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[Filed January 24, 1927.]

NOTICE OF APPEAL AND GROUNDS.

New Jersey Supreme Court.

WARREN COUNTY.

JOHN H. DAHLKE,
Plaintiff,
vs.
BASIC IRON ORE COMPANY,
a corporation,
Defendant.

Action at Law.

To: JOHN H. DAHLKE, Plaintiff and Attorney Pro Se.

SIR:

PLEASE TAKE NOTICE that the defendant in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following grounds, to wit:

1. Because the Supreme Court erred in giving judgment denying defendant's motion to strike out the first count of the amended complaint filed in this cause, because it failed to set out a cause of action, inasmuch as under the terms of the written contract, annexed to the complaint, only such tailings were to be paid for

by the defendant, as were used upon the premises described in the contract, in manner and form as provided in said contract and title in the tailings not so used, but removed from the premises, passed to the defendant and was its property.

2. Because the Supreme Court erred in giving a judgment denying defendant's motion to strike out the first count of the amended complaint filed in this cause because under the terms of the contract annexed to the complaint and made part of the first count, plaintiff was not entitled to recover from defendant.

3. Because the Supreme Court erred in admitting in evidence at the trial of this cause an original letter written by Charles E. Hewitt on behalf of the defendant, dated August 22, 1923 to the plaintiff, John H. Dahlke, over objection of defendant's counsel. (Ex. P-2.)

4. Because the Supreme Court erred in admitting in evidence at the trial of this cause a copy of a letter dated August 27, 1923, written by the plaintiff, John H. Dahlke, to Mr. Hewitt, an officer of the Basic Iron Ore Company, defendant, over the objection of defendant's counsel. (Ex. P-3.)

5. Because the Supreme Court erred in the trial of this cause in admitting in evidence over the objection of defendant's counsel, a letter dated May 1, 1924, written by Ogden B. Hewitt to the plaintiff, John H. Dahlke. (Ex. P-4.)

6. Because the Supreme Court erred in the trial of this cause in admitting in evidence over

the objection of defendant's counsel, a statement of the amount paid to Mr. Dahlke by the Basic Iron Ore Company on April 30, 1924. (Ex. P-5.)

7. Because the Supreme Court erred in the trial of this cause in admitting in evidence over the objection of defendant's counsel, a check payable to the defendant, John H. Dahlke, dated April 30, 1924, for $251.34 (Ex. P-6) and also check payable to the defendant, John H. Dahlke, dated September 9, 1924, for $22.25.

8. Because the Supreme Court erred in the trial of this cause in admitting in evidence over the objection of defendant's counsel a letter dated September 3d, 1923, from John H. Dahlke to Charles E. Hewitt. (Ex. P-9).

9. Because the Supreme Court erred in the trial of this cause in admitting in evidence over the objection of defendant's counsel a letter marked for identification. (Ex. P-10.)

10. Because the Supreme Court erred in the trial of this cause in admitting in evidence over the objection of defendant's counsel, copy of a letter, dated August 27, 1925, from John H. Dahlke to the Basic Iron Ore Company, marked Exhibit P-11.

11. Because the Supreme Court erred in the trial of this cause in admitting in evidence over the objection of defendant's counsel copy of a letter dated September 19, 1925, from John H. Dahlke to the Basic Iron Ore Company, marked Exhibit P-12.

12. Because the Supreme Court erred in the trial of this cause in admitting in evidence over the objection of defendant's counsel, copy of a letter dated October 26, 1925, from John H. Dahlke to the Basic Iron Ore Company, marked Exhibit P-13.

13. Because the Supreme Court erred in the trial of this cause in admitting in evidence over the objection of defendant's counsel, copy of a letter dated October 31, 1925, from John H. Dahlke to Ogden B. Hewitt, an officer of the defendant company. (Exhibit P-14.)

14. Because the Supreme Court erred in the trial of this cause in admitting in evidence over the objection of defendant's counsel copy of a letter dated November 12, 1925, from John H. Dahlke to the Basic Iron Ore Company, marked Exhibit P-15.

15. Because the Supreme Court erred in the trial of this cause in denying the motion made by defendant's counsel to direct a verdict for the defendant on the ground that plaintiff was not entitled to recover under the contract upon which the action was based.

16. Because the Supreme Court erred in the trial of this cause in granting a motion to direct a verdict in favor of the plaintiff for the sum of Five thousand, two hundred ninety-five dollars and twenty-eight cents ($5,295.28).

Respectfully yours,

EDGAR W. HUNT,
Attorney for Defendant.

[Served May 15, 1926.]

SUMMONS.

The State of New Jersey to the Basic Iron Ore Company:

You are summoned to answer the annexed Complaint of John H. Dahlke in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this eighth day of May, A. D. nineteen hundred and twenty-six.

EDWARD J. KELLEBER,
Clerk.

JOHN H. DAHLKE,
Attorney, Pro se.

[Served May 15, 1926.]

COMPLAINT.

NEW JERSEY SUPREME COURT.

WARREN COUNTY.

JOHN H. DAHLKE,
Plaintiff,

vs.

BASIC IRON ORE COMPANY,
a corporation,
Defendant.

Action at Law.

Plaintiff, residing at Belvidere, Warren County, New Jersey, says that:

1. He was in February 1920 and still is the owner of certain premises situate in the Township of Oxford, in the County of Warren and State of New Jersey, consisting of about 215 acres of land, on which were, at the times hereinafter mentioned, deposited certain ingredients consisting of ochre, umber, mica, silica and other substances, hereinafter called tailings, suitable to be used in the manufacture of paints, pigments and other articles, and which at those times were the property of the plaintiff.

2. That on or about February 27, 1920, plaintiff and defendant entered into a certain written agreement, a copy of which is hereto annexed and made a part hereof, by virtue of which agreement the plaintiff agreed to sell to

the defendant, subject to the provisions of said agreement, all his right, title, and interest of, in and to all the tailings then lying on the said premises from ore theretofore washed or otherwise treated on said premises, and the tailings which might thereafter be derived from the washing or other treatment of the ore lying in bank on said premises, and each and all the ingregdients thereof, for the prices in the said agreement set forth, that is to say: the defendant was to pay to the plaintiff for each and every ton of such tailings so taken and treated or manufactured by it the sum of one dollar per ton; and for each and every ton of such tailings sold by the defendant to the Berkleigh Manufacturing Company or to others and treated by it or them on said premises, it was to pay to the plaintiff twenty-five per cent of the amount received therefor; and it was further agreed that the Berkleigh Manufacturing Company was to pay four dollars per ton for said tailings; and it was further agreed that if the defendant assigned the said contract and such assignee should sell any such tailings to any corporation or partnership in which such assignee should have any interest through stock ownership or otherwise, the plaintiff was to receive for all such tailings so sold a royalty of twenty-five per cent of the full market value of such tailings, which royalty in no case was to be less than one dollar per ton.

3. After the taking of the said agreement and at the dates hereinafter specified the defendant took and converted to its own use and made shipments and delivery of the said tailings to

the Astoria Light, Heat and Power Company of New York, C. K. Williams Co. of Easton, Penna., and Walter A. Barrows & Co., of Philadelphia, Pa., as follows:

May and June	1924	988.80	net tons
September	1924	82.80	" "
November	1924	136.75	" "
December	1924	104.90	" "
January	1925	806.35	" "
July	1925	400.7	" "
August	1925	191.60	" "

making a total of 2,711.90 net tons of such tailings, of the value of $13,559.50, and thereby the defendant became liable to pay to the plaintiff for said tailings the sum of $3,389.87 and the said defendant has not paid to the plaintiff the said sum of $3,389.87 or any part thereof.

And after the month of August 1925 at divers times the said defendant took and converted to its own use and sold and delivered to the Astoria Light, Heat and Power Co. and to divers other persons and corporations whose names are unknown to the plaintiff, 10,000 tons of said tailings of the value of $50,000 and thereby the defendant became liable to pay to the plaintiff for said tailings the sum of $12,500.00, and the said defendant has not paid to the plaintiff the said sum of $12,500.00, or any part thereof.

SECOND COUNT.

1. Plaintiff says that on February 27, 1920, and at all times thereafter and until the several times of removal of the tailings hereinafter mentioned he was the owner of and was possessed of a tract of land in Oxford Township,

Warren County, New Jersey, consisting of about 215 acres, upon which lands and premises there had theretofore been deposited large quantities of ochre, umber, mica, silica and other ingredients used in the manufacture of paints, pigments and other articles of great value, which aforementioned ingredients were derived from the washing or iron ore on said premises and are and were commonly called tailings, and were the property of the plaintiff, comprising in the whole 25,000 tons and were of the value of $125,000.

2. Afterwards in the month of May 1924 and at divers other times subsequent thereto and to the time of the bringing of this suit the said defendant entered upon the said premises and took and removed therefrom 25,000 tons of said tailings of great value to wit of the value of $125,000 and converted the said tailings to their own use and the said defendant thereby and by reason of the premises became and were indebted to the said plaintiff in the said sum of $125,000, the value of the said tailings so taken, removed and converted, and the said defendant has not paid to the plaintiff the said last mentioned sum of $125,000, or any part thereof.

Plaintiff demands as damages under the first count in this complaint the sum of $15,889.87, with interest.

Plaintiff demands as damages under the second count in this complaint the sum of $125,000.

JOHN H. DAHLKE,
Attorney Pro se.

AGREEMENT made this 27th day of February A. D. 1920, between JOHN H. DAHLKE of the town of Belvidere, Warren County, New Jersey, Party of the first part, and the BASIC IRON ORE COMPANY, a corporation organized and existing under the laws of the State of New Jersey, party of the second part, WITNESSETH:

WHEREAS the party of the first part heretofore granted to Robert L. Ahles the exclusive right to mine and remove iron ore contained in a tract of land in the Township of Oxford, Warren County, New Jersey, by two certain leases, one dated November 18, 1901, for a term of twenty years from said date and recorded in the Clerk's Office of Warren County on December 30, 1901 in Book 2 of Agreements, at page 62, etc., and the other dated October 23, 1903, for a further term of twenty years from the date of expiration of said first agreement mentioned to November 18, 1941, and recorded in the said Clerk's Office on April 2, 1904, in Book 3 of Leases at pages 49, etc., which said leases were duly assigned to the party of the second part hereof by written assignment, dated February 14, 1902, and recorded in the Clerk's Office of Warren County on June 7, 1902, in Book 3 of Assignments of Leases, at pages 11, etc., and the party of the first part is still the owner of the demised premises described in said leases, and the party of the second part is still the holder of said leases; and

WHEREAS there is now lying in bank on said premises demised certain ore heretofore mined

or caused to be mined and the tailings from ore heretofore washed or otherwise treated or caused to be washed or treated by the party of the second part on said premises, and the party of the second part has erected or caused or permitted to be erected on said premises a building designed to utilize certain of the ore tailings in the manufacture of paint and paint materials;

Now, therefore, in consideration of the premises and of the sum of one dollar by each party to the other in hand well and truly paid, the receipt whereof is hereby acknowledged, and of the agreements hereinafter contained, it is agreed between the parties as follows:

The party of the first part does hereby grant unto the party of the second part, subject to the provisions of this agreement, all his right, title and interest of, in and to all the tailings now lying on said demised premises from ore heretofore washed or otherwise treated on said premises, and the tailings which may hereafter be derived from the washing or other treatment of the ore now lying in bank on said premises, and each and all the ingredients thereof; and also the right to conduct or permit to be conducted on any part or parts of the said premises lying southerly of the Thomas Edison railroad any and all operations which may be desirable in the treatment of the said ore in bank or in the treatment of tailings therefrom or the tailings now on said premises, or in the manufacture thereof into paint or paint materials or other materials of any and all kinds whatsoever; and

for such purpose or purposes also the right to erect or cause or permit to be erected and maintained thereon buildings, plants and equipment, including those now thereon, with the privilege to remove the same at any time within one year after such treatment or manufacture, or other use of such buildings in connection with the mining operations, shall have been discontinued, (provided that such period for removal shall be deemed to be further extended so long as their existence shall not interfere with the use of the property for other purposes and until the party of the first part shall give to the party of the second part written notice requiring the removal of the buildings by a date therein mentioned, not less than sixty days from the giving of such notice), provided however as a condition to the right of such removal that all payments provided for in this agreement to be made to the party of the first part shall have been then paid.

The party of the second part will pay to the party of the first part for each and every ton of such tailings (viz, tailings now on said premises and tailings from such ore in bank on said premises as shall be hereafter treated on said premises) so taken and treated or manufactured by the party of the second part the sum of one dollar per ton; and for each and every ton of such tailings sold by the party of the second part to the Berkleigh Manufacturing Company or to others and treated by it or them on said premises 25% of the amount paid therefor by it or them to the party of the second part; it being understood that the amount fixed by the agreement between the party of the second part and the Berkleigh Manufacturing Company is Four Dollars per ton for said tailings.

It is hereby agreed that if this contract shall be assigned by the party of the second part and such assignee shall sell any such tailings to any corporation or partnership in which such assignee shall have any interest through stock ownership or otherwise, the party of the first part shall receive for all such tailings so sold a royalty of 25% of the full market value of such tailings, which royalty payable to the party of the first part shall not be in any case less than $1 per ton.

The party of the second part shall be entitled to take and dispose of the refuse rock obtained from the iron ore by the washing operations or other treatment of the ore in bank on said premises and not included in the tailings suitable for paints or paint materials or treatment for other minerals, and shall not be required to make any payment to the party of the first part therefor.

The party of the second part will, as often as statements shall be rendered to it by the Berkleigh Manufacturing Company or others purchasing such tailings as to the amount of all such tailings taken and treated by it or others on the said premises, render to the party of the first part, within ten days thereafter, a true and correct copy of such statement, and will at the same time make payment to the party of the second part of the amounts due him hereunder; and in case the operation is conducted by the party of the second part itself the party of the

second part will render to the party of the first part a like statement monthly and make the payments due hereunder at the same time.

The party of the first part shall have the right at all reasonable times to examine the books relating to the sale or use of such tailings by the party of the second part and to take extracts therefrom.

In case the party of the second part shall fail to render such statements or to make the payments herein provided for as required by the foregoing provisions hereof within thirty days after such default and written demand by the party of the first part, then the party of the first part may at his option elect to declare this agreement null and void, provided, however, that if the amount of payments due hereunder shall be in dispute, then such thirty day period shall not be set running until the amount due shall be fixed by agreement or judicially determined.

This agreement is not intended to affect the present rights of the parties with respect to shipments of crude or washed ore from said premises, nor the existing agreement between the parties with respect to the royalties to be paid on such shipments.

The party of the second part shall be privileged to assign or sublease in whole or in part any right, title, interest or privilege acquired by it under this agreement; and the provisions hereof shall bind and inure to the benefit of the parties hereto and to their respective heirs, legal representatives, successors and assigns.

In witness whereof the party of the first part has hereunto set his hand and seal, and the party of the second part has caused these presents to be signed by its officers thereunto duly authorized, and its corporate seal to be hereto affixed, the day and year first above written.

Executed in duplicate.

John H. Dahlke L.S.

Basic Iron Ore Company
By Erskine Hewitt
Its President.

[Filed June 11, 1926.]

NOTICE OF MOTION TO STRIKE OUT AMENDED COMPLAINT.

NEW JERSEY SUPREME COURT,

WARREN COUNTY.

JOHN H. DAHLKE,
Plaintiff,

vs.

BASIC IRON ORE COMPANY,
a corporation,
Defendant.

Action at Law.

To: JOHN H. DAHLKE, Plaintiff and Attorney Pro se.

SIR:

TAKE NOTICE that I shall move to strike out the amended complaint heretofore filed in the above named cause, before the Honorable Thomas W. Trenchard, Justice of the Supreme Court, at the State House in the City of Trenton, New Jersey, on July 1, 1926, at ten thirty o'clock in the forenoon, Day Light Saving Time, or as soon thereafter as counsel can be heard for the following named reasons:

1. Because there is a misjoinder of the causes of action in the complaint.

2. Because the plaintiff has joined two causes of action which cannot be conveniently tried together.

Notice of Motion to Strike Out Amended Complaint.

3. Because the plaintiff has joined a cause of action based upon contract with a cause of action for conversion arising out of the same transaction.

4. Because the plaintiff has failed to elect whether to sue on conversion or on contract and the election of one remedy must necessarily operate as an estoppel to proceed upon the other.

5. Because the first count fails to set out a cause of action, inasmuch as under the terms of the written contract annexed to the complaint, only such tailings were to be paid for by the defendant as were used upon the premises described in the contract, in manner and form as provided in said contract and the title in the tailings not so used but removed from the premises passed to the defendant and were its property.

6. Because under the terms of the contract, annexed to the complaint and made a part of the first count, the plaintiff is not entitled to recover from the defendant.

Respectfully,

EDGAR W. HUNT,
Attorney for Defendant.

[Filed June 23, 1926.]

AMENDED COMPLAINT.

NEW JERSEY SUPREME COURT.

WARREN COUNTY.

JOHN H. DAHLKE,
Plaintiff,
vs.
BASIC IRON ORE COMPANY,
a corporation,
Defendant.

Action at Law.

Plaintiff residing at Belvidere, Warren County, New Jersey, says that:

1. He was in February 1920 and still is the owner of certain premises situate in the Township of Oxford, in the County of Warren and State of New Jersey, consisting of about 215 acres of land, on which were, at the times hereinafter mentioned, deposited certain ingredients consisting of ochre, umber, mica, silica and other substances, hereinafter called tailings, suitable to be used in the manufacture of paints, pigments and other articles, and which at those times were the property of the plaintiff.

2. That on or about February 27, 1920, plaintiff and defendant entered into a certain written agreement, a copy of which is hereto annexed and made a part hereof, by virtue of which agreement the plaintiff agreed to sell to the defendant, subject to the provisions of said

agreement, all his right, title and interest of, in and to all the tailings then lying on the said premises from ore theretofore washed or otherwise treated on said premises, and the tailings which might thereafter be derived from the washing or other treatment of the ore lying in bank on said premises, and each and all the ingredients thereof, for the prices in the agreement set forth, that is to say: the defendant was to pay to the plaintiff for each and every ton of such tailings so taken and treated or manufactured by it the sum of one dollar per ton; and for each and every ton of such tailings sold by the defendant to the Berkleigh Manufacturing Company or to others and treated by it or them on said premises, it was to pay to the plaintiff twenty-five per cent of the amount it received therefor; and it was further agreed that the Berkleigh Manufacturing Company was to pay four dollars per ton for said tailings; and it was further agreed that if the defendant assigned the said contract and such assignee should sell any such tailings to any corporation or partnership in which such assignee should have any interest through stock ownership or otherwise, the plaintiff was to receive for all such tailings so sold a royalty of twenty-five per cent of the full market value of such tailings, which royalty in no case was to be less than one dollar per ton.

3. After the making of the said agreement and at the dates hereinafter specified the defendant took and made shipments and delivery of the said tailings to the Astoria Light Heat and Power Company of New York, C. K. Williams & Co. of Easton, Penna., and Walter A. Barrows & Co., of Philadelphia, Penna., as follows:

May and June	1924	988.80 net tons
September	1924	82.80 net tons
November	1924	136.75 net tons
December	1924	104.90 net tons
January	1925	806.35 net tons
July	1925	400.7 net tons
August	1925	191.60 net tons

making a total of 2,711.90 net tons of such tailings, of the value of $13,559.50, and thereby the defendant became liable to pay to the plaintiff for said tailings the sum of $3,389.87 and the said defendant has not paid to the plaintiff the said sum of $3,389.87 or any part thereof.

And after the month of August 1925 at divers times the said defendant took and sold and delivered to the Astoria Light Heat and Power Co., and to divers other persons and corporations whose names are unknown to the plaintiff, 10,000 tons of said tailings of the value of $50,000., and thereby the defendant became liable to pay to the plaintiff for said tailings the sum of $12,500., and the said defendant has not paid to the plaintiff the said sum of $12,500., or any part thereof.

SECOND COUNT.

1. Plaintiff says that on February 27, 1920, and at all times thereafter and at the several times of removal of the tailings hereinafter mentioned he was the owner of and was possessed of a tract of land in Oxford Township, Warren County, New Jersey, consisting of about 215 acres, upon which lands and premises there had theretofore been deposited large quantities of ochre, umber, mica, silica and other ingredients used in the manufacture of paints, pigments and

other articles of great value, which aforementioned ingredients were derived from the washing of iron ore on said premises and are and were commonly called tailings, and were the property of the plaintiff, comprising in the whole 25,000., tons and were of the value of $125,000.

