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Notice of Appeal.

Filed January 19, 1932.

In Chancery of New Jersey.

Between

JAMES RADCLIFFE & SONS COMPANY, a corporation, and JOHN MAWHINNEY COMPANY, a corporation,

Complainants,
and

BOROUGH OF HAWTHORNE in the County of Passaic, a municipal corporation, *et als.*,

Defendants.

Notice of
Appeal.

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Between

IGOE BROTHERS, INC., a corporation,

Complainant,
and

BOROUGH OF HAWTHORNE,
CHARLES BANG, *et als.*,

Defendants.

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The defendants, Charles E. Knoble, Jr., and Walter Knoble trading as the Hawthorne Contracting Co., hereby appeal from the order in this matter, signed on December 14th, 1931, by Chancellor Edwin Robert Walker, on the advice of Vice Chancellor John O. Bigelow, which order dis-

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Notice of Appeal.

allowed the claim of Charles E. Knoble, Jr., and Walter Knoble, trading as the Hawthorne Contracting Co., and which order sustained the exceptions filed therein, from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in all Causes.

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FRANCES HART,

Solicitor for and of Counsel with defendant, Charles E. Knoble, Jr. and Walter Knoble, trading as the Hawthorne Contracting Co.

I conceive there is good cause for appeal in the above entitled cause.

MEYER LOBSENZ,

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Of Counsel with defendant, Charles E. Knoble, Jr. and Walter Knoble, trading as the Hawthorne Contracting Co.

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Petition of Appeal.

Filed January 21, 1932.

**NEW JERSEY COURT OF ERRORS AND
APPEALS.**

Between

JAMES RADCLIFFE & SONS COM-
PANY, a corporation, and JOHN
MAWHINNEY COMPANY, a cor-
poration,

Complainants-Appellees,

and

BOROUGH OF HAWTHORNE in the
County of Passaic, a municipal
corporation, *et als.*,

Defendants-Appellees,

and

CHARLES E. KNOBLE, JR. and
WALTER KNOBLE, trading as
HAWTHORNE CONTRACTING Co.,
Defendant-Appellant.

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Petition of
Appeal.

Between

IGOE BROTHERS, INC.,

Complainant-Appellee,

and

THE BOROUGH OF HAWTHORNE,
et als.,

Defendants-Appellees,

and

CHARLES E. KNOBLE, JR. and
WALTER KNOBLE, trading as
HAWTHORNE CONTRACTING Co.,
Defendant-Appellant.

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Petition of Appeal.

To the Honorable The Court of Errors and Appeals in the Last Resort in all Causes:

The petition of Charles E. Knoble, Jr., and Walter Knoble, trading as the Hawthorne Contracting Company., the appellant in the above entitled cause, respectfully shows that:

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1. Petitioners find themselves aggrieved by an order made in the Court of Chancery, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 14th day of December, 1931, in two certain causes pending in the said Court of Chancery, wherein James Radcliffe & Sons Company, a corporation, and John Mawhinney Company, a corporation, were complainants, and Borough of Hawthorne in the County of Passaic, a municipal corporation, et als., were defendants, and Igoe Brothers, Inc., a corporation was complainant, and Borough of Hawthorne, Charles Bang, et als., were defendants, in this respect:

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1. That the said order adjudged that exceptions 7 and 26 to the Master's Report be sustained and allowed, and that the claim of the appellants, Charles E. Knoble, Jr., and Walter Knoble, trading as the Hawthorne Contracting Co. be, and the same is herewith disallowed in its entirety.

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2. And petitioners appeal from the said order of the Chancellor, which orders that exceptions 7 and 26 to the Master's Report be allowed, and that the claim of the Hawthorne Contracting Co. be disallowed in its entirety, upon the following grounds:

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Petition of Appeal.

1. The order should have disallowed exceptions 7 and 26.

2. The order should have confirmed the claim of Charles E. Knoble, Jr. and Walter Knoble, trading as Hawthorne Contracting Co., and the order should have confirmed the master's report in allowing the said claim. 10

3. The order was erroneous, in that even if part of the claim of Charles E. Knoble, Jr. and Walter Knoble, trading as Hawthorne Contracting Co. was improper and illegal, still the balance of the claim should have been sustained as being separate and distinct items and claims. 20

4. The said order should have sustained the master's findings on the claim of Charles E. Knoble, Jr., and Walter Knoble, trading as Hawthorne Contracting Co., because the master's report was founded upon facts properly and legally proven.

5. The order should have sustained the master's findings, because the first time that any claim was made of an alleged fraud, or gross negligence upon the part of the Hawthorne Contracting Co., was after the entire testimony was taken, the master's report made, and only upon the filing of the exceptions. 30

6. The facts show that no one was misled by the affidavit of claim, or the testimony in the case, by any excessive claim, and that the only claims that were honored, were based upon actual meas- 40

Petition of Appeal.

urement made by the general contractor, and by the borough engineer.

7. There is nothing in the evidence to show an attempt to distort or hide the facts, or to claim more moneys than was actually due to the Hawthorne Contracting Co.

Petitioner therefore prays that the said order of the said Chancellor may be in the particulars aforesaid reversed, set aside, and of nothing holden, and that petitioner may have such other relief in the premises as this Court may deem proper.

FRANCES HART,
Solicitor of Appellant.

MEYER LOBSENZ,
Of Counsel with Appellant.

Answer to Petition of Appeal.

Filed January 22, 1932.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

JAMES RADCLIFFE & SONS COMPANY, a corporation, and JOHN MAWHINNEY COMPANY, a corporation,

Complainants-Appellees,
and

BOROUGH OF HAWTHORNE in the County of Passaic, a municipal corporation, *et als.*,

Defendants-Appellees,
and

CHARLES E. KNOBLE, JR. and WALTER KNOBLE, trading as HAWTHORNE CONTRACTING Co., Defendant-Appellant.

On Appeal
from the
Court of
Chancery.

Answer to
Petition of
Appeal.

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Between

IGOE BROTHERS, INC.,
Complainant-Appellee,
and

THE BOROUGH OF HAWTHORNE,
et als.,

Defendants-Appellees,
and

CHARLES E. KNOBLE, JR. and WALTER KNOBLE, trading as HAWTHORNE CONTRACTING Co., Defendant-Appellant.

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Answer to Petition of Appeal.

Answer of Lord & Burnham Company, Igoe
 Bros. Inc., Alliance Lumber Corporation and
 Charles Bang, the appellees in this appeal to the
 petition of appeal of Charles E. Knoble and Wal-
 ter Knoble, trading as the Hawthorne Contracting
 Company, the above named appellant; these ap-
 10 appellees not admitting the truth of all or any of the
 matters in said petition of appeal contained, for
 answer thereto nevertheless admit that a decree
 was on December 14, 1931 made and entered in
 the Court of Chancery of New Jersey in the above
 entitled cause for the purposes in said petition
 mentioned and as therein set forth but as to the
 substance and form of said decree these appellees
 beg leave to refer thereto when the same shall be
 20 produced. These appellees are advised and believe
 that the said decree is agreeable to equity and
 they pray that the same may be affirmed, the costs
 to be taxed in favor of these appellees.

STICKEL & STICKEL,
 Solicitors for and of Counsel
 with the said Appellees.

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State of Case.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between

JAMES RADCLIFFE & SONS COM-
PANY, a corporation, and JOHN
MAWHINNEY COMPANY, a cor-
poration,

Complainants,

and

BOROUGH OF HAWTHORNE in the
County of Passaic, a municipal
corporation, *et als.*,

Defendants.

On Appeal
from Court
of Chancery.State of
Case.

10

20

Between

IGOE BROTHERS, INC.,

Complainant,

and

THE BOROUGH OF HAWTHORNE,
et als.,

Defendants.

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Two Municipal Lien suits were started by three complainants as entitled above and the suits consolidated for the purpose of hearing by Frederick W. Van Blarcom as Special Master. In the hearing before the Master the validity both as to substance and form of the following claims was conceded by the contractor Charles Bang and all other parties to the suit:

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State of Case.

	Igoe Brothers, Inc.	\$2106.14
	Alliance Lumber Co.	600.00
	James Radcliffe & Sons Co.	277.75
	John Mawhinney Company	225.00
	Lord & Burnham Co.	4625.00
	Samuel Braen Sons	1432.80
10	Dalzell Trucking Co.	1300.00
	Giannone Electric Co., Inc.	95.29
	William H. Heyns	846.24

The following claims were objected to by the contractor or one or more of the other parties to the suit:

	Hawthorne Contracting Co.	\$6745.83
	Jesse J. Watts	5900.00
20	Anthony Korteweg	457.69
	C. J. Vanderbeck & Son.	399.60
	Watson Flagg Engineering Co.	109.24
	Joe Cortese	867.00

The claim of C. Ladow & Son for One Thousand dollars was objected to but the exception later withdrawn and the claim allowed. The Master reported in favor of all of the claims to which no objection was made and rejected all of the claims to which objection had been registered except as to the Hawthorne Contracting Co., which claim, however, the Master found should be allowed for \$5479.71, instead of \$6745.71, the difference being an item of 211 cubic yards of white stone at six dollars per cubic yard, which had not been supplied although claimed for in the proof of claim filed. The Hawthorne Contracting Co. filed two proofs, the first of which was not accurately veri-

State of Case.

fied and the second of which sought to correct that defect.

Exceptions to the Master's report were filed by the claimants Igoe Brothers, Inc., Alliance Lumber Co. and Lord & Burnham Co. and by the contractor Charles Bang, all of which exceptions were withdrawn before or at the argument except exceptions 7, 9, 16, 18, 20, 21, 23 and 26. Exceptions 16, 18, 21 and 23 were argued together and exception 7 and 26 argued together. Vice Chancellor Bigelow found it necessary to consider only exception 7 and 26 and based his decision upon the necessity for sustaining such exceptions. Exceptions were also filed by Jesse J. Watts to the adverse finding made by the Master but Vice Chancellor Bigelow overruled all such exceptions. The issue therefore decided by Vice Chancellor Bigelow and the one which is the subject matter of this appeal is the issue raised by exceptions 7 and 26.

Counsel for the interested parties have therefore agreed upon the following abridgement of the record before the Master which record before the Master consists of 272 pages of testimony most of which was testimony taken in support and in opposition to the claim of Jesse J. Watts and of other claims.

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Stipulation.

IN CHANCERY OF NEW JERSEY.

10	Between JAMES RADCLIFFE & SONS COM- PANY, a corporation, and JOHN MAWHINNEY COMPANY, a cor- poration, Complainants, and BOROUGH OF HAWTHORNE in the County of Passaic, a municipal corporation, <i>et als.</i> , Defendants.	}	Stipulation.
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20 It is stipulated that the state of case shall consist of the following:

1. Lien claim of Hawthorne Contracting Co.
2. Answer filed by Hawthorne Contracting Co.
3. Contract between Borough of Hawthorne and Charles Bang:

Pages 2-8 inclusive

30	“ 12 “ 18 “ 37 article 30.
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4. Contract between Charles Bang and Hawthorne Contracting Co.

5. Yellow sheets offered in evidence by Borough Engineer showing extra-excavation.

6. Eighth and Ninth Engineer's Certificates.

7. The following pages of the testimony:

Pages 147-180 inclusive

40	“ 186-191 “ “ 209-248 “
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Stipulation.

8. Master's report.
9. Exceptions filed.
10. Court's opinion.
11. Order modifying master's report.
12. Petition of Appeal.
13. Notice of Appeal.
14. Summary of facts as set forth above. 10

Attorney for James Radcliffe & Sons Co.

Attorney of John Mawhinney Company.

Attorney for Charles E. Knoble, Jr.
and Walter Knoble, trading as
Hawthorne Contracting Co. 20

Attorneys for Lord & Burnham Company.

Attorney for Giannone Electric Co. Inc.

Attorney for Dalzell Trucking Co. 30

Attorney for William W. Heyns.

Attorney for John Braen and Abram
Braen, trading as Samuel Braen's Sons.

Attorneys for Alliance Lumber Corporation. 40

Stipulation.

Attorney for C. Ladlow & Son.

Attorneys for Igoe Bros. Inc.

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Attorney for Jesse J. Watts.

Attorney for Joe Cortese.

Attorney for Anthony Korteweg.

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Attorney for C. J. Vanderbeck & Son.

Attorney for Watson-Flagg Engineer-
ing Company, Inc.

Attorney for Charles Bang.

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Notice of Claim.

Filed January 2, 1931.

Notice is hereby given to the Borough of Hawthorne a municipality of New Jersey, located in Passaic County, that Charles E. Knoble, Jr., and Walter Knoble, partners trading as the Hawthorne Contracting Co. who reside on the Goffle Hill Road, in the Borough of Hawthorne, New Jersey, that they have performed labor and supplied materials which have actually been used in the construction and completion of a certain building for the erection and construction of a sewerage disposal plant in the Borough of Hawthorne, Passaic County, New Jersey, made under contract between the said Borough of Hawthorne and Charles Bank contractor, and dated January 20th, 1930. The said labor and materials were respectively performed for and furnished to the said Charles Bank who contracted with the Borough of Hawthorne to erect the said sewerage disposal plant on land bounded on the west by the New York S. & W. Rail Road, north, by the Wagraw Road, and south by the Passaic River, all of which is shown in a certain Map entitled "Proposed Site For the Sewerage Treatment Plant, Hawthorne, N. J., dated October 23rd, 1929, made by H. J. Harder, C. E. and filed in the Office of the Borough of Engineers of Hawthorne, New Jersey. A statement of the labor performed and material furnished, all of which were actually performed and used in the erection and completion of the said contract are as follows:

The work was started on March 25th, 1930, and continued until November 22nd, 1930.

Notice of Claim.

	4,486 cu. yds. excavation at .97 Cu.	
	Yd	\$ 4,351.42
	3,500 cu. yds. fill at .73 cu. yd	2,555.00
	5,743 cu. yds. Filter Mat at 2.50 cu.	
	yd	14,357.50
	104.14 cu. yds. gravel at 2.50 cu. yd	260.35
10	52.07 cu. yds. sand at 1.85 cu. yd	96.32
	100 cu. yds. stone at 2.50 cu. yd	250.00
	400 cu. yds. white stone at 6.00 cu. yd	2,400.00
		\$24,270.59

For Extra Work for Charles Bang.

	1,398 cu. yds. excavation at \$.97 cu. yd	\$1,356.06
	1,398 cu. yds. back fill at .20 cu. yd	279.60
	28½ hrs. hoisting elevator for con-	
	crete at \$4.00 per hr.	114.00
20	22 hrs. shovel on Final Settling	
	Basin at \$6.00 per hr.	132.00
	2 men (45 hours) at 55c. per hr.	22.00
	Truck hire for 2½ days	30.00
		\$1,933.66

	Amount of Bill for work and	
	material on plant	\$26,204.25
	Amount received from Charles	
30	Bang	19,458.54
	Amount due	\$ 6,745.71

The amount of claimant's demand after deducting all credits and offsets is \$6,745.83, together with interest. The moneys became due to claimants on the 22 day of November, 1930, and were due from the said Charles Bang with whom Claimant had a contract, and for whom the materials

Notice of Claim.

were supplied. The said Charles Bang was the contractor with the municipality and claimants had a sub contract with Charles Bang, the contractor.

For the full value of the said labor and materials supplied by the claimants, a lien is claimed upon the moneys under the control of the Borough of Hawthorne, New Jersey due or to grow due on the said contract between the said Borough of Hawthorne and the said Charles Bang.

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CHARLES E. KNOBLE, JR.,
WALTER KNOBLE,
Trading as Hawthorne Contracting Co.

State of New Jersey, {
County of Passaic, {ss.:

20

WE, Charles E. Knoble, Jr., and Walter Knoble partners trading as the Hawthorne Contracting Co., being duly sworn upon our oath according to law depose and say:

We are partners trading as the Hawthorne Construction Co. We have read the foregoing notice of claim and all the matters and things therein stated and alleged are true.

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More particularly is it true that we have performed labor and supplied materials which were actually used upon a certain sewerage disposal plant for the construction of which Charles Bang had a contract with the Borough of Hawthorne, which contract was dated on January 20th, 1930. We both reside on the Goffle Hill Road, Hawthorne, New Jersey, and this work and the materials were actually used in the construction of the work.

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Notice of Claim.

We had a sub contract with the said Charles Bang to cover various items of work we had. A copy of the monies due to us, the work and labor supplied, and also the moneys paid are as follows:

10	4,486 cu. yds. excavation at .97 Cu.	
	Yd	\$ 4,351.42
	3,500 cu. yds. fill at .73 cu. yd	2,555.00
	5,743 cu. yds. Filter Mat at 2.50 cu.	
	yd	14,357.50
	104.14 cu. yds. gravel at 2.50 cu. yd	260.35
	52.07 cu. yds. sand at 1.85 cu. yd	96.32
	100 cu. yds. stone at 2.50 cu. yd	250.00
	400 cu. yds. white stone at 6.00 cu. yd	2,400.00
20		\$24,270.59

For Extra Work for Charles Bang.

	1,398 cu. yds. excavation at \$.97 cu. yd	\$1,356.06
	1,398 cu. yds. back fill at .20 cu. yd	279.60
	28½ hrs. hoisting elevator for concrete at \$4.00 per hr.	114.00
	22 hrs. shovel on Final Settling Basin at \$6.00 per hr.	132.00
30	2 men (45 hours) at 55c. per hr.	22.00
	Truck hire for 2½ days	30.00
		\$1,933.66

	Amount of Bill for work and material on plant	\$26,204.25
	Amount received from Charles Bang	19,458.54
40	Amount due	\$ 6,745.71

Notice of Claim.

There is now due to us after deducting all past credits and offsets the sum of \$6,745.71 with interest. We claim a lien upon the monies in the control of the Borough of Hawthorne due and to grow due on the said moneys from the Borough of Hawthorne and the said Charles Bang.

CHARLES E. KNOBLE, JR. 10
WALTER KNOBLE.

Subscribed and sworn to before me
this 31 day of December, 1930.

Phoebe E. Ward,
Notary Public
of N. J.

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Answer of Charles E. Knoble, Jr., and Walter Knoble, trading as Hawthorne Contracting Co.

Filed January 12, 1931.

IN CHANCERY OF NEW JERSEY.

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Between

JAMES RADCLIFFE & SONS COMPANY, a corporation, and JOHN MAWHINNEY COMPANY, a corporation,

Complainants,

and

BOROUGH OF HAWTHORNE in the County of Passaic, a municipal corporation, *et als.*,

20

Defendants.

Answer.

Defendants, Charles E. Knoble, Jr., and Walter Knoble, trading as Hawthorne Contracting Co. aver:

1. It admits paragraph 1, except that it avers the said contract was made by the Borough of Hawthorne with Charles Bang.

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2. Defendant has no knowledge as to paragraphs 2, 3, 4, 5, 6, 7, 8 and 9.

3. Defendant admits that the said work of the contractor Charles Bang has not been completed, nor has it been accepted by the Borough of Hawthorne, or by the said engineers of the Borough of Hawthorne.

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4. Defendant has no knowledge as to the claim filed by other sub contractor, but avers that they have prior to and again on December 31st, 1930, filed a notice of claim with the Clerk of the Bor-

Answer.

ough, by setting forth the monies due to them. A copy of said notice of claim is herewith attached.

5. Defendant has no knowledge as to paragraph 11.

FIRST SPECIAL DEFENSE.

Defendant avers that they had a sub contract with Charles Bang, who had a general contract for the construction of a sewerage treatment plant at Hawthorne, New Jersey. Defendant performed their work between March 25th, 1930 and November 22nd, 1930, inclusive. There is a balance due to the defendant in the sum of \$6,745.71, together with interest from November 22nd, 1930. Defendants have prior and again on December 31st, 1930, served a notice of their claim upon the Clerk of the Borough of Hawthorne, a copy of which is as follows:

"NOTICE OF CLAIM"

Notice is hereby given to the Borough of Hawthorne, a municipality of New Jersey, located in Passaic County, that Charles E. Knoble, Jr., and Walter Knoble, partners trading as the Hawthorne Contracting Co. who reside on the Goffle Hill Road, in the Borough of Hawthorne, New Jersey, that they have performed labor and supplied materials which have actually been used in the construction and completion of a certain building for the erection and construction of a sewerage disposal plant in the Borough of Hawthorne, Passaic County, New Jersey, made under contract between the said Borough of Hawthorne and Charles Bang, contractor, and dated January 20th, 1930. The said labor and materials were respec-

Answer.

tively performed for and furnished to the said Charles Bang who contracted with the Borough of Hawthorne to erect the said sewerage disposal plant on land bounded on the west by the New York S. & W. Rail Road, north, by the Wagaraw Road, and south by the Passaic River, all of which
 10 is shown in a certain Map entitled "Proposed Site For the Sewerage Treatment Plant, Hawthorne, N. J., dated October 23rd, 1929, made by H. J. Harder, C. E. and filed in the Office of the Borough of Engineers of Hawthorne, New Jersey. A statement of the labor performed and material furnished, all of which were actually performed and used in the erection and completion of the said contract are as follows:

20 The work was started on March 25th, 1930, and continued until November 22nd, 1930.

4,486 cu. yds. excavation at .97 Cu.	
Yd	\$ 4,351.42
3,500 cu. yds. fill at .73 cu. yd	2,555.00
5,743 cu. yds. Filter Mat at 2.50 cu.	
yd	14,357.50
104.14 cu. yds. gravel at 2.50 cu. yd	260.35
52.07 cu. yds. sand at 1.85 cu. yd	96.32
30 100 cu. yds. stone at 2.50 cu. yd	250.00
400 cu. yds. white stone at 6.00 cu. yd	2,400.00
	\$24,270.59

For Extra Work for Charles Bang.

1,398 cu. yds. excavation at \$.97 cu. yd	\$1,356.06
1,398 cu. yds. back fill at .20 cu. yd	279.60
28½ hrs. hoisting elevator for con-	
crete at \$4.00 per hr.	114.00

Answer.

22 hrs. shovel on Final Settling		
Basin at \$6.00 per hr.	132.00	
2 men (45 hours) at 55c. per hr.	22.00	
Truck hire for 21½ days	30.00	
	\$1,933.66	10
Amount of Bill for work and material on plant	\$26,204.25	
Amount received from Charles Bang	19,458.54	
Amount due	\$ 6,745.71	

The amount of claimants demand after deducting all credits and offsets is \$6,745.83, together with interest. The moneys became due to claimants on the 22nd day of November, 1930 and were due from the said Charles Bang with whom claimants had a contract, and for whom the materials were supplied. The said Charles Bang was the contractor with the municipality and claimants had a sub contract with Charles Bang, the contractor.

For the full value of the said labor and materials supplied by the claimants, a lien is claimed upon the moneys under the control of the Borough of Hawthorne, New Jersey, due or to grow due on the said contract between the said Borough of Hawthorne and the said Charles Bang.

CHARLES E. KNOBLE, JR.,
WALTER KNOBLE,
Trading as Hawthorne Contracting Co.

Answer.

State of New Jersey, {
 County of Passaic, {ss.:

We, Charles E. Knoble, Jr., and Walter Knoble, partners trading as the Hawthorne Contracting Co., being duly sworn upon our oath according to law depose and say:

10 We are partners trading as the Hawthorne Contracting Co. We have read the foregoing notice of claim and all the matters and things therein stated and alleged are true.

More particularly is it true that we have performed labor and supplied materials which were actually used upon a certain sewerage disposal plant for the construction of which Charles Bang had a contract with the Borough of Hawthorne, which contract was dated on January 20th, 1930.

20 We both reside on the Goffle Hill Road, Hawthorne, New Jersey, and this work and the materials were actually used in the construction of the work.

We had a sub contract with the said Charles Bang to cover various items of work we had a copy of the monies due to us, the work and labor supplied, and also the moneys paid are as follows:

30	4,486 cu. yds. excavation at .97 Cu.	
	Yd	\$ 4,351.42
	3,500 cu. yds. fill at .73 cu. yd	2,555.00
	5,743 cu. yds. Filter Mat at 2.50 cu.	
	yd	14,357.50
	104.14 cu. yds. gravel at 2.50 cu. yd	260.35
	52.07 cu. yds. sand at 1.85 cu. yd	96.32
	100 cu. yds. stone at 2.50 cu. yd	250.00
	400 cu. yds. white stone at 6.00 cu. yd	2,400.00

40 \$24,270.59

1,398 cu. yds. excavation at \$.97 cu. yd	\$1,356.06	
1,398 cu. yds. back fill at .20 cu. yd	279.60	
281½ hrs. hoisting elevator for concrete at \$4.00 per hr.	114.00	
22 hrs. shovel on Final Settling Basin at \$6.00 per hr.	132.00	10
2 men (45 hours) at 55c. per hr.	22.00	
Truck hire for 2½ days	30.00	
	\$1,933.66	

Amount of Bill for work and material on plant	\$26,204.25	
Amount received from Charles Bang	19,458.54	20

Amount due	\$ 6,745.71
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There is now due to us after deducting all past credits and offsets the sum of \$6,745.71, with interest. We claim a lien upon the monies in the control of the Borough of Hawthorne due and to grow due on the said moneys from the Borough of Hawthorne and the said Charles Bang.

CHARLES E. KNOBLE, JR.
WALTER KNOBLE.

Subscribed and sworn to before me
this 31st day of December, 1930.

Phoebe E. Ward,

Notary Public of

New Jersey.

Answer.

SECOND SPECIAL DEFENSE

Defendant claims a lien upon the money which is or may become due from the Borough of Hawthorne to the said Charles Bang for the work on the said sewerage plant as aforesaid.

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FRANCES HART,
Solicitor of Defendant
Hawthorne Contracting Co.

Exhibit. *He 3*

Charles E. Koble, Jr.

Walter Knoble

Tel. Hawthorne 2861

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HAWTHORNE CONTRACTING CO.

GOFFLE HILL ROAD

Hawthorne, N. J.

RECEIVED BY MR. BANG December 30, 1930.

Copy of Contract Between Charles Bang and
Hawthorne Contracting Co.

Hawthorne Contracting Co.

Goffle Hill Road,

30 Hawthorne, N. J.

Gentlemen: Re: Sewage Treatment Plant.

I hereby accept your estimate of December 9th to furnish the following items at prices given in connection with the above job.

All work is to be done in accordance with plans and specifications and under the supervision of Engineer Harold J. Harder.

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Exhibit.

Item

1. Excavation—3000 cu. yds. at \$.97 cu. yd.
2. Fill—1000 cu. yds. at \$.73 cu. yd.
3. Gravel or Stone—100 cu. yds. at \$2.50 cu. yd.
4. Sand (Washed)—60 cu. yds. at \$1.85 cu. yd.
5. Filter Material—5400 cu. yds. at \$2.50 cu. yd.
30. White Stone—400 cu. yds. at \$6.00 cu. yd. 10
31. Gravel or Stone—100 cu. yds. at \$2.50 cu. yd.

It is understood that you are to do, all pipe trench excavation where you are able to use your machine, and prices to be paid are given under item #1.

Very truly yours,

CHARLES BANG.

CB:IMC

20

Exhibit.

2.

INSTRUCTIONS TO BIDDERS.

Each bidder must state in his proposal his full name and residence and the names and residences of all persons interested with him; if no other persons be interested with him, he must distinctly state the fact. He must also declare that his proposal is made without any connection, directly or indirectly, with any other bidder for the work particularly mentioned in his proposal; that it is in all respects fair and without fraud or collusion with any person whomsoever; and that no person acting for, or employed by the Borough of Hawthorne, is directly or indirectly interested therein or in the supplies or work to which it relates, or in any portion of the profits thereof. 30

Each bid must be accompanied by a certified 40

Exhibit.

check in the sum of \$5,000.00 drawn upon any reliable national bank or trust company in good and proper standing, to the order of the Borough of Hawthorne, which check shall be forfeited to the Borough of Hawthorne in case the bidder to whom the contract is awarded fails or neglects to enter
10 into the contract prepared by the borough, and furnish a bond satisfactory to the borough within five days after the award of the contract to him.

Each bidder shall submit with his bid a certificate from a surety company, qualified to do business in New Jersey, stating that such surety company will provide the bidder with a bond in an amount equal to one hundred (100) per cent of the contract price bid for the whole work.

20 The contract will not be awarded on any bid submitted unless the bidder shall furnish proof that he has made sufficient provision for the complete payment of any obligation he may incur to any injured employee or his dependents, under the provisions of the Workmen's Compensation Act.

The price must be WRITTEN in the proposal and also stated in FIGURES.

In case any discrepancy exists in this proposal between the written figures and the numerals, the
30 written figures will have the preference.

No permission will be given for the withdrawal of any proposal.

Contractors are cautioned to carefully examine the whole site of the work and note all the physical obstacles to be overcome, and also to read with care every section of the specifications, and study the plans and profiles, before submitting a proposal for the work.

40 Upon the award of the contract the successful

Exhibit.

bidder shall furnish a bond in an amount equal to one hundred per cent of the contract price bid for the whole work which shall conform to the requirements of Chapter 75 of the Laws of 1918.

The Borough Commissioners reserve the right to waive any immaterial informality in any pro-

10

2. continued.

posal and to reject any or all proposals if deemed to the interest of the Borough to do so.

3.

Contractors are to deliver their proposals in person, or by an authorized representative, to the Borough Clerk, at a meeting to be held in Lincoln School, Washington Avenue, at 8 P. M., December 11, 1929.

20

The Engineers estimate of work and materials, by which the proposals will be compared, is as follows, to wit:

Item	Description	Estimated Quantity	Unit
1.	Excavation	3,000	cu. yards
2.	Fill	1,000	cu. yards
3.	Gravel or Stone	100	cu. yards
4.	Sand	60	cu. yards
5.	Filter Material	5,400	cu. yards
6.	Concrete Class A		
	Alternate A	1,200	cu. yards
	Alternate B	1,300	cu. yards
7.	Concrete Class B	10	cu. yards
8.	Steel Reinforcement	100,000	pounds
9.	Vitrified Pipe 6 in.	300	linear feet
10.	Vitrified Pipe 8 in.	50	linear feet

30

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Exhibit.

Item	Description	Estimated Quantity	Unit
	11. Vitrified Pipe 10 in.	50	linear feet
	12. Vitrified Pipe 12 in.	50	linear feet
	13. Vitrified Pipe 18 in.	50	linear feet
	14. Cast Iron Pipe, B. & S.	65	tons
	15. Cast Iron Pipe, Flexible Joint	5	tons
10	16. Cast Iron Pipe, Specials	25	tons
	17. Gate Valves 2-6 in; 2-8 in.		each
	18. Miscellaneous Steel	5,000	pounds
	19. Structural Steel	10,000	pounds
	20. Dosing Siphons	2	each
	21. Sluice Gates 2-12 inch		each
	22. Drain Tile—4 inch	250	linear feet
	23. Spray Nozzles	280	each
	24. Plug Valves—6 inch	2	each
20	25. (a) Sludge Bed Superstructure	1	Lump sum
	(b) Sprinkling Filter Super- structure	1	Lump sum
	26. Channel Tile	22,000	Linear feet
	27. Recording Gage	1	each
	28. Weir	1	each
	29. Lumber	2	M. ft. B. M.
	30. White Stone Paths and Embankments	400	cu. yards
30	31. Gravel or stone roads	100	cu. yards
	32. Water Pipe and connections		Lump sum
	33. Mechanical Bar Screen	1	Lump sum
	34. Primary Settling Basin Mechanism		
	Alternate A—Clarifier	1	Lump sum
	Alternate B— Scraper	1	Lump sum

The above estimated quantities are approximate, and the Borough Commissioners reserves the right to increase or diminish the same as may be necessary in the judgement of the Engineer.

Exhibit.

The bidder must state the unit price for each separate estimated quantity or work hereinabove mentioned, by which bids will be compared. The proposal must cover the entire work and no partial bids will be received.

4.

10

The attention of Contractors is particularly called to the fact that the Borough of Hawthorne reserves the right to order changes in the size and location of any of the units of the plant and in any of the quantities that may be affected by such changes or that may be affected by altering the design of any portion as shown on the original plans.

