INDEX

TESTIMONY.

For Plaintiff.

For Defendant.

EXHIBITS.

		Off'd	P't'd
P. 1.	Agreement	40	88
P. 2.	Letter dated February 17, 1925, Gibbs Construction Company to August Lacombe	41	95
P. 3.	Letter dated May 30, 1925, Gibbs Construction Company to August Lacombe	43	96
P. 4.	Letter dated April 10, 1925, Gibbs Construction Company to August Lacombe	48	97

Notice of Appeal.

NOTICE OF APPEAL.

Filed April 19, 1927.

Essex County Circuit Court

AUGUST L. LACOMBE,
Plaintiff,
vs.
TYLER M. GIBBS, trading as T. M. GIBBS CONSTRUCTION COMPANY,
Defendant.

Action at Law.

Notice of Appeal.

To: Milton M. Unger, Esq., attorney for plaintiff.

DEAR SIR:

PLEASE TAKE NOTICE, that the defendant appeals to the Court of Errors and Appeals of New Jersey from the whole of the judgment entered in this cause.

WOLBER & GILHOOLY,
Attorneys for Defendant.

Dated, April 13, 1927.

Service of the within notice of appeal is hereby acknowledged this 14th day of April, 1927.

MILTON M. UNGER,
Attorney for Plaintiff.

GROUNDS OF APPEAL.

Filed May 12, 1927.

New Jersey Court of Errors and Appeals

AUGUST L. LACOMBE, *Plaintiff-Respondent,* *vs.* TYLER M. GIBBS, trading as T. M. GIBBS CONSTRUCTION COMPANY, *Defendant-Appellant.*	*Action at Law.* *Grounds of Appeal.*

To: Milton M. Unger, Esq., attorney for plaintiff-respondent, 763 Broad street, Newark, New Jersey.

The appellant states the following grounds of appeal:

1. That the Court erred in granting the motion of the plaintiff for direction of a verdict in favor of the plaintiff on the first count of the complaint.

2. That the Court erred in directing a verdict for the plaintiff on the counter-claim filed by the defendant.

WOLBER & GILHOOLY,
Attorneys for Defendant-Appellant.

Service of the within grounds of appeal is hereby acknowledged this 11th day of May A. D. 1927.

MILTON M. UNGER,
Attorney for Plaintiff-Respondent.

WRIT OF ATTACHMENT.

ESSEX COUNTY CIRCUIT COURT.

Between AUGUST L. LACOMBE, *Plaintiff,* *and* TYLER M. GIBBS, trading as T. M. GIBBS CONSTRUCTION Co., *Defendant.*

Returnable, April 1, 1926, Milton M. Unger, attorney.

By virtue of the above-stated and hereto annexed writ to me directed, I did on the 5th day of March, as 1926, at 11:45 A. M., at the suit of the plaintiff above-named, in the presence of Michael J. A. Doyle (a credible person), attach the rights and credits, moneys, effects, goods, chattels, lands and tenements of the said defendant, and particularly all his right, title and interest of, in and to the hereafter described:

Certain moneys due defendant or to become due the said defendant from the Board of Education of Irvington, or from the Town of Irvington, N. J.

Service of writ made on Board of Education by delivering a true copy thereof to William A. Sherman, Secretary at its office, Clinton avenue, Irvington, N. J.

Also on Town of Irvington, N. J., by delivering a true copy thereof to W. H. Jamoneau, Town Clerk, at City Hall, Irvington, N. J.

No other rights or credits, moneys or effects, goods or chattels, lands or tenements of the said defendant being found in my county.

HARRY B. O'CONNELL,
Sheriff.

By JOHN J. McLAUGHLIN,
Special Deputy.

We, the undersigned, John J. McLaughlin, Special Deputy Sheriff, and Michael J. A. Doyle, Freeholder, of the County of Essex, hereby value and appraise the rights and tenements of the said defendant at the sum of ten thousand dollars.

JOHN J. McLAUGHLIN,
Special Deputy Sheriff.

MICHAEL J. A. DOYLE,
Freeholder.

ESSEX COUNTY. *ss.*

THE STATE OF NEW JERSEY, TO OUR
(L. S.) SHERIFF OF OUR COUNTY OF ESSEX,
GREETING:

WE COMMAND YOU, that you attach the rights and credits, moneys and effects, goods, and chattels, lands and tenements of Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, wheresoever they may be found in your county, so that he be and appear before our Circuit Court to be held at Newark, and for said County of Essex, on the 1st day of April, next,

to answer August L. Lacombe in an action at law upon contract, wherein the said August L. Lacombe demands $6,000, and have you then and there this writ.

WITNESS, WILLIAM A. SMITH, Esquire, Judge of our said Circuit Court at Newark aforesaid, this 4th day of March, 1926.

JOHN H. SCOTT,
Clerk.

MILTON M. UNGER,
Attorney.

Served the within writ in the manner and form required by law in the presence of Michael J. A. Doyle, a credible person, this 5th day of March A. D. 1926, as per inventory and appraisement hereto annexed.

HARRY B. O'CONNELL,
Sheriff.

By JOHN J. McLAUGHLIN,
Special Deputy.

I hereby appoint and depute John J. McLaughlin to serve the within writ.

Witness my hand and seal this 4th day of March, 1926.

HARRY B. O'CONNELL,
Sheriff.

By ALFRED C. WALKER,
Under Sheriff.

Sheriff fees, $6.62.

(L. S.)

AFFIDAVIT.

Filed March 4, 1926.

ESSEX COUNTY CIRCUIT COURT.

AUGUST L. LACOMBE, *Plaintiff,* *vs.* TYLER M. GIBBS, trading as T. M. GIBBS CONSTRUCTION Co., *Defendant.*	*In Attachment.* *Affidavit.*

STATE OF NEW JERSEY, COUNTY OF ESSEX. } *ss.*

AUGUST L. LACOMBE, being duly sworn according to law, upon his oath deposes and says: I am the plaintiff in the above suit. Tyler M. Gibbs is trading as T. M. Gibbs Construction Company, and is not a resident of the State of New Jersey at the present time, and no summons can be served upon him in the State of New Jersey. The said Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, owes to deponent the sum of $3,564.01, as nearly as this deponent can specify.

The consideration for said indebtedness is as follows: On February 17, 1925, deponent entered into an agreement in writing with the said defendant, whereby deponent agreed to provide necessary equipment, tools, teams and labor to do general and trench excavation for a high school on Clinton avenue, Irvington, N. J., and the defendant agreed to pay therefor the sum of seventy cents per cubic yard for general excavation and the sum of $1.25 per cubic yard for trench excavation; the payments to be made on or about the 15th of the month and to be for eighty per cent. of the value of the work done up to the 1st of the month.

Pursuant thereto, plaintiff excavated 7,945 yards of general excavation at seventy cents per cubic yard and became entitled to $5,561.50, and the plaintiff excavated 117 yards of trench excavation at $1.25 per cubic yard and became entitled to $146.25, making a total of $5,707.75. The defendant paid plaintiff on account thereof, $2,500, and owes a balance of $3,207.75, which amount, although duly demanded, the defendant has neglected and refused to pay.

In addition thereto, and during the progress of the work, the defendant wrongfully broke his contract and refused to allow plaintiff to proceed with his said work. There remained to be done 783 cubic yards of trench excavation, and had plaintiff been permitted to finish the same, he would have made a profit of 45½ cents per cubic yard, in doing said work.

He therefore lost and was deprived of a profit of $356.26, which, together with the aforesaid sum of $3,207.75, makes a total of $3,564.01, which is the sum in which the defendant is now indebted to the plaintiff.

AUGUST L. LACOMBE.

Sworn to and subscribed before
me this 23rd day of February
A. D. 1926.

SAMUEL GREEN,
Notary Public of New Jersey.
My Commission Expires Nov. 3, 1929.

(SEAL)

ORDER FOR PUBLICATION AND APPOINTMENT OF AN AUDITOR.

Filed March 13, 1926.

ESSEX COUNTY CIRCUIT COURT.

AUGUST L. LACOMBE, *Plaintiff,*	*In Attachment.*
vs.	*Order for Publication and Appointment of an Auditor.*
TYLER M. GIBBS, trading as T. M. GIBBS CONSTRUCTION Co., *Defendant.*	

It appearing that a certain writ of attachment has been duly issued out of the Circuit Court in and for the County of Essex in the above-stated action, directed to the Sheriff of the County of Essex, tested March 4, 1926, returnable on the 1st day of April, 1926, and that in pursuance thereof a certain attachment and levy has been made upon certain rights and credits and certain moneys due or to become due to the defendant, Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, from the Board of Education of Irvington or from the Town of Irvington, County of Essex and State of New Jersey; and application being now made for an order of publication and the appointment of an auditor to adjust and ascertain the amount due to the plaintiff and each of the applying creditors, if any, under "An Act for the relief of creditors against absent, fraudulent and absconding debtors (Revision of 1901)" and it appearing that the sheriff has made a return of the said writ

to this court, and no appearance having been entered in the cause by the defendant:

It is, therefore, on this 13th day of March, 1926, ORDERED, that a notice of the issuing of the attachment be published in the manner prescribed by the statute once a week for four successive weeks in the Newark Evening News, published at Newark, in this State, and that a copy of said notice be mailed to the defendant at his last known address; and it is further ORDERED, that MICHAEL G. ALENICK, Esquire, of the City of Newark, New Jersey, be and is hereby appointed auditor to adjust and ascertain the amounts due to the plaintiff, and each of the applying creditors, if any.

On motion of Milton M. Unger, attorney of plaintiff.

Let the above rule be entered on the minutes.

WORRALL F. MOUNTAIN.

COMPLAINT.

Filed April 1, 1926.

ESSEX COUNTY CIRCUIT COURT.

AUGUST L. LACOMBE, *Plaintiff,* *vs.* TYLER M. GIBBS, trading as T. M. GIBBS CONSTRUCTION Co., *Defendant.*	*In Attachment.* *Complaint.*

AUGUST L. LACOMBE, plaintiff, residing in the Town of Irvington, County of Essex and State of New Jersey, says that:

COUNT ONE.

1. On February 17, 1925, plaintiff entered into an agreement in writing with the above defendant, whereby plaintiff agreed to provide necessary equipment, tools, teams and labor to do the general and trench excavation for a high school on Clinton avenue, Irvington, N. J., and defendant agreed to pay therefor the sum of seventy cents per cubic yard for general excavation and the sum of $1.25 per cubic yard for trench excavation, the payments to be made on or about the 15th of the month, and to be for eighty per cent. of the value of the work done up to the 1st of the month. The contract herein referred to will be produced at the trial of this cause.

2. Pursuant to the said agreement, the plaintiff excavated 7,945 cubic yards of general excavation at seventy cents per cubic yard, and became entitled to $5,561.50 and the plaintiff excavated 117 cubic yards of trench excavation at $1.25 per cubic yard, and became entitled to $146.25, making in all a total of $5,707.75. The defendant paid plaintiff on account thereof, the sum of $2,500 and still owes to the plaintiff the balance of $3,207.75, which amount although duly demanded, the defendant has neglected and refused to pay.

WHEREFORE, judgment will be claimed on the first count in the sum of $3,207.75, together with interest and costs of suit to be taxed.

COUNT TWO.

1. The plaintiff repeats paragraph one of the first count.

2. During the progress of the work the defendant wrongfully broke his contract and refused to allow the plaintiff to proceed with the said work.

3. There remained to be done to complete the contract 783 cubic yards of trench excavation and had the plaintiff been permitted to finish the same, he would have made a profit of forty-five and one-half cents (45½c) per cubic yard in doing said work.

4. Plaintiff, therefore, lost and was deprived of a profit of $356.26.

Judgment will be claimed on the second count in the sum of $356.26.

RECAPITULATION.

1. Judgment will be claimed on the first count for $3,207.75, plus interest and costs.

2. Judgment will be claimed on the second count for $356.26, plus interest and costs.

3. Judgment will be claimed on both counts for $3,564.01, plus interest and costs of suit to be taxed.

MILTON M. UNGER,
Attorney of Plaintiff.

RULE DISCHARGING AUDITOR.

Filed March 25, 1926.

ESSEX COUNTY CIRCUIT COURT.

AUGUST L. LACOMBE, *Plaintiff,* *vs.* TYLER M. GIBBS, trading as T. M. GIBBS CONSTRUCTION COMPANY, *Defendant.*	*Action at Law.* *In Attachment.* *Rule Discharging Auditor.*

It appearing that heretofore and on the 13th day of March, 1926, Michael Alenick, Esquire, was appointed auditor to adjust and ascertain the amounts due the plaintiff in the above-entitled action, if any, and it appearing that since the date of said appointment the defendant has entered his appearance. It is, therefore, on this 25th day of March, 1926:

ORDERED, that Michael G. Alenick, Esquire, be discharged as auditor in the above-entitled action.

WORRALL F. MOUNTAIN,
Judge.

I hereby consent to the entry of the above rule.

MILTON M. UNGER,
Attorney for Plaintiff.

Notice of Appearance.

NOTICE OF APPEARANCE.

Filed March 25, 1926.

ESSEX COUNTY CIRCUIT COURT.

AUGUST L. LACOMBE, *Plaintiff,* vs. TYLER M. GIBBS, trading as T. M. GIBBS CONSTRUCTION COMPANY, *Defendant.*	*Action at Law.* *In Attachment.* *Notice of Appeal.*

To: Milton M. Unger, Esq., attorney for plaintiff, 763 Broad street, Newark, New Jersey.

SIR:

TAKE NOTICE, that on the 25th day of March, 1926, we, as attorneys for the defendant in the above-entitled action filed the defendant's appearance to the claim of the plaintiff above-named and on behalf of the defendant we inform you that we are willing to accept a declaration of the suit instituted by you on behalf of the plaintiff.

WOLBER & GILHOOLY,
Attorneys for Defendant.

Service acknowledged March 25, 1926.

MILTON M. UNGER,
Attorney of Plaintiff.

Appearance of Defendant.

APPEARANCE OF DEFENDANT.

Filed March 25, 1926.

ESSEX COUNTY CIRCUIT COURT.

AUGUST L. LACOMBE, *Plaintiff,* vs. TYLER M. GIBBS, trading as T. M. GIBBS CONSTRUCTION COMPANY, *Defendant.*	*Action at Law.* *In Attachment.* *Appearance of Defendant.*

The defendant's appearance is entered in the above cause this 25th day of March, 1926.

WOLBER & GILHOOLY,
Attorneys of Defendant.

BOND.

Filed April 16, 1926.

ESSEX COUNTY CIRCUIT COURT.

AUGUST L. LACOMBE, *Plaintiff,* *vs.* TYLER M. GIBBS, trading as T. M. GIBBS CONSTRUCTION Co., *Defendant.*	*In Attachment.* *Bond.*

KNOW ALL MEN BY THESE PRESENTS, that we Tyler M. Gibbs, trading as T. M. Gibbs Construction Co. of the City of Philadelphia, State of Pennsylvania, as principal and the Continental Casualty Company, a corporation of the City of Chicago, State of Illinois, licensed to do business in the State of New Jersey, as surety, are held and firmly bound unto August L. Lacombe of the Town of Irvington, County of Essex, and State of New Jersey, the plaintiff named in the above entitled action in the sum of $3,864.01, to be paid to the said August L. Lacombe, his executors, administrators and assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly, severally and firmly by these presents.

Sealed with our seals and dated this 7th of April, in the year 1926.

The condition of this obligation is such that whereas a certain writ of attachment lately issued out of the Essex County Circuit Court,

by the suit of August L. Lacombe against the said Tyler M. Gibbs, trading as T. M. Gibbs Construction Co.; by virtue whereof the Sheriff of said County of Essex did seize and attach certain personal property consisting of certain moneys, due or to become due to the defendant from the Board of Education of Irvington or from the Town of Irvington, County of Essex and State of New Jersey; and the said Tyler M. Gibbs, trading as T. M. Gibbs Construction Co., having entered his appearance on the suit of said plaintiff, and the said Tyler M. Gibbs trading as T. M. Gibbs Construction Co., is about to apply to the said court to set aside the said writ and to discharge his aforesaid personal property from the lien thereof.

Now, therefore, if the said Tyler M. Gibbs, trading as T. M. Gibbs Construction Co., shall pay to the said August L. Lacombe, his executors, administrators or assigns, said moneys as shall be adjudged to be due him by the judgment of the Court in the said action, then this obligation to be void, otherwise to remain in full force and virtue.

TYLER M. GIBBS,
Trading as T. M. Gibbs
Construction Co.

Signed, sealed and delivered
in the presence of

C. M. HARTMAN.
(SURETY)

Attest:

CONTINENTAL CASUALTY COMPANY,
By S. ROYDEN MANNING,
Attorney in Fact.

(SEAL)

Bond.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA. } *ss.*

Be it remembered that on this 10th day of April, 1926, before me, the subscriber, D. Audley Reuben, Notary Public, personally appeared Tyler M. Gibbs, trading as T. M. Gibbs Construction Co., known to me to be the obligor mentioned in the within bond, to whom I first made known the contents thereof, and thereupon he acknowledged that, he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

D. AUDLEY REUBEN,
Notary Public.
Commission Expires March 24th, 1927.

(SEAL)

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA. } *ss.*

Be it remembered, that on this day of April, 1926, before me the subscriber, a Notary Public, personally appeared S. Royden Fanning, known to me to be the Attorney-in-Fact of the Continental Casualty Co., a corporation, one of the obligors within named, who being by me duly sworn on his oath said and made proof to my satisfaction that he is such attorney-in-fact, and that he well knows the common seal of said corporation, and that the seal affixed to the within bond is such common seal and was thereto affixed by S. Royden Fanning, the attorney-in-fact of said corporation, and that the said bond was by the said S. Royden Fanning also signed and delivered as and for the voluntary

Bond.

act and deed of said corporation in the presence of said deponent, who thereupon subscribed his name thereto as attesting witness.

S. ROYDEN FANNING.

Sworn and subscribed before me, at Philadelphia, Pa., this 7th day of April A. D. 1926.