2. Afterwards in the month of May 1924 and at divers other times subsequent thereto and to the time of the bringing of this suit the said defendant by its officers, agents and servants entered upon the said premises and took and removed therefrom 25,000 tons of said tailings of great value, to wit of the value of $125,000., and converted the said tailings to its own use and the said defendant thereby and by reason of the premises became and was indebted to the said plaintiff in the said sum of $125,000., the value of the said tailings so taken, removed and converted, and although the said defendant was so indebted to the plaintiff it has not paid to him the said last mentioned sum of $125,000., or any part thereof.

Plaintiff demands as damages under the first count in this complaint the sum of $15,889.87 with interest.

Plaintiff demands as damages under the second count in this complaint the sum of $125,000., with interest.

JOHN H. DAHLKE,
Attorney Pro Se.

AGREEMENT made this 27th day of February, A.D. 1920, between John H. Dahlke of the Town of Belvidere, Warren County, New Jersey, party

of the first part, and the Basic Iron Ore Company, a corporation organized and existing under the laws of the State of New Jersey, party of the second part, Witnesseth:

Whereas the party of the first part heretofore granted to Robert L. Ahles the exclusive right to mine and remove iron ore contained in a tract of land in the Township of Oxford, Warren County, New Jersey, by two certain leases, one dated November 18, 1901, for a term of twenty years from said date and recorded in the Clerk's Office of Warren County on December 30, 1901, in Book 2 of Agreements, at page 62, etc., and the other dated October 23, 1903, for a further term of twenty years from the date of expiration of said first agreement mentioned to November 18, 1941, and recorded in the said Clerk's Office on April 2, 1904, in Book 3 of leases at pages 49, etc., which said leases were duly assigned to the party of the second part hereof by written assignment, dated February 14, 1902, and recorded in the Clerk's Office of Warren County on June 7, 1902, in Book 3 of Assignments of Leases, at pages 11, etc; and the party of the first part is still the owner of the demised premises described in said leases, and the party of the second part is still the holder of said leases; and

Whereas there is now lying in bank on said premises demised certain ore heretofore mined or caused to be mined and the tailings from ore heretofore washed or otherwise treated or caused to be washed or treated by the party of the second part on said premises; and the party of the second part has erected or caused or permitted to be erected on said premises a building designated to utilize certain of the ore tailings in the manufacture of paint and paint materials;

Now, therefore, in consideration of the premises and of the sum of one dollar by each party to the other in hand well and truly paid, the receipt whereof is hereby acknowledged, and of the agreements hereinafter contained, it is agreed between the parties as follows:

The party of the first part does hereby grant unto the party of the second part, subject to the provisions of this agreement, all his right, title and interest of, in and to all the tailings now lying on said demised premises from ore heretofore washed or otherwise treated on said premises, and the tailings which may hereafter be derived from the washing or other treatment of the ore now lying in bank on said premises, and each and all the ingredients thereof; and also the right to conduct or permit to be conducted on any part or parts of the said premises lying southerly of the Thomas Edison railroad any and all operations which may be desirable in the treatment of the said ore in bank or in the treatment of tailings therefrom or the tailings now on said premises, or in the manufacture thereof into paint or paint materials or other materials of any and all kinds whatsoever; and for such purpose or purposes also the right to erect or cause or permit to be erected and maintained thereon buildings, plants and equipment, including those now thereon, with the privilege to remove the same at any time within one year after such treatment or manufacture, or other use of such buildings in connection with the mining operations, shall have been discontinued. (Provided that such period for removal shall be deemed to be further extended so long as their existence shall not interfere with the use of the

property for other purposes and until the party of the first part shall give to the party of the second part written notice requiring the removal of the buildings by a date therein mentioned, not less than sixty days from the giving of such notice), provided however as a condition to the right of such removal that all payments provided for in this agreement to the made to the party of the first part shall have been then paid.

The party of the second part will pay to the party of the first part for each and every ton of such tailings (viz, tailings now on said premises and tailings from such ore in bank on said premises as shall be hereafter treated on said premises) so taken and treated or manufactured by the party of the second part the sum of one dollar per ton; and for each and every ton of such tailings sold by the party of the second part to the Berkleigh Manufacturing Company or to others and treated by it or them on said premises 25% of the amount paid therefore by it or them to the party of the second part; it being understood that the amount fixed by the agreement between the party of the second part and the Berkleigh Manufacturing Company is four dollars per ton for said tailings.

It is hereby agreed that if this contract shall be assigned by the party of the second part and such assignee shall sell any such tailings to any corporation or partnership in which such assignee shall have any interest through stock ownership or otherwise, the party of the first part shall receive for all such tailings so sold a royalty of 25% of the full market value of such tailings, which royalty payable to the

party of the first part shall not be in any case less than $1 per ton.

The party of the second part shall be entitled to take and dispose of the refuse rock obtained from the iron ore by the washing operations or other treatment of the ore in bank on said premises and not included in the tailings suitable for paints or paint materials or treatment for other minerals, and shall not be required to make any payment to the party of the first part therefor.

The party of the second part will, as often as statements shall be rendered to it by the Berkleigh Manufacturing Company or others purchasing such tailings as to the amount of all such tailings taken and treated by it or others on the said premises, render to the party of the first part, within ten days thereafter, a true and correct copy of such statement, and will at the same time make payment to the party of the second part of the amounts due him hereunder; and in case the operation is conducted by the party of the second part itself the party of the second part will render to the party of the first part a like statement monthly and make the payments due hereunder at the same time.

The party of the first part shall have the right at all reasonable times to examine the books relating to the sale or use of such tailings by the party of the second part and to take extracts therefrom.

In case the party of the second part shall fail to render such statements or to make the payments herein provided for as required by the foregoing provisions hereof within thirty

days after such default and written demand by the party of the first part, then the party of the first part may at his option elect to declare this agreement null and void, provided, however, that if the amount of payments due hereunder shall be in dispute, then such thirty day period shall not be set running until the amount due shall be fixed by agreement or judicially determined.

This agreement is not intended to affect the present rights of the parties with respect to shipments of crude or washed ore from said premises, nor the existing agreement between the parties with respect to the royalties to be paid on such shipments.

The party of the second part shall be privileged to assign or sublease in whole or in part any right, title, interest or privilege acquired by it under this agreement; and the provisions hereof shall bind and inure to the benefit of the parties hereto and to their respective heirs, legal representatives, successors and assigns.

In witness whereof the party of the first part has hereunto set his hand and seal, and the party of the second part has caused these presents to be signed by its officers thereunto duly authorized and its corporate seal to be hereto affixed, the day and year first above written.

Executed in duplicate.

John H. Dahlke L.S.

Basic Iron Ore Company
By Erskine Hewitt
Its President.

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

Be it remembered that on this 28th day of February in the year one thousand nine hundred and twenty before me personally appeared John H. Dahlke who, I am satisfied, is the grantor in the within instrument, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

Charles A. Dahlke,
(Seal) Commissioner of Deeds for
the State of New Jersey.

State of New York, }
County of New York, } ss.:

Be it remembered that on the 27th day of February in the year one thousand nine hundred and twenty before me a subscriber, a Foreign Commissioner of Deeds for New Jersey in New York personally appeared Erskine Hewitt to me known, who being by me duly sworn, according to law, on his oath doth depose and say:

That he is the President of and well acquainted with the seal of the Basic Iron Ore Company, the grantors in the foregoing instrument named; that the seal affixed to the said instrument is the corporate seal of said corporation; that it was so affixed by order of said corporation; that he is the President of said Corporation; that he saw the said
as such sign

the said deed and heard him declare that he signed, sealed and delivered the same as the voluntary act and deed of the said corporation by their order, and that this deponent signed his name thereto at the same time as the subscribing witness.

RUTH A. YERION,
A Foreign Commissioner of Deeds
(Seal) for New Jersey in New York.

[Filed June 28, 1926.]

MEMORANDUM FOR DEFENDANT ON MOTION TO STRIKE OUT AMENDED COMPLAINT.

NEW JERSEY SUPREME COURT.

WARREN COUNTY.

JOHN H. DAHLKE,
Plaintiff,
vs.
BASIC IRON ORE COMPANY,
a corporation,
Defendant.
} Action at Law.

This matter comes before the court on defendant's motion to strike out both counts of the amended complaint.

FIRST COUNT.

By the first count, the plaintiff, John H. Dahlke, seeks to recover damages for a breach of contract under seal made between him and the defendant, on February 27, 1920. From the allegations of the first count it appears that the plaintiff was the lessor of a tract of land which he owned in Oxford township, Warren County, New Jersey, to one, Robert Ahles, and that the original lease had been extended in its operation until 1941; and that the defendant, a mining company, was the assignee of the lease and operated a mine on the

premises. In February 1920 there was a large bank of iron ore and tailings deposited on these lands and about this time the defendant and the Berkleigh Manufacturing Company, erected buildings on the leased premises which were used in the treatment of the tailings for the purpose of manufacturing paint. A dispute arose between the parties about the right of the defendant, or persons holding under it, to use buildings on the premises for the manufacture of paint and paint materials derived from the tailings. These facts can be gleaned from the agreement dated February 27, 1920, annexed to the complaint and referred to in the first count, which sets forth in a preamble the circumstances leading up to the making of the agreement. It is contended for the defendant that it was the purpose of this agreement to establish beyond controversy, the right of the defendant to maintain buildings on the premises for use in the manufacture of paint and paint materials and to use the tailings for this purpose. By the terms of this agreement it is contended for the defendant that the title in the tailings was transferred to the defendant with the proviso that certain royalties be paid for all tailings used or treated on the premises in the conduct of the paint business or any other business in which the tailings might be used. It is contended by the defendant that the preamble of the contract and its recitals show beyond question of doubt that it was the intention of the parties to compensate the plaintiff for the use of his property, which was outside of the terms of his lease.

At this point it is well to advert to the fact that the complaint under discussion is an amended complaint and that the original complaint, laid in two counts, was stricken out by Mr. Justice Trenchard. In the original complaint both counts charged a conversion. The first count of the original complaint recited the agreement now under discussion. Objection was made to this count because it was contended on behalf of the defendant that by the terms of the agreement, title in the tailings passed to the defendant and for this reason there could be no conversion as alleged in the first count of the original complaint. Then the second count of the original complaint was stricken out for technical reasons not pertinent to this discussion.

In the first count of the amended complaint in paragraph two, the pleader treats the contract as an agreement to sell rather than as a completed sale of the tailings.

A careful scrutiny of the terms of the agreement will demonstrate the soundness of the defendant's position.

The following paragraph is particularly important:

> "The party of the second part will pay to the party of the first part for each and every ton of such tailings (viz. tailings now on said premises and tailings from such ore in bank on said premises as shall be hereafter treated on said premises) so taken and treated or manufactured by the party of the second part the sum of one dollar per ton; and for each and every ten of such tailings sold by the party of the

second part to the Berkleigh Manufacturing Company or to others and treated by it or them on said premises 25% of the amount paid therefore by it or them to the party of the second part; it being understood that the amount fixed by the agreement between the party of the second part and the Berkleigh Manufacturing Company is four dollars per ton for said tailings."

By the terms of the first count of the amended complaint the plaintiff seeks to recover damages for tailings removed from the premises and not treated there. Under the terms of the agreement it is the defendant's contention that the plaintiff is not entitled to any payment for such tailings as the title to them has already passed to it and that the only compensation due would be for tailings treated on the premises in the course of the manufacture of paint materials or other products. During the course of oral argument, plaintiff's counsel challenged this construction alleging that the parties had given the contract a construction favorable to the plaintiff, by paying for tailings and accepting payment for tailings which had been removed from the property and which were not treated there. There is no allegation in the complaint to support this statement and of course the court in examining the complaint is limited to consideration of the well pleaded facts therein set forth. It is therefore contended that an examination of the agreement, careful consideration being given to the preamble, will indicate that on the face of the first count of the amended complaint there is no basis for recovery.

Second Count.

Objection was made to the second count on ground that it presented an issue which could not be conveniently tried with the first count. This motion is addressed to the court's discretion. Plaintiff's counsel in oral argument admitted that the agreement constituted a sale of the tailings, consequently it would be an absurdity to claim conversion. The crux of the case is the construction to be placed upon the agreement, annexed to the complaint and included by reference in the first count. The motion contended for in the second count is so clearly absurd when considered in connection with the allegations of the first count and the admission made by plaintiff's counsel in oral argument, that the case is peculiarly one in which the court should exercise its discretion to strike out the second count or require an election on the part of the plaintiff, inasmuch as the causes of action expressed in the two counts could not be conveniently tried together.

Resume.

In oral argument it was suggested to the court by defendant's counsel that when the crude ore, including the tailings, was removed from the premises, less royalty was paid than when the ore alone was removed and the tailings permitted to remain on the premises. In other words, by the payment of a less price, the ore and tailings could be removed, and a greater price would be paid for the removal of the ore when the tailings were permitted to remain on

Memorandum for Defendant on Motion to Strike Out Amended Complaint.

the property. Of course, there is nothing in the pleadings to show the terms of the mining lease, but it is contended that there is sufficient in the preamble of the agreement and the agreement itself to show that the plaintiff's claim is not well founded and that he is not entitled to any recovery.

It is respectfully submitted that both counts of the complaint be stricken out.

Respectfully submitted,

EDGAR W. HUNT,
HARLAN BESSON,
Of counsel with defendant.

[Filed July 6, 1926.]

STIPULATION.

NEW JERSEY SUPREME COURT.

WARREN COUNTY.

JOHN H. DAHLKE,
Plaintiff,
vs.
BASIC IRON ORE COMPANY,
a corporation,
Defendant.
} Action at Law.

IT IS STIPULATED and AGREED by and between the attorneys for the respective parties in the above entitled cause that the agreement for motion to strike out the amended complaint, heretofore set for July 1, 1926, before the Honorable Thomas W. Trenchard, Justice of the Supreme Court, at the Statehouse in the City of Trenton, New Jersey, at ten thirty o'clock in the forenoon Day Light Saving Time or as soon thereafter as counsel can be heard, shall be continued until July 8, 1926, at the hour and place as above stated.

July 1, 1926.

John H. Dahlke,
Attorney Pro se.

E. W. Hunt,
Attorney for Basic Iron Ore Company.

[Filed July 10, 1926.]

STIPULATION.

NEW JERSEY SUPREME COURT.

WARREN COUNTY.

JOHN H. DAHLKE, Plaintiff, vs. BASIC IRON ORE COMPANY, a corporation, Defendant.	Action at Law.

IT IS STIPULATED and AGREED by and between the attorneys for the respective parties in the above entitled cause that the agreement for motion to strike out the amended complaint, heretofore set for July 8, 1926, before the Honorable Thomas W. Trenchard, Justice of the Supreme Court, at the Statehouse in the City of Trenton, New Jersey, at ten thirty o'clock in the forenoon Day Light Saving Time or as soon thereafter as counsel can be heard, shall be continued until July 15, 1926, at the hour and place as above stated.

July 8, 1926.

John H. Dahlke.
Attorney Pro se.

E. W. Hunt
Attorney for Basic Iron Ore Company.

[Filed July 24, 1926.]

ORDER.

NEW JERSEY SUPREME COURT,

WARREN COUNTY.

JOHN H. DAHLKE, Plaintiff, vs. BASIC IRON ORE COMPANY, a corporation, Defendant.	Action at Law

This matter being opened to the court by Harlan Besson, Esquire, of counsel with the defendant, in the presence of John H. Dahlke, Esquire, appearing Pro se, and motion having been made to strike out the complaint because there was a misjoinder of counts and for other reasons more specifically set forth in the notice and it appearing to the court that this was a matter which should properly be heard before the Circuit Judge sitting for the Circuit in Warren County and it further appearing that the said Circuit Judge is the Hon. Rulif V. Lawrence of Freehold, New Jersey, and it having been ascertained that the earliest convenient date upon which the said Circuit Judge could hear the matter would be on Wednesday, September first at 10:30 A. M., Daylight Saving Time, at the Stacy Trent Hotel, Trenton, New Jersey,

IT IS on this twenty-third day of July, A. D., 1926,

Order.

ORDERED, that the argument of the questions arising on this motion, being the same, are hereby continued until September 1, 1926, at 10:30 A. M., Daylight Saving Time, at the Stacy Trent Hotel, Trenton, New Jersey, before the Hon. Rulif V. Lawrence.

(Signed) THOMAS W. TRENCHARD,
J. S. C.

[Filed Sept. 9, 1926.]

ON MOTION TO STRIKE COMPLAINT. CONCLUSION.

NEW JERSEY SUPREME COURT,

WARREN COUNTY CIRCUIT.

JOHN H. DAHLKE,
Plaintiff,
vs.
BASIC IRON ORE COMPANY,
a corporation,
Defendant.
— Action at Law.

Defendant company is operating an iron ore mine on premises belonging to plaintiff under a lease. In 1920, the parties entered into a separate agreement regarding the utilization of a certain by-product of the mining operation called tailings in the manufacture of paint or paint materials "or other materials of any and all kinds whatsoever". The compensation to plaintiff involves what may be called a royalty. A controversy has arisen as to whether plaintiff is entitled to royalties for tailings sold to others and not treated in the manufacture of paint, &c., on the premises. This involves a construction of the agreement which is in writing and attached to the complaint. Objection is made to the complaint because it includes a claim for the material not treated on the premises which it is claimed cannot be supported by a fair interpretation of the agreement. The plead-

ing contains two counts, the first resting on plaintiff's allegation as to the meaning of the agreement, that is to say, on the agreement itself, and the second sounding in trover and conversion on the theory that if the agreement does not cover all material, such as that sold and not treated on the premises, such material nevertheless belonged to him as the owner of the soil and its sale by defendant in the circumstances would be a conversion. In other words, the pleading may be characterized as a protective one couched in the alternative to save plaintiff's rights whatever they be determined to be at the trial of the action. It is suggested, however, that such causes of action cannot be conveniently tried together. It is not perceived that this is so for the reason that they apparently have a common question of law or fact and arise out of the same transaction. There appears to be no good reason why they cannot be conveniently tried together. An examination of the pleading as a whole leads to the conclusion that it is not objectionable. While the interpretation of the agreement may be a court question, it is conceivable that such interpretation may depend to some degree on the facts presented at the trial. In the circumstances, the motion to strike the complaint will be denied. Defendant may have fifteen days in which to file an answer.

RULIF V. LAWRENCE,
(Supreme Court Commissioner)
Circuit Court Judge.

[Filed Sept. 14, 1926.]

ORDER DENYING MOTION TO STRIKE OUT COMPLAINT.

NEW JERSEY SUPREME COURT,

WARREN COUNTY.

JOHN H. DAHLKE,
Plaintiff,
vs.
BASIC IRON ORE COMPANY,
a corporation,
Defendant.

Action at Law.

This matter being opened to the Court by Harlan Besson, Esquire, of Counsel with the Defendant, in the presence of John H. Dahlke, Esquire, Attorney Pro Se, and argument having been heard to strike out the first and second counts of the amended complaint on the ground of improper joinder, &c., and after hearing and considering the argument of counsel

IT IS on this 11th day of September, 1926,

ORDERED, that the motion of the defendant to strike out said counts be denied and that the said defendant have leave to answer the said complaint within fifteen days.

[Filed Sept. 18, 1926.]

ORDER.

NEW JERSEY SUPREME COURT,

WARREN COUNTY.

JOHN H. DAHLKE,
Plaintiff,

vs.

BASIC IRON ORE COMPANY,
a corporation,
Defendant.

Action at Law.

Application for a Bill of Particulars with respect to certain allegations of the second count of the plaintiff's complaint having been made on behalf of the defendant and said application being heard in the presence of Harlan Besson, Esquire, of counsel with the defendant and John H. Dahlke, Esquire, counsel Pro se, due notice of such application having been given and due consideration having been given to the application,

IT IS on this seventeenth day of September, A. D. 1926,

ORDERED, that the plaintiff be required to serve upon the defendant or its attorney within five days from the date of service hereof, a Bill of Particulars, setting forth the specific dates of the removal of tailings as alleged in paragraph two of the second count of the complaint, as well as the specific quantity of tailings removed on

each occasion and the officers, agents or servants by whom such removal was affected as known to the plaintiff, and also the value of the tailings removed on each of said occasions.

