simmonds: You haven't inquired about the $209 item or the $7.80 item.

By Mr. Harrigan:

Q. This American Iron Works, what was that?

A. That was the cost of the 2 sidewalk scuttle doors, the cost of material and installation by American Iron Works.

Q. What are scuttle doors?

A. Metal folding doors that old-timers used to put coal down there. It's a metal exit door to get to the basement entrance.

The Court: What was the amount?

page 219 } The Witness: $290.

By Mr. Harrigan:

Q. Where were they installed?

A. On the side of the theatre, on the right-hand side of the theatre, *faving* the theatre, near the front.

Q. And they were replaced?

A. They were replaced.

Q. What was the condition of the old ones?

A. The old ones were off the *hing* in some parts, did not meet properly, and were the result of water or rain—The basement *wa3* continually being filled with water, and when Mr. Burke and I viewed it, we decided we should replace them.

Q. Would they lock?

A. In some fashion.

Q. When you say "in some fashion," did that provide the minimum amount of security?

A. No; no security to that.

Q. Now, "miscellaneous hardware, $7.80," what was that purported to represent?

A. Just what it says, miscellaneous hardware.

Q. Which would be what type of items?

A. I couldn't tell you. The Shell Hardware is a few steps away in the back door. The men had our permis-

page 220 } sion to use our charge account to buy whatever they needed to complete their work.

Q. Were you there most of the time supervising this job?

Nathan Platt

A. I was there almost every day of the time my men were there.

Q. Directing your attention to the interior portion of the bill, what did the interior portion of the bill, what category did that consist of?

A. This work, too, was in four phases: First we constructed or made two portholes in the projection room for their new cameras; then we erected a partition in the upper lounge, so dividing it that three-fourths of it was a lounge and the other one-fourth portion became a storage room.

Q. All right.

A. Then, in the area that had been created as a lounge, we then went through and fixed or replaced moldings in such a manner that it had finished base and ceiling moldings and sills, ready for the painter.

The fourth was interior decorating. Mr. Burke had selected some plywoods which we then placed in the lower lobby, down the stairways as a decoratice feature under the direction of the interior decorator.

page 221 } Q. Directing your attention to the portion of the bill that you mention for fixing and replacing moldings, what area of the building are you talking about when you are talking about fixing and replacing the moldings?

A. In the area the lounge was created in.

Q. What was the condition of the molding that needed fixing?

Mr. Simmonds: He hasn't said there was any need to fix it.

The Court: He didn't say that. He said they put in a partition to make it three-fourths and one-fourth for storage room, and then they installed base and ceiling *mold3*. I can visualize some new walls and old walls, too. Go on from there, sir.

By Mr. Harrigan:

Q. All right. Didn't you have two phases, the partition and moldings, were they two separate categories?

A. In order to give it a uniform appearance in the area we had created a storage room, we used those moldings there to continue the work of the lounge so that it all would become uniform.

In any area of the lounge that was previously there, where the moldings were bad or torn, we then used the same moldings to correct the old moldings so that everything

page 222 } was properly prepared for a painter. In other words, we did new work and replaced old work.

Nathan Platt

Q. Now, with regard to the areas in the lounge where the moldings were bad, would you describe how you fixed those and the cost of fixing those areas?

A. Well, it wasn't too bad. The entire cost, I estimate, would only be about $30 of labor and material because we used the same material.

Q. With regard to the partition, what was the cost for the labor and materials for the partition?

A. $86.48 for the material and $100 for the labor.

Q. The portholes that you had to cut, is that classified new work?

A. Yes.

Q. And the plywood that you put up?

A. The interior decorating part of the plywood?

Q. Yes.

A. New work.

Q. On this $30. figure, does that include this 10 percent overhead and 10 percent profit?

A. Well, actually, it's an estimate of the time. We actually didn't keep a stop-watch on it. I know about how long the man was there, from one part of an afternoon, to do that work.

page 223 } Mr. Harrigan: That is all.

Before I close, I would like to offer this bill *inot* evidence.

Mr. Simmonds: I object to it and state my reasons, if you would like.

The Court: Again, as judge, let me look at it a minute. I have taken some notes since the beginning of the testimony—

If I had a jury here, I wouldn't let it in. I think it would be prejudicial. But where I have taken notes and advised counsel I have received it solely as it relates to the testimony and those things which may later be found applicable, I still have not come to the ultimate conclusion, of course, on the standard of, shall I say, "trade fixtures," so that in a very real sense, it is received conditionally.

Mr. Simmonds: I should like to state my objections to it, if I may.

The Court: All right.

Mr. Simmonds: With respect to the work that's been called the exterior work, it is clear that what has been done is a complete replacement of the eight doors, with new doors and the standard required under the Lease was merely to turn the property over in the original condition, less

page 224 } ordinary wear and tear. Obviously, the bills as submitted have produced a new product, without taking into account that the tenant had a perfect right to turn the building back with ordinary wear and tear; and there has been no evidence whatsoever to try to indicate that it was beyond—Well, there is no evidence except for the cost of brand new doors—8 doors and 2 frames, blinds and shutters on the windows. There wasn't enough evidence given to indicate what that was, whether that's needed decor or whether it is something that was worn out.

Mr. Harrigan: That's new decor.

Mr. Simmonds: Yes. Well, that wouldn't be chargeable to the defendant. And the building of the new display cases would not be chargeable to the defendant, so we have no figures to break down to show what, if anything, should be charged to the defendant in connection with exterior work.

With respect to the interior work, it seems to me that none of that could be properly charged. There is some talk about changing the molding, but that apparently was brought about by the fact that they decided to partition off the lounge, and the work involved in that, it seems to me, cannot be broken down to say that part of it should have been charged to the defendant, because the lounge was likewise sub-
page 225 } ject to ordinary wear and tear; and where they elected to partition it off, obviously the defendant should not be charged with any of those costs. And I think, admittedly, new portholes and the plywood were for new work and should not be charged, so we don't have any figure in numbers to go before the Court to indicate what, if anything, should be charged to the defendant, and I would object to the admission of this in evidence.

The Court: Any further questions?

I have already ruled. I am going to let you put the grounds in.

Mr. Simmonds: May I have an exception?

The Court: Yes, sir.

Mr. Simmonds: As I understand, your Honor, even though you have admitted this in evidence, you have done so provisionally?

The Court: That's right. It's for a limited purpose and provisionally. For example, on the interior, I have heard two items, $186.48 total for upper lounge and $30 on what he described as items 2 and 3, so as to interior work, that's the most it's offered for.

Nathan Platt

And I consider also that plaintiff is wanting, indirectly, to show that they have not charged the defendant with everything they did do, so I think they are entitled to
page 226 } put it in. I fully expect to hear some more questions from you about its value. There are two sides to every case.

This is probably a good time for me to leave for this probation matter.

(Whereupon, the case was recessed for a short period, after which the case was resumed.)

CROSS EXAMINATION

By Mr. Simmonds:

Q. Mr. Platt, when you went over to the Glebe with Mr. Goldman, I take it that Mr. Goldman is the one who directed what work he wanted you to do?

A. Yes.

Q. Did you meet Mr. Sharlin at all at that time?

A. No.

Q. And your bills were to the K & B Theatre, were they not?

A. Our bills?

Q. Yes.

A. Directly to them.

Q. And paid by K & B, I take it?

A. Yes.

Q. When you first went over there and put the 2 by 4's on the doors to close them, I take it a good deal of work was being done in the theatre at that time, was it not?

A. No.

page 227 } Q. Was not?

A. Nothing was there.

Q. I say, was there any work going on replacing it?

A. Nothing.

Q. Did any go on before you worked on the doors?

A. Nothing.

Q. These doors, I take it, are new doors that you put in there, is that correct, and new frames for 2 of them?

A. Two new frames.

Q. And 8 new doors?

A. Eight new doors—two frames were left as they were.

Q. Yes. Would you say that the doors that you installed in there were better than the doors that were there originally?

A. Yes.

The Court: Cost more new than the others would have cost new?

Mr. Simmonds: That's in effect what I'm getting at.

The Witness: Yes.

The Court: The quality—as distinguished from identical.

By Mr. Simmonds:

Q. Mr. Platt, are you familiar with other theatres that had needed metal doors and that type of work?

page 228 } A. K and B on occasions have had break-ins and we have had to go back and replace some of the doors that had been busted or broken.

Q. Isn't there right hard wear and tear on these exit doors in theatres?

A. I think so, yes.

Q. And what would you estimate as the average life of metal doors on a moving picture theatre building?

A. Are you distinguishing between a metal door, or the hardware that goes with the metal door?

Q. I guess I mean the whole door, total door.

A. The door itself should stay pretty—should have a longevity; but the hardware, depending on the quality, would give you the time element.

Q. I take it the quality of the hardware on the doors you installed was better than the hardware that was on the previous door?

A. Yes.

Q. And is it true that the scuttle doors that you replaced were also better quality than the original doors?

A. I would say they were, yes.

Mr. Simmonds: I think that is all.

RE-DIRECT EXAMINATION

By Mr. Harrigan:

page 229 } Q. This hardware that you put on these doors, what was the cost of just the hardware?

A. I don't have a specific breakdown. I could only give you an opinion, because it was under one lump sum, to CECO.

Q. Would this be an expert opinion that you would be giving in an estimate?

A. I think so; I have bought enough of them.

Q. What would be your estimate?

A. About $85 a set.
Q. How many sets were there?
A. There would have been four sets, one set to each opening.
Q. Four sets. This work you did on the upstairs interior, in effect what you did was just converted it back into a lounge area, isn't that right?
A. I don't know—we put up a partition.
Q. What was the area supposed to be?
A. Well, it eventually became a lounge and a storage room.

* * * * *

page 230 }

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Thereupon,

EDWARD DE LISIO was called as a witness on behalf of the Plaintiff, and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Harrigan:
Q. Would you state your name please?
A. Edward DeLisio.
Q. Where are you employed, Mr. DeLisio?
A. Gly Construction Company.
Q. Where is that located?
A. Prince Georges County, Maryland.
Q. What type of work does Gly Construction Company do?
A. Paving work.
page 231 } Q. Calling your attention to around June of 1965, did you have occasion to go to what was commonly called the Glebe Theatre on Glebe Road, in Arlington County?
A. Yes, I did.
Q. And when did you first go down there?
A. I believe it was sometime, either the early part of June or the latter part of May.
Q. For what purpose did you go down there?
A. To inspect and to make recommendations of what we thought had to be done to the lot.

Q. You're talking about the parking lot?

A. That's right.

Q. When you arrived there, would you describe to the Court the condition that you found the parking lot in?

A. There were numerous pot-holes and deterioration in the pavement, and corruations in the pavement. By that I mean it was uneven.

Q. Numerous pot-holes, deterioration and corrugation. Did there come a time when you actually went in and did some work on this lot?

A. Yes, we did.

Q. Do you have your breakdown of your bill on the work that you did?

A. Yes, I do (examining).

page 232 } Mr. Harrigan: I would like to offer this for identification, with the right to substitute a carbon copy.

The Court: I am not going to accept any writings or conditioned offerings of paper—I will be liberal about releasing—but the concept the Court gets everything second-hand is absolutely the reverse of my philosophy. End of speech.

Hopefully, to avoid the confusion, this is marked Plaintiff's D for identification.

(Document marked Plaintiff's Exhibit D for identification.)

By Mr. Harrigan:

Q. Does this bill represent all the work done that your organization did on that lot?

A. That's true.

Q. This Item One, for $1,000, was that new work?

A. Yes, it was.

Mr. Simmonds: When you say "new work," you mean, you're not attempting to charge that against the defendant?

Mr. Harrigan: Not attempting to charge that against the defendant.

By Mr. Harrigan:

Q. Item 2 there is an amount for $427.50. Would you explain to the Court what that was for and the
page 233 } condition you found the particular area where you charged this amount—the condition that was in?

Edward De Lisio

A. Somehow or other, water was working its way under the concrete sidewalk, and causing the sidewalk to drop, which made a drop at the entrance there of about an inch-an-a-half to two inches, which is an unusual step and is a hazard.

Q. Where was this particular portion of the sidewalk located, in reference to the entrance of the theatre?

A. Right in front of the theatre.

Q. Where the people go in and out?

A. Yes.

Q. There was a drop there of how much?

A. Say an inch-and-a-half to 2 inches.

Q. All right. What, if anything, did you do regarding that condition?

A. We removed the existing sidewalk, compacted the earth on the bottom, and replaced it to the new elevation.

Q. And the amount of that particular part of the work amounted to how much?

Mr. Simmonds: If your Honor please, would you prefer that I object to each item as he testifies to it, or when he finishes to go back and object to each item? I
page 234 } certainly object to this particular item because there is no requirement anywhere in the lease or anywhere that we take care of the sidewalks.

The Court: Mr. Harrigan, what's the theory of presenting this, that a dropped sidewalk was within the tenant's duty to repair?

Mr. Harrigan: Your Honor, the condition existed because of the fault of the tenant—the dropped sidewalk. What the tenant did—and there has been testimony by Mr. Sharlin—when the tenant paved this Section 6 and 7 of the parking lot, it paved it in such a manner that it left a couple of feet between the building and the paving, and paved it in such a manner that water ran down into this section and out under—over the sidewalk, which caused the excess accumulation of water, which condition caused the sidewalk to sink.

The Court: I have *no* heard this side. I have heard one witness say there was trouble where the pavement met the building. To my recalling, the only testimony I have heard is that the paving touched the building. I have heard about the Ball property and some kind of a storm sewer pipe, because of parking lot draining down-hill towards the theatre, but I haven't heard anything about a bare space and this side-walk dropping—to recall it.

page 235 } Mr. Harrigan: We'll connect all this up.

Edward De Lisio

The Court: You put Mr. Simmonds to an objection. Do you want to put in a bill before your foundation for it? I think his objection has to be good.

Mr. Harrigan: All right.

By Mr. Harrigan:

Q. Mr. DeLisio, do you know, do you have an opinion as to what caused that particular condition in relation to what you saw there?

Mr. Simmonds: If your Honor please, I don't think Mr. DeLisio is in a position to state the cause of it and who was responsible for it. And I might also add, if your Honor please, that this is a suit for breach of covenants in a lease, namely, to keep certain things in repair and deliver them up in the *samd* condition wherein they were accepted. If they are claiming that this was done because of some negligence on the part of the defendant, it seems to me it's not within the scope of the Motion for Judgment.

But I also rely on the fact that there isn't any evidence before us now to tie this into any negligent act, even on the part of defendant, and I am sure the gentleman is not in a position to give an opinion as to whose fault it was that caused the pavement to drop. I think the most he

page 236 } can say, probably, as he has said, it was apparently caused by water getting underneath the sidewalk. But to let him speculate would be unfair because the Commonwealth of Virginia had fairly recently come through there and improved the highway, and made a considerable change there. And we believe that, we are convinced, that any damage to that sidewalk was a result of the State's constructing the widening of Glebe Road. And I think until there has been some direct testimony by someone who knows as to whose fault it was, this item should not be allowed; and certainly, this gentleman can do no more than say it was due to water seepage underneath the sidewalk.

Mr. Harrigan: On that point, your Honor, Mr. Simmonds' saying we have to show negligence, I don't think that's the case. All we have to show is damage. They have to show no negligence in order to excuse themselves from it. I think that's the law. It's been the law. All we have to show is damage and repair.

Now, they can excuse themselves by showing the condition existed through no fault of their own, but unless they do show that, the burden is on them to relieve themselves. The

burden is not on us to show that the condition existed and that they are responsible for it through negligence. I think the law is quite clear in that regard.

page 237 } Mr. Simmonds: Your Honor, this is not part of the premises that is a covenant to keep in repair.

Mr. Harrigan: That is, I think, a matter of argument, your Honor, and goes to the weight, not the admissibility.

The Court: Yesterday Plaintiff's contention was that Plaintiff's paving had been damaged. Now you say it is defendant's faulty paving which caused the sidewalk to drop. It seems to me Plaintiff has got to elect here.

Mr. Harrigan: No, your Honor, it was contended yesterday, there are two areas that were paved, one area initially paved and areas 6 and 7 were paved later on.

The Court: I follow you.

Mr. Harrigan: We don't contend that we paved areas 6 and 7; we contend that they asked to improve it. We agreed to allow them to improve it on certain conditions. I think that has been the testimony consistently as to the areas 6 and 7, and this is the area where the break was.

But our position on this is that we are showing that there was a damage condition there, and that it cost a certain amount to repair that damaged condition, and their not returning the premises in the same condition as it was when delivered, and that it is up to them, then, to show

page 238 } they are without fault as to that particular condition in order to relieve themselves. And assuming they can (not) show that, their argument is out.

The Court: The objection is sustained as to Item 2 on Plaintiff's Exhibit D for identification.

Mr. Harrigan: Sustained as to the admissibility of any testimony in it, or subject to connecting it up?

The Court: The objection is to the witness giving the cost of tearing out and replacing a sidewalk.

Mr. Harrigan: The objection was to his giving an opinion as to what caused the damage.

Mr. Simmonds: Initially, the objection was as you stated, your Honor, which you sustained at that time, and Mr. Harrigan asked another question about how it happened, or what caused it, and that's when I raised another objection.

Mr. Harrigan: Could you read it back, Miss Reporter?

The Court: Instead of taking ten minutes to find it and read it back and ask your question anew, I will permit Plaintiff to ask questions calculated to show that tenant's control

of activities in the building were such that there was an abnormal wear and tear, for example, and on that theory I will let him offer some evidence.

page 239 } Mr. Harrigan: On that point too, for the record, I would like to say the defendants have the burden of proving—

The Court: I am not getting into a legal dispute. We will come to that at the end of the case. But the claim is the breach of lease agreement, and the Plaintiff, in Motions for Judgment has the burden—Whether the burden to go forward with the evidence shifts or something else, you can show me some case law later on.

Mr. Harrigan: All right.

Did you strike this $427 or sustain any testimony regarding any cost affixed—

The Court: As to payment of money, I sustain the objection. The cart is in front of the horse. Now, you want to ask him questions leading to a showing of why the sidewalk dropped to qualifying this man as an expert who knows, and then ask your question.

Mr. Harrigan: All right.

By Mr. Harrigan:

Q. Mr. DeLisio, how long have you been in this particular business?

A. Twelve years.

Mr. Simmonds: May I have an exception to your Honor's—

page 240 } The Court: Yes.

By Mr. Harrigan:

Q. Have you run into this type of condition before?

A. Yes.

Q. Did you inspect premises right around the corner from where this condition existed between the parking lot and the building?

A. Yes, I did.

Q. What was the condition of the paving in relation to how close to the building it was?

A. It was right adjacent to the building—the concrete was, and the concrete had gone down.

The Court: Is this under the marquee on the front, towards Glebe Road or on the side?

The Witness: I'm talking about on the front.
The Court: Under the marquee.
The Witness: Yes.
Mr. Simmonds: I can't hear Mr. DeLisio over here. I wish he would raise his voice. The pavement you have reference to is the new concrete pavement you put in or replaced?
The Court: Witness nodded yes.

By Mr. Harrigan:
Q. In viewing that particular area, did you
page 241 } notice whether there had been any repairs made on it or attempted repairs where this drop was?
A. Not where the concrete was.
Q. What was the grade of the lot coming down towards that particular section as to which way the water would run?
A. The water was running towards the concrete.
Q. Towards the concrete?
A. Yes.
Q. And was this condition a contributing factor to the settling of this particular sidewalk?

Mr. Simmonds: Your Honor—
The Court: Sustained. Leading.

By Mr. Harrigan:
Q. What effect would this condition have as to the running of water and the settling of the sidewalk?

Mr. Simmonds: If your Honor please, I think we haven't enough background for him to answer that question. He hasn't indicated that he was out there making observations as to the manner in which the water was cast off the parking lot, and it is pure speculation on his part—conjecture.
The Court: Well, answer the question with any facts you observed as distinguished from opinion. Go that far first.
page 242 } Was there any connection, from things you saw on the site between the grade of the parking lot you have on the side of the building, and this point where it touched that sidewalk—any connection? What evidence did you see of any connection?
The Witness: The water was going towards the building instead of—Normally, you try to make it go away from the building. It was directing the water to that corner of the building.

The Court: Did you see water flowing during the rain or something?

The Witness: We took shots on the elevation to make sure that we would correct the condition when we repaved it.

The Court: Did you see water flowing during a rain?

The Witness: I don't know if I was out there when it was raining, your Honor.

The Court: Is your testimony based on your knowledge of this sort of thing, then, as distinguished from observation of water?

The Witness: That's right.

The Court: Were there any breaks between paved surfaces?

The Witness: Yes, there was at one spot, in the corner there.

The Court: Describe it.

page 243 } The Witness: There was an opening on, I would say, about an inch or so where the asphalt had gone away from the concrete.

The Court: Next question.

By Mr. Harrigan:

Q. What if any effect did those particular conditions have, in your opinion, as to the sinking of the sidewalk?

A. Well, your concrete has to rest on a firm sub-base. When you get water in your sub-base, your concrete will seek another level.

Q. When you repaired did you correct this particular condition?

A. Yes, we did. We brought in bank gravel and tamped it well with penumatic tamps, and diverted the water away from the building so it would not happen again.

The Court: Mr. DeLisio, from Glebe road toward the rear of the theatre premises—

The Witness: Yes.

The Court: Is the grade down from Glebe towards the rear or the reverse, or level?

The Witness: There was a break in the grade. On one side it came towards Glebe Road and the other side it came towards a structure that was in the back.

page 244 } The Court: How far along the side of the theatre is this change in grade? For example, can you say it was a third of the way back from the theatre, from

the front of the water, draining toward the front, and the rest, to the rear or what—See what I mean?

The Witness: Yes. I would say the grade break stopped at the end of the theatre and went towards Glebe Road.

The Court: Which end?

The Witness: The rear end.

The Court: I see.

The Witness: And then from the rear of the theatre it went to a structure which was about 30 or 40 foot in back of the theatre.

The Court: Gentlemen, in line with Mr. Simmonds' series of objections, I don't see how Plaintiff can overcome the fact that it is the paving of the lower-numbered lots done first which also drains to this area—If Plaintiff can overcome that, I want him to go ahead; but otherwise, it looks like Mr. Simmonds' objection to this whole line of testimony would be good.

Mr. Harrigan: I think we can overcome it on the theory that under the conditions which they agreed to pave this particular lot, it was implied that they maintain
page 245 } a suitable grade and suitable care, which in fact they did at a later date, the evidence will show.

Mr. Simmonds: Your Honor, there is no evidence to that. The only condition was that he could use it, and whenever he had, the plaintiff, had to use it, they would give it up. He put the letter in himself.

Mr. Harrigan: The letter said—

The Court: Is that the most you expect to prove?

Mr. Harrigan: That they did not maintain it pursuant to that, they did not pave it pursuant to that letter, and Mr. Simmonds put that letter in.

Mr. Simmonds: What letter in?

Mr. Harrigan: Well, bill.

The Court: Do you have anything else you would show?

Mr. Harrigan: I also show that this condition was well known to the Neighborhood Theatre people, and they had correspondence about it, and they attempted to repair it themselves.

The Court: On your statement that you are going to tie it all in with this kind of evidence, I will let you proceed.

Mr. Harrigan: That's all I have on this particular point other than the cost, which is already in evidence—the cost of repairing it and what he did to repair it.

page 246 } The Court: I sustain the objection to his giving

the cost, but since you make the proffer, I am going to again receive it conditionally on its being tied in.

Mr. Simmonds: If your Honor please, before you actually admit it, may I ask just one or two questions about that?

The Court: It may be simpler this way. All right.

Mr. Simmonds: May I have the lease, if your Honor please?