D. AUDLEY REUBEN,
Notary Public.
Commission Expires March 24, 1927.

(SEAL)

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA. } *ss.*

IN THE COURTS OF COMMON PLEAS OF PHILADELPHIA COUNTY.

(SEAL) I, John M. Scott, Prothonotary of the Courts of Common Pleas of said County, which are Courts of Record, having a common seal, being the officer authorized by the laws of the State of Pennsylvania, to make the following certificate, acting by my principal deputy, William J. Kerns, or my second deputy, Meredith Hanna, do certify that D. Audley Reuben, Esquire, before whom the annexed affidavit was made, was at the time of so doing a Notary Public for the Commonwealth of Pennsylvania, residing in the County of Philadelphia, duly commissioned and qualified to administer oaths and affirmations and to take acknowledgments and proofs of deeds or conveyances for land, tenements and hereditaments

Bond.

to be recorded in said State of Pennsylvania, and to all whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that I am well acquainted with the handwriting of the said Notary Public and verily believe the signature thereto is genuine, and that said oath or affirmation purports to be taken in all respects as required by the laws of the State of Pennsylvania.

The impression of the seal of the Notary Public is not required by law to be filed in this office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court this 7th day of April in the year of our Lord one thousand nine hundred and twenty-six (1926).

JOHN M. SCOTT,
Prothonotary.

By Wm. J. Kerns,
Principal Deputy Prothonotary.

Durante Absentia,
Secundum Legem.

Bond.

Tax Paid on Original

CONTINENTAL CASUALTY COMPANY,

H. G. B. Alexander, President.
Chicago, Ill.

CERTIFICATE OF AUTHORITY INDIVIDUAL ATTORNEY-IN-FACT.

Know All Men By These Presents, that the Continental Casualty Company, a corporation, duly organized under the laws of the State of Indiana, and having its general office in the City of Chicago, and State of Illinois, hath made, constituted and appointed, and does by these presents make, constitute and appoint, S. Royden Fanning of Philadelphia, Pa., its true and lawful attorney-in-fact with full power and authority hereby conferred to sign, seal and execute in its behalf bonds, undertakings and other obligatory instruments of similar nature subject, however, to the following conditions and limitations: Any and all Fidelity and Surety Bonds in penalty not exceeding five thousand dollars ($5,000) each and to bind the Continental Casualty Company thereby as fully and to the same extent as if such instruments were signed by the duly authorized officers of the Continental Casualty Company and all the said attorney, pursuant to the authority hereby given are hereby ratified and confirmed.

This power of attorney is made and executed pursuant to and by authority of the following By-Law adopted by the Board of Directors of the company at a meeting duly called and held on the 17th day of October, 1922.

"ARTICLE XI—SURETY BONDS AND UNDERTAKINGS.

SECTION 2.

Appointment of attorneys-in-fact. The president or any vice-president may, from time to time appoint by written certificates attorneys-in-fact to act in behalf of the company in the execution of policies of insurance, bonds, undertakings and other obligatory instruments of like nature. Such attorneys-in-fact subject to the limitations set forth in their respective certificates of authority shall have full power to bind the company by their signature and execution of any such instrument and to attach the seal of the company thereto. The president or any vice-president or the Board of Directors may at any time revoke all power and authority previously given to any attorney-in-fact."

IN WITNESS WHEREOF, the CONTINENTAL CASUALTY COMPANY has caused these presents to be signed by its vice-president and its corporate seal to be hereto affixed this 29th day of March, 1926.

CONTINENTAL CASUALTY COMPANY.

By H. G. BADGEROW,
Vice-President.

(SEAL)

STATE OF ILLINOIS, }
COUNTY OF COOK. } *ss.*

On this 29th day of March, 1926, before me personally came H. C. Badgerow, to me known, who being by me duly sworn did depose and say that he resides in the City of Chicago, State of Illinois; that he is a vice-president of the CONTINENTAL CASUALTY COMPANY, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed pursuant to authority given by the Board of Directors of said corporation and that he signed his name thereto pursuant to like authority.

M. R. MARX.

My Commission Expires Nov. 18, 1926.

(NOTARIAL SEAL)

CERTIFICATE.

I, I. F. PARSONS, Assistant Secretary of the CONTINENTAL CASUALTY COMPANY, do hereby certify that the attached power of attorney, dated March 29, 1926, in behalf of S. ROYDEN FANNING, is a true and correct copy and that same is still in force. In testimony whereof, I have hereunto subscribed my name and affixed the corporate seal of the said company, this 29th day of March, 1926.

I. F. PARSONS,
Assistant Secretary.

Bond.

CONTINENTAL CASUALTY COMPANY,
CHICAGO.

Financial Statement, December 31, 1925.

RESOURCES.

Real estate unincumbered	$ 178,950.00
Mortgage loans—first liens on real estate	2,568,596.24
Stocks and bonds	7,574,963.00
Cash in banks and offices	570,770.84
Collections in transit	187,495.91
Premiums in course of collection	3,104,907.81
Interest due and accrued	202,702.18
Other assets	226,099.49
Gross assets	$14,614,485.47
Non-admitted assets	350,471.52
Admitted assets	$14,264,013.95

Commissions to become due and other liabilities	$ 1,124,807.39
Reserves (required by law) for reinsurance	6,023,475.93
Liability and compensation losses	2,003,271.30
Claims in process of adjustment	1,312,066.84
Capital stock	2,000,000.00
Surplus over all voluntary	1,000,000.00
Reserve	800,392.49
	$14,264,013.95

Bond.

STATE OF ILLINOIS, }
COUNTY OF COOK. } *ss.*

E. G. TIMME, being duly sworn, says, that he is Secretary of the Continental Casualty Company and that the above is a true and correct statement of the assets and liabilities of said company on the 31st day of December, 1925.

E. G. TIMME,
Secretary.

Subscribed and sworn to before me this 27th day of January, 1926.

I. F. PARSONS,
Notary Public.
(SEAL)

I approve the within bond as to form and the sufficiency thereof.

WORRALL F. MOUNTAIN,
Judge, Essex County Circuit Court.

I hereby acknowledge the sufficiency of the within bond and approve of its form and consent to the filing of the same.

MILTON M. UNGER,
Attorney for Plaintiff,
August L. Lacombe.

RULE TO SET ASIDE ATTACHMENT.

Filed April 16, 1926.

ESSEX COUNTY CIRCUIT COURT.

AUGUST L. LACOMBE, *Plaintiff,* vs. TYLER M. GIBBS, trading as T. M. GIBBS CONSTRUCTION Co., *Defendant.*	*In Attachment.* *Rule to Set Aside Attachment.*

Upon reading the consent of the attorney for the plaintiff in the above-entitled matter hereunder written to the entry of this rule and the said defendant, Tyler M. Gibbs, trading as T. M. Gibbs Construction Co., having entered his appearance at the suit of the plaintiff and has also entered into bond with an approved security, pursuant to the statute in such case made and provided, which bond has been approved by me and accepted and approved by the aforesaid attorney for the plaintiff;

Therefore, it is ordered by the Court that upon filing the said bond, with my approval, endorsed thereon, with the clerk of this court, the said attachment therein be set aside.

Dated this 15th day of April A. D. 1926.

On motion of

WOLBER & GILHOOLY,
Attorneys of Defendant.

Let the above order be entered on the minutes.

WORRALL F. MOUNTAIN,
Judge.

I hereby consent to the entry of the above order and waive notice of application therefore.

MILTON M. UNGER,
Attorney for Plaintiff.

ANSWER AND COUNTER-CLAIM.

ESSEX COUNTY CIRCUIT COURT.

AUGUST L. LACOMBE, *Plaintiff,*	*In Attachment.*
vs.	
TYLER M. GIBBS, trading as T. M. GIBBS CONSTRUCTION COMPANY, *Defendant.*	*Answer and Counter-Claim.*

The defendant residing in the City of Philadelphia, State of Pennsylvania, answering the complaint of the defendant, says that:

ANSWER TO FIRST COUNT.

1. He admits paragraph one of the first count.

2. He denies the remaining allegations of the first count of the complaint, excepting that he admits that he paid to the plaintiff the sum of $2,500.

FIRST SEPARATE DEFENSE TO THE FIRST COUNT.

1. It was amongst other things in the contract mentioned in the complaint provided that it was understood and agreed by and between the parties to said contract that the work included in said contract was to be done under the direction of, and subject to the approval of and acceptance by, the architect and contractor.

2. The work alleged to have been performed by the plaintiff was not accepted by the defendant, who was the contractor mentioned in said contract for the reason that the plaintiff did not complete his said work.

SECOND SEPARATE DEFENSE TO THE FIRST COUNT.

1. The plaintiff agreed to and with the defendant that he, the plaintiff, would co-operate with the defendant and all other sub-contractors employed on the work in order to avoid complications and insure first-class workmanship in every respect, and that in the performance of his said contract that the plaintiff would employ only men whose work would be acceptable to and in harmony with other workmen.

2. The plaintiff failed to co-operate with the defendant and other sub-contractors employed on the work so as to avoid complications and he failed to provide first-class workmen and the plaintiff failed to employ men whose work was acceptable to and in harmony with other workmen on the building.

3. Pursuant to article 6 of the aforesaid contract, the defendant gave to the plaintiff a three-day written notice to provide such labor as was required under said contract but the said plaintiff refused to supply the necessary and proper labor to perform his said contract and as a result thereof the defendant was obliged to engage another contractor to perform the work so required to be performed by the plaintiff.

THIRD SEPARATE DEFENSE TO THE FIRST COUNT.

1. It was provided in the aforesaid contract that final payment thereunder should be made within thirty days after the completion and acceptance of the work.

2. The plaintiff has not completed the work required to be performed under the said contract nor has the same been accepted by the defendant.

ANSWER TO SECOND COUNT.

1. Paragraph one in the second count is admitted.

2. The defendant denies the remaining allegations contained in the second count of the complaint.

SEPARATE DEFENSE TO SECOND COUNT.

1. The defendant repeats each and every allegation contained in the first, second and third separate defense to the first count and makes the same a part hereof as if recited at length.

COUNTER-CLAIM.

1. Heretofore and on February 17, 1925, the defendant entered into a written agreement with the plaintiff whereby plaintiff amongst other things agreed to supply the necessary equipment, tools, pumps and labor to perform the trench excavation required for the erection of a high school located on Clinton avenue, Irvington, New Jersey, in accordance with the terms of said

contract and the plans and specifications for said work.

2. Plaintiff agreed to perform said trench excavation in accordance with the terms of said contract and the plans and specifications for the price of $1.25 per cubic yard.

3. It was amongst other things in said contract provided that the plaintiff agreed that he would co-operate with the defendant and all sub-contractors employed in the erection of the aforesaid building for the purpose of avoiding complications and to insure first-class workmanship in every respect and that in the performance of his work under said contract and in the erection of the work provided for at the place aforesaid that he, the plaintiff, would employ only men whose work would be acceptable to and in harmony with other workmen on the building.

4. It thereupon became the duty of the defendant under said contract to co-operate with the plaintiff and all other contractors employed on the work aforesaid, in order to avoid complications and to insure first-class workmanship in every respect and it also became the duty of the plaintiff to employ men whose work would be acceptable to and in harmony with other workmen on the building.

5. Later disregarding the expressed terms of said contract, defendant failed to co-operate with the defendant and other contractors employed on the aforesaid work and he failed to employ men whose work was acceptable to and in harmony with other workmen on the aforesaid building. It was further provided by said con-

tract that should the plaintiff at any time refuse or neglect to supply a sufficiency of properly skilled workmen or fail in any respect to prosecute the work with promptness and diligence or fail in the performance of any of the agreements in said contract contained, that the defendant should be at liberty after three days' written notice to the plaintiff to provide any such labor and to deduct the cost thereof from any money due or thereafter to become due to the plaintiff under said contract. It was further provided that if the defendant agreed that such refusal on the part of the plaintiff was sufficient ground for said action that the defendant should be at liberty to terminate the employment of the plaintiff for the said work and to enter upon the premises and take possession of the same for the purpose of completing the work neglected under such contract and to employ any other person or persons to finish the work and it was further provided that in case of such discontinuance of the employment of the plaintiff that the plaintiff should not be entitled to receive any further payment under his said contract until the said work should be wholly finished, at which time if the unpaid balance of the amount to be paid under said contract should exceed the expense incurred by the defendant in finishing such work, such excess should be paid by the defendant to the plaintiff, but if such expense should exceed the unpaid balance the plaintiff should pay it to the defendant.

6. Complying with the terms of said contract as mentioned in the preceding paragraph, the defendant did serve upon the plaintiff a three-day written notice requiring the plaintiff to comply with his said contract and which said notice was

served on the plaintiff on or about April 10, 1925.

7. The plaintiff failed to complete the work required to be performed under said contract in accordance with the terms thereof and the defendant was obliged to employ and he did employ other men to perform the labor which the plaintiff had agreed to perform under his said contract.

8. At the time that the plaintiff refused to complete his work under said contract there remained to be removed the sum of 969 cubic yards of trench excavation and which work the defendant was compelled to have performed and for which he was compelled to pay the sum of $5.10 per cubic yard amounting to $4,846.82.

9. It was provided in said contract that the plaintiff, comply with the laws relating to Workmen's Compensation and Public Liability.

10. By reason of the plaintiff's failure to complete the work it was necessary for the defendant to provide workmen's compensation insurance and the defendant was compelled to pay the sum of $179.89 therefor.

The defendant demands damages on the counter-claim in the sum of $5,026.71, together with lawful interest and costs of suit to be taxed.

WOLBER & GILHOOLY,
Attorneys for Defendant.

Filing as of time is consented to.

MILTON M. UNGER,
Attorney for Plaintiff.

REPLY AND ANSWER TO COUNTER-CLAIM.

Filed May 24, 1926.

ESSEX COUNTY CIRCUIT COURT.

AUGUST L. LACOMBE, *Plaintiff,* vs. TYLER M. GIBBS, trading as T. M. GIBBS CONSTRUCTION Co., *Defendant.*	*In Attachment.* *Reply and Answer to Counter-Claim.*

The plaintiff, replying to the answer filed herein, says:

1. He repeats, re-affirms and re-asserts each and every allegation contained in the complaint filed herein.

2. He denies each and every allegation contained in the separate defenses raised to the first and second counts.

The plaintiff, answering the counter-claim exhibited by the defendant, says:

1. He admits paragraphs one, two and three.

2. He denies paragraphs four and five.

3. He admits receiving a three-day notice mentioned in paragraph six, but denies the remainder of the allegations contained in said paragraph.

4. He denies paragraphs seven and eight.

5. He has no knowledge sufficient to form a belief as to the truth of the matters contained in paragraphs nine and ten of defendant's counter-claim, and places the defendant upon his proof of the same.

FIRST SEPARATE DEFENSE TO COUNTER-CLAIM.

The defendant, by his agents, servants and employees, unlawfully and in violation of the rights of the plaintiff, interfered with, obstructed, and refused to allow the plaintiff to proceed with his work in accordance with the terms of the contract, and did order and direct the plaintiff to cease performance thereof.

SECOND SEPARATE DEFENSE.

At the time that plaintiff and his workmen were on the job, no other contractor or subcontractor was employed in the manufacturing, assembling or erection of the work specified in the contract, and there were no other workmen on the job, and no other workmen with whom the plaintiff and or his workmen had to work harmoniously.

MILTON M. UNGER,
Attorney of Plaintiff.

REPLY TO ANSWER TO COUNTER-CLAIM.

Filed May 26, 1926.

ESSEX COUNTY CIRCUIT COURT.

AUGUST L. LACOMBE, *Plaintiff,* *vs.* TYLER M. GIBBS, trading as T. M. GIBBS CONSTRUCTION COMPANY, *Defendant.*	*In Attachment.* *Reply to Answer to Counter-Claim.*

The defendant, replying to the answer to the counter-claim filed herein, says:

1. He denies the allegations contained in the first and second separate defenses.

WOLBER & GILHOOLY,
Attorneys for Defendant.

POSTEA AND JUDGMENT.

ESSEX COUNTY CIRCUIT COURT.

39802 AUGUST L. LACOMBE, *Plaintiff,* *vs.* TYLER M. GIBBS, trading as T. M. GIBBS CONSTRUCTION COMPANY, *Defendant.*	*Action at Law.* *On Verdict by a Jury.* *Judgment for Plaintiff.*

Damage $3,560.60
Costs 106.38

Total $3,666.98

Milton M. Unger, plaintiff's attorney.

This action was tried before Judge Nelson Y. Dungan, with a jury at the County Circuit Court on March 16, 1927.

The cause having been heard and submitted to the jury, they return their verdict as follows:

They find in favor of the plaintiff, August L. Lacombe and against the defendant, Tyler M. Gibbs, trading as T. M. Gibbs Construction Co., for the sum of three thousand five hundred sixty dollars and sixty cents ($3,560.60) damage.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of three thousand five hundred sixty dollars and sixty cents ($3,560.60) and costs which are taxed at one hundred six dollars and thirty-eight cents, making

Certificate of Circuit Court Clerk.

in the whole the sum of thirty-six hundred sixty-six dollars and ninety-eight cents.

Judgment entered and signed March 16, 1927.

WILLIAM S. GUMMERE,
Judge.

JOHN H. SCOTT,
Clerk.

Recorded in Book 102, Circuit Court Judgments, page 374.

ESSEX COUNTY CLERK'S OFFICE.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

I, JOHN H. SCOTT, Clerk of the Circuit Court, in and for the County of Essex in the State of New Jersey, DO HEREBY CERTIFY, that the foregoing is a true and correct copy of all the records in the case of August L. Lacombe, plaintiff vs. Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, defendants, prepared for an appeal to the Court of Errors and Appeals, together with a copy of the judgment record entered in Book 102, Circuit Court Judgments, page 374, and the same is taken from and compared with original copies of all the records on file in my office and as the same now remains on the files of said office.