(Signed) RULIF V. LAWRENCE,
Judge of Warren County Circuit Court, sitting as Commissioner.
Pursuant to rule 94.

[Filed Sept. 17, 1926.]

ON MOTION FOR BILL OF PARTICULARS.

NEW JERSEY SUPREME COURT,

WARREN COUNTY.

JOHN H. DAHLKE, Plaintiff, vs. BASIC IRON ORE COMPANY, a corporation, Defendant.	Action at Law.

To JOHN H. DAHLKE, ESQUIRE, Plaintiff and Attorney Pro se,

Belvidere, New Jersey.

Sir:

TAKE NOTICE that on the seventeenth day of September, A. D. 1926, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Stacy Trent Hotel in the City of Trenton and State of New Jersey, I shall move before the Honorable Rulif V. Lawrence, Judge of the Warren County Circuit Court and Commissioner, etc., under the rules of the New Jersey Supreme Court, for an order directing you to furnish the defendant in this cause with a Bill of Particulars, containing a specific statement of the tailings alleged to have been removed from your property in the month of May,

1924, and at divers other times subsequent thereto and to the time of the bringing of this suit, as set forth in the second paragraph of the second count of your complaint and that in said Bill of Particulars, you be required to give the exact dates of the alleged takings of tailings and the value of tailings taken on each of the said several occasions.

Respectfully yours,

EDGAR W. HUNT,

By:
Attorney for Defendant.

[Filed Sept. 20, 1926.]

BILL OF PARTICULARS.

NEW JERSEY SUPREME COURT,

WARREN COUNTY.

JOHN H. DAHLKE,
Plaintiff,

vs.

BASIC IRON ORE COMPANY,
a corporation,
Defendant.

Action at Law.

The following statement is a bill of particulars of the dates of the removal of the tailings and the value thereof concerning which claim is made by the plaintiff under the second count of the complaint, furnished pursuant to the Order of the Judge of the Warren County Circuit Court sitting as Commissioner, made on September 17, 1926, viz.:

May and June, 1924	988.80	net tons
September, 1924	82.80	net tons
November, 1924	136.75	net tons
December, 1924	104.90	net tons
January, 1925	806.35	net tons
July, 1925	400.7	net tons
August, 1925	191.60	net tons
	2,711.90	net tons

after August, 1925, beginning with the month of September, 1925, and at all times there-

after up to the time of the bringing of this suit the said defendant by its agents and servants caused to be wrongfully taken and removed 10,000 tons of tailings from the property of the plaintiff against the protests and objections of the plaintiff made known to the defendant.

The value of the said tailings so taken by the defendant is $5. per ton.

JOHN H. DAHLKE,
Attorney Pro Se.

[Filed Sept. 21, 1926.]

ANSWER.

NEW JERSEY SUPREME COURT,

WARREN COUNTY.

JOHN H. DAHLKE, Plaintiff, vs. BASIC IRON ORE COMPANY, a corporation, Defendant.	Action at Law.

The defendant, Basic Iron Ore Company, a New Jersey corporation having its principal office and place of business in the State of New Jersey says that:

FIRST DEFENSE TO FIRST COUNT.

Defendant will object to the sufficiency of the first count in point of law in that it fails to state a cause of action, inasmuch as by the terms of the written agreement forming a part of the said count, the tailings therein mentioned were sold to the defendant which had a right to remove same from the premises without paying the plaintiff anything further for them.

SECOND DEFENSE TO FIRST COUNT.

Defendant will object to the sufficiency of the first count in point of law in that it fails to state cause of action, inasmuch as under the terms

of the written contract forming part of the count the defendant owned the tailings mentioned therein and was obliged to pay royalties to the plaintiff only when plaintiff's premises were used as prescribed in the said agreement for the treatment or manufacture of the tailings.

THIRD DEFENSE TO FIRST COUNT.

1. It admits the allegation of paragraph one of the first count except that it denies that the tailings mentioned in said paragraph were the property of the plaintiff.

2. It admits that it entered into a written agreement on or about February 27, 1920, as alleged in the second paragraph of the first count but denies that under and by virtue of the terms of the said agreement, the plaintiff agreed to sell to it subject to the provisions of said agreement all his right, title and interest of, in and to all the tailings then lying on the said premises from ore theretofore washed or otherwise treated on said premises and the tailings which might thereafter be derived from the washing or other treatment of the ore lying in bank on said premises and each and all the ingredients thereof for the price in the agreement set forth, but to the contrary it says that the plaintiff under and by virtue of the terms of the said written agreement, presently sold all of his right, title and interest in the said tailings to the defendant and that under and by virtue of the terms of the said agreement the royalties or payments mentioned in the second paragraph of the first count were to be paid to the plaintiff only when tail-

ings were taken and treated or manufactured upon the plaintiff's premises, as in said agreement is more fully and at large set forth and that under and by virtue of the terms of the said agreement it was provided that no payment was to be made to the plaintiff for tailings sold by the defendant and removed from the premises and which were not taken and treated or manufactured on the premises.

3. It admits that it made the shipment and delivery of tailings as alleged in paragraph three of the first count but denies that in making such shipments and delivery it became liable to the plaintiff in any way, but on the contrary it says that it does not owe the plaintiff anything for tailings taken and shipped as alleged in the third paragraph of the first count.

4. It admits the allegations of the fourth but un-numbered paragraph of the first count, except that it denies that any such quantity as 10,000 tons of tailings of the value of $50,000 were sold and delivered as therein alleged and it further alleges that such tailings as were shipped in August, 1925, and at divers times thereafter and prior to the commencement of this action, were the property of the defendant and the plaintiff was not entitled to any payment whatsoever for such shipments.

FOURTH DEFENSE OF FIRST COUNT.

1. The defendant says that it is the assignee of a certain lease, a true copy (exclusive of the

acknowledgments in due form), of which is hereto annexed and made part hereof and for better identification marked Appendix "A", and that under and by virtue of the terms of the said lease the plaintiff, John H. Dahlke, being the owner of the said premises in the township of Oxford, Warren County, New Jersey, mentioned in the first paragraph of the first count, on the 23rd day of October, 1903, himself thereafter duly executed to Robert L. Ahles a lease of the mining rights for a term of twenty (20) years, to commence on November 18, 1921 and to end on November 18, 1941; that said lease was an extension of a prior lease in substantially the same form, between the same parties, relating to the same mining rights, dated November 18, 1901, duly acknowledged and recorded for a term of twenty (20) years, to end on November 18, 1921, that both said agreements of lease were on March 31, 1904, duly assigned by the said Robert L. Ahles, to the Basic Iron Ore Company, defendant herein, by assignments now shown to the court here, which became the owner thereof and of all the rights and privileges of Ahles therein, and which company is and still continues to be the owner and possessor thereof; that by agreement between the parties hereto, dated July 22, 1912, and now shown to the court here, in consideration of a cash payment of $5,000 made to said plaintiff by the defendant the lease was modified so as to provide that the royalties on all iron ore shipped on or after said date is reduced to ten cents (10¢) a ton for untreated ore and twelve and one-half cents (12½¢) a ton for treated or refined ore.

2. The defendant alleges that under and by virtue of the terms of the leases and agreement aforesaid and also of the agreement annexed to the complaint in this cause, the defendant was at all times mentioned in the first count of the complaint as the owner of the tailings therein mentioned and that the plaintiff is not entitled to recover any royalties for the sale and delivery of such tailings, unless the said tailings are taken and treated or manufactured upon the said premises prior to sale or shipment, in which event it becomes liable for the payment of such royalties as in the agreement annexed to the complaint it is provided.

First Defense to Second Count.

1. Defendant admits that on February 27, 1920, plaintiff was the owner of a certain tract of land in Oxford Township, Warren County, New Jersey, consisting of about 215 acres as alleged in the first paragraph of the second count, but denies the rest of the allegation in the said paragraph.

2. It denies the allegations of paragraph two of the second count.

E. W. Hunt

Attorney for Defendant.

Exhibit "A."

Articles of Agreement made and entered into the twenty-third day of October, A. D. nineteen hundred and three, between John H. Dahlke, of

the town of Belvidere, in the County of Warren and State of New Jersey, party of the first part, and Robert L. Ahles, of the town of Bayside, Long Island, party of the second part.

Whereas the parties of the first and second part have heretofore entered into an article of agreement and lease, by which the party of the first part granted, bargained and sold to the party of the second part, for a term of twenty years, the exclusive right to mine and remove the iron ore contained on, in and under all the lands and premises, situate lying and being in the township of Oxford, in the County of Warren and State of New Jersey, and particularly described in said article of agreement and lease, upon certain terms and conditions, said article of agreement and lease bears date on the eighteenth day of November, A. D. nineteen hundred and one, and the term of twenty years therein mentioned is to begin on the date of said article of agreement and lease. Said article of agreement and lease was duly acknowledged by the parties thereto before Nicholas Harris, Esq., a master in Chancery of the State of New Jersey, on the thirtieth day of December, A. D. nineteen hundred and one, and duly delivered to the party of the second part by the party of the first part, and is the same agreement and lease under which mining operations for iron-ore are now conducted on the said premises.

Now, therefore, witnesseth, that in consideration of the premises and the further consideration of the sum of one dollar, duly paid to the party of the first part by the party of the second part, and of the covenants and agreements, here-

inafter set forth, to be kept on the part of the party of the second part, the party of the first part has and by these presents doth grant, bargain and sell to the party of the second part, for the further term of twenty years, from the eighteenth day of November, A. D. nineteen hundred and twenty-one until the eighteenth day of November, A. D. nineteen hundred and forty-one, the exclusive right to mine and remove all the remaining iron ore contained in, on and under all that tract of land and premises situate, lying and being in the township of Oxford, in the County of Warren and State of New Jersey, owned by the party of the first part and being about two hundred and fifteen acres of land, adjoining land of John Sarson, Jacob Cummins, the "Hoagland Farm", the Hixon lot, the Cutzler lot, the Pittenger lot and the Raub Farm, together with all the necessary rights and privileges for exploring, mining and carrying away said ores, including the right of way for railroads and other roads to and from any part thereof to the public highways, also to have the right of washing on the said premises such ores as shall require washing, and to use any creek and other water for such purposes; also to have the right and privilege to erect on the said premises the necessary buildings and machinery for mining and washing ores, and to enjoy every facility for mining, washing and carrying ores away as he would or could have if he was the real owner of the land, but not to do unnecessary damage and to pay the tenant for crops that should be destroyed by him.

In consideration whereof the said party of the

second part, agrees to pay to the party of the first part, for every ton of twenty-two hundred and forty pounds in weight of merchantable iron ore raised, mined and taken away from the said premises the sum of twenty-five cents on washed iron ore the market value of which is four dollars per ton and over, f. o. b. at mines, and for washed iron ore the market value of which is less than four dollars per ton at the ratio in value of twenty-five cents to four dollars, and on all unwashed iron ores shipped and used fifteen cents per ton, said royalties to be paid quarterly on the first day of April, July, October and January of each year for the quarter immediately preceding. The weights of ores to be ascertained from scales of railroad companies transporting the ore, and if not shipped by railroad to be ascertained in any other reasonable manner; the party of the second part to furnish statement of ores shipped, to whom shipped and when shipped, and the prices and values thereof with payment of royalties, party of the first part to have the right at all reasonable hours to inspect the books or book in which weights and prices of ores are kept and to take statements therefrom.

It is further agreed that the party of the second part shall each and every year during the term of this lease and agreement pay unto the party of the first part the sum of four hundred dollars, to be paid in quarterly payments of one hundred dollars each quarter on the quarterly dates specified, which sum shall be credited against royalties on iron ore subsequently mined. In case of failure to pay such quarterly

Answer.

payments or royalties within twenty days after they are due and written demand has been made for the same then in that case this lease shall be null and void, at the option of the party of the first part, and the party of the first part, his heirs and assigns may enter.

THIS AGREEMENT and lease is, however, upon this express condition, that if the agreement and lease between the parties hereto for the mining, &c., of the iron ore for twenty years from the eighteenth day of November, A. D. nineteen hundred and one, which lease and agreement has been herein before described, shall have been surrendered, cancelled, or avoided or forfeited in any way, then in that case this agreement and lease shall be absolutely void and of no effect, and the term therein granted shall be for nothing holden.

IT IS FURTHER AGREED that this agreement and lease shall be subject to the lease for limestone made heretofore by the party of the first part to one Joseph H. Wilson.

IT IS FURTHER AGREED that the party of the second part may surrender this agreement and lease upon thirty days' notice in writing to the party of the first part; but in case of the surrender of this lease the party of the second part agrees to keep the shaft or shafts in operation, free from water as is usual, up to the date of such surrender, and the party of the second part, during the term of this lease and agreement, shall have the right to remove his property, including buildings and machinery, &c., by him erected, provided however that royalties and

Answer.

payments to be made under this lease are first paid. Mining operations are not to be carried on within a hundred feet of any farm buildings now upon the premises, except by the written consent of the party of the first part.

IT IS FURTHER AGREED, that the heirs, executors, administrators and assigns of the respective parties hereto are bound to the performance of all agreements, covenants and conditions and are also entitled to all the benefits and advantages arising from such agreements, covenants and conditions the same as if each had every time been mentioned and bound to the performance of such agreements, covenants and conditions as are herein set forth.

IN WITNESS WHEREOF the parties have hereunto set their hands and seals the day and year first above written.

Executed in duplicate.

JOHN H. DAHLKE, L. S.
ROBERT L. AHLES, L. S.

Signed, sealed and delivered
in the presence of
L. TAYLOR.

[Filed Oct. 2, 1926.]

REPLY.

NEW JERSEY SUPREME COURT,

WARREN COUNTY.

JOHN H. DAHLKE, Plaintiff, vs. BASIC IRON ORE COMPANY, a corporation, Defendant.	Action at Law.

1. The plaintiff denies the matters set forth in the first and second defenses of the answer to the first count in the complaint.

2. The plaintiff denies the matters set forth in the several paragraphs of the third defense of the answer to the first count of the complaint, except those matters which are admitted in the said defense.

3. The plaintiff admits the first paragraph of the fourth defense of the answer but he denies the matters set forth in the second paragraph of the fourth defense of the answer.

JOHN H. DAHLKE,
Attorney Pro Se.

[Filed Oct. 28, 1926.]

AMENDED POSTEA.

NEW JERSEY SUPREME COURT,

WARREN COUNTY.

JOHN H. DAHLKE, Plaintiff, vs. BASIC IRON ORE COMPANY, a corporation, Defendant.	Action at Law.

The postea heretofore filed in the above named cause is amended to read as follows:

This case was tried before Judge Rulif V. Lawrence, with a jury, in the Warren Circuit, on October 25th and 26th, 1926. During the trial the second count of the complaint was abandoned and the jury rendered, by the direction of the court, a general verdict against the defendant, and in favor of the plaintiff on the first count of the complaint, for Five Thousand Two Hundred Ninety-five and twenty-eight hundredths Dollars, ($5,295.28).

Rulif V. Lawrence.
Judge.

[Entered Dec. 7, 1926.]

JUDGMENT.

JOHN H. DAHLKE,
Plaintiff,
vs.
BASIC IRON ORE COMPANY,
a corporation,
Defendant.

Action
at Law.
On Postea.

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of five thousand, two hundred ninety-five dollars and twenty-eight cents on the first count of the complaint, besides costs to be taxed.

Entered December 7, 1926. On motion of

JOHN H. DAHLKE,
Atty. Pro se.

NEW JERSEY SUPREME COURT.

JOHN H. DAHLKE,
Plaintiff,
vs.
BASIC IRON ORE COMPANY,
a corporation,
Defendant.

Action
at Law.
On Postea.

Judgment entered this seventh day of December in favor of plaintiff and against the defendant for the sum of five thousand, two hundred ninety-five dollars and twenty-eight cents damages and fifty-one dollars and ninety-four cents costs.

WM. J. GUMMERE,
Chief Justice.

NEW JERSEY SUPREME COURT,
No. 17, WARREN CIRCUIT,
September Term, 1926.

JOHN H. DAHLKE,
Plaintiff,
vs.
BASIC IRON ORE COMPANY,
Defendant.
Action at Law.

Transcript of shorthand notes of testimony, etc., taken in the above entitled matter on the trial thereof before Hon. Rulif V. Lawrence, Circuit Court Judge, and a jury, at the Court House, Belvidere, New Jersey, on Monday, October 25, 1926.

APPEARANCES:

JOHN H. DAHLKE and SYLVESTER C. SMITH, Jr. (Smith & Smith), for the Plaintiff.
HARLAN BESSON, for the Defendant.

(Jury empaneled and sworn.)

Mr. Besson: May it please the Court, before the case is opened to the jury I would like to draw the Court's attention to an application which I wish to make to amend the fourth defense to the first count. It is on page 13 of the transcript, in paragraph 1. The amendment I have discussed with Mr. Dahlke and it consists in inserting the words, "The lease was modified", after the word "Defendant" and before the word "So".

Discussion.

Mr. Smith: There is no objection to that.

The Court: There being no objection the amendment will be allowed.

(Mr. Smith opened for the plaintiff.)

The Court: Just how much do you claim in dollars and cents?

Mr. Smith: $4940.28 and the interest.

Mr. Besson: If the Court please, at the outset there were two counts in the complaint, one based upon the contract and one in which an alleged conversion is charged.

The Court: Now do you ask them to elect whether they are relying on the first count or the second count?

Mr. Besson: Yes, sir. I assume from Mr. Smith's opening statement that they rely on the first count, which is the contract.

Mr. Smith: I think that is correct. There is nothing in the Practice Act why they cannot be tried together.

Mr. Besson: I understand the conversion was charged in the second count and includes a much larger claim of damages.

The Court: I now understand they are relying upon the first count.

Mr. Smith: That is right.

Mr. Besson: I might also supplement Mr. Smith's statement by saying that I have calculated the total amount of tons shipped and the total amount of interest on payments which Mr. Dahlke claims are due and I arrive at the sum of $5295.28, which brings the interest down to the date of this trial.

Mr. Dahlke: That is correct.

(Mr. Besson opened for the Defendant.)

The Court: What is this schedule that you produced in your opening?

Mr. Besson: The schedule that was agreed upon. Mr. Dahlke replied to my demand for a bill of particulars by setting out certain information.

The Court: Does that statement contain a schedule of all shipments made of this ore not treated on the premises, of tailings shipped to someone else off the property?

Mr. Besson: Yes, sir; and that also represents a calculation of the interest due on these amounts; so that if there is anything due to Mr. Dahlke upon the theory of his first count he is entitled to the sum of $5295.28.

The Court: Does it not become a question of law?

Mr. Besson: I think it is entirely a question of law.

The Court: The construction of the agreement is a matter of law and if I decide that Mr. Dahlke is entitled under the agreement to recover as a matter of law, the only thing left would be to direct a verdict on this schedule.

Mr. Besson: That is right.

The Court: In other words, there would be no question of fact for the jury to determine.

Mr. Besson: There is one thing I might suggest to your honor that you might wish to do, and that is to take sufficient proof to put yourself in the position that the parties were at the time this agreement was made.

The Court: I cannot allow any testimony to supplement the terms of the agreement.

Mr. Besson: No, sir. Just to put yourself in the position of the parties at the time the agreement was made.

The Court: What is the attitude of counsel?

Mr. Dahlke: I wish to say the situation as indicated is entirely satisfactory except for this fact: We have a chemist here to show that these tailings are not iron ore.

The Court: Does that make any difference, in view of Mr. Besson's opening.

Mr. Besson: I do not think we contend the tailings are iron ore.

The Court: They admit apparently that the issue involves the sale of tailings and shipment from the premises.

Mr. Dahlke: If that is admitted then we will not offer any evidence on that. There is one other point that might be presented in evidence to the jury, that might be a question, and that is this: after the making of this agreement of 1920 concerning tailings the Basic Iron Ore Company—

Mr. Besson: I ask that the question be discussed at side bar.

The Court: The jury may return tomorrow at ten o'clock.

(The Court and counsel retired to chambers.)