By Mr. Simmonds:

Q. I show you the plat attached to Plaintiff's #1 which purports to show the parking lot area and the theatre. Can you point out on this *platt* the area embraced within the repaving that you have just referred to?

A. As I recall, it was right over here (indicating).

The Court: He indicated.

By Mr. Simmonds:

Q. It is to the south of the building?

The Court: That would be east of Glebe Road?

Mr. Harrigan: This is the marquee.

The Witness: (Indicating) right.

By Mr. Simmonds:

Q. Now, with respect to the ticket office and the marquee, as you face the theatre, was this paving to the

page 247 } left or to the right?

A. It's to the right and to the left.

Q. How far did it *extent* to on the right?

The Court: Again, distinguish between paving of bituminous surface and concrete.

By Mr. Simmonds:

Q. Yes. I have reference to the concrete work that you put down.

A. It was at this corner here (indicating) and now I don't know the particular area, but it was 342 square feet of concrete that we removed; but I do know that it was at this corner here because this is where your water condition existed.

Mr. Simmonds: All right.

Edward De Lisio

By Mr. Harrigan:

Q. The ticket booth was under the marquee, is that right?

A. Yes.

Q. In relation to the ticket booth, where was this drop? How close to the ticket booth was it?

A. It was maybe, I think it was right next to the ticket booth because it was on both sides.

Q. Both sides of the ticket booth?

A. That's right.

page 248 } Q. That's where this condition existed?

A. Right.

Q. And you have already testified that your cost to repair this was $427.50?

A. Right.

Mr. Harrigan: Now, going to Item 4, your Honor, which we put in the Bill of Particulars. At this time, we will straighten that item out.

The Court: You're passing 3?

Mr. Harrigan: Three we're passing as new work. Item 4 we are passing; item 5 we are passing, which is the $1,360 one; item 6, a $30 bill, lining wall with 1 by 4's we are passing.

By Mr. Harrigan:

Q. Item 7 is an item on your bill of removing broken cast-iron drain from roof and replacing same. Would you describe to the Court where that particular item was and why it was necessary to replace it?

A. To the best of my knowledge, it was at the rear of the building, and it was broken and instead of the water going off the roof into this drain, it was spilling out.

Q. Was it necessary that that be replaced?

A. Yes.

The Court: What is your answer?

page 249 } The Witness: Yes.

Mr. Simmonds: If your Honor please, I think any evidence with respect to breaking of a drain or the condition that existed when he went there, which was the latter part of May or early June, which was one month after the rental of this property, should not be allowed because in that month's time, goodness knows who used the lot, and in what manner it was used; and Mr. Sharlin has testified Kids were running rampant around this place. And until it's tied in that

that condition existed when the property was surrendered, I don't think that that should be allowed.

Mr. Harrigan: I understood that we had that into evidence with Mr. Sharlin, when he discussed the drain.

The Court: Counsel may have tied this in with what Mr. Sharlin's testimony was. I didn't catch it on the case. Neither have I heard evidence there were children on the roof.

At this time, I am going to deny Mr. Simmonds' motion to strike it out, but I am going to give you all plenty of leave to argue at the end.

Mr. Simmonds: If your Honor please, I didn't understand this item was a drain on the roof. I understood it was from the roof down to the ground, and I thought it was a cast-iron pipe along the lower part of the drain.

page 250 } The Court: I realize it can be read two ways. "Take it from off of the roof," as a country-man would say, or repair a drain which began at the roof but which was broken at the ground level. Will the witness explain it?

The Witness: Broken at the ground level.

The Court: I see. Well, I am still going to leave it in now, but let counsel argue it later.

Mr. Harrigan: All right.

By Mr. Harrigan:

Q. Drawing your attention to Item 8—Item 8 is an item that you have "patching areas cut out with 40 tons asphalt" $640. Would you explain exactly why that item was necessary?

A. We had a very bad condition of pot-holes; and before you can do any repaving on a paved lot, you have to go in and get the soft spots out in places where you have breaks in the paving, and that's what we did.

Q. That item—what was the total cost of that patching?

A. $640.

Q. Now, directing your attention to Item 9, your Honor, "patching lot, gravel base, $1392. We are not claiming that, so that is out.

Item 10 is an item where you have "Resurfac-

page 251 } ing Lot, 3,400 square yards at $1.70 a yard, $5,880. Would you explain exactly why that was necessary?

A. Number one, the lot was corrugated and irregular; number 2, the water was not going away from the building, so the only way you can do a job to prevent people from stumbling

and so forth is to repave it mechanically with a machine that will give you grades and elevations.

Q. What would happen if you just left the lot in the condition it was after you patched the areas?

A. You would be back next year patching again.

Q. With regard to the safety factor, is that suitable for people?

A. I would say that you would have a real insurance problem on account of it would not have been safe.

Q. This $5,880 figure was the actual cost of repaving?

A. Yes, it was.

Q. Mr. Simmonds: If your Honor please, I object to the admission of that in evidence. He says himself he is practically making a new project in realigning the lot.

The Court: I haven't heard a bit of testimony that he saw damage from abnormal wear and tear. Objection sustained.

page 252 } Mr. Harrigan: All right. Let me ask you this: Was that parking lot maintained in a suitable condition for the parking of cars?

Mr. Simmonds: I object to that, if your Honor please.

The Court: "Suitable" isn't any standard at all. The issue is abnormal wear and tear.

Mr. Harrigan: That's the standard in this lease, your Honor.

The Court: What section?

Mr. Harrigan: I think it is 14.

The Court: Not in 14. It's the end of 17.

Mr. Harrigan: The end of 17.

Mr. Simmonds: If your Honor please, that's another thing Mr. Sharlin is contending, that he built the parking lot to start with, and we say he did not pay for it completely; and now he seeks to charge the tenant because the grade of it apparently wasn't right; and this new tenant, K and B, thought they needed an entirely new lot. Certainly this is a far-cry from requiring it to be maintained in—maintain it subject to reasonable wear and tear.

The Court: Well, there might be a case which gives a definition of "suitable condition" for the parking of automobiles. When there is no reference as to whether it was to be paved or not; and whether it was paved, in the

page 253 } first place, is not fully clear to me.

Mr. Harrigan: That's the language of the lease.

The Court: They agreed to it. It's the law of their relation-

ship. The law as between the parties as they agreed. That's one of the definitions of the contract.

Mr. Simmonds: But on the other hand, you have to read that in the light of Paragraph 14, about turning the property over subject to ordinary or reasonable wear and tear, and certainly nothing could be read in paragraph 17 and paragraph 14 to say when the property was surrendered up that they had to give them a brand new parking lot.

The Court: That's correct, and the Court's difficulty is in knowing what was there when it was rented. I am not satisfied on this yet. So if I don't know that, I have difficulty even in mid-case of receiving and evaluating evidence, much less ruling on its admissibility as to the "suitable" condition, because I am not satisfied I have a standard of original condition for comparison.

The only solution I know in this type of situation is for the Court to let it in and sort it right back out at the end of the case. I could never do this with a jury, but it is the only way that I know to do it. So, I will hear your witness.

Mr. Simmonds: May I have an exception to your Honor's ruling?

page 254 } The Court: Yes.

By Mr. Harrigan:

Q. In relation to putting this lot in a suitable condition for the parking of automobiles, why was it necessary to resurface this particular lot?

A. On account of the irregularities through the wear and tear.

Q. Was it apparent that there was any maintenance done on this particular lot when you looked at it?

A. There were some holes that had been patched, in a fashion.

Q. All right. Now, in relation to the area that needed to be patched which had pot-holes in it, what relationship did that area have to the entire lot?

A. I would say it would be about 200 square yards of isolated conditions throughout the lot.

Q. 200 square yards? Does this include pot-holes?

A. Yes.

The Court: That would be what percent of the whole lot? Your bill was for how many yards?

The Witness: Roughly 4,000. So you have got 200 into 4,000, so roughly, one-twentieth.

Mr. Harrigan: All right.

page 255 } By Mr. Harrigan:

Q. Now, directing your attention to Item 11, that was considered as new work, is that correct?

A. Yes.

Q. Item 12—so many feet of asphalt, $475. What does that purport to represent?

A. It was a 5-foot sidewalk area adjacent to the alley, and the curb was put there to keep the erosion down, off the sidewalk area which was later seeded and beautified, I guess you'd call it.

Mr. Simmonds: I certainly object to that, if your Honor please. That's new work, new construction, not maintenance of the parking lot.

Mr. Harrigan: Our position on that, your Honor, is, it is a preventative maintenance type condition.

Mr. Simmonds: If your Honor please—

The Court: Objection is sustained.

Mr. Harrigan: All right. We'll strike that amount out.

By Mr. Harrigan:

Q. Now, we have Item 13 which we included.

The Court: Again, this is an area on the Lee Highway side of the paved area. That would be, roughly, the page 256 } north side, is that right?

The Witness: The area adjacent to the alley.

The Court: That's out, too.

By Mr. Harrigan:

Q. What was the condition of that area that you worked on in Item 13?

A. I would say it was a disgrace.

Q. What was wrong?

A. It had all kinds of debris, trees sprouting up and cans thrown around.

Q. Who cleaned that up?

A. We did.

The Court: Was that the place where you put the grass, a place where cars had been parking?

The Witness: No, your Honor, it was growing wild.

The Court: Then, I will rule it out. 17, at least talks about—it means the parking area.

Mr. Harrigan: Exception.
The Court: Noted.

By Mr. Harrigan:
Q. Now, your Item 14, what does that represent?
A. Well, when you resurface a lot, you have to put lines on it to show people where to park if you want to control your parking.
page 257 } Q. And that is for painting, for parking lot?

Mr. Simmonds: That is looking toward the future. It certainly was not necessary to repaint it for the tenant and maintaining the lot for his term. All this testimony goes to putting it in shape for K and B for their 10 or 15-year term that they have.
The Court: Another witness testified earlier that the lines had worn off. Well, that's wear. Is it abnormal wear? It didn't say so, so lacking your showing of abnormal wear, granted that it is the tenant's duty to keep the lot up—I can't drive a car as judge without knowing that roughly every year, all highway divisions have to repaint, so on a 20-year leasing, if the lines had worn out, I can't see that repainting them is abnormal wear and tear compensible to the landlord, so the objection is sustained.
Mr. Harrigan: Exception on the ground that he has a duty to maintain the lines on the lot during the term, not to just leave it then go to state of disrepair at their leisure.
The Court: This I understand.
Mr. Harrigan: And that they failed to do that, and that is a proper element of damage for which we are asking.
That is all.

page 258 } CROSS EXAMINATION

By Mr. Simmonds:
Q. Who ordered this work, Mr. DeLisio?
A. Mr. Burkham.
Q. He is with the K and B Theatres?
A. Yes, he is.
Q. Did Mr. Sharlin order any of this work done?
A. No, he did not, but he was out there when we were looking it over.
Q. Your answer to the question is "No," is that right?
A. He did not order any of the work. No, he did not.

Q. Did not pay for any of it?
A. No, he did not.
Q. This job was done in view of the fact the K and B Theatres were renting the theatre for a term of a number of years, isn't that correct?
A. I don't know.
Q. You don't know that?
A. I don't know. It wasn't my jurisdiction to know what their agreement was.
Q. You didn't know they were leasing the theatre for a term?

A. I did not know. I knew they were going in
page 259 } there, but as far as leasing it to them—
Q. What reason did you think K and B Theatres ordered this done?

Mr. Harrigan: Objection. I don't see what reason it was has anything to do with it. It calls for pure speculation on his part. He's already said he didn't even know there was a lease.
The Court: Mr. Simmonds can ask him if he knows.
Mr. Harrigan: He's asked him that three times.
Mr. Simmonds: I am testing now his answer on things.
Mr. Harrigan: He's tested twice before.
The Court: I will let him test some more.

By Mr. Simmonds:
Q. Why did you think they were asking you to repave this lot and beautify it and so forth?
A. I didn't know if they owned it. They might have owned it, as far as I was concerned.
Q. You thought they were going to occupy it? Did you?
A. Yes, I did.

Mr. Simmonds: That is all.
The Court: Referring to the paper in front of you, is there a connection between Item 8 on it, "Patching areas cut out with 40 tons of asphalt at $16?"
page 260 } The Witness: Yes.
The Court: Is there a connection between that and your testimony a little bit earlier concerning 200 square yards of pot-holes?
The Witness: Yes.
The Court: Are they the same, different, or—
The Witness: The same.

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The Court: And it doesn't relate to covering an area where there was a 680-foot ditch?

The Witness: No, sir.

The Court: That's not included in the $640?

The Witness: No, sir.

The Court: Any questions based on the Court's?

Mr. Simmonds: No.

Mr. Harrigan: No.

The Court: All right. You may step down. You are excused from the case.

(Witness excused.)

Mr. Simmonds: If your Honor please, Mr. Harrigan has permitted Mr. Budina to be put on out of turn, in view of the fact he is up from Richmond and cannot conveniently get up again.

The Court: Yes.

page 261 } Mr. Harrigan: Excuse me. I would like to offer this in evidence. It was only marked for identification.

The Court: That was Plaintiff's D.

Mr. Simmonds: I object to the admission of the document, in any event, for the reasons that I have stated as each item came up, and I object to it also on the ground that I think the document offered should strike out the items for which no claim is being made. The document he has in his hand includes all the items.

Mr. Harrigan: All right. I think that part is relevant to show that we did not charge for all the items that were done, and only for the items that—

Mr. Simmonds: But the exhibit standing by itself looks like you are asking for $12,000.

The Court: Well, I don't think I have to be concerned with what it looks like. I have made notes about what Mr. Harrigan said he was not claiming, one or two items that I said I was not going to receive, so, to the extent that it gee's with the evidence admitted, and for the second reason, to show not all items were charged to Neighborhood, it is received as the previous items. It is limited in its application, but it is received.

Mr. Simmonds: Exception.

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* * * * *

Thereupon,

A. O. BUDINA was called, out of order, as a witness on behalf of the defendant, and having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Simmonds:

Q. Will you please state your name and address?

A. A. O. Budina, Richmond, Virginia.

Q. What is your occupation?

A. Architect.

Q. How long have you been an architect?

A. Since 1921, I was first registered.

Q. Would you briefly state your experience as an architect, where you have practiced and the type of work you have done?

A. Well, I worked in various offices in Chicago between 1916 and 19—

Mr. Harrigan: Are you trying to qualify him as an expert witness—architect?

Mr. Simmonds: Yes. I also want to get some page 263 } of his background in, too.

The Witness: Various offices since 1916, and the war interfered for a year, and after that, I was with the railroad company in their building department, as an architect-draftsman; then I went with a firm in Chicago, John Eberson, who was a specialist in theatres and was building theatres all over the country; and in 1926 he moved to New York, and I was manager of his New York office from 1926 to 1930. Then somewhere along '31, in there, the depression came on, and there wasn't any building, and I was with the Prudential Insurance Company, as what they called a Property Inspector, handling maintenance work for them.

By Mr. Simmonds:

Q. When you were with Eberson, did you handle the design of theatres, moving picture theatres?

A. O. Budina

A. I was the chief draftsman in Chicago and wrote the specifications. And then in New York, I was in charge of the office, the entire operation there.

Q. Did that involve the design of theatres?

A. Yes; we did practically nothing else.

Q. Then, after that, you say you were with Prudential during the depression?

A. During the depression I was with Prudential Insurance Company, Mortgage-Loan Department, rehabilitating property.

page 264 } Q. Did there come a time when you became associated with Neighborhood Theatres?

A. In 1936 I moved to Richmond and was in the Neighborhood Theatres office, as their architect there.

Q. Were you with them full-time?

A. Yes, sir.

Q. What were your duties in that organization?

A. Well, I had general supervision, care of the theatres, the physical care of the theatres, and I designed the new theatres, some of the new theatres, as far as I could.

Q. Did you have any connection with the design and erection of the Glebe Theatre in 1944-45?

A. Yes. I worked very closely with Mr. Eberson's office at that time and spent about 3 or 4 weeks in New York while those drawings were being prepared.

Q. Did you have anything to do with the supervision of the erection of that theatre?

A. Yes, I did.

Q. Are you acquainted, Mr. Budina, with the custom and usage in the motion picture theatre industry with respect to the equipping of theatres?

A. Yes.

Q. What is the custom, sir?

page 265 } Mr. Harrigan: Your Honor, on this point, I would like to make an objection. I would like him to proffer what he would like to use the custom and usage for. If it's to show what fixtures should come in and go out, I think the Lease controls, and specifically controls that; and until there is some ruling that that is so vague, that some other standard should be used, I don't think custom and usage is relevant to any matter in issue, and I object to its coming in.

Mr. Simmonds: If your Honor please, in addition to the *Least* itself, which we think the proper construction of it

covers all the equipment including electrical fixtures, the custom and usage in the industry of whether or not electrical fixtures, that type of thing, are intended by the tenant to become a part of the real estate, is material in deciding whether or not this is personal propery or real estate. And I intend to show by this witness and others that it is the custom and usage in the industry for the tenant to provide these items, including electrical fixtures which are not regarded as being, or not intended to be attached to the real estate, so that aside from the Lease, they would be challenged.

The Court: Objection is overruled. The Court will receive evidence of custom in the field at the time of the
page 266 } construction of the Glebe Theatre, not in contravention of what's in the Lease, but to show what the business world was doing at the time the lease was written, to better understand its terms—not to change them.

Mr. Harrigan: Exception on the grounds that it is not a proper testimony.

By Mr. Simmonds:

Q. Would you state what that custom is?

A. Generally, when a theatre changes hands, or operators, the theatre is rehabilitated. You also see these signs, "Closed for remodeling" and "Under new management," and that sort of thing. That's standard practice.

Q. Does that include the changing of the electrical fixtures as well as other things?

A. Could very well, yes.

Mr. Harrigan: I'm going to object. Mr. Simmonds is leading the witness now.

The Court: I think you were sustained.

By Mr. Simmonds:

Q. Mr. Budina, with respect to this particular job, do you know of your own knowledge, whether or not it was intended that the electrical fixtures—

Mr. Harrigan: Your Honor, I object to this. This is leading, too.

page 267 } The Court: Mr. Budina, please don't answer unless I tell you you may.

By Mr. Simmonds:

Q. I ask you with respect to this particular job which you

say that you supervised, if you know whether it was intended that the electrical fixtures which were put in the building were intended to become a part of the real estate or were intended to remain the personal property of the tenant?

Mr. Harrigan: Objection. Unless he had some active part in the Lease or negotiated the Lease, or unless he was a party to the Lease, I don't see how he can testify as to what the intent of these particular people on these particular fixtures were.

He started talking about custom and usage in the trade. The Court allowed that in, on custom and usage. Now, he is asking him specifically to interpret this particular lease when he wasn't even a party to it, based on his knowledge of custom and usage.

Mr. Simmonds: I'm afraid you misunderstood me, Mr. Harrigan. This question is directed to the intention of the man who was in charge of the construction and the placing of the equipment in the building, as to whether or page 268 } not it was intended to be incorporated in the building as a part of the real estate, and certainly the best one that I know of—and it has nothing to do with interpretation of the Lease whatsoever—

Mr. Harrigan: I object on the grounds that he was not even a party to the Lease.

Mr. Simmonds: If your Honor please, maybe I should ask some other questions leading up to that particular question. So, I will withdraw that at the moment.

The Court: All right.

Mr. Simmonds: —and ask some other questions.

By Mr. Simmonds:

Q. Did I ask you what your connection with this particular job was?

The Court: Yes. He answered *He* was with Eberson's office which supervised the plans and the construction.

The Witness: Yes.

By Mr. Simmonds:

Q. How often were you in Arlington in connection with the construction of this building?

A. I would say I averaged once every ten days, at least.

Q. Are you familiar with the parking lot that was provided at that time?

page 269 } A. In general, yes.
Q. What was it, sir?
A. It was simply graded, and then—it was surfaced with gravel or crushed stone.
Q. Was that bank gravel or—
A. No, I think it was crushed stone.
Q. Was it asphalted?
A. No.
Q. Are you certain of that?
A. Positive.

Mr. Simmonds: Your Honor, I think I had a document of the Virginia Contracting and Equipment Company for identification, and I did not mark the number on it. Perhaps I didn't have it identified. I was questioning Mr. Sharlin about it.

I would like this document on the letterhead of Virginia Contracting & Equipment Company, Alexandria, Virginia, marked.

The Court: D-11 has a copy of that letter attached.

Mr. Simmonds: May I have a copy of that letter?

By Mr. Simmonds:

Q. I show you Exhibit D11, and that part of it consisting of the statement of the Virginia Contracting and
page 270 } Equipment Company dated May 3, 1945, and ask you if you are familiar with that document?

A. No, I can't say that I am familiar with that document. There was some work on the parking lot, that was done and that resulted in a question of drainage in the adjoining property to the south. And at that time, we developed what we called a "French drain," so as to overcome that. That was done on the parking lot area.

Q. When you say "we," who worked?

A. I was with Neighborhood Theatre, I'm referring to.

Q. Did you work that out with Mr. Sharlin and the neighbors?

A. I don't recall ever discussing it with Mr. Sharlin, no, or with the neighborhood.

Q. Mr. Budina, I show you the letter which is a part of Exhibit D-11 and which is a copy of a letter addressed to you from Mr. Sharlin, and ask you to read that, and then tell me what, if you know, disposition was made of the bill which was enclosed.

A. O. Budina

A. "Enclosed please find statement from Virginia Contracting & Equipment Company. As you will notice, I have marked the amounts to be paid by Neighborhood
page 271 } "Theatres and Dominion Electric Supply Company."

Q. All right, now, sir, referring to a document that was enclosed in there, can you tell us what part of that bill was paid by Neighborhood?

A. Neighborhood evidently paid $6,130.

Mr. Harrigan: Objection to what Neighborhood "evidently did." If he knows from first-hand knowledge, then he knows; but if he doesn't—If he is just guessing by looking at the bill, I object; unless he has first-hand knowledge of who paid what.

By Mr. Simmonds:

Q. Do you know what part was paid?

A. I don't know anything about—whether it was ever paid, but this was the notation Mr. Sharlin evidently made on this particular document.

Q. Do you recall whether you approved it or not?

A. No, I don't, no. This was approved by Mr. Ware, who was one of the project managers for Doyle & Russell, the project manager.

Q. Are you able to tell the Court from this bill the work that was embraced within the amount which bears a legend of "Neighborhood" on it?

A. Well, it's an item of Contract Number 1, lump sum, $5,690. Without knowing what that Contract
page 272 } Number 1 is, I really can't identify that.

Q. You have no independent recollection at this time of what that was for?

A. No.

Q. Do you have any independent recollection of what the item marked "Dominion" was for?

A. No. It was Contract Number 2, lump sum, $1400.

Q. Mr. Budina, did you have anything to do with the ordering of the decoration and the fixtures in the theatre?

A. I did.

Q. What did you do, sir?

A. I purchased all the stage draperies, the wall fabric, wall papers, furniture, light fixtures, carpet, seats, the resilient flooring in the auditorium, and what we know as decorative painting.

Q. From whom did you purchase the light fixtures?
A. Light-o-lier Company, in New York.

Mr. Simmonds: If your Honor please, if I am not mistaken, I offered those for identification, and I believe Mr. Harrigan had them put in as Plaintiff's—I don't have the number.
The Court: Are you referring to D-11?
Mr. Simmonds: No, sir, the Lightolier bill.
page 273 } The Court: Mr. Harrigan, P-6 is the Lightolier bill. It was your D-13.
Mr. Simmonds: Would you have that?