Each bidder must bid on both alternates and the Borough Commissioners reserves the right to select whichever of the two alternates that it may deem to be best for the interests of the Borough of Hawthorne, regardless of which of the two is higher.

20

THE BOROUGH OF HAWTHORNE,
John A. Shea,
Borough Clerk.

5.

PROPOSAL

30

To the Borough Commissioners of the Borough of Hawthorne in the State of New Jersey:

In conformity with the foregoing "Instructions," We the
residing at _____ do
hereby submit the following Proposal for doing all
the work and furnishing all the materials for the
construction of a sedimentation tank, dosing
siphons, sprinkling filter, secondary sedimentation

40

Exhibit.

basin, digestion tank and sludge bed with necessary appurtenances. And do hereby declare that the only person interested in this proposal, and that no other person has any interest herein, or in the contract proposed to be taken; that this proposal is made without any
 10 connection, directly or indirectly, with any other person or persons making proposals for the same work, and is in all respects fair, and without fraud or collusion with any person whomsoever.

And further declare that no person acting for, or employed by, the Borough of Hawthorne, is directly or indirectly interested in this proposal, or in the supplies of work to which it relates, or in any portion of the profits thereof.

20 And further declare that have carefully examined the form of contract, bond, specifications and plans for said work now on file in the Engineer's office, and that will contract to do the work and furnish the materials required for the completion of the said work, in all respects according to the terms of said contract, specifications and plans, and furnish the bond required, for the following prices, to wit:

30 Item 1. For Excavation, the sum of
 dollars (\$) per cu. yd.

Item 2. For Fill, the sum of
 dollars (\$) per cu. yd.

Item 3. For Gravel or Stone, the sum of
 dollars (\$) per cu. yd.

40 Item 4. For Sand, the sum of
 dollars (\$) per cu. yd.

Exhibit.

Item 5. For Filter Material, the sum of
 dollars (\$) per cu. yd.

6.

Item 6. For Concrete—Class A—the sum of.....
 dollars (\$) per cu. yd.

10

Item 7. For Concrete—Class B—the sum of.....
 dollars (\$) per cu. yd.

Item 8. For Steel Reinforcement, the sum
 of
dollars (\$) per pound.

Item 9. For Vitrified Pipe—6 inch—the sum
 of
dollars (\$) per lineal foot.

20

Item 10. For Vitrified Pipe—8 inch—the sum
 of
dollars (\$) per lineal foot.

Item 11. For Vitrified Pipe—10 inch—the sum
 of
dollars (\$) per lineal foot.

30

Item 12. For Vitrified Pipe—12 inch—the sum
 of
dollars (\$) per lineal foot.

Item 13. For Vitrified Pipe 18 inch—the sum
 of
dollars (\$) per lineal foot.

Item 14. For Cast Iron Pipe, B and S, the sum
 of
dollars (\$) per ton.

40

Exhibit.

- Item 15. For Cast Iron Pipe, Flexible Joing, the
sum of
.....dollars (\$)) per ton.
- Item 16. For the Cast Iron Pipe Specials, the
sum of
10dollars (\$)) per ton.
- Item 17. For Gate Valves, 6 inch, the sum
of
.....dollars (\$)) each.
For Gate Valves, 8 inch, the sum of.....
.....dollars (\$)) each.
- Item 18. For Miscellaneous Steel, the sum
of
20dollars (\$)) per pound.
- Item 19. For Structural Steel, the sum of.....
.....dollars (\$)) per pound.
7.
- Item 20. For Dosing Siphons—20 inch—the sum
of
.....dollars (\$)) each.
- 30 Item 21. For Sluice Gates, 12 inch, the sum
of
.....dollars (\$)) each.
- Item 22. For Drain Tile—4 inch—the sum
of
.....dollars (\$)) per lineal foot.
- Item 23. For Spray Nozzles, the sum of.....
40dollars (\$)) each.

Exhibit.

- Item 24. For Plug Valves, 6 inch, the sum
of
.....dollars (\$) each.
- Item 25. (a) For Sludge Bed Superstructure, the
sum of
.....dollars (\$) lump sum. **10**
- Item 26. For Channel Tile, the sum of.....
.....dollars (\$) per lineal foot.
- Item 27. For Recording Gage, the sum of.....
.....dollars (\$) lump sum.
- Item 28. For Weir, the sum of
.....dollars (\$) each. **20**
- Item 29. For Lumber, the sum of
.....dollars (\$) per 1,000 ft. B. M.
- Item 30. For White Stone Paths and Embank-
ments, the sum of
.....dollars (\$) per cu. yd.
- Item 31. For Stone or Gravel for Roads, the sum
of
.....dollars (\$) lump sum. **30**
- Item 32. For Water Pipe and Connection, the sum
of
.....dollars (\$) lump sum.
- 8.
- Item 33. For Mechanical Bar Screen, the sum
of
.....dollars (\$) each. **40**

Exhibit.

Item 34. For Primary Settling Basin Mechanism Alternate A—For Clarifier, the sum of

.....dollars (\$) each.

Alternate B — For Scraper, the sum of

10

.....dollars (\$) each.

The above prices are to include the cost of doing all work and furnishing all other materials required by the contract, specifications and plans.

In no case shall the Contractor be paid for any quantities greater in volume than those given in the Engineer's estimate, unless such greater quantities are ordered by the Engineer in writing, approved by the Commissioner of Streets and Public Improvements, the amount to be paid agreed on before the work is performed, and accepted in writing by the contractor.

20

This proposal is accompanied with a certified check as required by the foregoing "Instruction" as security that the bidder will enter into the contract if this bid is accepted which shall be forfeited as fixed and liquidated damages if the bidder fails or neglects to execute such contract and furnish the bond required.

30

Signature:

Address:

.....
.....
.....

12.

40 upon the delivery of the release hereinafter men-

Exhibit.

tioned. It is expressly understood that such estimates shall only be made when the work progresses as rapidly as may be required by the Engineer, and in accordance with the provisions of this contract.

The prices and amounts to be paid under this contract refer simply to the quantities of work which shall be done, as the final measurements of the work may prove them to be, the monthly estimates exhibited being but approximate; and no claims growing out of misconception of the quantities or kinds of work, or of any errors in the approximate statements of them in the monthly estimates, are to be allowed or considered valid. 10

The Borough shall not be precluded or estopped by any return or certificate made or given by any engineer, inspector, or other officer, agent or appointee of the Borough Commissioners, under or in pursuance of anything in these specifications contained, from at any time showing the true amount and character of the work which shall have been done and materials which shall have been furnished by the Contractor. 20

Payments will be made on certificate of the Engineer, On or about the first of each month as the work progresses the Engineer will issue certificates for payment for ninety per cent of the total amount of the work done during the previous month, and the first of the month following the completion of the work to the satisfaction of the Borough Commissioners and Engineer, a certificate will be issued for the total cost of the work done, less five per cent. hereinafter provided for, and also the payments that were made on account. 30

Exhibit.

10 The contractor will be required to keep in repair the work done under the contract for a period of six (6) months after the date of the final payment, and five per cent of the total amount of the contract will be retained from the final certificate for the purpose of making any repairs that may become necessary during that time, that the contractor neglects or refuses to make.

At the expiration of six months after the date of the final payment, the amount retained will be paid, providing the whole work is in a condition that is satisfactory to the Borough Commissioners and all repairs have been made.

20 If it becomes necessary for the Borough to make repairs after the contractor has been notified, the cost will be deducted from the amount retained, and the balance if any, paid to the Contractor at the expiration of the time that he is required to keep the work in repair.

30 All fees for any patented invention, article or arrangements that may be used upon or in any manner connected with the construction, erection, maintenance of the work, or any part thereof embraced in these specifications, shall be included in the price mentioned in the contract and the Contractor shall protect and hold harmless the Borough against

18.

DETAILED SPECIFICATIONS EXCAVATION

ITEM 1

40 *Work Included.* Under Item 1, the Contractor shall clear and grub as required and shall make the excavations required for the settling tanks, the

Exhibit.

sludge beds, the sprinkling filter, the secondary settling basin, miscellaneous piping, the manholes, and other structures as shown on the drawings or required. Under this item shall also be included the cost of all backfill.

Pipe Trench Excavation. Pipe trench shall have a flat bottom at least two (2) inches below, the outside of the barrel of the pipe. Trenches shall be at least two and one half (2 1-2) feet wide, evenly distributed on both sides of the pipe. 10

Disposal of Excavated Material. Material from the excavation shall be used in grading the grounds around the tanks to the lines and grades indicated by the Engineer. The Engineer shall decide upon the quality and character of the excavated material to be used for backfilling adjacent to the structures. No measurement for payment shall be made for the disposal of this excess material to the lines and grades required, but compensation therefore will be considered as included in the prices bid for the appropriate items. 20

Sheeting and Bracing. The sheeting and bracing for the trenches shall be of sufficient strength to sustain the sides of the excavation and to prevent any movement which could in any way injure the work, and shall be driven to such lines as not to diminish the working space sufficiently to delay the work or reduce the wall thickness. Where ordered in writing, wooden sheeting shall be driven and left in place and paid for under Item 30. 30

Sheeting and bracing not ordered in writing left in place will not be paid for but shall be removed as the excavations are backfilled, and in such a manner as to prevent the caving in of the sides of the excavation. 40

Exhibit.

Measurement and Payment. The volume of excavation to be paid for under Item 1 shall be the number of cubic yards measured in place inside the lines and grades given and within the following limits:

- 10 Trench excavation for cast iron, or vitrified pipes shall be measured to a horizontal line 2 inches below the bottom of the barrel of the pipe and as having a width 18 inches greater than the outside diameter of the barrel of the pipe.

- 20 Excavations for structures, unless otherwise specified shall be measured to the under side of the structure as shown on the drawing or ordered and within vertical lines passing through points 9 inches outside of the limiting lines of the structures.

37.

WHITE STONE PATHS AND EMBANKMENTS

ITEM 30

Under Item 30 the Contractor shall furnish and place white Franklin stone on all paths and embankments and in other places where ordered.

- 30 The embankments shall be brought to within six inches of the lines shown on the plans and the white stone shall be carefully placed over the entire embankments to a depth of six inches. Where paths are to be placed on undisturbed ground, the earth shall be excavated to a depth of six inches and the white stone shall be placed therein. All paths shall be thoroughly compacted and rolled and all embankments shall be carefully graded.

Exhibit.

Water shall be used in suitable amounts to assist in compacting.

The white stone shall be obtained from Franklin, N. J., of the type known as Franklin crystal spar. It shall contain no stones greater than one inch in diameter and shall not contain more than 25% of fine material which will pass through a screen having a clear mesh of $\frac{1}{4}$ inch. 10

The volume to be paid for under this item shall be the number of cubic yards of white stone actually placed and measured inside the lines and grades given and after the material has been rolled or graded.

The price stipulated for this item shall include the preparation of the foundation, the furnishing and placing of the stone and all watering, raking and rolling. 20

Exhibit H. C. 4—Yellow Sheets.

SCHEDULE "B".

HAWTHORNE SEWAGE TREATMENT PLANT.

Notes on Excavation not covered by Specs. or to be paid for by Borough. 30

Sprinkling Filter

Actual max. dimensions 265.33 ft. long x 109.33 ft. wide.

Limit lines per spec. 267 ft. long x 111 ft. wide.

Limit lines of excavation 271.33 ft. long x 117.33 ft. wide. 40

Exhibit.

Cu. yds. difference—(501.66 ft. x 3.4 ft. av. cut)
 and (267 ft. x 5 ft. x 3.4 ft. av. cut) 27
 and 5117 and 4539 — 9656 — 357 cu. yds

 27

 27

10 *Dosing Tank*

Pipe Conns. to Spr. Filter, 2 Trenches 11 ft. x
 3 ft. x 3.5 ft.
 equals 8.5 cu yds.

Digestion Tank

Limit lines per Spec. 35.5 ft. sq.

Limit lines of excavation 40 ft. sq.

Average cut 3.6 ft. around perimeter of Tank

20 Cu. yds. difference 151 ft. x 4.5 ft. x 3.6 ft—

 27

90.5 cu. yds

Primary Settling Basin

Limit lines per Spec. 63.5 ft. long x 28.5 ft. wide
 x 2 ft. deep and 28.5 ft. long x 8.5 ft. wide x 5 ft.
 deep

30 Limit Lines of Excavation 69.5 x 34.5 x 2 and 34.5
 x 14.5 x 5

Cu. yds difference—(196 ft. x 3 ft. x 2) and
 27

(86 ft. x 3 ft. x 5)—91.3 cu. yds

Bar Screen 2 ft. clearance around

77 ft. x 2 ft. x 3 ft. — 17 cu. yds

 27

Exhibit.

Water Main Trench Wagaraw Rd. to Sly. end
Sludge Bed.

941 ft. long less 40 ft. thru Digester Excavation

901 ft. x 3 ft. wide x 4.75 ft. average depth—

901 x 3 x 4.75 — 475.5 cu. yds.

27—

10

Drain Trench Nly. end sludge bed to Underdrain

101 ft. x 3 ft. x 4 ft. — 44.4 cu. yds

27

Final Settling Basin

Limit lines per Spec. 51.25 x 21.75 x 7.25 ft. av.
cut.

Limit lines of excavation 61.25 ft. x 31.75 ft. x 7.25 av. cut. 20

Difference in cu. yds.

166 ft. x 5 ft. x 7.25 ft — 222.8 cu. yds

27

Additional depth excavation of 1 ft.—

61.25 ft. x 31.75 ft. x 1 ft. — 72 cu. yds.

27

30

Outfall Line Trench

70 ft. x 3 ft. x 2.5 ft. deep — 19.4 cu. yds.

27

40

*Exhibit.**Summary.*

	Sprinkling Filter	357.00	cu. yds.
	Dosing Tank	8.5	cu. yds.
	Digestion Tank	90.5	cu. yds.
	Primary Basin	91.3	cu. yds.
	Bar Screen	17.0	cu. yds.
10	Water Main Trench	475.5	cu. yds.
	Drain Trench	44.4	cu. yds.
	Final Basin	222.8	cu. yds.
	Final Basin	72.0	cu. yds.
	Outfall Trench	19.4	cu. yds.
Grand Total		1,398.4	cu. yds.

Exhibit.

20

8th Certificate of Engineer October 22, 1930.
 For Charles Bang, 105 Sylvester Avenue, Hawthorne, N. J.
 For Construction Sewage Treatment Plant, Hawthorne, N. J.

30

	4,486 cu. yds. earth excavation at 1.50	6,729.00
	3,500 cu. yds. fill at .80	2,800.00
	5,743 cu. yds. filter material at 2.75	15,793.25
	1235.7 cu. yds. concrete at 17.05	21,068.68
	104.14 cu. yds. gravel at 2.75	286.38
	52.07 cu. yds. sand at 2.00	104.14
	45 cu. yds. stone in final basin at 2.75	123.75
	132,708 lbs. steel reinforcement at .05 $\frac{1}{4}$	6,967.17
	1,010 lbs. miscellaneous steel at .08	80.80
	1,200 lbs. structural steel at .07	84.00
	33.50 tons C. I specials at 97.50	3,266.25
	91.28 tons C. I. Pipe B & S at 94.00	8,580.32
40	9.43 tons C. I. Pipe Flexible Joint at 150.00	1,414.50

Exhibit.

18,270 lin. ft. channel tile at .28	5,115.60	
156 lin. ft. 18 in. vitrified tile at 3.00	468.00	
132 lin. ft. 12 in. vitrified tile at 2.75	363.00	
367 lin. ft. 6 in. vitrified tile at .80	293.60	
304 lin. ft. 4 in. vitrified tile at .30	91.20	
9,718 feet B. M. Lumber at 150.00	1,457.70	
2 12 in. sluice gates at 200.00	400.00	10
11 8 in. gate valves at 112.00	1,232.00	
5 6 in. gate valves at 100.00	500.00	
2 Dosing Siphons complete at 2,750.00	5,500.00	
1 Sludge bed retaining wall at (cost plus 15%)	443.30	
280 Spray nozzles at 3.30	924.00	
1 recording gauge at 221.00	921.00	
Water pipe and connections	2,800.00	
Water pipe extension and connections (cost plus 15%)	740.00	20
Culvert pipe (cost plus 15%)	106.44	
2 Plug valves at 175.00	350.00	
Sludge bed superstructure complete	5,500.00	
1 Weir at 45.00	45.00	
Mechanical Bar Screen complete	2,250.00	
Primary basin scraper complete	4,900.00	
Piping and connections to Digestion Tank	537.50	
Downes Steel Floating Cover F. O. B. Hawthorne	3,200.00	30
	\$104,736.58	
Less ten per cent retained	10,473.65	
	\$94,262.93	
Less former payments on account	91,382.93	
Amount Due	\$2,880.00	40

Exhibit.

9th Certificate of Engineer. November 12, 1930.

For Charles Bang, 105 Sylvester Avenue, Hawthorne, N. J.

Construction of Sewage Treatment Plant,
Hawthorne.

10	4,486 cu. yds. earth excavation at 1.50	6,729.00
	3,500 cu. yds. fill at .80	2,800.00
	5,743 cu. yds. filter material at 2.75	15,793.25
	1,235.7 cu. yds. concrete at 17.05	21,068.68
	104.14 cu. yds. gravel at 2.75	286.38
	52.07 cu. yds. sand at 2.00	104.14
	45 cu. yds. stone in final basin at 2.75	123.75
	100 cu. yds. stone for roads at 2.75	275.00
	320 cu. yds. white stone paths and embankments at 6.60	2,112.00
20	132,708 lbs. steel reinforcement at .05 $\frac{1}{4}$	6,967.17
	1,010 lbs. miscellaneous steel at .08	80.80
	1,200 structural steel at .07	84.00
	33.50 tons C. I specials at 97.50	3,266.25
	91.28 tons C. I. Pipe B & S at 94.00	8,580.32
	9.43 tons C. I. Pipe Flexible Joint at 150.00	1,414.50
	18,270 lin. ft. channel tile at .28	5,115.60
	156 lin. ft. 18 in. vitrified tile at 3.00	468.00
30	132 lin. ft. 12 in. vitrified tile at 2.75	363.00
	367 lin. ft. 6 in. vitrified tile at .80	293.60
	304 lin. ft. 4 in. vitrified tile at .30	91.20
	9,718 feet B. M. Lumber at 150.00	1,457.70
	2 12 in. sluice gates at 200.00	400.00
	11 8 in. gate valves at 112.00	1,232.00
	5 6 in. gate valves at 100.00	500.00
	2 Dosing Siphons complete at 2,750.00	5,500.00
40	1 Sludge bed retaining wall at (cost plus 15%)	443.30

Exhibit.

280 Spray nozzles at 3.30	924.00	
1 recording gauge at 221.00	221.00	
Water pipe and connections	2,800.00	
Water pipe extension and connections (cost plus 15%)	740.00	
Culvert pipe (cost plus 15%)	106.44	
2 Plug valves at 175.00	350.00	10
Sludge bed superstructure complete	5,500.00	
1 Weir at 45.00	45.00	
Mechanical Bar Screen complete	2,250.00	
Primary basin scraper complete	4,900.00	
Piping and connections to Digestion Tank	537.50	
Downes Steel Floating Cover F. O. B. Hawthorne	3,200.00	
		20
	\$107,123.58	
Less ten per cent retained	10,712.35	
	\$96,411.23	
Less former payments on account	94,262.93	
Amount due	\$ 2,148.30	

9th November 12, 1930

For H. J. Harder, 129 Market Street, Paterson, N.
J.

Engineering construction Sewage
Treatment Plant, Hawthorne.

Five per cent of \$2,148.30 amount of Cer-
tificate No. 2458 issued to Charles Bang \$107.41

Walter Knoble—Direct.

147.

WALTER KNOBLE, a witness produced on behalf of the defendant Hawthorne Contracting Co., being duly sworn according to law, on his oath testified as follows:

Direct-examination by Mr. Lobsenz:

10 Q. Mr. Knoble, are you connected with the Hawthorne Contracting Co.? A. I am.

Q. And did your company have any contract to do work in reference to the sewage disposal plant at Hawthorne? A. Yes.

Q. Did you have it in writing or orally? A. In writing.

Q. Is this the writing that you had? A. Yes.

20

Mr. Lobsenz: I offer it in evidence.

(Contract between Charles Bang and Hawthorne Contracting Co., dated February 27, 1930, is received and marked Exhibited H. C.-3, on behalf of the defendant Hawthorne Contracting Co.)

Q. Did you do any extra work, besides the work set forth in that contract? A. Yes sir.

30 Q. What extra work did you do? A. The extra work I did was as follows:

1398 cu yd. excavation at .97 cu. yd.	\$1,356.06
1398 cu. yd. back fill at .20 cu. yd.	279.60
28½ hrs. hoisting elevator for concrete,	
at \$4.00 per hr.	114.00
22 hrs. shovel on final settling basin at	
\$6.00 per hr.	142.00
2 men (45 hrs.) at .55 per. hr.	22.00
Truck hire for 2½ days	30.00

40

\$1,933.66

Walter Knoble—Direct.

148.

	\$1,933.66	
Amount of bill for work and material on		
plant	26,204.25	
Amount received from Charles Bang ..	19,458.54	
Amount due	\$6,745.71	10

Q. Mr. Knoble, did you do all of the work under the original contract and supply all of the materials? A. Yes.

Q. The white stone, did you supply 400 cubic yards? A. No, that has not been supplied yet.

Q. I mean actually delivered on the job? A. It hasn't all been actually delivered yet.

Q. How much did you actually deliver on the job? A. About 197 cubic yards, I believe.

20

By Mr. Mann: Did you personally deliver it?

A. No, I don't drive the trucks.

Mr. Mann: I object to his testimony, unless he personally delivered it.

By Mr. Lobsenz:

Q. Have you the slips to show the deliveries? A. I have. (Witness produces slips).

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Mr. Mann: I object to the slips going into evidence. There is nothing on the slips to indicate its receipt by Bang or by any of Bang's men. They are self-serving. There is nothing on the slips to show they were actually received on the job.

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Walter Knoble—Direct.

By Mr. Lobsenz:

Q. Are these all the same thing? A. Yes.

Mr. Lobsenz: I offer them all.

Mr. Mann: Same objection.

149.

10 Mr. Wright: My objection is that they are simply slips to the Hawthorne Contracting Co. and they are not connected up at the present time with the job.

Mr. Lobsenz: I withdraw the offer.

Q. Have you been down to the plant to determine as to whether or not that much of the white stone was actually delivered on the job by your company? A. I was there on the job when it was delivered and know it is there.

20 Q. Did you work on this contract and during the extra work were you also there? A. Yes.

Q. Everything was actually done? A. Positively.

Q. Were you personally on the job, supervising it during all of this time? A. I was.

Q. Did you speak to Mr. Bang in reference to this extra work, as to the charge? A. Yes.

Q. And was the price agreed upon? A. It was.

30 Q. And was it agreeable to him to pay the charges you have made for the extras? A. Yes.

Q. And is that a reasonable price for the extras? A. Very reasonable.

Q. In your stop claim you charge for the 400 cubic yards of white stone and you now tell us that you delivered 197 cubic yards, is that correct? A. That is it.

Walter Knoble—Cross.

Q. Why is it that you made the charge for the 400 cubic yards? A. We have contracted for the

150.

400 cubic yards and it is no more than right. We have to pay for it and we have no other use for the stone. Furthermore we were stopped on the job, because there was going to be so many alterations, the stone was being mixed with the dirt and was being used at a loss. It was to be placed after all excavation was done and the ground settled.

10

Q. Is the balance of the stone available and subject to the orders of the Engineer on this work? A. It is.

20

By the Master:

Q. Has the stone been ordered by you from the concern that supplies it to you? A. Yes.

Cross-examination by Mr. Mann:

Q. However, of the 400 cubic yards of white stone, how many yards were not delivered and used on the job? A. The difference between 400 and 197.

30

Q. 203 yards, so that 203 yards never was delivered to the job? A. Not yet.

Q. And the job is completed as far as your work is concerned? A. No.

Mr. Mann: May I withdraw that question, the certificate speaks for itself.

Master: It is a little late now that you have the answer.

40

Walter Knoble—Cross.

Q. You have here 4486 cubic yards of excavation. All that was actually done, was it? A. Yes.

Q. On what part of the work? A. On the job, on the complete job.

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Q. In detail, what parts of the job and how many yards on the various parts? A. 4486 cubic yards was actual work done for Bang for the Borough.

Q. I mean, can you tell us how many yards excavation was done on each different part of the job? A. No.

Q. You did it, did you not? A. Why certainly.

20

Q. How did you arrive at the figures of 4468 cubic yards?

Q. That is the figure that the engineer's certificate calls for. The engineer measures that, not us.

Q. Engineer Harder gave you a certificate to that effect? A. No, I never had any dealings with Mr. Harder or Mr. Hood.

30

Q. From whom did you get the certificates? A. The Borough got the certificate from the engineer.

Q. From whom did you get the certificate? A. I never got a certificate.

Q. How did you arrived at that figure? A. From a copy of the certificate which I had. There are nine certificates and the 9th certificate shows a total excavation of 4486 cubic yards. This is a duplicate certificate.

40

Q. How do you arrive at the 1398 cubic yards of excavation and the like amount of back fill in

Walter Knoble—Cross.

the extras? A. That is the extra. When the engineer gives you your stations he allows you 9 in. on each side as a variation. In other words if this is the pile that is to be dug there is allowed a contractor 9 in. on each side. When he comes to dig this out the contractor sees that if you go over that point say three or four feet, he can save time and labor and also pay for the excavation, why that comes in under the extra yardage. Now in order to prove that, on each unit he has the measurements that were taken by the engineer, by actual measurements. 10

152.

Q. What engineer gave you the 1398 cubic yard figure? A. Mr. Hood.

Q. The 3500 cubic yards of fill you get also from the certificates? A. Yes sir. 20

Q. And the 5,743 cubic yards filter mat., you also obtained from the certificates? A. Yes.

Q. And these were based on figures given by Mr. Harder? A. Yes.

Q. Mr. Knoble, the amount of work that you put into the job and the labor for examining the white stone that was delivered, you personally did see the delivery? A. I certainly did. 30

Q. Did you personally supervise the work in the settling basin? A. The final settling basin?

Q. Yes. A. I was on the job, yes.

Cross-examination by Mr. Weiss:

Q. Mr. Knoble you have a charge for 1398 cubic yards excavation at 97c per cubic yard, is that right? A. Yes.

Q. Is that chargeable to the Borough of Haw- 40

Walter Knoble—Cross.

thorne or to Mr. Bang personally. A. Not to my knowledge, thought Bang ordered it. I don't know but this was extra work, that was done outside the lines given by the engineer.

Q. Was this extra work outside the lines? A. Yes.

10 Q. Don't you know of your own knowledge; that the Borough of Hawthorne is not responsible for any excavation outside of the lines?

Mr. Lobsenz: I object, on the ground it is immaterial.

Master: I think that is a conclusion of the law and is not a proper question. I sustain the objection.

20 Q. Did you see the specifications for this job and for your particular work, Mr. Knoble? A. Yes.

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Mr. Lobsenz: I object to the question on the ground it is immaterial. We have a contract with this man. It is immaterial whether he knows or not. Our contract is with Bang and we insist to be paid for it.

Mr. Weiss: If he has seen the specifications and knows the contents and does work knowing the Borough is not responsible, than it is up to him.

Mr. Zimmerman: This proceeding is against the Borough and not against Mr. Bang.

Master: It is against the fund.

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Walter Knoble—Cross.

Q. And you say you saw these specifications, Mr. Knoble?

Mr. Lobsenz: I object to the question on the ground it is immaterial.

Master: This so-called contract or arrangement between the Hawthorne Contracting Co., and Charles Bang provides that all work is to be done in accordance with the plans and specifications and under the supervision of the engineer. If he has not read them I don't know how he is going to carry out his contract with Charles Bang. 10

Q. Have you read the plans and specifications?

A. Yes. 20

154.

Q. Referring to the extra work, this 1398 cubic yards of excavation at 97c per cubic yards, that includes work or excavation outside the lines, that is true, isn't it? A. That is right.

Q. I refer you to page 18 of the specifications, Exhibit H-29, in the last paragraph it says: "Excavation for structures, unless otherwise specified shall be measured to the underside of the structure as shown on the drawing or ordered and within vertical lines passing through points 9 inches outside of the limiting lines of the structures." Is that right? A. That is right. 30

Q. This excavation under the extra work is outside the structure, isn't it? A. That is right.

Q. And you knew at that time that the Borough was not responsible for the payment of the excavation outside the structure? 40

Walter Knoble—Cross.

Mr. Lobsenz: I object to the question on the ground it is immaterial.

Master: It is the same question that was asked before. I sustain the objection.

Mr. Weiss: I withdraw the question.

10 Q. Referring to another item of extras, which is 28½ hours of hoisting elevator for concrete at \$4 per hour. Was that done under the direction of Mr. Bang? A. Yes.

Q. You also have truck hire for 2½ days \$30. was that under the direction of Mr. Bang? A. Yes sir.

Q. And you received no authority or consent from the Borough Engineer, did you, in reference to those two items? A. No.

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156.

Cross-examination by Mr. Wright:

Q. Mr. Knoble, I call your attention to your contract which is Exhibit H.C.-3 and under item 1, ask you if you didn't contract for 3000 cubic yards of excavation? A. No. you don't contract for those yardages. It is merely an estimated yardage. It may vary.

30

Q. How do you account for the fact that your claim and the extras combined for excavation call for 5885 cubic yards, when the estimate was 3000? A. The 1398 is work that was not estimated by the engineer. That was extra work that was done afterwards, as I explained before, to take care of doing the work in a quicker period of time, that meant a saving of time by expending it some other way.

40

Q. Now under the fill, under item 2 of your con-

Walter Knoble—Cross.

tract, 1000 cubic yards are estimated? A. Yes.

Q. And you supplied a total in fill of 4898 yards according to your claim? A. Of fill?

Q. Yes, that was 3500 cubic yards under your original contract and 1398 under the extra work?

A. The 1398 cubic yards under the extra work was the back fill.

10

Q. You just dug it out and then put it back, is that the idea? A. Yes.

Q. Under item 3 of your contract, it calls for 100 cubic yards of stone or gravel and item 31 calls for 100 cubic yards of gravel or stone, making it 200 yards in all? A. That is right.

157.

Q. Under your claim you supplied 204.14 cubic yards. I don't think we need argue about that. Is that right? A. I supplied that.

20

Q. Under item 3 washed sand. Your contract calls for 30 cubic yards and you supplied 52.07 according to your claim, is that correct? A. If it is on the claim, yes.

Q. Under item 5, your contract calls for 5400 cubic yards of filter material and you supplied 5743 cubic yards, is that right? A. I haven't the claim before me, yes.

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Q. So that in all cases where you supplied either more or less you charged for either more or less? A. Yes.

Q. With the exception of item 30, white stone? A. That is right.

Q. Why didn't you charge for the amount of white stone you supplied instead of 400 cubic yards? A. Because I am obliged to pay for that amount of stone, that 400 yards.

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Walter Knoble—Cross.

Q. Has it actually been delivered to you from your correspondent? A. It is ready to be delivered, we only have it delivered when we are able to put the shovel at work to lift it out of the cars.

Q. Is it in the cars here? A. No, it is at the quarry.

10 Q. And there is no market for that white stone, other than your order? A. No, we never use it.

Q. It can't be sold anywhere else in the world except on your order?

Mr. Lobsenz: I object to that. It is immaterial.

Master: I don't know where you are going to get with that question.

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Mr. Mann: If it was not delivered, it is not lienable at all.

Mr. Wright: I withdraw the question.

Q. Under your price of item 1, 97c per cubic yard for excavation, is that the current price in this section for excavation land such as this was?

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Mr. Lobsenz: I object to the question on the ground it is immaterial, because there is an exact contract for this.

Mr. Wright: We are interested not in the exact contract, but the reasonable market value of these things that were supplied.

Master: Not at all, where we have a contract you can't go on a question of reasonable value, except as to extras. If there was no agreed price, the situation would be different.