Mr. Dahlke: The only other thing that we desire to bring before the Court, and that might have to go to the jury, unless Mr. Besson will admit it, is the statement rendered under date of April 30, 1924, to Dahlke by the Company, and the letter that accompanies it, May 1, 1924, of Ogden Hewitt to John H. Dahlke. The statement shows a total shipment of seven cars, making 321.75 tons at $4., making $1287. This statement by adjustment was subject to certain demurrage charges of the Lackawanna Railroad, leaving a net sum of $251.34 paid to Dahlke.

Mr. Smith: And also the correspondence prior to that.

Mr. Dahlke: No; there is nothing prior to it.

Now, then, afterward there was an additional amount of demurrage. The demurrage was settled and there was an additional amount of twenty-five dollars and some odd cents to the $251., additional payment sent to me.

The Court: That is, reducing it—

Mr. Dahlke: No; increasing it, making it $275. That was paid to me. That statement shows that the tailings were shipped to the Astoria Light, Heat & Power Company and that—

The Court: What is the significance of that?

Mr. Dahlke: That they had interpreted this contract themselves and paid for the tailings shipped up to that time off of the property and not treatel thereon. There are two letters that go over the situation. The letter of August 22, 1923—

The Court: It is a matter of evidence, is it not?

Mr. Dahlke: That is part of my evidence, yes, sir; but if that is agreed to there is nothing for the jury.

Mr. Besson: There is one question here that I would like to bring to your honor's attention, in the first place that evidence here is not admissible for consideration unless it appears that this contract is so ambiguous that the Court cannot interpret it without the aid of it.

The Court: In other words, you invoke the rule that an interpretation of the contract by the parties themselves cannot alter the contract even though one of the parties has misconstrued the contract.

Mr. Besson: Yes, sir.

The Court: In other words, if you made an error or mistake in interpreting that contract and sent Mr. Dahlke this sum of money in the circumstances that the letters indicate, that that still does not foreclose you.

Mr. Besson: That is it, sir. Then I want to say, further than that, in the letters that were sent by Mr. Charles E. Hewitt, an officer of the Basic Iron Ore Company, he protested against these payments, or stated that he made these payments and subsequent payments under protest.

Mr. Dahlke: I will furnish those letters.

Mr. Besson: The letters were dated in August, 1923.

The Court: Gentlemen, tomorrow morning you better put in such evidence as will provide the ground work for an interpretation of this agreement as a matter of law. Put in this also. I think it would be admissible. Then counsel may argue pro and con on the question as to whether or not that would prevent the Court from passing upon this agreement as a matter of law, in view of what is claimed by Mr. Dahlke about the parties' own interpretation.

Mr. Besson: That is true. We do not dispute the letters at all because in a way this is somewhat of a friendly suit. We have agreed on practically everything here. We agree that we wrote these letters and he agrees that he wrote these letters to us, so there is practically no question of fact. It is only the legal question.

Mr. Dahlke: Mr. Smith suggests that prior to the making of the contract in April, 1920, there was a full and ample discussion and we

agreed on that contract, that I claimed the tailings, and they deny—that, of course is in the contract.

The Court: I cannot permit any conversations or dealings relating to the subject of tailings prior to the execution of that contract.

Mr. Smith: Only so far as it affects ownership.

The Court: That is recited; there is a preamble in the agreement.

Mr. Besson: Any claim of ownership that we have has got to be based upon the agreement.

The Court: They recognized apparently by making the agreement that Mr. Dahlke did own the pile of tailings on the ground on the leased premises, otherwise they would not have made the agreement.

Mr. Dahlke: Then, your honor, there is nothing for the jury.

Mr. Besson: No.

(Adjourned until Tuesday, October 26, 1926, at ten o'clock in the forenoon.)

Belvidere, N. J., October 26, 1926.

(Case resumed pursuant to adjournment.)
(Appearances as before noted.)

The Court: Now, gentlemen, just what is the posture of this case now? At the close of the session yesterday as I understood it counsel agreed that really there was a question of law involved. I think perhaps it would be better to put in such proof as apparently is necessary in order that

we may ascertain the facts in the case. Of course, most of them are incorporated in the documentary evidence, the agreements and leases and so on. I think, in the circumstances, that perhaps the case had better be submitted in the regular way and then at the conclusion of the plaintiff's case, in the event of there being a motion for a nonsuit, it may be argued and the Court will pass upon it. I think probably all the facts may be incorporated in the plaintiff's case, or agreed upon, and then if counsel for the defendant desires to make a motion for a nonsuit the court may dispose of it. Otherwise, you may withdraw a juror and have the case submitted to the Court for decision on the law. Which do counsel prefer?

Mr. Smith: We would rather wait until we submit the proof, I think.

The Court: Very well. Then you may proceed.

Mr. Smith: I would like to offer the agreement, dated February 27, 1920, in evidence.

(Marked Exhibit P-1.)

Mr. Smith: I would also like to offer the original letter from Charles E. Hewitt, of August 22, 1923; copy of a letter, the original not being in our possession, dated August 27, 1923, written by Mr. Dahlke to Mr. Hewitt, who is on officer of the Basic Iron Ore Company, the defendant; and a letter of May 1, 1924, written by Ogden B. Hewitt to Mr. Dahlke; and also the statement of the amount paid to Mr. Dahlke, of April 30, 1924.

Mr. Besson: I object on the ground that the contract is not ambiguous, that it speaks for itself, and that this is parole evidence which is

offered in violation of the rule governing the admission of it.

The Court: To which counsel for the plaintiff replies, I assume, that it tends to indicate the construction by the defendant itself upon the character of this contract.

Mr. Smith: Yes, sir.

The Court: Objection overruled.

The correspondence and statement may be marked as an exhibit and you may have an exception.

Mr. Besson: Yes, sir.

(Papers referred to and offered in evidence are marked, respectively, Exhibit P-2, Exhibit P-3, Exhibit P-4 and Exhibit P-5.

The Court: Mr. Besson, have you the original of that letter from Mr. Dahlke?

Mr. Besson: I have received a notice to produce certain letters.

The Court: Produce the original letter first and then the plaintiff may offer it.

Mr. Smith: August 27, 1923, was the date.

Mr. Besson: I think Mr. Dahlke and I have agreed to use copies if necessary.

The objection I was making was not to the fact that the letter was secondary, but merely on the parole evidence question.

The Court: Objection overruled, and you may have an exception. The letters offered together with the copy of the original of the one offered and written by Mr. Dahlke to the defendant company may be marked.

Mr. Smith: I would now like to offer in evidence two checks, one for $251.34, which I have asked the defendant to produce, the cancelled check, and another check for $22.25, made payable to Mr. Dahlke.

The check for $251.34 is dated April 30, 1924.

(Check referred to is marked Exhibit P-6.)

Mr. Smith: And the next one, dated about September 9, 1924, for $22.25.

Mr. Besson: The defendant is willing to concede that we gave that check.

The Court: It is admitted on the record that in addition to the check just offered one bearing date about September 9, 1924, was also given to the plaintiff, for $22.25, and this check having been mislaid, it is admitted that such check was given.

Mr. Besson: May I have an exception on the record to the offer?

The Court: Objection is made to the offer. The objection is overruled and you may have an exception.

Mr. Besson: Mr. Smith wants to make a proposition of an admission that he asks us to make, with reference to the purpose for which these payments were made. Of course, I would like to supplement that by saying that we also made these payments under protest.

Mr. Smith: We do not want any such admission as that.

Mr. Besson: We will not object to admitting that.

The Court: I think you may consider that as part of the affirmative case for the plaintiff, and then I think I will permit you to proceed with your defense to the extent of offering those letters which you say indicate a protest on the part of the defendant company, and then perhaps instead of a motion for nonsuit it will resolve itself into a motion for direction of a verdict.

Mr. Besson: Yes, sir.

Mr. Smith: I would like to now offer for the record this statement which has been submitted and agreed upon by Mr. Besson, of the amount of net tons of tailings that were shipped from the premises up to the present time, and the interest to date on the various shipments which have been made, that is interest to October twenty-fifth.

The Court: Does it appear on the statement for what purpose those tailings were sold or shipped?

Mr. Besson: No. They were not sold for making paint; that is certain.

Mr. Smith: Of that we would have no knowledge.

The Court: Then you will have to put that in as part of your defense.

That statement may be received and marked.

(Marked Exhibit P-7.)

The Court: Now, what else have you?

Mr. Smith: For the purpose of the record we would like to offer a statement of tailings shipped by the Pequest Company after July 31, 1925, with the prices indicated.

The Court: What is the Pequest Company?

Mr. Smith: It is the Basic Iron Ore Company, the defendant. And it shows also the prices which were received by their own statement for this, for the purpose of showing the price was above the amount set forth in the contract.

The Court: Of four dollars a ton?

Mr. Smith: Yes, sir. It was really six dollars.

Mr. Besson: I object to that. I cannot see

how that is relevant. We have already agreed upon the amount which would be received if the plaintiff is entitled to recover.

The Court: What is that statement?

Mr. Smith: The persons to whom it was shipped, the date it was shipped, the quantity shipped, and also the gross tons and the rate per ton, without any—

The Court: Of tailings?

Mr. Smith: Yes, sir.

The Court: And the statement you have just offered is a summary of what you are now offering?

Mr. Smith: Yes, sir, without any names as to where they were shipped, but just has the dates and the gross tons, worked out on a net basis.

The Court: And you agree that the statement offered is a summary of the statement you now offer?

Mr. Smith: It is a summary of the gross tons shipped out.

Mr. Besson: It is more than that. In fact it relates to transactions after the commencement of this suit, and that is why I object to it.

The Court: If that be so then it would not be material. So much of it as has any relation to the issue in the case—

Mr. Dahlke: The statement we offer is the exact amount of tailings that were shipped prior to the bringing of the suit, and this is the statement furnished by the Basic Iron Ore Company, the defendant, which shows the amount of tailings that were shipped during that period, and some additional tailings that have no interest in this suit.

The Court: The statement may be received and marked as an exhibit and will be considered only with reference to the tailings shipped prior to the beginning of this suit.

Mr. Dahlke: And the price of six dollars per ton.

Mr. Besson: I object to it on the ground it is irrelevant.

The Court: Objection overruled. It will be admitted to the extent indicated by the Court, and you may have an exception.

(Statement referred to is marked Exhibit P-8.)

Mr. Smith: I might say that that portion of the statment which is relevant to the tailings in issue in the case is indicated by two pencil lines that are drawn on it.

The Court: All right.

Mr. Smith: With that we will rest.

The Court: Proceed with the defense.

Mr. Besson: I would like to offer in evidence, first,—I asked Mr. Dahlke to produce certain original letters, one of which was a letter dated August 22, 1925, written to him by Charles E. Hewitt on behalf of the Basic Iron Ore Company. I think that letter he has produced and offered himself.

I then asked him to produce a letter dated August 30th, written by Charles E. Hewitt on behalf of the Basic Iron Ore Company. I have a copy of that letter; that is 1923.

The Court: Have you the original?

Mr. Dahlke: We do not object on account of not producing the original. I am unable to find it.

The Court: The copy may be marked.

(Paper referred to and offered in evidence is marked Exhibit D-1.)

Mr. Besson: Now the next letter that I asked Mr. Dahlke to produce was a letter dated October 23, 1923, from the Basic Iron Ore Company, signed by Mr. Ogden Hewitt and addressed to Mr. Dahlke.

The Court: The letter is produced. It may be marked.

(Paper referred to and offered in evidence is marked Exhibit D-2.)

Mr. Besson: The next is a letter dated October 29, 1923, signed by Ogden B. Hewitt on behalf of the Basic Iron Ore Company, and addressed to Mr. John H. Dahlke.

Mr. Smith: We consent to the copy.

(Paper referred to and offered in evidence is marked Exhibit D-3.)

Mr. Besson: The next letter which I asked you to produce was the letter dated November 16, 1925.

(Paper produced and marked Exhibit D-4.)

Mr. Besson: The next one I ask you to produce is number six on the list. That is the letter dated October 28, 1925.

(Paper produced.)

Mr. Smith: That is November 6, 1925.

(Marked Exhibit D-5.)

Mr. Besson: I would ask you, Mr. Dahlke, if you have a letter of October 5, 1925, Mr. Charles E. Hewitt's letter, written on behalf of the Basic Iron Ore Company?

Mr. Smith: I am going to object to this letter on two grounds: first, that it is a self-serving declaration—this is October 5, 1925—and second, it is not material to the issue.

Mr. Besson: I have not asked Mr. Dahlke to produce it, but I do not see how it is a self-serving declaration. It simply relates to the—Of course, in order to determine that question I think your honor ought to examine the letter.

I think that is just as relevant as these other letters which have been offered as a part of the correspondence.

The Court: (After examining paper) This letter will be admitted and marked, and you may have an exception.

(Paper referred to is marked Exhibit D-6.)

Mr. Besson: I also asked you to produce a letter of November 5, 1925.

Mr. Smith: We did produce that.

Mr. Besson: Then next is the letter of October 16, 1923, addressed to Mr. John H. Dahlke, and signed by Charles E. Hewitt on behalf of the Basic Iron Ore Company.

The Court: There is no denial on the part of Mr. Dahlke of having received the original?

Mr. Smith: No.

The Court: The copy may be offered.

Mr. Besson: Here is our copy of it, although that, I think, deals with another controversy; probably that has no bearing on this suit. I will withdraw the offer.

Now, I would also like to offer—A copy of the mining lease is annexed to the answer, and I think Mr. Dahlke agrees with me that that is the lease and he stated before that it would not be necessary to produce the original record from the Clerk's office.

The Court: Very well. I think his reply admits that lease.

Mr. Dahlke: Yes, sir; it does.

Mr. Besson: And his reply also admits the agreement between the two parties, which was embodied in two letters which I read to the jury in my opening. Do you have any objection to admitting those two letters?

Mr. Dahlke: There is no objection to them. That is the fact.

The Court: They may be marked.

(Papers referred to are marked Exhibit D-7 and Exhibit D-8.)

Mr. Besson: I would like to prove on the record that prior to the making of this change that the reason for the reduction in the royalties has been the fact that the operations of the Basic Iron Ore Company had been unprofitably conducted. I think I could prove that by Mr. Richards.

Mr. Smith: If the Court please, I object to that because the contract and agreement and the letters speak for themselves.

The Court: What is your answer?

Mr. Besson: I think that is probably so. The only thing that it might do is put the Court in the position of the parties at the time the agreement was made.

The Court: There is no difficulty about the Court getting the position of the parties with all this correspondence and the pleadings.

Now I will allow you to put on a witness who may testify, if you have one available, as to these shipments and the purpose of them, whether the tailings shipped to the Astoria Light, Heat and Power Company, and the other concerns, were for the purpose of using that material for the manufacture of paint or not, unless it is ad-

mitted that such shipments were not used for the purpose of manufacturing paint.

Mr. Dahlke: We have no knowledge what they were used for when they were taken away.

The Court: Then I think you should put on proof, Mr. Besson.

OGDEN HEWITT, sworn for the defendant.

Direct examination by Mr. Besson:

Q. Mr. Hewitt, you are a mining engineer? A. I have no degree as such but I have practiced it for several years.

Q. Your father, Charles E. Hewitt is president of the Basic Iron Ore Company? A. No, sir; he is an executive of the company.

Q. And he has a part in the management of the company? A. Yes, sir.

Q. Are you familiar with the shipments of ore that have been mentioned in the schedule which has been marked Exhibit P-8?

Mr. Smith: Do you mean tailings?

Mr. Besson: Yes.

Q. The schedule or statement of tailings shipped, marked Exhibit P-8 in this case? A. I am; yes, sir.

Q. Are you personally acquainted with the purpose to which these tailings were applied after shipment to the consignees mentioned on that list? A. Yes, sir.

Q. What was the purpose?

Mr. Smith: I object to that on the ground it is immaterial under the terms

of the agreement for what purpose these tailings were used.

The Court: Objection overruled. You may have an exception.

Mr. Smith: We ask an exception.

A. The material listed here, in fact all of this material, all of the tailings that have been shipped have been used for only two purposes, one purpose for the manufacture of paint, and I think that all the material shipped for that purpose went to one party.

Q. What party was that? A. That was C. K. Williams & Company, of Easton, Pennsylvania.

Q. What was the total amount of that shipment? What was the residue of the shipment used for? A. All of the remaining tonnage that has been shipped was used for the purpose of cleaning illuminating gas, that is removing hydrogen sulphide from illuminating gas, and was used by the gas company. That is the purpose for which the material was used that was shipped to the Astoria Light, Heat & Power Company.

The Court: Did he tell us the amount which was used for the manufacture of paint, shipped to the C. K. Williams Company?

Mr. Besson: I think there are three items on the list: shipments of August 1, 1925, August 7, 1925 and August 4, 1925, the total of which is one hundred and forty-five and a half tons, that is, net tons.

The Court: Does not the other statement show that?

Q. The only shipments made for the purpose of manufacturing paint were the shipments to C. K. Williams & Company; isn't that right? A. Yes, sir; that is true.

Q. Can you point out any other shipments on that list, in addition to the three shipments that are indicated at the head of the list? A. No, sir. I do not see any indicated here to C. K. Williams & Company. I would call your attention to the fact, however, that this list does not purport to include all of this material ever shipped.

Q. I am referring to the shipments that are on this list.

A. That is obvious.

Q. And I am not referring to shipments made since this suit started. A. That is all, I think.

The Court: Is there anything more?

Mr. Dahlke: Except that we want to show that there were more shipments made to C. K. Williams & Company than as stated by the witness. This letter (indicating) will indicate it.

Q. What other shipments were made to C. K. Williams, if you know? A. I do not know offhand. I know other shipments were made but I will have to refer to the records.

The Court: Does the letter in question indicate it?

Q. I show you exhibit D-6. Does that letter give you any information as to what shipments were made to C. K. Williams & Company? A. No, sir; this does not. This states a list of the tonnages and states that shipments have been made to several people, among others C. K. Williams & Company, but not stating what tonnage was shipped to C. K. Williams & Company.

Mr. Besson: That is all.

Cross-examination by Mr. Smith:

Q. These shipments, Mr. Hewitt, were of tailings, were they not, to the Astoria Light, Heat & Power Company and these other people beside C. K. Williams & Company? A. Yes, sir; they were the material referred to in this suit as tailings.

Mr. Smith: That is all.

By the Court:

Q. Mr. Hewitt, were the tailings ever utilized for any other purpose on the property itself than the manufacture of paint? A. No, sir.

Q. What is the history of the tailing, if you know it? A. The tailing is the by-product of the washing process to concentrate iron ore for blast furnace use. The by-product is found to be suitable, because it is an iron oxide, for paint pigment. A company was formed to manufacture from this iron oxide, by roasting, a pigment to be sold on the market for paint. That company was financially unsuccessful. The tailings or the raw material which had been washed out of the crude ore lay on the bank for several years and a demand finally made itself apparent for that material for the purpose of cleaning illuminating gas.

Q. So far as you know was any claim ever made by Mr. Dahlke of ownership in the tailings prior to the agreement of February, 1920? A. My knowledge of the matter does not extend

back that far, because I have since then become associated with the company, but my opinion is that there was no—

Mr. Smith: I object to that.

The Court: Strike it out.

By Mr. Smith:

Q. Tailings are the refuse after the washing process for the ore that is already mined? A. That is the usual sense of tailings.

Q. And that is the sense in which this was used—

The Court: Mr. Smith, do you claim that the tailings belonged to Mr. Dahlke?

Mr. Smith: Yes, sir; I do.

The Court: From the very beginning?

Mr. Smith: Yes, sir; I do. There was nothing in there—The first agreement covered all kinds of ore, the ore that was mined and the washed ore shipped. It says "Ore shipped," not "Tailings shipped."

The Court: Isn't there a reference to crude ore, with the right to sell it?

Mr. Smith: Yes, sir.

The Court: Crude ore, washed ore and the iron ore.

Mr. Smith: No. Crude ore comes up without the washing process, including all the material which would result; but the washed ore was a different proposition.

The Court: Under the original lease the company had a right to ship that crude ore if it saw fit.

Mr. Smith: They did, but they had to pay for it on a tonnage basis.

The Court: You admit that they paid for all of the iron ore, under the agreement.

Mr. Smith: Yes, sir: that is admitted, on the iron ore shipped.

The Court: The royalties on all shipments made were paid?

Mr. Smith: Yes, sir.

The Court: So there is no controversy between Mr. Dahlke and the company on that?

Mr. Smith: No.

The Witness: I can enlighten you on that matter of refuse.

The Court: Well, never mind. We know what it is.