By Mr. Simmonds:
Q. Mr. Budina, I show you Exhibit P-6 and ask you if that is the bill from Lightolier for fixtures that you ordered and were placed in the Glebe Theatre?
A. Yes, they are (reading).
Q. Would you *plea;se* state the amounts and the type of fixtures they are, and where they were located in the theatre?
A. The lobby fixtures were a colonial type, brass fixture, as I recall. The exit passage—I think that was simply a white bowl with a glass, a white bowl fixture.
Q. Going back to the lobby fixtures, was that in keeping with any kind of decor?
A. Yes, we were trying for a colonial-type of atmosphere, there.
Q. How *man* exit lights are shown on there?
A. None. This is a light in an Exit passageway, a little ceiling light.
Q. What's the next one? Go on down the list, if you will.
A. The next is a small light in the manager's office. I think that's simply a commercial type of fixture. The
page 274 } stairway light, I think, was simply a bowl against the ceiling, and I think the box office light was a similar thing. The foyer lights were recessed in the ceiling, can-type of thing, with the light shining through.
Q. You say they were purchased from Lightolier?
A. Yes.
Q. How many were there?
A. Six.
Q. Going back to the colonial lights for the lobby, how many were purchased?
A. Six.
Q. If you will, continue, please.
A. On the Mezzanine floor there was a stair, hall light

which I really don't recall what that was. In fact, there were two of them, but I don't recall whether they were hanging fixtures or close-up fixtures or not.

Q. All right, sir.

A. The numbers don't mean anything to me after these years. Two lounge fixtures, which are in colonial brass. I think they were a chandelier-type of fixture. The powder room had a brass fixture—one. There were two fixtures in the toilet rooms which I think were simply a page 275 } commercial type light, opalescent glass; and the vestibule is very much like that because the number is similar; and the rear of the auditorium, I don't know what they were.

Q. All right sir. Does that conclude the bill?

A. Yes.

Q. What is the amount of that bill?

A. $569.

Q. Do you know whether that was paid by Neighborhood?

A. It was approved by me on the 16th of February, and evidently was paid. Yes, it was paid on February 23rd, 1945; marked "paid."

Q. Thank you. I now ask you the question again that I did before, Mr. Budina: Could you tell us whether or not when you ordered those fixtures and had them installed in the theatre for Neighborhood, whether it was intended that those fixtures remain the property of Neighborhood or—

Mr. Harrigan: Objection, your Honor.

Mr. Simmonds: Let me finish the question.

Q. (continuing)—or whether they were to be incorporated in the building as a part of the real estate?

Mr. Harrigan: I object to the form of the question, your Honor. It's a leading question; it's suggestive, suggests the answer, and on that ground, I believe it should be page 276 } rephrased and should be asked in a different manner.

Mr. Simmonds: If your Honor please, I think the question is in proper form. It does not suggest which of two answers for Mr. Budina to say, and I think your Honor can tell from the previous answers that he has given, that he is not to be suggested to as to the answers that he will give. In any event, the form of the question, as I say, as it was made I don't think is leading, and is not suggestive.

The Court: Mr. Simmonds, why wouldn't it violate the *parole* evidence rule, particularly in the light of Paragraph 2 referring to certain items to become affixed—whether affixed or not, remain the property—

Mr. Simmonds: It's my contention, if your Honor please, that whether or not an item furnished by a tenant becomes affixed to the real estate is primarily based upon the intention of the tenant when he places that fixture in the building. That is the cardinal principle in arriving at whether or not it is a fixture. The other is the difficulty of removal, and whether it affects the structure of the building by removal. This is entirely independent of the Lease, if your Honor please. If it didn't become affixed to the real estate, it's the tenant's property, and he can remove it regardless of any of the terms of the lease. That only refers to
page 277 } items which might be thought to become affixed to the real estate.

And I might also say, if your Honor please, with the wording of "whatever nature," or "whatsoever nature", which I believe are the words they used, ". . equipment of whatsoever nature" expands the wording of the foregoing enumeration of equipment that Mr. Harrigan was insisting limited the type of equipment covered by the lease. And those words are not needed whatsoever if it wasn't intended to broaden the language of the specific items mentioned above.

So, as I say, I think this is admissible on both grounds, that it's covered by the lease, and secondly that, even if it was not covered by the Lease, it would remain personal property, which would be removed by a tenant.

The Court: I am inclined to the view that these light fixtures, particularly Exit Light fixtures, are not covered in Paragraph 2. It talks about "seats, booth equipment, sound equipment, carpets and necessary furniture." Then, "necessary equipment such as motors compressors and the like for a cooling system." The foregoing are all in one sentence.

Then, "all such equipment, fixtures or furniture of whatsoever kind so installed or brought upon the
page 278 } premises "by the Lessee, whether or not the same be affixed to the freehold, shall at all times remain the property of the Lessee," et cetera.

I think "all such equipment" refers back—"all such fixtures, all such furniture. . ." So then, if this is not covered in the Lease, conversations between the parties, manner of affixing, all become relevant. So, I think the objection has to be overruled.

Mr. Harrigan: May I make one point before the Court finally rules on it?

The Court: All right.

Mr. Harrigan: I think Mr. Simmonds' position is that the intention of the parties is relevant, but I think the leading case in Virginia on fixtures says, "in the absence of contract, in the absence of agreement. . ." then the Court looks to the various tests, whether it's affixed to the freehold.

The Court: All right. I find no agreement in the lease concerning Exit Lights in a recessed box, so Mr. Simmonds may ask about that.

Mr. Harrigan: Note my exception on the ground the Lease covers all the items that are to be removed by the lessee and they are specifically enumerated, and this by

page 279 } reference necessarily precludes the removal of other items that are not enumerated.

Mr. Harrigan: Exception.

Mr. Simmonds: Do I understand—

The Court: I decided I am going to hear you out at least as to Exit Light Fixtures because I don't think they are covered, and as I read this—

Mr. Harrigan: There is nothing on there, your Honor. Exit light fixtures—

The Court: —Number 2 is silent about Light Fixtures, so I will hear his evidence about their intention, about how they are affixed, about how the parties had conversations, because I know of no other reference in the Lease.

Mr. Simmonds: Will you answer the question, then, as to whether—

The Court: I will also hear about custom.

The Witness: I'm confused now, about—

The Court: I have a little bit of trouble myself. You better repeat, Mr. *Simonds*.

By Mr. Simmonds:

Q. Mr. Budina, I am asking at this point, when you purchased those fixtures for Neighborhood and had them installed in the Theatre, was it your intention as agent of Neighborhood—

page 280 } Mr. Harrigan: Your Honor, this is the same question I objected to, and I think it would be easier to ask him just what was Neighborhood's or his intention.

The Court: Did you all intend to keep the light fixtures that you refer to on this bill of Lightolier? That's part of it, isn't it?

Mr. Simmonds: Yes.

The Witness: I would say, back in 1945 we weren't thinking what was going to happen in 1965.

By Mr. Simmonds:

Q. Mr. Budina, in connection with equipping a theatre, there are many items of personal property, are there not, that are put in the theatre that are not enumerated in the Lease?

A. Yes.

Q. I think I asked you, did I not, about the custom in the industry about equipping the theatres by the tenant, did I not?

A. Yes.

Q. Mr. Budina, do you have a list that you helped prepare setting forth the purchases that you made in connection with the construction of the building and the equipping of the same except for the photographic equipment?

A. Yes.

Q. May I see that please?

A. (Handed document.)

page 281 } Q. Would you tell us what this list is that is marked—

Mr. Harrigan: I would like to know if he can identify the list and if he made the list up first.

Mr. Simmonds: I am trying to give it a name for identification. Suppose we mark this defendant's next number for identification.

The Court: D-17 for identification.

By Mr. Simmonds:

Q. Will you tell me what this list is, Mr. Budina, that is marked D-17 for identification?

A. This represents a list of the expenditures made by Neighborhood Theatre in connection with this theatre.

Mr. Harrigan: I object to this unless he has some first-hand knowledge.

The Court: Let's let him talk on.

Do you have any more description of what it is?

A. O. Budina

The Witness: This is a list of items, wallpaper, hardware, electric fixtures, floor covering, Rand-McNally map of the world that we have—this was wartime and everybody was interested in what was going on around the world, and we had a very large map I purchased from Rand McNally, and that's what that represents.

page 282 } Elmer Bryant was in the Theatre Equipment field and I don't know what that particular item is.

The Court: Does this list represent things that, as architect you authorized for purchase for this particular building?

The Witness: That's right.

The Court: Would your testimony be that you bought each one of the items listed there—that is, you or Neighborhood Theatres?

Mr. Harrigan, I am looking for a short-cut to a case that's going to be long. It's my duty to shorten it if I can.

Mr. Harrigan: Maybe Mr. Simmonds can proffer what this expects to prove.

Mr. Simmonds: I expect to show the equipment and fixtures and so forth that were put in and paid for by Neighborhood.

The Court: All right. Can you testify, sir, that each item on that list was put in by Neighborhood Theatres on your authorization?

The Witness: (Reading) I can, with a very few exceptions like insurance—I didn't have anything to do with placing insurance on the building.

page 283 } The Court: That's not at issue in this case. Are there prices shown on the list?

The Witness:

The Court: From what? You developed this list before you came here today. From what resource materials did you prepare it, for example, to know price.

By Mr. Simmonds:

Q. When was this prepared, sir?

A. This was prepared—Frankly, I don't know when this was prepared.

Q. This wasn't prepared in connection with this case?

A. No, no; this came out of the file.

The Court: Out of the file from construction time?

The Witness: Yes, sir.

Can't that come in, and you cross from it? You know he's going to say it.

Mr. Harrigan: Could I ask a few questions on *voir dire*-type in order to see if I can—

The Court: I did it for Mr. Simmonds. I will do it for you.

VOIR DIRE

By Mr. Harrigan:

Q. Do you know when that was prepared?

A. What, that?

Q. Do you know if it is accurate?

page 284 } A. Yes, I'm positive of that.

Q. Did you prepare it?

A. No, not wholly by myself. It was prepared by the Accounting Department in the Neighborhood Theatre, and I signified where the accounts were to be, whether it was a taxable item or something—simply for tax purposes, as I remember.

Q. Do you know if every item on there went into the Glebe Theatre in Arlington, of your own personal knowledge?

A. Yes.

Q. Where is the original of that document?

A. That's at Neighborhood Theatres' file.

Mr. Simmonds: I will offer that in evidence.

Mr. Harrigan: I will interpose an objection unless that is in the original.

Mr. Simmonds: Are you making objection on that, that it isn't a copy of the original, sir?

Mr. Harrigan: Well,—

Mr. Simmonds: I don't think that statement comes from very good grace, after the testimony that's come in so far from the Plaintiff.

The Court: Mr. Simmonds is asking you if you are making an objection. He's asking you a question.

page 285 } Mr. Simmonds: Yes, are you making an objection to that because that might not be an authentic copy of the original? Is that your objection to it?

Mr. Harrigan: Is this from the Accounting Department?

The Witness: Yes, this is from the Accounting Department?

The Court: He said it came to him from the Accounting Department, to him as architect, for him to designate the applicability of items.

Mr. Harrigan: You have the accounts in here?

The Court: As between accounts, for example?
Mr. Simmonds: Now we admit it in evidence as D-17.
The Court: Simply as what the witness would testify to, item by item. It's a time-saver.
Mr. Simmonds: Yes.
The Court: Received.

(Exhibit D-17 of the Defendant was received in evidence.)

By Mr. Simmonds:
Q. Mr. Budina, did that list purport to have the projection equipment and booth equipment?
A. No.
page 286 } Q. You say this was prepared for tax purposes?
A. Yes.
Q. What was the total of the items on this list?
A. $39,875.35 I believe it is.
Q. Mr. Budina, could you tell us who purchased the electric signs for the theatre?
A. Neighborhood Theatre purchased that.
Q. Would you describe what signs there were on the marquee of the theatre?
A. There were three attraction boxes, and then one Glebe Theatre (name) sign, or possibly two—it's been so long ago that I haven't—It was a triangular-shaped sign.

Mr. Simmonds: I think that was put in as Plaintiff's either 5 or 7, if your Honor please.
The Court: Regal?
Mr. Simmonds: Yes, your Honor, Regal Sign.

By Mr. Simmonds:
Q. I show you Exhibit P-5, and ask you if that indicates the bill for the attraction signs and the Glebe Theatre signs.
A. That's right, it does.
Q. Were they ordered by you?
A. Yes.
page 287 } Q. Were they paid by Neighborhood?
A. Neighborhood Theatres.
Q. Will you tell the Court how those are put up on the marquee?
A. It's customary to build a structural steel frame with the roof deck on top of that, and the ceiling, and the face, the perimeter is left bare. When the plans for the Glebe

Theatre were prepared, we had no idea we could get this, so the plans indicate a wood facia on there, that we expected to put on; but as things loosened up, we were able to buy these, and these signs were fastened right on the face of the structural steel-work, where the wood facia had been designated on the plan.

Q. Mr. Budina, I should have asked this question before: In connection with the equipment which you identified as having been purchased from Lightolier, do you know by whom it was installed?

A. Installed by the general contractor's sub-contractor, which was Ford Electric Company.

Q. I show you a copy of a statement on the letterhead of George A. Ford Electric Company dated June 18, 1945 and ask you what that is.

page 288 } A. This list represents work that Ford did for Neighborhood Theatre over and above what was included in the electrical specifications and the contract that was handled through Doyle & Russell.

Q. Does that indicate the language of "fixtures, electrical fixtures."

A. Without reading the whole thing, I'm not sure. "Hanging fixtures," one item, two items, three items.

Q. Was that bill paid for by Neighborhood?

A. It's marked "paid" and it's initialed by me, as approved.

Mr. Harrigan: I object. This is all self-serving. The fact it is marked "paid," I'm sure the witness doesn't have a bit of knowledge if it was paid or not.

By Mr. Simmonds:

Q. Did you approve payment of this by Neighborhood?

A. Yes, I did.

Q. Was that work done?

A. Yes.

The Court: The evidence that he approved it is in the testimony; that it's marked "paid" would have to apparently rest on hearsay. Sustained.

By Mr. Simmonds:

Q. I am not concerned with whether it is paid or not at this time, but that work was done at your direction?

page 289 } A. Under my direction, and the bill was approved by me. My initials—

Mr. Simmonds: All right, sir.

I ask that that be admitted as Defendant's D-18.

Mr. Harrigan: Object to it on the grounds it is not relevant to anything in issue.

In addition, I have other objections. There are several other items here such as disconnecting, taking out dimmer plates, State and Buckingham Theatres, which I don't even know is legitimate.

Mr. Simmonds: Your Honor, we are not attempting to prove any dollar amount of the cost of equipment put in a place, or cost of putting the equipment in there. We are merely showing that certain items of equipment were installed at the cost to Neighborhood at the time and place it was erected; so the fact that it might include, which I did not know, items for another theatre, is entirely irrelevant.

The Court: It seems to read, "Disconnecting and taking out dimmer plates in State and Buckingham Theatres." It keeps on going.

Did you say these were approved in connection with the Glebe Theatre job?

The Witness: Yes.

page 290 } The Court: Objection overruled. It's received.

Mr. Harrigan: Exception.

(Defendant's Exhibit D-18 was admitted into evidence.)

By Mr. Simmonds:

Q. Mr. Budina, what was the quality of the material that went into the building, in a general way?

A. Well, if you remember, you recall this was war-time, a war-time project, that had to get War Production Board approval, and everything, most everything was hard to get; so we had to take what we could get, what was available; and many a time we accepted things that ordinarily we would not have thought of putting into the theatre. The spigots on the lavatories always annoyed me. They were just rough brass and they are referred to in the specifications as "Victory-type fixtures"; and the toilet stalls were asbestoes board instead of metal, and right on through the line, there were a lot of things that were not top quality.

Q. How about the hardware on the doors?

A. I would say the hardware on the doors probably were all right. The Exit panic bolts were purchased in New York from a man by the name of Kursam, who was a specialist in theatre hardware, and there is an item there of $160 for

page 291 } these panic bolts that were purchased in New York.

Q. Speaking of panic bolts, Mr. Budina, are the doors, the Exit Doors to a theatre supposed to be locked from the inside?

A. Not with a key, no. They are supposed to be operated by this panic bolt, where any pressure against that bolt will release the bolt top and bottom, sort of open it at any time from the inside.

Q. Is it against the fire regulations to lock it?

A. Very specifically, yes.

Q. Did you have anything to do with the maintenance of the Neighborhood Theatres?

A. Yes.

Q. For how long a time did that occur?

A. Well, I started with Neighborhood Theatre in 1936 and left them in 1955.

Q. During that period of time, did you have any connection with the maintenance of the theatres?

A. Yes.

Q. Are you acquainted with the manner in which the Glebe Theatre was maintained during that period?

A. It was maintained just like any other theatre that the chain had; whether it was wholly-owned by
page 292 } Neighborhood or whether it was leased, we never made a distinction.

Q. Was the Glebe maintained as well as the other theatres?

A. On an average, yes.

Mr. Harrigan: I didn't hear it.

The Court: The question was, "Was the Glebe maintained as well as the other theatres?" And the answer was, "On an average, yes."

By Mr. Simmonds:

Q. Have you any comment about the quality of the boiler that was in the Glebe Theatre?

A. The quality of what?

Q. The boiler.

Q. I think it was a good boiler, especially for war-time. It probably was not designed for oil-burning because we went to elaborate provisions to provide for coal-burning, so it probably was a coal-burning boiler that was adapted to oil-burning at a future time.

A. O. Budina

Q. Do I understand when the building was first built it was built for a coal-burning furnace?

A. It was built with a coal-burning furnace, and the provision was made to get the coal into the building.

Q. Did there come a time when it was converted to oil burner?

page 293 } A. Yes.

Q. Who paid for that, sir?

A. I cannot say.

Q. In your experience as an architect and maintenance man, can you give us an estimate of the life of an exit door for a theatre?

A. I would say 15, 20 years is a long life for a kalamein door, yes, sir. That is a metal-clad door—and that would be a good one. And, of course, these being purchased in 1945-46, we really had no way of knowing what was under the tin, under the metal.

Q. Did you have any trouble with them after about ten years?

A. The bottom rail rusts out, and we have trouble with them.

Q. Was that true of the doors in the Glebe?

A. I think that was true there, yes.

Mr. Simmonds: I think that is all.

The Court: Is that door spelled k-a-l-a-m-e-i-n?

The Witness: Yes, sir.

Could I amplify something in connection with that list of items that totalled $39,000?

The Court: If one of your answers has not been complete and you want to finish it, yes, sir.

page 294 } The Witness: That's been referred to as items of equipment which I authorized. There are two items there which represent fees to the architects in New York which I did not authorize in whole.

The Court: No problem about that because that's not in issue here.

The Witness: I just wanted to make that clear that I did not authorize that.

The Court: There is an anomaly: You are sworn to tell the whole truth, but your attorneys don't ask you purposely for it. That's an anomaly of the law—nothing personal about it.

* * * * *

page 299 }

* * * * *

Thereupon,

A. O. BUDINA, witness called on behalf of Defendant, out of turn, resumed the stand and testified further as follows:

Mr. Simmonds: Your Honor, there is one further question I would like to ask Mr. Budina before he goes on cross-examination, if I may.

DIRECT EXAMINATION (Continued)

By Mr. Simmonds:

Q. Br. Budina, will you take a look at the plans, Plaintiff's Exhibit 3, and particularly E-1 and E-2, and tell us what electrical work was required to be done by Mr. Sharlin as owner of the property?

A. The drawings are numbered E-1 and E-2. The drawings are the electrical wiring diagrams which show the various outlets for light fixtures, aisle lights, poster frames,—

The Court: What are they?

The Witness: Poster frames show the posters on the coming attractions.

The Court: You mean inside the lobby, Coming Attractions?

page 300 } The Witness: Two of them on the exterior, as I remember.

The Court: I know what you mean.

The Witness: They are lighted.

By Mr. Simmonds:

Q. Mr. Budina, is there anything there that required Mr. Sharlin to extend the service beyond the boxes or junction boxes, whatever they are called—the outlets?

A. No. He carries them to the outlets and the fixtures, electrician picks up the wire in the fixture and takes it from there.

Q. Do you know whether Neighborhood paid for the electrical wiring beyond the outlets?

A. They did, yes, sir.

Mr. Simmonds: That is all.

The Court: Just before you start cross-examination, will you tell me what a "French drain" is?

The Witness: A "French drain" is simply a ditch dug in the earth and filled with stone, gravel, loose, in the hopes that that would carry away the water and let it seep into the ground rather than run across the surface.

The Court: I see.

Your witness.

page 301 } CROSS EXAMINATION

By Mr. Harrigan:

Q. Now, Mr. Budina, as I understood your testimony, you were the architect in this particular building, is that correct?

A. I was associated with Mr. Eberson, as architect.

Q. And where were you located at that time?

A. I was employed by Neighborhood Theatre, in Richmond.

Q. And your offices were in Richmond?

A. They were.

Q. Did you draw these plans and specifications?

A. Not entirely, no. They were done in Mr. Eberson's office, and I spent two or three weeks up there going over them, helping with certain things and certain specifications — I helped them with that and reviewed it as they went along.

Q. You also said you did go up to the Glebe Theatre and supervised the work?

A. That's right.

Q. So, you are familiar with the general lay-out of the theatre, is that right?

A. Yes, sir.

Q. You are familiar with the plant, is that right?

A. Yes.

page 302 } Q. I direct your attention to Plaintiff's Exhibit P-1. Attached thereto is a plat purported to be the plat of the Glebe Theatre on Glebe Road, in Arlington. Is that the plat of that particular ground?

A. Yes, sir.

Q. In that Lease it states the Lease covers lots 1 through 8. Do you know where lots 1 through 8 are on there?

A. Well, six are identified, but I don't think 7 and 8 are —not identified here.

Q. Well, was this all the ground where this is marked out, the building line that was the leased property?

Mr. Simmonds: What was the question?

The Court: To what do you point, Mr. Harrigan?

Mr. Harrigan: To the building line labeled, "Building Line" on the plat.

The Witness: The building line is simply the line that's been established here as the front line of the building. This had to be set back from the property line, 25 feet from the property line. That was done at the requirement of the County due to the proposed widening at some future date. They required this set-back.

Q. All right. So, the property line would be 25 feet farther up than the building line?

page 303 } A. (Indicating) This was the property line.

Q. This was all included within the Lease, this whole—

Mr. Simmonds: I suppose the Lease speaks for itself, if your Honor please. I object to that.

Mr. Harrigan: I am trying to clarify this, your Honor.

The Court: Plaintiff put the lease in with the plat attached. I take it you simply want the witness connected with the defendant to agree that that's correct, if he knows. This *cannt* be asked to vary the terms of the Lease by *parole* evidence.

Mr. Harrigan: I'm just trying to clear up that this front part of the theatre out to the end of the marquee was part of the leased premises.

The Court: I think the lease will have to speak for itself. Objection sustained.

Mr. Harrigan: All right.

By Mr. Harrigan:

Q. I ask you this: Was this marquee on the leased premises?

A. Frankly, I don't know.

Q. Beg pardon?

A. I don't know. It was beyond the building line.

page 304 } Q. Part of it was, wasn't it?

A. I'm afraid I'm not qualified to say what was leased and was not leased here.

Q. All right. In that case, then I show you another plat of the same area. Is that the same plat which has the spaces marked off?

A. No, no, it's not the same plat.

Q. What's the difference?

A. This has the date of November 1955 and this one (indicating) is dated 1943.

Q. Aside from the date in which the survey was made, is it the same?

Mr. Simmonds: Your Honor, I don't think it is up to this witness to try to point out—

The Witness: I don't know.