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Walter Knoble—Cross.

Mr. Lobsenz: You have a contract wherein the price is fixed at 97c to be paid to the contractor by Mr. Bang, who was to get \$1.50 from the borough. He made 53c on every cubic yard and that certainly cannot be attacked.

Master: I will sustain the objection.

10

Mr. Wright: He contracted for 3000 cubic yards of excavation and under that contract he is entitled to be paid 97c per cu. yard for 300 cubic yards, but he actually excavated 5884 cubic yard and he is not entitled to anything but a reasonable price after the 3000 yards.

(Unrecorded argument between counsel
sel and Master.)

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Master: I understand the witness has testified that it is customary in these cases, and outside of my personal knowledge of years

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of experience in the County, that these quantities are estimated and that it is the custom to estimate the quantities, but the contractor is never paid on the estimated quantity, he is paid on the quantity actually delivered. If they estimate 3000 yards and the job calls for 4000 yards, I don't know of anything that is going to make a difference in the price for the additional 1000 yards and I don't see how, on the other hand, if the estimated quantity is 300 cubic yards, and the contractor only does 2000 cubic yards, he can be allowed a rebate for the market price.

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Mr. Wright: That is perfectly correct, but here we have a case where the engineer's es-

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Walter Knoble—Cross.

10 timate calls for 3000 and he does practically 5900 cubic yards, where the engineer is 100% wrong in the estimate. And we also have a case where the estimate calls for 1000 cubic yards of fill and there has been practically 500 cubic yards of fill, which makes the engineer 400% wrong in the fill. Now, your Honor has had experience with engineers in the county also and he knows that they don't go anywhere from 100% to 400% wrong. As far as the item of the fill is concerned, all he did was pick it up and lay it down and he gets 97c per cubic yard for picking it up and 97c per c. yard for laying it down.

20 Master: That may be all right, but that is what you do when you open up and relay any kind of a trench.

Mr. Wright: I am wrong in one item, he gets 97c for picking it up and 21c for laying it down.

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30 Mr. Zimmerman: I would like to join in the objection as to any extra over and above the amounts that are set forth in Exhibit H. C.-3. As to any quantity beyond that, I also join in the objection. I think that the reasonable value should be shown as to anything over and above what is specifically set forth in that contract.

Master: I didn't understand your question to relate to the extra work. I understood your question to relate to the contract.

40 Mr. Wright: Part of this excavation and part of this fill is under extra work.

Walter Knoble—Cross.

Master: Then you have to separate it. Your questions have all gone to the contract and under the contract these quantities are variable.

By Mr. Wright:

Q. Under your contract, Mr. Knoble, you excavated 4486 cubic yards of fill? A. That is right. 10

Q. Although the estimate is 3000 cubic yards, is that right? A. Yes.

Q. Then you also have for excavation 1398 cubic yards of extra excavation at 97c per cu. yd.? A. Yes.

Q. Is that 97c per yard the current price charged? A. It states in the contract that all extras must be according to the contract.

Q. Was this extra work pipe trench excavation? A. Yes. 20

Q. It was? A. He bid that lump sum.

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Q. But it was pipe trench, it wasn't foundation excavation, or anything like that? A. Part of it was, yes.

Q. What part of it was pipe excavation and what part was the other. Water main trench was 475.5 drain trench was 44.4 out fall trench 19.4. 30

Q. Of that 1396 cubic yards 511.5 was pipe trench? A. Yes.

Q. What represents the remainder of that excavation. A. Exrta on the sprinkling filter amount to 357 cu. yds.

on the dosing tank 8.5 cu. yd.

Digestion tank 90.5 cu. yd.

On the Primary settling basin 91.3 cu. yd. 40

Walter Knoble—Cross.

On the bar screen	17. cu. yd.
Final settling basin	222.8 cu. yd.
Final Settling basin, additional depth 72.	cu. yd.

Q. Then approximately 900 cu. yds. was not pipe trench? A. If your figures are correct, yes.

10 Q. You have practically 1400 cu. yds. 500 was pipe trench? A. Yes.

Q. And approximately 900 was not pipe trench? A. Yes.

Q. What is the customary figure for 900 yards of excavation such as this was—not pipe trench excavation—but what is the customary charge in this vicinity for like property?

20 Mr. Lobsenz: I object to the question, your Honor on this ground. This contract between the parties sets forth an agreement to perform work according to estimate of December 9th and to furnish items at prices given in connection with the above work. In other words, it shows an estimate only and

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30 any additional work that had to be done was to be done under those prices as set forth in the first paragraph. Then it says: "All work is to be done in accordance with the plans and specifications." The plans and specifications to which this contract refers state that the above are estimated quantities and are approximate and may be increased or diminished as may be necessary in the judgment of the engineer. Now then, if that be the case, these extra items do not

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Walter Knoble—Cross.

come under extras, but they come under the original contract, because the original contract provided for an increase or decrease in the quantities.

Mr. Wright: If your Honor please, this contract provides for certain work to be done in accordance with the terms of the specifications, of the original contract. We are not at present taking any exception to the work done under the original contract. There has never been an engineer's certificate produced here for the 1398 cubic yards that I am addressing my questions to at present, nor has the engineer certified that it was done. The written contract provides only for 300 cu. yards of excavation, we have allowed 4486 cu. yd. This extra work was not contracted for and apparently from the terms of this written contract was not contemplated by the parties at the time.

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Mr. Lobsenz: It is a question of law, the writing speaks for itself. It is an estimate, the prices are contained in the estimate and all work done is to be paid at the prices set forth in that estimate.

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Master: I understand that this is so-called extra work, but as extra work it is an extension of the terms of the contract. From a practical point of view, I don't see how this objection can be raised by an intervening creditor. It is an objection that can be raised only by the Borough of Hawthorne, as I see it. If the Objection is sustained and the ultimate decision of the court is that the

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Walter Knoble—Cross.

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price of this extra work is to be at the current rate instead of the contract price and the current rate is lower, you are going to diminish your fund. If it is at a higher rate, it is going to increase your fund and the amount of the increase or lessening of the fund is going to be for the benefit or detriment of this creditor. It is not going to effect any other creditor, as I understand it, because it goes to the establishment of the amount due from the Boro of Hawthorne to the contractor under his contract and the objection can only properly be raised by the Borough of Hawthorne. My decision is not going to effect the standing or the amount that any other claimant is going to get out of the fund. If the Borough of Hawthorne makes this objection under the terms of its contract, the objection is over-ruled.

20

Mr. Weiss: May I make the objection.

30

Master: You may make the objection and under the terms of the contract you are bound to provide this work at the price bid by the contractor and which you are obliged to pay. If you can show me that this work is not an extension of the work contemplated under the contract but entirely new work which was not contemplated under the contract, then I will allow the question.

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(Unrecorded argument between counsel and master.)

Mr. Wright: I withdraw the question.

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*Walter Knoble—Cross.**Cross-examination by Mr. Weiss:*

Q. Under your contract or under your agreement you were to charge so much per cubic yard, is that right? A. Yes.

Q. That included extras also, in other words, for example, if you were to dig 1000 cu. yds. you would charge whatever agreement you had made, is that right? A. Yes. 10

Q. Under the extras you have a charge of 1398 cu. yds. excavation and also the same amount of back fill. You would charge only per cu. yd. is that right? A. That is right.

Q. You also included additional work such as truck hire and shovel. Those items were necessary for your extra work? A. for the completion of the job, yes. 20

Q. And now do you figure out that in this particular work on the extras, you charge those additional items, whereas under the original work or the regular work under the contract you don't charge for hoisting elevator, for shovel, for the two men and truck hire? A. We didn't do any of that work, only for hoisting concrete for Mr. Bang. 30

Q. You needed a shovel on your excavation under the original contract didn't you? A. Yes.

Q. You made no charge for a shovel on your ordinary work, did you? A. No, that was contract price.

Q. And you needed trucks and you needed men on your original work, didn't you? A. Yes.

Q. And you made no charge for that? A. No, that all goes in under the contract price.

Q. Yes and your contract price at that time was 97c per cu. yd. is that right? A. Yes.

10 Q. And on the extras you attempt to charge 97c per cu. yard? A. Yes.

Q. Now why do you make an additional charge for the shovel, for 2 men and for a truck, when the contract price was 97c per cu. yard? A. I think you will find that down in the final settling basin, as we got down to our called for depth under this bid, we struck water and mud and we had to go down to a rock foundation for the footings. We were down there in a bunch of mud and muck, nobody could figure how much it would cost to
20 dig that out.

Q. Would you have had the same obstacle in the work that you made your estimate on? A. No.

Q. Why not? A. Because this work is way down.

Q. Didn't you have to go down in other excavation work? A. This was the lowest pit that was dug.

30 Q. You might have done against the same trouble on the other work? A. Then it would have been just too bad.

Q. Then you wouldn't have charged for the joist or the shovel, would you? A. I don't think I am getting your point.

Mr. Lobsenz: The hoist and shovel were needed for raising concrete on a different job.

Witness: We dismantled our shovel and laid it aside and used it to hoist his elevator.

Q. I am referring to the shovel on the settling basin. Your chances were the same on the extras as they were on the regular work with reference to the shovel, weren't they? A. No. 10

Q. You might have had the same thing occur on your regular work as on the extra work? A. No, the depth is what counts. You are going below the river bottom.

Q. Mr. Knoble, this extra work was done below the under side of the structure, is that right? A. Yes.

Q. And according to the specifications which you say you read, you couldn't charge the Borough for any work below the under side of the structure, is that right? A. Right. 20

Q. And at the same time you are charging him, according to this claim that you filed, is that right? A. I am charging Mr. Bang, yes.

Q. This claim is against the Borough, isn't it? A. Yes.

Q. And you are attempting to charge the Borough for work that the Borough is not responsible for, is that right, but Mr. Bang personally? A. Yes, that is charged to Mr. Bang. 30

Q. According to this claim you are attempting to charge the Boro for this work? A. We have no bills against the Borough. Our bill isn't against the Borough.

Walter Knoble—Redirect.

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Cross-examination by Mr. Baten:

Q. Was all the work done on the sewage disposal plant? A. Yes.

Q. At the request of Mr. Bang? A. Yes.

10 *Redirect-examination by Mr. Lobsenz:*

Q. Were there any changes made in the contract after the contract was accepted? A. Yes.

Q. In reference to the work that you were supposed to do, were there any changes made by the Borough Engineer? A. Yes.

Q. Alterations? A. Yes.

Q. And did any work have to be done over again. Had any work been done and then you were ordered to excavate again or fill again? A. Yes.

Q. And you got your orders from whom on that? A. From Mr. Bang and his engineer, Mr. Watts.

Q. Was that work done, that extra work or the changes done under the direction of the Borough Engineer? A. Yes.

Q. Mr. Knoble when you gave this estimate of your contract with Mr. Bang, did you look at the estimate given by the Borough on this sewer? A. Yes.

Q. Did your estimates for this work correspond with the estimates on this contract with the Borough, or the estimates of the Borough? A. Yes.

Q. Was the question as to the excavation you were to do and the excavation that Mr. Bang was to be paid for discussed by you and Mr. Bang?

40 Mr. Wright: Objected to, the contract speaks for itself.

Walter Knoble—Redirect.

Mr. Weiss: I object to it for the Borough of Hawthorne. The contract or agreement

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between Mr. Bang and Mr. Knoble would not be binding upon the Borough.

(Unrecorded argument between counsel).

Mr. Alexander: I make a motion that Mr. Bang and his attorney be made to introduce and bring to this court the application upon which the bond was issued.

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(Further unrecorded argument).

Q. Was the question as to the excavation you were to do and the excavation that Mr. Bang was to be paid for discussed by you and Mr. Bang? A. Yes.

Q. Was there any allowance made for the extra digging and excavation that you would have to make for which Bang would not be paid by the Borough? A. Yes.

20

Q. How did you make the allowance? A. He pays us 97c per yard and he charges the Borough \$150. to take care of unforeseen things that may occur, his bond, etc.

Q. Under unforeseen things that may occur, does that include the extra digging that is necessarily done in doing this work? A. Yes.

30

Q. Does Bang save money by having this extra excavation done rather than having the work done exactly within the lines as set forth in the plans? A. Yes.

Q. And how does that save him money? A. That saves it and allows his men more freedom to work. They can work on both sides of the form, saves putting in sheathing such as the final

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Walter Knoble—Redirect.

settling basin would have required had he not dug that extra width.

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10 Q. Did you have such a large difference in the price you charged to Bang and the price he charged to the Borough in the other items? A. No.

Mr. Mann: I object to this line of testimony on the ground that the contract speaks for itself. The contracts are both on record, they have been produced in evidence and this examination is simply a waste of time.

20 Q. For the fill you charged Mr. Bang 70c per cubic yard? A. 73c.

Q. And Mr. Bang charged the Borough what? A. 80c per cu. yard.

Q. For the gravel we charged Mr. Bang \$2.50 per cu. yd. and he charged the Borough \$2.75? A. Yes.

Q. For the sand we charged Mr. Bang \$1.85 and he charged the Borough \$2.00? A. Yes.

30 Q. For the filter material we charged Mr. Bang \$2.50 per cubic yard and he charged the Borough \$2.75? A. Yes.

Q. For the white stone we charged Mr. Bang \$6.00 per cubic yard and he charged the Borough \$6.60? A. Yes.

Q. You say the prices and charges you have made on this claim represent and are according to the Borough Engineer's estimate and certificates? A. Yes.

40

*Walter Knoble—Redirect.**By Mr. Wright:*

Q. How do you know what Mr. Bang charged the Borough on these unit prices by the certificate?

A. Take the last certificate, the 9th certificate, which has everything on it; this is Bang's prices on the different items, and the contract will show you our price.

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Mr. Mann: I want to move to strike from the record this witness' testimony as to the amount of yards dug out and refilled, on the ground that his testimony is based on what he shows to be a copy of the engineer's certificate. He personally cannot testify as to the actual amount of yardage taken out. He has based his testimony merely on the fact that he has before him what he says is a copy of the engineer's certificate, therefore his testimony is based entirely on hearsay and improper evidence, and I move that it be stricken from the evidence.

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Mr. Lobsenz: I am connecting it up. He was there on the job and he is giving his testimony. I can only produce one witness at a time. I am having the engineer here and I will connect it up.

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Master: My understanding of the testimony up to this time is that he got the yardage from the engineer's certificate. Now if you want to dispute the engineer's certificate go to it, but I will not strike out any testimony that has already been taken.

Mr. Mann: I objected at the outset of this man's testimony, on the ground that his evi-

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John W. Hood—Direct.

10 dence was based on hearsay. I want to enter an objection now to the entire line. You will recall that you asked me to bring it out in cross-examination, instead of interjecting an objection as we went long. Now, I want to enter an objection to all his testimony on the ground that it is based entirely upon hearsay of his drivers, his employees and copies of the engineer's certificates.

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20 Mr. Mann: I objected at the outset of this man's testimony, on the ground that his evidence was based on hearsay. I want to enter an objection now to the entire line. You will recall that you asked me to bring it out in cross-examination, instead of interjecting an objection as we went along. Now, I want to enter an objection to all his testimony on the ground that it is based entirely upon hearsay of his drivers, his employees and copies of the engineer's certificates.

30 JOHN W. HOOD, a witness produced on behalf of the defendant Hawthorne Contracting Co., recalled, having been previously sworn testified as follows:

Direct-examination by Mr. Lobsenz:

Q. Hr. Hood, have you been personally on this sewage job? A. Yes.

40 Q. And did you make estimates and figure out

John W. Hood—Direct.

the work that the Hawthorne Contracting Co., has done? A. Yes.

Q. And did you make proper measurements of everything that they have done? A. Partly and partly through another assistant of Mr. Harder's, but I supervised the whole work.

Q. So it was all done under your own work and supervision? A. Yes. 10

Q. Did you figure out all of the various items, everything that they have done? A. Yes.

Q. You can refer to any slips you desire. Will you just tell us how much excavation they have

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done? A. It has been submitted in evidence, it is on the engineer's certificate, 4486 cubic yards of excavation. 20

Q. That is without these other additional items which have been spoken of? A. Yes.

Q. Which I shall refer to later? A. Yes.

Q. How much fill? A. 3500 cubic yards of fill.

Q. Is that also without these items on the yellow sheets? A. It is.

Q. So that all these items will be without these items on the yellow sheets? A. Yes.

(Counsel is referring to two yellow sheets, headed "Notes on excavation not covered by specifications or to be paid for by Borough," which are offered in evidence later in the testimony and marked Exhibit H. C.-4.) 30

Q. How much filter material? A. 5743 cubic yards.

Q. How much gravel? A. 104.14 cubic yards.

Q. How much sand? A. 52.07 cubic yards. 40

John W. Hood—Direct.

Q. How much stone? A. 100 cubic yards of stone for roads.

Q. Is that the same thing as gravel? A. Yes.

Q. How many cubic yards of white stone? A. 320 cubic yards white stone.

Q. Is that your estimate? A. It is.

10 Q. Do you know anything about the hoisting of the elevator for concrete? A. No.

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Q. Do you know whether or not they did use an elevator for the hoisting of concrete? Did you actually see it done on the job? A. I did not.

20 Q. Do you know anything about using the shovel on the final settling basin? A. Yes. They used the shovel on the final settling basin to make some additional depth excavating.

Q. Why was that necessary? A. Because a proper bottom could not be found at the level prescribed by the engineer.

Q. Why is a proper bottom necessary? A. The tank is a heavy unit; it is filled with water when in operation and it requires a solid foundation to set on, otherwise it will break up.

30 Q. Do you know anything about the truck that was hired for $2\frac{1}{2}$ days and 2 men? A. No. I have papers submitted, they are on file in the office, I believe, which bear out these figures.

Q. Was there other work done besides these items that you have referred to? A. Yes, there was.

40 Q. What other work was one besides the items you have mentioned? Give it to us in summary form, may be it would be better. A. Mr. Bang's contract with the Borough provides that he shall

John W. Hood—Direct.

be paid by the Borough for the quantities 9 in. outside of the maximum dimensions of the unit. This other work as you term it is the work done outside of that 9 in. dimension in all cases.

Q. What work is that? A. Sprinkling filter,

173 10

dosing tank, digestion tank, primary settling basin, bar screen, water main trench, drain trench, final settling basin and outfall trench.

Q. That is exact yardage of excavation, is it?
A. Yes.

Q. How much is it? A. 1398.4 cubic yards.

Q. Was that back fill necessary with that work?
A. Yes that was.

Q. How much? A. I suppose it would be approximately the same quantity. I don't take any stock of the back fill. 20

Q. In other words if you lift it out, you have to put it back? A. Not necessarily. You may lift out a greater amount of excavation.

Q. I mean on this job was it put back? A. Well, some of it would go back.

Q. What other extra work was there that the Hawthorne Contracting Company has done? A. 30
I am not aware of any outside of those measurements.

Q. Does that include everything on the yellow sheet? A. Yes.

Q. Whose measurements are those? A. Those are my measurements; they were made in the course of my work for the borough.

Q. Are those sheets in your hand writing? A. Yes sir.

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John W. Hood—Direct.

Mr. Lobsenz: I offer the yellow sheets in evidence.

(Two yellow sheets headed "Hawthorne Sewage Treatment plant. Notes on excavation not covered by specs. or to be paid for by Borough," marked Exhibit H.C.-4).

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Q. Mr. Hood, did you actually measure the quantity of white stone supplied, or is that just an estimate? A. It is only an estimate.

Q. The other work were exact measurements? A. Up to the 8th certificate.

20 Q. These items that you have given us, without the yellow sheets, show the total amount of work that this man has done according to the Borough specifications, for which he should be paid, is that correct? A. Yes.

Q. Now these yellow sheets represent the extra digging? A. Yes, outside the lines.

Q. Why was this extra digging done outside the lines and why was it necessary? A. It was necessary in order, I suppose, to facilitate Mr. Bang's work.

30 Q. Does it facilitate the work? A. It permits his men to go faster on the job, it permits them to have access to the building of the forms.

Q. Is that the usual procedure, to dig more than you actually need in order to get greater facilities? A. Yes.

Q. This extra digging, did that save money also, because no sheathing was necessary?

Mrs. Weiss: Saved money for whom?

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Mr. Lobsenz: For Mr. Bang.

John W. Hood—Direct.

A. I personally would say that it saved him money, but it was an error in judgment on his part in ordering the work done.

Q. It saves the sheating? A. Yes.

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Q. It also gives the men more room to work in?

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A. Yes.

Q. Do you happen to know of your own knowledge whether, when a man takes a job to be paid for extra amount of excavation only, that he will subcontract with knowledge that extra amount of digging will have to be done?

Mr. Zimmerman: I think that is objectionable.

Master: I overrule the question.

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Mr. Lobsenz: I withdraw it.

Cross-examination by Mr. Weiss:

Q. Mr. Hood, the items mentioned on these yellow sheets, marked Exhibit H. C.-4, do these include extra work? A. No, these include extra digging, not extra work on the part of the Borough, extra digging, to enable the contractor to execute the work.

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Q. You say to enable the contractor to do extra work? A. To execute his work.

Q. Is the borough responsible for this extra work?

Mr. Lobsenz: I object to that question.

Mr. Weiss: I withdraw the question.

Q. Is the Borough obliged to pay for this extra work? Referring to the yellow sheets, Exhibit H. C.-4). A. No.

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John W. Hood—Cross.

Q. Looking at the claim of the Hawthorne Contracting Co., referring to extra work, is any of this extra work to be paid by the Borough of Hawthorne? A. No. There was an argument about the item for the shovel and 2 men's labor in

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the final settling basin, but Mr. Harder would not agree to it, because the specifications provided that excavation would be paid for only to the bottom lines of the unit as established by the plans.

Q. On these items, amounting to \$1933.66, which is the total amount for the extra work, the only person responsible for that is Mr. Bang personally, is that right? A. Yes.

20

Q. The Borough of Hawthorne is not? A. No. *By the Master:*

Q. Take all the extra work for which the Borough of Hawthorne is responsible to Mr. Bang, how much is that? A. Will you ask that question again?

Q. The amount of money due from the Borough of Hawthorne to Mr. Bang for the extra work, have you calculated it? A. No.

30

Q. Can you calculate it? A. Not without Mr. Bang. You will recall that at one of the previous hearings I attempted to get Mr. Bang and Mr. Mann to fix a certain date on which Mr. Bang would appear at Mr. Harder's office. I was unable to get him to Mr. Harder's office, and, of course, the work to which you refer has never been done yet.

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By Mr. Mann: That has not been done because—such items for example as Knoble's

John W. Hood—Cross.

claim for extra, if they are allowed naturally the Borough pays them.

Mr. Weiss: I object to that statment.

Mr. Mann: And if these extras are not allowed, it is that much less that the Borough would have to pay and because of the de-

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termination of that matter Bang held back.

Mr. Weiss: I think that is an improper statement to make.

Master: My thought is this—The Hawthorne Contracting Co. and Bang did extra work for which the Borough of Hawthorne is responsible. Now the Hawthorne Contracting Company also did work for Bang that the Borough of Hawthorne is not responsible for, but I claim that the fund is responsible for it. Now then, if I close this hearing and determine how much is coming from the Borough to Bang and don't include this extra work, everybody is going to lose. Now the important thing, as I see it, is for the creditors to get the fund. I can understand why Bang hasn't any more interest in this fund, but the creditors have an interest.

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By Mr. Lobsenz:

Q. After the original plans and specifications were made on this sewage plant, were there any changes made after that? A. There were.

Q. About how many changes, just the number of changes?

Q. There were two main changes.

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John W. Hood—Cross.

Q. And how many sub-changes? A. I wouldn't be prepared to say how many sub-changes.

Q. About how many? A. I wouldn't even make a crack at it.

Q. Were there several small changes besides the two main changes? A. Yes, a number of minor changes.

Q. Did that require extra work and extra material? A. It did.

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Q. Have you given us an estimate as to the cost of this extra material and work? A. It is evident in the engineer's certificates.

Q. Have you made the final compilation? A. We have not in respect to some of the items.

Q. How soon can you get together to let us know what is the total amount of money due from the Borough to Mr. Bang, and include not alone the original contract and specifications, but also all of the changes made? A. If his Honor will admit the different claims which have been heard by him, we will be glad to take those claims as he approves them, include them and compile the final certificate.

By Mr. Lobsenz:

Q. Have you the plans and specifications showing the various changes made? A. We have the revised plans showing the changes made. The specifications have not been changed, but as I said before the last payment on account shows, by reason of the quantities the changes which actually were incurred in the building of the plant, by the amount in which they exceed the estimated quantities that appear in the specifications.

John W. Hood—Cross.

Q. Will you produce whatever papers you have showing the additions and changes made on this work? A. I can produce the plans this afternoon.

By Mr. Wise:

Q. There is still some work to be done that Mr. Bang has not performed, such as mentioned in

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letter addressed to Mr. Bang which is marked in evidence, which letter is dated April 21, 1931, is that right? A. Yes.

Q. Mr. Bang has performed some of that work, has he not? A. Yes.

Q. Have you received or secured an estimate of what it will cost the Borough to complete this additional work, so that the Hawthorne Sewage Treatment plant may be in complete operation?

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A. I think that is useless for this reason, when we prepare the final certificate we pay only for 95% of the work done, the remaining 5% covers all that. We don't have to make estimates to cover work he is still to do or work he is forced to do.

Master: That may be all right, but under circumstances of this kind, all the money comes into this fund, less what it will cost the Borough to finish the job.

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Cross-examination by Mr. Baten:

Q. In reference to this claim which states 400 cubic yards of white stone, do you know whether or not the entire 400 cubic yards were used? A. They are not.

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John W. Hood—Cross.

Q. Do you know how many yards were actually used? A. I heard this morning 197 cubic yards but I estimated the job, from looking at it, which I am required to do, and I made a poor estimate of 320 cubic yards.

Q. All you know is that 197 cubic yards was
10 180

actually used? A. May I explain that on the first of each month we are supposed to make an approximate estimate by looking at the job and I estimated 320 cubic yards, but there are not 320 cubic yards there, so the Borough has that much money coming off the fund before it is paid out; but there is still work to be done.

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Noon Recess.

2 P. M.

JOHN W. HOOD, recalled, having been previously sworn on his oath testified as follows:

Direct-examination by Mr. Lobsenz:

30 Q. Mr. Hood have you the plans setting forth the original disposal plant and the changes made?
A. I have.

(Plans offered in evidence and marked Exhibit H. C.-5 on behalf of the defendant, Hawthorne Contracting Co.)

Q. Do they show all of the changes or just the larger changes? A. They show the large changes

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John W. Hood—Recalled—Direct.

and a number of the minor changes in yellow crayon and red ink.

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APPEARANCES:

- JAMES N. WRIGHT, ESQ.,
Solicitor of the complaintant James
Radcliffe & Sons Company. 10
- SAMUEL BATEN, ESQ.,
Solicitor of the Complainant, John
Mawhinney Company.
- I. ARTHUR WEISS, ESQ.,
Solicitor of the defendant, Lord &
Burnham Company.
- THOMAS L. ZIMMERMAN, ESQ.,
Solicitor of the defendant Lord & Burn-
ham Company. 20
- MISS FRANCES HART and
MEYER LOBSENZ, ESQ.,
Solicitors of the defendants, Charles E.
Knoble, Jr. and Walter Knoble, trad-
ing as Hawthorne Contracting Co.

JOHN W. HOOD, recalled, having been previ-
ously sworn on his oath testified as follows: 30

Direct-examination by Mr. Weiss:

Q. Mr. Hood, you have made a tentative state-
ment of the amount in the hands of the Borough
due to the contractor, Charles Bang, on the Haw-
thorne sewage disposal plant? A. Yes.

Q. Does that statement that you have before you
include the extras, particularly the claim of James
Radcliffe & Sons, John Mawhinney Co., Dalzell 40

John W. Hood—Recalled—Direct.

Trucking Co. and C. J. Vanderbeck? A. It does.

Q. And those are all the claims for extras? A. No.

Q. And those are all the claims for extras against Charles Bang or for work done up to the present time for the Borough of Hawthorne? A. It is all the claims that have been filed. Does
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this statement also include an estimated amount to complete the repairs to the plant? A. Just tell us what the amount is and how you arrived at it and any changes that might be necessary because of future information? A. In explanation I might state that at the last hearing I was instructed to prepare a final certificate, but for two reasons, I haven't been able to prepare a final certificate. One is that the repairs to the plant have not been completed due to materials not having come forward yet and the men have been laid off who were performing the repair work until such time as the materials come from the Chapman Valve Company in New York. The second reason is that Mr. Bang called at Mr. Harder's office yesterday afternoon at four o'clock and wanted to thrash over about upwards of twenty different items, some of which we will be prepared to admit and some of which we will not be prepared to admit. If your Honor wishes to give him a further opportunity to keep a date in Mr. Harder's office and continue the matter of the final certificate until such time as he can keep a date, then we will be glad to do so.
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By Mr. Wright:

Q. Would these items that he wants to thrash
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John W. Hood—Recalled—Direct.

over with you increase the fund to any appreciable degree?

Mr. Weiss: I object to the question. My objection to the question is that these items mentioned by Mr. Hood could not be allowed unless the claim was filed.

Mr. Wright: No. The borough must pay the entire amount due on this sewage plant, whether the contractor or subcontractor has

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filed his claim or not. In other words, my claim is, if Radcliffe, my client, has not filed a claim, it would not relieve the Borough from paying that money into this fund, because the Borough is liable for all work done.

Mr. Weiss: If there was no claim filed or nothing to give the engineer of the Borough any knowledge of that particular work, how could the Borough pay.

Mr. Wright: The engineer can estimate what that work should have cost at a reasonable price from a subcontractor. He knows the work has been done and it is up to him to include not only all claims filed, as he has testified, but all work that has been done on this job by any contractor for which the Borough is liable to pay.

Master: The engineer should include in his final estimate all work that has been done under this contract and all extra work. If it is impossible to ascertain the exact cost of this work, he is to estimate the cost and include it in the estimate. As to the sec-

John W. Hood—Recalled—Direct.

10 ond proposition of the engineer, I would say that, having given Mr. Bang and the engineer an opportunity to get together and settle these various items and it is rather apparent that the contractor is reluctant to do so, or would prefer to delay any agreement with the engineer, that in order to dispose of the matter promptly and effectively, the disputes between the contractor and the engineer, if any, are to be settled and determined by me at this hearing or an adjourned hearing. Now, Mr. Hood go on with your figures.

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	A. Total cost of plant as per 9th certificate	\$107,123.58
20	Overestimated:	
	131 cu. yds. white stone	
	at \$6.60	\$864.60
	147 tons flexible joining	
	pipe at \$150	220.50

Q. In whose claim was the overestimate made?

A. On the white stone placed by the Hawthorne Contracting Co. At the last hearing I received three receipted accounts from the special master's hands relating to white stone, which told me that actually there had been placed on the plant 131 yards less than what I estimated for the 9th certificate on account 1.47 tons of flexible joint pipe at \$150., \$220.50, that is corrected because of a statement received from the Flexible Joint Pipe Co. in New York, who sold a quantity of pipe to the contractor and the total over estimate included in the 9th certificate on account is the sum of \$1085.10.

40 Deducting the total over estimate of \$1085.10 from

John W. Hood—Recalled—Direct.

the total cost of the plant per 9th certificate, we arrive at a figure of \$10,038.48. Going forward to claims which are yet to be placed on certificate, we have:

Radcliffe—miscellaneous ironwork	\$277.75	
Mawhinney—roofing and flashings	225.00	
Dalzell—rigging and trucking	1,300.00	10
Vanderbeck—acetlyene welding	399.50	
A total cost of	2,202.35	
Plus 15% which is provided for on		
all extras	330.35	
	2,532.70	
	190	20
	\$106,038.48	
	2,532.70	
	108,571.18	
Less former payments on account	96,411.23	
Leaves a balance of	12,159.95	
Less amount estimated to complete		
repairs to plant	300.00	30
Amount actually due on this tenta-		
tive statement	\$ 11,859.95	

However, there are some claims of the contractor which should be allowed and if he will keep an appointment, properly made over this table here before your Honor, Mr. Harder's Office will be glad to keep that appointment and iron matters out and include them in the final certificate.