ELMER P. RICHARDS, sworn for the defendant.

Mr. Besson: I think I will withdraw Mr. Richards. I think we can submit the case on the testimony—

The Court: I thought you were going to bring out whether there was any claim made to the ownership of the tailings.

Direct examaination by Mr. Besson:

Q. What was your connection with the Basic Ore Company? A. I had charge of their properties for a number of years, from 1902 to 1923.

By the Court:

Q. Including this property in Oxford Township? A. Yes, sir.

By Mr. Besson:

Q. Were you familiar with the situation there as it existed prior to February 27, 1920? A. Yes, sir.

Q. Did Mr. Dahlke prior to that time make any claim to the tailings in bank on the property of the company?

Mr. Smith: I object to that. He says "Prior to that time." Prior to the entering into the agreement.

The Court: Objection overruled. You may have an exception.

A. He did not.

Q. When was the building erected on the land by the Berkleigh Manufacturing Company? A. In 1920, and 1921.

The Court: That was subsequent to the agreement, was it?

Q. Was that before the agreement? A. The building was erected—

By the Court:

Q. You had erected the building before February 17, 1920? A. Yes, sir.

Q. Then this agreement was made after that building had been erected? A. I do not think the building was finished.

By Mr. Besson:

Q. But it was practically finished? A. Yes, sir.

By the Court:

Q. That is what attracted the attention of Mr. Dahlke. A. The Berkleigh Manufacturing Company began negotiations in 1918 on that property and continued experiments until 1919.

By Mr. Besson:

Q. Did Mr. Dahlke come there first when this building was being constructed? A. Not to my knowledge.

Q. What were you doing there at that time? A. I was in the office at Butzville, New Jersey, a mile away, and visited the property frequently.

The Court:

Q. When did you first know Mr. Dahlke was claiming an interest in these tailings? A. I cannot tell you the exact date, your honor.

Q. How long before the agreement of February 17, 1920, which is the agreement here in question, did you know that Mr. Dahlke was claiming an interest in the tailings? A. Not more than a month or two prior to that time.

Mr. Besson: That is all.

Cross-examination by Mr. Smith:

Q. You learned of it through Mr. Hewitt, who was really in charge of the property? A. Through the New York office.

Q. Mr. Dahlke had his dealings with the New York office? A. Not with me.

Q. So you were not in any position to know when Mr. Dahlke had made his first claims to the title in the tailings?

A. Not until informed by the New York office.

By the Court:

Q. How long had that bank of tailings been accumulating? A. Since we began washing operations, which was some time in 1920.

Q. What about the residue of that? A. It was thrown on the bank and some of it used for filling in roads and other purposes.

By the Court:

Q. Would you call that tailings? A. Not at that time. In fact the entrance to the present mill there is from the residue of that crushing.

Q. Is some of the residue from that process still in this large pile in the bank? A. In the bank right there where the entrance is to the present plant; in fact it is the railroad bed.

Q. Would you call tailings produced by the crushing process instead of the washing process? A. No. That was simply separation.

Q. The rest is rock? A. Whatever would be of commercial value was shipped away and the rest was thrown on the bank.

Q. Is there a distinction between the rock ore and the tailings? A. In the present tailings there is no rock.

Q. Would you call it refuse rock? A. Yes, sir; refuse rock.

Mr. Besson: I would like to recall Mr. Ogden Hewitt for the purpose of explaining this process from which tailings are derived.

OGDEN HEWITT, recalled for the defendant.

By the Court:

Q. Proceed and explain what "tailings" means. A. Your honor, "tailings" is a term that is very ambiguous. It means any by-

product from a process designed to concentrate ores of any kind.

Q. What is the distinction between tailings and refuse rock? A. Tailings may not be completely valueless. It may be re-worked. For instance, in gold mining it has been frequently found that large piles of discards are re-worked at a profit after the original process is completed. The milling process by which the tailings, so-called in this suit, the material at issue in this suit, were produced—as a matter of fact there were produced three products. One was the concentrated iron ore which was shipped to the blast furnace; the other was the material at issue in this suit, and the third was the slag or rock which is produced and thrown on another pile on another side of the mill, which was said to be valueless.

Mr. Besson: I think that is all. I would like to make one statement to the Court. When I went away yesterday I was under the impression that this matter had resolved itself into a matter of law. Mr. Charles E. Hewitt, who could have been here this morning, was advised there was no reason for him to come. He had some direct dealings with Mr. Dahlke from the New York office with reference to the erection of this plant. Mr. Richards I do not think seems to be able to give entirely the situation as it existed at the time this agreement was made. If there is any way possible to do it, I would like to reserve the right to produce Mr. Charles E. Hewitt.

The Court: I will pass on that in a moment.

By Mr. Smith:

Q. Weren't you present prior to 1920 when Mr. Dahlke was talking about this agreement with your father? A. No, sir; I was not, Mr. Smith.

The Court: Have you anything more?

Mr. Smith: Yes. We would like to offer some evidence in rebuttal.

The Court: Now I will allow the defense to rest, subject to the right to call Mr. Charles E. Hewitt, and I will decide later about that.

Mr. Smith: The originals of these letters are offered: First, September 3, 1923. We have a copy here which we will offer if it is agreed to, from Mr. Dahlke to Mr. Hewitt.

Mr. Besson: I have no objection to the form of the letter, using copies. The only objection I would like to make is to the fact that they are not admissible in interpretation of the contract. They are letters, as I understand, that are offered for the purpose of showing the construction placed upon the contract by the parties.

Mr. Smith: It is in answer to a letter Mr. Hewitt has offered and it is to complete the file of correspondence.

The Court: It may be offered.

(Two letters referred to are marked, respectively, Exhibit P-9 and Exhibit P-10.)

The Court: I think, gentlemen, you better have all the correspondence go in so that we may have it of record.

Mr. Smith: I will offer the copy, which I believe is not objected to on the ground it is secondary evidence, of the following letters, and ask that they be marked as exhibits:

A letter from Mr. Dahlke to Basic Iron Ore Company, dated August 27, 1925.

(Marked Exhibit P-11.)

Mr. Smith: A letter from Mr. Dahlke to Basic Iron Ore Company, dated September 19, 1925.

(Marked Exhibit P-12.)

Mr. Smith: A letter of October 26, 1925, to the Basic Iron Ore Company from Mr. Dahlke.

(Marked Exhibit P-13.)

Mr. Smith: A letter of October 31, 1925, to Mr. Ogden B. Hewitt, who was an officer of the defendant, from Mr. Dahlke.

(Marked Exhibit P-14.)

Mr. Smith: A letter dated November 12, 1925, to the Basic Iron Ore Company from Mr. Dahlke.

(Marked Exhibit P-15.)

Mr. Besson: May we have the letters received by you from the company?

Mr. Smith: We will offer these. I think they should go in.

An original letter to Mr. Dahlke, dated August 28, 1925, by the defendant company.

(Marked Exhibit P-16.)

Mr. Smith: And a letter dated October 28, 1925, to Mr. Dahlke, written by Mr. Ogden B. Hewitt, an officer of the defendant company.

(Marked Exhibit P-17.)

The Court: Now is that all of the correspondence?

Mr. Smith: I would like to call Mr. Dahlke.

JOHN H. DAHLKE, the Plaintiff, sworn.

Direct examination by Mr. Smith:

Q. Mr. Dahlke, prior to the twenty-seventh day of February, 1920, did you make any claim to the tailings on the property covered by this lease agreement which has been offered in evidence? A. I considered the tailings—

By the Court:

Q. No. Did you make any claim, to the Basic Iron Ore Company? A. I did not to the Basic Iron Ore Company, because the matter did not come in question.

By Mr. Smith:

Q. When did you first take up that question? A. It was a month or two prior to the making of this contract.

By the Court:

Q. The agreement of February 17, 1920? A. Yes.

By Mr. Smith:

Q. Prior to that time how long had the operation or process been conducted by the Basic Iron Ore Company which resulted in the accumulation of tailings or refuse on the bank?

A. The lease was made in 1901, I think. The operation of mining commenced the year following.

By the Court:

Q. 1902? A. 1902. And in 1903 or 1904 it was found that the concentration of the ore was more profitable and it was concentrated.

Q. That is, you mean the crude ore was shipped?

A. Before that crude ore was shipped, up to 1904 or 1905, and they found the shipment of crude ore was not as profitable as concentrate.

Q. Is that washing it? A. Either washing it or refining it by a crushing process. The washing of the ore was the first process for concentration.

Q. When did that begin? A. In 1905 or 1906.

Q. How long was it continued? A. Down to the time, off and on, to 1914, I think. Since that time—

Q. The mine has not been in operation? A. The mine was not in operation, but there has been operation on the property in the washing of ore.

Q. Were they shipping crude ore right along? A. No.

Q. In other words, what I mean is did they ship it in crude form as well as in the refined form? A. Some months they would ship crude

ore and some months concentrated ore, according to the orders that they received.

Q. As a matter of fact, they shipped crude ore right down to 1914, together with the concentrated ore? A. According to their orders; yes, sir. They had a right to ship both classes of ore.

Q. Of course, the crude ore included the tailings? A. Yes, sir; they had a right to do that.

Q. They had a right to ship it off the premises? A. Yes, sir.

By Mr. Smith:

Q. Was there a difference in the price paid for what you call concentrated ore or washed ore? A. Yes, sir.

Mr. Besson: The list shows that.

The Court: Yes. The crude ore was at a lesser price than the concentrate.

Q. When they reported the ore that had been concentrated to you as shipped what term did they use? A. Iron ore.

By the Court:

Q. Why did they pay a higher royalty for the concentrated ore than the crude? A. Because there was refuse in the concentration of ore, both of rock and of clay and the other ingredients that were taken out of the concentrated ore.

Q. Why did they pay you more for concentrated ore than the crude ore? A. Because of the waste material in the ore. The tailings would be waste and therefore I would get more because there would not be as large a tonnage of the concentrates as the raw ore.

Q. Therefore they paid you more for the concentrated ore than the crude ore? A. Yes, sir.

Q. Was that due to the fact that they operated on the land in the case of the concentrated ore rather than shipping it off without treating it? A. No, sir.

Q. Did that make any difference in the price at all?

A. No, sir. It was merely the fact that I would receive payment for less tonnage of concentrated ore than of raw ore. In the raw ore they would take the rock and clay and all the other ingredients and load that on the car and ship it.

Q. And you admit they had a right to ship the crude ore? A. I do, under the lease.

By Mr. Smith:

Q. Now you stated that a month or so before this contract of February 27th was taken up you made a claim to the tailings? A. That was the first time the matter came into question. Before that I considered the refuse as mine.

Mr. Besson: I object and move to strike that out.

By the Court:

Q. When did you first make known to the Basic Iron Ore Company that you claimed an interest in the tailings?

A. When the question came up.

Q. About four months before this agreement?

A. I would imagine four or five months.

Q. Before that you made no claim? A. No.

Q. Had tailings accumulated on the land before that?

A. Yes, sir?

Q. A large bank? A. A considerable bank had accumulated before this; that is, not in a bank but just wasted over the property.

Q. And you made no claim until this controversy came up about four months before the present agreement? A. I did not.

Cross-examination by Mr. Besson:

Q. Do you remember the construction of the plant by the Berkleigh Manufacturing Company before that time?

A. I do.

Q. When did that begin? A. That I can not tell you.

Q. It was before this agreement? A. Yes, sir. That is what called my attention to it, when I found the buildings were not for the purpose of mining operations.

By the Court:

Q. Then your curiosity was aroused? A. Yes, sir, and I went there and asked them what they were doing.

By Mr. Besson:

Q. Then is when you found that the buildings were not in your lease? A. No; they had a right to erect buildings for the purpose of mining and concentration.

Q. You knew they had a right to erect buildings for the purpose of making paint? A. No,

sir. I went to Mr. Hewitt and I said, "I understand you are erecting buildings for the purpose of manufacturing paint, and to use my tailings for that purpose." He said "Yes." And I said, "Those tailings are mine, and while I will make no objection to your using them and to do what you like with them I want to be paid for them and we should agree on a price.

Q. Didn't Mr. Hewitt claim the tailings on behalf of the Basic Iron Ore Company? A. No. sir. He conceded the tailings were mine and offered to pay for the tailings as embodied in the agreement. Mr. Wright (?), the attorney for the Basic Iron Ore Company drew the agreement.

Q. When did this discussion take place? A. It was several months before the actual writing of the agreement.

Q. Was it over at the plant, or where? A. At the office in New York. Mr. Wright was called in by Mr. Charles Hewitt when we came to determine what should be done. Mr. Wright came there and took notes of what the agreement was, and he dictated a synopsis of the agreement and Mr. Wright wrote it up and sent it to me at Belvidere to look over. I made certain corrections in it and returned it to Mr. Wright and then received it in the present state it is now.

Mr. Besson: I think that is all.

The Court: Do you desire to produce Mr. Hewitt?

Mr. Besson: For the purpose of showing that the Basic Iron Ore Company claimed these tailings as theirs.

The Court: From the beginning?

Mr. Besson: From the beginning, but I do

not think that really adds anything to the situation, because the agreement is the controlling factor.

Mr. Dahlke: We both claimed them, of course, if the thing had been discussed.

The Court. You mean both were claiming them?

Mr. Dahlke: Yes, sir, if it had come up. I would have claimed them from the beginning, and I did.

The Court: No. You said on the witness stand that you made no claim of the Basic Iron Ore Company until this controversy came up.

Mr. Dahlke: That is true, but I claimed it as my property from the very beginning.

The Court: What do you mean by the beginning?

Mr. Dahlke: The making of the lease. They paid only for concentrated ore or unwashed ore.

The Court: But you admit they had a right to ship crude ore.

Mr. Dahlke: Yes, but I got paid for it.

Mr. Besson: I will forego producing Mr. Hewitt, because the contract controls the situation.

The Court: Now do both sides rest?

Mr. Smith: We rest.

Mr. Besson: I would like, if the Court please, to make a motion for the direction of a verdict for the defendant, if it is in order for me to make the motion at this time, on the ground that under the agreement upon which this suit is predicated, or this action is predicated, these tailings were sold to the Basic Iron Ore Company, and that the only purpose of this agreement was to provide a method of compensating Mr. Dahlke for the use of his land and the maintenance of buildings there for the manufacture of paint; and that under and by virtue of this agreement the tailings were the property of the Basic Iron Ore Company, and when the tailings were shipped from the property and not used on the property for any purpose of manufacture they belonged to the Basic Iron Ore Company and it had the right to dispose of them as it saw fit and had paid for them.

As far as the situation is concerned the Court, I think, has previously considered the language of this contract on motions that were made earlier in the case, and I think that the only construction that can be reasonably given to the language that is contained in that agreement is that there has been a present grant of the tailings and that what took place subsequently related to the use of the buildings; and, in fact, it appears I think from the testimony here that it was the erection of the building on the property that first drew Mr. Dahlke's attention to the question of tailings. Prior to that time there had been no question about it. The tailings were part of the crude ore and they were shipped from the property and paid for by the Basic Iron Ore Company when they were shipped from the property in that manner. The Basic Iron Ore Company still had the right to ship from this pile of ore the crude ore including the tailings, and I think this agreement was designed by the parties to settle all these questions.

(After argument.)

The Court: This case is not without doubt

and very considerable difficulty. In fact, I think it is one which should go to the appellate courts for what might be termed a more leisurely and better considered interpretation of the agreement that is the basis for this suit. The trial court at an actual trial of the case has not the time to construe it with the accuracy that the appellate court would have—and I confess that I have some considerable doubt as to the intent and meaning of the agreement in question.

Last night I was very strongly inclined to the view that the plaintiff's case was untenable; that, as a matter of fact, the material called "tailings," shipped to others and not used on the premises for the manufacture of paint or other substances, could not be considered within the category of the agreement. Whether it would be within the purview of the original mining lease is another question, but it is not necessary for this court to decide that in this trial, for the reason that the plaintiff relies absolutely upon the agreement offered in evidence and the count thereon which has been referred to as the first in the complaint.

Therefore I had inclined to the view that the plaintiff was not entitled to recover for the tailings that had been shipped or sold to others. However, since it does appear that the defendant company apparently put a construction upon this agreement which would be inclusive of the tailings shipped to the Astoria Light, Heat & Power Company and others included in the statement filed here, I may say that the plaintiff apparently makes out what might be called a prima facie case. It is a question of law, and I

confess I am in doubt about it, and since I reach the conclusion that there is a prima facie case made out here, at least it is not sufficiently rebutted by the defense, and particularly in view of the construction that may be said to have been placed upon this agreement by the company itself, and to the end that the case may go to the appellate court, where I think it ought to go, I feel obliged in the circumstances to deny the motion, and I will allow counsel for the plaintiff to make a motion to direct a verdict in favor of the plaintiff and against the defendant.

Mr. Besson: May I have an exception on the record?

The Court: Make your motion.

Mr. Smith: I move for the direction of a verdict in the sum of $5295.28 in favor of the plaintiff.

The Court: The objection may be noted; the objection will be overruled and for the reasons heretofore given the motion to direct a verdict in favor of the plaintiff and against the defendant will be granted.

In granting this motion I want to say frankly that I am not all certain that I am correct in doing so, but I know of no other way that the parties can properly have considered the legal phases of the agreement than the way I have now directed.

Mr. Besson: Of course, in stating my ground of objection to the granting of this motion to direct a verdict I would like to state, or reiterate, that it is our contention that under this contract the plaintiff is not entitled to recover anything for tailings shipped off of the prop-

erty, and that for that reason, as it has been stated before on the motion for direction of verdict, the motion for direction of verdict for the plaintiff should be denied.

The Court: As the Court has heretofore said, I am not at all certain as to the legal effect of this agreement, and I would not be at all surprised if the appellate court might decide the other way; but in the circumstances I conclude that the plaintiff has made out a case here, especially in view of the action of the defendant in paying the royalty under that agreement for tailings shipped to the Astoria Light, Heat & Power Company.

The jury may return a verdict in favor of the plaintiff and against the defendant for the sum of $5295.28; and, of course, an exception will be allowed to the Court's ruling.

(The jury returned a verdict accordingly.)

COPY

EXHIBIT D-7.

June 18, 1912.

Mr. John H. Dahlke,
Belvidere, N. J.

Dear Sir:—

Your favor of the 15th inst. is received.

We understand your proposition to be that on the payment by us of $5000.00 cash, the royalty on all ore shipped on and after this date will be 10 cts. per ton for untreated ore and 12½ cts. per ton on treated or refined ore. All the conditions of the lease dated November 18, 1901, other than the amount of royalty, which is hereby modified, to remain unchanged.

We accept your proposition, and accordingly enclose herewith Hewitt Green's check for $5000.00 to your order. Kindly acknowledge the receipt of this letter and also of the check.

Yours very truly,

(Signed) Basic Iron Ore Company
By Charles E. Hewitt.

Enc.

COPY

EXHIBIT D-8.

June 22, 1912.

Basic Iron Ore Company,
50 Church Street,
New York City.

Gentlemen:—

I have your favor of the 18th instant, enclosing check for $5000. payable to my order

signed Hewitt Green and Charles E. Hewitt. The reason for the delay in acknowledging the same was caused by my absence from home until today.

It is understood that in consideration of this payment of $5000. the royalty on all iron ore shipped on and after June 18th is reduced to 10c per ton for untreated ore and 12½c per ton for treated or refined ore. All conditions of the lease dated November 18, 1901, other than the amount of royalty, which is hereby modified, to remain unchanged.

This letter is addressed to the Basic Iron Ore Company as your letter to me was signed in that way.

Yours very truly,

(Signed) JOHN M. DAHLKE

COPY

EXHIBIT P-2.

August 22, 1923.

Mr. John H. Dahlke,
Belvidere, N. J.

Dear Sir,

In the hope of getting further business we have taken an order for 300 tons of tailings, to be shipped to Astoria Light, Heat & Power Company, Astoria, L. I. who expect to use it in lining retorts used in manufacturing gas. It is possible and seems probable that it may be satisfactory for the purpose intended. The price at which this sample was sold is $4.00 per net ton f. o. b. Oxford, N. J.

In line with the contract between us and our recent conversation in regard to the royalty you

would be willing to take, we have assumed that you would be satisfied with a royalty of 25% of the net price we shall receive, and as in this case we must bear the cost of loading, this cost to be deducted before estimating the 25% to you. I think I have told you the whole story, and shall be glad if you will advise me if the above will be satisfactory to you.