IN TESTIMONY WHEREOF, I have (SEAL) hereunto set my hand and affixed the official seal of said Court and County, at Newark, N. J., this 3rd day of May A. D. 1927.

JOHN H. SCOTT,
Clerk.

Opening.

ESSEX COUNTY CIRCUIT COURT.

Tuesday, March 15, 1927.

AUGUST L. LACOMBE, *vs.* TYLER M. GIBBS, trading as T. M. GIBBS CONSTRUCTION COMPANY.	*Action at Law.*

Before Hon. Nelson Y. Dungan, *J.*, and a jury.

For the plaintiff appears Milton M. Unger.

For the defendant appear Wolber & Gilhooly (by Edward J. Gilhooly).

(A jury is called and sworn.)

Mr. Unger opens in behalf of plaintiff.

Mr. Gilhooly opens in behalf of defendant.

Adjourned to Wednesday, March 16, 1927, at 10 o'clock A. M.

August L. Lacombe, direct.

SECOND DAY.

Wednesday, March 16, 1927.

Continued pursuant to adjournment.

Present, counsel as before stated.

AUGUST L. LACOMBE, plaintiff, sworn in his own behalf.

Direct examination by Mr. Unger.

Q You are the plaintiff in this case? A Yes, sir.

Q You are a contractor? A Yes, sir.

Q Where do you carry on business? A I did carry it on on Lyons avenue.

Q You were once a freeholder of this county? A Yes, sir.

Q You are a Commissioner of Irvington? A Yes, sir.

Q You made a contract with the Gibbs Construction Company? A Yes, sir.

Mr. Unger: I offer in evidence agreement dated August 27, 1925, between the T. M. Gibbs Construction Company and August L. Lacombe.

(Paper referred to is marked Exhibit P. 1.)

Q Under this contract you were to provide all the necessary equipment, tools, teams and labor to do the general and trench excavation for the high school located on Clinton avenue, Irvington, New Jersey? A Yes, sir.

Q And the contract says that "The contractor agrees to establish elevations of the present

August L. Lacombe, direct.

grades at sufficient points on the building site to enable the amount of earth to be moved to be determined by measuring the area of the basement and trenches, using said elevations as a basis, and payment is to be made for the amount of earth so determined. All earth is to be left on the building lot and to be rough graded by the subcontractor as directed by the contractor?" A Yes, sir.

By the Court.

Q And the contractor is the Gibbs Construction Company? A Yes, sir.

By Mr. Unger.

Q It also says that you are to start your work, "As soon as the building is staked out and proceed with the same with sufficient men and equipment to complete the general excavation in twenty working days," and you are to carry out the trench work in such manner, and also you are to get seventy cents per cubic yard for general excavation and $1.25 for trench excavation, and you are to be paid eighty-five per cent. of your work on the first of the month, computed up to the first of the month. When you received that contract was it accompanied by this letter from the Gibbs Construction Company which I now show you? A Yes, sir.

Mr. Unger: I offer in evidence letter dated February 17, 1925, written by the T. M. Gibbs Construction Company to the plaintiff.

(Marked Exhibit P. 2.)

Q After you received this letter did you wait on the T. M. Gibbs Company for instructions to start? A I waited until such time as the building had been staked out.

Q Was it staked out by somebody else for you? A Yes, sir.

Q And with whom, representing the Gibbs Construction Company, were you dealing with? A At first with Mr. Ericson.

Q Who is he? A He was engineer on the job.

Q And did he continue in the engineering work? A No, Mr. Durant took up that work.

Q Were you told to go ahead by Mr. Ericson? A Yes, sir.

Q When was that date? A I can't remember exactly that day. There was a snowstorm just about that time and when we were able to get in with a shovel we went in.

Q Who was in charge of your men? A My foreman.

Q Who was he? A Otto Vopelius.

Q In this contract there is a reference to trench and general excavation? A One can be done by steam shovel and the trench excavation had to be done by hand.

Q Which had to be done first? A The general excavation.

Q How many men did you have there? A They varied from six to seventeen.

Q Did you complete the excavation? A Yes, sir.

Q How many yards? A 7,945 yards.

Q Who ascertained that? A I left the measurement of the excavation to the contractors themselves.

Q With what person? A I left it with the Gibbs Construction Company.

Q Their office? A Yes.

Q Were you subsequently furnished with 7,945 yards as the computation? A That is what I was.

Q Did that correspond with what you thought you had done? A Yes, sir.

Q You left it to them? A Yes, sir.

Q Under that contract you had coming seventy cents a cubic yard for that? A Yes, sir.

Q Did you bill the company for your work? A After I received the measurement I did, yes.

Q In response to your bill, did you receive this letter that I show you? A Yes.

Mr. Unger: I offer in evidence a letter from the T. M. Gibbs Construction Company to August Lacombe, dated May 30, 1925.

(Marked Exhibit P. 3.)

Q I notice that in this letter it is stated that the twenty-five is on account of your invoice of $2,250. 7,945 yards at 70 cents would make a little more than this. A I had considerable trouble and I took the quantities that would have to be removed in that bill and sent them a bill for that.

Q And subsequently did you send to the Gibbs Construction Company the correct bill for the 7,945 yards? A Yes.

Q Did you get any more money from the T. M. Gibbs Construction Company? A The only money I received is work ordered by the Board of Education.

Q On this contract? A On this contract I received no further payment.

August L. Lacombe, direct.

Q During the time that you and your men were doing this general excavation had there come up any difficulty of any kind? A Not any more than they wished the work to hurry along, but the weather didn't permit it, so we couldn't do it.

Q Was there any complaint, so far as you were concerned? A No, sir.

Q Did you start on the trench excavation? A We started two excavations, one for the plumber and the one from the cellar down to the brook.

Q Did you complete all your trench work? A I didn't.

Q Why not? A Because they stopped me—they didn't stop me really—they stopped the foreman on the work.

Q Were you there when you were stopped? A No, sir.

Q Did you take up the matter with the T. M. Gibbs Construction Company? A I did.

Q Did you tell them you wanted to keep on with the trench excavation? A I couldn't. The foreman told me that they stopped—

Objected to.

Q Tell me what you told the Gibbs Construction people as the result of that? A The foreman was allowed to go ahead with the work and he reported it to me and in the meantime they told me they wouldn't allow me to employ anybody except masons and laborers.

Q And your contract did not so provide? A No, sir.

Q Did you offer to proceed with the contract? A Yes, sir, we were ready to finish it with our own men.

August L. Lacombe, direct.

Q Did you compute the amount that you had done when your foreman was stopped? A One hundred and seventeen.

Q $1.25, according to your contract? A Yes, sir.

By the Court.

Q Did you tell the defendant that you were ready to go on with your own men? A Yes, sir.

Q Whom did you tell? A Mr. Durant, the superintendent.

Q Did you examine this job to ascertain what the total amount of trench excavation would be? A The only way I could arrive at that was by their bidding sheet. They estimated a thousand yards, but there was no way to tell because you had to dig until you struck a solid footing.

Q In the counter-claim which has been filed here the defendant sets up that there remains to be removed 969 of trench excavation. Did that correspond—

Mr. Gilhooly: We are willing to stipulate that there still remained 969 yards of trench excavation to be done.

By Mr. Unger.

Q Although you said at the beginning that it would be less than that? A Their estimate said a thousand yards.

Q Had you been permitted to finish the excavation of the trenches under the terms of the contract what profit would you have realized under that contract?

Mr. Gilhooly: I object to that as a conclusion. What work we have completed it cost us 79½ cents per yard.

Q What in your opinion would be the cost of doing the remainder? A That is rather hard to say because you don't know what conditions you are going to find. I can only say what it did cost me up to the present time.

Q What was the minimum profit that you would have realized if you completed the work?

Objected to as incompetent.

Objection sustained.

Q What kind of excavation had you done for trenches up to the time you were stopped? A We had trenches eight feet deep and two and a half feet wide.

Q Was the remainder of the trench work any different essentially from that?

Mr. Gilhooly: I object to that, unless the witness followed the progress of the work and saw the site.

The Court: The objection will be overruled.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A I should say not because it was all filled in with garbage.

Q That was all filled-in ground? A Yes, sir.

Q What was the profit on your work that you had completed? A Forty-five and a half cents.

Q Would you say that you would have made that same profit if you had been allowed to complete the work?

Objected to.

By the Court.

Q What was the ground filled in with? A With garbage, that is, the biggest part of it. There may have been a little earth on top.

Q Would you have made the same profit? A I can't imagine where the conditions would have been much different.

Q My question is whether you would have made the same profit? A Yes, I say I can't imagine where the conditions of the ground would have been much different.

By Mr. Unger.

Q Did you, throughout the time that you were doing this work, employ the men to do this work? A Yes, sir.

Q During the time you were doing this trench and general excavation and up to the time you were stopped, were there any other subcontractors doing any other kind of work on this site? A No, sir.

Q Had any other building contractors started to perform any other work? A No.

Q And you were working alone? A Yes, sir.

Q Had you been permitted to finish this trench excavation when would your work have been entirely done, based upon the amount that was yet undone? A That is rather a hard question for me to answer.

Q I don't mean to a day, I mean approximately, what is the greatest amount of time which you would have needed to complete the trench excavation had you been permitted to go ahead without interference? A I should say about fourteen days.

Q Do you know the date when you were stopped with the trench work? A We were stopped on the 10th of April.

Q Did you receive this letter from the Gibbs Construction Company, showing you letter dated April 10th? A Yes, sir.

Mr. Unger: I offer this letter in evidence dated April 10, 1925, written by the Gibbs Construction Company to August Lacombe.

(Marked Exhibit P. 4.)

Q When you entered into this contract had you been informed or told by the Gibbs Construction Company that there was a clause in there that was intended to prohibit you from working except with union labor? A Yes, sir.

Mr. Gilhooly: I object to that.

The Court: The objection will be sustained, and the answer will not be recorded.

Q In article 5 of this contract which is referred to here, it says, "That the subcontractor agrees to cooperate with the contractor and all other subcontractors employed on the work in order to avoid complications and to insure first-class workmanship in every respect, and further, that in the manufacturing, assembling and erection of the work he employ men whose work will be acceptable to and in harmony with other

workmen on the building." While you were working there was there any building? A No, sir.

Q Were there any workmen on any other building there? A No, sir.

Q You have never received any more than the $2,500? A That is all.

Cross examination by Mr. Gilhooly.

Q You remember Mr. Durant, this gentleman here, being the superintendent of this work? A I do.

Q Do you recall in April having a conversation with Mr. Durant with respect to labor difficulties?

Mr. Unger: I object. The question is whether he recalls having a conversation in April with respect to labor difficulties. That is the very testimony that has been ruled out.

(Question read.)

Q Did you have such a conversation? A Yes, sir.

Q And Mr. Durant came to you in the early part of April or the latter part of March and said to you that the labor delegation had been to see him, did he not? A I don't remember that, no.

Q You remember Mr. Durant bringing the labor delegates with him? A I don't remember that in the latter part of March.

Q That was after you got the three days' notice? A Yes, sir.

Q You want to tell us that you didn't have any conversation with any labor delegates prior to getting the three days' notice? A The only

conversation I had was with the labor delegates; they spoke to me.

Q That was before you got your three days' notice? A Yes, sir.

Q And you were told that you were employing non-union men in the trench excavation? A Yes, sir.

Q And you were then told you would have to employ union men, so no other men could be employed on that job? A I can answer that question this way, I never employ any union men; no excavators does.

Q You had a conversation with Mr. Durant about this labor situation? A Yes, sir.

Q Mr. Durant at no time told you that he insisted on having union men or union labor? A Yes, sir, that is what they are.

Q He also told you that the labor delegates had been to see you? A Yes, sir.

Q Did you say after he talked to you that they threatened to tie up the job? A Yes, sir.

Q At that time the Gibbs Construction Company had a general labor foreman on the job? A I don't know what he is.

Q But there was a man on the job? A I don't know.

Q There was a man on the job? A Yes, sir.

Q There were carpenters working on the job at the time you completed the general excavation? A They were building a tool chest.

Q Preparatory to going on with the work generally in the building? A I don't know that.

Q There was a plumber there? A I didn't see any plumber there, no.

Q You wouldn't say there was no plumber? A The plumber deposited material on the job.

Q And the plumber had some workmen who did the work for him in depositing this material on the job, didn't he? A I don't know whether they were plumbers or what they were.

Q They were workmen, anyhow? A Yes.

Q At the time that this labor situation developed the Gibbs Construction Company had some of their own laborers pumping out water in different parts of this excavation? A I don't know who they were.

Q Were you not told that unless you employed union laborers in the making of these trenches that the Gibbs Construction Company would not be permitted to pour concrete in these trenches? A No, sir, I wasn't told that.

Q What were you told about that by the delegates? A The delegates said I would have to put in union men and I said I had nothing to do with that, my contract didn't call for that.

Q You didn't feel obligated to employ union labor in digging these trenches because there were no other workmen on the job; is that right? A No, I wouldn't say that; there were other workmen on the job; we worked there until the 29th of April with every kind of a workman on the job.

Q So there were several other workmen with your own men on the job? A As I say, we worked until the 29th day of April with every kind of workman on the job.

Q You didn't do any work after the three days' notice? A We did.

Q But you didn't do any trench work after April 10th? A No, sir.

Q Your contract, in Article 5, provides that in the manufacturing, assembling and erecting of the work, you will only employ men whose

work will be acceptable to and in harmony with other workmen on the building. You knew, did you not, that the workmen you had in your employ were not in harmony with the other workmen? A No, sir.

Q You were told by the labor delegates that was the fact? A We worked until the 10th day of April. We didn't do any erecting or construction or anything of that kind.

Q Didn't the labor delegates tell you you would have to employ union men? A Yes, sir. I answered that before.

Q And you knew you were employing men who were not in harmony on the job? A I couldn't say that. They allowed my men to stay there.

Q You didn't do any trench work? A No, sir, but they were on the job.

Q What were you doing? A General excavating.

Q It was because of your refusal to employ union men that Mr. Durant told you that you would have to stop work on the trenches; isn't that the fact? A Yes, sir.

Q Will you tell us, please, the details how you arrive at the figure of 79½ cents a yard? A By the time the men took on it.

Q How much excavating in a trench can a man do in an hour? A I can't tell you how much he can do in an hour, because I say conditions of that ground, he might strike an old Ford or some other tin car, and it might take him several hours.

Q But you can tell us from your general knowledge how much excavation you can do per hour? A In general I could, yes.

Q How much excavation could a man do an hour? A He ought to be able to throw out a yard and a half in an hour.

Q How much were you paying your employees? A Fifty cents an hour.

Q Any of them getting any more? A No.

Q There was a foreman on the job? A There was a foreman. He was figured against the whole job. I figured him in on the whole job.

Q You didn't follow this work to see just what difficulties the Gibbs Construction Company ran into with respect to excavating? A I saw it there; I didn't pay much attention to the trenches because I wasn't interested.

Q They ran into pretty hard dirt? A No hard dirt.

Q Did you see them do any sheet piling? A No, sir.

Q Did you see that they ran across certain springs? A I didn't see that, I answered.

Q You didn't see any springs? A I didn't pay any attention to it.

Q It adds to your difficulties? A Sometimes it does.

Q You can't outline your trench? A Sometimes.

Q Sometimes you can and sometimes you can't? A Yes, sir.

Q And it increases your cost? A Yes, sir.

Q And if you run into hard dirt, can a man still dig a yard and a half per hour? A Not hard dirt.

Q That would change the condition again, would it not, some of these trenches you dug were seven feet? A Some that we dug were eight feet.

Q It would take a man longer to dig the trench if it was deeper? A It costs you more to

get the bottom out than the top, but on the general run we figure so much per yard.

Q And you have to employ two men, one to remove the dirt and the other to take it away? A Yes, sir.

Q That would add to the cost? A That is right.

Q How deep were the trenches that you dug while you were on the job? A Eight feet.

Q Despite the fact that it was eight feet deep you could make a profit at forty-five and a half cents a yard? A Yes, sir, we certainly did.

Q Have you got your records here? A No, sir.

Q You are only approximating it? A No, I am not. The tickets we turned in at night and they are put into the books.

Q On the trench excavation you had done at the time your work was terminated you hadn't done any rough grading with the soil that you dug out of these trenches? A No.

Q You left that right there? A Yes, that is all I was supposed to do.

Q You were supposed to rough grade also? A Not the trenches.

Q Your contract provides that all earth is to be left on the building lot and to be rough graded by sub-contractor directed by the contractor. You didn't do any rough grading? A Yes, I done a lot of rough grading around there; I done a lot of rough grading around that building.

Q If you hadn't removed it to do that rough grading that would have added to the cost of your excavating? A Not much.

Q You mean to tell us it wouldn't add to it? A Yes, but not much; the men had to spread it around.

Q When Mr. Durant spoke to you about this labor proposition did you not say to him that you wanted to call quits right then and there? A I told Mr. Durant this—

Q Did you say that, that you wanted to call it quits? A Yes, but I couldn't dig them at the price I had to pay for union labor.

Re-direct examination by Mr. Unger.

Q I want to know whether there were any workmen employed on the job by any other contractor who complained that the work that your men had done was not acceptable? A No, sir.

Q I am referring now to the work and not to the people? A No, sir.

Q Was there ever any complaint made of their work? A No.

Re-cross examination by Mr. Gilhooly.

Q There was a complaint made, wasn't there, with respect to the men that you used on your trucks, wasn't there? A I never heard of it if there was.

Q The labor delegate came to you on behalf of his men? A No, he didn't come to me.

Q You mean to tell us that you never had any trouble with respect to the men on your truck? A I never had any trouble but once.

Q What was that trouble? A That was on High street.

Q On this job? A No, I don't remember any trouble whatsoever.

Q The labor delegate came to you on behalf of the men who were working on the job when they complained about you employing non-union men? A They know better than that; exca-

vators never employ union men; there is no such thing as a laborers' union.

Q There were other laborers on the job other than those employed by you? A I don't know what they were; there was no constructive work going on on that job. They didn't come to me and ask me to settle with my men.