Mr. Simmonds: —the difference between a plat made by someone entirely unconnected with the witness, made in 1953.

The Court: I can't help but have *yeard* your witness say "I don't know." I think it is mute.

Mr. Simmonds: All right.

By Mr. Harrigan:

Q. Do you have your plans of the marquee?

A. The plans are part of the building plans.

page 305 } Q. Would you indicate which plan covers the marquee?

A. Drawing Number 4 is the first sheet on which the marquee is shown. That is shown in the plan on that sheet and is shown on elevation sheet in Sheet Number 7.

Q. In relation to where the marquee started to come out from the building, where was the ticket booth?

The Court: May I ask where this line of questioning leads?

Mr. Harrigan: We want to show, your Honor, that this crack that was on the sidewalk, where the sidewalk went down, was on the property that was leased, was right by the ticket booth, and was some 14 feet inside the property line, and this concrete was in fact, it's a foyer-type, not a sidewalk—a foyer.

The Court: All right.

The Witness: The front of the box office was 18 inches, by these plans, in front of the building line.

By Mr. Harrigan:

Q. In front of the building line?

A. That's right.

Q. And the building line was 25 feet in front of the property line, is that right?

A. That's right.

page 306 } Q. When that area was constructed, was there a concrete foyer put in front of the ticket office?

A. No, no.
Q. Was it just left dirt?
A. I'm afraid I didn't understand your first question.
Q. Was there a concrete foyer, sort of a walk placed in front of the ticket office, right under the marquee?
A. There was a sidewalk, but not a foyer.
Q. But there was a concrete sidewalk?
A. That's right.
Q. —in front of the marquee?
A. That's right.
Q. And that was part of the original construction?
A. It was part of the original construction.
Q. Fine. This building was specifically built and designed for the operation as a movie theatre, wasn't it?
A. That's right, yes, sir.
Q. Beg pardon?
A. Yes, sir.
Q. In this design, on the second floor, did the plans indicate that that was a lounge area?
A. That was the lounge area, yes, sir.
Q. And from your recollection, you can testify that that's all it was, just a lounge area?

page 307 } The Court: Let me ask Mr. Simmonds—is that disputed?

Mr. Simmonds: Frankly, I don't know what area you are speaking of.

The Court: The question was, had the second floor lounge been partitioned by Mr. Pearson. Mr. Sharlin said he saw it and made no objection to it. Is that what you are trying to show—will you all concede that?

Mr. Harrigan: I am trying to show it was specifically, originally a lounge area.

The Court: Lounge only?

Mr. *Harrington*: Lounge only.

Mr. Simmonds: I was under the impression there was a theatre manager's office.

The Court: Added later.

Mr. Simmonds: No; originally was a manager's—

The Court: I think if you stipulate may be quicker.

Mr. Simmonds: I will stipulate.

Mr. Harrigan: —stipulate originally a lounge area and there was no provision in there for building an office.

The Witness: No intention to, that's right.

A. O. Budina

By Mr. Harrigan:

Q. There did come a time when this lounge area
page 308 } was converted to offices, is that right?

A. Yes, sir, that's right.

Q. Did you help supervise that construction, if you recall?

A. I don't recall doing much supervision; it was simply a matter of buying the partitions and having them set up.

Q. Do you recall when that was done?

A. No, no.

Q. You admit that there wasn't any provision in the Lease or specifications for this improvement, don't you?

A. I know there wasn't anything in the building plans.

Q. All right.

A. For the Lease, I'm not prepared to say.

Q. If the Lease had a provision in it whereby the premises were to be returned in the same condition as when delivered, that would mean that these partitions would have to be torn out, wouldn't it?

Mr. Simmonds: I think you are probably arguing with the witness and also asking for construction of the Lease.

The Court: Sustained. The Lease will speak for itself.

By Mr. Harrigan:

Q. Did you intend to tear these out at the end
page 309 } of the term and restore the premises?

A. I frankly never gave that a thought.

Q. You didn't think about that. Are you familiar with the cost factors in construction?

A. I don't get the question.

Q. Are you familiar with various building costs and construction renovation?

A. To a certain extent I would be.

Q. Did you ever see these offices?

A. Yes.

Q. Would you describe how many partitions were put up?

A. There was one big office in the front. These, incidentally, were sectional partitions. They were steel partitions that were designed to be taken in and dismantled and taken out. They were typical Hauserman sectional office partitions.

Q. How many were there, if you recall?

A. I can't answer that except there was a general office across the front, and then there was another big office in the back of that, and I think a small office partitioned off of

that had the information — *wicket* for information window.

page 310 } Q. So, you had several partitions, is that right? Is that a fair statement?

A. Yes.

Q. How were they attached to the walls?

A. Ordinarily, there would be a metal filler-plate fastened on the wall.

Q. How was that fastened on the wall?

A. With expansion shield and bolts and screws.

Q. Bolts and screws. A filler-plate and these partitions to fit in the filler-plate?

A. Yes.

Q. So, in any event, this would damage the wall, would it not, by putting these up—the original condition of the wall?

A. By the fact that there are a number of holes that needed to be—yes.

Q. Do you know how much it cost to put those in?

A. Well, I don't recall now.

Q. Do you have an estimate of how much it would cost to take those out and repair the damaged holes?

Mr. Simmonds: I don't know whether to take them out has any bearing on this case. I think it might be the cost of repairing the wall; but you can ask him that.

The Court: If taken out, then the question

page 311 } would be narrowed to cost.

Mr. Harrigan: The cost of restoring it to the condition it was before putting them up. Do you know what that price is?

The Court: After the partitions were out, can you estimate the cost of repairing the wall?

The Witness: I wouldn't want to venture a guess on that.

By Mr. Harrigan:

Q. In other words, you don't know; you're not familiar with—

A. It shouldn't be any sizeable amount. $25 ought to do all the patching and plastering on it. You can do a lot of patching and plastering for $25, so something less than that, I would say.

Q. Then, you would have bare plaster, wouldn't you, right?

A. That's the way—

Q. Then, you would have to pain in order to conform it, wouldn't you?

A. Not necessarily.

Q. Well, how else would you do it?

page 312 } A. Put it back in the condition that it was delivered to the tenant when the building was turned over to them in 1945. There wasn't any paint on it at that time.

The Court: The building was delivered unpainted?

The Witness: Yes.

The Court: I see.

By Mr. Harrigan:

Q. Are you telling us that those partitions were put in when the walls were unpainted?

A. No, I didn't say that.

Q. As a matter of fact, the walls were painted when they were put in, weren't they?

A. No, I don't think so.

Q. You don't think so.

A. I think they were papered.

Q. They were papered?

A. —by the tenant.

Q. This is a matter of semantics. There was a covering on the wall, wasn't there?

A. Yes.

Q. And that would have to be restored, that covering, wouldn't it, right?

A. Either that or the paper would have to be taken off, all of it.

page 313 } Q. That would be an additional expense, wouldn't it?

A. What?

Mr. Simmonds: I think he is arguing with the witness, if your Honor please.

By Mr. Harrigan:

Q. When you put in these offices, you had some trouble heating them, didn't you?

A. I don't remember that.

Q. Do you remember whether you altered the boiler in some way, put some additional mechanism on the boiler in order to heat these offices?

A. No.

Q. You don't remember that?

A. No.

Q. Are you saying you did not do it, or you don't remember?

A. I don't remember.

Q. I show you what purports to be a copy of a letter to Mr. *Thalheimer* from you dated November, 1950.

The Court: *Thalheimer.*

The Witness: (Reading) This would indicate that there was trouble at that time, heating.

Mr. Harrigan: Your Honor, I would like to have this marked for identification.

page 314 } The Court: *Leter* bearing date of November 16, 1950 is marked for identification Plaintiff's Exhibit P-18.

(Plaintiff's Exhibit P-18 marked for identification.)

By Mr. Harrigan:

Q. This exhibit, P-18, indicates you did have some difficulty in heating that lounge area, right?

A. Apparently, yes.

Q. And that as a result of that, you did in fact alter the boiler system somewhat in order to heat it?

A. Piping.

Q. You altered it—piping?

A. Piping.

Q. Did you get permission from Mr. Sharlin to do that work?

A. I don't remember ever discussing that with Mr. Sharlin, no.

Q. You just went ahead and did it?

A. Yes.

Mr. Harrigan: I would like to offer this in evidence, your Honor.

The Court: Received.

(Plaintiff's Exhibit P-18 was received in evidence.)

page 315 } By Mr. Harrigan:

Q. Then, would it be fair to say that you put in offices without authority, and changed the boiler system or piping system without authority?

Mr. Simmonds: I object, your Honor. It seems to me that if Mr. Budina has testified to the facts as he knows them to be, and he is arguing—

The Court: It's trying a collateral—Your client has said he saw the offices going in and he raised no objection, so what's the fight about?

Mr. Harrigan: There is a question, then, when then on voluntary improvements—The fact that you see them does not mean that they don't have to restore the premises.

The Court: That's a matter for argument. Keep the trial moving or we'll be here all week.

By Mr. Harrigan:

Q. The marquee are on the plans, aren't they?

A. Yes.

Q. How many theatres have you designed or been associated with other people in—a great many, is that a fair statement?

A. I would say in the neighborhood of a hundred since 1920.

Q. Generally, aren't the marquees specifically
page 316 } designed for each theatre, and each one of them is a little different?

A. I really don't know quite what your question means.

Q. Do you just copy plans from old marquees and make them identical or is each marquee sort of an individual creation?

A. I will have to ask what is the marquee?

Q. You said it was in the plans.

A. It is.

Q. Now, you tell me what is the marquee.

A. Well, the marquee consists of the shelter over an entrance. That's the definition of a marquee.

Q. In these plans—And eventually, this marquee has signs on it, such as the "Glebe", is that right?

A. Yes. Yes, I testified to that the other day that this was designed with a wood facia when it was designed, on the theory signs would not be available. Signs were available before the wood facia was put on, so the wood facia was eliminated, and the signs were put on the face of the marquee, the perimeter of it. That part of it will vary from one theatre to another, and the shape of the marquee will vary from one theatre to another, but basically, it is a steel framework with a roof deck on top and some kind of a soffit underneath.

page 317 } Q. In this particular marquee at the Glebe Theatre, it was designed in such a way that it left space for recessed attraction panels, wasn't it?

Mr. Simmonds: I think the words "attraction panel" has been used, up to now, to mean those thing that went on the top of the marquee. Is that what you are referring to?

Mr. *Harrington*: No, that's the Glebe sign.

Mr. Simmonds: I'm talking about on the face of the marquee.

Mr. *Harrington*: That's right. There are three attraction panels.

Mr. Simmonds: Those tell what's coming next week or what's here.

Mr. *Harrington*: Yes.

The Court: Call the little ones at eye level "poster panels," call the ones up in the air "attraction panels."

By Mr. *Harrington*:

Q. This marquee was designed so three attraction panels could be recessed into the structure, is that right?

A. Weren't recessed, no.

Q. You mean, they were not recessed?

A. No.

Q. How many attraction panels were put on this marquee?

page 318 } A. Three; a three-sided marquee.

Q. Were these panels custom-made for this particular marquee?

A. Yes.

Q. As a matter of fact, attraction panels are always custom-made, aren't they? You can't buy them from stock?

A. I'm not prepared to say that.

Q. But you are prepared to say these were custom-made for this particular marquee?

A. Yes.

Q. These three panels, how were they attached to the marquee?

A. Simply bolted to the steel framework that went around the perimeter of the marquee.

Q. All three of them were bolted right on?

A. Right. Yes.

Q. Just for the sake of clarification, removable letters are placed on these panels to show what's playing at the theatre, right?

A. That's correct.

Q. And these panels are generally made out of plexi-glass or some substance like that?

A. Well, they are today, but I don't think they were twenty years ago, twenty-one years ago.

page 319 } Q. Is it fair to say that these three panels that are bolted on that marquee are attached in a permanent fashion to this steel work?

A. No.

Q. It's not fair to say that.

A. It simply means unscrewing a nut off a bolt and taking them down again.

Q. How many nuts?

A. I wouldn't know.

Q. You said "a" nut, do you mean one nut?

A. No, no, but that's all it involves, unscrewing a nut and taking them down.

Q. But they are attached, right to the—

A. That's right.

Q. And they ordinarily remain up there until they are broken or it's necessary to replace them, isn't that right?

A. Yes.

Mr. Simmonds: If your Honor please, I don't see that this witness has got to speculate as to the various and sundry reasons for taking them down. I think it's entirely irrelevant to the issue.

Mr. Harrigan: I think it's relevant, your Honor. It shows the permanency and character of these things, and that the only reason they would be taken down would be—

page 320 } The Court: I heard that testimony when I was barely into the case. I recall Mr. Sharlin telling about how the Glebe signs came down. He made reference to something on the order of "torched off," where they were fastened to the steel frame. I don't recall any testimony about the attraction panels one way or the other. It may be back in my notes—eight pages back—but it was there.

Mr. *Harrington*: I think there definitely was. There is no controversy that the panels were taken out and the Glebe signs taken out.

Mr. Simmonds: That's right. But I think your question as to how—

The Court: When you get to the question of how, or the damage to the taking or the right to remove either one?

Mr. Harrigan: Right to remove is what I'm going into now, your Honor.

The Court: The Lease is going to speak for itself on three things really involved: The lease; custom in the industry that might give on the context in which the lease was drawn, and the general law of freeholds, unless modified, you see, so I think you are limited in your questioning. Objection is sustained.

page 321 } You can ask him about the custom.

Mr. Harrigan: I can't ask him how they are attached, your Honor?

The Court: He said already they were bolted on and that you just unbolted and take them off. Your client said the Glebe signs were torched off, or something on that order—cut off. If you want to get into the Glebe signs, go ahead. That's already in and in without objection.

Mr. Harrigan: All right.

The Court: Mr. Simmonds says there's no doubt his clients would move the attraction panels.

Mr. Simmonds: That's right.

The Court: So, that's covered.

By Mr. Harrigan:

Q. Were the attraction panels placed on the marquee to carry out the purpose for which the building was acquired, the purpose for which it was adapted and occupied?

Mr. Simmonds: Please read the question.

By Mr. Harrigan:

Q. Were the attraction panels bolted to this marquee to carry out the very purpose for which the building was acquired and adapted as a movie theatre?

Mr. Simmonds: I think that's entirely too gen-

page 322 } eral a question, your Honor, to put to this witness. It may assist in accomplishing the purpose, but to say it was put up to carry out the purpose, I don't think it adds anything, your Honor.

The Court: Please don't think the Court would miss this. If a marquee is designed to hold the attraction panels bolted on there, obviously it's for the purpose—I realize what it's doing. You've checked out some law and you want to phrase the question to the witness in a question of law, but you can argue that to the Court. You may be sure I will take notice

attraction panels are part of the theatre. What happens under the Lease, I will decide at the end of the case.

Mr. Harrigan: Are you overruling the question, your Honor?

The Court: Yes, because there is just no need to ask it.

Mr. Harrigan: All right. Exception.

The Court: I tell you, I presume the answer through my general knowledge, take judicial notice that attraction panels on the theatre marquee are there to serve a purpose for the building, so I say, don't bother to put it in. I accept it. You may except to that, but I don't think you want to.

page 323 } Mr. Harrigan: In that case—

By Mr. Harrigan:

Q. In addition to these panels and this particular marquee, there was installed two Glebe signs, right?

A. Yes, sir.

Q. The Glebe signs are that type of sign that is custom-made, aren't they?

A. Yes, sir.

Q. And these signs were specifically made for that particular marquee, is that right?

A. Yes.

Q. How were they attached to this marquee?

A. They were attached to the top of the attraction signs.

Q. And by a method of bolting them right on there?

A. I really don't know how they were fastened together. It would be of no interest to me.

Q. Well, it's fastened so they cannot be removed or blown off by the wind, aren't they?

A. Yes.

Mr. Simmonds: That's two questions. He asked one, whether they could be removed and one—

The Court: Split your questions.

page 324 } By Mr. Harrigan:

Q. All right—fastened in some way so they cannot be removed without some effort, taking a lot of bolts out, and so forth?

Mr. Simmonds: Your Honor, I don't see that this—

The Court: Mr. Harrigan, as I realize we are taking this defense witness out of turn, do you have a witness who can testify they were taken down in an unworkmanlike manner, something like that?

Mr. Harrigan: Yes, sir.

The Court: I realize a Court should not suggest to an attorney how to prove a case. It's pretty hard to prove anything through the admissions of an opponent. I don't deny you the right to try it, though, or Mr. Simmonds.

Mr. Harrigan: All right.

By Mr. Harrigan:

Q. Did Mr. Sharlin pick out this name Glebe Theatre, didn't he—the name "Glebe" himself?

Mr. Simmonds: I think this is irrelevant.

The Court: Overruled. That would be surrounding facts and circumstances.

The Witness: I wouldn't know.

Mr. Harrigan: You don't know.

page 325 } By Mr. Harrigan:

Q. Now, let's go to the wiring. I believe you have already testified that the general wiring throughout the theatre was done during construction, is that right?

A. Yes.

Q. Does that mean that for fixtures the wiring was already there and all you had to do was connect up the fixtures, is that right?

A. That's right.

Q. And you would have to run leads out to the marquee for the lights on the marquee?

A. Yes.

Mr. Simmonds: Are you talking about what Mr. Sharlin was supposed to—

Mr. Harrigan: No, I'm talking about what was done in general construction.

The Witness: The service to the marquee lighting for the attraction panels and name signs was run out to the wall and the sign man picked it up from there.

By Mr. Harrigan:

Q. That's customary for the sign man to pick it up and hook up the sign?

A. That's right.

page 326 } The Court: What wall do you refer to?

The Witness: The front wall of the building.

A. O. Budina

The Court: Is that per plan?

The Witness: It doesn't show on the plan, no. There was a riser (?) diagram missing, your Honor. That would probably show that, but that's not important in these plans.

The Court: I see. All right.

By Mr. Harrigan:

Q. But that was done in this particular—

A. Yes, I'm sure it was.

Q. You had certain fixtures, recessed lighting fixtures, under the marquee, some 16 of them?

A. I didn't think there were that many, but—

Q. Could you look and see?

A. (Looking) The plans show that there were eight.

Q. When you say eight, what you mean is that there were eight from the ticket booth on out, right?

A. In the ceiling of the marquee.

Q. And there were eight more right behind the ticket booth all enclosed in the same ceiling, wasn't there?

Mr. Simmonds: If your Honor please, I was under the impression that the testimony with respect to
page 327 } damaged or missing fixtures was in the marquee itself and not in the building proper.

The Court: I think other testimony said all light fixtures removed. *The* spoke of Exit signs internally and the testimony was quite broad.

Mr. Simmonds: I was under the impression that the front was limited to the marquee.

The Court: Those who referred to the marquee did not distinguish between marquee and I will call it "foyer" for that area back of the ticket office now referred to by counsel.

By Mr. Harrigan:

Q. You testified there were eight in front of the ticket booth?

A. Yes.

Q. How many were in back of the ticket booth?

A. There were two along side and six in the back.

Q. Sixteen all together of these lights, is that correct?

A. Yes.

Q. On your plans, it shows that these lights were recessed in the marquee, doesn't it?

A. No.

page 328 } Q. Weren't they recessed lights?

A. I think they were, yes.

Q. And the wiring was extended out to cover these 16 lights, is that right?

A. Yes.

Q. O.K. These 16 lights, when they were installed, were they recessed up into the ceiling?

The Court: He says he thought they were, but the plans did not show it.

By Mr. Harrigan:

Q. Maybe I ought to ask you this: Do your plans show everything that was done?

A. I would say no.

Q. All right.

A. The plans show a lot of things that were not done.

Q. So the plans aren't exactly accurate, that's what *your* telling—

A. As I stated, the other day, this was a war-time project, and we "played it by ear" from one week to the next as to what became available; and as I say, this wooden facia was left off the marquee and the attraction signs placed there; that normally would have been done. But that holds true throughout the whole building operation.

page 329 } Q. There is a booth in this theatre, isn't there, what they call the "booth," which is where the cameras are, and so forth?

A. There is the projection room where the projectors are.

Q. The projection room?

A. Yes.

Q. Are circuits run up into the projection room?

A. Electrical circuits?

Q. Yes.

A. Yes.

Q. And they use these circuits to hook up to the cameras, et cetera, and equipment?

The Court: Cameras? Not cameras, projectors!

The Witness: Circuits run to a panel in the projection room.

By Mr. Harrigan:

Q. Right, and from that panel, the wiring is led to the projectors?

A. In the original installation, the wiring only goes to the

panel, and then it goes from the panel to the projectors, right, or other equipment?

A. Right.

page 330 } By Mr. Harrigan:

Q. Ordinarily, then, if you were removing equipment, say projectors, you would disconnect the wiring from the equipment itself, wouldn't you?

A. No, not necessarily.

Q. How else would you do it?

A. Go back to the panel.

Q. And rip out all the wire?

A. From the panel to the projector that was put in by the tenant as part of the tenant's work.

Q. That's how you would always do it?

A. I wouldn't say you would always do it.

Q. What good would the wiring do from the panel to the projectors, to anybody?

A. What good would it be?

Q. Yes, it's worthless to anybody, isn't it?

A. Yes.

Q. You would never reinstall that in another theatre, would you?

A. I wouldn't think so. It wouldn't be worth anything to anybody who put other projectors in it.

Q. Is that right?

page 331 } A. Projectors today take a whole lot more wire, a bigger wire than the projectors installed twenty years ago.

Q. That's if new projectors were used?

A. Yes, so it isn't worth anything to anybody, in the place or out of the place.

Q. If a projector broke down, and a used piece of equipment was put in there, are you telling us that you could not just reconnect the used piece of equipment in the theatre?

Mr. Simmonds: Your Honor, it seems to me that that has little or nothing to do with this particular case.

The Court: Sustained. If he had shown it was, it would be something else.

By Mr. Harrigan:

Q. Are you an electrician?

A. No, sir.

Q. Is this an expert opinion you are giving us, or just your own personal opinion?

A. What opinion?

Q. That you couldn't use this wiring again.

A. Well, I know for a fact that the projectors today require a whole lot more current than they did twenty years ago, and they are entirely different type of equipment.

Q. You don't know what equipment was put in the Glebe, do you, as far as wiring? Do you?

page 332 } Mr. Simmonds: When, Mr. Harrigan?
Mr. Simmonds: You mean initially?
The Court: In construction or—

By Mr. Harrigan:

Q. At construction, what size wiring, what size equipment?

A. No.

Q. You don't even know what size projectors they had, do you?

A. No.

The Court: Would that be in the "Specs"?

The Witness: No, that equipment is purchased by the tenant and installed.

The Court: But even the wiring from the what—the focal electrical point in the building to a panel located in or adjacent to the projection booth, would that size wire be known or some description of it, technically?

The Witness: I am not prepared to answer that, sir.

By Mr. Harrigan:

Q. Let's go to the Exit fixtures. He had Exit fixtures similar to those in the wall, didn't he (indicating)?

A. I'm not sure.

Q. Are you sure whether they were recessed or not?

page 333 } A. I don't recall.
Q. Does your plan show this?

A. No.

Q. This was something extra?

A. I really don't know what was bought. Lots of time you have Exit fixtures that are surface-mount and sometimes mounted on the system. I don't recall what these were.

Q. In any event, the wiring to those fixtures has to come

through the walls, and it's part of the original construction, isn't it?

A. That's right.

Q. And if the fixtures were recessed such as that one, it would be part of the construction, wouldn't it?

A. Probably, yes.

Q. Mr. Simmonds showed you an invoice the other day that had on it some foyer fixtures.

The Court: Is that Light-o-lier?

The Witness: Yes.