John W. Hood—Recalled—Direct.

There is also being made at the present time, in addition to the repairs, some uncompleted work, which has come to light. They are only minor details, but they are not deductible from Mr. Bang; they will be added to the amount due him; in other words they will be added to the fund when they are completed probably one week hence. I think that completes all the information that I am required to give you.

Mr. Weiss: I offer this statement in evidence.

(Tentative statement of Cost in lien of certificate, dated June 3, 1931, is marked Exhibit H-30 on behalf of the defendant, Borough of Hawthorne).

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CHARLES BANG, recalled for examination in regard to the claim of the Hawthorne Contracting Co., having been previously sworn on his oath testified as follows:

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Mr. Lobsenz: I object on the ground that the case as far as the Hawthorne Contracting Co. is concerned has been entirely closed.

Master: I understand it has been closed as far as the Hawthorne Contracting Co., but has not been closed as far as any contradictory evidence is concerned.

Examination by Mr. Mann:

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Q. Mr. Bang, you have in front of you the bill of the Hawthorne Contracting Co., will you tell the Master what items on that bill are improper

Charles Bang—Direct.

or have never been delivered, or what items the Hawthorne Contracting Co. are not entitled to payment for? A. The total of their bill is \$6,745.-83 and the items noted on the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th certificates are perfectly proper; on the 9th certificate a final item covering 80 yards white stone; that has been adjusted at the previous hearing. On the first sheet of the bill there is a heading "For Excavation." It gives work known as excavation on nine different units of the plant, the exact excavation at the sprinkler filter, at the dosing tank, at the digestion tank, at the primary basin, at the bar screen, water main trench, at the drain trench, at the final basin and at the outfall trench. That is not due for the reason that the Town of Hawthorne did not pay me for this work.

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Mr. Lobsenz: At this state I object on the ground that all of that calls for a conclusion and that is for the law to determine.

A. In accepting the estimate of the work that they were to do for me I clearly stated that all work is to be done in accordance with plans and specifications and under the supervision of Engineer Harold J. Harder.

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Mr. Lobsenz: To all of this I offer the same objection. It has all been gone into and all of this calls for a legal conclusion.

Mr. Mann: The witness says he told them what they were to do at the outset of the contract. Where is there a legal conclusion involved there?

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Charles Bang—Direct.

Q. Mr. Bang in the claim filed by the Hawthorne Contracting Co. there is a group of items called extras aggregating \$1,933.66. Were those items within the perview of the plans, specifications or contract?

10 Mr. Lobsenz: I object to the question, on the ground it calls for a legal conclusion.

Master: I will admit the question.

A. With the exception of three items that I want to talk about they were not.

Q. Which of the extra items designated here are improper, as not being within the perview of the contract? A. Here they have lumped them all, whereas I have them on this bill separate.

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Q. Tell us in cubic yards? A. You want a list of everything that I question.

Q. Yes. A. I question 858.7 cubic yards of excavation at 97c. per cubic yard.

30 Q. What do you say to that item? A. I say it is not proper, because the Borough of Hawthorne won't pay me for that amount and any work that was to have been done by the Hawthorne Contracting Co. was to have been done in accordance with the plans and specifications; inasmuch as it wasn't, that is why I question the item.

Q. Did you order it? A. I did not.

Q. Was it done? A. No, sir.

Master: Did I understand you to say it was not done?

A. It was not done.

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Charles Bang—Direct.

By Mr. Mann:

Q. What other item do you question? A. I question 858.7 cubic yards of back fill at 20c. per cubic yard for the same reason.

Q. Was it done? A. No, sir.

Q. Was it ordered by you? A. It was not.

Q. Is it within the terms of the contract? A. 10
No, sir.

Mr. Lobsenz: I object on the ground it calls for a conclusion.

Q. An item of 28c. hours hoisting elevator at \$4. per hour, is that within the requirements of the contract? A. I used this hoisting elevator for perhaps 28½ hours and at the time it was offered to me, it was offered to simplify the hoisting of concrete. As I was hoisting the concrete we were 20
getting along satisfactorily, but this was a little better way of doing it and in offering that equipment to raise this concrete I had no idea that it

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was going to cost me \$4. an hour.

By the Master:

Q. What did you think it was going to cost you? A. I had no idea. In fact, I thought that it was- 30
n't going to cost anything beyond the actual cost of operating the machine, probably gasoline and operator's wages.

Q. Why? A. In the spirit that it was offered, judging from the spirit in which it was offered.

By Mr. Mann:

Q. You thought it was a hand out, rather than a business proposition on that particular item? A. 40
I did.

Charles Bang—Direct.

Q. What other item do you question? A. Item "Extra, final basin, shovel 22 hours at \$6. per hour."

Q. Was that done? A. It was.

Q. Was it called for by you? A. It was.

10 Q. Is it within the contract? A. It was agreed as an extra by the engineer and the 2 men, 45 hours at 55c. per hour. The reason for this work was this, we were excavating for what is known as the final basin. After we reached the proper depth we found that we had a muck that it was practically impossible to pore concrete on. On order of the engineer we had to go down a depth of either 6 in. or 8 in. additional and in conversation with the engineer yesterday, the engineer has denied me this
20 additional excavation and for that reason I deny it to the Hawthorne Contracting Co. The last item, truck hire for 21½ days is proper.

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Cross-examination by Mr. Lobsenz:

Q. Did you measure any of the excavation itself, the cubic yards of actual excavation? A. Those items that are mentioned there?

30 Q. Any items? A. I have checked them, yes, sir.

Q. With whom? A. With myself.

Q. How did you check them, what means did you use to check them? A. You mean these items, I had no occasion to check these.

Q. Did you check any items of excavation yourself? A. I did, yes.

40 Q. What are the items that you checked? A. Covered by these certificates 4486 cubic yards of earth excavation.

Charles Bang—Cross.

Q. Do you base your figures on these certificates? A. I do.

Q. So that you depend upon these certificates to the extent of the amount of yardage excavated? A. Through the certificate I receive my payment and naturally I depend on that.

Q. Outside of the certificates you did not do any measuring yourself as to the amount of yardage excavated? A. We absolutely did. 10

Q. Where are your measurements? A. The measurements are on the plans.

Q. I asked you before whether or not you actually measured the amount of yardage that they excavated? A. Surely.

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Q. Where are your figures by which you did it? A. They have been taken off the plans. 20

Q. You took them off the plans. Did you measure them on the grounds? A. We didn't have to measure them on the ground, except as to the depth of the cut. In some cases of course we had the original survey with the correct slope, we have the elevation marked on the plan and we can—

Q. So now you are trying to say that from the plans and from the engineer's certificate you figured out the excavation made? A. From the plan we figured the excavation. The engineer figured the excavation and we try to check it. 30

Q. So that outside of the plans and outside of the engineer's certificates, you did not do any actual measurement on the ground of the exact yardage excavated? A. Yes, sir.

Q. Yourself? A. Surely.

Q. Where are your figures by which you did it? 40

Charles Bang—Cross.

A. I don't recall, they are probably just memorandums.

Q. Where are they now? A. I don't have them.

Q. Where did you keep the memorandums? A. At home.

10 Q. You haven't got any of them? A. No, sir, not that I know of. I could look for them and probably locate them.

Q. Did you measure them yourself? A. I assisted, yes.

Q. Who did you assist? A. Watts and I.

Q. Have you Watts' figures? A. No.

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20 Q. Did anyone else measure them besides you and Watts? A. Mr. Hood or a member of that office, I guess.

Q. Were they there at the time it was measured on the ground? A. I don't recall.

Q. Was there work done just to the 9 inch leeway from the walls, or was a wider excavation made? A. I don't know, I was only interested in 9 inch.

30 Q. I am not asking you what you were interested in. I am asking you what was done? A. Judging the exact distance is very hard because the bank varies.

Q. You just told us you measured to find out how far they went? A. Absolutely.

Q. Now I am asking you, how far did they go beyond the wall itself? A. Approximately 9 inches.

40 Q. Did they ever go beyond that? A. No. Some cases where the bank has fallen, it would have gone further.

Charles Bang—Cross.

Q. Where was that where the bank had fallen in? A. I don't know.

Q. You said you measured where it was and where the bank fell in? A. Do you want me to explain each distinct part of the plant? A. It is an impossibility to tell such things.

Q. Did you not exactly measure then the extra yardage that they excavated, either because of falling in of the banks or for any other reason? A. Excavation is never figured exactly. 10

Q. You didn't measure the average, did you? A. Yes, sir.

Q. Yourself? A. Yes.

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Q. You have not the figures? A. I have the figures on the plans from where we took our figures and from the actual job itself. 20

Q. The figures from the actual job you haven't? A. They are on the plans.

Q. Are these the figures you are going by? A. We rechecked that from what we measured on the job. In some cases the figures were taken from the plans and in some cases from the job, the actual hole that was dug.

Q. Were there any cases where they had to dig deeper underneath these tanks in order to give the banks a firm foundation? A. In the case of the final basin that I mentioned, yes. 30

Q. And without the final basin, besides that? A. There was one occasion on the sprinkler filter and those items were not considered as extra excavation. They were classed as excavation under the terms of the contract and were included on the certificates.

Q. How deep was the deepest or these tanks un- 40

Charles Bang—Cross.

der the ground? A. I believe the deepest cut we had was in the final basin and from the approximate depth we had there it was about 6 feet to 6 feet 6 inches.

Q. After these holes were dug, did you put forms in for the cement to be poured in? A. We did.

10 Q. And the forms are of wood? A. That is right.

Q. And they are supported on the inside and outside? A. They were bound together on this particular job by an affair we call a tie screw.

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20 Q. Is that from the inside or outside? A. In most cases all our bracing was done on the inside and on the outside out men worked around the forms. 95% of the work was done from the inside of the excavation.

Q. And 5% of the work had to be done on the outside? A. Yes.

Q. And the forms had to be built on the outside? A. The forms were built on the inside.

Q. You have an outside form and an inside form? A. That is true.

30 Q. And the more room you have for the workmen on the outside the quicker these men can get around? A. If they have work to do.

Q. And they did have 5% of the work to do? A. Perhaps.

Q. Now have you photogra showing the excavations themselves? A. I do have.

Q. Where are they? A. At home.

Q. Will you bring them in here? A. Yes.

40 Q. Who took the photographs? A. Mr. Watts took most of the photographs.

Charles Bang—Cross.

Q. Who took the rest of them? A. Mr. Hayns took some.

Q. Who did the actual measurement of the excavation and back fill that was allowed by the Borough? A. Either Mr. Hood or one of his men.

Q. And you saw Mr. Hood or his men there actually measuring the exact cubic yardage excavated? A. In some cases they measured as to the earth, but in most cases they figured that excavation from the plans. 10

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Q. But in other cases did you see them there measuring the exact amount? A. I have seen them there measuring many times.

Q. At any rate the figures of Mr. Hood were the ones upon which you were paid? A. That is true. 20

Q. Didn't you take into consideration that extra excavation would have to be made in order to do your work? A. It wasn't necessary.

Q. You charged the Borough how much for the excavation? A. I charged at the rate of \$1.50 per yard.

Q. How much did you pay the Hawthorne Contracting Co.? A. 97c. per cubic yard.

Q. That is about 1/3 profit? A. 55c. per cubic yard profit. 30

Q. On the other items you didn't make as high a profit, did you? A. In some cases I did and others I didn't.

Q. What did you charge for the filter material? A. Approximately 10% profit.

Mr. Mann: I do not see the relevancy of the question.

Mr. Lobsenz: The relevancy is this. The 40

Charles Bang—Cross.

10 contract was made with knowledge of the fact that extra excavation would have to be made for which he would not be paid. This man took a one-third profit on that as against about 10% on other items, so that he took into consideration this additional excavation he would have to pay for and he was paid for it. The contracts and the figures on all these items will show that the fact he had to dig the extra excavation was taken into consideration.

Master: I will take it subject to the objection of any counsel.

20 Mr. Baten: I object to the question on the ground there is no basis for it and has nothing to do with the issue involved in this case.

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Mr. Wright: I object to it because it isn't proper cross-examination. On direct-examination, nothing was said about prices.

Q. What did you charge for the filter material?

A. \$2.75.

30 Q. And the contract price with the Hawthorne Contract Company was \$2.50, is that right? A. Yes.

Q. Now the gravel charge to the Borough was \$2.75?

40 Mr. Mann: May I object your Honor. It is going further than I thought it would go. The Hawthorne Contracting Co. has charged us with certain volumes at certain prices. We are not charging that the prices are excessive. We are saying that the volume of

Charles Bang—Cross.

work was not put in. What on earth has that to do with what the Borough is to pay us in price for the work? I object, I don't think it is relevant at all.

Master: How far are you going with this examination?

Mr. Lobsenz: I am going down all the items and show that on all those other items 10% was charged and on this one 33 $\frac{1}{4}$ % profit was made, or even more than that and that these other items were taken into consideration. Now as to the fact whether or not the work was done. The witness says he does not know he never measured it. He takes his measurements from the plans. 10

Master: I have let you show three or four of these and I understand the rest of the figures are shown on the exhibits. Is that so? 20

Mr. Lobsenz: Yes.

Master: So that it is only a question of having this witness examine papers that are already in evidence.

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Mr. Lobsenz: That is all.

Master: I think then that we will curtail further questioning. Anything that you want to show by way of argument, you can use the figures on these exhibits. 30

Q. On all the items supplied by the Hawthorne Contracting Co. you charged a leeway of 10% profit, with the exception of the excavation on which your leeway is 1/3, is that correct? A. That is correct.

Q. Now in regard to the elevator for hoisting concrete. There is no doubt that this elevat- 40

Charles Bang—Cross.

or was used for the period of time claimed, 28½ hours? A. That is true.

Q. But no price was made on it? A. That is right.

Q. No price discussed? A. That is right.

10 Q. Did this include not alone the use of the elevator, but the use of a man and gasoline? A. Did not include the use of the elevator, included the use of a shovel that was used to operate the elevator and a man and gasoline.

Q. On the final settling basin 22 hours of extra work was actually done? A. That is true.

Q. And men were used and a truck was used for that purpose? A. No, a truck was not used.

Q. Men were used for that purpose? A. That is true.

20 Q. This extra work was done under orders of the Borough Engineer? A. That is true.

Q. And was necessary because you did not have a proper foundation on which to place the tanks? A. That is true.

Q. And in other places where you did not have a proper foundation to place the tank excavation had to be made until you got the proper foundation is that correct? A. In one other case.

30 Q. Which other case was that? A. At the south east corner of the sprinkling filter.

Q. And extra excavation had to be made in order to get a proper foundation? A. What do you mean by extra excavation?

Q. Had to be dug down lower? A. Excavation had to be dug to reach a solid foundation, yes.

40 Q. And only on the sprinkling filter? A. Sprinkling filter and the southeast corner of the ludge bed that was lower.

Charles Bang—Cross.

Q. You say there was a place where the bank fell in? A. Many places.

Q. How many places did the bank fall in? A. I don't know.

Q. About how many? A. I can't say.

Q. There were several places where the bank fell in, is that correct? A. Yes. 10

Q. How much yardage did that take along with it, do you know? A. I don't know.

By the Master:

Q. Mr. Bang, this additional depth that was made, you say, in the settling basin or the sludge basin? A. Final basin.

Q. That excavation, I understand you to say, was actually made, was it? A. Yes, here is the thing about that. Excavation under the terms of the contract only to within 9 inches of the lines was to be paid for by the town at the rate of \$1.50 per cubic yard. In this particular case we had dug this out with a shovel and we had a lot of water in the hold and we struck muck at the bottom. It was an impossibility to dig that six inches with the shovel and as a result it had to be dug 20

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out by hand and the use of a shovel. We had to dig the muck out and throw it into the shovel and it was one hard job. For that the Hawthorne Contracting Co. have billed me the shovel at the rate of \$6. per hour, the day work on it and I had some of my own men assisting them in digging it out. The thing that I want to know is, whether or not they are entitled to this price at day labor, or whether they are entitled to that additional excavation at the rate of \$1.50 per yard. In other 40

Charles Bang—Cross.

words if, as Mr. Hood says, I can only be paid at the price of \$1.50 per cubic yard, I can't pay the Hawthorne Contracting Co. for days work.

Q. How many yards were there?

Mr. Hood: It took 45 cubic yards of stone to replace the sand taken out.

10 Q. Mr. Bang, why was there a 33% profit on the excavation and only 10% on the other items? A. In order to get into the job, it was necessary to build a temporary road. It was an expenditure which had to be met right from the start, in order to live up to the terms of the contract and ground had to be furnished that cost in the neighborhood of \$1500. or \$1600. that had to be paid for as soon after the job was started as was possible. Nat-
20 urally excavation was the first money coming in and to the item of excavation we added the expense of the ground and the expense of the temporary road. That is why it was added to the first item, the excavation item.

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30 By the Master: It is stipulated by all solicitors that at the hearing to be held at two o'clock on Monday, June 8, 1931, or such time as the hearing may be hereafter ad-
40 journed to by the Special Master, Mr. Hood of the Borough Engineer's Office and Mr. Charles Bang, the contractor, will testify before the Special Master as to the proper items to be inserted in the final certificate and the ultimate amount of the final certificate; the items and amounts to be determined by the Special Master after having heard both the engineer and the contractor; no solicitor of any party to be present at such hearing.

There were present at this hearing:

FREDERICK W. VAN BLARCOM, ESQ.,
Special Master.

CHARLES BANG, the contractor.

JOHN W. HOOD, Engineer.

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No solicitors were present in accordance with the stipulation entered into at the last hearing. The following statements and answer made by Mr. Bang or Mr. Hood are statements and answers made under oath.

By the Master (questioning Mr. Bang)

Q. At the last hearing, Mr. Bang, you testified that you did certain extra work in and about this job that has not been allowed to you by the Borough Engineer in the 9th certificate and which you are entitled to receive compensation for in the final certificate? A. That is right.

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Q. For the purpose of enlightening me as to just what is claimed by both sides, we will take these items as nearly as can be in one order in which you gave me at the last hearing? A. Yes, sir. The way I have outlined this tentative sheet is this, my first heading is, "Amount retained and that is the same figure that is shown on the certificate, namely \$10,712.35. That, of course, has to be adjusted some because of a deduction that was made on the knoble claim, and a deduction on the Knoble claim would naturally make a reduction on this. In the testimony at the hearing that I was not to that amount can be found. The item of flexible joint

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10 pipe, as I told you at the last hearing. There were some invoices I was trying to get separated. It was necessary for me to get in touch with C. Ladow & Son at Vineland, N. J., asking them to separate an invoice showing total tonage of a certain lot of pipe that I bought from them that I had left over on a job. It was numerous sizes that were used and among that was two lengths of universal pipe and there was also the bill of the Flexible pipe. It is true that there were 16,101 pounds purchased from the Central Foundry Co., but totalling that to what was bought from Ladow it brings it to 9.43 tons.

20 Master: It is understood that Mr. Bang is to show bills from Joint Pipe and if he does that the deduction made by the Borough Engineer through Mr. Hood in a statement submitted at the last hearing will be eliminated.

Mr. Bang: The deduction of the white stone, 131 cubic yards at \$6.60 \$864.60 is agreed to by me, but I want a credit from the Hawthorne Contracting Co. bill for 131 cubic yards at a price of \$6.00 per cubic yard.

30 The first item on the 9th certificate is excavation. I have been charged for by the subcontractor with 63.8 cubic yards of excavation that were used at the drain trench and at the outfall trench. I spoke with Mr. Hood about this and he told me that had been included in the 9th certificate. I ask additional excavation of 63.8 cubic yards at \$1.50 per cubic yard, totalling \$95.70.

10 Q. What was that additional excavation of 63.8 cubic yards that is not in any of the certificates

Charles Bang—Cross.

issued by the Borough of Hawthorne to date? A. Mr. Hood maintains that it is in that certificate.

Q. What excavation does that item of 63.8 cubic yards cover? A. 63.8 cubic yards is covered by drain trench excavation and out fall trench excavation.

By Mr. Hood: I say that the earth excavation for all of the units of the plant was completely paid up on the 7th certificate, dated September 24, 1930. 10

Master: Which 7th certificate increased the excavated yardage from 4416 cubic yards as shown on the 6th certificate to 4486 cubic yards shown on the 7th certificate. Is that your contention?

A. That is it.

Master: What is your next item, Mr. Bang? 20

Mr. Bang: Also under the item of excavation I have been billed for yardage totalling approximately 858 cubic yards that was supposed to have been excavated to within 18 inches of the lines for which I was to have been paid by the town. On one of these items in particular, that of the final basin, 294.8 cubic yards, this additional excavation was made in lieu of sheathing, which would have been paid for at the rate of \$150. per thousand and also in some of the other cases some of that excavation was done in lieu of sheathing that would have been paid for at that rate. It was a cheaper proposition in these cases to do this additional excavation 30

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and for that reason a portion of this excavation, I feel should be granted.

Q. How much by way of sheathing did that additional excavation save the Borough? A. About \$300. on the final basin. 40

Charles Bang—Cross.

Master: It is estimated by Mr. Hood for the Borough Engineer that the additional excavation on the final basin at the price mentioned in the contract of \$1.50 per cubic yard and the cost of the necessary sheathing at the rate specified in the contract of \$150.00 per thousand feet would about counter balance. In other words, that the costs of the extra excavation would amount to about the same as the cost of the sheathing that would be necessary if such extra excavation had not been made.

Mr. Bang: I understand that all of the amount claimed by the Hawthorne Contracting Co., 294.8 cubic yards was not all excavation for this purpose and that about 200 cubic yards of this excavation should be charged against the Borough in lieu of sheathing.

Mr. Hood: I made a survey for the Borough of this extra excavation and estimate from my measurements that 294.8 cubic yards was the amount of excavation done for the purpose of the final basin. The same thing holds good on these other items of extra excavation, which was done in lieu of sheathing.

Mr. Bang: The items of extra excavation are as follows on which units the extra excavation was in lieu of sheathing:

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Sprinkler filter	357. cubic yards
Dosing tank	8.5 cubic yards
Digestion tank	90.5 cubic yards
Primary Basin	91.3 cubic yards
Bar Screen	17. cubic yards
Drain trench	44.4 cubic yards
Final basin	294.8 cubic yards
Out fall trench	19.4 cubic yards

Charles Bang—Cross.

Master it is agreed that this additional excavation obviated the necessity of sheathing on these different units to that extent and that the cost of the sheathing was approximately the cost of the excavation.

Q. Mr. Bang, what was the Borough to pay you for excavation? A. \$1.50 per cubic yard.

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Q. What were you to pay the Hawthorne Contracting Co.? A. 97c. per cubic yard.

Mr. Bang: In addition to this work, the Hawthorne Contracting Company have charged me for excavating of the water main trench 475.5 cubic yards, which is all right as far as I am concerned, but I cannot collect from the Borough, because on this job I bid a lump sum to complete.

Mr. Bang: On the final basin after we had struck the bottom as was required by the plans and ordered by the engineer we found a much that it was impossible to put a concrete base on. It was then ordered by Mr. Feltz, Mr. Harder's engineer on the job, to excavate an additional 6 inches in depth. The time that it took to do this

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additional excavation and all labor in connection with it I claim. The excavation naturally had to be done by hand and the charge that I am asking for is as follows:

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22 hours shovel	@ \$6.00	\$132.00
30 hours labor	1.25	37.50
96 hours labor	.90	86.40
45 hours labor	.55	22.00
216 hours pumping water	2.00	432.00

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Charles Bang—Cross.

In explanation of the item of water pumping which seems to be excessive over the labor charge is explained in this way. The period of labor during the day would be an 8 hour day, whereas it required us to pump 24 hours a day.

Q. Was that work necessary and covered by the specifications? A. No, sir.

Q. You mean it was necessary but not covered by the specifications? A. It was necessary by order of the engineer. It was not covered by the specifications. They couldn't provide for any such thing as that in the specifications until we dug a hole to find out what we were going to strike.

Master: Mr. Hood, what have you to say about that?

Mr. Hood: In that connection, I might say that Mr. Bang took up the matter of this claim with Mr. Harder about eight months ago and Mr. Harder refused it for the reason that there is a bid price to cover all excavations of \$1.50. If Mr. Bang is willing to accept the amount of dirt which he took out of there at that price, he can have it,

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otherwise Mr. Harder cannot admit his claim.

Q. How much dirt was taken out? A. It took 45 cubic yards of stone to replace the dirt which was taken out, so naturally the inference is that he took 45 yards of dirt out of the hole. We say he put 45 cubic yards of stone back in the hole.

Mr. Hood: This extra work was certainly contemplated by the specifications, because we were within thirty feet of the river edge, starting two feet above the river level and the excavation was to be about five feet below the river level.

Charles Bang—Cross.

Q. The diagram or profile sketch of this excavation is shown on the bottom of sheet 2 of Exhibit H. C. 5.

Mr. Bang: This excavation that I am talking about is not indicated on this profile. We went down to the depths indicated as the final settling basin, on sheet 2, but when we got there we were ordered by Mr. Eugene Feltz of the Engineer's Office to go 6 inches deeper and at the time the question of the price of excavating was put up to him. We were told we would not be required to do it at the unit price of \$1.50 per cubic yard. 10

I also want to point out something about the set of plans that are offered in evidence by the engineer. On the first sheet it says, revised marked plans, do not take out, showing that there is a possibility of the elevations on the profile being different than the elevations of the unit in question, in which case there is a difference. 20

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Master: Take the next one that you dispute.

Mr. Bang: The next item, is the item of fill. This is an item which I took up with Mr. Hood and Mr. Hood in turn took it up with Mr. Harder and Mr. Harder said, "You are out of luck." In the item of fill, it covers embankments that are shown on the plans around the various units, that the elevation, the top of it is considerably higher than the elevation of the ground. During the excavation of the job, the material excavated was to have been piled on spoil piles and from the spoil piles after the unit had been erected thrown against the sides to form an embankment, but in this case when the excavation was going on, we found it necessary to use considerable of the fill 30 40

Charles Bang—Cross.

to fill in for a roadway and to fill in another swamp close to this water line that we ran and as a result we ran short of fill. Fill is paid for by the Borough at the rate of 80c. per yard. I maintain that because of the fact that we had to go along the rear bank, excavate material, haul it
 10 from the rear bank to the unit that required fill and then put it in position, I am entitled to the price of excavation for this reason, that had the material that was excavated and was used on the roads and used to fill in the swamps, been saved for fill, it would have been piled on spoil piles in a position where one handling would have placed it where it was needed; whereas digging it from the rear bank we had to excavate, load it on trucks,
 20 haul it from there to the unit on which it was

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needed and then pick it up and put it on the embankment. I ask for 2000 yards, at the difference between the price of fill and the price of excavation, that means the difference between 80c. and \$1.50, or 70c. making \$1400.00.

Master: What do you say about that, Mr. Hood?

30 Mr. Hood: In all cases the unit price bid covers the cost of furnishing and placing fill.

Q. On the 9th certificate is that fill, 2000 cubic yards allowed at 80c.

Mr. Hood: That was a matter which was closed way back before the 9th certificate.

Q. It has been paid for at the rate of 80c. per cubic yard is that right?

Mr. Hood: Yes, sir.

40 Q. And the claim is now for an additional 70c. on 2000 cubic yards, is that right?

Charles Bang—Cross.

Mr. Hood: Yes.

Q. Mr. Bang, did you make any objection to this at the time the item was included in the certificate? A. I did, yes.

Q. To Mr. Harder? A. To Mr. Hood.

Q. And it was not allowed?

Mr. Bang: A. It was not allowed at the time. At the time Mr. Hood said he would take it up with Mr. Harder. Mr. Harder took it up with the Borough and I don't know what the outcome of that was. 10

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Master: All right, what is the next item.

Mr. Bang: The next is 130 feet 6 in. V. T. Drain from sludge to surface drain. At the last hearing Mr. Hood claimed that I had put my bill in for that and had been paid. 20

Mr. Hood: Yes, you claimed there is 148 ft. to be exact.

Mr. Bang: The payment that Mr. Hood shows does not cover the item that I am asking. The payment that Mr. Hood shows covers a total of all vitrified tile pipe used on the job. The item of 148 ft. of 6 inch vitrified tile must be in the sludge bed.

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Mr. Hood: The total amount on the 9th certificate of 6 in. vitrified pipe is 367 ft., of which that 130 ft. is a part.

Q. What have you to show that it is a part? A. The various measurements on the sludge bed and on this extra work.

Mr. Bang: I am willing to go over the job with Mr. Hood as to that item and if he can convince me, all right.

Q. How much is the difference in money? 40

Charles Bang—Cross.

Mr. Bang: \$104.00.

Master: What is the next item?

Mr. Hood: Regarding the sluice gate I haven't got the extra parts and so have been unable to finish it. As soon as I do I will present the facts to the master.

10 Master: What is the next item?

Mr. Bang: Downes Steel Floating cover \$3200. which has been certified to on account. In addition to the \$3200. I claim an item of cartage and placing \$1300, riveting and welding \$399.60; flash-

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ing around the scuttle holes \$64.00.

Mr. Hood: Leave the entire matter of the Mendelsohn Sheet Metal Works of which the \$64. is a
20 part over until the next hearing.

Mr. Bang: Roofing \$225.00; Lumber and labor, nails &c. for wood roof and cut walk on Downes cover \$290.00. The way we arrived at the \$290. is to estimate the cost of the completed job in regard to this roof. I had men working on that off and on, a carpenter and I helped sometimes. They were working on this roof and sometimes they were doing work on the contract work which was not
30 extras and the materials they used might have been new materials for that part of the work and might have been other materials that were taken from some other part of the job; so that the only way I could arrive at the value of this roof is by estimating the material that was put in it and the time of the men.

Master: Have you finished with the Downes cover?

Mr. Bang: Hose connection, valves, sluice gate
10 labor, etc. \$98.80. During the time that this ma-

Charles Bang—Cross.

terial was being unloaded from the cars, being taken cross one of the units to be placed in the unit it was finally set in, it was quite a heavy proposition; other things had to be taken care of when it was being welded and riveted, when the roof was being put on it and when the general installation was being made, it required supervision. In other words, I had a man there during the whole job, who supervised, that man was Mr. Watts. the salary that we paid him is in the testi-

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mony and I say that supervision is worth about \$400. that is much less than 10%.

Mr. Hood: In conection with the claim for supervision, I refer to the first paragraph on page 16 of the specifications which provides that the contractor shall do extra work in connection with his contract at the rate of cost plus 15% for profits and superintendence according to the nature of the work. In other words, I want you to take this item of supervision off and it will be provided for in the 15% that I am going to put on whenever the cost had been definitely determined.

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Mr. Bang: That is not what I maintain.

Master: What are your objections to these other items?

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Mr. Hood: I have no objections to them. The only objection I make is against the additional claim for superintendence on the grounds that the 15% allowed under the contract provides for all expenses incurred by the contract over and above the actual cost to him.

Mr. Bang: Would it make any difference if we call it foremanship instead of superintendence?

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Charles Bang—Cross.

Mr. Hood: It would not make any difference; as such it comes under the 15%.

Master: What is the next item?

Mr. Bang: Scum trough and charges to gauge cover.

10 Mr. Hood: That is a part of the bill which is being held over until the next hearing.

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Mr. Bang: Part of this is part of that bill.

Mr. Hood: You stated that the bill which you now submit from Mendelsohn includes the work of furnishing and placing the scum trough and also the flashings on the Downes Cover.

20 Mr. Bang: I didn't say that it included the furnishing and placing of it. What I wanted to say is that there is a certain portion of labor of my men on this scum trough, a total of \$195.35.

Mr. Hood: You are within the 15% again.

Mr. Bang: We installed the scum trough releases.

30 Mr. Hood: You didn't. I was there when Mr. Mendelsohn delivered them, I was there when he came back the next day and installed them. I might say that Mr. Watts was present supervising the work and lending a hand when he saw it would help the good work along.