Q There were some men, carpenters, there? A They didn't leave.

Q They were on the job? A Yes, but they didn't leave.

Q They were building the sheds? A Yes, sir, they kept on building.

Q Did you mean to make an evasive answer when you say there were no men on the job doing construction work? A I don't know what these men were and who they were. Sometimes they have alterations and building the sheds.

Q There were carpenters or laborers there building sheds? A I don't know whether they were laborers or carpenters.

Q You saw a foreman employed by the Gibbs Construction Company? A I didn't know whether he is a foreman or not.

Q You knew that he was there? A Yes, sir.

Q And you knew that he was working for somebody? A Yes.

OTTO VOPELIUS, sworn in behalf of the plaintiff.

Direct examination by Mr. Unger.

Q Did you have anything to do with the excavation work on this Irvington highway? A Yes, sir.

Q What were you? A Foreman.

Q For whom? A Mr. Lacombe.

Q Were you in charge of that excavation? A Yes, sir.

Q Did you do that work? A I continued until I was stopped.

Q Before you were stopped were there any complaints made to you that the work was not satisfactory? A No, sir.

Q No objection of any kind was made regarding you before the day on which the work was stopped? A No, sir.

Q What day was the work stopped? A The date I could not realize because I didn't put it down, but it was somewheres around—somewheres around the 8th or 9th of April, something like that.

Q On that day were you on the job? A Yes, sir.

Q What kind of work had you been doing there? A They were excavating to the rear there with horses and scrapers, and then I had seven men in the trenches.

Q Was the trench work going on? A I started to do it; I was told to do it.

Q How long had you been working on the trench work? A That day the men stepped out with the picks, they told me they had to take the men out.

Q Who told you that? A Mr. Durant and their engineer.

Q What engineer? A From the Gibbs Construction Company.

Q Who was Mr. Durant? A Mr. Durant was the superintendent of the job.

Q Of the Gibbs Construction Company? A Yes, sir.

Q What did he say to you? A He said I had to stop work on account of the union men, the delegates.

Q What did he say? A He said, "You have got to stop; you have got to have union men."

Q What work was he referring to? A The trench work in the cellar.

Q Before Mr. Durant told you that had anything happened on that job with reference to his property? A No, sir.

Q Did anybody else come on the job and complain? A No, sir.

Q Were there any other buildings or work going on on the schoolhouse site? A They were building sheds.

Q Where was that? A On the Clinton avenue side.

Q Was any part of the school building going up? A No, sir.

Q Were the masons or any other contractors working on that side? A There were some other laborers there, but I don't know who they were.

Q Were they doing any work? A No, sir.

Q Had your men been stopped up to that day from digging either the excavation or trench work? A No, sir.

Q When you were stopped what did Mr. Durant tell you to do? A He told me to stop the trench digging because they had to be union laborers.

Q What did you do? A I put my men out and put them to work on the other section, the rear, on the general excavation.

Q When you put your men on the other section, on the rear, they were then doing excavation? A Yes, sir.

Q Were they stopped by Mr. Durant from doing that work? A No, sir.

Q You let them go ahead? A Yes, sir.

Q Did you finish that work? A Yes, sir.

Cross examination waived.

FRED B. DURANT, sworn in behalf of the defendant.

Direct examination by Mr. Gilhooly.

Q What is your occupation? A Superintendent of construction.

Q And you have been such for how long? A For twelve years.

Q Are you familiar with building construction in all its phases and branches? A Thoroughly familiar.

Q In February, March and April, 1925, were you employed by the Gibbs Construction Company? A Yes, sir.

Q And you were working on the Irvington High School job? A Yes, sir.

Q And while on this job you met Mr. Lacombe? A Yes, sir.

Q In the months of March and April there was some controversy on the job? A Yes, sir.

Q What was that about? A It was in reference to conditions applying to the labor, union or non-union.

By the Court.

Q Do you mean that was the only complaint of Mr. Lacombe's work, his failure to employ union labor? A Yes, sir.

Fred B. Durant, direct.

By Mr. Gilhooly.

Q At the time of this controversy did you have any other men employed on this work? A Yes.

Q Whom did you have, not mentioning their names, but who were they? A The carpenters and laborers.

Q How about the plumbers? A The plumbers were working there, but he was not working for us.

Q He was under contract? A Yes. Your question was he working for me.

Q And you were the subcontractor on the job? A As we understand subcontractors.

Q I show you a photograph and ask you if you can identify that photograph? A Yes, sir, I identify that.

Q What is that photograph? A It is a view of the site of the Irvington High School.

Q As of what time? A As of April 1, 1925.

Q Would you say that that view as represented by that photograph is an accurate representation of the conditions existing at that time? A It is.

By Mr. Unger.

Q Did you take this picture yourself? A No, sir.

Q How do you know when it was taken? A Because I was on the ground with the photographer at the time the exposure was made.

Q Then the taking of that picture is April 1, 1925? A As of April 1, 1925.

By the Court.

Q You say "as of." What do you mean by the use of the words "as of"? A The picture

Fred B. Durant, direct.

should be taken April 1st. As April 1st is Sunday the picture may be taken on the 31st or the preceding date of the month, or the second day of the month—

Q I do not care anything about that. Do you know when it was taken? A About April 1st.

By Mr. Gilhooly.

Q But it does accurately portray the conditions at that time? A Yes, sir.

Mr. Gilhooly: I offer the picture in evidence.

Mr. Unger: I object to it.

The Court: Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Does this picture accurately portray the condition existing on April 1, 1925? A Yes, sir.

By the Court.

Q How do you know that if you don't know when that was taken? A I know when it was taken, but not the exact hour.

Q You are asked the date; you haven't been asked the hour? A No.

Mr. Gilhooly: I withdraw the offer.

Q Will you please tell the Court and jury the conversations you had with Mr. Lacombe regarding the labor situation. Tell it to us in detail? A The first conversation occurred when representatives of the unions approached me and asked—

Q Don't tell us what they said to you; it is only your conversations with Mr. Lacombe. A When representatives of the union approached me with reference to the work I took them to Mr. Lacombe and heard and stood the first part of the conversation—

Q Repeat that. A When the representatives of the union approached me in reference to excavation I took them directly to Mr. Lacombe.

Q Will you tell us where that was and where you took them to Mr. Lacombe? A That was the month of March.

Q It was prior to the time you sent the three days' notice? A Yes, sir.

Q When the representatives of the union called on you and you brought them to Mr. Lacombe, did you take any of the laborers on the job with you? A Yes, sir, the steward of the laborers, as they call him, on the job.

Q What is a steward? A He is a representative of the union on this particular job on which he is working.

Q What did you hear when they were taken to Mr. Lacombe? A The question was asked as to whether we would use union men.

By the Court.

Q You are asked the conversation in your presence with Mr. Lacombe, so it will be necessary for you to so state who said different things and who made replies. A The delegate for the laborers, an Italian, whose name I forget for the time being, asked the question, and the question was addressed to no one in particular, was addressed to both Mr. Lacombe and I, "Will you employ union men on this job, and when are you

going to do?" An exact verbatim report of the entire conversation I don't recall.

Q What did Mr. Lacombe reply? A Mr. Lacombe replied that he had never used union labor and didn't intend to start now.

Q How long did that conference last? A Probably ten minutes.

Q Did you remain during the entire conference? A No, sir; I walked away.

Q And was this steward present at that conference, the steward you speak of? A Yes, sir.

Q The representatives of the laborers on the job? A Yes, sir.

Q Did he take part in the conversation, that you recall? A No, sir.

Q Did you ever have any later conversation with Mr. Lacombe about the employment of union labor? A Yes, sir; there were several conversations which were, if I may say, a continuation of the same subject.

Q What were those conversations that you had with Mr. Lacombe? A I told Mr. Lacombe—

The Court: This was later.

Witness: I told Mr. Lacombe that I was in entire sympathy with his position, but that if we must have union labor on that job he must furnish the union labor.

Q Did you repeat anything to Mr. Lacombe that the union delegates had said with respect to the trenches? A I told Mr. Lacombe just what the labor delegates had told me.

Q What did they tell you? A That unless the trenches were excavated by union labor they wouldn't furnish us with the concrete, and should we succeed in getting men to put in the concrete

we would be unable to get masons to place the brick work.

Q Was there any conversation between you and Mr. Lacombe regarding the men who were employed by you on the job withdrawing if he didn't employ union labor? A Yes, sir.

Q What was that conversation? A The conversation was that I told Mr. Lacombe that I had been again called to account by the delegates because a decision had not been given to him in reference to the excavation, and that he had noticed men were then engaged in the work of digging trenches, and that unless we immediately changed the non-union men to union men he would take off those men who were working on the job and under his control.

Q These men were your employees? A They were our employees.

Q They were union men? A Yes, sir.

Q And were your carpenters union men? A Yes, sir.

Q What did he say? A He stated as before, that he had never employed union men, that he wouldn't, that it was none of his business, and there was probably some fifteen minutes consumed in talking pro and con, the same thing, and then Mr. Lacombe suggested that we call it quits by him for the general excavation and proceed with the trench excavation ourselves.

Q What did you say to that? A I told him we could not, that he was under contract and we expected him to complete his contract.

Q Did you have any discussion about the contract? A Yes, sir.

Q As the result of these conferences and after Mr. Lacombe refused to proceed with union labor, is that when you served the notice on Mr. Lacombe? A Yes, sir.

Q You were superintendent on this job? A Yes, sir.

Q Did you observe the trench excavation as it was done after Mr. Lacombe got off the job? A Yes, sir; I observed the trench excavation several times daily.

Q Was that trench excavating done under your supervision? A Yes, sir.

Q Did you let out a new contract for the trench excavation? A No, sir.

Q What did you do? A We put out our own forces to work on the excavating of the trenches.

Q We have stipulated that there was 969 yards of trench excavation done after Mr. Lacombe was off the job; that is the correct amount? A That is correct.

Q What did it cost the Gibbs Construction Company per cubic yard to do this work? A It cost some five dollars, $5.18 to the best of my recollection.

Q You don't mean to do that work? A Per cubic yard.

Q What was the nature of the soil that you had to contend with in doing this work? A Most of the soil was a very hard gravel, a conglomeration, in the nature of hardpan.

Q Was it very difficult digging? A Very difficult digging. Every piece of it was picked.

Q By that you mean what? A It was necessary to use a pick in order to loosen it.

Q Were there any other sections that you got that in, anything except hard dirt? A Yes, sir; there were sections where the soil was damp, saturated with water, and the banks wouldn't hold up.

Q What did you do then? A We planked the excavation and sides, to hold the sides.

Q So you could complete your trenches? A So we could complete our trenches without the sides falling in.

Q What was the rate per hour paid to the workmen? A Laborers $1 per hour.

Q Mr. Lacombe has testified that he paid fifty cents an hour and the contract price was $1.25, and according to your figure was $5.18. Can you explain to the jury why there was such a material difference when the labor was only double? A I think so.

Q Will you please do that? A $1.25 per cubic yard for trench excavation is too low for any kind of soil; in sand that had already been loosened you could possibly shovel it out for about that price, but when it becomes necessary for at least eighty per cent. of it to use a pick all the way down, to sheet-pile some of the trenches, some of the trenches was seven-feet deep, when it was necessary to throw the soil to the bank and have a man on the bank and throw it away, it was also necessary to wheel some of this soil away from the trenches; it was easier to throw it away at once and save a second operation, but the $1.25 will pay a little more than fifty cents an hour. I find that a man can pick from one yard, under extremely favorable conditions, to a fourth or fifth of a yard per hour, not with the digging. That is on the basis of eight yards a day, for the extremely favorable condition, or one and three-fifths yards per day for the very hard digging. Some other excavations cost a little more than five dollars a yard, depending upon the nature of the soil—

Q Confining yourself to the condition which you found in your opinion is $5.18 a reasonable charge? A I believe so.

Q That was the actual cost based on your records? A Yes, sir.

Q That was kept daily? A Yes, sir.

Q Made under your supervision? A Yes, sir.

Q Did you check up the work at intervals? A I checked the work daily.

Q In your opinion, could Mr. Lacombe have done this trench excavation for $1.25? A I believe it would have been impossible.

Q Could he have made a profit, in your opinion? A No, sir.

Cross examination by Mr. Unger.

Q He was willing to do it? A May I qualify that?

Q I say, he was willing to do it at $1.25 a yard? A At the time of the contract.

Q Was there any time that he expressed a willingness or unwillingness to do it? A Yes, sir, the time when he found it necessary to employ union men.

Q When you told him he would have to change his men to accommodate the walking delegates on the job he couldn't do it? A Yes, sir.

By the Court.

Q And you knew that? A At what time?

Q This time. A I knew it at the time the controversy arose, but I didn't know it previous to that.

Q I understand your testimony, but can you do it at his own terms at fifty cents an hour for his employees? A Just the one condition, if ideal conditions prevail throughout, then it was possible.

Q Not conditions that you found prevailed there? A After we found the conditions that prevailed it was impossible.

By Mr. Unger.

Q Fifty cents an hour would have allowed him thirty-five cents leeway, wouldn't it? A For what?

Q For trench excavations, that is what I am talking about and that is what you are talking about. Do you understand me? A No, sir, not quite.

Q You charge $1.25 a yard under the contract and it cost him fifty cents an hour for the expense and labor, there would be a leeway of fifty cents, and you say it would take a man an hour to excavate a yard? A Yes, sir.

Q Then my question is logical? A No, sir.

Q You said awhile ago that a man could handle a yard about in an hour or four-fifths of a yard? A I understand the question to be, there would be a leeway of seventy-five cents if excavation cost fifty cents. Understand that excavation costs so much, plus the cost of the disposal of the soil.

Q You said in your opinion it would take a man an hour to dispose of a yard of trench excavation in this spot? A No, sir.

Q Didn't you say that? A No, sir, I don't understand it that way.

Q I am mistaken about it? A Yes, sir.

Q How much could a man do an hour? How many yards could he excavate an hour? A About one-fourth of a yard per hour.

Q You mean it would take a man an hour to excavate one-fourth of a square yard? A No, sir, cubic yard.

Q A cubic yard is three, by three, by three feet? A Yes, sir.

Q And he can only do one-quarter in an hour? A Yes, sir.

Q Is that a one-handed man or two-handed man? A No, sir.

Q Where do you get the men from? A We get them from the union agency.

Q Were they professional diggers? A Yes, sir.

Q They work on extra margin, they had a good job, you paid them a dollar for every hour? A Yes, sir.

Q And they got a quarter of a yard dug in an hour? A Yes, sir.

Q That means it cost $4.00 to excavate one yard? A Yes, sir.

Q It costs more money to throw it around? A Yes, sir.

Q Did you have that in mind when you awarded this contract to Lacombe? A I didn't award the contract.

Q Did you know that he was doing that at $1.25 a yard? A I knew that when the contract was awarded.

Q You knew that at that time? A Yes, sir.

Q In your opinion, was that a ruinous contract that he entered into at that time?

Mr. Gilhooly: I object.

The Court: I think that is proper, in view of the fact that the witness said that Mr. Lacombe could not do this trench work at the contract price. The question may be answered. May I ask if you refer to the trenches or the entire contract?

Mr. Unger: I am referring to that work that cost $1.25.

Witness: I don't think $1.25 per cubic yard sufficient to pay for the trench excavation.

Q That was entirely too low? A Yes, sir.

Q Did you bring to Mr. Lacombe's attention the fact that it was entirely too low?

Objected to.

Q Having in mind the fact that the figure of $1.25 was entirely too low, did it occur to you when the contract was signed that he didn't contemplate union laborers to do the digging?

Objected to.

Objection sustained.

Q In your letter which you wrote on April 10, 1925, did you say to Mr. Lacombe that "the work of the trench excavation must proceed without further delay in accordance with Article 5 of our contract, which means you must use union labor for trench excavation in Irvington." You recall that, do you? A Yes, sir.

Q Had you prior to that time called his attention to the fact that it was your construction of the contract? A Yes, sir.

Q When did you do that? A At the time the controversy first arose.

Q That was in what month? A The month of March.

Q And you wanted him to understand that the contract in plain English meant union labor; is that right? A That is right.

Q Did you think that the contract wasn't plain on that point?

Objected to.

A It was plain to me.

Q That did mean union labor? A It meant union labor in certain localities.

Q Why didn't you put it in? A I didn't make it.

Q Did you think that the way the contract was drawn somebody had to guess at it?

Objected to.

Objection sustained.

Q I understand that you continued to call Mr. Lacombe's attention to that, that this labor problem existed, not only one time but several times? A Yes, sir.

Q Why didn't you stop work before? A I don't understand the question.

Q So that during the times in which you called his attention to the fact that the union people were complaining to you— A Yes, sir.

Q —certainly at that time Lacombe was doing his work? A Yes, sir.

Q Why didn't you stop the work then? A The question is not clear. You use the word work—what was the word, work?

Q If you don't know, I don't know. A It is divisible into two parts, general excavation or trench excavation.

Q Call it either. A There was never any cause to stop the work on the general construction.

Q Why is it? A Because it is not a stipulation of union conditions, that union men be employed on general excavation.

Q In other words, you didn't want Lacombe to prevent him from using labor union on the general construction, but on the trench excavation? A I don't know; I didn't make it.

Q You tried to enforce it? A Yes, sir.

Q Why? A Because compulsory.

Q On whom? A On us.

Q As to one kind of work and not as to the other kind of work? A No, sir, compulsory upon us to follow the conditions that prevailed in the district.

Q Did you want Lacombe to guess on what part of the work he was to use union labor and what part to use non-union labor? A I didn't want him to guess anything.

Q How does he know? A He lives very near the site in this district.

Q You heard him say he had been doing business seventeen years and never had union labor? A Yes.

Q Isn't it true that you fired him off the job because your company didn't have the money to pay the balance due him? A No, sir.

Q Did you pay him eighty-five per cent. of the value of his work, when he sent in a bill for his general excavation? A Because bills, invoices, a contractor is not paid on the job; they are paid from the home office. It is not within my province to say pay a bill or not to pay.