Of course, our records of cost will be subject to your inspection at any reasonable time.

Yours very truly,

(Snd.) CHARLES E. HEWITT.

COPY

EXHIBIT P-3.

August 27, 1923.

Mr. Charles E. Hewitt,
50 Church Street,
New York City.

Dear Sir:—

Your favor of the 22nd. instant reached here during my absence from home.

In reference to your statement about the sale of the tailings, and that your company have to bear the cost of the loading, I beg to say that I am willing to accept 25% of the net proceeds received by you, i. e. the amount may be calculated after the cost of the loading is deducted.

This to hold for the sale of the tailings in question and also for any future sales of tailings.

Yours very truly,

JHD/C JOHN H. DAHLKE.

COPY

EXHIBIT D-1.

August 30th, 1923.

Mr. John H. Dahlke,
Belvidere, N. J.

Dear Sir:—

After writing my letter of the 22nd inst. it occurred to me that having paid the royalties on the washed ore that the tailings from the washed ore, unless used as provided under the arrangement in connection with the Berkleigh Manufacturing Co., may be shipped by us without the payment of further royalty. I have only casually examined the contracts but if I am correct in my surmise no royalty is due you on the tailings about to be shipped. I have just received your letter of the 27th inst. and would like to have you look into the matter and advise me whether you think I am right or not.

Yours very truly,

(Snd.) CHARLES E. HEWITT.

COPY

EXHIBIT P-9.

Sept. 3, 1923.

Mr. Charles E. Hewitt,
50 Church Street,
New York City.

My dear Sir:—

I have your favor of the 30th ultimo and in reply thereto I beg to say that I cannot come to

Exhibit D-2.

any other conclusion respecting the tailings than I did three or four years ago.

After you have washed the ore and shipped it the tailings, the residue, are mine but I am willing for you to sell them upon your paying to me the royalty heretofore agreed to, subject to the modification recently made by me.

Yours very truly,

JHD/C John H. Dahlke.

COPY

EXHIBIT D-2.

October 23rd, 1923.

Mr. John H. Dahlke,
Belvidere, N. J.

Dear Sir:—

With reference to a shipment of 321.75 net tons of Ahles fine ore washings or paint material during the month of September to the Astoria Light, Heat & Power Co. as outlined in Mr. Charles E. Hewitt's letter of August 30th, 1923; we do not believe that royalty is due you on this material under the terms of our understanding and contract, and further consideration confirms this opinion. We have no desire, however, to adopt an arbitrary attitude, nor in fact to take any position at variance with a policy of cooperation between us which the writer personally feels is much to our mutual best interest in working out the future destinies of your property in such a way to be of maximum profit to you and minimum loss to us.

Exhibit P-10.

Accordingly we are instructing Mr. Richards to forward you a check for $321.75 to be credited on royalty account against this shipment being at the rate of $1.00 per net ton but with the understanding and reservation that such payment is without prejudice and that we still maintain that such payment is not due under the contract and if eventually so determined between us by agreement, or otherwise, will subsequently be credited by you against our general royalty account. At the same time we beg to suggest that in this matter as in the other, on which there has recently been a difference of opinion between us, you suggest some method of settling the question.

Very truly yours,

BASIC IRON ORE COMPANY
By Ogden B. Hewitt

EXHIBIT P-10.

October 24, 1923.

Pequest Company,
50 Church Street,
New York City.

Attention of Ogden B. Hewitt:

My dear Sir:—

I have your letter of the 23rd instant in which you advise that you have directed $321.75 to be paid to me for royalties on the tailings shipments made in September last.

Under date of Aug. 27th last I wrote your father that I was willing to accept 25% of the net proceeds received by you, i. e. the amount to

Exhibit D-3.

be calculated after the cost of the loading is deducted.

It may be that this letter has not come to your attention.

In case check has gone forward I will on receipt of the same hold it until I hear further from you in this matter.

JHD/CAD Yours very truly,
John H. Dahlke.

EXHIBIT D-3.

October 29th, 1923.

Mr. John H. Dahlke,
Belvidere, New Jersey.

My dear Sir:—

Beg to acknowledge and thank you for your letter of October 24th regarding royalties on paint ore shipped to the Consolidated Gas Company. We have not as yet, been able to assemble all of the cost of loading this material due to the car demurrage charge billed by the railroad to the Consolidated Gas Company and not, as yet, returned to us. As soon as we have succeeded in completing the statement we will again take this matter up with you.

Very truly yours,

(Snd.) OGDEN B. HEWITT.

EXHIBIT P-4.

May 1st, 1924.

Mr. John H. Dahlke,
Belvidere, N. J.

My dear Sir:

Enclosed herewith please find check for $251.34 in payment of royalties on iron ore tailings shipped to the Astoria Light, Heat & Power Co., Sept. 8th, 1923. We discussed this matter in your office a week ago Saturday and went in some detail in explaining the circumstances to you. Mr. Richard's statement of the operation is attached hereto and the matter of car demurrage thereon is the matter which I explained to you when last in your office.

This item of $160.00 still remains unsettled and should it transpire that this charge be vacated by the railroad, you will be entitled to a further royalty on this sale of 25% of $160.00, or $40.00; or if we have to pay any part of this charge, you will be entitled to 25% of the difference between the cost to us and the $160.00.

Trusting that this will be satisfactory to you and regretting that we have been unable, due to the difficulty in getting action from the railroad, in cleaning this up before.

Very truly yours,

OGDEN B. HEWITT.

Enc.

EXHIBIT P-5.

Belvidere, N. J., April 30, 1924.

Basic Iron Ore Co.

TO

John H. Dahlke.

Royalty on Iron Ore Tailings shipped to Astoria Light, Heat & Power Company, Sept. 8, 1923.

7 cars—321.75 net tons at $4.00		$1287.00
Less the following:—		
Labor loading on cars	$104.14	
Switching charges at $2.50 per car	17.50	
Car Demurrage—D. L. & W. R. R. Co.	160.00	281.64
		$1005.36

25% of net amount $251.34

Received payment,

EXHIBIT P-6.

(check)

No. 1234 Jersey City, N. J. April 30, 1924.

COMMERCIAL TRUST COMPANY OF NEW JERSEY 55-41
15 Exchange Place
Jersey City, N. J.

Pay to the order of———John H. Dahlke——
Two hundred, fifty-one and——34/100 Dollars
$251.34/100. PEQUEST COMPANY.
Charles E. Hewitt.

endorsed, John H. Dahlke.

EXHIBIT P-7.

		Net Tons
Shipments of tailings prior to August 31, 1925, (Admitted in complaint)		2,711.90
Shipment of tailings since August 31, 1925.		
1926.		
Apr. 30.		841.05
May 31.		278.80
	Gross Tons	
1925.		
Nov. 7	154.263	
Dec. 7 & 8th	89.151	
" 11th.	127.143	
" 14, 15, & 17th.	135.670	
" 18 & 21st.	84.821	
" 30th.	37.054	
1926.		
Jan. 12, 14, & 15th.	107.679	
Mar. 24, 25 & 29th.	114.331	
May 8th.	40.938	
" 21st.	53.214	
" 24th.	45.670	
	989.934	
		1,108.53
		4,940.28

Exhibit P-11.

989,934 gross tons or 1108.53 net tons.

989.
240

39560 — 989.93
1978 — 118.6

200)237360(118.6 — 1108.53
2000

3736
2000

17360
16000

1360.0
1200.0

EXHIBIT P-11.

JOHN H. DAHLKE
Counsellor-At-Law
Belvidere, N. J.

August 27, 1925.

Basic Iron Ore Company,
50 Church Street,
New York City.

Gentlemen:—

I beg to advise that I did not receive any statement of tailings shipments made from the premises near Buttzville, at any time this year.

Yours very truly,

J. H. DAHLKE

EXHIBIT P-16.

August 28th, 1925.

Mr. John H. Dahlke,
Belvidere, N. J.

My dear Mr. Dahlke:

This will acknowledge your letter dated August 27th, 1925 regarding statement of tailings shipments made from Buttzville this year. We have forwarded a copy of same to Mr. Richards and will advise you promptly regarding this matter as soon as we have received his reply.

Very truly yours,

BASIC IRON ORE COMPANY,
By Ogden Hewitt.

EXHIBIT P-12.

September 19, 1925.

Basic Iron Ore Co.,
50 Church Street,
New York City.

Gentlemen:

With reference to your advice of the 28th. ultimo regarding the statements of tailings, I beg to say that Mr. Richards informs me that the statements were mailed each month by him to the New York office and my statements would come from there.

JHD/C

Yours very truly,

John H. Dahlke.

EXHIBIT D-6.

October 5, 1925.

Mr. John H. Dahlke
Belvidere, N. J.

My dear Sir:

With further reference to the matter of royalties on shipments from Ahles Mine, which has been the subject of recent letters from you, and which matter the writer has been unable to give as prompt attention as he would have wished, due to his absence from this office on other work, the following iron ore tailings have been shipped during the past year from Ahles Mine:

		Pounds	Net Tons
May & June	1924	1,977,600	988.80
September	1924	165,600	82.80
November	1924	273,500	136.75
December	1924	209,800	104.90
June	1925	1,612,700	806.35
July	1925	813,400	400.7
August	1925	383,200	191.60

No iron ore, crude or concentrates has been shipped.

Shipments have been made to the Astoria Light, Heat and Power Company of New York, C. K. Williams & Company of Easton, Pa., and Walter A. Barrows & Company of Philadelphia.

You will remember that it has been our contention that royalties on this material are not due you under the contract made with you at the time of the erection of a plant on the property by the Berkleigh Manufacturing Company. We have contended that you should not be paid royalties on this material in addition to the royalties which have been paid on all the ore from which this material was extracted.

Exhibit P-13.

We would suggest that on the occasion of your next trip to New York, that you call at this office or meet us at any more convenient place you may suggest, in order to further discuss this matter and come to an agreement regarding it, as we feel that in our mutual interest some arrangement may be found as a basis for a compromise acceptable and advantageous to both of us.

Very truly yours,

BASIC IRON ORE COMPANY
By Charles E. Hewitt

EXHIBIT P-13.

October 26, 1925.

Basic Iron Ore Company,
50 Church Street,
New York City.

Attention of Mr. Charles E. Hewitt.

My dear Sir:

May I expect to receive check for tailings shipped as per your letter of October 5th, instant, prior to or on November 1st. next.

Yours very truly,
JHD/C John H. Dahlke.

COPY

EXHIBIT P-17.

October 28, 1925.

Mr. John H. Dahlke
Belvidere, N. J.

My Dear Sir:

This will acknowledge your letter dated October 26, and I wish to apologize for not having taken this matter up with you earlier, but the facts are that my seniors in this office have been so much occupied with other matters that it has been impossible for me to get the matter up between us before them. I quite realize that this is of no interest to you, and regret very much to have had to delay the matter.

With regard to the matter that was up for arbitration, I must advise you that my seniors decline to accept your proposal that this be settled by the payment of one-half the amount at issue. You may remember that I stated that this would be acceptable to our people in my opinion if you would waive any future recurrence of the present situation your claim that our minimum royalty payments would only apply on ore mined and shipped after such payments were made instead of on any ore shipped as we contend would be the case. I have ascertained that it will be acceptable to them to settle this matter without arbitration by the payment as you suggest of one-half the amount involved, provided you will agree that in any future recurrence of the condition that we will figure the royalties due as you now contend they should be figured, and shall pay you one-half the amount of the difference between us due to any

future recurrence of this question. We will thus split our difference in any future recurrence of the question and have the matter settled as to the method of handling these royalties should we ever again ship ore from the property. If you do not agree on such a settlement we feel the arbitration of this matter should be expedited all possible.

With reference to the matter of the tailings royalties, my associates do not feel that you are in fact the owner of these tailings. They also feel that the $1.00 royalty agreed to be paid to you under the Berkleigh agreement, which was 25% of the amount contracted to be paid by the Berkleigh Manufacturing Company for the material was excessive per se as a royalty. It was accepted as applying to only such of the material as should be used in the plant built upon your property to enable us to perform a contract made by us with Berkleigh Manufacturing Company by arranging with you such an interest in their operations as would reconcile you to our arrangement with them after their plant was built. You may remember that our proposal made by Charles E. Hewitt when you were last in this office, was that we pay you a royalty of 50c per ton on this material. You declined to recede from your position of $1.00 per ton or 25% of the net return to us by sale of the material.

I have now obtained the consent of my associates to agree with you that we pay 75c per ton royalty on this material. If this is not satisfactory to you I would suggest that we place this matter also in arbitration in order to settle upon the fair and reasonable royalty to be paid

to you, if any, should we succeed in selling further tonnages of the tailings.

These suggestions as to a settlement of the two questions between us are made to exhaust every effort to reach a prompt settlement. They are made without prejudice.

I think should it be necessary to proceed with arbitration on these two questions we can expedite the action so as to arrive at a decision with some promptness either by insisting upon prompt action on the part of the arbitrators at present appointed (I understand that the arbitrator appointed by us has been ready to meet on the question at any time since his appointment), or by the use one of several available organizations for arbitration of just such questions as stand between us.

Very truly yours,

OBH:LMG — Ogden D. Hewitt

EXHIBIT P-14.

JOHN H. DAHLKE
Counsellor-At-Law
Belvidere, New Jersey

October 31, 1925.

Mr. Ogden B. Hewitt,
50 Church Street,
New York City.

My Dear Sir:—

Your letter of the 28th instant has been received. Your proposition which relates to the settlement of the arbitration now pending as

you have outlined the same coupled with proposition for the future payments, I feel, as I have heretofore stated to you, I must decline, and unless you change your mind we will proceed with the arbitration.

So far as relates to the payments for the tailings I feel that I do not care to sell the same for less than one dollar per ton, and I will of course expect that price to be paid to me for such shipments of the same as have been heretofore made. This proposition is by way of settlement. If declined by you, in case of litigation I should insist upon the payment to me of the amount realized by you for the same less the expenses.

Yours very truly,

JOHN H. DAHLKE

COPY

EXHIBIT D-5.

November 6, 1925.

Mr. John H. Dahlke,
Belvidere, N. J.

My dear Sir:

Your letter dated October 31, 1925 is received and has had due consideration.

Our decision to go into arbitration in the matter of the royalties due you on crude ore shipped on the interpretation of our contract in that matter, was reached after careful consideration of the question and we feel that some settlement upon which our future action can be

based should be arrived at. Accordingly we would be glad to have you instruct your arbitrator to get in touch with Mr. Whiting, who has been named by us, in order that this arbitration may proceed promptly.

So far as relates to the royalty payments for the tailings, we cannot understand the basis for your attitude in this matter, and as we have pointed out, our offer of 75c per ton is not, nor ever was admitted to be due you but was suggested by us as a compromise.

If you are not prepared to accept this offer nor to arbitrate the question of the amount of royalty to be paid you on this material, I must advise you that we will regretfully endure a litigation of the matter unless you can yourself suggest a more amicable solution.

Very truly yours,

(Snd.) OGDEN B. HEWITT.

EXHIBIT P-15.

JOHN H. DAHLKE,
Counsellor-At-Law
Belvidere, New Jersey.

November 12, 1925.

Basic Iron Ore Company,
50 Church Street,
New York City.

Attention of Ogden B. Hewitt:

My dear Sir:

I have your letter of the 6th instant.

My arbitrator advises me that a date for

the meeting of the arbitrators will be fixed for the latter part of next week and I hope that on that day as fixed the matter can be settled.

Relative to the payment for tailings I have nothing other to suggest than is stated in my letter of October 31st last.

These tailings are mine without any question, and unless you choose to settle for them at $1.00 per ton as I have offered you heretofore I will insist on being paid the amount realized by you for them less the expenses of shipping &c.

You will of course understand that no further sales of tailings will be made to you until we can agree on a price for them.

My offer to you and your father was to sell them at $1. per ton and this offer I will abide by if promptly accepted. Otherwise I will be compelled to institute a suit for the value of the tailings heretofore sold by you.

I also call your attention to the fact that you have heretofore settled for tailings heretofore shipped by you at the rate of $1.00 per ton.

Yours very truly,

Signed. JOHN H. DAHLKE.

EXHIBIT D-4.

COPY

November 16, 1925.

Mr. John H. Dahlke
Belvidere, N. J.

My dear Sir:

This will acknowledge your letter dated November 12, 1925.

It is gratifying that the arbitration already arranged for can go forward promptly.

With further reference to your letter, while it is true we made one payment to you on tailings shipped, it was specifically without prejudice, and we specifically stated that you might credit this payment on our general royalty account, provided it was eventually decided between us that we were right in our contention that we should not pay you royalties on this material under the agreement in force between us.

We must of course consider ourselves at liberty to continue to make sales of these tailings, which were granted by you to us under the terms of our agreement at the time the Berkleigh arrangement was made, and we expect to make such sales as opportunity offers.

Very truly yours,

PEQUEST COMPANY

OBH:LMG By— Ogden B. Hewitt.

EXHIBIT P-8.

Statement of "tailings" shipped by Pequest Company after July 31, 1925.

To Whom Shipped	Date Shipped	Quantity Shipped	
	1925		
C. K. Williams & Co.	Aug. 1		Net Tons @ $6.00 per
Easton, Pa.	" 7	94.60	net ton plus switch-
	" 4	46.90	ing charge of $2.50 per car.
Barrows & Co. Inc.			Gross Tons @ $6.00
Chester, Pa.	" 29	44.732	per Gross ton.
Barrows & Co. Inc. LeClade Gas Light Co. Carondelet, Mo.	Nov. 7	154.263	
Barrows & Co. Inc. Consolidated Gas, Elec. Light & Power Co.	Dec. 7		
Turner, Md.	" 8	89.151	
LaClede Gas Light Co. Carondelet, Mo.	" 11	127.143	
Camden Coke Co.	" 14		
Camden, N. J.	" 15		
	" 17	135.670	
Rochester Gas & Elec. Corp.	" 18		
Rochester, N. Y.	" 21	84.821	
	1926		
Grand Rapids Gas Light Co., Grand Rapids, Mich.	" 30	37.054	
Barrows & Co. Inc. Consolidated Gas & Elec.	Jan. 12		
Light & Power Co.	" 14		
Turner, Md.	" 15	107.679	
Rochester Gas & Elec. Corp.	Mar. 24		
Rochester, N. Y.	" 26		
	" 29	114.331	
Astoria Lt. Heat & Power Co.	Apr. 9		
Astoria, N. Y.	" 19		Net Tons @ $6.00 per
	" 29	841.05	net ton.
Astoria Lt. Heat & Power Co. Astoria, N. Y.	May 4	278.80	
Barrows & Co. Inc. Iron Hydroxide Co.			Gross Tons @ $6.00
Phila. Pa.	" 8	40.938	per Gross ton.
Consolidated Gas, Elec. Lt. & Power Co. Turner, Md.	May 21	53.214	
Camden Coke Co., Camden, N. J.	" 24	45.670	
Barrows & Co. Inc. Grand Rapids Gas Lt. Co. Grand Rapids, Mich.	June 10	40.000	
Consolidated Gas, Elec. Lt. & Power Co. Baltimore, Md.	" 12	36.473	

Exhibit P-8.

To Whom Shipped	Date Shipped	Quantity Shipped	
Standard Oil Co., of N. J. Bayway, N. J.	June 25	1.000	Net Ton @ $12.00 per N. T. which includes cost of 31 bags, being shipped in same.
Barrows & Co. Inc. Utica, Gas & Elec. Co. Utica, N. Y.	July 17	39.911	Gross Tons @ $6.00 per Gross ton.
Camden Coke Co. Camden, N. J.	" 23	33.661	
Barrows & Co. Inc. Consolidated Gas, Elec. Lt. & Power, Co., Turner, Md.	Aug. 2 " 5	77.098	
Barrows & Co. Inc. Utica Gas & Elec. Co. Utica, N. Y.	Sept. 4	48.750	
Camden Coke Co. Camden, N. J.	" 16 " 22	79.241	
Standard Oil Co. Bayway, N. J.	Oct. 2	40.268	

New Jersey Court of Errors and Appeals

BASIC IRON ORE COMPANY, a Corporation, *Appellant and Defendant Below*, *vs.* JOHN H. DAHLKE, *Respondent and Plaintiff Below.*	On Appeal from New Jersey Supreme Court, Warren Circuit.