Q. Mr. Bang what is your total for this item?

Mr. Bang: \$195.35 as given above.

Q. What does that sum of \$195.35 represent?

Mr. Bang: It includes work, materials, some work done by Mendelsohn and also labor performed by my men and material furnished by me.

40 The changes on the gauge cover consist of this. Mr. Harder or yourself, I forget which originally order a gauge cover identically the same as the

Charles Bang—Cross.

one that was up at Totowa and we furnished a gauge cover the same as was at Totowa, and after

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it was furnished, we found that it was not what we wanted, so it had to be changed. The top had to be made removable and various other things. 10

Master: What next?

Mr. Bang: Cast iron pipe to gauge chamber in place of vitrified tile \$38.50.

Mr. Hood: That is all right.

Mr. Bang: Steel pipe hangers installed on the end of primary basin \$135.00.

Mr. Hood: The item claimed by the contractor was to remedy defective valve operation at the location and of course should have been done in the beginning when the piping and valves were first installed. However, these hangers were not installed in the beginning and became necessary at a later date and of course the material used should be paid for by the Borough, but not the cost of excavating in the second place. 20

Master: Were these hangers provided for by the plans and specifications?

Mr. Hood: No, but the plans and specifications provide for the proper blocking or permanent rigidity of the piping to insure that at any future date that piping would give no trouble by reason of settlement. Of course, this was not done and the settling took place, necessitating a remedy at a later date, and the remedy took the form in this case of these hangers which Mr. Bang mentions. 30

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Q. Was the settling complained of by the engineer before this work was actually done?

10 Mr. Hood: I might state in answer to that question that it was on top of fill and of course the settlement was anticipated. The contractor had as full knowledge of the condition as the engineer and should have provided to offset that possibility in the beginning, which he did not.

Q. Did the engineer suggest it to the contractor before it was done?

Mr. Hood: Oh not. These are mere details and we leave these to the experience of the contractor to take care of them.

Master: Now we will go to the next item.

20 Mr. Bang: Checking plate doors, locking device for valves, two sets of iron stairways and labor for installing, \$347.50.

Mr. Hood: This is the material furnished by Radcliffe.

Mr. Bang: Part of the material furnished by Radcliffe.

30 Mr. Hood: Which has not been paid for to date and the contractor is entitled to the cost, which is \$277.75 plus the customary 15% which amounts to \$41.65, making the total of \$319.40.

Master: What is the explanation of the difference between \$277.75 and \$347.50?

Mr. Bang: It is true that \$277.75 is the amount paid Radcliffe for a part of the material, but in addition to this work there was excavation required, there was assistance required in placing the doors and stairs in the form of labor, and the fur-

nishing of expansion shields and lag screws and incidentals necessary to making them fast. It is about \$70. and I think that is reasonable.

Mr. Hood, as regards the incidentals, Radcliffe's price included installation which they actually did without any assistance from the contractor and as regards the checker plate doors, Radcliffe have a bill which they paid to one man for the installation of these doors, so it is quite apparent that in this case Mr. Bang did not perform any labor in connection with their bill and is therefore entitled to the cost of \$277.75 plus 15%. 10

Master: Did the amount of money paid by Radcliffe for the installation of the checker doors appear on their bills? 20

Mr. Hood: Their price to Mr. Bang of \$44.50 included installation and that installation was performed by R. L. Clark of Paterson.

Mr. Bang: I still maintain that I had men work on it.

Mr. Bang: The next item is 3 locks for the gauge chamber \$4.50.

Mr. Hood: That is all right.

Mr. Bang: 2 T handle wrenches \$26.80.

Mr. Hood: Where were those wrenches left? 30

Mr. Bang: The wrenches were on the job at the time a Borough man was left to take care of the plant and the man's name is Mr. LaPerry.

Mr. Hood: For what particular purpose were those wrenches intended?

Mr. Bang: To operate various valves and the doxing cyphon and the Downes cover. They were wrenches that were long enough to operate the 40

Charles Bang—Cross.

water line running into the digestion. There was one to be used to operate any valve that required operation.

Mr. Hood: I never saw those two wrenches and would like to have an opportunity to speak to Mr. LaPerry to find out whether they were on the job when he took charge.

10 Mr. Bang: One cast iron cover at the meter chamber \$14.00.

Master: Mr. Hood, what about that?

Mr. Hood: I don't believe that was previously included in the payments to Mr. Bang, that is all right.

Mr. Bang: One spray nozzle wrench \$6.50.

Mr. Hood: That is another item that falls in the same category as the two wrenches and I will look it up.

Mr. Bang: 2 - 2 in. gate valves, pipe, tappings and valve boxes for drains from manifold to sprinkling filter \$36.80.

Mr. Hood: I want to look this up the same as I will the other items.

Mr. Bang: The next item is extra switch board in bar screen to control primary basin mechanism \$110.29. This panel board of the particular type that it was ordered by Mr. Hood to conform with the panel board that was furnished by the door company to control the operation of the mechanical bar screen. Switches and controls, etc. were furnished by the Link Belt Company, but no provision for mounting was provided or covered by

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the specifications or plans. A portion of the charge is contained in the bill of the Giannone

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Charles Bang—Cross.

Electric Co. and the balance constitutes labor.

Mr. Hood: The answer is that under item 34, page 8 of the specifications the contractor bid a lump sum for a primary settling basin mechanism and the detailed specifications of item 34 provided that the lump sum bid for each alternate shall include all labor and material necessary to furnish and install the mechanism and motor complete, together with all labor. It is a well known fact that if you have a mechanism and you have a motor with no conduits through, of course the necessary appurtenance is the connection link in the form of a switch and switch board and this is the item which the contractor considers was outside of the specifications, but which the engineer does not consider as outside of the lump sum bid. 10

Mr. Bang: In connection with that I didn't say that this charge was for switches. I said that it included the mounting of the switches and controls, furnished and paid for under item 34, alternate B. I was not required in the specifications to do any mounting on a switch board similar to that of which I have already spoken. Had I cared to, it would have been within my right to install this equipment on a plain wood panel and in conversation with Mr. Hood I asked if he cared to have these panels match and his answer was, yes. Assuming that I would be paid for a slate panel similar to the door panel I installed it. This panel is a slate panel on legs similar to the one that 20 30

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was installed by the door company and the additional cost that I have included in this item is the difference between the price we paid and the price 40

Charles Bang—Cross.

of a plain wood panel which I could have put up under the specifications.

Mr. Hood: Mr. Bang says that he assumed he would be paid extra. The question in my mind is why he didn't bring up that important point with me at the time we were speaking about matching
10 the panels.

Master: Is the panel that was installed better than the one he could have installed?

Mr. Hood: He claims he could have mounted it on wood. If he had mounted it on wood contrary to my instructions on that particular item then possibly he might have had some trouble getting paid for that item, until he conformed to our orders on the subject.

Master: Is there anything in the specifications
20 that says it should be a slate board panel on legs?

Mr. Hood: The specifications don't go into details in that particular. The item of the payment for the primary basin mechanism was made on the 6th certificate. It seems strange that this matter should have been held over to this late date, before being brought up for discussion. This is the first I have heard of it.

Mr. Bang: I might say in answer to that, al-
30 though the primary basin mechanism was paid for in the 6th certificate, Mr. Hood at that time knowing I needed money, very graciously advanced me the item, even though the control mechanism had

not been installed, although it was on the job. I might also say that before any of this material was ordered or purchased plans and specifications from
40 the manufacturers in any case of mechanism were

Charles Bang—Cross.

submitted to the engineer for approval. No doubt in plan and specifications furnished by the Link Belt Co. to the engineer a list of controls was included and must have been approved by him and was approved by him before I ordered it.

Master: What is the next item?

Mr. Bang: Foot pieces for the sludge pipe \$120.00. 10

Mr. Hood: That is a matter that was gone into at the last hearing. That item was included in the cast iron specials and has already been paid to Mr. Bang.

Master: Can you show him that?

Mr. Hood: I don't know that it appears in his claims, but it was taken into consideration by us when we made up our totals on cast iron specials.

Mr. Bang: I maintain it has not been included. Again I question the fact that foot pieces can be called cast iron specials. It is a piece of cast iron and it does not in any way represent a piece of pipe and that is what cast iron specials are meant to include. It is merely a special and has not been included in the tonnage of cast iron specials. 20

Mr. Hood: No, that item has not been paid for, because it is not on the list and still has to be paid for. That is all right.

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Mr. Bang: 2—8 in. valve boxes \$22.00. There are two valve boxes, one at the hydrant between the dosing syphon and the digestion and one at the embankment at the digestion that were never included, \$22.00. The reason I know they were never included is because there is no such memorandum on the bill from the place where I bought them and they were bought locally. 40

Charles Bang—Cross.

Mr. Hood: I think that Mr. Bang is correct in that connection, but if you recall at the last hearing the matter was brought up and I stated as far as my interpretation of the specifications went the valve boxes were included in the valves, but inas-
 10 much as the specifications do not say so, I suppose will have to graciously admit he has a claim for two boxes.

Master: What is the next item?

Mr. Bang: 2 galvanized iron weirs at the primary basin and 2 galvanized iron weirs at the final basin, \$60.00.

Mr. Hood: I would like to have that item brought up for consideration at the next hearing. It falls in the same category as the scum trough and another item which we agreed to delay until the
 20 next time.

Mr. Bang: The plant itself has been changed to such an extent from the original plans and specifications and changes in the forms required form work that was considerably more expensive than that shown on the original plans and in that connection I point to additional work at both the nor-

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30 therly and the southerly end of the primary basin, key ways that were installed on the sprinkling filter. The furnishing of the material for and the installation has been paid for—I refer to the key ways, but the removal of the key ways has not been paid for. Also the erection of a number of piers in the sprinkling filter. This to a certain extent is covered by the plans and specifications, but the changes necessitated such a quantity of form work
 40 that it could hardly be expected to be paid for at

Charles Bang—Cross.

the regular unit price of concrete, namely \$17.05 per cubic yard. I ask an additional extra in some form or other for these various changes and the total is \$300.00.

Mr. Hood: This is just another case of the contractor's interpretation of the specifications versus the engineer's. Of course he feels he has a claim and the engineer knows perfectly well from the specifications that he has not. The unit price as bid for concrete included all form work and costs incurred in placing and furnishing that concrete and extra work and no extra work falls exactly under the same category even as the amount of excavation in excess of the original estimated quantity, which we are all familiar with; that was payable at the same price, the same unit price, and this is a similar case.

Mr. Bang: The erection of the piers was the added work and not contemplated in the concrete bid when it was prepared. Other changes were not contemplated and the time necessary in building

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of forms which were not contemplated at the time the bid was made. The court will see that if a form was built for a wall 18 in. thick and the bid was based upon that thickness and the wall was afterwards changed to a wall of 6 in. thick, it would require the same form on the same basis as the larger wall and the amount of concrete poured in the wall would possibly not pay for the concrete and the form work. The price of the poured concrete was estimated on the size of the concrete to be poured and the forms were included in such price by reason of the size of the wall or concrete structure to be poured.

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Charles Bang—Cross.

By Mr. Hood: The fact of the matter in this case is that the piers that were poured were bigger in size than the width of the wall. The width of the wall varied from 8 in. to 12 in. and the piers that were erected were 12 in. square. If the contractor could afford to build forms for the wall at his price, he could do the same for the piers.

10 Mr. Bang: In connection with Mr. Hood's comparing a wall tapering from 8 in. to 12 in. to a square pier 12 in. square, it is absolutely ridiculous. There is absolutely no comparison between the two. In the case of a pier we have to have forms on four sides, whereas on a wall we have forms only on two sides. The bracing conditions and every condition in connection with them are entirely different. As far as the job of building
20 the form for that pier is concerned, it is no job, but it all costs money.

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Master: Did you make any claim of the engineer at the time this work was ordered?

Mr. Bang: I don't recall whether I did or not.

Mr. Hood: Mr. Bang was paid for that additional concreting at the rate of \$17.05 per cubic yard, as provided in the bid.

30 Mr. Bang: The next item is the 15% on all items known as extras and one thing that must be taken into consideration is that the item of \$3200. mentioned in the 9th certificate is an extra and when making up the final certificate and adding 15%, this item of \$3200. should be added to the extras.

Mr. Hood: That is right, that will be done.

Mr. Bang: I want it understood while the engineer is here that the \$1008. retained by the col-
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Charles Bang—Cross.

lector on the Cortese account was not a payment to me and has not been paid by the Borough to anyone and that on the 7th certificate there appears an item less former payments on account \$84,372.97. This amount includes the \$1008.00 which I have just referred to and when the Master makes up a statement of the amount due from the Borough, the payments on account should be reduced that \$1008.00 and the amount due to me should be increased that amount. Take the 9th Certificate for instance, which shows amount due me \$2148.30, there also should be added to that the sum of \$1008.00, which is retained by the Borough, and not paid to anyone yet, making the total \$3156.30.

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Master's Report.

IN CHANCERY OF NEW JERSEY.

10	Between JAMES RADCLIFFE & SONS COM- PANY, a corporation, and JOHN MAWHINNEY COMPANY, a cor- poration, Complainants, and BOROUGH OF HAWTHORNE in the County of Passaic, a municipal corporation, <i>et als.</i> , Defendants.	}	On Bill, &c. Master's Report.
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20 *To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:*

In pursuance of an order of this court, made in the above entitled cause on the 6th day of April, 1931, whereby it was referred to me, Frederick W. Van Blarcom, one of the special masters of this court, to take testimony and report the validity of the liens of the complainants and the defend-
 30; ants and all other liens which may be filed within the time prescribed by the "Municipal Mechanic's Lien Law (Revision of 1918)," the amount due from the municipality to the contractor under the contract and from the contractor to the respective claimants.

I respectfully report that I have been attended by James N. Wright, Esquire, solicitor of the complainant James Radcliffe & Sons Company; Samuel Baten, Esquire, solicitor of the complainant
 40; John Mawhinney Company; I. Arthur Weiss, Es-

Master's Report.

quire, appearing for Alex M. MacLeod, solicitor of the defendant Borough of Hawthorne; John H. Yauch, Esquire, appearing for Wolber & Gilhooly, solicitors of the defendant Igoe Brothers; Sigmund Unger, Esquire, solicitor of the defendant Alliance Lumber Company; Saul M. Mann, Esquire, solicitor of the defendant Charles Bang; Fred G. Stickel, Jr., associated with Mr. Mann, of counsel with the defendant Charles Bang; Lawrence Diamond, Esquire, solicitor of the defendant William W. Heyns; Sidney Alexander, Esquire, solicitor of the defendant Jesse J. Watts; Thomas L. Zimmerman, Esquire, solicitor of the defendant Lord & Burnham Company; Albert Comstock, Esquire, solicitor of the defendant Joe Cortese; Abraham I. Feltman, Esquire, appearing for Mr. Comstock, solicitor of the defendant Joe Cortese; Henry A. Williams, Esquire, solicitor of the defendant Dalzell Trucking Company; Miss Frances Hart, solicitor of the defendants, Charles E. Knoble, Jr. and Walter Knoble, trading as Hawthorne Contracting Co., Giannone Electric Company, Inc., and John Braen and Abram Braen, trading as Samuel Braen's Sons; Meyer Lobsenz, Esquire, associated with Miss Hart, of counsel with the defendant Hawthorne Contracting Co.; Thomas G. Tusso, Esquire, solicitor of the defendant C. Ladow & Son.

I find and report that on or about the 20th day of February, 1930, the Borough of Hawthorne, a municipal corporation, entered into a contract (Exhibit H-29) with Charles Bang, for the construction of a sewage treatment plant in the Borough of Hawthorne, County of Passaic and State of New Jersey, in complete and strict accordance

Master's Report.

with the plans (Exhibit H. C.-5) and the proposal and specifications attached to said contract.

10 Although the contract offered in evidence was offered as the original contract (testimony p. 31), it is not signed by either the Borough of Hawthorne or Charles Bang, the contractor, but no one made any objection before me as to its being the contract under which the work was performed.

20 On this contract there were issued by Harold J. Harder, Borough Engineer, and signed by him nine certificates (Exhibits H-1 to H-9 inclusive, testimony, pp 11-13), eight of which were paid to the contractor by the Borough; but the claims of the contractor on which these certificates were based are not supported by any affidavit of the contractor, as will appear by inspection of the exhibits.

In the course of the work done under the said contract, there were certain additions thereto and extras provided by the contractor; but, on the other hand, the contractor, I find and report, failed to complete the said contract, by making repairs that were necessary before the sewage treatment plant was in complete running order and acceptable to the Borough of Hawthorne.

30 I find and report that all of the money due from the Borough of Hawthorne to the contractor was not paid to the contractor and under and by virtue of the provisions of the "Municipal Mechanic's Lien Law (Revision of 1918)" numerous claims against the fund were filed with the officials of the Borough of Hawthorne, and this suit is to determine the amount of money due from the Borough of Hawthorne to the contractor, which constitutes the fund, and the amounts and validity
40 of the respective claims filed.

Master's Report.

I find and report that there were produced before me on the part of Charles Bang, the contractor, many claims for extra work and materials in addition to those specified in the contract, which extra work and material amounted in the aggregate to a large sum of money. In many instances the proof was wholly inadequate and in other instances the claims were for work or material the cost of which was included in the contract price. 10

Some of the claims of the contractor I have allowed and some I have disallowed. All of the claims of the contractor which do not appear upon the statement in the next succeeding paragraph, I find and report should be disallowed.

I find and report that there is due and owing from the Borough of Hawthorne on this contract as follows: 20

4531 cu. yds. excavation at 1.50	\$ 6,796.50	
3500 cu. yds. fill at .80	2,800.00	
5743 cu. yds. filter material at 2.75	15,793.25	
1235.7 cu. yds. concrete at 17.05	21,068.68	
104.14 cu. yds. gravel at 2.75	286.38	
52.07 cu. yds. sand at 2.00	104.14	
45 cu. yds. stone in final basin at 2.75	123.75	
100 cu. yds. stone for roads at 2.75	275.00	30
189 cu. yds. white stone paths and embankments at 6.60	1,247.40	
132708 lbs. steel reinforcement at .05 $\frac{1}{4}$	6,967.17	
1010 lbs. misc. steel at .08	80.80	
1200 lbs. structural steel at .07	84.00	
33.50 tons C. I. specials at 97.50	3,266.25	
91.28 tons C. I pipe B. & S. at 94.00	8,580.32	
7.96 tons C. I. pipe flex joint at 150.00	1,194.00	
18270 lin ft. Channel tile at .28	5,115.00	40
156 lin ft. 18 in. vitr. tile at 3.00	468.00	

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	132 lin ft. 12 in. vitr. tile at 2.75	363.00
	367 lin ft. 6 in. vitr. tile at .80	293.60
	304 lin ft. 4 in. vitrified tile at .30	91.20
	9718 ft. B. M. lumber at 150.00	1,457.70
	2 12 in. sluice gates at 200.00	400.00
	11 8 in. gate valves at 112.00	1,232.00
10	5 6 in. gate valves at 100.00	500.00
	2 dosing siphons complete at 2750.00	5,500.00
	1 sludge bed retaining wall (cost plus 15%) at 443.30	443.30
	280 spray nozzles at 3.30	924.00
	1 recording gauge and cover at 221.00	221.00
	water pipe and connections 2800.00	2,800.00
	water pipe extension and con- nections (cost plus 15%) 740.00	740.00
	culvert pipe (cost plus 15%) 106.44	106.44
20	2 plug valves at 175.00	350.00
	sludge bed superstructure complete at 5500.00	5,500.00
	1 Bronze measuring weir at 45.00	45.00
	Mechanical bar screen compl. 2250.00	2,250.00
	Primary basin scraper mechanism complete at 4900.00	4,900.00
	Piping and connections to digestion tank at 537.50	537.50
30	Downes steel floating cover f.o.b. Hawthorne (cost plus 15%) at 3680.00	3,680.00
	C. I pipe and fittings to gauge chamber at 38.50	\$38.50
	3 padlocks at 4.50	4.50
	2 wrenches at 26.80	26.80
	1 manhole cover for meter chamber at 14.00	14.00
	1 spray nozzle wrench at 6.50	6.50

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2	2 in. valves, pipe, tappings and valve boxes for drains from sprinkling filter, laterals to manifold at 36.80	36.80	
4	sludge suction foot pieces	120.00	
2	8 in. valve boxes	22.00	
4	galvanized weirs	60.00	10
2	scum troughs and alterations to gauge cover	157.35	
	wood roof on Downes cover (cost plus 15%)	333.50	
	hose connections, valves and sluice gate for digestion tank (cost plus 15%)	110.17	
	Installing, welding and roofing Downes cover, (cost plus 15%)	2,213.29	20
2	sets iron stairs and one pair iron doors (cost plus 15%)	319.40	
Total		\$110,048.79	

Items to be deducted:

2	Pieces 3 in. hose, totalling 35 lin. ft. with brass couplings	\$ 41.00	
	Vulcanizing one piece 3 in. hose 20 ft. long	15.00	30
	Amount of engineer's certificate No. 2532, issued to William W. Heyns, subcontractor, for making repairs to defective valves, pipes, etc., which repairs Charles Bang neglected or refused to make	281.35	40

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Amount of engineer's certificate No. 2531, issued to C. J. Vanderbeck, boiler-maker, for welding gas leaks in Downes steel floating cover				67.25	
10		Total	404.60	404.60	
Balance				\$109,644.19	
Less former payments on account				96,411.23	
Amount due				\$ 13,232.96	
Amount due				\$13,232.96	
20	To this amount there should be added the amount of money retained by the Borough of Hawthorne to protect it against an alleged lien notice filed by Joe Cortese (Testimony p. 14 and p. 272), after the engineer had issued the 7th certificate (Exhibit H-7)				1,009.96
Total amount in the hands of the Borough of Hawthorne to be applied on this contract					\$14,242.92
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In connection with the claims of the contractor against the Borough of Hawthorne, there are two items which are also included in the claim filed with the Borough of Hawthorne by the defendants Charles E. Knoble, Jr., and Walter Knoble, trading as Hawthorne Contracting Company.

The first of these items goes to the excavation made for the final settling basin and other units constructed under the contract. The contract pro-

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Master's Report.

vides that the contractor shall not be paid for excavations beyond nine inches outside the structure lines as shown on the plans (Exhibit H-29, at page 18); but, as a matter of fact, the contractor instructed the defendant Hawthorne Contracting Company, which did all of this class of work for the contractor, to excavate beyond the nine inch limit, which was done. The contractor presented claims before me for the cost of the additional excavation at the contract price of \$1.50 per cubic yard, which claim amounted to a large amount of money. The contractor never obtained a written order from the engineer to do this work, nor does it appear before me that he ever sought to change the terms of the contract in this particular (testimony p. 270). What he did was a voluntary act.

I find and report that, as a result of this set of circumstances, the contractor is not entitled to receive, nor can the fund be enlarged by, the amount of his claim for this work.

On the other hand, I find and report that the defendant Hawthorne Contracting Co. has a good and valid claim against the fund for this excavation, for the reasons that it performed this work at the special instance and request of the contractor and that such work aided the contractor in the prosecution of the whole job (testimony pp. 150-152 & 155).

The second item is for the excavation of additional depth in the final settling basin, for which the contractor attempts to charge the Borough a considerable sum of money on the basis of days work, the use of a pump, a shovel and a truck, but it does not appear before me that the con-

Master's Report.

tractor ever sought or obtained a change in the terms of the contract in this particular, nor did he ever get a written order from the engineer to enable him to change the contract from the unit price for excavation to that of days work and appliances supplied.

10 On the other hand, I find and report that as between the contractor and the defendant Hawthorne Contracting Company, who did this work for the contractor, there was such a change made in the cost of excavation, which arose from the particular nature of the excavation and the obstacles encountered. The claim submitted by the Hawthorne Contracting Co. to the contractor in regard to this work is as follows:

20	22 hrs .shovel on final settling basin at	
	\$6.00 per hr.	\$132.00
	2 men (45 hours at .55 per hr.)	22.00
	Truck hire for 2½ days	30.00
	(Exhibit H-13).	

30 The engineer testified before me that it took 45 cubic yards of stone to fill this excavation (testimony p. 231 & p. 270) and in the absence of other proof, I find and report that this excavation amounted to 45 cubic yards and that the contractor is entitled to receive for this work the sum of \$67.50, being forty-five times the unit price of \$1.50 per cubic yard of excavation, which amount I have included in the statement of the moneys due from the Borough to the contractor as above set forth.

40 I also find and report that the claim of the Hawthorne Contracting Company for its work and

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labor in the furnishing of equipment for this excavation, as detailed above, should be and is allowed.

Further considering the claim filed by the defendant Hawthorne Contracting Company, there is in said claim an item of "400 cubic yards of white stone at \$6.00, \$2400.00" (Exhibit H-13), whereas there were only delivered on the job 189 cubic yards (Exhibit H-34) (testimony p. 149-150 et seq.).

I find and report that the claim of the defendant Hawthorne Contracting Company is excessive in the amount of the difference, that is to say 211 cubic yards of white stone at \$6.00, \$1266.00, which amount should be deducted from the amount of its claim.

Amount of claim filed by the defendants	
Charles E. Knoble, Jr., and Walter Knoble, trading as Hawthorne Contracting Co.	\$6,745.71
Less 211 cubic yards white stone at \$6.00	1,266.00
Net amount of claim	\$5,479.71

In respect to the claim of Jesse J. Watts, who filed a claim (Exhibit H-21) against this fund as follows:

"To preparation and compiling bid on Hawthorne Sewage Treatment Plant	\$800.00
To professional services as supervising and construction engineer at \$1,000. per month for 8 months	\$8,000.00

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	To four months waiting time relative to lengthy and dilatorious compiling of sub-contracts prior to commencement of actual construction	900.00
		\$9,700.00
10	Received on account	\$3,800.00
	Amount due	\$5,900.00"

I find and report that the first and last items on this claim, amounting to \$1,700.00, have been withdrawn by the claimant (testimony pp. 137-138). As to the balance, without considering whether or not this is such a claim as is contemplated by or can be successfully filed under the statute, I find
20 and report, as a matter of fact, that the contract between this claimant and the contractor Charles Bang was at the rate of \$100.00 per week and not at the rate of \$1,000.00 per month as he claims (Testimony pp. 96, 101, 108, 109, 113, 116) and that he has been fully paid (testimony p. 117). This claim should be and therefore is disallowed.

I find and report that there were no disputes as to the amounts of any of the other claims filed
30 against the fund.

Considering all of the claims filed with the Borough of Hawthorne against this fund:

I find and report that there is due to the complainant James Radcliffe & Sons Co. on its lien claim (Exhibit H-15) the sum of \$277.75.

I find and report that there is due to the complainant John Mawhinney Co. on its claim (Exhibit H-17) the sum of \$225.00.

I find and report that there is due to the defen-
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Master's Report.

dants Charles E. Knoble, Jr., and Walter Knoble, trading as Hawthorne Contracting Company on its lien claim (Exhibit H-13) the sum of \$5,479.71.

I find and report that there is due to the defendant Lord & Burnham Company, on its lien claim (Exhibit H-16) the sum of \$4,625.00.

I find and report that there is due to the defendant Giannone Electric Co., Inc., on its lien claim (Exhibit H-18 and H-19) the sum of \$95.29. 10

I find and report that there is due to the defendant Dalzell Trucking Co., on its lien claim (Exhibit H-20) the sum of \$1,300.00).

I find and report that there is due to the defendant William W. Heyns on his lien claim (Exhibit H-22) the sum of \$846.24.

I find and report that there is due to the defendant John Braen and Abram Braen, trading as Samuel Braen's Sons on its lien claim (Exhibit H-23) the sum of \$1,432.80. 20

I find and report that there is due to the defendant Alliance Lumber Corporation on its lien claim (Exhibit H-24) the sum of \$600.00.

I find and report that there is due to the defendant C. Ladow & Son on its lien claim (Exhibit H-27) the sum of \$1,012.67.

I find and report that there is due to the defendant Igoe Bros., Inc., on its lien claim (Exhibit I-1) the sum of \$2,106.14. 30

I find and report that the claim of Jesse J. Watts (Exhibit H-21), amounting to \$5900.00 is disallowed for the reasons given above and should not be paid.

I find and report that the claim of Joe Cortese (Exhibit H-10 & H-11), amounting to \$867.00, is disallowed because it does not meet with the statutory requirements and should not be paid. 40

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I find and report that the claim of Anthony Korteweg (Exhibit H-25), amounting to \$457.69, is disallowed because it does not meet with the statutory requirements and should not be paid.

10 I find and report that the claim of C. J. Vanderbeck & Son (Exhibit H-26), amounting to \$399.60, is disallowed because it does not meet with the statutory requirements and should not be paid.

I find and report that the claim of Watson-Flagg Engineering Company, Inc. (Exhibit H-28) amounting to \$109.24, is disallowed because it does not meet with the statutory requirements and should not be paid.

20 I find and report that the amount of the claims exceeds the amount of the fund in the hands of the Borough of Hawthorne applicable to their payment and am of the opinion that no interest should be added to any of the claims above mentioned. If, however, interest is to be added to the respective claims, it should be added from the dates below set forth:

Claim of James Radcliffe & Sons Co., interest from January 1, 1931 on \$277.75.

30 Claim of John Mawhinney Co., interest from January 1, 1931 on \$225.00.

Claim of Charles E. Knoble, Jr., and Walter Knoble, trading as Hawthorne Contracting Co., interest from November 22, 1930 on \$5,479.71.

Claim of Lord & Burnham Company, interest from October 30, 1930 on \$4,625.00.

Claim of Giannone Electric Co., Inc., interest from October 29, 1930 on \$95.29.

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Claim of Dalzell Trucking Co., interest from December 10, 1930 on \$1,300.00.

Claim of William W. Heyns, interest from January 4, 1931, on \$846.24.

Claim of John Braen and Abram Braen, trading as Samuel Braen's Sons, interest from July 25, 1930 on \$1,432.80.

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Claim of Alliance Lumber Corporation, interest from December 5, 1930 on \$600.00.

Claim of C. Ladow & Son, interest from October 22, 1930 on \$1,012.67.

Claim of Igoe Bros., Inc., interest from August 9, 1930 on \$2,106.14.

I submit a recapitulation as follows:

Amount of fund in the hands of the

Borough of Hawthorne

\$14,242.92

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Claims allowed:

James Radcliffe & Sons Co. \$ 277.75

John Mawhinney Company 225.00

Charles E. Knoble, Jr.,

and Walter Knoble, trad-

ing as Hawthorne Con-

tracting Co. 5,479.71

Lord & Burnham Company 4,625.00

Giannone Electric Co., Inc. 95.29

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Dalzell Trucking Co. \$1,300.00

William W. Heyns 846.24

John Braen and Abram

Braen, trading as Sam-

uel Braen's Sons 1,432.80

Alliance Lumber Corpora-

tion 600.00

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Master's Report.

C. Ladow & Son	1,012.67
Igoe Bros., Inc.	2,106.14

Total of Claims allowed \$18,000.60

10 I find and report that there were held before me twelve hearings; that sixteen witnesses were sworn and there was taken testimony which transcribed amounted to 683 folios; that there were marked forty-two exhibits; that according to the charges allowed to special masters by law and under the rules of this court, my fees would be as follows:

	12 hearings	\$6.00	\$ 72.00
	Swearing stenographer		.25
20	Swearing 16 witnesses	.25	4.00
	Taking depositions 683 folios	.30	204.90
	Marking 42 exhibits	.15	6.30
	Making report		10.00
	Drawing report 53 folios	.40	21.20
			\$318.65

30 The foregoing fees, however, do not include all of the time and attention given to this matter; much time being occupied by me in and about settling the amount due from the Borough to the contractor, hearing arguments between the contractor and the engineer which were not made a part of the record, also conferences and instructions given by me to the engineer for the purpose of facilitating the completion of the work and the proper charges to be made against the fund in connection there-

Master's Report.

with; nor does it include the time spent by me in going over the testimony to determine the several items in dispute. I am of the opinion that my services in this matter are of the value of \$1,000.00; to be paid out of the fund in the hands of the Borough.