Q You can't say why he was only paid this amount on the 31st of May? A I think I can.

Q Why? A If I can refer to Mr. Lacombe's invoice, it was $5,000 and eighty-five per cent. of that was considerably in excess of that, possibly; I didn't figure it.

Q You can figure it. A It can be done. Perhaps I can answer you this way, the ordinary procedure—

Q I don't want procedure. A I am an employee of the Gibbs Construction Company; I am not an employee—

Q Will you tell us why, as late as May, 1925, when this letter was written there is not a word in it about the fact that you are paying over five dollars for the trench excavation, or that you will deduct it or try to deduct it from Lacombe's contract, why is the letter silent on that, if you know? A There is no need to write anything.

Q Did you advise the Philadelphia office in which this letter was written that you were foreman of the job and were hiring men whose work was being paid at the rate of $5.18 a square yard? A $1 for labor.

Q Whereas Lacombe was only getting $1.25, did you tell that to your home office? A I did.

Q Do you remember you did? A No, sir, but I reported the amount of money expended in performing Lacombe's part of the work.

Q Did you get union men to do this work? A Yes, sir.

Q Were they union laborers? A Yes, sir.

Q Either belonging to a laborer's union, I mean, were they laborers belonging to a union or were they recruited from other lines to do this work? A Laborers belonging to a union, to the best of my knowledge.

Q Do you know whether they were laborers employed by the union? A I was satisfied that they were.

Q What satisfied you? A They were allowed to keep working without any opposition from anybody else.

Q And as long as they were allowed to continue without opposition they were satisfactory to the powers that be? A Yes, sir, I knew they were satisfactory.

Fred B. Durant, cross.

Q And you didn't care whether they were union or non-union? A No, sir.

Q So long as the delegates were not bothering you were satisfied? A Yes, sir.

Q And it was the delegates who bothered you? A Yes, practically.

By the Court.

Q I understand from your testimony that the objection which was made by the laborer representatives to Mr. Lacombe's continuance of this work was because he did not employ union labor, is that correct? A That is right.

Q And consequently because of that objection on the part of the labor representatives that was your objection? A Yes, sir, that was my objection.

Q There was no other objection? A Yes, sir, there was a very serious objection.

Q What was it? A I was doubtful of being able to complete the other part of our contract, which was to finish the building, had to brace brick work, stone work, plastering, windows.

Q But it all related to union labor? A Yes.

Q And your fear was that if you were permitted to continue this trench work that union labor would refuse to work for you? A That is correct.

Q So that as I say, the only objection that the labor representatives had or that you had was to Mr. Lacombe's continuance of the work was because he wouldn't employ union labor? A No.

Q That was all, there was no objection to the work being done by him if union labor was employed? A Yes, sir.

Q As far as you know? A Yes, sir.

Fred B. Durant, re-direct.

Q Satisfactory to the labor union and you? A Yes, sir.

Re-direct examination by Mr. Gilhooly.

Q I understand from your testimony they were threatened to be called off by union labor? A Yes, sir.

Q Mr. Unger interrogated you about general excavation and trench excavation. Was there any conversation with Mr. Lacombe and the labor delegates with respect to the general excavation? A The subject was mentioned in the discussion, yes.

Q Was Mr. Lacombe advised that he wouldn't have to have union laborers before the general excavation? A He was told it was not necessary that these men be fired.

Q You had the general excavation done by non-union laborers? A That is correct.

By the Court.

Q Who told him that? A The laborer delegate.

Q This Italian that you speak of? A Yes, sir, and others.

Q In your presence? A Yes, sir.

Q And it was satisfactory to you, was it not? A Yes, sir.

Q At the time that the payment of $2,500 was made on account of the invoice for $5,250, was it not contemplated by you at that time that you might have a counter-claim against Mr. Lacombe for trench work? A Yes, sir.

Mr. Unger: I object to that and ask that it be stricken out.

Fred B. Durant, re-cross.

The Court: The answer will be stricken out.

Q The men that were employed when Mr. Lacombe went off the job, were they men that you would classify as average workmen? A Yes, sir.

Q They were not crippled in any way? A No, sir.

Q As far as you could observe, they worked as hard and as faithfully as other laborers in that class? A Yes, sir.

Q The reason a man can only excavate a quarter of a yard is because of the condition of the ground? A Yes, sir.

Re-cross examination by Mr. Unger.

Q Lacombe did part of the trench excavation? A Yes, sir.

Q What became of Lacombe's trench that was done? A We put concrete in there.

Q Lacombe dug a sewer trench? A He didn't finish it.

Q He did some of it? A Yes, sir.

Q Did some part so the plumber's pipe could go in the trench? A No, sir, not until we dug it.

Q Did any of your pipes go into the trench that Mr. Lacombe dug? A No, sir.

William H. Aspden, direct.

WILLIAM H. ASPDEN, sworn in behalf of defendant.

Direct examination by Mr. Gilhooly.

Q What is your business? A Construction, building construction.

Q And you have been in that business how long? A Since I left school, twenty years, twenty-two years.

Q In the year 1925 were you in the employ of the Gibbs Construction Company? A Yes.

Q And did you act as superintendent of the job in Irvington? A Part of the time.

Q Are you familiar with the conditions of the soil on that job? A Yes, sir.

Q When you were on that job was there some trench excavating being done? A Yes, sir.

Q Will you tell the Court and jury the nature of that soil? A Yes, sir.

Q Please tell us what you found there? A In one section of the building was mud, loam soil and water springs occurring in the lower section of the building and the higher section of the basement were hard excavations.

Q And with respect to this hard excavation, did that involve a greater cost to excavate? A Yes, it would.

Q Considering all the conditions which you found on that work, what would you say with respect as to the price of $5.18 per cubic yard for trench excavation, as to whether or not it was reasonable? A Well, I should think reasonable.

Q You consider that a reasonable price? A Under the conditions, yes, sir.

Q Was it necessary to do any sheet piling? A Yes, sir.

Q And that is because of what? A Because of the nature of the soil, when we get down to hold the soil, to hold the bank.

Cross examination by Mr. Unger.

Q You observed that part of the trench excavation that had been completed by Lacombe? A No, Mr. Lacombe had left the job when we came.

Q Had the other people engaged in trench excavation started their work? A Yes, there were men working on the trenches.

Q When did you come on the job? A I couldn't give you the date.

Q Do you know the month? A I think maybe the latter part of April.

Q Did you observe that some of the work of excavating trenches was being done without piling? A Yes, there was some being done without piling.

Q Did you observe any that was being done without piling? A Yes, one section required piling.

Q What proportion did that section bear to the whole? A I couldn't give the percentage.

Q A small part of it? A I would say that it wasn't a very large portion.

Q Some of this ground was filled-in ground? A Yes, sir.

Q Ashes and garbage? A Yes, sir.

Q And the excavation, as far as that was concerned, wouldn't be as difficult to excavate, the ashes? A If I recall correctly, where we put the sheet piling was partly ashes and partly fill.

Q How do you base your estimate? A I base it on the experience that we had in ex-

cavating the soil that we had on that school, on that particular job, as much as anything else.

Q On this job? A Yes, sir.

Q Did you do the excavating, too? A I did some of it; I had charge of some of it.

Q You say the $5.18; what part of it at $5.18? A The actual excavating and the removal of the material out of your way, putting it where it belongs.

Q How do you arrive at $5.18; Lacombe got $1.25 under his contract; I would like you to tell how you make $5.18? A I don't know what you mean.

Q You figure the unit per foot at something, you don't get the $5.18? A I didn't estimate this job.

Q You are trying to estimate this job, and you said in your opinion that $5.18 is reasonable and I want to know upon what you found your opinion? A Excavating the material from the trenches and removing it from the building.

Q Is that the only way you could tell it? A There is a spring there; you have got to remove the water from the excavation.

Q How much does a laborer get per cubic yard for his work? A It would all be laborer's work.

Q How much would he get? A Of the $5.18?

Q Yes. A $5.00 I presume it was all day labor; I don't know of anything else.

Q Do you want us to understand that you would pay a laborer $5? A I don't know of any other place the expense would be distributed except labor.

Q Are you telling us that a laborer got $5 a cubic yard for excavating the work? A I presume he did.

Q How long would it take to excavate a cubic yard? A I should imagine it would take four to five hours, three to four hours.

Q What? A The cost of excavation is not all applied to the man who is actually excavating the material; there is a man removing the material—

Q I ask you what the excavator would be doing? A One man, if he had to remove the dirt from the building how long that would be?

Q How long? A I presume that would be four or five hours.

Q One cubic yard? A Yes, sir.

Q One man four or five hours to excavate a cubic yard? A Depending on the nature of the soil.

Q You have given us that on an average? A No, sir.

Q I don't suppose you can explain at all how Lacombe could do it for $1.25. A Possibly Lacombe was familiar with the conditions.

Q Assuming that he was familiar, do you understand how he could do it for a dollar and a quarter? A No, not if he was familiar with it.

DEFENDANT RESTS.

OTTO VOLPELIUS, recalled in behalf of plaintiff in rebuttal.

Direct examination by Mr. Unger.

Q That particular kind of trench work is included in the excavating that you charge for? A Yes; eight feet deep.

Q Did you finish that trench? A Yes, sir.

Q Did you say whether or not the plumber laid his pipes in it after you finished it? A He laid the pipes.

Q Was it necessary to do any further excavating in that trench before he was able to lay the pipes? A No, sir.

Cross examination by Mr. Gilhooly.

Q How long did it take you to do that particular excavating of that trench? A It took five men; it took a day and two hours.

Q A day and two hours for five men? A Yes, sir.

Q How many hours is that? A Nine hours a day.

Q One day and two hours for five men to do 517 cubic yards? A That particular trench.

Q I mean on trenches that you dig? A Then there was another trench, one of 240 feet.

Q How long did it take you to do that? A It took just two days and four hours, something near that.

By the Court.

Q How deep was that? A A foot and a half wide.

Q How deep? A A foot and a half deep.

PLAINTIFF RESTS.

DEFENDANT RESTS.

Mr. Unger: I move at this time for the direction of a verdict in favor of the plaintiff and against the defendant for $3,270.75, with interest from May 1, 1925. That figure is made up as follows: It covers 7,945 yards of general exca-

vation at 70 cents a yard, equaling $5,561.50, and 117 yards of trench excavating at $1.25 a yard, making $146.25, a total of $5,707.75, less a payment of $2,500 which was made on the 25th of May, 1925, leaving a balance of $3,207.75, with interest, which I will charge from June 1, 1925, so as to allow ample time for the completion, and now leaving open for the determination of the jury the question as to what, if anything, we should have by reason of the profit due us for the trench work which we didn't excavate, and leaving that to the jury to determine in view of all the evidence. My motion is predicated on what I consider to be the undisputed facts in the case and which, when the law is applied to them, would justify the direction of a verdict.

The Court: There is no question about that. I will direct the jury to start with that as the basis, but if the defendant is right in the counter-claim, the counter-claim amounts to so much more than that, so I cannot direct the jury to find a verdict in favor of the plaintiff.

Mr. Unger: I do not think the counter-claim has any legal foundation. My motion is predicated upon these facts.

The Court. Then you also move, as I understand it, for a verdict in favor of the plaintiff on the counter-claim?

Mr. Unger: Yes, as having no legal foundation in fact or law. The contract here is not in dispute in any detail nor is the character of the work in dispute.

(After argument.)

The Court: While a person performing labor for which he is seeking to recover against another may contract that he will use only union labor, although it is broadly hinted in the case of Rosenbaum *v.* The United States Credit System Company, reported in 65 Law 255, that such an agreement in the contract may be an agreement in restrain of trade, or that it is a covenant which the law will not enforce However, that is a decision of a court of equity, and the facts in that case may differentiate it from the case which is now being tried. The provision of the contract, which, it is insisted, in effect, requires the plaintiff to employ only those men, it seems to me, must be for the construction of the Court. The facts in this case, so far as Article 5 is concerned, are not in dispute. The plaintiff says that he was prevented from fulfilling his contract, as far as the trench was concerned, because of his refusal to employ union labor to do so, and Mr. Durant, the principal witness for the defendant here, very frankly admits that that is the construction contended for as to that section; that there was no other reason for preventing the plaintiff from a continuation and completion of his work except his refusal to employ union labor. So the whole case depends, so far as the work not actually performed is concerned, upon whether or not this section requires the plaintiff to employ union labor; nothing else to it at all. That section provides that the subcontractor, who is the plaintiff in this case, "agree to cooperate with contracts and all other subcontractors employed on the work in order to avoid complication and insure first-class workmanship in every respect," and further, that

"in the manufacturing, assembling and erection of the work, he will employ only men whose work will be acceptable to and in harmony with other workmen on the building," the three important words being "co-operate," "workmanship" and "work," and perhaps "to avoid complications." The defendant, by Mr. Durant, said that he was in sympathy with Mr. Lacombe, but that, fearing that they would be unable to complete the building because of the demands and requirements of the labor union, Mr. Lacombe was required to do the trench work, and to employ union labor. No complication had actually arisen up to that time except that Mr. Durant had been approached, and took to Mr. Lacombe this Italian representative of the labor union, but this action on his part was because of what the representative had said to him and his fear that complications might arise; but Article 5 gives as the reason for the provision that he is to insure first-class workmanship, and that in the erection of the work he will employ only men whose work—emphasizing the word "work"—will be acceptable and in harmony with other workmen on the building, not that he will employ men who will be acceptable and in harmony with other workmen, and not that he will employ men who shall belong to any particular organization, which, in this case, is admittedly the labor union, but men whose workmanship and whose work will be acceptable to the defendant and subcontractors and in harmony with other workmen on the building. No complaint has been made about the work that has been done by the plaintiff and his men. The work was entirely satisfactory, Mr. Durant says. The only complaint was, as I have said, that he failed and refused to employ certain men, men

who belonged to the union. I do not think that is specifically covered by this article, and I so construe it, so that results in the direction of a verdict in favor of the plaintiff for the contract price of seventy cents per yard for 7,945 yards, which is $5,561.50, and $1.25 a yard for 117 yards of trench work, which is $146.25, making altogether $5,707.75, less a payment of $2,500, making $3,207.75, with interest, from May 15, 1925, that being a time subsequent to the time when payment of these items was due. It is not certain whether this work was done before April 1st, and the plaintiff was entitled to recover 85 per cent. on the first day of the month after the work was done, and, of course, he being prevented from completing his contract, makes the entire amount due, although the contract provides that the amount is not due until the completion of the contract, but if the completion was illegally prevented, that makes the entire amount due.

The Court charges the jury as follows:

COURT'S CHARGE TO JURY.

DUNGAN, *J.*

Gentlemen of the Jury: As to profit, it is an admitted fact that there are 969 yards of trench work that the plaintiff failed to do. He says that he would have made a profit. Of course, he is not entitled to recover the contract price for that. What he is entitled to recover is what his profit would have been had he been permitted to complete it, and he says for the 117 yards he did it cost seventy-nine and one-half cents per yard, which would leave a profit of forty-five and a half cents per yard on that, and he says that he should say the balance of the work was not essentially different from what he had already done, as it was all filled-in ground. So if you find from the evidence that his profit would have been forty-five and a half cents a yard, then his profit on the 969 yards would be $440.89, to which interest may be added from the same date, May 15, 1925. However, Mr. Durant says there would have been no profit in it, that he could not have done that work, in his opinion, for $1.25 a yard. It cost them, he says, $5.18 a yard to complete it, and he tells you why; he says that there was a portion of the ground which had to be sheathed; they had to put sheet piling down because of the dampness and wet, and the balance of it was hardpan, which had to be picked, and he thinks that a digger could do only a quarter of a yard of it an hour. The plaintiff was paying fifty cents an hour, so that excavation would have cost $2 a yard against the amount which the defendant paid for it. Unless it appears in this

case by the greater weight of the evidence that that $1.25 a yard would have yielded a profit to the plaintiff, of course, he cannot recover on that item, because he is only entitled to his profit; and if there would have been no profit for the work not done the plaintiff cannot recover. If you find there would have been a profit, then you will award to him whatever profit he could have made by being permitted to continue this job.

You begin with a verdict directed against the defendant for $3,207.75, with interest from May 15, 1925, and then you may take into consideration this other item, and if you find anything due to the plaintiff, add interest from the same date, and the sum total will be the amount of your verdict.

Are counsel willing to accept my figures?

(Counsel for plaintiff and defendant respectively reply in the affirmative.)

The Court. (To the jury.) If your verdict is in favor of the plaintiff it will be for $3,560.

An exception to the ruling of the Court on behalf of the defendant may be noted as to the direction of a verdict.

Exception noted as ground of appeal.

And an exception may also be noted to the overruling of the counter-claim.

Exception noted as ground of appeal.

(The jury retires.)

EXHIBIT P. 1.

T. M. GIBBS CONSTRUCTION COMPANY

GENERAL CONTRACTORS

215 South Broad Street, Philadelphia

THIS AGREEMENT, made the Seventeenth day of February in the year 1925 by and between T. M. GIBBS CONSTRUCTION COMPANY, 1510 CHESTNUT STREET, PHILADELPHIA, PENNSYLVANIA, party of the first part (hereinafter designated the Contractor), and AUGUST L. LACOMBE, 668 LYONS AVENUE, IRVINGTON, NEW JERSEY, party of the second part (hereinafter designated the Sub-Contractor).

WITNESSETH, That the Sub-Contractor, in consideration of the fulfillment of the agreements herein made by the Contractor, agrees with the said Contractor as follows:

ARTICLE I. The Sub-Contractor shall and will provide all the necessary equipment, tools, teams and labor to do the General and Trench Excavation for the High School located on Clinton Avenue, Irvington, New Jersey, as shown on the drawings and described in the specifications prepared by Donn Barber, Architect, 101 Park Avenue, New York City, New York, which drawings and specifications become hereby a part of this contract.