BRIEF FOR APPELLANT.

INTRODUCTION.

This is an appeal from a judgment of the Supreme Court, rendered in an action at law, tried at the Warren Circuit, before Circuit Judge Lawrence and a jury on October 25 and 26, 1926. The plaintiff, John H. Dahlke, sued the Basic Iron Ore Company, a mining corporation, to recover royalties on the sale of tailings, basing his claim on an agreement under seal, made between the parties on February 27, 1920. The trial Court after hearing the testimony, denied a motion to direct a verdict for the defendant, and directed a verdict for the plaintiff, over objection of defendant's counsel, for the sum of $5,295.28. The course followed by the trial Judge was taken, however, only after he had made the following statements:

> "* * * Whether it would be within the purview of the original mining lease is another question, but it is not necessary for this court to

decide that in this trial, for the reason that the plaintiff relies absolutely upon the agreement offered in evidence and the count thereon which has been referred to as the first in the complaint."

"* * * I may say that the plaintiff apparently makes out what might be called a prima facie case. It is a question of law, and I confess I am in doubt about it, and since I reach the conclusion that there is a prima facie case made out here, at least it is not sufficiently rebutted by the defense, and particularly in view of the construction that may be said to have been placed upon this agreement by the company itself, and to the end that the case may go to the appellant court, where I think it ought to go, I feel obliged in the circumstances to deny the motion, and I will allow counsel for the plaintiff to make a motion to direct a verdict in favor of the plaintiff and against the defendant."

"* * * In granting this motion I want to say frankly that I am not all certain that I am correct in doing so, but I know of no other way that the parties can properly have considered the legal phases of the agreement than the way I have now directed."

"* * * I am not at all certain as to the legal effect of this agreement, and I would not be at all surprised if the appellate court might decide the other way; but in the circumstances I conclude that the plaintiff has made out a case here, especially in view of the action of the defendant in paying the royalty under that agreement for tailings shipped to the Astoria Light, Heat & Power Company."

The pleadings consisted of an amended complaint laid in two counts, motion to strike out, which was denied,

answer and reply. The first count was on contract, based upon the agreement of February 27, 1920. The second count was for conversion. The second count was abandoned at the trial and the action continued on the first count. See p. 63, lines 29, etc. The defendant by its answer to the first count set forth the mining lease, and alleged that under the agreement of February 27, 1920, and the mining lease, the tailings belonged to it. Plaintiff joined issue.

From the foregoing it will be seen that the determination of the cause is based upon the construction of the agreement of February 27, 1920, upon which the action was based.

FACTS.

From the admissions in the pleadings and the evidence, including the exhibits offered at the trial it appeared that the plaintiff, John H. Dahlke, owned an iron mine at Oxford Township, New Jersey, which he leased to Robert H. Ahles, by two leases, one dated November 18, 1901, for a term of twenty years, and the other dated October 23, 1903, for a term of twenty years from the date of the expiration of the first lease, dated November 18, 1901. The Basic Iron Ore Company became the assignee of the two leases on February 14, 1902, and continues in possession of the premises for the purposes and under the conditions set forth in the leases. (See Lease pp. 52-57).

Under the terms of the mining lease the defendant, Basic Iron Ore Company, undertook to pay royalties for washed and unwashed iron ore, as follows:—

"In consideration whereof the said party of the second part, agrees to pay to the party of the first part, for every ton of twenty-two hundred and forty pounds in weight of merchantable iron

ore raised, mined and taken away from the said premises the sum of twenty-five cents on washed iron ore the market value of which is four dollars per ton and over, f. o. b. at mines, and for washed iron ore, the market value of which is less than four dollars per ton at the ratio in value of twenty-five cents to four dollars, and on all unwashed iron ores shipped and used fifteen cents per ton, said royalties to be paid quarterly on the first day of April, July, October and January of each year for the quarter immediately preceding. The weights of ores to be ascertained from scales of railroad companies transporting the ore, and if not shipped by railroad to be ascertained in any other reasonable manner; the party of the second part to furnish statement of ores shipped, to whom shipped and when shipped, and the prices and values thereof with payment of royalties, party of the first part to have the right at all reasonable hours to inspect the books or book in which weights and prices of ores are kept and to take statements therefrom." (See pp. 54, 55, lines 40 and 1-30 respectively).

The provisions above indicated were changed by agreement of the parties in 1912. See Exhibits D-7 and D-8, pp. 103 and 104. Upon consideration of $5.000, Mr. Dahlke agreed to accept after that date ten cents (10c) a ton for untreated ore and twelve and one-half cents (12½c.) a ton for treated ore.

It will be seen from the foregoing that under this arrangement the defendant could remove the crude ore, which necessarily included the tailings, from the premises, upon payment of the agreed royalties. According to the testimony of E. P. Richards, who had charge of the mine from 1903 to 1923, nothing but crude ore was shipped from the premises, (See p. 86, line 34 to p. 87,

line 12), until 1920. At this time a new state of affairs developed. The defendant, sometime in 1919 and 1920, permitted the Berkleigh Manufacturing Company to erect a building on its premises and treat the ore and tailings for the purpose of manufacturing paint. (See p. 87, line 14). Manifestly the manufacturing of paint and the construction of a building for that purpose on Mr. Dahlke's land would not fall within the terms of the mining lease. Nor would the treatment of ore or tailings on the premises provide any method of compensating Mr. Dahlke for the material so used on the premises, since the terms of the mining lease provided a means of payment only when crude or treated ore was shipped from the premises.

The agreement of February 27, 1920 was prepared to meet the new situation. The parties recognized these conditions by inserting in this agreement of February 27, 1920, the following preamble, and other provisos hereinafter set forth:

> "Whereas there is now lying in bank on said premises demised certain ore heretofore mined or caused to be mined and the tailings from ore heretofore washed or otherwise treated or caused to be washed or treated by the party of the second part on said premises; and the party of the second part has erected or caused or permitted to be erected on said premises a building designated to utilize certain of the ore tailings in the manufacture of pain and paint materials;

The contract then set forth:

> Now, therefore, in consideration of the premises and of the sum of one dollar by each party to the other in hand well and truly paid, the receipt whereof is hereby acknowledged, and of the

agreements hereinafter contained, it is agreed between the parties as follows:

The party of the first part does hereby grant unto the party of the second part, subject to the provisions of this agreement, all his right, title and interest of, in and to all the tailings now lying on said demised premises from ore heretofore washed or otherwise treated on said premises, and the tailings which may hereafter be derived from the washing or other treatment of the ore now lying in bank on said premises, and each and all the ingredients thereof; and also the right to conduct or permit to be conducted on any part or parts of the said premises lying southerly of the Thomas Edison railroad any and all operations which may be desirable in the treatment of the said ore in bank or in the treatment of tailings therefrom or the tailings now on said premises, or in the manufacture thereof into paint or paint materials or other materials of any and all kinds whatsoever; and for such purpose or purposes also the right to erect or cause or permit to be erected and maintained thereon buildings, plants and equipment, including those now thereon, with the privilege to remove the same at any time within one year after such treatment or manufacture, or other use of such buildings in connection with the mining operations, shall have been discontinued. * * *"

"The party of the second part will pay to the party of the first part for each and every ton of such tailings (viz, tailings now on said premises and tailings from such ore in bank on said premises as shall be hereafter treated on said premises) so taken and treated or manufactured by the party of the second part the sum of one dollar per ton,

and for each and every ton of such tailings sold by the party of the second part to the Berkleigh Manufacturing Company or to others and treated by it or them on said premises 25 per cent. of the amount paid therefor by it or them to the party of the second part; it being understood that the amount fixed by the agreement between the party of the second part and the Berkleigh Manufacturing Company is four dollars per ton for said tailings.

It is hereby agreed that if this contract shall be assigned by the party of the second part and such assignee shall sell any such tailings to any corporation or partnership in which such assignee shall have any interest through stock ownership or otherwise, the party of the first part shall receive for all such tailings so sold a royalty of 25 per cent of the full market value of such tailings, which royalty payable to the party of the first part shall not be in any case less than $1 per ton.

The party of the second part shall be entitled to take and dispose of the refuse rock obtained from the iron ore by the washing operations or other treatment of the ore in bank on said premises and not included in the tailings suitable for paints or paint materials or treatment for other minerals, and shall not be required to make any payment to the party of the first part therefor."

(See p. 22, lines 33 to 43, p. 23, lines 1-38, p. 24, lines 14-41, p. 1-14).

The agreement of February 27, 1920 is set forth in toto on pp. 21-28, inclusive.

In 1923 the defendant found that the tailings might be used for the purpose of cleaning illuminating gas (See p. 79, lines 20, etc.) and commenced making shipments of them from the premises, which shipments were con-

tinued at intervals up to the time of the commencement of this action. Mr. Dahlke claimed that under the agreement of February 27, 1920, he should be paid for these shipments at the rate of one dollar a ton. The defendant claimed that under the terms of the agreement the plaintiff was not entitled to recover anything for the tailings, but that the agreement operated as a grant of the tailings, subject to payment, only in case the plaintiff's premises were used by the defendant or the Berkleigh Manufacturing Company in the treatment of the tailings for the purpose of manufacturing paint.

The question of the construction of the contract was raised in the lower court in several ways. It was raised at the outset on motion to strike out the first count of the amended complaint (See page 17, reasons 5 and 6). This motion was denied. (See Conclusions of Judge Lawrence, sitting as Supreme Court Commissioner under the Rule. pp. 39 and 40. Rule denying motion, p. 41).

The question was also raised on motion to direct a verdict for defendant. This motion was denied and objection noted. (See pp. 98, etc.)

The question was again raised on motion by plaintiff's counsel to direct a verdict, which was granted over objection noted by defendant's counsel. (See pp. 101, etc.)

The amount of the verdict represented the amount of royalties with interest based upon Mr. Dahlke's construction of the contract, which was adopted by the Court.

During the course of the trial certain letters were admitted in evidence, over objections noted by defendant's counsel, for the purpose of showing the practical construction placed upon the contract by the parties.

Testimony was also taken at the trial to show the situation of the parties at the time the agreement of February 27, 1920, was exectuted.

POINT ONE.

The Plaintiff was not entitled to recover under the Agreement of February 27, 1920, for tailings shipped from the mine premises.

Attention is invited to the first, second, fifteenth and sixteenth grounds of appeal, pp. 1, 2 and 4. The Court's attention is also directed to the notice of motion to strike out count one of the amended complaint, the order denying this motion and the conclusions upon which this order was based (pp. 16, 41 and 29).

In addition to this the Court is respectfully requested to consider the motion of defendant's counsel for the direction of a verdict, the trial Court's denial thereof and the notation of objection thereto (pp. 98, etc.) Likewise attention is invited to the ruling of the trial Court granting motion of plaintiff's counsel for the direction of a verdict, with the objection by defendant's counsel thereto noted on the record (pp. 101, line 20, etc.).

These rulings all involved the right of the plaintiff to recover royalties under the provisions of the agreement of February 27, 1920. For the defendant, it was urged that the purpose of the agreement was simply to provide a basis for compensating the plaintiff for the use of his property for the manufacture of paint from materials derived from the mine, and it was only in case the tailings were used on the plaintiff's premises, either by the defendant, the Berkleigh Manufacturing Company or some one else, in the manufacture of paint, that royalties were to be paid. The plaintiff, on the other hand, contended that he was to be paid royalties on all tailings taken whether on or off the premises.

In order to construe the agreement of February 27, 1920, let us consider the situation of the parties prior to the execution of that instrument. The mining company at that time occupied Mr. Dahlke's property under the

terms of the mining lease, assigned to it by Mr. Ahles (see p. 52), subject to the reduction in royalty payments made in 1912. See Exhibits D-7 and D-8. Up to 1920 nothing but crude ore had been shipped from the premises (see p. 86, line 20, to p. 87, line 32), and there was no deposit of tailings on the premises except a small quantity obtained for experimental purposes by the Berkleigh Manufacturing Company (see p. 86, line 20). The mining company authorized the Berkleigh Manufacturing Company to build on its land, and the building was partially constructed, the purpose of this building was to house a plant for the treatment of ore, using the tailings in the making of paint (see p. 84, line 26, etc.). About this time Mr. Dahlke arrived on the scene. He had a right to insist upon the removal of the Berkleigh building, inasmuch, as the construction of such a building and the manufacture of paint on the premises was clearly unauthorized under the lease. He also had a right to permit the Berkleigh building to remain and the paint manufacture to continue upon terms prescribed by him. The mining company, on the other hand, was in a postion to remove the entire body of crude ore from the premises upon payment to Mr. Dahlke of ten cents (10c.) a ton. (See Exhibits D-7 and D-8). They could remove the Berkleigh building to other premises, where the ore could be treated and tailings used for the manufacture of paint without any interference whatever on the part of Mr. Dahlke. In any event, the crude ore and treated ore, including the tailings, belonged to the mining company, subject to payment of royalties prescribed by the mining lease. In the case of *Boileau* v. *Heath*, L. R. Chancery, Div. (1898), Vol. 2, p. 303, at 305, Bigham, J., speaking for the Court said of tailings similar to those in the case at bar:

> "No doubt when the material was first found, it would have been competent for the Kidsgrove Company to have treated it as their own, and to have sold it, if they could, for their benefit."

In the foregoing case, the Kidsgrove Company was like the defendant, a mining company, which had leased a mine. But unlike the present case, the Kidsgrove Company had abandoned its lease, and a new company entered the premises. Under the Boileau case, just cited, while the new tenant had no right to the tailings, the Kidsgrove Company, in the same position as the defendant, had a right to the tailings. Such being the law, it is clear that the defendant had the right to remove the crude ore at ten cents (10c.) a ton or the treated ore, which would include tailings at twelve and a half (12½c.) a ton.

It was in the light of these facts that the agreement of February 27, 1920, was executed. How significant is the preamble, which stated:

> "Whereas, there is now lying in bank on said premises demised certain ore heretofore mined or caused to be mined, and the tailings from ore heretofore washed or otherwise treated or caused to be washed or treated by the party of the second part on said premises; and the party of the second part has erected or caused or permitted to be erected on said premises a building designated to utilize certain of the ore tailings in the manufacture of paint and paint materials;"

Is it reasonable to believe that it was intended that the defendant was to pay Mr. Dahlke for removing from the premises material at the rate of one dollar ($1) a ton under the agreement of February 27, 1920, which it already had a right to remove under the mining lease at the rate of either ten cents (10c.) or twelve and a half (12½c) a ton?

On the other hand, is it not manifest, that the agreement of February 27, 1920, was intended to operate as a present grant to the defendant of the tailings, subject only to the requirement that payment be made to Mr. Dahlke, for the use of his property in the erection of additional buildings thereon, and the manufacture of paint from tailings?

If there is any question of ambiguity with respect to the interpretation of this contract, the Court has the right to examine it in the light of the circumstances existing at the time of its execution. See *Fletcher* v. *Interstate Chemical Co.*, 94 N. J. L. 332, 110 Atl. 709; *Morris Canal & B. Co.* v. *Matthieson*, 17 N. J. Eq. 385; *United Boxboard and Paper Co.* v. *McEwan Bros. Co.*, 76 Atl. 550; *Ryer* v. *Turkel*, 75 N. J. L. 677, 70 Atl. 68.

In the light of the circumstances in which the parties found themselves at the time of making this contract, the construction urged for Mr. Dahlke, it is contended, is most unreasonable. Under the mining lease the defendant paid a greater price per ton for treating ore on premises and leaving a residue than for removing the crude ore in its entirety. Is it not preposterous to claim now that it should pay ten times the amount for the removal of the tailings than it would pay for the removal of the crude ore?

The rule of construction applicable to this case it is respectfully submitted, was aptly stated by former Vice-Chancellor Lane, in the case of *International Signal Co.* v. *Marconi Wireless Tel. Co.*, 104 Atl. 378, 89 N. J. Eq. 319, affirmed 106 Atl. 891, 90 N. J. Eq. 271, as follows:

> "The cardinal rule to be applied in construing a contract is to ascertain the intention of the parties. If more than one construction of the language used is possible, the circumstances surrounding the transaction may be considered, as well as

> the written document. If the intention is doubtful or obscure, a construction should be adopted which is most fair and reasonable, and which will impose the least harship upon either of the contracting parties. Citation of authority would be superfluous."

Under the terms of the mining lease it was apparently regarded by Mr. Dahlke, the lessor, that the shipping of crude ore from the premises was an advantage, inasmuch as he charged less per ton for shipment in this manner than he charged when the premises were used for washing the ore. Apparently the only sort of treatment which the lease originally contemplated was a washing process, because the distinction is made in the lease between washed and unwashed ore. (See p. 55, line 8, etc.).

It is contended that the language of the agreement of February 27, 1920, is quite clear and that it makes a present grant of the tailings and prescribes the only circumstances under which payment is to be made for them. It is evident that Mr. Dahlke had in mind at the time the use of his propery in paint manufacture and a plan for securing payment for the material consumed which was not removed from the premises.

It is, therefore, urged, in view of all the circumstances which have been set forth, that the construction insisted upon by Mr. Dahlke is most unreasonable, since if it is followed, the mining company would be obliged to pay ten times as much for the tailings as it would be required to pay for the entire body of crude ore of like tonnage.

It is to be observed from the testimony that the tailings in the suit at bar were the product of what is known as the milling process. Expert testimony with respect to this was given by Mr. Ogden B. Hewitt, who said, at p. 89, line 10, that:

"* * * The milling process by which the tailings, so-called in this suit, the material at issue in this suit, were produced—as a matter of fact there were produced three products. One was the concentrated iron ore which was shipped to the blast furnace; the other was the material at issue in this suit, and the third was the slag or rock which is produced and thrown on another pile on another side of the mill, which was said to be valueless."

Bearing in mind that only a small quantity of tailings lay in the bank produced by this milling process for experimental purposes at the time the agreement of February 27, 1920, was executed, and that only crude ore shipments had been made off the premises prior to that time according to the testimony of Mr. Richards, who had charge of the property for the Basic Iron Ore Company (see p. 85, line 19, to p. 87, line 33), it becomes readily apparent that it was of great importance at the time of executing this contract for the Basic Iron Ore Company to settle its rights with respect to the tailings before the milling process was put into execution by which these tailings might be produced, inasmuch as they were in a position to ship the crude ore from their own premises and carry on the milling process on some other property, without molestation by Mr. Dahlke or without any possibility that he might exact from them any unusual charge for the tailings.

If Mr. Dahlke is entitled to any compensation at all, his right to recover would be based upon the mining lease, which, of course, is foreign to this action because his present claim is based upon the agreement of February 27, 1920.

It is contended for the plaintiff that the proper construction of this agreement is the one urged for the defendant, and that the plaintiff is not entitled to recover anything in the case at bar.

POINT TWO.

The parties to the agreement of February 27, 1920, did not adopt any practical construction of it.

In arriving at his conclusions in directing the verdict for the plaintiff, the trial Court pointed out at p. 100, line 30, etc., that the defendant company had apparently put a construction on this agreement which justified him in adopting a construction favorable to the plaintiff.

It is contended that the testimony in the case does not justify any inference that the defendant company put a practical construction upon the agreement of February 27, 1920, which was favorable to the plaintiff.

In *Page, on Contracts*, Vol. 4, Sec. 2034, p. 3514, the text writer, in dealing with this phase of the law of contracts, said:

"* * * The practical construction which the parties have placed on a contract is to be considered only if the contract is ambiguous. If the contract is free and clear from ambiguity, the evident intention of the parties as manifest therein must be followed, although it is contrary to the practical construction which the parties have put upon such contract, even if such practical construction has been acquiesced in for a long period of time. Even if parts of the contract are abmiguous, the practical construction of the parties cannot be considered if the contract taken as a whole is clear.

The conduct of the parties which is relied upon as showing the practical construction which they have placed upon the contract must of itself be harmonious, uniform and free from ambiguity.

* * * If the conduct of one party shows that he has placed one construction upon the con-

tract, while the conduct of the other party shows that he has placed a different construction on the contract, such conduct is of no value in determining the meaning of the contract."