Mr. Simmonds: I believe it is Plaintiff's 5 or 6.

The Court: P-6.

By Mr. Harrigan:

Q. I show you Exhibit P-6.

The Court: It was offered for identification by page 334 } a different number, but it's admitted as P-6.

By Mr. Harrigan:

Q. Exhibit P-6, there is an item on there, this foyer, six round recessed fixtures, right?

A. That's what it says.

Q. Where were they put?

A. In the foyer.

Q. Where would the foyer be? Is that right behind the ticket booth?

A. No.

Q. Where is it?

A. (Indicated on Plan, by pointing).

Q. Which Plan do you point to?

The Court: What sheet?

By Mr. Harrigan:

Q. Which number are you looking at?

A. I think maybe we better look at the architectural drawing and identify the foyer. This is the foyer in here.

Mr. Simmonds: What?

The Court: What page are you referring to, Mr. Budina?

The Witness: Drawing Number 3. The foyer is the space directly behind the auditorium.

The Court: Does this theatre have a marquee up over the

page 335 } sidewalk, the ticket box—that's where it is disconnected from the rest of the building, so there is a—

The Witness: There is a lobby and another set of doors and the foyer is this area just behind the seats.

The Court: Oh, I see. All right.

I think the Court, as a layman, and perhaps counsel have been using the wrong terminology. All right, gentlemen, the foyer is the standing room back of the seats. Distinguish that from lobby; and in turn, you say there is an area outside the lobby as one leaves the building, a free-standing booth and farther out, the marquee?

The Witness: Yes.

The Court: All right.

I should know, having been there. I'm not supposed to take judicial notice, but I can even remember.

By Mr. Harrigan:

Q. Your impression is, anyway, that those six lights were put in, in that foyer? Is that right?

A. I think they were, but frankly, I couldn't show you where they are here.

Q. In other words, they don't show up on your print, is that what you tell me?

A. This drawing does not show anything that fits that description.

page 336 } The Court: What page is that?
The Witness: This is E-1.

By Mr. Harrigan:

Q. As a matter of fact, the drawing shows fixtures similar to colonial brass fixtures, doesn't it?

A. (Looking)

The Court: What point do you want to make, Mr. Harrigan? Again, I will ask if counsel dispute it.

Mr. Harrigan: Mr. Simmonds has offered this, said they put all this in.

The Court: He offered it for identification. It's your exhibit.

Mr. Harrigan: I put it in.

The Court: Yes, sir.

What point do you *wisn* to make?

Mr. Harrigan: That all of these were not put in in that theatre, and that where it says "Buckingham," there is some question of how many of these were in fact put in.

Mr. Simmonds: Mr. Harrigan, what does that say: "Shipped to Buckingham."

Mr. Harrigan: The only thing it says about Glebe, somebody crossed it off and wrote in "Glebe" on top of it, sometime or another.

Mr. Simmonds: (Examining) Down here it
page 337 } shows where it was paid and charged to Glebe, doesn't it?

Mr. Harrigan: Glebe was the main office.

The Court: I thought Mr. Simmonds offered this exhibit first for identification to show his client paid for all these fixtures, that you then agreed, and that's why you put it in as P-6.

Mr. Harrigan: I didn't put it in for that reason, your Honor. I put it in to show they were put in in February 1945. That's the only reason I put it in.

The Court: I see, so your present question is to develop—

By Mr. Harrigan:

Q. My present question is whether those six foyer fixtures were in fact put in? And apparently the answer is, he doesn't —The plans don't show it.

A. The plans don't show it. This crossing out is my crossing out. That is, I crossed the "Buckingham" bill because these went to the Glebe. We were doing both theatres approximately the same time, and this was incorrectly billed.

Q. All right. Let's go up to this parking lot. I show you this plat attached to the Lease, and it has an area with lines drawn over it. Does that purport to be the original parking lot?

A. Yes.

page 338 } Q. I believe you testified yesterday it was your recollection that this lot was not paved, is that right?

A. That's correct, yes, sir.

Q. And you said it had crushed stone on it?

A. Yes, sir.

Q. What did this area up here have on it?

A. Nothing.

Q. 6 and 7. Nothing at all?

A. That's right.

Q. For some reason or other, there was a draining problem caused on that lot, right?

A. That's right.

Q. And is it safe to say that a lot with crushed stone on it, you wouldn't have much drainage?

A. You would have more drainage on a lot that's surfaced than you would with a lot with *vegitation* on it; and you would have a whole lot more surface run-off if the lot were black-topped.

Q. If it were black-topped, this would cause—What do you call those things, "French" what?

A. French drains.

Q. French drain. When you black-top a lot and you run into this problem of run-off, would the French drain be the proper method to correct it?

page 339 } A. No.

The Court: May I go back? Your testimony about French drains, wasn't that at the rear of the building?

The Witness: Here (indicating).

The Court: Adjoining the Ball property?

The Witness: Yes, there was, but no French drain or nothing about that up front was there.

The Court: No. I think that's the difference.

By Mr. Harrigan:

Q. It was by the parking lot?

A. The part back in here.

The Court: Rear parking lot and your questions are about the back. Then, you best use words because the Court can't see everything you are pointing to.

By Mr. Harrigan:

Q. This French drain was as the result of the run-off at this back parking lot, is that right?

A. Yes.

Q. There were two contracts, this one contract, number $145,698. You said you didn't have any recollection of what that was.

A. This was evidently partly handled by Doyle

page 340 } & Russell who were building contractors for this project. This bill was.

The Court: What's the exhibit number?

Mr. Harrigan: That's mine.

The Court: Please use the Court's exhibits.

Mr. Harrigan: Dated May 3, '45, I think is what it says—May 3, May 5th.

Mr. Simmonds: Your Honor, I'm not sure that was ever put in evidence or even identified.

The Court: I think the same paper is here as D-11.

Mr. Simmonds: May I see it please?

Mr. Harrigan: That's correct.

The Court: Use that one, Mr. Harrigan.

By Mr. Harrigan:

Q. Now, I show you this exhibit marked D-11 and you were going to say something about that $5,000 figure.

A. This was a bill direct to Mr. Sharlin.

Q. Right. Just tell me what the $5,000 figure is, if you know—what this figure purports to represent.

A. I don't know.

Q. You don't have any idea?

A. I think it was for grading of the lot.

Q. Grading. $6,000 to grade a lot. That's not even reasonable, it is?

page 341 } A. Frankly, I don't know. But evidently, Virginia Contracting Company contracted with Mr. Sharlin for this, and it was approved by Mr. Ware, who was the superintendent for Doyle & Russell, so I had nothing to do with that until it came to me from Mr. Sharlin with this letter.

Q. That could have been for paving, could it?

A. No.

Q. Could not possibly have been for paving?

A. No.

Q. Because there wasn't any paving there?

A. Wasn't any paving there.

Q. When was the lot paved?

A. There was crushed stone put on it in '45 or '46.

Q. That's not my question. My question was: When was the lot paved?

A. I don't know.

Q. How long were you with Neighborhood?

A. I was with Neighborhood up to early in '55.

Q. And is it your testimony that up until early in '55, that lot was never paved with asphalt?

A. I wouldn't testify to that, no.

Q. If you cannot recollect if it was paved or not in '55, how can you recollect so clearly it was back in '45?

Mr. Simmonds: I think this is mere argument,
page 342 } if your Honor please.
The Witness: Frankly,—
Mr. Simmonds: He says he does not know when it was paved.
The Court: If he can answer, I will let him. Overrule the objection
Mr. Harrigan: Go ahead, Mr. Budina.
The Witness: I have a fixed policy wherever I have anything to say about a paving lot, not to black-top it until it has gone through two or three seasons of use with crushed stone on it, in order to overcome all of the sinkages and things like that, so whenever I have anything to do with a parking lot, I recommend they not put black-top on it until it's gone through, certainly, one whole year of use with crushed stone, then you can do it safely; so I am positive this was not done.

By Mr. Harrigan:
Q. All right. Do you know if it was paved in '55?
A. I wouldn't recall the year it was paved, no.
Q. When did you leave the organization?
A. In 1955.
Q. What month?
A. Probably in May.
page 343 } Q. In May?
A. Yes.
Q. So, up to May of '55, it's your recollection that the lot was not paved?
A. That's right.
Q. Is that right?
A. Yes.
Q. How long should a lot last, once it is paved?
A. That depends on the quality of the materials.
Q. Well, the quality of the materials, the type that you would have paved it with—how long?
A. I would say eight-ten years is the life of a black-top parking lot.
Q. At least eight-ten years?
A. Yes.
Q. How long would it be before it required patching and resurfacing? Would that be eight to ten years?

A. That might even be the third year, the second or third year.

Q. So, it could be before it needs to be re-surfaced?

A. That is a very difficult—

Mr. Simmonds: You're talking about holes; and now about resurfacing.

page 344 } By Mr. Harrigan:

Q. All right. It takes about 3 years before it needs patching?

A. It depends on the materials and the use. If you run trucks over it or—

Q. Let's take theatre lots. You're familiar with theatre lots

Mr. Simmonds: Let him answer the question, Mr. Harrigan.

The Witness: There is no way I can tell how it is used.

By Mr. Harrigan:

Q. But your experience on an average, is it fair to say it would require some patching in two or three years?

A. Yes.

Q. And it might require resurfacing, with heavy use, in not less than five years?

A. Yes.

Mr. Simmonds: That's—questions on something—

The Court: I think this goes beyond cross-examination. Your question assumes things that have not been covered at all, or even intimated.

Mr. Harrigan: The use of a lot?

page 345 } The Court: You're talking of heavy use and five years, and you draw them from nowhere.

Mr. Harrigan: A theatre lot I'm talking about.

Mr. Simmonds: This is certainly—

The Court: I think you passed the bounds of cross-examination, as broad as it is.

Mr. Harrigan: All right. I'll rephrase the question.

By Mr. Harrigan:

Q. Mr. Budina, did you ever write a letter to Mr. Thalhimer in 1950 telling him that the lot needed patching and needed to be resurfaced?

A. I don't remember.
Q. Well, let me show you this page 2 of this letter.

Mr. Simmonds: Let's see the whole letter. I think it's part of that letter you put in evidence.
Mr. Harrigan: Could be.
Mr. Simmonds: November 15th letter.
The Court: November 16th.
Mr. Simmonds: I think that's the second page of it. That's the second page of the same letter.
Mr. Harrigan: May I have this marked?
The Court: If counsel agrees, I will attach it to P-18.
page 346 } Mr. Harrigan: One is dated the 16th and one the 13th.
The Court: That's true. It's a different date.
Then this will be given a separate number.
Mr. Simmonds: All right.
The Court: Which is P-19.
Mr. Simmonds: Does that second page indicate, as Mr. Harrigan said, that it's from Mr. Budina to Mr. Thalhimer?
Mr. Harrigan: Yes, it does, I think.
The Court: In the upper left is "Mr. Thalhimer," page 2, date, and at the bottom "aob/" and the typists initials. I take that to be Mr. Budina's initials and the typist's.
This is P-19. Is there any objection to it, Mr. Simmonds?
Mr. Simmonds: No, sir.
The Court: Received.

(Exhibit P-19 received into evidence.)

The Court: Next question.

By Mr. Harrigan:
Q. I show you that letter where you said "the parking lot, however is showing some signs of wear and ought to be resurfaced in order to preserve its usefulness, but
page 347 } I believe "some patching could be done on it now to carry it through another season."
Are these your initials?
A. Yes, sir.

Mr. Harrigan: Like to offer this in evidence.
The Court: I have already received it.

By Mr. Harrigan:

Q. That letter would indicate the lot was surfaced in 1950, wouldn't it?

A. Sometime prior to that, yes, sir.

Q. So, then, your recollection as to the lot was it was not paved up until 1955?

Mr. Simmonds: If your Honor please, just a minute; Mr. Harrigan is deliberately using the word "paved" in one *one* sense, and he asked him the first time whether it had been surfaced. There is apparently a considerable difference, according to Mr. Budina's testifying it was surfaced with gravel in '45 or '46.

The Court: It would help the Court if counsel would use the terms "graveled" and "black-topped."

By Mr. Harrigan:

Q. That letter would indicate that it was black-topped in 1950, doesn't it?

A. No, it does not.

page 348 } Q. Doesn't?

A. No, it doesn't mention the word.

Q. Doesn't mention the word. So, in other words, we are talking about semantics.

Mr. Simmonds: Just a minute. I object to that.

The Court: Start a new question, Mr. Harrigan.

Mr. Harrigan: I'll withdraw that one right now.

By Mr. Harrigan:

Q. All right, Mr. Budina, let me show you this voucher of 1955. What is that?

A. It says "resurfacing parking area."

Mr. Harrigan: I don't know if he has one in. I would like to have that marked for identification.

Mr. Simmonds: You can put it in evidence, if you like.

The Court: Do you want to put it in?

Mr. Harrigan: Yes, your Honor.

The Court: Agreed, Mr. Simmonds?

Mr. Simmonds: Yes.

The Court: P-20, voucher dated September 29, 1955.

(Exhibit P-20 was received in evidence.)

Mr. Simmonds: If your Honor please, not having it in front of me, does that voucher show to whom it is made out?

The Court: The word "Glebe" is on the topmost line.

page 349 } Mr. Simmonds: I don't want any inference by the fact that Mr. Harrigan is putting it in evidence that Mr. Sharlin paid for that, which is not the fact.

The Court: The paper does not show who—

Mr. Simmonds: You are not contending Mr. Sharlin paid for that?

Mr. Harrigan: No, I'm not.

Mr. Simmonds: You concede that it was paid for by Neighborhood?

Mr. Harrigan: That's right.

By Mr. Harrigan:

Q. I show you this. In '55 were you there when this was done?

A. No, sir.

Q. You were not? Referring to the second page which is the bill, which is a note, would you read that?

A. "To Glebe Theatre, Arlington, Virginia. Application of plant mix asphalt over 4,200 square yards, grading of entire lot and patching of existing asphalt in corner of lot, but not treated; total cost to owners, $4,250. It's agreed and understood that I, the contractor, wait until September 29, 1957 for $250, the guarantee period. Amount now due for completion of contract, $4,000.

page 350 } "Thank you for the job."

Q. Doesn't this letter indicate there was existing asphalt on that lot when this was resurfaced?

A. It doesn't say it.

Q. What?

A. It doesn't say that.

Mr. Harrigan: Well, it speaks for itself.

The Court: Going back to P-19, would you look at those last lines. It uses the word "patching," Mr. Budina. Does that bring anything to mind?

The Witness: It does not.

The Court: Would the term be used to patch a gravel area as well as to patch a black-top area?

The Witness: Yes.

The Court: I see.

The Witness: In other words, there are a number of types of paving you can use: some is simply loose gravel and let it back; another way is to surface-treat it with oil, that's another way. That may have been done here. And black-top is the plant mix asphalting concrete. Three types.

The Court: Yes.

The Witness: It doesn't say "black-top." The page 351 } note very definitely says "plant mix" which is black-top.

By Mr. Harrigan:

Q. Is it fair to say you don't know what it means? Is that a fair statement?

A. No, that is not fair.

Mr. Simmonds: If your Honor please, he testified to what he thought it meant.

Mr. Harrigan: What he thought it meant and what it actually meant—

The Court: He said it could be done one of three things. It's his recollection there was no black-top.

Mr. Simmonds: Was that put in evidence, the paper you just read?

The Court: The bill—put in as P-20.

Mr. *Simmons*: He is reading from something else.

The Court: The second paper the Court handed back was the page P-19 which had the word "patching in it."

Mr. Simmonds: The paper Mr. Budina just read on the proposal of the company for—

The Court: That was second page of P-20.

Mr. Simmonds: Oh.

By Mr. Harrigan:

Q. Now, the Lease provided you could put in page 352 } certain air-conditioning equipment. Was there a big condensor on the roof?

A. I didn't get the question.

Q. Was there a big air-conditioning condensor put on the roof?

A. Yes.

Q. —while you were there. What's the normal life of that condensor?

A. Probably 20 years. Could I correct that? Generally, it's accepted as 12 years, air-conditioning equipment.

Q. Do you have a book there you are reading from?
A. Yes.
Q. Is that notes?
A. Yes.
Q. When were they made up?
A. Last week.
Q. Did you make up any notes on the parking lot?
A. No. This is a depreciation schedule, what is termed "Useful Life of various building equipment."
Q. Mr. Budina, on the doors, you replaced doors—you recommended that doors be replaced at one time, is that right?
A. Yes.
page 353 } Q. Were they fixed?
A. I assume so, yes. I have no recollection of them being fixed, but I assume they must have been.
Q. Is this customary in the business, when doors go out like that that they be repaired or replaced?
A. I really don't know.
Q. What?
A. I don't understand the question.

Mr. Harrigan: Read the question.

(Question read by reporter.)

The Witness: Natural, yes.

By Mr. Harrigan:
Q. And it's customary for the tenant to do it when there is a Lease like this?

Mr. Simmonds: I object to him saying what's in the Lease. He says he hadn't seen the Lease.
The Court: Doesn't the Lease have to speak for itself?
Mr. Harrigan: I will say this: As a matter of fact, in this particular place, the tenant did do it, didn't he?
The Witness: Frankly, I don't know.

By Mr. Harrigan:
Q. Well, you took it upon yourself to ask Mr. Thalhimer?
A. I recommended that they do, that they be replaced.
page 354 } Q. That Mr. Thalhimer replace them, right?
A. I don't know. From there on, I don't know.

Mr. Harrigan: That is all.

RE-DIRECT EXAMINATION

By Mr. Simmonds:

Q. Mr. Budina, you were asked some questions about the 16 lights, eight of which were in the ceiling of the marquee and eight of which were behind the box office, and you referred to wires extended to these 16 lights. Were these wires that you referred to extended to outlet boxes?

Mr. Harrigan: I'm going to object to Mr. Simmonds' leading. I think he can ask where the wires came from. It's his witness—where they are hooked up; but to tell him and shake his head and have him agree with Mr. Simmonds—

Mr. Simmonds: I haven't finished the question. It's new material he brought out any way, and I think I'm certainly entitled to cross-examine him on it.

The Court: At the moment, the witness is still Mr. Simmonds', taken out of turn. The objection is, it's leading. If you can rephrase it, it's better, Mr. Simmonds.

Mr. Simmonds: Well, what I had done was call his attention to the testimony that I wished to ask him about.

page 355 } By Mr. Simmonds:

Q. Well, in connection with the sixteen lights that were testified to in the marquee and behind it, were the service wires required by Mr. Sharlin to the junction boxes or outlet boxes?

A. The wiring that was done in connection with the building contract led to an outlet box, and from there on, the electrician run a piece of flexible cable, greenfield, to these recessed fixtures.

Q. And then when you said "electrician," you meant the electrician of Neighborhood?

A. Yes.

Mr. *Harrison*: I object to Mr. Simmonds'—

The Court: That one was leading.

Mr. Harrigan: —and move the question be stricken.

The Court: That one was leading. I will strike it.

By Mr. Simmonds:

Q. When you referred to the electrician, picking it up from there, whose electrician did you refer to?

A. In this particular case the electrician was the same, the Ford Electric Company were the sub-contractors under Doyle & Russell's contract, and they did this other work for Neighborhood Theatre.

page 356 } Q. Do you know who paid for the work of bringing the wires from the outlet box to—

A. Neighborhood Theatre did.

Mr. Simmonds: That is all.

RE-CROSS EXAMINATION

By Mr. Harrigan:

Q. Do you know who paid for that work, Mr. Budina, or are you guessing?

A. There is a bill for connecting light fixtures.

Q. That does not mean running from the panel box, does it? That means hooking it up? Doesn't that mean just hooking it up, hooking the wires on?

A. That's exactly what I said, from the outlet box to the fixture.

Q. You mean the outlet box to the one right in the ceiling?

A. That's right.

Q. In other words, all you have to do is hook it on and it's there. It's like screwing a light bulb in?

A. No.

Q. —except you don't have the wires. All right. Now, the same electrical contractor did all this work, didn't he?

A. Yes.

page 357 } The Court: He just said they did, the second part of it——as a sub-contractor for Doyle & Russell.

Mr. Harrigan: I have one or two questions that were not covered by Mr. Simmonds, but I would rather recall the witness later than ask him.

The Court: I would rather all questions be finished now. You want him as your own witness?

Mr. Harrigan: Yes, your Honor.

The Court: All right. As your witness.

Thereupon,

A. O. BUDINA was called as a witness on behalf of Plaintiff, and having been previously sworn, resumed the stand and testified as follows:

A. O. Budina

DIRECT EXAMINATION

By Mr. Harrigan:

Q. Mr. Budina, did you issue a certificate, an architect's certificate?

The Court: Of what type and for what?

Mr. Harrigan: For this particular job.

Mr. Simmonds: What kind of certificate are you talking about?

The Court: To whom, counsel?

page 358 } Mr. Harrigan: There should have been one given to Mr. Thalhimer and Mr. Sharlin.

The Court: A completion plan, statement, something like that?

Mr. Harrigan: That's right.

The Court: All right. That's what he's asking about.

The Witness: I'm still not quite sure, understand what you mean by the certificate.

By Mr. Harrigan:

Q. All right, the certificate by you stating that the building is completed and ready for occupancy?

A. No, I don't recall ever issuing that type of certificate.

Q. Would you normally issue that type of certificate after the building is absolutely complete?

A. Not unless it was requested by the owner. But this was a situation where I was a direct employee of Neighborhood Theatres. There would have been no purpose of my issuing that kind of certificate to Neighborhood Theatres and to Mr. Sharlin. The fact of the matter is that Mr. John Eberson was substituted as architect in my stead, and I was acting as an associate because I had so many other things to do at the time.

page 359 } The Court: Mr. Harrigan, are you trying to make some point about date of occupancy?

Mr. Harrigan: Date of completion.

The Court: Doesn't the supplement to the lease, signed by both, speak to that?

Mr. Harrigan: I don't think it does.

The Court: Because the supplement to the original Lease says, when they start showing movies or thirty days after completion of plan, whichever is first, to start paying rent. The supplement to the Lease, P-2, gives the date April 30,

1945 for rent to begin. I hardly see that there is an issue of —twenty years later. In other words, I don't think you need to prove it.

Put it this way: On the face of it, the building was accepted.

Mr. Harrigan: Well, was there an occupancy permit given in this particular case?

Mr. Simmonds: You mean by the County of Arlington?

Mr. Harrigan: Yes.

The Witness: I would not—I don't recall that, but I assume that there was because that's a requirement of the County authorities.

Mr. Harrigan: That is all.

page 360 } Mr. Simmonds: That's all I have.

May I ask Mr. Budina may be excused? Agreed, Mr. Harrigan?

Mr. Harrigan: Yes.

The Court: We'll take a recess till 4 o'clock.

(Short recess.)

(Witness excused.)

The Court: Mr. Simmonds.

Mr. Simmonds: Your Honor, before the next witness gets on, I would like to have Defendant's Exhibit No. 1, which is the lease between Sharlin and K and B, dated January 17, 1964 admitted into evidence. I think it was merely identified, but I believe—

Mr. Harrigan: I think they were admitted by stipulation.

The Court: Yes, sir, I have it in evidence. The Lease and the Addendum and P-3 were the Plans and P-4 the Specs. They are all in evidence as Plaintiff's Exhibits. They were agreed to by you.

Mr. Simmonds: I had reference to the Lease between Sharlin and K and B, which I think was marked Defendant's No. 1 for identification.

page 361 } The Court: That's correct.

Mr. Simmonds: I would like to now offer it in evidence. I think there has been ample testimony to have it now.

The Court: Any reason why not?

Mr. Harrigan: Which one?

The Court: The Lease, K and B and Sharlin.