The contractor agrees to establish elevations of the present grades at sufficient points on the building site to enable the amount of earth removed to be determined by measuring the area of the basement and trenches, using said elevations as a basis, and payment is to be made for the amount of earth so determined.

All earth is to be left on the building lot and to be rough graded by the sub-contractor as directed by the contractor.

ARTICLE II. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of, and subject to the approval of and acceptance by, the Architect and Contractor, and that the Architect's decision as to the true construction and meaning of the drawings and specifications shall be final. It is also understood and agreed by and between the parties hereto that such additional drawings and explanations as may be necessary to detail and illustrate the work to be done are to be furnished by said Architect, and the Sub-Contractor agrees to conform to and abide by the same so far as they may be consistent with the purpose and intent of the original drawings and specifications referred to in Art. I.

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

ARTICLE IV. The Sub-Contractor shall provide sufficient, safe and proper facilities at all

Exhibit P. 1.

times for the inspection of the work by the Contractor or his authorized representatives; shall, within twenty-four hours after receiving written notice from the Contractor to that effect, proceed to remove from the grounds or buildings all materials condemned by the Contractor whether worked or unworked, and to take down all portions of the work which the Contractor shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications, and shall make good all work damaged or destroyed thereby.

ARTICLE V. Sub-Contractor agrees to cooperate with Contractor and all other Sub-Contractors employed on the work in order to avoid complications and insure first-class workmanship in every respect, and further, that in the manufacturing, assembling and erection of the work, he will employ only men whose work will be acceptable to and in harmony with other workmen on the building.

ARTICLE VI. Should the Sub-Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, the Contractor shall be at liberty, after three (3) days' written notice to the Sub-Contractor, to provide any such labor, and deduct the cost thereof from any money then due or thereafter to become due to the Sub-Contractor under this contract; and if the Contractor decrees that such refusal, neglect or failure is sufficient ground for such action, the Contractor shall also be at liberty to ter-

Exhibit P. 1.

minate the employment of the Sub-Contractor for the said work and to enter upon the premises and take possession for the purpose of completing the work included under this contract, of all tools and appliances thereon, and to employ any other person or persons to finish the work; and in case of such discontinuance of the employment of the Sub-Contractor, he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Contractor in finishing the work, such excess shall be paid by the Contractor to the Sub-Contractor; but if such expense shall exceed such unpaid balance, the Sub-Contractor shall pay the difference to the Contractor

ARTICLE VII. The Sub-Contractor shall complete the several portions, and the whole of the work comprehended in this Agreement by and at the time or times hereinafter stated, to wit:

The sub-contractor is to start on his work as soon as the building is staked out and proceed with the same with sufficient men and equipment to complete the General Excavation in twenty (20) working days.

Trench Excavation is to be carried on at such times and in such a manner as directed by the Contractor.

ARTICLE VIII. Should the Sub-Contractor be delayed in the prosecution or completion of the work by the act, neglect or default of the Contractor, of the Architect, or of any other subcontractor employed by the Contractor upon the

Exhibit P. 1.

work, or by any damage caused by fire or other casualty for which the Sub-Contractor is not responsible, or by general strikes or lockouts caused by acts of the employees, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid, but no such allowance shall be made unless a claim therefor is presented in writing to the Contractor within forty-eight hours of the occurrence of such delay.

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

ARTICLE X. It is hereby mutually agreed between the parties hereto that the sum to be paid by the Contractor to the Sub-Contractor for said work and materials shall be

General Excavation Seventy Cents (70c) cubic yard.

Trench Excavation One Dollar Twenty-five cents ($1.25) cubic yard, subject to additions and deductions as hereinbefore provided, and that

Exhibit P. 1.

such sum shall be paid by the Contractor to the Sub-Contractor, in current funds, as follows: On or about the 15th of the month 85% of the value of the work done up to the first of the month. The final payment shall be made within thirty (30) days after the completion and acceptance of the work.

ARTICLE XI. It is further mutually agreed between the parties hereto that no payment made under this contract, except the final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

ARTICLE XIII. The Sub-Contractor agrees to comply with the laws relating to workmen's compensation and public liability and cause his Sub-Contractors, if any on said work, to also comply therewith and to exhibit to the Contractor's satisfaction, certificate and evidence of such compliance before said work is begun and to continue so to comply therewith during the performance of said work. He also agrees to pay compensation or cause the same to be paid, to his own employees and their dependents, and when required by law, to make payments to employees or dependents of his Sub-Contractors, and to save harmless the Contractor from all liability for any such payments the latter may be required to make. Also to indemnify and save harmless the Contractor from and against all payments of compensation for damages the Contractor may be required or obligated to make to his employees or dependents, or any other persons, including injuries to property which the Contractor may sustain or be obligated to pay on

account of the act, neglect or default of the Sub-Contractor or his agents.

Sub-Contractor further agrees to pay and indemnify the Contractor from and against all losses, liabilities, suits or obligations of every kind paid or incurred by the Contractor on account of the failure of the Sub-Contractor to perform his agreements herein, and agrees that the Contractor may retain from moneys owing by him to the Sub-Contractor, sufficient sums to protect him against any or all of said losses or liabilities.

ARTICLE XIV. In case the Contractor and Sub-Contractor fail to agree in relation to matters of payment, allowance or loss referred to in all Articles of this contract, the matter shall be referred to a Board of Arbitration, to consist of one person selected by the Contractor and one person selected by the Sub-Contractor, these two to select a third. The decision of any two of this Board shall be final and binding on both parties hereto. Each party hereto shall pay one-half of the expense of such reference.

ARTICLE XV. The said parties for themselves, their heirs, successors, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

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

T. M. GIBBS CONSTRUCTION COMPANY (SEAL)
R. S. MOORE (SEAL)
AUGUST L. LACOMBE (SEAL)

In Presence of
D. A. Cameron
C. Wm. Pfail

EXHIBIT P. 2.

Feb. 17, 1925.
HIGH SCHOOL,
IRVINGTON, N. J.
FILE A.

Mr. August L. Lacombe,
668 Lyons Ave.,
Irvington, N. J.

Dear Sir:—

Enclosed herewith find contract in duplicate covering the excavation for the above mentioned building. Please sign one copy of the same, have your signature witnessed, and return to us.

We trust that the weather will continue such that we can have our engineer on the site to stake out the building in the very near future, and request that you make arrangements so that you can get your shovel on the job just as soon as we are ready for you.

Very truly yours,

T. M. GIBBS CONSTRUCTION COMPANY

RSM-G
3 encls.

Exhibit P. 3.

EXHIBIT P. 3.

T. M. GIBBS CONSTRUCTION COMPANY
Corn Exchange Bank Building
1510 Chestnut Street
Philadelphia, Pennsylvania

May 23rd 1925

CLINTON AVENUE HIGH
SCHOOL IRVINGTON

Mr. August Lacombe
Irvington
New Jersey

Dear Sir:—

Attached hereto you will please find our check in the amount of twenty-five hundred dollars, applying as payment on account of your invoice of May 1st, in the amount of $5250.00.

Your other invoice dated May 1st in the amount of $500.00 has not been approved by the Architect and until such time as he does approve it, this bill of course cannot be paid.

As soon as all other obligations of your contract are complied with, we shall be very glad to send you a check for any balance due you.

Yours very truly

T. M. GIBBS CONSTRUCTION COMPANY
T. M. GIBBS

TMG
CMH

Exhibit P. 4.

EXHIBIT P. 4.

DRAWER "A"
IRVINGTON, N. J.
APRIL 10th. 1925

Mr. August Lacombe,
668 Lyons Avenue,
Irvington, N. J.

Dear Sir:

We have hesitated to enforce Article VI of our contract, feeling you did not understand in detail the nature of the union complications and all the conditions of your contract.

However, the writer finds from our conversation of this morning that you are fully aware of the details and that you have talked the matter over with your lawyer.

The time has arrived when the trench excavation must proceed without further delay. Further this work must be performed in accordance with Article V, of our contract which in plain English, means you must use union labor for trench excavation in Irvington.

This is to notify you that in accordance with Article VI of our contract (after the expiration of three days from this date,) we will proceed to excavate trenches, and charging the cost to your account unless you are performing this work according to all the terms of our contract.

Very truly yours,

T. M. GIBBS CONSTRUCTION CO.
F D Supt.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

AUGUST L. LACOMBE, *Plaintiff-Respondent,*	*Action at Law.*
vs.	*On Appeal from Essex County Circuit Court.*
TYLER M. GIBBS, trading as T. M. Gibbs Construction Company, *Defendant-Appellant.*	

BRIEF OF APPELLANT.

Statement of Facts.

On February 17, 1925, an agreement in writing was entered into between the parties to this suit whereby the plaintiff agreed that he would do all the general and trench excavation for a high school building now erected in Irvington, New Jersey. It was agreed that the plaintiff as subcontractor should receive seventy cents per cubic yard for general excavation and the sum of One dollar and twenty-five cents per cubic yard for trench excavation.

The plaintiff proceeded with the excavation pursuant to the contract and completed practically all of the general excavation and in addition he did one hundred and seventeen yards of trench work, so that at the time when the controversy between the parties arose the plaintiff had done work amounting to the sum of Three thousand two hundred and seven dollars and seventy-five cents ($3,207.75).

In the contract it was amongst other things provided as follows:

> "**Article V. Sub-contractor agrees to co-operate with contractor and all other sub-contractors employed on the work in order to avoid complications and insure first-class workmanship in every respect, and further, that in the manufacturing, assembling and erection of the work, he will employ only men whose work will be acceptable to and in harmony with other workmen on the building.**
>
> **Article VI. Should the sub-contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, the contractor shall be at liberty, after three (3) days' written notice to the sub-contractor, to provide any such labor, and deduct the cost thereof from any money then due or thereafter to become due to the sub-contractor under this contract: And if the contractor decrees that such refusal, neglect or failure is sufficient ground for such action, the contractor shall also be at liberty to terminate the employment of the sub-contractor for the said work and to enter upon the premises and take possession for the purpose of completing the work included under this contract, of all tools and appliances thereon, and to employ any other person or persons to finish the work: And in case of such discontinuance of the employment of the sub-contractor, he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the contractor in finishing the work, such excess shall be paid by the contractor to the sub-contractor: But if such expense shall exceed such unpaid balance, the sub-contractor shall pay the difference to the contractor" (State of Case, p. 90).**

Mr. Lacombe was employing non-union labor in performing the excavation. In the month of March, 1925, and during the progress of the work a delegate of the Laborers' Union representing other laborers on the job employed by the defendant, called on Mr. Durant, who was the superintendent on the job for the defendant, with respect to the employment by Mr. Lacombe of union labor. Mr. Durant took the delegate to Mr. Lacombe and Mr. Lacombe was asked by the delegate whether or not he would employ union men on the job and when would he do so. The plaintiff replied that he had never used union labor and did not intend to start then. At this conversation there was present the steward of the laborers who were employed on this job. It appeared from the testimony that a steward is a representative of the men on a particular job on which work is being done. The union delegates informed Mr. Durant that unless the trenches were excavated by union labor that they would not furnish the defendant with concrete and further that should the defendant succeed in getting men to put in the concrete work that the defendant would be unable to get masons to place the brick work. This information was given to Mr. Lacombe by Mr. Durant. At the time other employees of the defendant were working on this job and they were union men. The defendant had

laborers of his own as well as carpenters and others working on the job at the time this controversy arose. All of this testimony appears on pages 59 to 60 of the State of the Case. Upon Mr. Lacombe's refusal to employ union men or to satisfy the delegates, he was informed by the defendant through Mr. Durant that the defendant expected the plaintiff to proceed with his work in accordance with the requirements of the contract. This Mr. Lacombe refused to do unless he was permitted to proceed with non-union employees. As a result of the action of the plaintiff a notice in writing was served on the plaintiff by the defendant in accordance with Article VI of the contract demanding that the plaintiff proceed with his work in accordance with the contract, and that if he failed so to do that the defendant would proceed to excavate the trenches and charge the cost to the account of the plaintiff. Upon the plaintiff's failure to proceed as requested by the defendant the latter did the trench excavation himself. The contract price amounted to One dollar and twenty-five cents for trench excavation whereas it actually cost the defendant the sum of Five dollars and eighteen cents per cubic yard to do the work. (State of Case, p. 65). There was considerable testimony tending to explain the wide difference between the contract price, the price of the defendant and the actual cost of the work. (State of Case, pp. 66, 78-79-80).

As was stated above at the time the controversy arose there would have been due to the plaintiff the sum of Three thousand two hundred seven dollars and seventy-five cents ($3,207.75). The defendant refused to pay this amount because of his counter claim. There was nine hundred sixty-nine yards of trench excava-

tion remaining to be done and therefore the defendant's claim against the plaintiff was slightly in excess of Five thousand dollars ($5,-000).

Motion was made by the plaintiff for a direction of a verdict in favor of the plaintiff on the defendant's counter-claim and after argument a verdict was directed by the trial court in favor of the plaintiff for Three thousand five hundred and sixty dollars ($3,560).

LAW POINTS.

Contract between the parties misconstrued.

If the trial court had adopted the construction urged by the defendant with respect to Article V then the case would have gone to the jury on the defendant's counter-claim. The defendant contended that he was justified in insisting upon the employment of labor by the plaintiff in harmony with other workmen on this job. The plaintiff expressly agreed that he would employ only men whose work would be acceptable to and in harmony with other workmen on the building. The trial judge emphasized three words in this paragraph, to wit, "co-operate," "workmanship" and "work," but it is respectfully urged that emphasizing these words does not do justice to the meaning of the paragraph. The plaintiff agreed to co-operate with the contractor TO AVOID COMPLICATIONS as well as to insure first class workmanship. Complications certainly arose on this job when the delegates of the union consulted the defendant's superintendent and Mr. Lacombe, and then and there the plaintiff failed to co-operate with the defendant. The co-operation intended was indicated by the words in the same article

to the effect that the contractor will employ only men whose work will be acceptable to and in harmony with other workmen on the building. The men employed by the plaintiff were not acceptable to other workmen on the building. The defendant had other laborers in his employ and these men through their representatives complained of the employment by the plaintiff of non-union men in doing the trench excavating. (State of Case, p. 64). It is apparent that the union laborers had no objection to the employment of non-union men for general excavation because no trouble arose until the plaintiff was proceeding with the trench excavation. In addition to the laborers employed by the defendant there were carpenters and plumbers on the job. (State of Case, p. 60). It was obvious to both the plaintiff and the defendant that a serious complication had arisen due to the men employed by the plaintiff and it was for this very purpose that Article V was inserted in the contract. The defendant was placed in a position whereby there would be a walk-out by his laborers and other tradesmen and the job would be black-listed by the trades which were to follow after the excavating had been completed. Both the plaintiff and the defendant were in the building business for a considerable length of time and no doubt had gained valuable experience in this class of work. Both, of necessity, had been fully acquainted with labor conditions when the contract was made. The defendant did not limit the plaintiff in his selection of workmen but in order to protect himself he merely insisted that workmen employed by the plaintiff would be acceptable to and in harmony with other workmen on the building. The trial court emphasized the word "work." The plaintiff was required to perform the obligations of his contract in a first class

manner and as far as the character of his work was concerned he had to answer to no one other than the defendant and surely the parties did not intend that the work of the men employed by the plaintiff would have to be acceptable to other workmen on the building. Other workmen on this particular job were not interested in the plaintiff's work, but surely they were alone interested in their own, and if the plaintiff were to undertake the task of performing his work under the contract to the satisfaction of other workmen on the building he would indeed be undertaking a most serious and difficult task. If the parties had intended to give the meaning to the word "work" which was given by the trial judge they would have used the word "workmanship" and not "work."

The contract between the plaintiff and the defendant did not, of necessity, look forward to the employment of union labor exclusively. The defendant is described in the contract (State of case, p. 88) as being from Philadelphia, Pennsylvania, and the plaintiff is described as being from Irvington, New Jersey. It is obvious that the defendant looked forward to the completion of this work irrespective of labor conditions which prevailed in the locality of Irvington. If the various sub-contractors were to insist on an open shop the contract looked forward to employment by the plaintiff of men who would be acceptable in such a manner. If on the other hand conditions which prevailed in this locality required that the plaintiff employ none other than union men, then the obligation under the contract on the part of the plaintiff to so employ union men was contemplated. As it developed the representatives of laborers as well as other trades insisted upon the employment

of union labor by the plaintiff and this he refused to do.

We respectfully urge that the plaintiff agreed by the terms of Article V to employ union men in the prosecution of the work if it became necessary by reason of the demands and complaints of other workmen on the job. It is not disputed that the plaintiff failed to do this. Consequently the defendant was justified in proceeding with the balance of the work himself and inasmuch as the counter-claim exceeded the plaintiff's demand the case should have been submitted to the jury.

CONTRACT NOT INVALID.