All of which is respectfully submitted this sixth day of August, nineteen hundred and thirty-one. 10

Special Master in Chancery
of New Jersey.

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Exceptions to Master's Report.

IN CHANCERY OF NEW JERSEY.

10	Between JAMES RADCLIFFE & SONS COMPANY, a corporation, and JOHN MAWHINNEY COMPANY, a corporation, Complainants, and BOROUGH OF HAWTHORNE in the County of Passaic, a municipal corporation, <i>et als.</i>, Defendants.	}	On Bill, etc. Exception to Master's Report.
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20 The Defendant Constitution Indemnity Company of Philadelphia, assignee of the claims of Igoe Bros., Alliance Lumber Co., and Lord & Burnham Co., and the defendant Charles Bang, each hereby except to the report filed in this cause by Frederick W. Van Blarcom, one of the Special Masters of this Court, bearing date the 6th day of August, 1931 and submitted to the Court September 8, 1931, for the following reasons:

30 1. The Master allowed the claim of C. Ledow & Son for One thousand and twelve (\$1012.67) dollars and sixty-seven cents, although the claim had not been filed within the time required by the Municipal Lien Act, had not been properly filed, was defective in form and did not comply with the requirements of the Municipal Lien Act, and allowed this claim despite the fact that the

40 said claimant was not properly a party to the Mu-

Exceptions to Master's Report.

cial Lien suit and had neither filed its lien claim before the institution of the municipal lien suits so as to be a party to the suit by the complainants nor become a party to the municipal lien suit as required by the Statute.

2. The Master erred in rejecting the claims of Charles Bang for extra work performed and material supplied in connection with the performance and completion of the contract of the said Charles Bang with the Borough of Hawthorne and such claims for extra work and materials were neither inadequate in proof as found by the Master nor were they claims for work and material the cost of which was included in the contract price, but on the contrary the proof was complete and adequate as to this extra work and materials and such work and material was not called for or required by the original contract.

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3. The Master erred in disallowing the claims for extra work made by Charles Bang which claims he disallows in the following language, "all of the claims of the contractor which do not appear upon the statement in the next succeeding paragraph I find and report should be disallowed," Exceptants except to this finding and say that it is erroneous and that the claims thus disallowed should be allowed.

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4. The Master disallowed the claim of Charles Bang for the excavation made by him beyond nine (9) inches outside the structural lines as shown on the plans, and did so on the ground that his act in thus excavating was a voluntary act, in which finding the Master fell in error in that the

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Exceptions to Master's Report.

10 Borough agreed to pay for such extra work at the rate of One Dollar (\$1.50) and fifty cents per cubic yard and in that the necessity for a written order was waived by the conduct and actions of the Borough and its responsible officials. The contractor should have been allowed the amount of his claim in this respect.

20 5. Despite the disallowance of this excavation item so far as the contractor Charles Bang was concerned the Master allowed the subcontractor, Hawthorne Contracting Co., which did such excavation work for Charles Bang to be paid therefor, which finding by the master was erroneous and is hereby excepted to in that the Hawthorne Contracting Co. were to be paid for such work out of and upon the payment therefor by the Borough of Hawthorne and in that the Hawthorne Contracting Co. was entirely familiar with the facts surrounding the doing of such extra excavation work and undertook to perform said work and to be paid therefor upon the allowance therefor to the said Charles Bang by the Borough of Hawthorne of the cost of said work, and the said Hawthorne Contracting Co. cannot be allowed for said work unless Charles Bang is allowed therefor from the Borough of Hawthorne, and the Master should therefore have either allowed the claim of Charles Bang against the Borough of Hawthorne and also the claim of the Hawthorne Contracting Co. against Charles Bang or should have denied the claim of Bang against the Borough and the claim of the Hawthorne Contracting Co. against Bang.

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40 5. The Master also disallowed the claim of

Exceptions to Master's Report.

Charles Bang for the excavation of additional depth in the final settling basin and in so doing he fell in error for the reason that the Borough had authorized the performance of the said work on the basis claimed by the said Charles Bang and the necessity for a written order from the engineer had been waived by the Borough, while the actual amount seemingly allowed by the Master to the said Charles Bang for said work was entirely inadequate and at variance with the claim and facts in the case. 10

6. The Master allowed the Hawthorne Contracting Co. its claim for the performance for Charles Bang of such excavation of additional depth in the final settling basin although disallowing the claim of Charles Bang for the same work against the Borough and in so doing the Master was in error in that the Hawthorne Contracting Co. was only to be paid out of the allowance to be made by the Borough of Hawthorne to Charles Bang for said work and the said Hawthorne Contracting Co. undertook such work understanding that it would be paid only upon the making of the allowance to Charles Bang by the Borough for said work as agreed, so that the disallowance by the Master of the claim of Charles Bang for said work should have produced a similar disallowance of the claim of the Hawthorne Contracting Co. against Bang for such work. 20 30

7. The Master erroneously allowed the claim of the Hawthorne Contracting Co. for Five thousand four hundred seventy-nine (\$5,479.71) dollars and seventy-one cents when on the facts in the 40

Exceptions to Master's Report.

10 case there was due to the said company a sum very much smaller than the amount so allowed in that the said Hawthorne Contracting Co. did not supply all of the material claimed for nor did it perform the labor claimed for, and the work as done and the material as supplied was not as per agreement, was defective and inferior.

20 8. The master found that there was due to the said Charles Bang from the Borough of Hawthorne the sum of Fourteen thousand two hundred forty-two (\$14,242.92) dollars and ninety-two cents when in fact there was due and owing from the said Borough to the said Charles Bang in excess of Eighteen thousand (\$18,000.) dollars, and made such finding although the engineer of the
 30 Borough conceded that in addition to the amount due on the contract itself there was due to the said Charles Bang the cost of work done by the Hawthorne Contracting Co. and others plus a percentage thereon to the said Charles Bang and that such additional amount had not been determined by the Borough because the said Charles Bang had not submitted the bills of such subcontractors and materialmen and when he did the Borough would
 40 allow the amount thereof plus the percentage due to the said Charles Bang.

9. The Master allowed the Hawthorne Contracting Co. the amount claimed by it for excavating the extra nine (9) inches although finding that such excavation on the part of Bang was a voluntary act so far as the Borough was concerned not called for by the contract and not extra work, in which finding as to the Hawthorne Contracting
 50 Co. claim the Master was in error since the ma-

Exceptions to Master's Report.

terial and work done by the Hawthorne Contracting Co. did not go into the completion of the municipal contract in question but went into the performance of work by the said Bang which he carried out for his own interest and of his own ends, and therefore the Hawthorne Contracting Co. so far as its said claim is concerned was neither a materialman nor a laborer that had supplied material or labor for the performance or furtherance of a municipal contract. 10

10. Charles Bang, the contractor, claimed Seven hundred seven (\$707.90) dollars and ninety cents for work and material in connection with the final settling basin and established that the work was ordered by the Town Engineer Harder but the Master erroneously only allowed the sum of Sixty-seven (\$67.50) dollars and fifty cents representing forty-five (45) cubic yards of excavation although he should have allowed the claim as made by Charles Bang. 20

11. Charles Bang, the contractor, was entitled to One dollar and fifty cents (\$1.50) per cubic yard for such fill as it might be necessary to place for a roadway and for certain swampy ground, but the excavation which was supposed to supply sufficient for such filling purposes was not sufficient and the said Charles Bang was required to buy fill outside and made a claim for such extra fill so purchased which claim amounted to fourteen hundred (\$1400.) dollars and which the Master erroneously disallowed. 30

12. Charles Bang, the contractor, claimed an item of four hundred (\$400.) dollars for the supervision of his engineer Watts which the Master 40

Exceptions to Master's Report.

disallowed on the ground that it was covered by the fifteen (15%) per cent item in the contract or otherwise covered by the contract, in which finding the Master was in error.

10 13. The contractor made a claim for One hundred ninety-seven (\$197.35) dollars and thirty-five cents for labor and materials in installing a scum trough and the Master only allowed the sum of One Hundred fifty-seven (\$157.35) dollars and thirty-five cents although no testimony appears justifying the reduction of the claim by the sum of forty dollars.

20 14. The exceptant-contractor, Charles Bang, claimed Seven hundred and nine (\$709.90) dollars and ninety cents for extra excavating and for the removal of water due to excavating the final settling basin beyond the depth specified by the specifications, which claim was based upon the labor involved on a time basis; the Hawthorne Contracting Co., the sub-contractor of the exceptant-contractor, made a claim against the exceptant-contractor for One hundred sixty-four (\$164.) dollars for excavating the final settling basin be-
30 yond the specified depth, which claim was also on a time basis. The Town Engineer determined that under the contract between Bang and the Borough the contractor was entitled to payment for extra excavation on the basis of One dollar and fifty (\$1.50 cents per cubic yard and could not be paid on a time or work basis, which construction of the contract the Master adopted and therefore awarded to the expectant-contractor the sum of
40 sixty-seven (\$67.50) dollars and fifty cents, while

Exceptions to Master's Report.

at the same time allowing payment to the Hawthorne Contracting Co. against the exceptant-contractor on a time or work basis, the award being One Hundred fifty-four (\$154.) dollars despite the fact that the Hawthorne Contracting Co. was required to perform its contract with exceptant-Bang in accordance with the plans and specifications and contract which Bang had with the Borough, so that the construction of the said contract and specifications adopted by the Master should have applied as well to the Hawthorne Contracting Co. as to Bang. The Master should have allowed the Hawthorne Contracting Co.'s claim on a time or work basis and also the claim of the exceptant-contractor Bang of Seven hundred and nine (\$709.90) dollars and ninety cents on a time and work basis or it should have allowed both the Hawthorne Contracting Co. and exceptant-contractor Bang on the basis of One dollar (\$1.50) and fifty cents per cubic yard for forty-five cubic yards.

15. Exception is taken to the finding that the Hawthorne Contracting Co. is entitled against the fund and contractor Bang to recover for the use of the hoisting elevator for concrete at four (\$4.00) dollars per hour for twenty-eight and one-half ($28\frac{1}{2}$) hours because the testimony shows there was no contract or arrangement for its use, there is no proof as to the reasonable value of such use and four dollars per hour is entirely out of proportion to the value of such use.

16. Exception is taken to the finding of the Master that the Hawthorne Contracting Co. is entitled to payment for 1398 cubic yards of exca-

Exceptions to Master's Report.

10 vation at Ninety-seven (\$.97) cents per cubic yard and 1398 cubic yards of back fill at twenty (\$.20) cents per cubic yard, both of which were claimed as extra work, when the proof clearly shows that not more than 922 cubic yards was outside the contract which the Hawthorne Contracting Co. was required to perform and when it clearly appears that no more than 922 cubic yards were excavated outside the structure lines up to which structure lines and for nine inches outside the Hawthorne Contracting Co. was required by the contract with Bang to perform without an extra charge and even so much as was outside the contract or structure lines was not authorized by Bang in writing in accordance with the terms of his contract with the Hawthorne Contracting Co., the contract between 20 the contractor Bang and the Hawthorne Contracting Co. following the contract between Bang and the Borough of Hawthorne and to be performed in accordance with the specifications of the Borough contract.

17. Exception is taken to the failure of the Master to allow to the contractor Charles Bang the cost of the iron strips used to suspend the hangers, for which a claim of One hundred thirty-five (\$135.00) dollars was conceded by the Borough Engineer. 30

18. Exception is taken to the disallowance by the Master to Charles Bang of the claim for 63 8/10 cubic yards of drain and outfall trench excavation in that the Master excluded it because of the claim of the Borough that it had already been paid for through the seventh certificate, although 40 allowing it as an extra to the subcontractor who

Exceptions to Master's Report.

admitted he had received his share of the same quantity by his seventh certificate from contractor Bang. Either the extra should have been allowed to contractor Bang or it should have been disallowed to subcontractor Hawthorne Contracting Co.

19. Exception is taken to the failure of the Master to allow to contractor Charles Bang for 1398 cubic yards of excavation at ninety-seven (\$.97) cents per cubic yard and 1398 cubic yards of back fill at twenty (\$.20) cents per cubic yard.

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20. Exception is taken to the allowance to the Hawthorne Contracting Co. by the Master of 1398 cubic yards of excavation at ninety-seven (\$.97) cents per cubic yard and 1398 cubic yards of back fill at twenty (\$.20) cents per cubic yard as alleged extra work to the Hawthorne Contracting Co. due from Charles Bang.

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21. Exception is taken to the allowance to the Hawthorne Contracting Co. for 63.8 cubic yards of drain and outfall trench against contractor Charles Bang.

22. Exception is taken to the failure of the Master to allow to Charles Bang his claim for excavation at One (\$1.50) dollar and fifty cents per cubic yard which excavation obviated the necessity of sheathing. The testimony about this claim appears on page 228 and 229 of the testimony.

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23. Exception is taken to the allowance to the Hawthorne Contracting Co. of a charge for 475.5

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Exceptions to Master's Report.

10 cubic yards of excavation in water trench because the master disallowed the same claim by contractor Bang against the Borough on the ground that Bang had made a lump sum bid. The Hawthorne Contracting Co. contract was a copy so far as excavating was concerned of the contract of Bang with the Borough.

24. Exception is taken to the failure of the Master to allow the claim of Three hundred forty-seven (\$347.50) dollars and fifty cents for a set of iron stairs and one pair of iron doors, the Master having allowed three hundred nineteen (\$319.40) dollars and forty cents and disallowed an item for labor of seventy dollars.

20 25. Exception is taken to the disallowance by the Master of the claim of Charles Bang for mounting and matching an extra primary switch-board at One hundred ten (\$110.29) dollars and twenty-nine cents in that the cost of mounting and matching that particular board was extra work for which the contractor should have been allowed.

30 26. The claim of the Hawthorne Contracting Co. should have been totally rejected because it was made for a sum greater than was actually due and the claimant knowingly and consciously made such excessive claim it well knowing that it had not supplied 400 cubic yards of white stone into the municipal improvement in question.

STICKEL & STICKEL,
Solicitors of Exceptants.

Opinion.**IN CHANCERY OF NEW JERSEY.**

Between

JAMES RADCLIFFE & SONS Co.,

and another,

Complainants,

and

THE BOROUGH OF HAWTHORNE,

and others,

Defendants.

81/709

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Opinion.

Between

IGOE BROTHERS, INC.,

Complainant,

and

THE BOROUGH OF HAWTHORNE,

and others,

Defendants.

83/47

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November 18, 1931.

1. A claimant under the Municipal Mechanic's Lien Law (Rev. of 1918) is required in his notice of claim to state as nearly as may be the amount of his demand after deducting all just credits and offsets.

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2. If he fails to make a reasonable effort to ascertain the true facts on which the amount of his demand depends and so claims a materially larger amount than is owing, his lien is lost.

These two suits have a common purpose, namely,

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Opinion.

to establish and enforce liens under the municipal Mechanic's Lien Law on funds due by the Borough of Hawthorne to Charles Bang on a contract for the erection of a sewage disposal plant. Both causes were referred to a special master before whom the hearings were consolidated. He

10 reported that the sum in the hands of the Borough to be applied on the contract is \$14,242.92 and that the liens total \$18,000.60, divided among eleven claimants. Ten of these claims amounting to \$12,520.89 were uncontested; the eleventh, that of the defendants, Charles E. Knoble, Jr., and Walter Knoble, allowed for \$5,479.71, was disputed. Exceptions have been filed to the allowance of this claim. There is one other matter here in dispute:

20 The master disallowed in full the claim of the defendant Jesse J. Watts. Watts excepts.

MESSRS. STICKEL & STICKEL, for Exceptants Igoe Brothers, Alliance Lumber Co., and Lord & Burnham Co.

MISS FRANCES HART (MR. MEYER LOBSENZ), for Charles E. Knoble, Jr. and Walter Knoble.

30 MR. SIDNEY ALEXANDER, for Defendant, Jesse J. Watts.

BIGELOW, V. C.

Watts was the engineer employed by Bang, the contractor. He claimed that Bang promised to pay him \$1,000 a month; Bang testified the agreed salary was \$100 a week. If the former was the

40 fact, Watts' claim was valid. If the latter was

Opinion.

true, he had been paid in full and his claim was properly rejected. The master found that Watts was employed at \$100 a week; the evidence, though conflicting, supports the finding and therefore the finding will be sustained. "A master's finding of a fact in issue is entitled to great weight and should not be disturbed when there is a serious conflict of evidence." *Bagley etc. Co. v. Traders etc. Co.*, 86 A. 1029. *Riverside Apartment Corp. v. Capital Const. Co.*, 107 N. J. E. 405 152 A. 763. Watts also excepts in rather general terms to rulings of the master on the examination of witnesses. These exceptions must be overruled, since on the argument, his counsel was unable to point out any erroneous rulings which could have injured him. 10

The only exception to the allowance of the Knobles' claim which I need consider, is that the claim should have been totally rejected because it was made for a sum greater than was actually due and because the claimants knowingly and consciously made such excessive claim. The notice of claim which these defendants served on the Borough sets forth: 20

"A statement of the labor performed and material furnished, all of which were actually performed and used in the erection and completion of the said contract, are as follows: The work was started on March 25th, 1930 and continued until November 22nd, 1930. 30

4,486 cu. yds. excavation at .97 Cu.

Yd	\$ 4,351.42
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3,500 cu. yds. fill at .73 cu. yd	2,555.00
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5,743 cu. yds. Filter Mat at 2.50 cu.

yd	14,357.50
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104.14 cu. yds. gravel at 2.50 cu. yd	260.35
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Opinion.

52.07 cu. yds. sand at 1.85 cu. yd	96.32
100 cu. yds. stone at 2.50 cu. yd	250.00
400 cu. yds. white stone at 6.00 cu. yd	2,400.00
	\$24,270.59

10	For Extra Work for Charles Bang.	
	1,398 cu. yds. excavation at \$.97 cu. yd	\$1,356.06
	1,398 cu. yds. back fill at .20 cu. yd	279.60
	28½ hrs. hoisting elevator for concrete at \$4.00 per hr.	114.00
	22 hrs. shovel on Final Settling Basin at \$6.00 per hr.	132.00
	2 men (45 hours) at 55c. per hr.	22.00
	Truck hire for 2½ days	30.00
20		\$1,933.66
	Amount of Bill for work and material on plant	\$26,204.25
	Amount received from Charles Bang	19,458.54
	Amount due	\$ 6,745.71

30 “The amount of claimant’s demand after deducting all credits and offsets is \$6,745.83, together with interest. The moneys became due to claimants on the 22nd day of November, 1930, and were due from the said Charles Bang with whom claimants had a contract and for whom the materials were supplied.” Attached to the notice was an affidavit by both defendants setting forth, in part, “More particularly is it true that we have performed labor and supplied materials which were

40 actually used upon a certain sewage disposal plant

Opinion.

for the construction of which Charles Bang had a contract with the Borough of Hawthorne * * * and this work and the materials were actually used in the construction of the work. * * * There is now due to us after deducting all past credits and offsets the sum of \$6,745.71, with interest."

Among the items so claimed is 400 cubic yards of white stone at \$6 a yard, \$2,400. The master found that only 189 yards of white stone had been furnished and therefore deducted from the claim \$1,266 for the 211 cubic yards claimed but not furnished, and the master allowed the balance of the claim, \$5,479.71. Mr. Walter Knoble testified in support of the claim of his firm that they actually supplied and delivered on the job only 197 cubic yards of white stone; that they had contracted with a third party to purchase 400 cubic yards for the purpose of this job; "We have to pay for it and we have no other use for the stone"; that the balance of the stone has not actually been delivered to the Knobles but is still at the quarry; that it is, however, available when wanted and subjected to the orders of the Borough engineer; that the job is not completed as far as the Knobles' work is concerned. It also appeared that the engineer's original estimate of the amount of materials required for the sewage plant, called for 400 cubic yards of white stone.

Counsel for the Knobles readily concede that claimants have no lien for the stone not furnished to Bang or used in the sewage disposal plant. The question argued is this: Have the Knobles, by claiming for 400 cubic yards of stone when they furnished only 189, forfeited their lien for the materials actually furnished and the labor performed

Opinion.

by them in the execution of the contract? The Knobles say that the excessive claim was made in good faith, in the belief they were entitled to a lien for all the stone even though they knew part remained undelivered; that, therefore, their lien is not lost, since forfeiture of the lien results only from fraud or from the wilful making of an excessive claim. The exceptants contend that a lien is lost not only when an inflated claim is made fraudulently or wilfully, but also when such a claim is a product of the gross negligence of the claimant; that the Knobles, knowing they had delivered only part of the stone, set forth in their claim that they had delivered it all; that whether this misstatement was wilfully or negligently made, the lien is lost, regardless of the belief of the Knobles that they were entitled to payment for undelivered stone.

The Municipal Mechanic's Lien Law, P. L. 1918, p. 1041, Sec. 1, gives a lien for the value of labor performed and materials furnished toward the performance of the contract with the municipality. Section 2 requires the claimant to fill with the municipality a verified notice of claim which shall state "the amount claimed, from whom due, and if not due, when it will be due, and shall state as nearly as may be the amount of the demand after deducting all just credits and offsets. * * * And shall allege that the labor was performed or materials furnished to the said contractor or subcontractor, specifying which, and that they were actually performed or used in the execution or completion of the said contract with the said municipality." These provisions are primarily derived from P. L. 1892, p. 369. The language relating to the amount.

Opinion.

of the claim is identical in both acts except that the older statute lacks the phrase "as nearly as may be." The phrase seems to have been first introduced in the Revision of 1918.

Camden Iron Works v. Camden, 60 N. J. E. 211, 47 A. 221, reversed 64 N. J. E. 723, 52 A. 477, was based on the Municipal Mechanic's Lien Law of 1892. Vice Chancellor Reed dealt with a claim for \$32,228; he struck out one item of \$11,715 claimed for pipe not actually delivered, reduced the balance to \$14,499, and allowed the claim in that sum. He held that if a fraudulent purpose for claiming an excessive sum were shown, the lien would be forfeited, but where the party and his counsel deemed the larger claim worthy of submission to judicial determination, the fact that it was found to be partially invalid did not brand the whole claim fraudulent and discharge the lien. He added that the claim was made "without that care which should attend the filing of a lien under the statute." This decision of the Court of Chancery was followed by Vice Chancellor Grey in *Garrison v. Borio*, 61 N. J. E. 236, 47 A. 1060, and by Vice Chancellor Pitney in *Hall Co. v. Jersey City*, 62 N. J. E. 489, 50 A. 603. The latter wrote, "That a mistake in stating the amount of the claim by which it is made larger than it afterwards turns out actually to be, is not fatal unless made intentionally for the purpose of inflating the claim."

After these cases were decided, the Camden Iron Works decree was reversed by the Court of Errors and Appeals and the disputed claim disallowed entirely. Mr. Justice Fort wrote: "The requirement of the statute, therefore, is an accurate verified account with a statement thereon of all just credits

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Opinion.

and offsets. Good faith in the claim and accuracy in its statement are made the basal foundations of its right to be enforced against moneys due a contractor from a city." And again, "This statute clearly requires an honest and truthful statement of the claim for labor performed or material furnished in the execution of the contract and in order to make the accuracy of the statement quite essential, the statute provides that the verification shall be that the work was actually performed or the material actually used in the execution or completion of the contract. The statute is not broad enough to cover materials not actually used in the construction of the city work. The reason for this must be quite obvious. The swearing to an erroneous claim thoughtlessly and carelessly without any effort to obtain accessible data from which the error might be corrected, is swearing wilfully and knowingly. *Gibbs v. Hanchette*, 90 Mich. 657. In the statement of a fact which could have been avoided by reasonable diligence, the lien is lost. *Nicolai v. Van Fridagh*, 23 Oreg. 149. A material misstatement in a claim, if made fraudulently or what is about the same thing, made wilfully and knowingly violates the lien altogether." And he summed up the rule applicable: "If the account as filed is not the amount of the demand which is truly and substantially due to the claimant after deducting all just credits and setoffs, but is knowingly and consciously excessive and untrue, it will not be enforced as a lien." The Court of Errors and Appeals also put on the claimant the burden of proving that the excessive part of the claim was made in good faith.

Gregory v. Lewis, 87 N. J. E. 127, 99 A. 150, was decided by Vice Chancellor Backes in 1916. The

Opinion.

case came before him on a motion to dismiss the bill because the claims of complainants were excessive and therefore invalid. They included a large sum for consequential damages arising out of a breach of the contract with the principal contractor. "The statute gives a lien only for labor and materials actually performed or furnished towards the performance or completion of the contract. The lien does not extend to damages for a breach of the contract. * * * The question, therefore, is whether, by the inclusion of unliquidated damages, the complainants have forfeited their liens, and the answer is to be found in the motives actuating them in overstating their claims, for if this was done in good faith, they ought not to be penalized and suffered to lose the benefit of the statute to the amount of their just dues. * * * The inclusion of the offending items may have been the result of a misconception of the law or due to faulty advice of counsel. If the matter is reduced to inference, that of innocence must prevail. The fact that the notices frankly assert that part of the claim and how much was made up of damages, refutes the charge of deception." The motion to dismiss was denied. "Whatever may have been the cause, the complainants are entitled to their day in court to explain. On the face of the pleadings, it does not appear that they came into court with unclean hands and their claims should not be summarily rejected on a motion of this kind."

The provision of the Municipal Mechanic's Lien Law relating to the notice of claim may be compared with Section 3 of the Mechanic's Lien Act of 1898 relating to stop-notices; in *Camden Iron Works v. Camden*, *supra*, and in *Taylor v. Wahl*, 69 N. J. L. 471, 55 A. 40, it is suggested that the

Opinion.

principles controlling claims under both acts are the same. Section 3 of the Act of 1898 authorized the claimant to give to the owner notice "of the amount due to him or them". The Legislature by P. L. 1910, p. 500, added "specifying said amount as nearly as possible". Before the amendment of

10 1910, a failure to state in the stop-notice with absolute accuracy the amount due, was fatal. *Reeve v. Elmendorf*, 38 N. J. L. 125. *Hall v. Baldwin*, 45 N. J. E. 858, 18 A. 976. Chief Justice Gummere, writing for the Supreme Court in *Tuttle v. Cadwell*, 92 N. J. L. 26, 105 A. 11, said of the amendment: "Its purpose is to relieve the material-

20 man from stating in his stop-notice the amount due with absolute accuracy. But it requires him to state in that notice the amount of his claim against the contractor with as much accuracy as is reasonably possible. * * * In order to take advantage of the statute, when it appears that the amount specified in the stop-notice is in excess of the amount actually due, we think the burden rests upon the materialman to show that the excessive claim was not the result of carelessness and that the mistake had been made notwithstanding the fact that he had used every reasonable effort to ascertain with

30 exactness the amount which he was entitled to impound in the hands of the owner." To the same effect is *Intili v. Bonnet*, 6 N. J. Misc. 1043, 143 A. 741.

I have found no decision on the Municipal Mechanics' Lien Law of 1918 and the words therein "as nearly as may be". If, before that enactment, a claim for an excessive amount was valid when it sprang from the carelessness of the claimant and not from any wilful or fraudulent intent, then I

40 think the new statute requires a greater degree of

Opinion.

accuracy. A claimant who, through gross carelessness, demands an excessive amount, does not state the amount "as nearly as may be". But whatever the rule before 1918, a claimant is now required, in my opinion, to make a reasonable effort to ascertain the true facts on which the amount of his demand depends; and if through failure to do so, it comes about that he claims a materially larger amount than is owing, then his lien is lost. 10

The Knobles, in their claim, listed among the material furnished and actually used in the work, 400 cubic yards of stone for which they charged \$2,400. They swore that "the materials were actually used in the construction of the work". This was not the fact; only 189 yards of stone had been furnished by them, as they knew or might readily have ascertained if they had taken any pains to do so. Their claim was inflated by charging for 211 cubic yards at \$6 a yard, or \$1,266. They explain their excessive claim by testimony that they would have to pay for 400 cubic yards of stone, and that they stand ready to deliver the full amount on demand. But they have not explained at all their false statement that they had actually delivered 400 cubic yards. Their misconception of the law does not excuse the misstatement of the facts. 20 30

Because of this excessive demand, the Knobles have lost their lien on the fund and the exception to the allowance of their claim is sustained.

Order Confirming Master's Report.

IN CHANCERY OF NEW JERSEY.

10	Between JAMES RADCLIFFE & SONS COMPANY, a corporation, and JOHN MAWHINNEY COMPANY, a corporation, Complainants, and BOROUGH OF HAWTHORNE in the County of Passaic, a municipal corporation, <i>et als.</i>, Defendants.	On Bill, &c. Order Confirming Master's Report.
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20	Between IGOE BROTHERS, INC., a corporation, Complainant, and BOROUGH OF HAWTHORNE, CHARLES BANG, <i>et als.</i>, Defendants.	On Bill, &c. Order Confirming Master's Report.
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30 Exceptions having been filed by the complainant, Igoe Brothers Inc., and the defendants, Alliance Lumber Company, Lord & Burnham Company and Charles Bang, to the report of Frederick W. Van Blarcom, one of the masters of this court, on the matters referred to him by order of this court heretofore made, and the matter coming on to be heard in the presence of James N. Wright, Solicitor of the complainant, James Radcliffe &

40 Sons Company, Samuel Baten, Solicitor of the

Order Confirming Master's Report.

complainant, John Mawhinney Company, Fred G. Stickel, Jr., Solicitor of the exceptants, Sidney Alexander, Solicitor of the defendant, Jesse J. Watts, and Miss E. Frances Hart, Solicitor of the defendants, Charles Knoble, Jr. and Walter Knoble, trading as Hawthorne Contracting Company, and exceptions 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 17, 19, 22, 24, and 25 have been withdrawn by the solicitor of the exceptants leaving for consideration of the court and argument by counsel exceptions 7, 16, 18, 20, 21, 23 and 26 and the court having considered such exceptions and the arguments of counsel therein, and having determined that a decision of the issues raised by exceptions 7 and 26 made unnecessary the court's decision of the issues raised by the remaining exceptions before the court;

It is on this 14th day of December, 1931, ORDERED, that exceptions 7 and 26 to the master's report be and they are hereby sustained and allowed, and that the claim of the defendants, Charles E. Knoble, Jr. and Walter Knoble, trading as the Hawthorne Contracting Company, be and it is hereby disallowed in its entirety.

It is further ordered that the exceptions filed by the defendant, Jesse J. Watts, be and the same are hereby overruled.

It is further ordered that, as modified in accordance with the foregoing, the said master's report be and the same is hereby in all things ratified and confirmed according to the true tenor and meaning thereof, but subject to the right in the exceptants to request a decision upon exceptions 16, 18, 20, 21, and 23 in the event of an appeal from this order.

Order Confirming Master's Report.

It is further ordered that the matter of the right to ask for a counsel fee to be paid out of the fund in the hands of the Borough of Hawthorne to Fred G. Stickel, Jr., of Stickel & Stickel, Esqs., be reserved until the final decree of this cause.

E. R. WALKER,
C.

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Respectfully advised,
JOHN O. BIGELOW,
V. C.

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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

JAMES RADCLIFFE & SONS COMPANY, a corporation, and
JOHN MAWHINNEY COMPANY, a corporation,
Complainants-Appellees,

and

BOROUGH OF HAWTHORNE IN
THE COUNTY OF PASSAIC, a
municipal corporation, *et*
als.,

Defendants-Appellees,

and

CHARLES E. KNOBLE, JR., and
WALTER KNOBLE, trading as
Hawthorne Contracting Co.,
Defendant-Appellant.

On Bill, etc.

*On Appeal
from Court
of Chancery.*

Between

IGOE BROTHERS, INC.,
Complainant-Appellee,
and

THE BOROUGH OF HAWTHORNE,
et als.,
Defendants-Appellees,

and

CHARLES E. KNOBLE, JR., and
WALTER KNOBLE, trading as
Hawthorne Contracting Co.,
Defendant-Appellant.