Mr. Harrigan: Oh, I would object to that.

The Court: It's now in evidence.

Mr. Harrigan: Not relevant.
Mr. Simmonds: You say in evidence now?
Mr. Harrigan: Note my exception.

(Document received in evidence as Exhibit D-1.)

The Court: This was an exception on its relevancy?
Mr. Harrigan: Yes, your Honor. It's not relevant; isn't necessary for any matter in issue in the case, and prejudicial.

* * * * *

Thereupon,

WENDELL JORDAN was called as a witness on behalf Plaintiff, and having first been duly sworn, was examined and testified as follows:

page 362 } DIRECT EXAMINATION

By Mr. Harrigan:
Q. State your name, please.
A. Wendell Jordan.
Q. Where are you employed?
A. Dominion Electric Supply Co., Inc.
Q. What do you do up there?
A. Vice-President and General Manager. I specialize in the lighting field and power equipment.
Q. Is that a fixture business?
A. That's correct.
Q. How long have you been in the business?
A. Eighteen years.
Q. During that 18 years, have you bought and sold fixtures?
A. Yes, that's correct.
Q. I'm calling your attention to back around May of 1965, did there come a time when you went to the Glebe Theatre on Glebe Highway in Arlington, Virginia?
A. On Glebe Road.
Q. Glebe Road.
A. Yes, I did.
Q. When you arrived there, did you have oc-
page 363 } casion to look at the marquee?
A. Yes. Yes, I did.

Mr. Simmonds: I would like to have him specify the day if he went there, please.

The Court: The question was in May, '65, I think.

Mr. Harrigan: That's right.

By Mr. Harrigan:

Q. Do you know what date it was?

A. It was the early part of May. The exact date I couldn't say.

Q. Who did you go there with?

A. By myself.

Q. At whose request?

A. At Mr. Sharlin's request.

Q. When you arrived there, what did you observe about the lighting under the marquee?

A. Well, on my arrival at the theatre, all the recessed lights in the marquee had been removed, and at closer inspection at a later date, a couple of days after that, the wiring and everything had been cut off, up near the junction boxes for the recessed fixtures.

Q. What kind of a ceiling does that have on it?

A. The finished ceiling is a combination of plaster and concrete.

page 364 } Q. Did you observe any damage to the ceiling?

A. Not to the—

Mr. Simmonds: I object to the leading questions, if your Honor please.

Mr. Harrigan: All right, I'll rephrase it.

By Mr. Harrigan:

Q. What did you observe about this plaster and concrete when you were looking at the ceiling?

A. Well, the thing was stained and fixtures which had been removed showed that they were taken out with what I feel not the most expert care.

The Court: You said "stains"?

The Witness: Stains on the thing. That could be from time, though, I imagine.

By Mr. Harrigan:

Q. The condition of the plaster, what did you observe about that around the holes?

A. I really couldn't say there. I mean, it was just the finish of the plastering that you would normally notice.

Q. How many lights are in that bottom section, and in front and back of the ticket box?

A. Well, in the marquee itself, if I remember correctly, there were 17—17 fixtures.

page 365 } Q. I show you these exhibits, marked A-1 through A-17.

The Court: They are not in the case. They may be papers so marked.

Mr. Harrigan: I would like them marked for identification.

The Court: All right. A-1 through 16 are stapled together, so I will simply initial the first one, marked for identification to apply to all.

Mr. Harrigan: I think 16 and 17 are reversed there, your Honor, through error.

The Court: You're correct.

Mr. Simmonds: Off the record.

(Discussion off the record.)

Mr. Simmonds: On the record.

The Court: On the record.

Mr. Harrigan: For the record, all are being claimed against Neighborhood, with the exception of—in other words, A-14, A-15 and A-17 are not being charged against the Defendant.

(Exhibits A-1 thru A-16 marked.)

By Mr. Harrigan:

Q. Did you have occasion to observe the condition of the Exit fixtures?

A. Very definitely.

page 366 } Q. Tell the Court what you observed about those?

A. If I may, your Honor, I have a Manufacturer's Specification sheet, where I think you could appreciate—might explain the situation.

Mr. Simmonds: (Examining sheets.) All right.

By Mr. Harrigan:

Q. What is this Manufacturer's Sheet purport to show?

A. This is a standard Manufacturer's Specification Sheet

for recessed exit fixtures. This particular one is Daybright Lighting, out of St. Louis. It's not the unit that was installed originally; but if I may—whoever wants to look at this—the only thing left in the wall on my visit to the job was the back box, which is mounted in the masonry wall, fastened in securely with conduits. The wiring raceway and socket assemblies were missing, the outer frame, inner frame and glass, and the wires were cut up in the box of the Exit fixture. There were either nine or ten of these fixtures, and all of them were in the same condition on my visit to the job center.

Q. Will you show the judge that sample and what the box looks like, and the inside of the box—

Mr. Simmonds: Just a minute. You say this is a more recent fixture than the ones taken out?

page 367 } The Witness: It's a standard recessed Exit fixture used throughout the whole industry. It shows the component parts as they are put together, as I would say cover practically every manufacturer.

The Court: Is there a purpose, Mr. Harrigan to illustrate the box which remains, nothing else?

Mr. Harrigan: The box and what goes in it, which was taken out and the face of the box.

Mr. Simmonds: I think it's all right. Go ahead.

The Court: All right. Do you want it in evidence or simply exhibited?

Mr. Harrigan: Just exhibited.

The Court: I would look at it for that purpose.

Mr. Simmonds: I would like to follow it myself.

The Witness: It is very clear. I'll be glad to—

The Court: May I look at it?

The Witness: Yes, sir, you certainly may. The bottom picture is a better illustration than the top one, really.

The Court: All right.

By Mr. Harrigan:

Q. Referring to that particular picture, are all Exit boxes similar to that?

page 368 } A. All recessed Exits are very similar to this, yes.

Q. When you arrived at the Glebe Theatre, would you show the Court what was left in the wall, if anything?

A. The only thing left was this box, right here.

Q. Hold it up? Show Judge Brown. I will hold it.

Wendell Jordan

A. This box here, as shown in the bottom detail (indicating). Here shows the mounting in the conduit; the entry here; this shaded portion is the masonry wall. The only thing left is the back box. This wireway (wiring) and socket assembly was missing and the outer frame and the inner frame were missing.

Q. In relation to this photograph here, where were the wires cut?

A. When this assembly was cut out, there were wires maybe 2½, 3 inches wire was all that was left. Normally, when you pull into an Exit fixture, normally there should be about 6 inches of wire to make a proper connection. Where it was cut looks rather than these two little wire nuts—instead of this wire connector being taken apart and the wire just disconnected with a pair of pliers, the *insullation* was cut.

Q. Did you observe the lighting fixtures that
page 369 } hang from the ceilings, were they in place?

A. All fixtures were removed in the building. The only place I didn't observe was the basement areas; but all other fixtures were removed with the exception of the fixtures in the Main Lobby. I mean the main—where the seating, the auditorium, and they would have been at about a 20-foot ceiling. They were still there.

Q. So, there were eight fixtures in the ceiling?

A. In the auditorium.

Q. In the auditorium which were still there?

A. Yes.

Mr. Simmonds: Excuse me. Read that question and answer back please? I'm sorry.

(Question and answer read.)

By Mr. Harrigan:

Q. Did you furnish the equipment, the new fixtures to put back in this building?

A. Yes.

Q. I show you these invoices, starting with A-1. Tell the Court what they are and the amounts.

A. The item number one is exit panels taken from some fixtures we had in stock. Item 2, the first item $7.30—

The Court: Are you talking about Exhibit A-1 or items on Exhibit A-1?

page 370 } The Witness: You asked for the items—

Mr. Harrigan: Items on Exhibit A-1 and there will be a total at the end for A-1.

The Court: All right.

By Mr. Harrigan:

Q. Would you go through?

A. Item 1 are just panels that were used to make modifications of special door frames I had made. Item 3 are the special frames that were made by a metal fabricator. $99.67, total amount of the invoice.

Q. Were all these necessary to replace fixtures taken out?

A. Yes, the Exit fixtures.

Q. All right. Now, who put all of these in, which electrician?

A. The L. T. Souder Company.

Q. Referring you to A-2, what is A-2, what does it purport to represent?

A. That's light bulbs.

Q. How many of them?

A. 25.

Mr. Simmonds: If your Honor please, I don't know *wheter* you want me to object to each one that comes in, but on A-2, there is certainly no requirement that the Defend-
page 371 } ant furnish the new tenant with light bulbs.

Mr. Harrigan: Our position is, your Honor, they took the fixtures and the bulbs and everything with them. We have to replace them back in the condition they were in at the end of the tenancy. Many of the light bulbs were behind recessed panels like that.

The Court: Is your testimony, sir, about bulbs for Exit lights?

The Witness: It wouldn't show on the invoice where they were used. They could have been.

The Court: Can you tell me where they were used?

The Witness: No, sir, not from looking at this invoice.

The Court: Well, I have heard conflicting *testimoney* concerning Exit lights. I see an issue in the case there—bulbs, I guess one would say, are not part of the building, though most people leave them, and I have no testimony whether they were originally installed or not.

It seems like I am leaving an awful lot of ruling to the end of the case. It seems like I will have to, so the objection is overruled at this time.

Mr. Simmonds: Exception. I understand this is a provisional acceptance.

page 372 } The Court: I hate to do that to counsel, but I have just got to draw it all together near the end of the case.

By Mr. Harrigan:

Q. How much is that item, this particular invoice?

A. $13.13.

Q. They were all bulbs?

A. Yes.

Q. Directing your attention to A-3, what are they?

A. Item number 1 has been omitted; items 2 is a 45-amp—

The Court: What do you mean, "has been omitted?" Is not on there?

The Witness: No price; it's omitted off the invoice.

The Court: I see.

The Witness: Item Number 2 was 45-amp, one-time fuses. Item 3 is a panel trim—the amount of the invoice $13.62.

Mr. Simmonds: Your Honor, may my exception go to each of these?

The Court: Yes, a running exception A-1 through 17, there will be.

page 373 } By Mr. Harrigan:

Q. Item Number 2, panel fuses, and Item number 3 was what?

A. A panel trim.

Q. What's a trim?

A. Trim is the finished cover that goes on circuit braker or fuse panel to cover up the wire-way and just only leave the breakers' handles exposed.

Q. All right. All these items were installed?

A. Yes.

Mr. Simmonds: He wouldn't know that, would he? Do you know that?

The Court: The question was leading, but it will stay.

By Mr. Harrigan:

Q. What is the price of this invoice?

A. Total amount of this invoice, $13.62.

Q. Directing your attention to A-4, what's the first item on that invoice?

A. The first item, 15-amp, one-time fuses; the second item, 20-watt *florescent* light bulb.

Q. Total amount of that invoice?

A. 82 cents.

page 374 } Q. Item Number 5—

A. Item No. 1 is a 40-watt *flurescent* lamp; item 2 is a 30-watt *flurescent* lamp; item 3, 60-watt incandescent lamp; item 4 is an incandescent fixture, and the last item is lamps, incandescent lamps — total amount of the invoice $16.98.

Q. Do the figures beside each particular item represent its cost?

A. Its cost to the customer, right.

Q. A-6 what does that purport to represent?

A. A-6 is an incandescent lighting fixture; item 2 is an incandescent showcase bulb.

The Court: What?

The Witness: Incandescent showcase bulb.

By Mr. Harrigan:

Q. This first item, incandescent lighting fixture, what type of fixture is that?

A. Without looking at the Manufacturers' catalog, I think I know, but I would rather—it's a surface-mounted fixture.

Q. All right. The total amount of this invoice?

A. $11.77.

Q. A-7.

page 375 } A. Item 1 is a 75-watt incandescent lamp; item 2, a 100-watt incandescent light bulb; 40-watt *flurescent;* item 4 is a 30-watt *flurescent;* item 5 is a 25-watt incandescent lamp.

Q. Total amount of this invoice?

A. $24.20.

Q. Item No. 8. What is that and explain why that is necessary?

A. Item A-8 are special clips that I had made by a metal fabricator so that we could mount new fixtures in the canopy. The reason for these clips—Here again, I have a picture that will be of help in explaining this, because if we hadn't done this, it would have been necessary to remove the existing plaster frames and do extensive work, so by using these, we were able to modify the ceiling and put in a new style of lighting fixture to do the job. If I might, I would like to show this.

Q. Would you explain what you're talking about to the

judge, just hold it up, one side, and just point so Judge Brown can see it.

The Court: Let Mr. Simmonds see it first.

Mr. Simmonds: May I ask where these would go?

The Witness: This particular fixture, this
page 376 } 22438TH, this particular one was used in the canopy of the marquee of the Glebe Theatre.

Mr. Simmonds: Is that where those 16 lights—

The Witness: That's the ones in the canopy itself, the marquee—

Mr. Simmonds: All right.

The Witness: This again, is a Manufacturers' Sheet. You'll notice in the specification sheets, the dimension shows the dimension of the can, 9-7/8 inches in diameter, this particular one, the plaster ring—you see this black line right here indicates plaster ring being mounted in a plaster ceiling.

What happened, this is 9 and 7/8—the plaster rings in the ceiling were approximately 10½ inches, which of course, when you put a fixture in like this, it's very difficult to mount it in. There is nothing to mount it to. You have to make modifications to fit plaster ring. So, it was necessary to make this frame fit in the thing without making a lot of extensive repairs—make shims in there.

Q. Did you have to have clips for all these—

A. Every fixture.

Q. —holes in the canopy?

A. Every fixture.

page 377 } Q. What was the price of the clips?

A. For 70 clips, the Dominion Electric price was $40.

Q. Did that $40 represent just the cost of making the clips?

A. This represents Dominion's cost.

Q. That's cost—no profit?

A. No profit, no nothing.

Q. Going to A-9, what are those items and the total amount?

A. The first item has been omitted—no quantity shipped; item 2, light bulbs and total cost $18.00.

Q. Were there any bulbs in this theatre at all when you went in?

A. None that I saw. All the fixtures were removed.

Q. A-10. What's A-10?

A. Item number 1 is a 20-circuit, 3-phase breaker panel; item 2 is the trim for it.

Q. What's the total cost?
A. $48.44.
Q. Item 11, A-11.
A. Item 1 is a 12-circuit, 3-phase breaker panel; item 2 is a 20-circuit, 3-phase breaker panel; item 3 is a 42
page 378 } amp. 3-phase circuit panel; item 4 is a trim for item 3; item 5 are 15 amp, one-pole breakers to fit in the panels. Item 6 would be 20-ampere circuit breakers, and the last item, 30-amp, single-pull circuit breakers.
Q. What was the total cost?
A. $222.58.
Q. That is all electrical?
A. Yes.

The Court: Off the record.

(Discussion off the record.)

The Court: On the record.

By Mr. Harrigan:
Q. Tell the Court what A-12 is?
A. I'm missing the 12.

The Court: I thought I observed each one in the stack.
The Witness: I go from A-11 to A-13.
Mr. Harrigan: Here is A-12.
The Court: It will be noted for identification with the other numbers.

By Mr. Harrigan:
Q. What's that?
A. A-12.

page 379 } Mr. Simmonds: There is a comment on A-12 that I have which I don't think was put on by this gentleman or the store. I think it ought to be taken out, completely obliterated. Here is a marking pencil, Mr. Harrigan. I don't want even the judge to see it.

By Mr. Harrigan:
Q. A-12 is what?
A. Item 1 is a surface-mounted fixture; item 2 is a surface-mounted fixture; item 3 is a surface-mounted fixture; item 4 is a surface-mounted fixture; item 5 is a surface-mounted

fixture; item 6 is a surface-mounted fixture; item 7 and 8—they are all surface-mounted fixtures.

Q. When you say "surface-mounted fixture," is that—

A. Mounted on the surface.

Q. Instead of recessed?

A. Instead of being recessed, yes.

Q. Were these fixtures all installed?

A. To my knowledge.

Mr. Simmonds: What was the question?

The Court: Were these fixtures all installed? Answer, "to my knowledge."

Mr. Simmonds: What do you mean by that, so far as you know, or that you know of your own knowledge
page 380 } that they were installed?

The Witness: To my knowledge, they were all installed.

Mr. Simmonds: You mean, you know yourself they were installed?

The Witness: The only way I can prove it is to make a personal inspection of every one.

Mr. Simmonds: I move that question and answer be stricken. I would think all this gentleman could do would be to say they were sold, to be delivered to the theatre.

The Court: Probably so. I am going to allow some more questions to clear it up further, because it is fuzzy, all right.

By Mr. Harrigan:

Q. Did you make the survey of the building to decide what fixtures were needed?

A. Only on the canopy and the Exit fixtures.

Q. All right. These would be surface fixtures from the ceiling in the lobby, and so forth?

A. Yes.

Q. They were sold, weren't they?

A. Yes.

page 381 } The Court: By whom to whom?

The Witness: They were sold by Dominion to K and B Theatres.

Mr. Simmonds: To what?

The Witness: K and B Theatres.

The Court: Do you know where they were delivered? This is your knowledge?

The Witness: They were delivered to the Glebe Theatre, Glebe Road, by a company truck.

Wendell Jordan

The Court: Did you afterwards see them in position?
The Witness: Yes, I saw them in position. I couldn't say I seen every one listed here in this list.

By Mr. Harrigan:
Q. Who installed them?
A. These were installed by L. T. Souder Co.
Q. What's the total amount of those?
A. $488.69.
Q. Now, go to A-13.
A. A-13 is a surface-mounted Exit fixture.
Q. What's the cost of that?
A. $21. for the total invoice.
Q. Does that include the whole fixture?
A. Yes.

page 382 } By Mr. Harrigan:
Q. What's A-14?

The Court: I thought that was something you weren't going to claim. Couldn't that sheet be removed?
Mr. Harrigan: It's in front of the witness because you offered me—didn't I take it out? We will remove A-14, A-15 and A-17.

By Mr. Harrigan:
Q. What's A-16?
A. A-16 are the 16 spear fixtures used in the marquee in the canopy, on this previous specification sheet.
Q. What's the total price of *thos* 16 fixtures used in the canopy?
A. $158.40, total price of the invoice.
Q. Was all this equipment sold and delivered to the Glebe Theatre?
A. Yes.
Q. What trouble did you have, if any, with the Exit fixtures?

Mr. Simmonds: I think he testified about those, hasn't he, your Honor?
The Court: This is to develop what now?
page 383 } Mr. Harrigan: Just to develop that the way these things were taken out, with the box left in, the stuff that was taken out could not be reached.
Mr. Simmonds: If your Honor please, I don't want Mr.

Harrigan to do the testifying. I think this gentleman merely sold the material, furnished it. As to the idea of putting it in, I think it's a matter for the electrician to testify about, if any.

The Court: If this witness knows.

Mr. Harrigan: Was there difficulty in furnishing the material?

The Court: Was there difficulty in furnishing it?

Mr. Harrigan: Yes. These are not ready—they are custom-made materials. You have to have frames made to fit some of these boxes.

Mr. Simmonds: I think he testified to that. After all, merely the prices charged is what we are interested in.

The Court: In A-8, "Clips manufactured for lights,"—

Mr. Harrigan: That's on the marquee, your Honor.

The Court: This is somewhere else.

Mr. Harrigan: This is on the Exit fixtures themselves. All right. Objection overruled. Phrase your question so I can tell it is of his own knowledge.

page 384 } By Mr. *Harigan*:

Q. All right. What special efforts have to be made, if any, to reinstall the Exit fixtures?

Mr. Simmonds: I object to the question about the reinstallation. Talk about furnishing.

Mr. Harrigan: I think it's conceded they took them out. It's conceded we are installing them.

Mr. Simmonds: I thought this gentleman's connection with the thing was selling this equipment, fixtures. I didn't know he had anything to do with installation.

Mr. Harrigan: He's already testified he went down and looked and saw the way they took it out of the box and what they had to get in order to refit it and bring it back up without making it a new operation, putting brand new ones in.

The Court: The witness is instructed when you are asked a question by either attorney, don't want the answer to be based on what someone else told you, but on what things you yourself observed. With that caution, I will let counsel proceed.

By Mr. Harrigan:

Q. With regard to those Exit fixtures, what you personally observed and what did you have to do in order to furnish the material?

page 385 } A. On visiting the job site, as I mentioned

earlier. The door frames and the socket assemblies were missing. The fact that the cans had been in there for a considerable length of time, they are no longer a standard item that can be purchased from one of today's manufacturers. I made field measurements of the boxes and the mounting hardware, and made a drawing, took them to a local metal fabricator and had him to modify—

Mr. Simmonds: If your Honor please, I think this is entirely irrelevant and immaterial. What he is testifying to is that he sold a certain number of Exit boxes at a certain price. Whether it was easy to get them or hard to get them, that was his price. That's the only thing that's relevant and material, as far as his testimony is concerned.

Mr. Harrigan: Your Honor, I think it is relevant to show the type of act this was, taking these things out and the trouble these people went to to put them back in; and by going to this trouble, they saved Neighborhood the expense—

Mr. Simmonds: Let's don't testify.

Mr. Harrigan: Going on to this trouble, they put new frames around these fixtures, and it prevented them from tearing all the old fixtures out of the wall, and putting new ones in goes to reasonableness.

page 386 } The Court: The law says the plaintiff would minimize damage and difficulty of job and delay which become unimportant if price is put in evidence.

Mr. Simmonds: This is what they are claiming and this is what the evidence is.

The Court: Objection sustained.

Mr. Harrigan: Exception.

The Court: It's no different from having an auto wreck of a foreign car, and a person says, "I want $42.50 for this odd-size tire, and it took me 2 years, 11 months, and 10 days to get it." Well, the Court doesn't care how long it took to get it, or how hard it was; the only issue is, *W*as it damaged by someone's fault, and what's the price? That's the reason.

Mr. Harrigan: One other issue: On the issue of reasonable cost, entitled to reasonable cost to repair, these do tell these people were very conscientious about keeping costs down by going to extra trouble of having these frames made and fit into the marquee rather than rip the whole system out, which would have been so much easier at a much higher figure.

Te Court: I suggest you save that for rebuttal, so if defense doesn't question it, you don't need to have

page 387 } shown it.

Mr. Harrigan: All right. That's all.

CROSS EXAMINATION

By Mr. Simmonds:

Q. Do you know how many new circuits were put in the theatre when Souder did the electrical work?

A. No, sir, I don't.

Q. Do you know how many new panels were put in the building when the electrical work was done?

A. From the indications on the tickets here, there were 4 panels, if I recall.

Q. You don't know whether they were replacements or new panels for other circuits, do you?

A. That I could not say.

Q. Do you know whether or not they put in a new system of air-conditioning and heating in the plant and in the building?

Mr. Harrigan: If he knows of his own first-hand knowledge; Mr. Simmonds asked of first-hand knowledge, not hearsay.

Mr. Simmonds: I asked him his knowledge.

The Court: I think Mr. Sharlin had already testified to this, has he not?

Mr. Simmonds: I have forgotten.

page 388 } The Court: —that the condensor had to be removed because they were putting in the new air-conditioning system.

Mr. Simmonds: That's right.

The Court: He did.

By Mr. Simmonds:

Q. My real question to this gentleman is whether or not putting in of a new air-conditioning and gas-fired boiler system would require new wiring, new panel?

Mr. Harrigan: Would you read that back?

(Question was read.)

The Witness: This is conceivable. Not having anything to do with the air-conditioning in this particular instance, or looking at the specifications of the new building, I could not answer it.

Mr. Harrigan: Then, I will object to the witness's answer.
Mr. Simmonds: All right, sir.