The validity of Article V of the contract was not raised in the pleadings and therefore no such issue could be raised at the trial nor can it be raised in this court. We will, however, treat on this subject inasmuch as the trial judge made some slight comment on this subject in deciding the plaintiff's motion. A careful reading of the clause in question will disclose that the plaintiff was not required to employ only union men. He was unlimited in his choice of workmen excepting as to the limitation which he himself voluntarily placed on himself. For workmen to maintain an open shop is surely not illegal. Let us therefore assume for the purpose of this argument that the plaintiff had employed only union labor and that other workmen on the job insisted upon maintaining an open shop so that all workmen were free to obtain employment irrespective of whether or not they had become affiliated with any organization. If our construction of the meaning of Article V is adopted than it seems to us that no serious

argument could be made by the plaintiff that the clause in the contract was invalid by reason of the illegal restraint imposed. A contract to employ only union labor is not *per se* an illegal contract nor is it an unenforceable contract, but such contracts have been uniformly sanctioned by our courts if the restraint imposed is not unreasonable and the contract is made to advance the material interests of the union. In the case of *Jacobs* v. *Cohen*, decided in the Court of Appeals of New York and reported in 183 New York 207 (76 N. E., p. 5), it appeared that the contract was entered into between the defendant and one Jacobs as president of the Protective Coat Tailors and Pressers Union. Cohen agreed to employ only members of this union who were in good standing, etc., for the period of the agreement. He gave a note which was to be treated as liquidated damages if he violated the terms of the agreement. The defendant sought to employ others than members of the union and an action was brought upon the note. An answer was filed setting up that the contract was in restraint of trade and that it had for its purpose the combination of employers and employees whereby the freedom of citizens in pursuing lawful trade is through such contract hampered and restricted. It was urged that such contract was against public policy and should not be enforced. To this answer a demurrer was filed and sustained. The opinion of the court is in part as follows:

> "Whatever else may be said of it, this is the case of an agreement voluntarily made by an employer with his workmen, which bound the latter to give their skilled services for a certain period of time, upon certain conditions, regulating the performance of the work to be done, and restricting the class of workman who should be engaged

upon it to such persons as were in affiliation with the association, organized by the employer's workmen with reference to carrying on the very work. It would seem as though an employer should be unquestionably, free to enter into such a contract with his workmen for the conduct of the business, without it being deemed obnoxious upon any ground of public policy. If it might operate to prevent some persons from being employed by the firm, or, possibly, from remaining in the firm's employment, this is but an incidental feature. Its restrictions were not of an oppressive nature, operating generally in the community to prevent such craftsmen from obtaining employment and from earning their livlihood. It is but a private agreement between an employer and his employees concerning the conduct of the business for a year, and securing to the latter an absolute right to limit the class of their fellow workmen to those persons who should be in affiliation with an organization entered into with the design of protecting their interests in carrying on the work, as indeed, the agreement recites."

* * * * *

"The inviolability of the right of persons to freedom of action may well extend to any concert of action for legitimate ends, if consistent with the maintenance of law and order in the community, and if not interfering with the employment and the exercise by others of their constitutional rights. Their right to combine and to co-operate for the promotion of such ends as the increase of wages, the curtailment of hours of labor, the regulation of their relations with their employer, or for the redress of a grievance, is justifiable. Their combination is lawful, when it does not extend so far as to inflict injury upon others or to oppress and crush them by excluding them from all employment, unless gained through joining the labor organization or trades unions."

* * * * *

"This contract was voluntarily entered into by the Cohens, and if it provided for the performance of the firm's work by those only who were accerdited members in good standing of an organization of a class of workmen, whom they employed were they not free to do so? If they regarded it as beneficial for them to do so, does it lie in their mouths now to urge its illegality? That, incidentally, it might result in the discharge of some of those employed, for failure to come into affiliation with their fellow workmen's organization, or that it might prevent others from being engaged on the work, is neither something of which the employers may complain, nor something with which public policy is concerned."

In the case at bar the plaintiff and the defendant voluntarily entered into this contract. They regarded the language of the contract as beneficial to both. The plaintiff realized that he was free to employ any class of workmen, at least until objection should be made by others on the job. The defendant felt that the provisions were beneficial to him in that he was relieved of worry and responsibility about any labor troubles. That is why the words "in order to avoid complications" were used. We find it very difficult to construe the clause in question as tending to create a monopoly in labor or tending to injure others. The restraint imposed affects only one particular job and does not apply to the employment of any large body in the community, nor does it operate generally to prevent tradesmen from obtaining employment and earning their livlihood. It is a mere private agreement in which the public is not concerned. If a group of contractors combined for the purpose of forcing the employment of a certain class of labor there might be some plausible argument

but hardly where there was a single agreement between two individuals.

In the case of *Grassi Contracting Co.* v. *Bennett,* 174 App. D. 244 (160 N. Y. S. 279), it was held as follows:

> "**An employer may lawfully discharge or refuse to employ one because he is or is not a member of a labor union, and may lawfully contract with his employees to employ only union labor, and to discharge others, or vice versa.**"

In the case of *State, ex rel Robert Mitchell Furniture Co.* v. *Toole,* 26 Mont. 22 (55 L. R. A. 644), 91 Amer. St. Rep. 386; 66 Pac. 496), it was held that

> "**A contract between private persons may provide that it shall cease to be obligatory or be void, if either party to it shall employ non-union men, and the law will permit the provision to have its full force: And so with an inhibition against the hiring of union men, and with all other stipulations which are not impossible of performance, not immoral, nor contrary to public policy. A private person seeking proposals may give notice that the bidders must be members of labor organizations or employers of none but union workmen. The acceptance of a bid made in accordance with the terms of a notice would constitute a contract, the conditions whereof will be binding.**"

Our examination of the authorities does not disclose any case having been decided in this State directly in point with the case at bar.

In the case of *New Jersey Painting Co.* v. *Local No. 26, Brotherhood of Painters, Etc.,* 96 N. J. Eq. 632 (126 Atl. 399), which was decided in this

court it appeared that a bill of complaint was filed for an injunction against the defendants from ordering, advising, encouraging, participating in, persuading, contributing money or advice to any strike or cessation of work of any of complainant's employees. It appears that the defendant union passed a certain rule pertaining to the wage scale in the district in which work was to be done and it was contended by the complainant that the rule was illegal for the reason set forth in the opinion. The complainant failed to comply with the rule imposed by the union and the employees of the complainant were ordered to strike and did strike. While the last cited case is not directly in point of the case at bar it seems to us that it is analogous in principle. This court said in part:

> "The mere combination of action is not the element which gives an illegal character to the act. It is the illegality of the purpose to be accomplished, or the illegal means used separately or in furtherance of the purpose, which makes the act illegal."
>
> * * * * *
>
> "The above cases and nearly all the cases in this country quite uniformly hold, and the complainant seems to concede, that the union may arbitrarily fix a uniform scale of wage applicable to all its members, and strike to enforce its demands; i.e., either to maintain or advance a scale of wages, and the strike will not be interfered with by the courts, if it is lawfully carried on. *Bossert* v. *Dhuy,* 221 N. Y. 342, 117 N. E. 582, Ann. Cas. 1918D, 661. But the argument by the complainant, followed by the learned Vice-Chancellor in this case, seems to be based upon the idea that the union cannot in good faith frame or adopt a rule providing for a sliding scale of wages to fit ostensibly the varying local economic conditions throughout the United States, which

in effect does discriminate against some employers, as a class, in the matter of wages to be paid. It seems to be based upon the ground that such regulations create an unfair restraint of trade.

The attack is aimed not at the combination, but at its effect upon the employers. This is unsound, both legally and economically. In the last analysis, the prime object of the rule attacked is to establish a standard of wages. It is hardly necessary to enter into any extended discussion, pointing out that in law or by analogy article 4 S. 2, and Amend. 14 S. 1, of the Constitution of the United States, are not applicable to private contracts. These sections are directed against State action only. *United States* v. *Harris*, 106 U. S. 643, 1 Sup. Ct. 601, 27 L., Ed. 290.

Economically, the conclusion reached by the lower court confuses the possible or probable effect of the defendant's action upon the employers with the defendants' rights. The law gives the defendants a right to sell their labor to whom they please, when and under such condition as they may fix, individually or in combination. They may make rules and regulations passed in good faith, providing for what they deem to be an economic advantage to themselves. If in the enforcement of such rules and regulations they violate no law, but act solely for the declared purpose, the courts ought not and cannot legally enjoin them from such concerted action, simply because such action may affect some employers. How can it be said that such rules and regulations create an unfair restraint of trade? If the law gives the workers such rights, it must protect them to their enjoyment. They cannot be enjoined from their use or interfered with by the courts. Employers have no vested interest in the labor of workers. We think the defendants, by the terms of the statute in 1883, both its letter and spirit, are within its protection. They are also

within the protection of the *law* as declared in the cases cited. The cases, in which concerted action on the part of a body of workers has been held unlawful, have invariably been such in which either the object sought to be attained had little or no bearing on the interest of the workers, or in which the methods employed by them were in themselves unlawful."

In the case of *Taylor Iron & Steel Co.* v. *Nichols, et al.*, decided in this court in 1908, reported in 73 N. J. Eq. 684 (69 Atl. 186), it was amongst other things held that:

> "The validity of this agreement is assailed by the defendant on several grounds. We think it is necessary to consider only the objection that it is invalid because it constitutes an excessive restraint of trade.
>
> The rule of this State is that a contract in restraint of trade will not be enforced unless the restraint is no more extensive than is reasonably required to protect the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public."

Article V in the contract in question was inserted for the mutual advantage of the contracting parties. The defendant sought protection against labor troubles and the complainant obtained an advantage in that he was permitted to employ union or non-union labor as conditions prevailed in the community. From the authorities it would seem that the defendant would have the right to exact a covenant from the plaintiff that none but union labor would be employed, but the present case does not even go as far as that. The restraint imposed in this contract was reasonable in that it did not extend beyond the scope of the necessities and requirements of the parties to the contract. Therefore, we respect-

fully submit that the clause in question was legal and enforceable.

Respectfully submitted,

WOLBER & GILHOOLY,
Attorneys for and of Counsel
with Defendant-Appellant.

New Jersey Court of Errors and Appeals

August L. Lacombe, *Plaintiff-Respondent,* *vs.* Tyler M. Gibbs, trading as T. M. Gibbs Construction Company, *Defendant-Appellant.*	*Action at Law.* *On Appeal from Essex County Circuit Court.*

BRIEF OF PLAINTIFF-RESPONDENT.

History of the Cause.

This is an appeal from a judgment rendered in the Essex County Circuit Court on March 16, 1927, in favor of the plaintiff in an action at law which was tried by the Court and a jury.

The Court directed a verdict in favor of the plaintiff and against the defendant for $3,560.00 and submitted to the jury the question whether or not the plaintiff was entitled to certain additional profits which he claimed.

The jury rendered a verdict for the amount directed, together with costs in favor of the plaintiff. The Court also directed a verdict for the plaintiff on the counter-claim filed by the defendant.

Statement of Facts.

August L. Lacombe, the plaintiff-respondent, entered into a written contract with Tyler M. Gibbs, the defendant-appellant, trading as T. M. Gibbs Construction Company, dated February 17, 1925 (Exhibit P. 1, S. C., p. 88). This contract

consisted of a printed form prepared by the appellant, and contained the following clause, which is the principal subject of controversy on this appeal.

> "ARTICLE V. Sub-contractor agrees to co-operate with contractor and all other sub-contractors employed on the work in order to avoid complications and insure first-class workmanship in every respect, and further, that in the manufacturing, assembling and erection of the work, he will employ only men whose work will be acceptable to and in harmony with other workmen on the building."

By the terms of the contract it was agreed that the respondent should receive 70c. per cubic yard for general excavation work, and $1.25 per cubic yard for trench excavation work on the site of the now completed high school building in Irvington, N. J.

The respondent proceeded with the excavation and completed almost entirely the general excavation work, and in addition completed 117 cubic yards of trench work when he was stopped by the appellant. The contract price for the work he had completed at that time was $3,207.75.

The respondent issued a writ of attachment out of the Essex County Circuit Court in an action brought by him against the defendant to attach certain funds in the hands of the Board of Education of the Town of Irvington, New Jersey, due or to grow due to the appellant. The appellant entered an appearance and filed a bond. The respondent filed a complaint in which he demanded the sum of $3,207.75, the contract price of the work he performed, and the additional sum of $356.26, representing profits alleged to have been lost by reason of his discharge. The appellant filed an answer and counter-claim, and in the latter demanded $5,026.71 damages,

upon the theory that the respondent had breached the contract, and the costs of completing the work were much higher than the price at which the respondent contracted to perform it.

The questions to be discussed on this appeal are two in number.

1. Did the trial court commit error in directing a verdict in favor of the respondent on the first count of the complaint?

2. Did the trial court commit error in directing a verdict for the respondent on the counter-claim filed by the appellant?

The action of the trial court was based upon the provision contained in Article V quoted hereinabove (S. C., p. 83). In contending that no error was committed in either instance by the trial court, two points will be discussed by the respondent.

POINT ONE. The proper construction of the contract entered into by the parties warranted and required the direction of a verdict for the respondent upon the first count of the complaint and on the counter-claim of the appellant.

POINT TWO. Article V construed as contended for by the appellant would be unenforcible or illegal and, therefore, the trial court was warranted and required to direct a verdict as it did.

POINT ONE.

The proper construction of the contract entered into by the parties warranted and required the direction of a verdict for the respondent upon the first count of the complaint and on the counter-claim of the appellant.

The learned trial judge in his direction of a verdict, and the attorneys for the appellant, in their argument set forth in their brief, both conceded, and correctly so, that the whole case depends upon whether or not Article V requires the employment of union labor. It will not be necessary, therefore, to copiously refer to the testimony of the various witnesses. The brief submitted on behalf of the appellant treats the whole matter as dependent upon the construction of this article of the contract, so that discussion will be limited to that alone.

By every canon of construction established by the courts of this country, the words of Article V can be given no other construction than that applied to them by the trial court. For convenience in carefully examining that article it is here set forth a second time:

"Article V. Sub-contractor agrees to co-operate with contractor and all other sub-contractors employed on the work in order to avoid complications and insure first-class workmanship in every respect, and further, that in the manufacturing, assembling and erection of the work, he will employ only men whose work will be acceptable to and in harmony with other workmen on the building."

The learned trial judge in directing a verdict said (S. C., p. 84):

> "* * * the three important words being 'co-operate,' 'workmanship' and 'work,' and perhaps 'to avoid complications.'"

A careful examination of these words in connection with their context and relative positions in the article must inevitably result in the conclusion that the trial court was correct in its interpretation.

The only fair construction consistent with the expressed intention of the parties, and the accepted meaning of the terms used, is that the workmanship and manner of carrying on the labor of the men employed by the respondent would dovetail with the operations of other workmen on the job, so that a mutual give and take spirit might prevail in the use of appliances and the like for the common use of all workmen on the job, in the co-operating with each other in so regulating the work as to have it proceed in the most desirable manner for the peculiar requirements of each other, and in the avoiding of possible disputes and ill-feeling which might arise from a lack of such co-operation.

The use of the word "complications" in Article V is greatly relied upon in the brief of the appellant as indicating a mutual intention to employ only union men. That word is in the first portion of the article and is referable as clearly appears in the reading of the article, to the word "co-operation" which appears earlier. All of that early portion of the article is somewhat isolated from the remainder and regarded as distinct from it by the use of the words "and further," following which is the language construed by the Court. But even if the word "com-

plications'' is to be regarded as applicable to the whole of the article, nevertheless, the complications which must have been contemplated by the use of the words which were in fact used, were such as have already been indicated, and the fact is that there were no complications.

Judge Dungan interrogated Mr. Durant, superintendent of defendant's construction work (Case, p. 74), and there elicited the information that the defendant admitted that the only objection that any one had to the plaintiff or his work was because he wouldn't employ union labor and there was no objection to his work, as such—in short, it was otherwise satisfactory.

It may be that it was the secret intention of the appellant to require the respondent to employ union labor, but such an intention, if in fact it existed, is far different from the expressed intention and therefore is of no effect. In 13 C. J. 523, it is said:

> ''The secret intention of the parties, however, if different from the expressed intention, will not prevail, as the law looks to what the parties said as expressing their real intention.''

To the same effect are the following decisions: *Metropolis National Bank* v. *Kennedy,* 17 Wall. 19; *Nichols* v. *Mercer,* 44 Ill. 250; *Knapp* v. *Simon,* 49 N. Y. Super. 17; *Crimp* v. *McCormick Construction Co.,* 72 Fed. 366.

It is a well established principle that words used are to be given their ordinary and popular meaning when it is not evident that they are used in a technical sense. The three words emphasized by the learned trial court should be given a meaning consistent with that which their everyday use connotes.

Upon this subject the following pertinent statement is contained in 13 C. J. 531:

> ''In construing a written contract the words employed will be given their ordinary and popularly accepted meaning, in the absence of anything to show that they were used in a different sense.''

In *American Lithographic Company* v. *Commercial Casualty Insurance Company,* 81 N. J. L. 271, a decision of the Supreme Court, in which the opinion was written by Justice Parker, it was said:

> ''Applying the rule that words in a contract are to be understood in their ordinary sense, in the absence of anything to indicate that they were used in a peculiar sense, it seems plain that the words 'electrotypes of all the policies' means 'electrotypes of all the thirteen forms of policy' and not merely an assortment of fragmentary electrotypes which could be pieced together in various combinations so that the thirteen different forms could be assembled therefrom in turn.''

If these words were used with any special or particular meaning, certainly no evidence was submitted at the trial to support such a contention, the burden of proving which of course was upon the appellant.

Article V of the contract is to be most strongly construed against the appellant if it is ambiguous, for the contract was prepared by the appellant and consists of a printed form bearing at its head the name and address of the appellant. The language used was the language chosen by the appellant. It is unambiguous and is not open to the charge of uncertainty or vagueness of expression as far as the employment of union labor is concerned. But were it ambiguous, the rule just stated would of course apply. In *Adminis-*

trators of Stone v. *United States Casualty Company,* 34 N. J. L. 371, Chief Justice Beasley, speaking for the Supreme Court, said:

> "If the terms used are imperfect or ambiguous it is the fault of the defendants; it is their contract, and the construction of it must be most strongly against them—*contra proferentes.*"

In *American Lithographic Company* v. *Commercial Casualty Insurance Company, supra,* Justice Parker said:

> "Two other rules are applicable—first, that the language must be interpreted in the sense that the promisor knew, or had reason to know, the promisee understood it (9 Cyc. 578); second, that the words are to be most strongly construed against the party using them."

In 13 C. J. 545, the rule and reason therefor is stated in these terms:

> "Where a contract is ambiguous it will be construed most strongly against the party preparing it or employing the words concerning which doubt arises, the reason for the rule being that a man is responsible for ambiguities in his own expression and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the Court will adopt a construction by which they would mean another thing more to his advantage. * * * *The rules just stated are of course peculiarly applicable where the contract is on a printed form prepared by one of the parties.*"

Construing the language of Article V most strongly against the appellant it cannot be seen how there can be read into the article, a requirement that the respondent employ union labor.