**BRIEF OF APPELLEES,
IGOE BROS., INC., ET ALS.**

Two municipal lien suits were started by three complainants entitled as above and the suits consolidated for purposes of hearing by Frederick W. Van Blarcom as Special Master, to whom the cases were referred. In the hearing before the Master the validity both as to substance and form of the following claims was conceded by the contractor Charles Bang and all other parties to the suit:

Igoe Brothers, Inc.....	\$2,106.14
Alliance Lumber Co.....	600.00
James Radcliffe & Sons Co.....	277.75
John Mawhinney Company.....	255.00
Lord & Burnham.....	4,625.00
Samuel Braen Sons.....	1,432.80
Dalzell Trucking Co.....	1,300.00
Giannone Electric Co., Inc.....	95.29
William H. Heyns.....	846.24

The following claims were objected to by the contractor or one or more of the other parties to the suit:

Hawthorne Contracting Co.....	\$6,745.83
Jesse J. Watts	5,900.00
Anthony Korteweg	457.69
C. J. Vanderbeck & Son.....	399.60
Watson Flagg Engineering Co.....	109.24
Joe Cortese	867.00

The claim of C. Ladow & Son for one thousand dollars was objected to but the objection later withdrawn and the claim allowed. The Master reported in favor of all of the claims to which no objection was made and rejected all of the claims to which objection had been registered except as to the Hawthorne Contracting Co. claim, which claim, however, the Master found should be allowed for \$5,479.71 instead of \$6,745.71, the difference representing an item of 211 cubic yards of white stone at six dollars per cubic yard which had not been supplied although

claimed for in the proof of claim filed. The Hawthorne Contracting Co. filed two proofs, the first of which was not accurately verified and the second of which sought to correct that defect.

Exceptions to the Master's report were filed by the claimants Igoe Bros. Inc., Alliance Lumber Co. and Lord & Burnham Co. and by the contractor Charles Bang, all of which exceptions were withdrawn before or at the argument before the Vice-Chancellor excepting Exceptions 7, 9, 16, 18, 20, 21, 23 and 26. Exceptions 16, 18, 21 and 23 were argued together and Exceptions 7 and 26 argued together. Vice-Chancellor Bigelow found it necessary to consider only Exception 26 and based his decision upon the necessity for sustaining that exception. Exceptions were also filed by Jesse J. Watts to the adverse finding made by the Master against his claim, but Vice-Chancellor Bigelow overruled all such exceptions. The issue therefore decided by Vice-Chancellor Bigelow and the one which is the subject matter of this appeal is the issue raised by Exception 26. That exception reads as follows:

"26. The claim of the Hawthorne Contracting Co. should have been totally rejected because it was made for a sum greater than was actually due and the claimant knowingly and consciously made such excessive claim, it well knowing that it had not supplied 400 cubic yards of white stone into the municipal improvement in question."

THE COURT OF CHANCERY PROPERLY DENIED TO THE APPELLANT A LIEN UPON THE FUND DUE TO THE GENERAL CONTRACTOR FROM THE MUNICIPALITY IN VIEW OF THE FACT THAT THE APPELLANT HAD KNOWINGLY AND CONSCIOUSLY MADE AND FILED AN EXCESSIVE CLAIM AGAINST THE GENERAL CONTRACTOR AND THE FUND IN THE HANDS OF THE MUNICIPALITY DUE THE CONTRACTOR.

The Statute involved and under which the notice of claim was given and the municipal lien suits brought is the Municipal Mechanic's Lien Law, Pamphlet Laws of 1918, page 1041. Section I gives a lien for the value of labor performed and materials furnished to the completion of a contract of a municipality. Section II requires the claimant to file with a municipality a verified notice of claim which shall state among other things "the amount claimed, from whom due, and if not due, when it will be due, and shall state as nearly as may be the amount of the demand after deducting all just credits and offsets. * * * And shall allege that the labor was performed or materials furnished to the said contractor or subcontractor, specifying which, and that they were actually performed or used in the execution or completion of the said contract with the said municipality." These provisions as Vice-Chancellor Bigelow points out in his opinion are primarily derived from Pamphlet Laws of 1892, page 369. The language relating to the amount of the claim is identical in both acts except that the older statute lacks the phrase "as nearly as may be." The phrase seems to have been first introduced in the revision of 1918.

The first decision under this section of the act seems to be the case of *Camden Iron Works v. Camden*, 60 N. J. Eq. 211, 47 Atl. 221, reversed 64 N. J. Eq. 723, 52 Atl. 477. The decision was based upon the Act of 1892, but as the Act of 1892 is practically the same as that of 1918 except for the words "as nearly as may be" this decision and the reversal of it is of great importance in the determination of the instant case. Vice-Chancellor Reed held that if a fraudulent purpose for claiming an excessive sum were shown the lien would be forfeited, but where the party and his counsel deemed the larger claim worthy of submission to judicial determination the fact that it was found to be partially invalid would not brand the whole claim as fraudulent and thereby discharge the lien. Despite the fact, therefore, that in his words the claim was made "without that care which should attend the filing of a lien under the statute" Vice-Chancellor Reed struck out one item of the claim, an item which claimed for pipe not actually delivered, reduced the balance of the claim somewhat and allowed the claim for the reduced sum. This decision as Vice-Chancellor Bigelow points out in his opinion was followed in *Garrison v. Borio*, 61 N. J. Eq. 236, 47 Atl. 1060, and in *Hall Co. v. Jersey City*, 62 N. J. Eq. 489, 50 Atl. 603. In the latter case Vice-Chancellor Pitney wrote "that a mistake in stating the amount of the claim by which it is made larger than it afterward turns out actually to be is not fatal unless made intentionally for the purpose of inflating the claim." It is submitted that even under the rule as laid down in these cases the claimed lien of the appellant must be denied. But in any event, after the rendition of these decisions the Camden Iron Works

decree was reversed by the Court of Errors and Appeals and the disputed claim disallowed entirely.

Justice Fort wrote, "The requirement of the statute therefore is an accurate verified account with a statement thereon of all just credits and offsets. Good faith in the claim and accuracy in its statement are made the basal foundations of its right to be enforced against moneys due a contractor from a city." And again, "This statement clearly requires an honest and truthful statement of the claim for labor performed or material furnished in the execution of the contract and in order to make the accuracy of the statement quite essential the statute provides that the verification shall be that the work was actually performed or the material actually used in the execution or completion of the contract. The statute is not broad enough to cover materials not actually used in the construction of the city work. The reason for this is quite obvious." And then Justice Fort proceeds with this very significant language, "The swearing to an erroneous claim thoughtlessly and carelessly without any effort to obtain accessible data from which the error might be corrected is swearing wilfully and knowingly. *Gibbs v. Hanchette*, 90 Mich. 657. In the statement of a fact which could have been avoided by reasonable diligence the lien is lost. *Nicolai v. Van Fridagh*, 23 Oreg. 149. A material misstatement in a claim, if made fraudulently or what is about the same thing, made wilfully and knowingly, violates the lien altogether." And finally Justice Fort summed up the rule in this fashion, "If the account as filed is not the amount of the demand which is truly and substantially due to the claimant after deducting all just credits and set-

offs, but is knowingly and consciously excessive and untrue, it will not be enforced as a lien," and the Court of Errors and Appeals put upon the claimant the burden of proving that the excessive part of the claim was made in good faith.

In 1916 Vice-Chancellor Backes in the case of *Gregory v. Lewis*, 87 N. J. Eq. 127, 99 Atl. 150, applied this statute and its interpretation made by the Court of Errors and Appeals in the Camden Iron Works case to a claim and facts before him. The case came before the Vice-Chancellor on a motion to dismiss the bill because the claims of complainants were excessive and therefore invalid. Each of the claimants included in their notice a large sum for consequential damages arising out of a breach of their respective contracts with the principal contractor. Vice-Chancellor Backes said, "The statute gives a lien only for labor and materials actually performed or furnished towards the performance or completion of the contract. The lien does not extend to damages for breach of the contract.

* * * The question therefore is whether by the inclusion of unliquidated damages the complainants have forfeited their liens and the answer is to be found in the motives actuating them in overstating their claims, for if this was done in good faith they ought not to be penalized and suffered to lose the benefit of the statute to the amount of their just dues. * * * The inclusion of the offending items may have been the result of a misconception of the law or due to faulty advice of counsel. If the matter is reduced to inference that of innocence must prevail. The fact that the notices frankly assert that part of the claim and how much was made up of damages refutes the charge of deception." On page 133 of the opinion Vice-Chancellor

Backes says, "Whatever may have been the motive the complainants are entitled to their day in court to explain. On the face of the pleadings it does not appear that they came to court with unclean hands and their claims should not be summarily rejected on a motion of this kind." The motion to dismiss was denied. It is quite evident, however, that the Vice-Chancellor's conclusion was based upon the frank revealment of all the facts in the notice and that he must have arrived at a different result had the notice treated this sum claimed for unliquidated damages as though it represented materials actually incorporated into the job as was done in the instant case. See also 27 Cyc. 202, Subdivision D, where the general rule is stated as in the two prior New Jersey cases.

The provision of the Municipal Mechanic's Lien Law under consideration may be compared with Section 3 of the Mechanic's Lien Act of 1898 relating to stop notices, and in *Camden Iron Works v. Camden*, *supra*, and in *Taylor v. Wahl*, 69 N. J. L. 471, 55 Atl. 40, it is suggested that the principles controlling claims under both acts are the same, Justice Fort in the latter case at page 474 saying, "The principle controlling in such a case as this is the same as that declared by the Court of Errors and Appeals to apply where a notice to hold back is given to a city by a claimant against a contractor upon work done under a public contract. *Camden Iron Works v. Camden*, 64 N. J. Eq. 723." Section 3 of the Act of 1898 authorized the claimant to give to the owner notice of the amount due to him or them and our courts held that a failure to state in the stop notice the amount due with absolute accuracy was fatal. *Reeve v. Elmendorf*, 38 N. J. L. 125; *Hall v. Baldwin*, 45 N. J. Eq. 858, 18 Atl. 976.

Thereafter the legislature by Pamphlet Laws of 1910, page 500, amended Section 3 by adding the words "specifying said amount as nearly as possible" which it will be observed is substantially the language of the amendment to the Municipal Mechanic's Lien Law which is "as nearly as may be." In *Tuttle v. Cadwell*, 92 N. J. L. 26, 105 Atl. 11, the amendment to Section 3 of the Mechanic's Lien Act was under consideration. The Court after pointing out that prior to the amendment the failure of the materialman to state in his stop notice with absolute accuracy the amount of the debt due to him was fatal to his right to recover under the section as it then read and that this was true even where the violation was slight and had resulted from an honest mistake, showed that the theory upon which the case went to the jury in the case under review seems to have been "that this amendment obviated the necessity of any accuracy in the specification of the amount due and that if it should appear at the trial that the amount demanded was in excess of that which the plaintiff was entitled to recover from the contractor he could nevertheless hold the owner responsible for whatever sum was shown to be actually due." This theory has a familiar ring for it is the contention which the appellant makes and the construction which the appellant submits should be given to the amendment to the Municipal Lien Act because of the words "as near as may be." It is therefore significant to note how the Supreme Court disposed of the similar contention made by reason of the substantially similar amendment to the Mechanic's Lien Act. Chief Justice Gummere in *Tuttle v. Cadwell* said, speaking of the said theory, "We think that so broad a construction of this statutory provision

is not justified. Its purpose is to relieve the materialman from stating in his stop notice the amount due with absolute accuracy, but it requires him to state in that notice the amount of his claim against the contractor with as much accuracy as is reasonably possible." After a statement that the claimant did not state his claim with absolute accuracy the court proceeded, "His failure to do so is not shown to have been the result of mistake nor does it appear that he made any effort to determine accurately what the amount was. In order to take advantage of the statute when it appears that the amount specified in the stop notice is in excess of the amount actually due we think the burden rests upon the materialman to show that the excessive claim was not the result of carelessness and that the mistake had been made notwithstanding the fact that he had used every reasonable effort to ascertain with exactness the amount which he was entitled to impound in the hands of the owner." To the same effect is *Intili v. Bonnet*, 6 N. J. Misc. 1043, 143 Atl. 741. See also *Hasson, et al. v. Bruzel, et al.*, 144 Atl. 319, 104 N. J. Eq. 95. The only cases which I have been able to find decided since the amendment of the municipal lien act inserting the words "as nearly as may be" are the following. The case of *West Jersey & Seashore R. R. Co.*, complainant, v. *County of Cape May*, 100 N. J. Eq. 181, a decision of Vice-Chancellor Ingersoll in which he says, "Does the fact that the notice filed was incorrect and claimed too much money defeat the claim? The notice claimed an item of ten dollars as freight, which as a matter of fact was an item for materials furnished. This was clearly an error and the notice and claim were made in good faith and the lien therefore does not fail," citing the *Camden Iron Works v. Cam-*

den case, 64 N. J. Eq. 723. It is perfectly apparent in this case that the Vice-Chancellor found as a fact that the item in question was inserted by error and the correct charge was for material furnished and for which consequently claimant was entitled to a lien. The other case is that of the *Thirteenth Ward Building and Loan Association, Complainant, v. Kantor*, 105 N. J. Eq. 339, a decision by Vice-Chancellor Backes. There Vice-Chancellor Backes said as to items for which credit had not been given by the claimant, "Credit must be given for the sums. The failure to credit the amounts can reasonably be attributed to accident due to confusion of the book accounts and notes of the parties and cannot be said to have been willful, to the defeat of the lien claim," citing *Camden Iron Works v. Camden, supra*; *Gregory v. Lewis, supra*. A reading of the opinion in this Thirteenth Ward case will indicate that there was considerable confusion and doubt and that it was possible to find as a fact that due to such confusion and doubt the items in question had not been included. The Court indicates, however, that had the omission of these credits been due to other than an accident and had their omission been willful a different result would have obtained.

See also the case of *Central R. R. of N. J. v. Galleno-Poole, Inc., et al.*, 107 N. J. Eq. 267, a decision of Vice-Chancellor Fielder in 1930. In this case the claim was divided into two parts. The Vice-Chancellor held that while the first part was eligible to lien the second part with reference to the demurrage could not be construed to be for labor performed. There is no discussion of the question whether the claim having been filed for an excessive sum the lien should be forfeited and the reason seems to be that the claim-

ant set up honestly and frankly in his notice its situation and why it considered it had a lien and did not conceal but honestly revealed its entire situation.

We respectfully submit therefore, (1) that our courts have held that the principles controlling claims under Section 3 of the Act of 1898 and under Section 2 of the Municipal Lien Act are the same, (2) that the amendments to each act are in substance the same, "as nearly as possible," "as nearly as may be," and therefore that the interpretation of "as nearly as possible" in the amendment to Section 3 of the Act of 1898 governs and that the decision of Vice-Chancellor Bigelow that a claimant who through gross carelessness demands an excessive amount does not state the amount "as nearly as may be" and that in any event a claimant who fails to make a reasonable effort to ascertain the true facts on which the amount of his demand depends and by failing so to do claims a materially larger amount than is in fact owing loses his lien in its entirety, correctly states the law of New Jersey.

Let us then apply the law as laid down by our courts to the facts. The appellant filed two notices, one prior to December 31, 1930 and the one relied upon on December 31, 1930. Page 20, paragraph 4 of the answer; page 10, lines 39 and 40; page 11, lines 1 and 2. In the claim relied upon, page 15, Charles E. Knoble, Jr. and Walter Knoble, trading as the Hawthorne Contracting Co. and making up the appellant-claimant, start off by stating "that they have performed labor and supplied materials which have actually been used in the construction and completion of" the municipal improvement in question. Lines 12 to 17. They then proceed to say, "The said labor

and materials were respectively performed for and furnished to" the general contractor. Page 15, lines 20, 22. And again, "A statement of the labor performed and material furnished all of which were actually performed and used in the erection and completion of the said contract are as follows:

"The work was started on March 25th, 1930, and continued until November 22nd, 1930."

Page 15, lines 33 to 40. And then in the notice of claim it is stated, "400 cubic yards White Stone at \$6.00 cu. yard, \$2,400." Page 16, line 12. "The amount due" is stated to be \$6,745.71. Again, "The amount of claimant's demand after deducting all credits and offsets is \$6,745.83, together with interest. The moneys became due to claimants on the 22nd day of November, 1930, and were due from the said Charles Bang with whom Claimant had a contract, and for whom the materials were supplied." Page 16, lines 32 to 40. Page 17, line 1. And finally, "For the full value of the said labor and materials supplied by the claimants, a lien is claimed," page 17, lines 8 and 9. Then follows the affidavit of these two partners in which they say, "We have read the foregoing notice of claim and all the matters and things therein stated and alleged are true." Page 17, lines 28 to 30. And continuing and significantly, "More particularly is it true that we have performed labor and supplied materials which were actually used upon" the municipal improvement in question. And again, "We both reside on the Goffle Hill Road, Hawthorne, New Jersey, and this work and the materials were actually used in the construction of the work." Page 17, lines 30 to 40. And on page 18, lines 2, 3 and 4, "A copy of the monies due to us, the

work and labor supplied, and also the moneys paid are as follows:" then follows the statement in which appears in line 19 "400 cubic yds. white stone at 6.00 cu. yd. \$2400.00." Lastly, "There is now due to us after deducting all past credits and offsets the sum of \$6745.71 with interest." Page 19, lines 1, 2 and 3. This affidavit is certified to have been subscribed and sworn to before a notary on December 31, 1930.

Walter Knoble, the only one of the two partners who testified in support of the claim, after testifying as to his bill further testifies as follows:

"Q Mr. Knoble, did you do all of the work under the original contract and supply all of the materials? A Yes." Page 49, lines 11, 12 and 13.

Then in response to a direct and leading question of his counsel as follows:

"Q The white stone, did you supply 400 cubic yards? A No, that has not been supplied yet.

Q I mean actually delivered on this job. A It hasn't all been actually delivered yet.

Q How much did you actually deliver on the job? A About 197 cubic yards I believe." Page 49, lines 14 to 20.

It thus plainly appears and without dispute that the notice is inaccurate in its statements that 400 cubic yards of white stone were actually used in the construction of the municipal work or that it had been supplied "to the contractor," and therefore that the amount due the appellant-claimant as stated in the notice was inaccurate. Were these material inaccuracies the result of accident or do they spring from design? Were these material inaccuracies the result of gross carelessness arising out of a failure to ascertain the facts as nearly as they might have been ascer-

tained or are they the natural result of honest and excusable mistakes? Let us see.

On page 50 the claimant is asked, "Have you been down to the plant to determine as to whether or not that much of the white stone was actually delivered on the job by your company? A I was there on the job when it was delivered and know it is there.

"Q Did you work on this contract and during the extra work were you also there? A Yes." Lines 14 to 22. And again, "Q Were you personally on the job supervising it during all of this time? A I was." Page 50, lines 25 to 26. It thus appears plainly that although this man had personal knowledge of the fact that only 197 cubic yards of white stone went into this municipal contract he deliberately on several occasions in his notice and in the affidavit asserted and swore that 400 cubic yards of white stone had actually gone into the municipal improvement. If such conduct is not the willful making of a material misstatement, a conscious making of an excessive claim, then there never can be a willful, conscious making of an excessive claim. But beyond this, the state of case shows that Charles Bang had a unit contract with the Borough of Hawthorne, page 27, that No. 30 of that contract called for 400 cubic yards of white stone, and that the "above estimated quantities are approximate, subject to increase or diminishment." Page 30, lines 37 to 40; page 31, lines 1 to 4. That item No. 30 in the specifications distinctly provided that "The volume to be paid for under this item shall be the number of cubic yards of white stone actually placed and measured inside the lines and grades given and after the material has been rolled or graded." Page 41, lines 12 to 16. The Hawthorne Con-

tracting Co., the claimant, took from Charles Bang a subcontract, see page 26, and agreed to supply certain of the material called for by the general contract, including under item No. 30 "white stone, 400 cubic yards at 6.00 cubic yard," page 27, line 10. Not only was the material to be supplied but the work incident to it under the general contract was also to be done "in accordance with plans and specifications and under the supervision of Engineer Harold J. Harder." Page 26, lines 38 to 40. That this contract was intended to be a subcontract under the general contract to the extent of the subject matter of the subcontract and that the items therein contained were estimates which would vary more or less according as the same estimates varied in the general contract, and that the subcontractor was to be paid as the general contractor was to be paid plainly appears from the testimony on page 56, where Mr. Knoble interprets this somewhat ambiguous contract.

"Q Mr. Knoble, I call your attention to your contract which is Exhibit HC-3 and under item 1 ask you if you did not contract for three thousand cubic yards of excavation? A No, you don't contract for those yardages. It is merely an estimated yardage. It might vary." Lines 22 to 29. See also page 62 where the solicitor for the claimant insists upon this interpretation of the contract on behalf of his client. Lines 34 to 40; page 63, lines 1 to 4. See also page 68 where the claimant states that when he gave his estimate of his work to the general contractor he looked at the estimate given to the Borough and that his estimates for the work corresponded with the estimates on the contract with the Borough. Lines 28 to 34. Page 54, lines 20 to 22, and page 55, lines 19 and 20, where the claimant

admits that he saw the specifications for this job and for his particular work in it and had read the plans and specifications. See also page 52, lines 14 to 40, and page 53, lines 18 to 26, where the claimant indicates that he relied for his figures upon the certificates issued by the Borough Engineer to the general contractor, and whatever was allowed to the general contractor the claimant charged to the general contractor to the extent of his subcontract. See page 70, lines 37 to 40; page 71, lines 1 to 10. And yet despite the fact that under his contract the items therein contained were estimated items and that Bang was to pay only for the actual quantities supplied whether more or less, what do we find? That the claimant in every instance in that contract save in the case of white stone supplied more material than the estimates called for and charged for it, and nevertheless in the case of the white stone where to his personal knowledge he had supplied less than the estimated quantity he deliberately bills the contractor for the full estimated 400 cubic yards and swears that it went into the building and was supplied to the contractor. See page 57 and particularly lines 32 to 40.

“Q So that in all cases where you supplied either more or less you charged for either more or less? A Yes.

“Q With the exception of item No. 30, white stone? A That is right.”

This situation it seems to me goes further than showing mere willful, conscious misstatement. It permits of the inference that it was done for a purpose, deliberately done, in the hope that 400 cubic yards of white stone might be collected for out of the fund in the hands of the municipality for distribution among materialmen that had actually supplied material to the municipal im-

provement. Here is not mere carelessness. There is no evidence here of accident. Design speaks at this point.

This is emphasized by two things. When the claimant first admitted that he had applied only 197 cubic yards of stone and not 400 cubic yards he gave the impression that the stone was immediately available and ordered. I think the impression was given to everyone that it was on hand (page 51, lines 18 to 30). Nevertheless, later on cross examination the extent of the frankness which his counsel now stresses is realized when it appears that the stone was still at the quarry and that it had not even been delivered to the claimant (page 58, lines 1 to 12). This is significant in view of the claimant's uncorroborated statement that he had contracted for the 400 cubic yards and was bounden to pay for it, particularly when the burden of making explanation of his inaccuracy is upon the claimant. The second significant point is that although the 8th certificate issued October 22, 1930 did not contain an item for stone the 9th certificate issued November 12, 1930 contained an item allowing to Charles Bang 320 cubic yards of white stone at \$6.00, a total of \$2,112.00 and yet despite the fact that this claimant by his own testimony relied upon these certificates to fix his own estimates and although he knew that he had only supplied 197 cubic yards he deliberately thereafter not only did not tell the engineer that the 320 cubic yards allowed to Bang was too much but he deliberately filed his verified claim for 400 cubic yards, one claim before December 31st and the other afterwards and followed it up by filing an answer or allowing an answer to be filed which set up the same notice with the same misstatements. If this claimant

is the essence of frankness and honesty and fairness and if he has come into equity with clean hands as he contends, what is his explanation of his failure to correct this 9th certificate? The Engineer says it was an estimate and that he was wrong and he apparently did not know he was wrong until it developed at the hearing. See page 74, lines 4 to 10; page 76, lines 11, 12 and 13; page 81, lines 37 to 40, and page 82, lines 1 to 20. And as a result of the testimony at the hearing the claim of the contractor Bang was reduced from 320 cubic yards of white stone which the engineer had estimated to the actual amount that the claimant at the hearing admitted had been delivered. Not until the hearing before the Master when claimant knew that his claim was disputed by the general contractor and others and when he wanted or hoped that his belated frankness might be capitalized as is sought to be done in the brief, did he admit to the true situation.

It is sought to excuse the misstatements of the claimant by the claim that the claimant had an unliquidated charge for the balance of the stone. In other words, that his contract having been based upon 400 cubic yards of white stone he had ordered that quantity and that if Bang had completed the job that quantity would have been used. See page 51, lines 1 to 17; page 57, lines 39 to 40. But while that argument might have some force if the claim for unliquidated damages had been frankly set forth in the notice as in the Gregory case it must be of little value or weight to excuse deliberate statements made under oath that the 400 cubic yards had actually been incorporated into the municipal job and supplied to the general contractor. Moreover, in view of this more or less contract, interpreted

so by the claimant himself and his attorney and corroborated by the surrounding facts, it is a matter of real doubt whether the claimant had any claim at all for any stone beyond the 197 cubic yards he actually supplied, and it must be a matter of real doubt even in the claimant's mind, for under the more or less contract he was to be paid only for material actually supplied and he knew at the time he filed his notice that the job was not yet complete. There is no proof that at the time he filed the claim the general contractor had abandoned the job and consequently when the notice was filed the claimant was still subject to the duty of supplying the white stone if the general contractor demanded it and to be paid when he did it and not before. How then can the claimant justly now contend that he put the 400 cubic yards of stone in his claim on the theory of an unliquidated claim, when he knew at that time that he had no claim except for the 197 cubic yards he had supplied and that the most he had was the right to be paid for more stone if, as and when he supplied it? Furthermore, there is no proof whatsoever that 400 cubic yards of white stone was ordered or that the claimant is liable for it and the burden of proof is upon the claimant to explain his conduct.

But even assuming this claim of resultant damage or unliquidated damage now made, was what the claimant intended when he put in the liquidated claim for 400 cubic yards of stone, what then becomes of the requirement of the statute that the amount due be stated? Clearly, even looking at this matter from the claimant's lights he would not be entitled to payment for more stone until he supplied it. How then could he claim that there was twenty-four hundred

dollars due for 400 cubic yards of stone when all but 197 cubic yards of stone was in the quarry and when under his contract he was only entitled to be paid if, as and when he delivered more stone? In this respect the notice does not comply with the statute in that it appears the claimant stated an amount to be due which was in fact not due. The testimony shows that it was not until the hearing that the Master determined the cost of completion. Until then there was no reason to think that Bang had breached his contract, certainly none when the claim was filed. Is this filing a claim setting forth the amount as nearly as might be? The real situation is that this unliquidated damage claim is an afterthought in the hope that it would successfully explain the misstatements of the notice, and if there had been enough money in this job to go around so that everybody could have been paid in full the Borough of Hawthorne would have paid for 400 cubic yards of white stone at \$6.60 per cubic yard to Charles Bang and Charles Bang would have gladly paid to the Hawthorne Contracting Co., the claimant, for 400 cubic yards at \$6.00 per cubic yard. It was the failure of the money to go around that brought this matter to a head. It was not until then apparently that the engineer knew that he had made an estimate far beyond what had actually been supplied.

Perhaps realizing that this unliquidated claim contention hardly purges the claimant of his statements that the material was in fact supplied and incorporated into the job the astounding proposition is thrice advanced in the brief of counsel for the appellant that the inclusion of this 400 cubic yards of stone in the notice might have been a lawyer's mistake and that there

is no proof that the affiants and claimants knew what they were signing or that they had read it. Thrice it is sought to suggest that affiants signed affidavits without knowing the contents and without explanation of the contents on the part of the draftsman. Now of course there is no proof whatsoever in the case that this is so and the burden is upon the appellants to explain their misstatements. But even if proven it would only serve to establish a non-compliance with the statute. For if this claim was not in fact verified then it must of necessity fall, for it is only a verified claim that comes within the protection of the statute. It is interesting to observe, however, in passing, that the affiants both state, "We have read the foregoing notice of claim and all the matters and things therein stated and alleged are true." The claim reminds me of the busy business man who in the presence of his friend was doing a lot of signing for fifteen or twenty minutes and to whom his friend at the conclusion said, "My, you must have paid out a lot of money when you signed those checks," and to which the busy business man said, "For Heaven's sake, were those checks? I thought they were affidavits." I am unwilling to admit that the attorneys did not read to or explain the contents to the affiants, but if not and affiants did not read the notice and affidavit that certainly does not furnish a satisfactory explanation for their misstatements.

Appellant constantly in its brief fails to distinguish between honesty and frankness in the notice and in the testimony. Assuming for the sake of argument that the claimant was honest and frank at the hearing, that would not dispose of the quite different course taken in preparing and filing the notice. Counsel for the appellant

seems to think that because at the hearing it only claimed 197 cubic yards, although the incorrect estimate of the engineer allowed the general contractor 320 cubic yards and that the general contractor did not protest appellant's claim for 400 cubic yards in its stop notice, and did not call it to the attention of the appellant that therefore the appellant is entitled to some credit or advantage and that that is some indication that the claim was honestly made. It seems to think that only if it had persisted in claiming 400 cubic yards after the contractor had protested or after someone else had objected would its conduct be regarded as dishonest or unconscionable. We submit that it was not necessary that Bang, the Borough or anyone else should have protested this 400 cubic yards of white stone except in the way and manner that it did protest it. Bang, the Borough and the other materialmen were entitled to expect an honest statement from the claimant, particularly when the claimant had personal knowledge of the facts. The contention would seem to be that it is not necessary to be honest in making your claim in the first instance but that if your dishonesty is shown you may safely take the position that it was a mistake should you find that you cannot get away with your original claim. Obviously that is not the law. The conduct of the claimant was not born of mere error, unconsciously made as contended by the claimant, nor does claimant's claim honestly recite all the facts as contended by counsel. Nor is it true as counsel contends that there was no misrepresentation. The notice, the answer, both misrepresent the situation as known to the claimant and did so after Certificate No. 9 was issued and had been brought to his attention in which the engineer

erroneously allowed the general contractor for 320 cubic yards, a mistake which apparently the claimant made no effort to correct and after which it filed its claim for 400 cubic yards. The affidavit stating that the 400 cubic yards had been used in the completion of this municipal work was knowingly and consciously made, as was the claim that the contractor owed the affiant for 400 cubic yards, when under the testimony the claimant knew that all the general contractor owed was for 197 cubic yards plus such further yardage as might thereafter be supplied at the unit rate under the subcontract and for which a supplemental claim must of necessity have been filed had any more white stone been supplied.

There is no proof in this case that the claimant was charged and required to pay or will be required to pay for this extra stone, nor is there any statement in his claim explaining this 400 cubic yard item and that part had been supplied and part was in the quarry and that he had to pay for it. There is no such frankness here as in the Gregory case. Claimant knowingly and wittingly claimed for the full 400 cubic yards and swore that it had been used in the performance of his contract. His explanation is feeble and the facts plainly indicate when the notice was filed claimant knew that it was false. The burden of proof being upon the claimant to offer a satisfactory explanation and it not having offered any such explanation, the Vice-Chancellor's finding of fact and law should be sustained.

And finally it is sought to avoid the consequences of these misstatements by a claim that the claimant instead of making a subcontract

with the general contractor made seven sub-contracts because it so happens that there were seven items in the subcontract and therefore that only the item relating to the 400 cubic yards of stone should be denied a lien and not the entire claim. There is of course no merit to this. Both the general contract and the subcontract were single contracts on a unit basis. The case of *Camden Iron Works v. Camden* is not authority for the proposition claimed, for there were two separate notices, two separate contracts and even in that case there were several items in the notices. Justice Fort in this case said, "The citations herein made and a careful examination of many others, including all the textbooks on the subject that I have been able to find, seem to make it clear that the rule applicable to the right of the claimant in this case to a lien upon the funds of the City of Camden due to Pfeiffer, the contractor, is that if the account as filed is not the amount of the demand which is truly and substantially due to the claimant after deducting all just credits and set-offs, but is knowingly and consciously excessive and untrue it will not be enforced as a lien." And later in the opinion, "The whole of that lien claim will be disallowed."