By Mr. Simmonds:
Q. Then, as you say, you don't know how much of this equipment other than the bulbs and the fixtures were required by new installations and new wiring in the theatre, do you?
A. Would you repeat the question?

page 389 } (Reporter read the question back.)

The Witness: That's right, I don't know.

By Mr. Simmonds:
Q. Each and every one of these bills that you have testified to were billed to K and B Theatres, were they not?
A. K and B Theatres.
Q. Yes.

Mr. Harrigan: I would object to this question on the same ground that I have on the others, that who they are billed to and who pays them is not relevant for any condition in this case, and whether K and B paid them or not, is not relevant.
Mr. Simmonds: If your Honor please, just from the witness's own answers here, we don't know whether or not these bills were entirely for items which the defendant in any sense could be responsible for. If they put in new panels and new wiring and new circuits, certainly it is not chargeable to defendant; so it is entirely proper that we at least have before the Court the name of the party to whom these items were sold.
The Court: The name K and B, or just plain K B, according to their letterhead symbol, I don't know what it is. We all know what we are talking about. Your question
page 390 } and answer are in, Mr. Simmonds. I am going to let the bills in. I have some testimony concerning some specific numbers of fixtures.
I guess it's common knowledge that Courts take notice of the light fixtures not coming with bulbs, so there is some basis on the plaintiff's theory of the case to put it in.
I will hear you, well, I will say in final argument. You are making it now.
Mr. Simmonds: My point is, if your Honor please, we contend, as we have right from the beginning, that we have the right to take out all electrical fixtures that were put in

initially, and as part of the evidence in that respect, we intend to show that it is the custom for the new tenant to put in his own fixtures, among other things; and this is certainly material evidence and relevant evidence to the effect that these were ordered by K and B.

The Court: Well, certainly, if I had reached the point in the case where I had decided that is the fact, I would not hear any of this evidence; but being on the plaintiff's case—and this is under their theory of the case—it seems to me it is admissible evidence.

page 391 } If your context is correct, then the evidence will be valueless, if I find in the end, your client had the right to remove all fixtures.

The rule on the specific proof of damages may give me some real trouble—or the plaintiff. I will just have to worry with that when I get to it.

Mr. Simmonds: All right.

By Mr. Simmonds:

Q. And all these bills were paid to Dominion Electric by K and B?

A. I couldn't answer that, Mr. Simmonds. I am not in the accounting department.

Q. There was one Number 14, which you said was not chargeable. Do you know what that was? Was that a light fixture also?

A. Are you asking me, sir?

Q. Yes, sir.

A. I don't think I have A-14 here.

The Court: The witness was not given A-14.

The Witness: A-14 I don't have.

Mr. Harrigan: He didn't say it wasn't chargeable. I said it wasn't.

Mr. Simmonds: May I see A-14?

page 392 } Mr. Harrigan: No, it's not in evidence.

The Court: Weren't these numbered according to discovery, or some interrogatory?

Mr. Harrigan: Yes.

The Court: We show it, Mr. Harrigan.

Mr. Harrigan: Since A-14 did not come up in direct—

(Discussion off the record.)

Mr. Simmonds: Mine were not numbered the same as his, if your Honor please.

Mr. Simmonds: That's all the questions I have.
The Court: The testimony of this witness is completed?
Mr. Simmonds: As far as I am concerned.
The Court: Do you wish him excused from the case?
Mr. Harrigan: Yes.
The Court: All right. You are excused, Mr. Jordan, from the case.

(Witness excused.)

The Court: Two papers were used by the witness for illustration. I don't have them in evidence. He is about to leave with them.

You may take them, Mr. Harrigan.

page 393 } Mr. Harrigan: I would like to offer those in evidence.

The Court: A-1 to A-13 inclusive, plus A-16.
Mr. Harrigan: —offered in evidence.
The Court: The Plaintiff's Exhibits A-1 to 13 plus A-16 received.

(Plaintiff's Exhibits A-1 to A-13 inclusive, plus A-16 were received in evidence.)

Mr. Simmonds: I preserve my exception. I understood taht you were going to admit them provisionally.
The Court: That's correct. Exception is noted.
Mr. Simmonds: I would like to have my exception.
The Court: Yes, sir. Off the record.

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Thereupon,

CHARLES SHAMIGIAN was called as a witness on behalf of Plaintiff, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Harrigan:
Q. State your name please.

A. Charles Shamigian.

Q. What connection did you have in 1955 with the Maryland Signs, Incorporated?

A. I was president of the corporation, Maryland Sign Co.

Q. What type of work do you do?

A. Manufacturing and sold neon and plastic signs.

Q. Are you still engaged in that work?

A. Yes, I am.

Q. Calling your attention back to 1965 around May, did you have occasion to go to the Dominion Theatre, or the Glebe, on Glebe Road, in Arlington?

A. Yes, I did, with Mr. Goldman of the K and
page 396 } B Theatres, for the purpose of manufacturing and installing of some new signs for the marquee?

Q. When did you go down there?

A. Oh, sometime in May, I believe it was.

Q. Of 1965?

A. That's right.

Q. When you arrived there, in what condition was the marquee?

A. Well, there were no existing attraction signs on the marquee at all. Everything had been taken out and removed. There was no other existing Glebe sign or, you know, theatre name signs at all; everything had been taken out. In my opinion, it was just taken out with an acetylene torch and was—

Mr. Simmonds: He hasn't answered the question.

The Court: He hasn't been qualified on that point yet. Wait for the question, Mr. Shamigian.

By Mr. Harrigan:

Q. Everything had been taken out?

A. Definitely.

Q. Did you observe in what fashion they were taken out? Could you tell?

A. Well, a lot of it was taken out with an acetylene torch; a lot of the bolts were cut. Some of the frame
page 397 } work was cut.

Q. With a torch?

A. With a torch.

Q. Did this damage the framework?

A. Not to any great extent, no.

Q. Did you estimate, give them a contract on what it would cost to replace the attraction panels and the Glebe sign?

A. Yes, I did.
Q. Do you have that contract with you?
A. Yes, I do.

Mr. Harrigan: I would like this marked for identification, your Honor.
The Court: Would this be P-21 for identification?
Mr. Harrigan: That is H-1. Perhaps he could mark that as H-1. That's his original contract, your Honor.
The Court: Do you have a copy of this?
Mr. Simmonds: No, sir, I do not have the contract. May I see it?
Mr. Harrigan: Perhaps we better mark that H-2? The bill has been marked H-1.
The Court: Off the record.

(Discussion off the record.)

page 398 } Mr. Simmonds: If your Honor please, of course, I object to these as not being required to be paid for by Neighborhood, they having the right to take the signs out. If you want to—
Mr. Harrigan: I'm merely asking them to be marked for identification. If there is objection to that, fine. Otherwise—
The Court: You want the paper dated June 15, 1965 marked H-1 for identification?
Mr. Harrigan: That's correct, your Honor.
The Court: H-1 is marked for identification. Paper marked Proposal, dated 5/11/65 marked H-2 for identification instead of P-21, as I said earlier.

(Documents were marked H-1 and H-2 for identification (for Plaintiff)).

By Mr. Harrigan:
Q. How many attraction panels were on the marquee?
A. Three attraction panels.
Q. Did you manufacture and install three attraction panels?
A. Yes.
Q. What was the cost of manufacturing and installing those attraction panels?
A. $2496.
page 399 } Q. Were you the supervisor on this job also?
A. Yes, sir.
Q. Did you make up these cost estimates?

Charles Shamigian

A. Yes, I did.
Q. At how many theatres have you worked on marquees?
A. Off-hand, I couldn't tell you, but quite a few.
Q. How many marquees are identical?
A. I have never worked on two identical marquees as yet. Unless these theatres were built at the same time and owned by the same company, then they might make them identical; but because of frontages and so forth, I have never run into two identical marquees.
Q. Are the attraction panels custom-made?
A. Yes, they are.
Q. These attraction panels, are they custom-made?
A. Yes, they were.
Q. How are they bolted onto the theatre?
A. They are bolted onto the structural iron, to the marquee with half-inch bolts, between 18 and 20 inches apart.
Q. Was there any evidence of bolts (?) where these panels fitted into there?
A. No, there was no—As I said, the only thing on the marquee was the existing iron work. The shell of the
page 400 } marquee was all there was existing when we went to put the signs in.
Q. On this contract, you have an estimate for the manufacture and installation of two Glebe signs. Was that the original contract?
A. Yes, it was.
Q. What was the cost for the manufacture and installation of two Glebe signs in your estimate?
A. $1940.00.
Q. The Glebe signs, are they custom-made?
A. Yes, they are.
Q. Did you custom-make these particular signs?
A. Yes, I did.
Q. Were they installed?
A. Yes, they were.

The Court: I am a little confused. You mean, you made signs reading "Glebe"?
Mr. Harrigan: No, your Honor. I am going to clear that up.

By Mr. Harrigan:
Q. The original contract was for Glebe signs and then it was changed.

Charles Shamigian

The Court: I understood that. Maybe I misunderstood that question. Did you ask him, "Did you install these
page 401 } Glebe signs?"

Mr. Harrigan: I think he understood me to say—

The Court: I don't and the record didn't.

By Mr. Harrigan:

Q. Did you make up these Glebe signs?

A. No, I didn't make those up.

Q. Why not?

A. The original contract called for the Glebe signs, and after we started making up the pattern work, and after we started making the signs, Mr. Goldman of the K and B Theatres called me and told me to hold up on that, for some reason. He said there was something involved—He didn't explain it; he didn't feel he was going to be able to use the name of Glebe. We held back on that, and he called me back in about ten days and he said, "Come in with some sketches," and they had decided to use the name of "Dominion."

Q. What was the difference in price if you made up a Glebe sign or a Dominion sign?

A. The difference of $375.

Q. So that the Dominion sign cost $375 more?

A. That's correct.

Q. But if you had made up the Glebe sign and installed it, it would have cost $1940?

A. That's correct.

page 402 } Q. What other work did you have to do other than the attraction panels and the sign itself, in the theatre?

A. We had some *flashing* put above the attraction panels just for preventative measures; in case any water settled on top of the marquee, that it wouldn't run down into the attraction panel signs.

Q. Is this always done, as a rule?

Mr. Simmonds: I object to the leading question.

Mr. Harrigan: All right. I will withdraw it.

By Mr. Harrigan:

Q. Why did you have to put flasking in this particular case?

A. We just felt it was necessary in this case.

Q. Why in this case?

Charles Shamigian

A. Well, there was a gap there, and we were just a little bit leery of it.

Q. What was the cost of the flasking?

A. $175.

Q. What is the purpose of flasking?

A. It's to keep the water back; it's a metal stripping put behind the sign at the both ends and tar is put in on top—tar and whatnot.

Q. Tar?

A. The roofer had done this, so I am really not
page 403 } too familiar with it at all.

Q. In what fashion are these signs attached to the marquee, the lettered signs like "Glebe" or "Dominion"?

A. The "Dominion" signs were placed on top of the marquee on both sides.

Q. How are they secured?

A. They are secured with bolts.

Q. Bolts?

A. That's right, angle-iron and bolts.

Q. Is this the total of your bill here for installing and manufacturing the attraction panels—$2496?

A. That's right.

Q. Your bill, if you would have manufactured and installed Glebe signs would have been $1940?

A. That's correct.

Q. And the flasking was $175?

A. That's correct.

Q. Do you have any other charge?

A. There is a permit charge on this location. It was $80 on permits. This is for obtaining and securing permits for the Dominion Theatre.

Q. What was the condition of these circuits that go to the sign, when you got there?

A. When Mr. Goldman of the K and B Theatres
page 404 } and I got there he had looked over the location
with me and he, or we had checked on the circuits.
Some of them were hanging down, but they had been cut off so I told Mr. Goldman I wanted five new circuits coming out through the signs.

Q. Was that to replace the old?

A. To replace the old circuits.

Q. Could you tell what they had been cut with?

A. As I said, it looked like they had been cut with an acetylene torch.

Mr. *Harrington*: All right.

The Court: You mean an electrical circuit cut with—

The Witness: Yes. Once the wires of the circuit had been disconnected in the building, they can just go ahead and cut them and take them down.

The Court: I just *wnated* to know about the manner of cutting. At what point was the cutting at the marquee?

The Witness: It was out at the marquee. Everything I have been talking about is on the marquee.

Mr. *Harrington*: I would like to offer those bills and invoices in evidence, your Honor.

Mr. Simmonds: Your Honor, we object to their admission into evidence on the grounds that these, the at-
page 405 } traction panels and the Glebe signs were items that had been installed by the defendant, at the defendant's cost, and that he had a right to remove them when they left the premises, and these bills are not proper *chargds* against them.

The Court: Mr. Harrigan.

Mr. Harrigan: Your Honor, on that, our position on that is that these were permanent fixtures; they were installed for the purpose for which the theatre was to be used; they were in no way put in as a temporary venture; that they were bolted right to the I-beams (eye), that they were part of the realty, and they remained part of the realty at the termination of the lease.

I have a case which I think bears me out on that. If your Honor would care to look at it at this time or at a later date, I would be glad to show it to him.

The Court: I better look at it now.

Mr. Harrigan: This is a situation, your Honor, similar to where a person leased a building for the purpose of installing bakery equipment, which he installed at a great expense, and it was held that that was a permanent part of the realty, and it goes into the various tests for determining whether it becomes part of the realty or not.

page 406 } We feel that in our case, that this is clearly part of the realty, and our second point on this is that the Lease controls what they can take out, and the Lease only states they can take out seats, booth equipment, sound equipment, carpets and all necessary furniture. And then it goes on to state, "all such equipment, fixtures and furniture so installed of whatsoever kind. ." which again refers back to the seats, booth equipment, sound equipment, carpets and furniture, "shall remain the property of the

lessee." There is absolutely nothing about permanent fixtures such as signs which are bolted right in and are an integral part of the marquee.

And in the absence of providing in the Lease that they could rip out or take out panels and signs of this sort, and leave a bare marquee, your Honor, I think the case clearly shows that the lease does not cover this, and therefore, they the precluded under the Lease—and even if the Lease were interpreted some other way, and we have to go to the law of fixtures, and the law on fixtures would clearly support our position that this was a permanent part of the realty. The evidence is that it was worthless, custom-made for the marquee, installed in the marquee right on the struc-
page 407 } ture of the building by bolts bolted on. It was necessary to the very purpose for which this building was leased, rented and occupied, that it was put in in a permanent way. It stayed in there for the whole duration of the Lease, and that it could not be used in any other theatre unless there were identical construction of the marquee. And the witness has testified that in all the marquees he has worked on, he has not found any that are identical, that the sign was permanently installed to the building. And, based on the authority in that case, if your Honor goes beyond the Lease, we feel that it is definitely a permanent part of the realty, and they had no right to remove it.

The Court: Do you agree with Mr. Simmonds' statement that Neighborhood Theatres paid for both the attraction panels and the Glebe signs?

Mr. Harrigan: That's not in evidence yet. I do agree that they paid for them, apparently paid for them. I will agree they were billed to them. That's what the bill shows. Who paid for them—I wasn't there, so I don't know whether I can agree to that. I agree they have a bill which says they ordered them; but I don't think who paid for them is the test, because in that case, it is perfectly apparent
page 408 } in that case that the Lessee put some $17,000 worth of equipment in the building that he leased, and he paid for the leased equipment that he put in, such as bakery ovens and so forth, and that in that case, in laying down the test, it does not consider that with any weight at all. The permanency of the fixture and the purpose for which it was used is the deciding factor; and if it was used for the purposes in which the building was adapted to, then it goes with the building. But I think that point could be cleared up on that case, if your Honor would skim through it.

Charles Shamigian

The Court: Mr. Simmonds, it is *Danville Holding Corporation* vs. *Clement,* 178 Virginia, 223.

Mr. Simmonds: May I take a quick look? Oh, you haven't seen it yourself.

(Court read case.)

The Court: This will be twelve pages to read.

Mr. Harrigan: Could we have a five-minute, or three-minute recess while your Honor is reading?

The Court: Yes.

(Recess.)

The Court: I have questions as to whether this case covers all of the Virginia law to be raised before me because they begin by saying, on page 231:

page 409 } "The sole question of law is that of the law of fixtures as between a mortgagor and a mortgagee of land."

Later they say "it's not necessary to enter into a discussion of the general doctrine of fixtures as between landlord and tenant," which is what is before me. They said this is not that kind of case.

Then, they go on and discuss the case of fixtures generally. Here's a man who buys a former silk mill, skating rink, or what-have-you, and he puts in a bakery while he owns it. Then he, in essence, goes broke and the building goes one way and he executes an assignment the other way, and the question is, who gets the bakery equipment?

They say: "We decide this on the law of fixtures with three tests, or three factors, and briefly stated: first, how it is annexed to the realty; second, its adaptation to use, or purpose for that realty; and third, the owner's intention.

They put little weight on number one. The second, "adaptation of the chattel to the use of the property to which it is annexed is entitled to great weight." The other paragraph, "the intention of the party making the annexation is the paramount and controlling consideration."

page 410 } But when you turn later in the case, on page 236, the Court says:

"In the absence of an agreement between the parties the controlling test in Virginia is whether the machinery is permanent in its character and essential to the purpose for which the building is occupied and employed."

One time they say use is entitled to great weight and the other place they say the user's intention is controlling.

The Court: I reach this view: It is manifestly clear to me that the nature of the two Glebe signs was such that no matter how they were attached to the marquee, it was not intended that they be part of the building. If ever there was a trade fixture, it is the trade name of the tenant, and the parties could never have contemplated, at the time of the installation that, in a specialty building, a theatre building, that a tenant would leave, and then a new competitor would come in and take the benefit of the first tenant's trade name, namely "Glebe." They could not have expected this, so, to that extent, these two exhibits ought not to be received.

Let me see the two papers again.

Mr. Simmonds: I would like to make a comment.

page 411 } The Court: Yes, let me add this, too, the attraction panels. I can't reach any mid-case conclusion as to them.

Mr. Simmonds: May I point out a couple of things at this time?

The Court: Yes.

Mr. Simmonds: Mr. Harrigan is apparently putting great weight on the fact that this had something to do with the use of the building as a moving picture theatre. Actually, it's not essential to the operation of a moving picture theatre; it is merely an advertising "gimmick." It could have had *amman* out front with a "sandwich" affair advertising the shows, as far as that goes. But it's gotten a little more sophisticated now, and they have put up these so-called "attraction panels," and as I say, it is just another form of advertising as much as putting it in the newspaper, or putting it on the radio.

This case points out that in so far as it is the element of being used with the building, whether it is essential—that's the word they use, "essential to the purposes for which the building is used." So, we find it doesn't meet that test, and as your Honor pointed out, this is where we have

page 412 } two different factors: It's not a landlord and tenant situation, where we have a situation of what each party was supposed to furnish toward the building;

but we have a case where there is an owner who has put this machinery in there it needed for the operation of a bakery, and very solidly affixed it through some kind of concrete bases. Then, he comes along and puts a deed of trust on it, or a mortgage, and the question is, what was covered by the mortgage, and so the intent of the owner in this case is probably one way—and I think the Court sort of took it into account—that he is now expressing an intent earlier which was sort of contrary to what really was the case.

The Court: Yes, he was the owner of the building when he put the bakery equipment in, which is not quite what is in front of me.

Mr. Simmonds: Yes. And it seems to me a compelling thing in this case is that the Plans themselves do not show an attraction panel or panels on the marquee. As Mr. Budina testified, it was designed during the war, and it was not thought they would be able to get the metal necessary to hold the marquees, and so it is shown as a wooden page 413 } facia, so obviously, this thing is not an essential part of the building because they designed it and were going to operate without any attraction sign at all. And there has been no evidence here that Mr. Goldman wanted them. The testimony will show they weren't any good anyway, and probably we would have been billed for not taking them down just as they have billed us for not taking away the air-conditioning equipment. And, if your Honor please, it seems to me that it's quite clear from the evidence that the tenant bought them, they are not essential to the building; and just as, with other things, he intended to take it away when he left, if he had to leave, which as it did turn out, he had to leave.

I don't think we have to go into the language of the deed itself; but it seems to me, leaving aside the deed, this never was intended to be a real fixture; and for that reason alone the bill should not be admitted.

Mr. Harrigan: Your Honor, on this one point—May I look at the case?

Mr. Simmonds makes a point of the fact that there was a deed put on this property, and he says this is important; this distinguishes it. This case deals with that. On page 237, it says, "The fact that the deed of trust was given to secure the Danville Holding Corporation for a part of page 414 } the purchase money, does not alter the situation. The case is governed by the law of fixtures and not the law of liens." So, the Court discounted that. "Neither

the circumstances of the lien, its character, nor its priority at the time of its execution have any bearing upon the elements which determine the character of a fixture as realty or personalty, when there is no agreement between the parties in the instrument creating the lien or otherwise as the specific identity and nature of the chattel in question."

And we maintain that there is an agreement in this instrument which allows only certain things to be taken out, and the sign certainly was not listed. So, our position is that even the Glebe sign could not be taken out because it is their contract, and that sign is not mentioned in that contract, and the contract controls what they can take out. What good would that provision in the contract be if it were interpreted that they could take out everything that is specifically enumerated and then leave the question open for everything that was not?

That particular clause, then, would have no bearing at all because they would do the same thing. They would come in to Court and say, "We have a right to take everything out in the contract," and that would give no meaning at

page 415 } all to that clause in the contract which says they are allowed to take out seats and they are allowed to take out booth equipment, and they are allowed to take out sound equipment and they are allowed to take out their carpets and their necessary furniture. Why even put that in the contract if they are allowed to take out everything they put in? It would have no force, no effect, and it would be in effect holding that that meant nothing at all. They might just as well have left it out of the contract entirely.

So, our position is, the contract controls in this case. We don't even get to the law of fixtures; but if we do get to the law of fixtures, the fact in this case that there is a deed of trust, the Court discounted this, as the case is controlled by the law of fixtures.

Now, Mr. Simmonds makes another point that attraction panels are not essential to the theatre business. Every theatre in the Metropolitan area uses attraction panels to add—

Mr. Simmonds: Are you testifying in that, Mr.—

Mr. Harrigan: He has testified also; he has testified they are not essential, and there is no evidence that they are not, as long as everybody is testifying—

Mr. Simmonds: Are you testifying they are

page 416 } used in all the theatres of the Metropolitan Washington Area? I don't think that's so, is the reason I asked the question, if your Honor please. I'm sure that is not so.

If I may—

Mr. Harrigan: I am not finished.

The Court: The objection to your asserting facts without having testimony to support it. In a sense you could be saying, asking the Court to take judicial notice that almost all theatres in the Metropolitan Washington Area use attraction panels. Mr. Simmonds disputes this, and I haven't made up my mind.

Mr. Harrigan: I asked Mr. Budina if that was essential, and the Court took judicial notice of this, that panels are essential to the operation of the movie theatre, and I think the Court made a ruling at that time, and I wasn't allowed any further questions along that line.

The Court: Let us come back to the question of the admissibility of these two papers. The Glebe sign is clearly out, and the paper H-1 is of no help in the decision of the case.

Mr. Harrigan: All right, your Honor.

The Court: The objection to its admission is sustained.

Mr. Harrigan: Note my exception on the page 417 } grounds of authority in *Danville* vs. *Clement*.

I am putting some objection in the record, if I may, on this Glebe sign, itself, I object to the Court's ruling and except on the grounds of *Danville Holding Company versus Clement,* 178 Virginia, 231 and the authorities cited therein, plus the other reasons cited in the argument.

Mr. Simmonds: If your Honor please, with respect to the agreement, if your Honor feels that the agreement has some relation to this, I think Mr. Harrigan has not analyzed this correctly, two parts to it: to what the lessee can do and has to do, and I would like you to notice that the word "fixture" never appears in anything that he is required to do or put in.