The point is made in the brief of the appellant that "the men employed by the plaintiff were not acceptable to other workmen on the building." The contract did not require that they should be. It merely provided in Article V, that the contractor should employ "* * * only men WHOSE WORK will be acceptable to and in harmony with other workmen on the building." It was the work and not the men, which was stipulated for.

In *Trustees of Seventh Baptist Church* v. *Andrew and Thomas, et al.,* a decision of the Court of Appeals of Maryland, reported in 82 Atl. 452, it was said:

> "The word 'work' obviously has a very broad and general meaning, but is defined, as applied to contracts, to be the product of labor and material combined which terminates in the execution of the contract, and applies to all the work done under the contract. This meaning of the word, it will be seen, runs through the whole contract and specifications in this case, and it is in this sense that the word is here used. This meaning is supported by certain expressions in the contract itself; for example: 'Take down the work which the architect shall condemn'; 'the contractor shall cover and protect the work from damage by the weather'; 'the contractor shall maintain insurance on the work.' And in the specifications will be found similar expressions, to wit, 'the contractor shall have some competent person on the work.' 'The contractor must protect his work,' and 'work shown on the drawings.'"

In the instant case it is to be noted the word "work" was used twice in Article V, before that clause providing for the employment of men whose work should be acceptable. It was used in exactly the same manner as is set forth in the opinion quoted above. It is obvious that in a

contract of this nature, the parties are most interested in what is to be produced, and the word "work" therefore, must be deemed, unless the contrary is clearly shown, to mean the product of the fusion of labor and material.

It is urged that the appellant, coming from Pennsylvania, looked forward to the employment by the respondent of that type of men which conditions, union or non-union, in the locality of Irvington would be found to require. There is not a single word in the contract showing this to have been in the contemplation of the parties. Not a single word of testimony was adduced to support any such contention.

Another rule of construction applicable in the instant case is that a contract must be construed as a whole and the intention of the parties is to be collected from the entire instrument, and not from detached portions. The construction of this contract as a whole fails to disclose any reference to the employment of union men by the respondent. In Article VI, the clause which follows immediately after Article V, it was provided that: "Should the sub-contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen * * *." Nothing was said here about union workmen, and Section VI is the one which gives to the contractor, the appellant herein, the right to terminate the contract, and stipulates the grounds upon which such termination may be made.

A very important rule of construction, which is directly applicable in the instant case, is stated in these words in 13 C. J., page 546:

> "Where the parties to the contract have given it 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."

From the brief of the appellant and from the testimony it appears that the work was started and had proceeded for some time with non-union men, without objection from the appellant. It was only when labor union delegates made complaints to the superintendent of the appellant that the latter took the position that the contract called for the employment by the respondent of union men only. During the operations with non-union men, prior to the objections by the union delegates, the appellant was silent on this question.

The foregoing rule of construction was affirmed by this Court in *Edmunds* v. *Miller,* 61 N. J. L. 677, and is also recognized in *Church* v. *Florence Iron Works,* 45 N. J. L. 129, and *Van Dyke* v. *Anderson,* 83 N. J. E. 568.

Upon an entire consideration of the clearness of the language used, the nature of the contract, the real interest of the appellant in having different classes of workmen so handle themselves and their materials and supplies as to avoid confusion and complications, the construction placed upon the contract by the parties themselves, and the inconsistency of the construction contended for by the appellant, with the other portions of the contract, and with the established rules and canons of construction referred to herein, there must result the conclusion that the trial court committed no error in construing the contract as it did, and in directing a verdict.

POINT TWO.

Article V construed as contended for by the appellant would be unenforcible or illegal, and therefore the trial court was warranted and required to direct a verdict as it did.

Upon the motion of the respondent for a direction of a verdict, it was contended that Article V of the contract construed as contended for by the appellant, would be unenforcible as containing an undue restraint of trade and discrimination, and perhaps an illegal provision as being opposed to public policy.

The learned trial judge commented on this contention in directing the verdict, but did not deem it necessary to decide the question. Although the alleged unenforcibility or illegality was not set forth in the respondent's pleadings, the question was, nevertheless, mooted at the trial without objection and has been discussed in the brief of the appellant. The respondent, therefore, will undertake to establish the point set forth above.

By our State Constitution it is provided that:

> "All men are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness."

This is the grand underlying statement of the popular will which renders unenforcible Article V of the contract construed as the appellant would have it construed.

In *Brennan* v. *United Hatters,* 73 N. J. L. 729, a monumental decision of this Court, Justice Pitney, in writing the opinion of the Court, said:

> "As a part of the right of acquiring property there resides in every man the right of making contracts for the purchase and sale of property, and contracts for personal service, which amount to the purchase and sale of labor. It makes little difference whether the right that underlies contracts of the latter sort is called a personal right or a property right. It seems to us impossible to draw a distinction between a right of property and a right of acquiring property that will make a disturbance of the latter right any less actionable than a disturbance of the former. In a civilized community which recognizes the right of private property among its institutions, the notion is intolerable that a man should be protected by the law in the enjoyment of property once it is acquired, but left unprotected by the law in his efforts to acquire it."

A consideration beyond these able statements by the learned Justice, which is of the utmost importance in the present case, is that the appellant was engaged in the execution of a public work, namely, the building of a high school in the Town of Irvington. That municipality, through its Board of Education, was engaged in spending the money of its taxpayers for the erection of the high school, and was interested in the highest degree in securing the erection of the building at the lowest possible cost and burden to its taxpayers. It entered into the contract with the appellant for the erection of the high school, it being understood, of course, that the appellant was a general contractor and that the different classes of work would have to be let out to sub-contractors. For this purpose the appellant was virtually the agent of the Town of Irvington in disbursing the funds of the taxpayers for the completion of the work. As such agent, it was the duty of the appellant to obtain first-class workmanship and materials, at the

best price, and to derive all the advantage and benefit which competition could furnish in that behalf. The appellant was, in effect, acting for a trustee, the municipality, and the *cestuis que trust* were the taxpayers. 2 Dillon Mun. Corp., Sections 914-919.

The Board of Education is also to be regarded as a quasi public corporation, and under the same obligations as the municipality.

The appellant, by entering into the contract in question, if it be a contract for the employment of union labor only, has wrongfully exercised his powers under the contract with the municipality, and has, therefore, caused the municipality to surrender without compensation or return, the right of free contract, which really is a property right and is held in trust for the taxpayers, like any other property.

In another sense, it is to be noted that the principal, the municipality, has a right to the benefit of the entire capacity of its agent, the appellant. He is not permitted to assume inconsistent duties such as would be the case if this contract provided for the employment of union labor only. The agent would then be acting on the one hand for the municipality and on the other for the benefit of others to the detriment of the municipality. Mecham Agency, page 300; Greenwood Pub. Pol., pages 179, 181, 183, 300.

In *Adams* v. *Brenan,* 177 Ill. 194, 42 L. R. A. 718, a taxpayer of the City of Chicago filed a bill against the Board of Education of the city, a contractor, and the city, for the rescission of a contract between the Board of Education and the contractor, which contained the following

clause, which was the principal subject of the controversy:

> "NOTE:—None but Union Labor shall be employed on any part of the work where said work is classified under any existing Union.
>
> By order of the Board of Education."

Justice Cartright, in writing the opinion for the Supreme Court, said:

> "It is plain that the rule adopted by the Board and included in this contract is a discrimination between different classes of citizens, and of such a nature as to restrict competition and to increase the cost of work. It is unquestionable that if the legislature should enact a statute containing the same provision as this contract in regard to any work to be done for boards of education, or if they should, by a statute, undertake to require this board, as the agency of the state in the management of school affairs in the city of Chicago to adopt such a rule or insert such a clause in its contracts, or should undertake to authorize it to do so, the provision would be absolutely null and void, as in conflict with the constitution of the state. If such a restriction were sought to be enforced by any law of the state, it would constitute an infringement upon the constitutional rights of citizens, so that the state, in its sovereign capacity, through its legislature, could not enact such a provision. Millett *v.* People, 117 Ill. 294, 57 Am. Rep. 869; Frorer *v.* People, 141 Ill. 171, 16 L. R. A. 492; Braceville Coal Co. *v.* People, 147 Ill. 66, 22 L. R. A. 340; Ramsey *v.* People, 142 Ill. 380, 17 L. R. A. 853; Ritchie *v.* People, 155 Ill. 98, 29 L. R. A. 79; People, McIlhany, *v.* Chicago Live Stock Exchange, 170 Ill. 556, 39 L. R. A. 373. There is no more reason or justification for such a contract as this than there would be for a provision that no one should be employed except members of some particular party or church. In any such case

it might be said that the board entertained a bona fide opinion that the members of some political party were more intelligent and better capable of performing the work, so that better results would be attained; or that the members of some church, on account of their higher standard of morality, would more faithfully and conscientiously carry out the contract."

It may be thought that the Board of Education or the contractor may exercise a certain discretion in limiting competition. This contention was made however, in the *Adams* v. *Brenan case,* and it was there said:

"The fact that the board may have been of the opinion that its action was for the benefit of the public cannot afford a justification for limiting competition in bidders, and requiring them to abandon the right to contract with whomsoever they may choose for the performance of the work.

"There seems, however, to be a claim that the board of education, although it could not be lawfully required or authorized to make such a contract, may have some sort of discretion to do so; and the only question in the case on the subject of the validity of such contract is whether the board possesses power beyond that of the legislature in which is vested the entire legislative authority of the state. Upon what theory it could be claimed that this board of education which exercises merely the function of the state in maintaining public schools within a limited portion of the state, can possess either power or discretion which the state in its sovereign capacity could not confer upon it, we are unable to imagine. No argument is made which would justify such a conclusion. There can be no greater power of the board to act of its own motion than by virtue of positive law. The results in either case are equally in conflict with the organic law, and such legislation, contract, or action, whatever form it may take, is void."

Aside from the fact that a public corporation is involved in the instant case, such a contract as is now being considered, would be unenforcible and perhaps illegal if made by a private citizen if the constitutional guaranties commented upon by Justice Pitney, *supra,* are to be given effect.

In *Curran* v. *Galen,* 152 N. Y. 33, a decision of the New York Court of Appeals, it was said:

"Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workingmen be to hamper or to restrict that freedom, and, through contracts or arrangements with employers, to coerce other workingmen to become members of the organization and to come under its rules and conditions, under the penalty of the loss of their positions and of deprivation of employment, then that purpose seems clearly unlawful, and militates against the spirit of our government and the nature of our institutions. The effectuation of such a purpose would conflict with that principle of public policy which prohibits monopolies and exclusive privileges. It would tend to deprive the public of the services of men to useful employments and capacities. It would to use the language of Mr. Justice Barrett in People, Gili. *v.* Smith, 5 N. Y. Crim. Rep., 513, 'impoverish and crush a citizen for no reason connected in the slightest degree with the advancement of wages or the maintenance of the rate.'"

This decision was quoted and commented on by Justice Pitney in *Brennan* v. *United Hatters, supra.* In that case, it will be recalled, the labor union entered into an agreement with manufacturing hatters, requiring the latter to employ none but members of the association in their shops. Justice Pitney said:

"We say *assuming* such an agreement not to be unlawful because in our view its lawful-

ness admits of question. In Curran *v.* Galen, 152 N. Y. 33, certain brewery companies in the City of Rochester, having formed themselves into a brewers' association, made an agreement with a labor union, composed of workmen employed in the brewing business in that city, to the effect that all employes of the brewery companies should be members of the union, and that no employe should work for a period longer than four weeks without becoming a member. It was held (as we read the opinion) that the purpose of the union that no employee of a brewing company should be allowed to work without becoming a member of the union, and that the contract referred to should be availed of to compel the discharge of an independent employe, was, in effect, a threat to keep persons from working at the particular trade and to procure their dismissal from employment; and that this plan of *compelling workmen, not in affiliation with the organization, to join it at the peril of being deprived of their employment and of the means of making a livelihood, was unlawful.*"

The case of *Jacabs* v. *Cohen,* 183 N. Y. 207, is much relied upon by the appellant. Speaking of that case Justice Pitney said:

> "In the more recent case of Jacobs *v.* Cohen, 183 N. Y. 207, a contract between a single firm of employers and a labor union, whereby the firm agreed for a certain period to employ and retain only members of the union, and the latter for the same period bound themselves to furnish the services of its members, was held not violative of public policy, on the ground, among others (see P. 211) that 'its restrictions were not of an oppressive nature, operating generally in a community to prevent such craftsmen from obtaining employment and from earning their livelihood.' Whether these decisions are consistent with each other is a question that may require consideration at a future time. At the same time, Protective Association *v.* Cumming, 170 *Id.* 315, may come under consideration. Plant *v.* Woode, 176 Mass. 492; Berry *v.* Donovan, 188 *Id.* 353, and many of the cases cited below, may also throw light upon the lawfulness of such a trade agreement."

The dissenting opinion of Justice Vann, in *Jacobs* v. *Cohen,* in which Justice Bartlett concurred, is very enlightening:

> "The business affected did not belong to the union, or its members, but to the defendants, who agreed voluntarily, of course, to employ and discharge, workmen at the dictation of the union. The labor department of the industry was under the control of the union, for both employer and employed, abrogating their own rights, placed themselves under its command in that respect. *This was a form of slavery, even if voluntarily submitted to; for whoever controls the means by which a man lives controls the man himself. Both the proprietors and the workmen seem to have walked under the yoke of the union without a protest. The employers could employ no one who was not a member of the union, and not even then unless he bore its pass card. They could have no apprentices. Even in an emergency and with the consent of their workmen, they could not exceed the hours of labor prescribed by the union.* A baster, however willing, could not sew on a button, and a presser, even if he wanted to, could not make a buttonhole. If a strong man, capable of working ten hours a day, wished to do so, and his employers were willing to pay him extra for the overtime, he could not without the written consent of the union. A qualified workman, not a member of the union, might be unwilling to join, yet he could not get work unless he did. If an employee wished to leave the union, he could not without losing his place. The employers could not hire non-union men who wished to work for them, nor have extra helpers in their business, and even the work-

men themselves could not take apprentices. Employers were bound to abide by the rules and regulations of the union, and permit its representatives to enter their shops at any and all hours of the day and night for the purpose of inspection and enforcing the terms of the contract as well as the rules and regulations. The employees could refuse to work during a 'sympathy strike' and paralyze the business without affecting the validity of the agreement. They were bound to obey the rules and regulations of the union, whatever they might be that were in force at any time during the year covered by the agreement. Thus master and men bound themselves by these remarkable stipulations made with a voluntary association, which had no pecuniary interest in the business or in the labor of those employed. The labor of the employees belonged to themselves, and they had a right to sell it to whom they chose and on such conditions as were mutually satisfactory. The business belonged to the defendants, and they had the right to employ any man who was willing to work for them; but by this agreement an outsider intervened, and compelled those who owned the business and those who did the work to submit to its direction. As was said by the court below, the will of the employer 'was subjected by executory contract to an arbitrary domination, which not only deprived' him 'of all freedom of action, but also crushed the rights and interests of all independent competition in the field of labor.'

The manifest purpose of the contract was to prevent competition and create a monopoly of labor. A combination of capital, or labor, or as in this case of both, to prevent the free pursuit of any lawful business, trade or occupation, is forbidden both by statute and the common law. Re Davies, 168 N. Y. 89, 56 L. R. A. 855, 61 N. E. 118; Laws 1897, Chap. 383, Para. 1, p. 310. A labor trust in restraint of free labor is opposed to sound public policy the same as a trust of capital in

restraint of free production, and any agreement by which either object is sought to be accomplished is illegal and void."

Somewhat similar to the views of Justice Vann set forth above are those of **Vice-Chancellor** Green in *Barr* v. *Essex Trades Council,* 53, N. J. E. 101, where that learned jurist said:

> "It was Mr. Barr's personal right, without interference or dictation from any person or persons, to employ, in the prosecution of his business, such mechanical appliances as were safe and healthful, and to employ, in the production of his paper, such persons and lawful means as he might choose.
>
> It is said in Hilton *v.* Eckersley, 6 EL. & B. 47: 'It is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his own mode of carrying it (his business) on according to his own discretion and choice.' "

The fact that the respondent entered into this agreement does prevent him from claiming that it is illegal, if illegal it is, and if it is merely unenforcible by reason of its containing an undue restraint of trade, he is not estopped from setting up the unenforcibility of the agreement. In *Rosenbaum* v. *U. S. Credit System Company,* 65 N. J. L. 255, this Court said:

> "Both parties must be presumed to have known the law as to contracts in restraint of trade, and therefore the restrictive covenant, if invalid, ought not to be held to avoid the valid covenants. Contracts in undue restraint of trade are loosely spoken of in the books as illegal contracts. It is more accurate to style them unenforceable contracts. It is not against the law to make such a contract, or illegal to perform it. As was said by Chief Baron Pollock, in Green *v.* Price, 13 *Id.* 694; 'it is not like a contract to do an illegal act; it is merely a covenant which the law will not enforce, but the party may perform it if he choose.' "

The appellant in his brief has laid much stress upon the decision in the *New Jersey Painting Co.* v. *Local No. 26, Brotherhood of Painters, etc.,* 92 N. J. E. 681. That case presented for consideration a situation where a sliding wage scale was fixed and the union ordered the complainant's employees to strike upon his non-compliance with the scale. No considerations pertinent to the present inquiry were raised in that decision.

It is patently evident that such a provision as Article V of this contract is contended to be has the effect of restricting competition, creating a monopoly and injuring the public generally, especially in a small municipality such as Irvington, where a supply of a given class of labor is necessarily limited. To hold such an agreement enforceable against a public corporation, although only indirectly through its agent, the appellant, or to hold it enforcible even as against a private individual would be a departure from the spirit and theory of kindred decisions of the courts of this State.

The foregoing considerations, of course, are made upon the *assumption* that the article of the contract under consideration *requires* the employment of union labor only. The respondent has extensively pointed out the complete impossibility in law, logic or reason, of such a construction, and it is respectfully urged therefore, that the judgment in the lower court should be affirmed.

Respectfully submitted,

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