In 13 Corpus Juris, p. 546, Sec. 517, Topic "Contracts," the textwriter says:

> "Where the parties to a contract have given it a practical construction by their conduct, as by acts in partial performance, such construction is entitled to great if not controlling weight in determining its proper interpretation, particularly where such interpretation is agreed on before any controversy has arisen. But practical construction is not conclusive, and may be considered only when the contract, read in the light of the surrounding circumstances, leaves the proper construction in doubt. The practical construction put on a contract by the parties cannot control the express unambiguous provisions of the instrument itself, and, further, a practical construction, to be adopted, must be reasonable."

The testimony from which the trial court inferred that the parties had placed a construction upon the contract consisted of certain letters which were admitted in evidence over the objection of defendant's counsel. These letters are Exhibits P-2, P-3, D-1, P-9, D-2, P-10, D-3, P-4, P-5, P-6, P-7, P-11, P-16, P-12, D-6, P-13, P-17, P-14, D-5, P-15, D-4, and are to be found in the printed record beginning at p. 104 and continuing to and including p. 123. A careful examination of the letters will indicate that the Basic Iron Ore Company did not recognize the right of the plaintiff to collect royalties. The Court is respectfully requested to examine particularly Exhibit D-1, at p. 106, which is as follows:

"August 30th, 1923.

Mr. John H. Dahlke,
Belvidere, N. J.

Dear Sir:—

After writing my letter of the 22nd inst, it occurred to me that having paid the royalties on the washed ore that the tailings from the washed ore, unless used as provided under the arrangement in connection with the Berkleigh Manufacturing Co., may be shipped by us without the payment of further royalty. I have only casually examined the contracts, but if I am correct in my surmise *no royalty is due you on the tailings about to be shipped.* I have just received your letter of the 27th inst. and would like to have you look into the matter and advise me whether you think I am right or not.

Yours very truly,
(Snd.) Charles E. Hewitt"

(Italics are those of counsel).

Again the Court is requested to examine Exhibit D-2, at pp. 107 and 108, in which it appears that the payment of the royalty check therein mentioned was without prejudice and that the defendant maintained that such payment was not due under the contract. The Court's attention is specifically directed to the following excerpt from this letter, beginning at l. 1, p. 108:

> "Accordingly we are instructing Mr. Richards to forward you a check for $321.75 to be credited on royalty account against this shipment being at the rate of $1.00 per net ton, *but with the understanding and reservation that such payment is without prejudice* and that we still maintain that such payment is not due under the contract and if eventually so determined between us by agree-

ment or otherwise, will subsequently be credited by you against our general royalty account. At the same time we beg to suggest that in this matter as in the other, on which there has recently been a difference of opinion between us, you suggest some method of settling the question."

(Italics are those of counsel).

In the correspondence which was continued between the parties up to about six months before the commencement of this action, it will appear that the Basic Iron Ore Company never receded from its position that it was not required to pay royalties for the shipment of tailings upon the basis set out in the agreement of February 27, 1920.

Exhibit P-17, at p. 117, being a letter directed to the plaintiff, written on October 28, 1925, is particularly emphatic in regard to this attitude. See particularly that part of the letter on p. 118, l. 12, etc.

It is contended that a careful examination of all this correspondence, even assuming that it was admissible in evidence, does not justify a finding that the parties had placed a practical construction on the contract, and the trial court should not have adopted this as the basis for reaching the conclusion that a verdict should be directed for the plaintiff.

POINT THREE.

The correspondence between the parties subsequent to the making of the agreement of February 27, 1920, was not properly admissible.

Attention is invited to page 69, line 29, of the printed record. It will appear there that plaintiff's counsel offered in evidence Exhibits P-2, P-3, P-4 and P-5. These Exhibits were admitted over the objection of de-

fendant's counsel and the objection noted on the record. Other exhibits of the same tenor were admitted over objection. It is contended that these exhibits should not have been admitted because the contract in the light of surrounding circumstances, existing at the time of its execution, was not so ambiguous as to require a practical construction by the parties as a necessary aid to construction by the Court. In the case of *Lehigh Valley* v. *Stewart*, 37 N. J. L. p. 53, the rule with respect to the admissibility of such evidence is discussed by Js. Dalrimple, speaking for the Supreme Court. He said, inter alia:

"* * * Agreements may be read in the light of surrounding circumstances and parol evidence will be received to show the sense in which parties used local and technical terms. 1 Greenl, Ev., Secs. 277, 294. But I do not understand that it is insisted that the evidence sought to be given under the notice in question is admissible on either of these grounds. It is claimed to be legal because the agreement has received a practical interpretation by the parties which now binds them. But the principle invoked in support of this contention does not go to the extent claimed. It has been held that where the language of a deed is doubtful in the description of land conveyed, parol evidence of the practical interpretation by the acts of the parties, may be received to remove the doubt, and that evidence of former transactions between the same parties is admissible to explain the meaning of terms in a written contract respecting subsequent transactions of the same character. I Greenl. Ev. Sec. 293. The object of these rules, it will be perceived, is to ascertain the true meaning of words in a written contract, about which there is doubt. * * *"

It will be observed that the trial court in admitting these documents said at page 70, line 3:

> "To which counsel for the plaintiff replies, I assume, that it tends to indicate the construction by the defendant itself upon the character of this contract."

It has already been pointed out that the trial court in arriving at the conclusion to direct a verdict for the plaintiff, based that finding largely upon the alleged practical construction said to have been set forth in these letters. It is, however, urged that the Court had not right to consider these letters at all and that they were not properly admited in evidence and this of itself would constitute sufficient grounds for reversing the judgment. See 6 Ruling Case Law, Section 242, at p. 854.

POINT FOUR.

The testimony presented some conflict as to the facts.

An examination of the record will indicate that Mr. Richards, who had charge of the mine for the Basic Iron Ore Company, testified that nothing but crude ore was shipped up to to 1920 and that there was no washing carried on prior to 1920. (See p. 85, line 39, pp. 86 and 87, to include p. 88 to line 3).

On the other hand Mr. Dahlke testified that the crude ore shipments continued up to 1905 (See p. 93, line 20), and that washed and crude ore was shipped between 1905 and 1914.

This conflict of testimony was important because there was some testimony to indicate that tailings were a product of the washing process, whereas, Mr. Dahlke contended they began to accumulate in 1904. (See p. 93, line 14). Mr. Ogden Hewitt testified, as has already been pointed

out that the tailings mentioned in the contract were a product of the milling process. (See p. 89, line 12). It will appear from Mr. Richard's testimony that this accumulation began in 1920.

It would appear from the foregoing that there was some dispute of fact which it might have been necessary to have determined before the Court was in a position to state what the circumstances really were under which the parties entered into the agreement. If the contract is to be considered as ambiguous, and such circumstances are necessary to be considered in arriving at its interpretation, then a finding of fact on these questions was beyond the power of the Court and was properly a function for a jury. If on the other hand the contract is to be considered as unambiguous, its construction can be determined by an examination of the instrument itself without recourse to extraneous testimony. The trial court apparently regarded the contract as ambiguous and resorted to extraneous testimony, thereby developing a conflict in the testimony which rendered a direction of a verdict for the plaintiff improper.

POINT FIVE.

The judgment below should be reversed.

It is contended for the reasons given above that the plaintiff was not entitled to recover under the agreement of February 27, 1920, and that judgment, if the Court regards the contract as unambiguous should have been entered for the defendant. If the Court regards the contract as ambiguous then it is contended testimony was improperly admitted that an erroneous construction adopted and a factual conflict overlooked, any of which situations require the judment to be reversed and a new trial ordered.

New Jersey Court of Errors and Appeals

JOHN H. DAHLKE,
Plaintiff Appellee,

and

BASIC IRON ORE COMPANY,
Defendant Appellant.

ON APPEAL FROM NEW JERSEY
SUPREME COURT, WARREN CIRCUIT

BRIEF FOR PLAINTIFF - APPELLEE

This appeal brings up for review a judgment entered in the Supreme Court upon a postea of judgment for $5,295.26 of Supreme Court issues tried at the Warren Circuit.

1. The first ground of appeal is that the Court erred in refusing to strike out the first count of the amended complaint because it fails to set out a cause of action under the terms of the written contract annexed to the complaint because only such tailings were to be paid for as were used upon the premises, and that tailings not so used, but removed from the premises, passed to the defendant and was its property.

2. The second ground of appeal is that the Court erred in giving judgment substantially as set out in the first ground.

3. The other grounds of appeal relate to the admission of letters, statements and checks.

THE FACTS

On or about the 3rd day of October, 1903, the plaintiff and defendant entered into an agreement, commonly called a mining lease, of premises owned by the plaintiff, by which the plaintiff granted the rights, afterward acquired by this defendant, the exclusive right to mine, remove and carry away all the iron ore contained in, on and under all that tract of land and premises, &c.

Ex. A. P. 52.

In consideration that the defendant pay for each ton of iron ore raised, mined and taken away from the said premises the sum of twenty-five cents on washed iron ore, &c., and on all unwashed iron ore shipped and used fifteen cents. (This royalty was afterwards reduced to fifteen cents and ten cents respectively.

Ex. A. P. 54, line 40.

Afterwards, on or about February 27, 1920, the plaintiff and defendant entered into an agreement, Ex. P. 1, pg. 21, line 40, wherein it is recited (among other matters) that there is lying in bank on said premises certain ore tailings and the defendant has or permitted to be erected a building to utilize certain of the ore tailings in the manufacture of paint and paint materials.

Page 22, line 33.

In consideration thereof and of the agreements hereinafter contained, the plaintiff thereby grants unto the defendant, subject to the provisions of this agreement, all his right, title and interest of, in and to the tailings now lying on said premises from ore

theretofore washed or otherwise treated on said premises.

P. 23, lines 10, &c.

ARGUMENT

The questions to be settled by this Court are :

A. To whom did the tailings belong prior to the making of the Agreement dated February 27, 1920. Ex A. P. 52.

B. Upon what terms and conditions did the plaintiff grant to the defendant the said tailings ?

Ex. P. 1, pg 21, line 39.

1. By the making of the Agreement, Exhibit A., the defendant acquired the exclusive right to mine and remove all the iron ore contained in, on or under all that tract of land and premises, &c.

Ex. A. P. 54, line 12 &c.

And the defendant did not acquire the righht to mine and remove any other substances or material whatsoever; its rights were confined exclusively to iron ore, washed or unwashed. The defendant had the privilege to wash this ore on the premises.

Ex. A. Pg. 54, line 28.

The defendant agreed to pay for every ton of merchantable iron ore raised, mined and taken the sum of 25c on washed ore, &c., and on all unwashed iron ore shipped and used 15c per ton. Page 55, top. This royalty was subsequently reduced to 12½c and 10c respectively per ton.

The defendant washed some iron ore and shipped away, leaving the refuse therefrom, which was rock and other material called tailings, on the premises. The said rock and tailings were supposed to be of no value, and the tailings not being iron ore the defendant had no property in them. All that the defendant acquired was the IRON ORE. The de-

fendant did not pay for tailings, and the tailings were the property of the plaintiff.

This was conceded by Mr. Hewitt at the time of the making of the Agreement dated February 27, 1920.

See testimony J. H. Dahlke, p. 97, top to line 20.

2. This condition so remained from the making of the said agreement of lease in 1903 until the making of the agreement on February 27, 1920.

After the recital in said agreement it is provided as follows :

"In consideration of the premises and of the agreements hereinafter contained, it is agreed as follows: The party fo the first part hereby grants unto the party of the second part **subject to the provisions of this agreement,** all his right, title and interest of, in and to all the tailings now lying on the said premises from ore heretofore washed or otherwise treated on said premises, and the tailings which may hereafter be derived from the washing or other treatment of the ore now lying in bank on said premises, and each and all the ingrediants thereof.

Ex. P. 1. Page 23 top.

See page 24, lines 14 to 32.

The party of the second part will pay to the party of the first part for each and every ton of such tailings (viz. tailings now on said premises and tailings from such ore in bank on said premises as shall be hereafter treated on said premises) SO TAKEN AND TREATED OR MANUFACTURED BY THE PARTY OF THE SECOND PART THE SUM OF ONE DOLLAR PER TON; and for each and every ton of such tailings sold by the party of the second part to the Berkleigh Maunfacturing Company or to others and treated by it or them on said premises 25% of the amount paid therefore by it or them to the party of the second

part; it being understood that the amount fixed by the agreement between the party of the second part and the Berkleigh Manufacturing Company is four dollars per ton for said tailings.

The grant by the party of the first part is not an absolute sale of the tailings. It is a grant subject to the provisions of the agreement and the provisions in said agreement are— (read page 24, line 19, etc.) From this it appears that two different prices for said tailings are provided for, viz:

1. THE PARTY OF THE SECOND PART WILL PAY TO THE PARTY OF THE FIRST PART FOR EACH AND EVERY TON OF SUCH TAILINGS SO TAKEN AND TREATED OR MANUFACTURED BY THE PARTY OF THE SECOND PART THE SUM OF ONE DOLLAR PER TON.

Pg. 24, lines 22-27.

2. And for each and every ton, (viz. page 24, lines 22-27) and treated on the premises 25% of the amount paid therefore.

The first price is fixed for tailings taken by the second party and treated or manufactured by it at $1 per ton. The party of the second part is not obligated to treat the tailings on the premises, and perhaps has no right to treat them there and therefor has the the right to take away said tailings and treat them elsewhere, or perhaps the implied right to have them treated by others.

The second price to be paid for tailings is 25% of the amount paid therefore by the Berkleigh Manufacturing Company or by others and treated on the premises. The 25% so fixed could not be less than $1 per ton, but might be in excess of said price; in fact, tailings were sold for $6 per ton.

Ex. P. 8, page 124.

It appears clearly that a distinction was drawn between tailings taken away and tailings treated on

the premises.

It is clear that the contracting parties intended to differentiate and pay 25% for the tailings treated on the premises and pay only $1 per ton for the tailings taken away and treated or manufactured elsewhere.

3. It might be important to observe that the contracting parties construed the contract as above.
Ex. P. 2. Page 104. Test. of Dahlke, p. 97, top to line 20.

4. It seems that the offer of the price to be paid for tailings as stated in Ex. P. 2, page 104, and the acceptance of the terms so offered in Ex. P. 3, page 105 change or modify the terms of the contract by changing the price for tailings shipped from the former price of $1 per ton to 25% per ton net.

It is very apparent that the contracting parties intended so to do and acted upon it by making payment in accordance therewith.
See Ex. P. 5 & P. 6. Pg. 111.

The tailings afterward sold and shipped from the premises were sold at $6 per ton.
See Ex. P. 8, page 124.

This would entitle the plaintiff to a larger payment than $1 per ton, but plaintiff only claimed $1 per ton for tailings shipped, which is the minimum price to be paid to him under the agreement.

Exhibit P. 8, page 124 is the statement furnished by the Basic Iron Ore Company of tailings shipped by the Pequest Company.
Test. Page 73, line 34 &c.

Special attention is called to Exhibit P, 17, page 117, by which it appears that the principal objection is to the amount of the royalty of $1, and an offer to pay 75c for the royalty.

The contention of the appellant, Basic Iron Ore Company, that the agreement upon which the suit is based, (Exhibit P. I p. 21, line 39) was a mere lease agreement to enable the Barkleigh Manufacturing Company or its assigns to erect buildings on the property in question for the purpose of making paint, is contradicted by the contract itself.

Analyzing the agreement, it provides :

1. A grant, (conditioned on royalty payment) of TAILINGS.
   (a) those on bank which were the result previous concentrating operations;
   (b) Those tailings resulting from further ore washing or concentrating operations.

2. Right to use premises or tailings, or manufacture thereof, into paint, incidental to said grant.

3. Right to erect buildings for such purpose with provisions for removal, incidental to said grant.

Clearly, the primary intention of the parties was to grant title to the TAILINGS in consideration of the payment of a royalty. Exhibit A, the original mining grant has the same provision for the erection of buildings and use of the premises in connection with concentration (by washing or other methods) of iron ore. Appellant's counsel would hardly claim that this is an agreement merely for the erection of buildings on premises.

The primary rule in the construction of contracts is that the Court, must, if possible, ascertain and give effect to the mutual intention of the parties, so far as that may be done, without contravention of legal principles.
Melick vs. Pidook, 44, N. J. E. 525. United Boxboard, etc., vs. McEwan Bros., 76 A. 550.

Intention is to be deduced from the language employed by them. 13 C. J. 524, and cases cited.

Contract must be construed as a whole and the intention of the parties collected from the enire instrument and not from detached portions. Chism vs. Schipper, 51 N. J. L. 1, 30, L. R. A. N. S. 1088.

The agreement relied upon uses the term "royalty," (p. 24 l. 4). The plain meaning of the word demonstrates the real purpose and intent of the contracting parties.

The contention of appellant's counsel that the payment of royalties was limited to those tailings which were treated or manufactured on the premises fails to take into consideration the whole language of the agreement. The agreement provides, (p. 25, line 32 :

"The party of the first part shall have the right "at all reasonable times to examine the books relat-"ing to the sale of use of such tailings by the party "of the second part."

We contend that words "sale and use" clearly show an intent to include all tailings shipped off the premises, and no matter where used.

THE LETTERS AND EVIDENCE WERE ADMISSABLE UNDER THE RULES OF EVIDENCE.

In arriving at the intention of the parties where the language of a contract is susceptible of more than one construction, it should be construed in the light of circumstances surrounding them at the time it is made.

United Box Board, etc., Co., vs. McEwan Bros. Co. 76 A. 550, Jersey City v. Flynn, 74 N. J. E. 104.

For this purpose the Court will consider the the nature of the agreement itself, together with all the facts and circumstances leading up to and attending its execution, the relation and condition of the parties, the nature and situation of the subject matter and the apparent purpose of making the agreement.

Ryer v. Finkle, 75 N. J. L. 677. Morris Canal Co. vs. Matthieson, 17 N. J. E. 385.

What was the position of the parties at the time the contract was made ?

Mr. Dahlke discovered that buildings which were not for mining operation, were being erected on the premises, (p. 96, line 25) ; he called the attention of Mr. Hewitt, an officer of the appellant company, to this fact, and claimed title in the tailings. Mr Hewitt conceded the title to the tailings was in Mr. Dahlke, (testimony of John H. Dahlke, p. 97, lines 1-20). This is not denied by Mr. Hewitt, and is further evidenced by Mr. Dahlke's letter. Ex. P. 9, p. 106.

For that reason alone the agreement of February 27, 1920, was executed. It was a conveyance of title to the tailings, and the consideration was a royalty payment.

The contention of appellant that the tailings had already been paid for is answered by the terms of the previous agreement. Crude ore included the iron ore, tailings and rock or slag. When shipped, the crude or untreated ore tonnage included the weight of worthless rock and the tailings as well as the iron ore; and Mr. Dahlke was paid therefor the sum of ten cents per ton.

When appellant shipped, treated or refined ore, it used the premises for the purpose of treatment and refining and paid only twelve and one-half cents per ton. There was no tonnage of rock, slag or tailings paid for. The payment was only for "refined ore." Exhibit D-7, p. 103.

Supplementing all other rules of construction and in a sense determining the matter beyond a reasonable doubt, the parties themselves agreed upon a construction of the contract. Charles E. Hewitt, an officer of the appellant company, took the first step, in his letter of August 22, 1923 (Exhibit P. 2, p 102) wherein he wrote Mr. Dahlke :

"In line with the contract between us and "our recent conversation, in regard to the royalty "you would be willing to take," etc.

The letter suggests a modification of price and refers specifically to tailings to be shipped, but not TREATED, on the premises.

Mr. Dahlke accepts the proposition, (Ex. P. 3) Subsequent correspondence suggests an after thought on the part of Mr. Hewitt. But the ultimate result is payment in accordance with the agreement of these two letters.

Where the parties to a contract have given it a practical construction by their conduct as by acts in partial performance, such construction is entitled to great, if not controlling weight in determining its proper interpretation, PARTICULARLY when such interpretation is agreed upon before any controversy has arisen.

Edmunds vs. Miller, 61 N. J. L. 677. Camden etc., R. R. Co. vs. Lippencott, N. J. L. 405. Church vs. Florence Iron Works, 45 N. J. L. 129. VanDyke vs. Anderson, 83 N. J. E. 568. United Box Board Co. vs. McEwan Bros. Co., 76 A. 550.

We therefore, respectfully urge that the trial court committed no legal error in granting motion for direction of a verdict and the judgment of the Supreme Court should be affirmed.

JOHN H. DAHLKE, pro se,
SYLVESTER C. SMITH, Jr.
Of Counsel for Respondent.