It says here:

"Lessee agrees to equip said building at the lessee's own cost and expense, with seats, booth equipment, sound equipment, carpets, necessary furniture for the operation of a moving picture theatre, and agrees at its own expense, as soon as the same may become available, to install the necessary equipment such as motors, compressors and the like for a cooling system. . ."

And now the next sentence deals with what the lessee shall retain ownership of. It doesn't relate to what he page 418 } is required to put in. And it says:

"All such equipment for any of the above" fixtures are never mentioned above, "or furniture of whatsoever kind so installed or brought on the premises by the Lessee, whether or not the same may be affixed to the freehold, shall at all times remain the property of the Lessee, subject only to Lessor's liens for rent as provided by law."

If your Honor please, that last sentence dealing with the ownership of the things that are put on the land or in the building by the lessee deals with not only the equipment mentioned above, but "fixtures or furniture of whatsoever kind," and it seems to me that if it becomes necessary to resolve this by the instrument, that it clearly leaves the ownership in the lessee of this attraction panel.

Mr. Harrigan: If I can comment on that statement.

The Court: All right.

Mr. Harrigan: In Mr. *Simmond's* interpretation, he tries to separate these sentences out of this paragraph. Like, when he said, "all such," I noticed he did not put much emphasis on "such." All such" must refer to the equipment previously furnished. If it did not, why didn't they put in, "in addition, all equipment put in. . ."?

page 419 } In order to give any meaning to "all such equipment, fixtures or furniture," it definitely refers back to that specifically mentioned—"all such equipment." It would have no meaning unless it referred back to the specific items previously mentioned. And to give it any meaning at all, just from a practical point of view, it would have to refer back. And the law of *ejusdem generis,* in interpreting general terms such as equipment, fixtures and furniture, is a rule of construction whereby it takes its color and meaning from the specific items, or class of items specifically mentioned. And the class of items here are "booth equipment" which could include cameras and it could include a generator; and "sound equipment," whatever that includes; "furniture" which is tables, perhaps in the lounge, chairs; "carpets" which is quite specific.

But this "all such equipment" takes its meaning from the class previously illustrated, and by the wildess imagination, it would be very difficult to put in electrical fixtures or attraction panels into any class which they mentioned.

Mr. Simmonds: The trouble with Mr. Harrigan's argument is he does not give meaning to the word "fixtures,"

page 420 } which is never mentioned in the sentence above,

in which he is trying to say "all such equipment." As I say, that relates to one thing; but the word "fixtures" appears there for the first time.

And another rule of construction is that you have to take into account all the words. To ignore the word "fixtures" would certainly do violence to the agreement; and nowhere above, where he tries to say the word "such" applies to, is the word "fixtures" used. So, it seems to me they retain ownership of the fixtures. And, even though they might have been attached to the freehold, they had the right to retain ownership and remove them.

Mr. Harrigan: Compressors are fixtures. Motors are fixtures.

Mr. Simmonds: That's your language, now.

The Court: Well, what are fixtures? is yet another question.

I am not ready, gentlemen, to reach a final view on this question of fixtures. The one case cited to me says it does not cover the law of landlord and tenant fixtures, and there is bound to be more law. Maybe it comes out the same, but I want to know it.

Mr. Harrigan: There is. It is the same test. page 421 } I'll be glad to provide it.

The Court: Gentlemen, I see the argument each makes. On Mr. Simmonds' side of the argument, one can go a little farther—it's "necessary furniture" which the lessee agrees to put in, but he may remove furniture of whatsoever kind. That's different.

Mr. Harrigan: Right. So,—

The Court: So, the issue before me is, whether or not to receive in evidence H-2, and I am going to receive it on the Plaintiff's theory of the case. I am just not prepared at this point—and I don't think counsel have given me the *quantum* of law I want on landlord and tenant fixtures for me to do otherwise. So, on the Plaintiff's theory, H-2 is in.

Mr. Simmonds: Your Honor, I take it that it is subject to motion to strike it when other evidence comes in, other law comes in?

The Court: Yes, sir.

Mr. Simmonds: I might say I didn't bring the books over. I didn't realize this was coming up this morning.

The Court: This is a problem. When we get to the end of the case and are arguing law, I at least will have all applicable facts before me, at the risk of running a little page 422 } in the trial.

Mr. Simmonds: For the purposes of the record, I will except to the admission of H-2.

The Court: Noted.

The Court: Next question.

Mr. Simmonds: I believe he had finished examining the witness and just ask that they be admitted.

Mr. Harrigan: That is all.

(Plaintiff's Exhibit H-2 was received in evidence.)

CROSS EXAMINATION

By Mr. Simmonds:

Q. Mr. Shamigian, do you know how long an attraction panel usually lasts, or what is the average lifetime of attraction panels?

A. No, I would not.

Q. Have you hung attraction panels in the District of Columbia, on theatres?

A. Yes, I have.

Q. They are required to be flush with the buildings, are they not?

A. They are, yes, that's true.

Q. You cannot have them on an over-hanging marquee?

A. Unless they are being replaced on an existing marquee.

page 423 } A. No new marquees, no.

Mr. Harrigan: I object to the question. I don't know what materiality it has in this case, what happens in the District.

Mr. Simmonds: That's in refutation of your testimony.

Mr. Harrigan: That *was'nt* evidence.

The Court: I'm going to leave it in.

Mr. Simmonds: I have no further questions.

The Court: You may step down, sir.

Is this witness's presence desired further in the case?

* * * * *

Thereupon,

PATRICK DOUGHERTY witness on behalf of the Plaintiff, having been previously sworn, was examined and testified further as follows:

Patrick Dougherty

page 424 } FURTHER RE-DIRECT EXAMINATION

By Mr. Harrigan:
Q. State your name, please.
A. Patrick Dougherty.
Q. Who do you work for?
A. L. T. Souder Company.
Q. What do you do?
A. *Electfical*—

Mr. Simmonds: This is the same gentleman who testified two or three days ago, was sworn and gave his occupation and so forth.

By Mr. Harrigan:
Q. You are the same witness who was sworn before and testified?
A. That's right.
Q. Mr. Dougherty, did you work on the Glebe Theatre in Arlington?
A. Yes, I did.
Q. Do you have your worksheets with you?
A. Yes.
Q. May I see them?
A. (Handing)

page 425 } Mr. Harrigan: Your Honor, I have a total bill and a worksheet which I would like to mark for identification. I think there is a bill for something already marked for identification in this case.

The Court: You mean the top of one of these two papers is already in? I don't follow you.

Mr. Harrigan: Yes, it is, your Honor. *I* has been marked and it is marked B-4.

The Court: You want the yellow sheet marked for identification and the next number, then, is—

Mr. Harrigan: Since they are attached, I can mark both of them B-4 and B-4-1.

The Court: There is no point in my having something in evidence twice. I have got enough in this file. It just needs a new number for this worksheet.

Mr. Harrigan: That's correct.

The Court: You went as high as B-5 before.

Mr. Harrigan: That would be B-4-1, since that's a type of

B-4 type of exhibit, if we want to be consistent. I don't care—

The Court: That's getting too consistent. Is there a B-6 heretofore?

Mr. Harrigan: No, your Honor.

page 426 } The Court: That's what it will be, B-6 for identification.

(Exhibit was marked Plaintiff's Exhibit B-6 for identification.)

By Mr. Harrigan:

Q. I show you this worksheet which has been marked B-6, in the amount of $658.21. Can you identify that?

A. This is labor and material required for replacing the wire for the seat lights.

Q. Was this the wire that you previously testified about that was cut down to the conduit?

A. That's right.

Q. Directing your attention to the materials on that bill, what is the total amount of materials on that bill?

A. $93.30.

Q. Were all those materials used in replacing the wire for the seat lights?

A. Yes, they were; they were necessary items to reconnect the seat lights.

Q. Do you have a labor charge?

A. Yes, I have. It's $381.70.

Q. Now, was that the total charge for labor?

A. No. To this is added 12 percent which covers

page 427 } insurance and taxes, workmen's compensation, social security taxes.

Q. How much is that?

A. $45.80.

Q. What else do you have? Do you have an overhead figure?

A. Yes. Insurance and taxes together with the original labor and materials are, subtotal—to this is added 15 percent overhead, subtotal being $520.80. 15 percent of this is $78.12.

Q. What does that total?

A. $59.92.

Q. What figure is added to that?

A. To this is added 10 percent profit, grand total of $658.81.

The Court: $658.81.

The Witness: Yes, your Honor.

Patrick Dougherty

By Mr. Harrigan:
Q. Was all this material and labor necessary to—

Mr. Simmonds: I object to the leading question.
The Court: Sustained.

By Mr. Harrigan:
Q. Why was all this labor and material necessary?
A. It was necessary for us to come from the
page 428 } floor boxes which were located in the floor to reconnect the seats. The equipment, the materials were not there.

Mr. Harrigan: I would like to offer this into evidence, your Honor.
Mr. Simmonds: I would like to ask some questions before it is admitted.
The Court: All right.
Mr. Harrigan: Your Honor, I think he can ask questions—I'm not through, unless you want to break it up into each item.
Mr. Simmonds: I think I have the right to ask questions about that particular document.
The Court: On its admissibility.
Mr. Harrigan: If it's on its admissibility only.

VOIR DIRE

By Mr. Simmonds:
Q. Mr. Dougherty, is this in your handwriting?
A. No, it is not.
Q. Do you know whose handwriting it is in?
A. Mr. Hampton of L. T. Souder Co., who makes all the job sheets. We give him a listing of the materials used and he transposes it. The labor is taken from the Labor Sheet, weekly time sheets.
page 429 } Q. Do I understand that this covers the labor and material in connection with reconnecting the new seats to the electrical system?
A. No, this is materials necessary to install the wiring for the seats and the greenfield, the floor covers that were missing and tapping out the screw openings. It's not in connection with seat lights.
Q. Labor does not include connecting seat lights?
A. No, it does not. This is an item that was covered in the house fixtures and the footlights and the marquee.
Q. I must have misunderstood you. I thought you said, in

answer to Mr. Harrigan, that this was labor and material in connection with the reconnecting of the seat lights.

Mr. Harrigan: I object to that. I did not say that at all, your Honor. My question was, was this the labor and material for installing the wiring for the seat lights? There was nothing said about whether it was connected into the new seats.

Mr. Simmonds: I'm afraid you didn't hear what I said. I said, in answer to your question he said that was for reconnecting, was that incorrect?

A. It's the materials necessary to connect the seats.

page 430 } Mr. Simmonds: Your Honor, I object to the admission of this as not prepared by this gentleman, not in his handwriting, not prepared by him.

By Mr. Harrigan:

Q. On that point alone, are you the supervisor on the job?

A. That's right.

Q. Who furnished Mr. Hampton the labor and material figures used on this particular job?

A. I did.

Q. Are you familiar with the cost?

A. Yes.

Q. Are they accurate?

A. Yes.

The Court: It's kind of moot. I look back at my notes and I have almost identical testimony, dollar amounts, what it's for. It's true the paper is prepared by someone else. There is no testimony—it's a person under Mr. Dougherty's supervision. The indications are, it was somebody on the inside of the accounting end of the business where Mr. Dougherty is apparently a field superintendent, so on that basis of objection, it is sustained. B-6 is not received in evidence.

page 431 } Mr. Harrigan: All right. I would except to that, your Honor. He has testified as to its reliability, that he furnished the materials, that they are accurate, that all the materials were installed and—

The Court: I heard his testimony, but don't receive the paper.

Mr. Harrigan: But you already have the bill in evidence, $658.51, I believe. I think that has already been received.

Patrick Dougherty

By Mr. Harrigan:

Q. Now, I show you a bill marked $2,358.54. Is that for work done at the Glebe Theatre?

A. Yes, it was.

Mr. Harrigan: I would like that marked for identification, your Honor.

The Court: This will be numbered B-7 for identification.

(B-7 was marked for identification.)

Mr. Simmonds: Is that the bill or worksheet or both?

Mr. Harrigan: The bill and worksheet.

The Court: They are attached. I treat them as one, though the writing is on the worksheet.

Mr. Simmonds: I think that bill or copy of it
page 432 } was already offered in evidence and refused.

Mr. Harrigan: I am asking to have it marked for identification, your Honor. That's the only thing I've asked for so far.

The Court: All right. It is so marked.

Mr. Simmonds: The point I am making, if your Honor please, it was offered once before for identification and after evidence, it was refused.

Mr. Harrigan: The bill was. The worksheet was not.

Mr. Simmonds: That's right.

The Court: I thought the judge said it was the bill and worksheet now being marked B-7.

Mr. Harrigan: All right.

By Mr. Harrigan:

Q. I show you your worksheet marked B-7, which has an amount $2358.54 on it. Can you identify that as work done for Glebe Theatre?

A. Yes, it is.

Q. What was it? Generally, what was the work done to comprise that bill?

A. It was material and labor necessary to rewire and reinstall lights in the marquee, or the under side of the marquee, the footlights, rehang all the fixtures in the theatre, Exit lights, house lights.

page 433 } Q. What was the condition of the fixtures in the marquee?

Mr. Simmonds: Your Honor, I think he went over that the last time.

The Court: I have certainly heard him on that.

By Mr. Harrigan:

Q. Did you have to rewire those?

A. Yes, we did.

Q. Directing your attention to the bill, is it broken down into material and labor?

A. Yes, it is.

Q. What materials did you use in rewiring the marquee?

A. I have got the breakdown on that here.

Mr. Simmonds: What are you referring to now, sir?

The Witness: Some notes where I have got this broken apart.

By Mr. Simmonds: By whom are the notes made?

The Witness: By me.

Mr. Simmonds: When did you make up those notes?

The Witness: Since I have gone over this and in trying to break it apart.

Mr. Simmonds: In the last day or two?

The Witness: In the last—Yes.

Mr. Simmonds: May I see those notes?

page 434 } Mr. Harrigan: Your Honor, I don't think he has any right to see the notes. He has no *a* right to cross-examine and run up every time I start examining.

The Court: I think it is perhaps premature, Mr. Simmonds. The notes described are such that he may look at them. If you want to look at them, when you come to cross you may see them.

Separate that from other papers, that at which you look.

By Mr. Harrigan:

Q. Look at the bill for materials. Go down the bill and tell me what material is needed to rewire the marquee.

A. I have a listing of 100 feet of number 12 TW wire.

Q. Where was that put in?

A. It was put in in the general field that existed in the marquee.

Q. Are you talking about those 16 lights under the marquee in front and back of the ticket—

A. That's right, 16 recessed fixtures.

Q. What was the amount of that bill?

A. The total amount of the bill is $200.42.

Q. That's total labor, right? All I want is the amount of this 100 feet of number 12 TW wire?

A. $1.94 cents.

page 435 } Q. Going down the other items on materials, what other materials were necessary and included there?

A. The plastering charge of $96.95.

Q. What was that for?

A. This was for patching the plaster around the ceiling openings.

Q. Where these light fixtures were removed?

A. That's right.

Q. On this $96.95, was that the total charge for plastering?

A. There was a direct charge to us. To this we add 15 percent overhead.

Q. How much would that be in this particular case?

Mr. Harrigan: I have that figure. It's a matter of multiplication, if—

Mr. Simmonds: If your Honor please, I want to object to this manner of presenting the case. This gentleman was on the stand last Thursday or Friday, I believe, came in here for the purpose of proving these electric bills, under beam, we'll call it; and now, after having been examined on that and cross-examined, he comes in 3 or 4 days later, and the Plaintiff puts him back on the stand again to try to bolster up his case.

page 436 } I think it is not proper, and I would object that this gentleman be allowed to come back now and to go over the whole matter again and try to plug up the holes that might have been in his testimony last week.

Mr. Harrigan: Your Honor, the last time—

The Court: I don't want it done with every witness. I think it is discretionary for the Court—If Mr. Harrigan would have asked for permission to recall him later, I expect I would have said yes. I trust you are not going to do this with everybody who testified.

Mr. Harrigan: No, sir.

The Court: All right. Objection overruled.

Mr. Simmonds: Exception.

The Court: Noted.

By Mr. Harrigan:

Q. When you left off, I think you had a plastering bill of $96.95 in which there was a 15 percent charge, which is always added on.

A. That's right, 15 percent of the total of the plastering and the TW wire.

Mr. Harrigan: I can have him figure that up, your Honor, on the stand or I could tell him what it is.

The Witness: It runs approximately—

page 437 } By Mr. Harrigan:

Q. I don't want "approximately." I want 15 percent.

Mr. Harrigan: If Mr. Simmonds will agree 15 percent is a certain figure—

The Court: I have heard his testimony, that it is 15 percent. That's enough—that is, of the two items he has covered so far.

By Mr. Harrigan:

Q. After that 15 percent, do you then add the two?

A. 15 percent is added to the total price of the materials, and 10 percent of this subtotal is then added.

Mr. Harrigan: I would like to put these figures in, your Honor, because it might save your Honor some—

The Court: I don't understand what you mean, "put the figures in."

Mr. Harrigan: Just how much this amounts to, 15 percent of $96.95.

The Court: All right, if you have worked out the mathematics, and tell me $1.94, plus $96.95 and then 15 percent of that, and you tell me what it is, that's all right. You're a lawyer.

Mr. Harrigan: $14.54, which makes a total of $111.49, and the 10 percent that he testified about, added to that makes a total of $122.64 for plastering.

page 438 } The Court: Do you know that that was charged that way?

The Witness: Yes, the plastering charge was for—

The Court: All right.

By Mr. Harrigan:

Q. Were there any other items of materials that were used for replacements?

A. Yes. There were 60 lamps that were installed around, miscellaneous fixtures or temporary lighting we had to install in the theatre to allow them to work.

Q. How much was that figure?
A. $11.91.
Q. To that would you add the—
A. 15 and then 10 percent.
Q. To the $1.94 would you also add 15 and 10 percent?
A. Yes.
Q. Do you have a labor charge on there?
A. Yes, I have: Total labor was $1485.75.
Q. What do you add onto that in order to get a final figure?
A. 12 percent insurance and taxes.
Q. Then, that's added up—
A. —to the original labor, and then the material is added to this, sub-total; 15 percent, subtotal; 10 percent,
page 439 } grand total.
Q. O.K. What labor charge was there for rewiring the canopy?

Mr. Simmonds: Rewiring what?
Mr. Harrigan: Rewiring the canopy, the 16 lights under the marquee.
The Witness: I have a breakdown for the men who worked on the marquee. May I refer to that?

By Mr. Harrigan:
Q. Yes.
A. Got $950.20.
Q. I'm talking about the labor charge.
A. This is a labor charge.
Q. Is this for rewiring the canopy?
A. Oh, no, I'm sorry. This was for the marquee fixtures.
Q. I want the charge for rewiring the canopy.
A. $235.76.
Q. How was that figured up?
A. There were two men worked two, eight-hour days, or a total of 32 hours. This, at $5.20 an hour, is $166.40.
Q. To this, 12 percent insurance and taxes?
A. To this 12 percent insurance and taxes is added, a total of $199.70.
page 440 } Q. All right.
A. Sub-total, $186.37; 15 percent overhead, $27.96, sub-total, $214.33; ten percent profit, $21.43 and grand total, $235.76.
Q. That was just the rewiring of the fixtures?
A. That's right.
Q. All right. You installed the fixtures, did you?

A. Yes, I did.

Q. What was necessary in installing the fixtures?

A. There were some special clips that were supplied by Dominion Electric Compay, along with the fixtures. These clips gave us some trouble; they had to be fastened to the fixtures in a precise fashion to allow you to fasten the ring that existed in the ceiling, the opening in the ceiling.

Q. If these clips hadn't been used, what process would have been necessary?

A. We probably would have had to take the ceiling, all the recessed opening would have had to be cut out and new plasterings put in—just have a new ceiling.

Q. Do you have a breakdown of the labor charge for installing these 16 fixtures?

A. Yes, I have.

Q. Would you tell the Court how that is arrived at?

page 441 } Mr. Simmonds: Is the process the same as the other?

The Witness: Yes.

The Court: What's the total?

The Witness: $950.20, grand total is $1494.74.

The Court: Let's keep it moving along.

By Mr. Harrigan:

Q. That's computed the same way, 12 plus 10, plus 15?

A. Yes.

The Court: You went real fast that time. Your question was, installation of marquee fixtures—he says the process for that item, the installing of fixtures was the same. I'm not sure what he means, $1494. 74 applies to.

The Witness: This is the labor for installation. Do you want the total figures, the original labor, plus the mark-up for 12 percent?

The Court: No. Once, Mr. Harrigan, you have had your client explain how come 2 electricians cost $235.76 for two days of work, then from then on, don't let him explain the procedure. Just let him give the amount, see?

Mr. Harrigan: All right.

The Court: I don't really understand—I don't understand this $235-something, labor on marquee.

page 442 } The Court: That is rewiring to the fixtures. Now, "installing marquee fixtures," what's that figure?

The Witness: $1494.74.
The Court: What was the $950-something, you gave?
The Witness: That was the cost of labor before insurance and 15 percent overhead.
The Court: I see, before all this.
Mr. Harrigan: That's why I went through it.

By Mr. Harrigan:
Q. $1494.74, right?
A. Yes.
Q. Did you have Exit fixtures that you had to install?
A. Yes, we did.
Q. What was the cost of labor for installing the Exit fixtures?

Mr. Simmonds: What was that, Exit fixtures?
Mr. Harrigan: Exit fixtures.
The Witness: One man, two days, $117.88 labor.

By Mr. Harrigan:
Q. That was the total figure including the 12, 15 and 10 percent?
A. That's right, that's a portion—the figure represents the insurance and overhead and profit.
page 443 } Q. $117.88. Did you have some decorative fixtures that you had to reinstall?
A. Yes, we did.
Q. Colonial-type fixtures? What's the price for installing those?
A. I have got that listed with the other fixtures. It's broken down.
Q. What other fixtures did you have to install?
A. The fixtures in the bathroom, storage room, Manager's Office, restroom sign.
Q. Were these fixtures that were previously-existing?
A. The openings were there for them, yes.
Q. What was the total cost for installing those fixtures?
A. $76.37.
Q. Does that $76.37 represent the 12, 15 and 10 percent?
A. Yes, it does.
Q. Were there any wall plugs?
A. That's included in this figure; yes, there were about 6 receptacles in it.
Q. What was the condition of those plugs?
A. They were broken.

Q. That's included in the $76.36?
A. Yes.
page 444 } Q. All right. Do you have a total cost for—

Mr. Harrigan: I don't think I have to put that in, your Honor.

By Mr. Harrigan:
Q. Was the charge for hooking up the seat lights in this total bill, $2358.?
A. Yes, it was.
Q. And was that beyond the labor that you have just testified about?
A. Yes, it was.

Mr. Harrigan: He said, "Yes, it was."
The Court: I know. I heard him.
You mean all these items beginning with $1.94 for 100 feet of wire, down through $76.37 are in addition to $2,358?
The Witness: No, sir. These are portions of that, broken apart.
The Court: Now, it's clearer to me because that's what I thought you meant.
The Witness: For the connection of the seat lights, you have got roughly about 6½ hours to connect the actual 20 seat lights.

By Mr. Harrigan:
Q. Labor for that has not been included in your—

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A. No.

Mr. Harrigan: Could I have those exhibits 1 through 17?

By Mr. Harrigan:
Q. I show you these exhibits marked A-1 through A-13 and the Exhibit marked A-16. Do you recognize the materials that those exhibits represent?
A. They are Exit light fixtures on A-1.
Q. Just thumb through them and tell me if you received and installed all of that equipment?
A. Yes, we did.
Q. All of them?
A. Yes.

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