Much is made in appellant's brief of the alleged harshness of denying appellant a lien. The fundamental defect in this claim for a lien on the funds due Bang from the Borough of Hawthorne is the falsity of the claim. Such falsity forfeits not the right to collect from the debtor Bang but the right to share the funds with materialmen's claims honestly made. This is not unfair or harsh. To deny a lien under such circumstances is in the interest of proper claimants to the fund. An excessive claim

fastening a lien holds up everyone, perhaps the job, and may break a contractor. Thus one who seeks such a lien should be truthful and not even grossly careless. We may see the consequences here. Of all of the claims filed only two were disputed, the Watts claim, which was palpably not the subject matter of a lien and which the Court properly rejected, and the claim of the Hawthorne Contracting Co., which the contractor in the light of the testimony properly disputed and which the materialmen properly questioned. If both of these claims had been truthful it may well be that the fund would have been sufficient or could have been made sufficient to go around and all this litigation, expense and consequent reduction of the fund would have been avoided.

In *Reeve v. Elmendorf, supra*, Chief Justice Beasley at page 132 in commenting upon the justice of the rule that a materialman would be denied recovery where he made an inaccurate claim even though the inaccuracy arose out of honest mistake said, "It is reasonable to require the materialman or workman to be certain that the claim he makes is in all respects correct before he proceeds to impound moneys in the hands of the owner and to interrupt the due execution of the building contract. A privilege to make exorbitant and illfounded claims and on a refusal of payment to intercept such sums and hold them in the hands of the owner an indefinite time would be simply an instrument of vexation and oppression." And Justice Fort in the Camden Iron Works case at page 735 says, "As the amount claimed is to be retained by the owner it would be sheer injustice to allow more to be claimed than is justly due?" So here as the effect of filing a claim is that the municipality

will hold up payments to the contractor or at least hold up the amount of the claim it would be sheer injustice to permit an excessive claim to be filed without punishing one who filed such claim. Unless such punishment was meted out the right to file such a claim would become an instrument of vexation and oppression. The claimant here filed two claims and had apparently plenty of time for reflection. "The swearing to an erroneous claim thoughtlessly and carelessly without any effort to obtain accessible data from which the error might be corrected is swearing willfully and knowingly. *Gibbs v. Hanchette*, 90 Mich. 657," quoted with approval on page 732 of the *Camden Iron Works v. Camden*, *supra* case. In the instant case the most that can be said for the claimant is that the erroneous claim was thoughtlessly and carelessly sworn to. But actually there is more to it than that. The testimony shows that the claimant deliberately swore to a claim knowingly false.

It is respectfully submitted therefore that not only does the testimony clearly indicate that the claimant through gross carelessness demanded an excessive amount and did not make a reasonable effort to ascertain the true facts as nearly as might be on which its claim depended, but also that the claimant with personal knowledge that 197 cubic yards of white stone only had been incorporated into the public improvement and that only 197 cubic yards of white stone had been supplied to the general contractor, deliberately, consciously, willfully and intentionally filed and swore to a claim for 400 cubic yards of white stone and alleged not only that such material had been supplied to the general contractor and incorporated into the public improvement but that the general contractor at that time owed the

claimant for 400 cubic yards of white stone, when it clearly appears that neither at that time nor at any time since did the general contractor owe the claimant for any more than 197 cubic yards of white stone. Under such circumstances we submit that the claimant has lost its lien whether the principle is adopted or not that gross carelessness deprives a claimant of its lien, although we strongly urge that the opinion of Vice-Chancellor Bigelow in holding as he did is the logical, natural, reasonable interpretation of the statute in the light of the decisions of this state, particularly of those interpreting the kindred Mechanic's Lien Statute.

Respectfully submitted,

STICKEL & STICKEL,
FRED G. STICKEL, JR.,
Solicitors and Counsel of Defendant-
Appellees Igo Bros., Inc., Alliance
Lumber Co., Lord & Burnham Co.,
and Charles Bang.

New Jersey Court of Errors and Appeals

ON APPEAL FROM COURT OF CHANCERY.

On Bill, &c.

Between

JAMES RADCLIFFE & SONS COMPANY, a corporation, and JOHN MAWHINNEY COMPANY, a corporation,

Complainants-Appellees,
and

BOROUGH OF HAWTHORNE in the County of Passaic, a municipal corporation, *et als.*

Defendants-Appellees,
and

CHARLES E. KNOBLE, JR., and WALTER KNOBLE, trading as HAWTHORNE CONTRACTING Co.,

Defendant-Appellant.

Between

IGOE BROTHERS, INC.,

Complainant-Appellee,
and

THE BOROUGH OF HAWTHORNE, *et als.*,
Defendants-Appellees,
and

CHARLES E. KNOBLE, JR., and WALTER KNOBLE, trading as HAWTHORNE CONTRACTING Co.,

Defendant-Appellant.

BRIEF OF APPELLANT.

Summary of Facts.

The above suits arise out of municipal liens filed pursuant to the failure of Charles Bang, a general contractor, to complete the erection of a

sewage-disposal plant for the Borough of Hawthorne, and his failure to pay the subcontractors the amounts due to them.

The contract entered into between the Borough and Charles Bang was based upon a unit system. The Hawthorne Contracting Co., a sub-contractor, agreed to supply seven of these items.

The Hawthorne Contracting Co., one of the sub-contractors, filed a claim for \$6745.71, allowance of \$5479.71 was made by the Special Master. The difference arose from 211 cubic yards of white stone, which had not actually been delivered, but payment for which was claimed. The Master's Report was set aside by the Vice Chancellor, in so far as it allowed the claim of the Hawthorne Contracting Co. The Vice Chancellor disallowed the entire claim of the Hawthorne Contracting Co., because of the one item of white stone, which was in dispute. An appeal from this order is now being taken.

POINT ONE.

The claim of the Hawthorne Contracting Co. as allowed by the master, should be affirmed, because the work was done in good faith, and the claim was made in good faith.

The general contract entered into, between the Borough and Charles Bang, the general contractor, provided for the erection of a sewage plant. The contract was based upon a unit system, and covered certain estimated quantities of materials. This contract is set forth on pages 27 to 41 inclusive. The basis of computation is set forth on pages 33 to 35. The blanks were actually filled out in the contract, but were not available at the

time the state of case was prepared. Charles Bang, in turn, made a separate contract with the Hawthorne Contracting Co. for seven separate items as set forth on pages 26 and 27. At the time the lien-suit was started, the entire work was not completed and there was still work which had to be done, and defects repaired. In other words, the final certificate was never prepared by the Borough engineer. The Master had to make allowances for general defects and unfinished work. The testimony covering the items for the unfinished work are set forth on pages 103 to 125 inclusive.

At the time the Hawthorne Contracting Co. filed its claim, it had not as yet finished its work, nor was it released by the general contractor, or the Borough engineer from completing its work (p. 82, l. 20; p. 81, ll. 8-18; p. 51, l. 33). It had 400 cubic yards of white stone ordered, and awaiting immediate delivery upon call from the Borough engineer. 197 cubic yards of this stone was actually delivered. The Hawthorne Contracting Co. filed its stop-notice demanding payment for the seven items furnished and also for the 400 cubic yards of white stone, which it had ordered and could not use for other purposes (p. 58, ll. 1-12).

All of the testimony of the parties in regard to the white stone are set forth hereinbelow:

WALTER KNOBLE (p. 49, ll. 12-20).

Q. The white stone, did you supply 400 cubic yards? A. No, that has not been supplied yet.

Q. I mean actually delivered on the job? A. It hasn't all been actually delivered yet.

Q. How much did you actually deliver on the job? A. About 197 cubic yards, I believe.

(Page 50, lines 33-40; Page 51 lines 1-35).

Q. In your stop claim you charge for the 400 cubic yards of white stone and you now tell us that you delivered 197 cubic yards, is that correct? A. That is it.

Q. Why is it that you made the charge for the 400 cubic yards? A. We have contracted for the 400 cubic yards and it is no more than right. We have to pay for it and we have no other use for the stone. Furthermore we were stopped on the job, because there was going to be so many alterations, the stone was being mixed with the dirt and was being used at a loss. It was to be placed after all excavation was done and the ground settled.

Q. Is the balance of the stone available and subject to the orders of the Engineer on this work? A. It is.

Q. Has the stone been ordered by you from the concern that supplies it to you? A. Yes.

Q. However, of the 400 cubic yards of white stone, how many yards were not delivered and used on the job? A. The difference between 400 and 197.

Q. 203 yards, so that 203 yards never was delivered to the job? A. Not yet.

Q. And the job is completed as far as your work is concerned? A. No.

(Page 57, lines 31-40; Page 58, lines 1-12).

Q. So that in all cases where you supplied either more or less you charged for either more or less? A. Yes.

Q. With the exception of item 30, white stone? A. That is right.

Q. Why didn't you charge for the amount of white stone you supplied instead of 400 cubic yards? A. Because I am obliged to pay for that amount of stone, that 400 yards.

Q. Has it actually been delivered to you

from your correspondent? A. It is ready to be delivered, we only have it delivered when we are able to put the shovel at work to lift it out of the cars.

Q. Is it in the cars here? A. No, it is at the quarry.

Q. And there is no market for that white stone, other than your order? A. No, we never use it.

Q. It can't be sold anywhere else in the world except on your order?

JOHN W. HOOD (Page 74, lines 4-10).

Q. How many cubic yards of white stone?

A. 320 cubic yards of white stone.

Q. Is that your estimate? A. It is.

(Page 76, lines 12-15).

Q. Mr. Hood, did you actually measure the quantity of white stone supplied, or is that just an estimate? A. It is only an estimate.

(Page 81, lines 36-40).

Q. In reference to this claim which states 400 cubic yards of white stone, do you know whether or not the entire 400 cubic yards were used? A. They are not.

(Page 82, lines 1-20).

Q. Do you know how many yards were actually used? A. I heard this morning 197 cubic yards, but I estimated the job, from looking at it, which I am required to do, and I made a poor estimate of 320 cubic yards.

Q. All you know is that 197 cubic yards was actually used? A. May I explain that on the first of each month we are supposed to make an approximate estimate by looking at the job and I estimated 320 cubic yards, but there are not 320 cubic yards

there, so the Borough has that much money coming off the fund before it is paid out; but there is still work to be done.

(Page 86, lines 20-22).

Over-estimated:

131 cu. yds. white stone at \$6.60 \$864.60

CHARLES BANG (Page 89, lines 3-10).

A. The total of their bill is \$6,745.83 and the items noted on the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th certificates are perfectly proper; on the 9th certificate a final item covering 80 yards white stone; that has been adjusted at the previous hearing.

(Page 103, Lines 30-40).

That, of course, has to be adjusted some because of a deduction that was made on the Knoble claim, and a deduction on the Knoble claim would naturally make a reduction on this. In the testimony at the hearing that I was not to that amount can be found.

(Page 104, lines 22-28).

Mr. Bang: The deduction of the white stone, 131 cubic yards at \$6.60 \$864.60 is agreed to by me, but I want a credit from the Hawthorne Contracting Co. bill for 131 cubic yards at a price of \$6.00 per cubic yard.

It can be seen from the foregoing that there was no attempt to hide or conceal the actual facts in the case. The Hawthorne Contracting Co. felt that it had sustained a loss on the 400 cubic yards of white stone, and demanded payment. There is nothing in the case to show any attempt at concealment of this fact. Nor was any attempt made

to inform the general contractor or the borough engineer that 400 cubic yards was actually delivered. In fact, if the Hawthorne Contracting Co. desired to defraud anyone, it could have stated that it actually delivered 320 cubic yards of white stone as set forth in the engineer's ninth certificate on page 46. But it did not avail itself of that opportunity. A careful reading of all the testimony fails to show anything in the case, other than an honest effort to be paid for moneys justly due.

In this case, the Borough engineer measured the items supplied from time to time, and issued his certificates therefor (p. 82, ll. 1-20). The Hawthorne Contracting Co. depended upon the engineer's certificates for its own payments. In fact, the Borough engineer prepared on a yellow sheet of paper, in his own handwriting, the figures for the extra excavation for which payment was to be made (p. 75, ll. 32-40).

The probabilities in this case all point to a demand made by the Hawthorne Contracting Co. for payment. This company gave the items to its attorney to be set up in a stop-notice. Without more adieu, and without further question, these items were incorporated in the stop-notice. This stop-notice is set forth on pages 16 to 19, inclusive. There is nothing in the case to show that the agent of the Hawthorne Contracting Co. actually read the stop-notice, or that the terms of the stop-notice was explained to him. There is nothing in the entire case to show that an actual statement was made to anyone that 400 cubic yards were delivered.

At the hearing, Mr. Knoble was asked on direct-examination whether he supplied all of the white stone. He stated directly, on page 19, line 15-20 that 197 cubic yards were delivered. On page 51,

he gave full explanation as to why he made a demand for the payment of the entire 400 cubic yards. This testimony clearly shows that there was no attempt at evasion, concealment, or fraud. How different this case would be if Mr. Knoble had testified that 400 cubic yards were delivered, and then under cross-examination, or by other witnesses, conclusive proof was given that only 197 cubic yards were delivered! But that is not what happened in this case! Mr. Knoble told the facts clearly, honestly and voluntarily.

Mr. Bang, the general contractor, did not claim that he was ever imposed upon by the Hawthorne Contracting Co. He stated that he was satisfied to pay for the white stone actually delivered, (p. 89, l. 10; p. 104, ll. 22-28). His only complaint was that he did not want to pay for extra excavation to the Hawthorne Contracting Co., when the Borough was not compelled to pay for this extra excavation under his contract (p. 89, l. 18). A reading of the testimony of the Borough engineer does not show that he was imposed upon by the Hawthorne Contracting Co. In fact, he stated that he represented the Hawthorne Contracting Co., Mr. Bang and the Borough, in making the estimates and signing the certificates, and that he made the measurements for all of the parties concerned. He stated that he estimated that 320 cubic yards of white stone was delivered (p. 82, ll. 1-20). In the face of this estimate, the Hawthorne Contracting Co., only claimed 197 cubic yards. Does this show imposition, or rather does it bespeak a desire to speak the truth?

Payment was allowed by the special master for all of the seven items actually supplied to the job (p. 139, l. 20). Moneys representing the work which the Hawthorne Contracting Co. supplied

was ordered to be paid by the Borough. That part of the report was affirmed. There is no reason for compelling the Borough of Hawthorne to pay the general contractor for work which the Hawthorne Contracting Co. had done, and then taking this money, and giving it to other contractors who did not help to create this fund.

The thought that the claim of the Hawthorne Contracting Co. should be rejected arose long after the hearing, the filing of the Master's report, and even the filing of the exceptions. In fact, the original exceptions filed were only 25 in number, and the exceptions which claimed a forfeiture of the moneys due to the Hawthorne Contracting Co. was only added after the other exceptions had been filed. Then exception 26 (p. 152, ll. 28-34), was added with the others.

It is respectfully submitted that the testimony of all the parties which are set forth in the earlier part of this brief, all point to one conclusion. That is, that the Hawthorne Contracting Co. filed a claim for the moneys which they thought were honestly and sincerely due to them. The probabilities further show that they made up a bill and gave it to their attorney for the purpose of filing a stop-notice. The attorney then set forth this stop-notice in statutory form, asked the representative to sign it, and he did. There is nothing in the case to show that this representative actually read the stop-notice, or that the stop-notice was explained to him. There is nothing to show that upon filing this stop-notice with the Borough, that the general contractor called to the attention of the Hawthorne Contracting Co. that 400 cubic yards were not actually delivered. If Mr. Bang had protested at any time to the amount of the stop-notice, and if he had particularly called to

the attention of the Hawthorne Contracting Co. that there was an error in the claim; then if in the face of all that, the Hawthorne Contracting Co. persisted, it might then be claimed, that the claim was wilfully, knowingly, and fraudulently made. If the Hawthorne Contracting Co. in face of the general contractor's denial, maintained an actual delivery of 400 cubic yards of white stone; and if it also informed the Borough engineer, that it had delivered 400 cubic yards, and had insisted upon a certificate for the allowance made, then it might have been guilty of fraud.

In this case all of the facts show that the error was a mere technical one, that it was unconsciously made, that there was no effort at the perversion or concealment of the truth. The Hawthorne Contracting Co. did not employ agents of their own to make exaggerated measurements. They did not even adopt the Borough engineer's estimate of 320 cubic yards when the 197 cubic yards were actually delivered.

It is respectfully submitted that when the claim is made in good faith, it should be allowed for services performed.

POINT TWO.

The claim of the Hawthorne Contracting Co. consisting of seven items should not be forfeited because of a mistake in the amount due.

The facts in this case disclose that the Hawthorne Contracting Co. made a contract with the general contractor for 7 different items. One of these items was white stone (p. 27, l. 10). The payments were made to the Hawthorne Contracting Co. upon certificates signed by the Borough engineer from time to time. Pages 44-47 inclusive. The Hawthorne Contracting Co. used the figures of the Borough engineer as their guide and the general contractor also used these figures, (p. 53, ll. 1-25; p. 75, ll. 32-40; p. 76, ll. 1-10; p. 41 to 44, inclusive; p. 94, ll. 18-20). The claim was made in good faith, and was made honestly.

The stop-notice made claim for seven various items, page 16. At that time the certificate of the Borough engineer set forth that 320 cubic yards of white stone were actually delivered (p. 46, l. 18). 400 cubic yards was the estimate required for the work, (p. 30, l. 29), and was the amount actually ordered to be delivered (p. 51, ll. 1-10). At the hearing Mr. Knoble of the Hawthorne Contracting Co. stated that 197 cubic yards was actually delivered (p. 49, l. 20), but he demanded payment for 400 cubic yards, because he had ordered the same (p. 51, l. 22), and because the work was not complete, (p. 51, l. 34) and he was still under order by the Borough engineer, to supply the additional white stone upon demand (p. 51, l. 18). There was no attempt at evasion. The testimony was brought out voluntarily under direct examin-

ation. This case, therefore, must come under the doctrine of the case of Gregory vs. Lewis, 87 Equity 127, and not under the case of the Camden Iron Works v. Camden, 64 Eq. 723.

At the time the Camden case was decided in 1902, the statute then in effect was the statute of 1892, page 369. This statute contained a requirement that the lien claim must

“giving the *amount of the demand* after deducting all just credits and offsets.”

This same requirement was made in the amendment in 1909, page 261, 3. C. S. page 3317.

This requirement, however, was changed in 1918, chapter 280, and the expression above quoted was changed so that the stop-notice

“shall *state as nearly as may be the amount* of the demand after deducting all just credits and set-offs.”

This change in the statute was referred to in Tuttel v. Cadwell, 92 Law, page 26, as relieving the materialman from stating in his stop-notice the amount due with absolute precision.

The Camden Iron Works case is not applicable to this case, because at the time that the case was decided, the 1892 statute, which rigorously demanded a precise statement, was in force. But since that time, the 1918 statute dispensed with this rigid requirement.

The Camden Iron Works case is not applicable because the facts there are far different. In that case, pipes were charged for which were not shipped. Not only were they not shipped, but they were never ordered, and in fact were sold by the Camden Iron Works to other parties. These facts are set forth in the opinion of the Vice Chancellor,

in 60 Equity, page 213 at the beginning of the second paragraph.

The testimony in the Camden Iron Works case show that the claim was made fraudulently, consciously, oppressively and knowingly. The president on testifying could not explain nor justify the excessive claim, because of overweight, nor the wholly improper inclusion of charging for pipes which were never delivered, and in fact were resold to other parties.

In the Camden case, the court stated, 64 Eq. page 734,

“The letter of Pfeiffer to the Camden Iron Works, of Feb. 10th, 1897, shows that the impropriety and wholly baseless character of such a claim was brought to the attention of the claimant, in great detail, over four months before the claimant filed with the clerk of the City of Camden its inaccurate, untrue, excessive and oppressive claim. It is an irresistible conclusion that it filed this lien notice against both light and knowledge. The letters in evidence, the testimony of the president of the company, the whole course of conduct of the claimant company in relation to garnisheeing other funds of Pfeiffer in a trust company in Philadelphia after, or at the time of, the filing of its lien notices with the City of Camden, is so flagrantly unfair, unjust and oppressive as to give the irresistible inference that the act of the claimant company, in filing its lien for an untrue and excessive amount, was knowingly and consciously done.”

In the Camden case, therefore, where fraud was actually shown, where demands wholly without excuse were made, and where the statute required an exact amount to be set forth, how could those facts correspond with the facts in our case. Here

the Hawthorne Contracting Co. honestly, fairly, and openly recited all of the facts. This case is more like the case of Gregory vs. Lewis, 87 Equity, page 127, which was decided in 1917, even before the newer act of 1918 was passed.

Vice Chancellor Backes, in Gregory v. Lewis, differentiated that case from the Camden Iron Works, in that there was nothing in the facts to show fraud or an intent to deceive.

In Gregory v. Lewis, the stop-notice claimed moneys not alone for goods delivered, but also for damages sustained, because of the breach of contract of the general contractor. The claim for damages was set forth as damages.

The court held in Gregory vs. Lewis, that whether the inclusion of items for unliquidated damages shall cause a forfeiture of the lien depends upon

“the motives actuating them in overstating their claim, for if this was done in good faith, they ought not to be penalized and suffered to lose the benefit of the statute to the amount of their just dues.”

The Court in 87 Equity, page 131, then quoted the opinion of the Camden Iron Works case, and showed the actual fraud in that case. The opinion of Gregory vs. Lewis in 87 Equity, 133, then continues as follows:

“Now, although the complainants were not entitled to liens for the consequential damages, and they ought not to have been included in the notices, it does not follow that the demands were knowingly and consciously untrue, *i. e.*, false. That the complainants were subjected to the extra outlay by reason of the breach of the contract by Lewis, and that the expenses were actually incurred

in completing the contract, is admitted. The inclusion of the offending items may have been the result of a misconception of the law, or due to faulty advice of counsel. If the matter is reduced to inference, that of innocence must prevail."

The Camden Iron Works case was further differentiated in *W. J. & S. R. R. Co. vs. Cape May Co.* 100 Equity, 181, at page 183. The Court there held that where the notice was filed and incorrect and made as an error, the notice and claim could not cause forfeiture of the entire amount due.

The Camden Iron Works case was again differentiated in *13th Ward B. & L. v. Kanter*, 105 Eq. 339 on page 345. In that case the lien set forth a claim of \$1500 more than was actually due. The court held

"the failure to credit the amounts can reasonably be attributed to accident, due to confusion of the book accounts and notes of the parties, and can not be said to have been willful, to the defeat of the lien claim."

A careful reading of the testimony shows that on direct-examination Mr. Knoble, of the Hawthorne Contracting Co. in giving the details of his claim, stated that 197 cubic yards were delivered. At that very time the municipal engineer had credited him with 320 cubic yards of white stone, as having actually been delivered. This was set forth in the ninth certificate (p. 46, l. 19). If Mr. Knoble had desired to put in a false and excessive claim, he could have stated that 320 cubic yards were actually delivered, and the demand damages for the balance. But, he stated that he actually delivered 197 cubic yards (p. 49, l. 19), stated that the work was not finished (p. 51, l. 33), that he was never called off the job and that the

borough engineer still held him to his contract to deliver the full 400 cubic yards (p. 51, l. 18). Mr. Hood, the borough engineer, also admitted that the work was not finished or complete (p. 81, ll. 8-13) and that he did not release the Hawthorne Contracting Co. from delivering the balance of the white stone (p. 82, l. 20).

A careful reading of the testimony will not show that any demand was made for payment for 400 cubic yards of white stone, as actually having been delivered. The lien-claim for this amount was filed, it is true, but was filed to cover the resultant damages. Mr. Bang, the general contractor never claimed to have been imposed upon for an excessive charge. He was never told that 400 cubic yards were delivered. He testified that he was merely paying for actual delivered goods upon actual measurements by the borough engineer (p. 89, ll. 3-10). The Hawthorne Contracting Co. also relied upon the Borough engineer for its measurements, and he represented all the parties concerned. If the Hawthorne Contracting Co. wanted to put in any false claims, it could have hired its own engineer and made an excessive demand. The Borough engineer stated that he estimated 320 cubic yards as actually delivered (p. 82, l. 6; p. 46, l. 18). There is nothing in his testimony to show that the Hawthorne Contracting Co. represented that 400 cubic yards was delivered.

Throughout the hearing, there was nothing in the case to show any representations by the Hawthorne Contracting Co. to the general contractor, or to the Borough engineer, that 400 cubic yards were actually delivered. Since therefore, no one was defrauded, and since there was no attempt to impose upon anyone, and since the Hawthorne

Contracting Co. at the hearing voluntarily and fully explained what occurred, why should they be, at this time, forced to lose and forfeit the moneys actually due to them?

It is well known that pleadings are filed with insufficient information, without actual data, and without legal advice. That is the reason so many pleadings are amended even during a hearing. That is also the reason the 1918 act was passed, to relieve the situation, and to permit sub-contractors to be paid for materials delivered on public improvements.

In this case, the Vice Chancellor went even beyond the requirements of the Camden Iron Works case. He stated that a lien-claim filed thoughtlessly and carelessly, should be forfeited. That was not even the law under the statute of 1902, because even then willful and fraudulent intent had to be proven. If it was not the law then, why should it now be the law, when the 1918 act took away the strictness of the requirements, and permitted the lien to be filed in an amount "as nearly as may be?"

This effort to make new law in favor of forfeiture certainly should not be encouraged, because any type of carelessness or negligence, even involving smallest items, would forfeit claims, involving large amounts of moneys. Forfeitures are not favored by any court. On the other hand, the court ought to do everything possible to prevent forfeitures, and enable subcontractors to collect moneys due to them.

Tuttle v. Cadwell, 92 Law, 26, cited by the Vice Chancellor in this case, is not applicable for two reasons. In the first place, the case involves a private mechanics lien. In the second place, the facts are entirely different.

In the Tuttle case, the facts were as follows: The plaintiff claimed \$653.90 from the contractor, and on refusal, served notice upon the owner for that amount. The owner notified the contractor of the claim, and the contractor informed the owner that they did not owe the owner the \$653.90 but actually owed the sum of \$471.43. The plaintiff refused to accept that amount of money and started suit. At the trial, the most that the plaintiff attempted to prove was the sum of \$555.83, but at the close of the trial, accepted the sum of \$471.43. See 92 Law, page 27, line 31. The court there held that the plaintiff's failure to state the exact amount was *not the result of mistake*, (See page 27, line 34), and the plaintiff made no effort to determine accurately the amount due. The court held that where it *appeared* to the claimant that the amount was excessive, then it had the burden to show that the claim was not the result of carelessness. But in our case it never "appeared" to the Hawthorne Contracting Co. that its claim was excessive. Its claim was never disputed. It was merely placed on file, together with all the other claims, and upon the hearing, testimony on all the claims were given and payments allowed.

In the Tuttle case, the owner notified the plaintiff that he was not satisfied and stated that the contractor did not admit that amount of money being due. At the trial, the court stated:

"not only was there no attempt to show that the plaintiff's claim as expressed in the stop-notice was valid, but on the contrary, it was admitted that the contractors challenge of the correctness of the plaintiff's claim was entirely justified, and that no such amount was due as was exhibited in that claim. A materialman cannot take advantage of the benefit of this section of the Mechanics' Lien

Law for the purpose of holding the owner liable for the contractor's debt, *after the owner has expressed dissatisfaction as to the correctness of the claim*, unless he proves at the trial that the claim was, in fact, correct, or as nearly correct as it was then reasonably possible to make it, and that therefore, inferentially, the dissatisfaction of the owner was without solid support."

Intili vs. Bonnet, 143 A. 741; 6 N. J. Misc. R. 1043. In that case a greater claim was filed than proven. There was absolutely no explanation for this demand.

It is respectfully submitted that the instant case is quite on all fours with Gregory v. Lewis, and should be decided on the doctrines therein set forth. Nothing short of actual fraud should defeat a claim filed. The law has not as yet been interpreted as forfeiting a claim whose items are set forth carelessly, or as a result of a mistaken idea of what the law ought to allow. The tendency has been toward a more lenient interpretation so that actual justice ought to be given to all the parties. A reaction should not be allowed to set in and upset all the work done to relieve litigants from the rigors of technical pleadings and notices.

POINT THREE.

Though the claim for the white stone be disallowed, that should not declare the forfeiture of the claims for the six other items.

The contract in this case, between the Borough and Charles Bang, the general contractor, was made upon a unit basis. See contract, page 32 to 36 inclusive. There was no stipulated price for the entire contract, except as based upon certain estimated quantities (p. 37, ll. 9-13). The contractor was to be paid on a unit basis, according to the quantities used and measured, and certified to by the Borough engineer, from time to time (p. 37, ll. 8-13). Separate prices per unit was made for each separate item. See original contract, page 27 to 41 inclusive.

The contract between the Hawthorne Contracting Co. and Charles Bang was also upon a unit basis. See their contract on pages 26 and 27. Each unit was a separate contract in itself. It is immaterial that the Hawthorne Contracting Co., made a contract for seven separate units on one sheet of paper. It might just as well have made seven separate contracts, and put in seven different claims. Since each unit was separate, and since a separate price was made for each unit, it could be readily seen that there is no reason for tying one up with another. In the Camden Iron Works Case, 64 Equity, on page 724, two separate contracts were made between the Camden Iron Works and Mr. Pfeiffer, the general contractor. But both these contracts were dated Oct. 31st, 1896. These two contracts might as

well be considered as a single contract for two separate units, just as occurred in the instant case. Still the court held that by disallowing one claim, was no reason for disallowing the other claim, and held 64 E. page 734

“so much of the decree as allows \$2509.39 upon the second claim filed, which relates to the stand-pipe, ordered and delivered under another contract, should be affirmed. These two claims must be treated and considered separately. Each could have been dealt with by the contractor, and the city as independent and substantive. The filing of the one, in no way hindered or delayed the adjustment of the other.”

Thus in the instant case, the Hawthorne Contracting Co. might have supplied white stone and a second company performed the excavation, a third company supplied the gravel, a fourth company, the sand, etc. Each item was independent of the other. “Each could have been dealt with by the contractor, and the city as independent and separate.”

Conclusion.

It is respectfully submitted that the claim of the Hawthorne Contracting Co. should be allowed as set forth in the Master's Report. Full adjustments between the parties on all items were made by the Master after due and full hearing. The Hawthorne Contracting Co. honestly and fairly performed their work, and supplied their materials, the total of which amounted to more than \$26,000. A \$2400 item covering white stone was disputed. There is nothing in the case to attack

the honesty and good faith of the Hawthorne Contracting Co. in filing the claim that they did.

What happened was that the Hawthorne Contracting Co. made an invoice of their claims. Their attorney embodied this invoice in an affidavit of stop-notice, and without further adieu, the claim was filed. There is nothing in the case to show that the official of the Hawthorne Contracting Co. even read the stop-notice before signing it, or that there was a consultation as to what should be allowed or disallowed. There is nothing in the case to show any letters or oral statements, or demands made, that more materials were delivered, than were actually delivered. All of the evidence points to one conclusion, and that is, the Borough the general contractor, and the Hawthorne Contracting Co. all relied upon the actual measurements and certificates of the Borough engineer for their guidance.

Even if the court should be inclined to disallow one item of materials shipped, that should not be any reason for disallowing other items which were shipped, and for which the Borough has made payment to the general contractor. There is no reason for enriching the general fund due to the general contractor, from the Borough, and paying these moneys to other contractors who did nothing toward building up this common fund. The Borough has been ordered to pay the moneys due to the general contractor under the actual measurements made by the Borough engineer. It is respectfully submitted that the part of the moneys due to the Hawthorne Contracting Co. out of this fund should be allowed, and paid to them.

It is respectfully submitted that the report of the master should be affirmed in toto, and the order of the Vice Chancellor setting aside the report should be reversed.

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