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NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.
CUMBERLAND COUNTY.

CLIFTON BURKET,
Plaintiff, }
 v. } Action at Law. 10
 EDWARD H. ELLIS, } Notice of Appeal.
Defendant. }

To McDonald & Joseph, Attorneys for the Plaintiff:

Take notice: That the defendant appeals from the whole of the judgment in this cause, to the Court of Errors and Appeals of the State of New Jersey.

OSCAR B. REDROW,
Attorney for Defendant.

[ENDORSED.]

Service of the within notice of appeal is hereby acknowledged this 15th day of March, 1928. 30

McDonald & Joseph,
Attorney for Plaintiff.

SUMMONS.

THE STATE OF NEW JERSEY TO EDWARD H. ELLIS:

10 You are summoned to answer the annexed complaint of Clifton Burket, in an (Seal) action at law in the New Jersey Supreme Court. And take notice that unless you file an answer to said complaint with the Clerk of the Supreme Court at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton, this twenty-third day of June, nineteen hundred and twenty-seven.

EDWARD J. KELLEHER,
Clerk.

20 McDONALD & JOSEPH,
Attorneys.

30

COMPLAINT.

NEW JERSEY SUPREME COURT.
CUMBERLAND COUNTY.

CLIFTON BURKET,
Plaintiff,)
v.) Action at Law. 10
EDWARD H. ELLIS,)
Defendant.)
Complaint.

Plaintiff, residing in the Borough of Vineland, Cumberland County, New Jersey, says:

1. In or about the month of April, 1927, the plaintiff and the defendant entered into a verbal contract of employment, whereby the defendant agreed to pay the plaintiff a weekly salary of seventy-five (\$75.00) dollars, for superintending the paving of the State road known as Delsea Drive, between the village of Malaga, in Gloucester County, New Jersey, and Oak Road, in Landis Township, Cumberland County, New Jersey. Said employment to continue during the time such paving work was under construction, at the said salary of \$75.00, to be paid by the defendant, and in addition thereto the defendant promised and agreed to pay the plaintiff the sum of one thousand (\$1,000.00) dollars when his work, superintending the construction of said paving, was completed. 30

2. Plaintiff entered upon said employment and has

performed his part of said agreement in every respect. Said pavement was completed on June 20th, 1927, and the defendant has paid plaintiff the sum of \$75.00 weekly as agreed, to the said 20th day of June, 1927, but has refused to pay the additional sum of \$1,000.00, as agreed, and no part thereof has been paid, with the exception of one hundred fifty-nine (\$159.00) dollars, which has been received by the plaintiff on account thereof, leaving a balance of eight hundred forty-one (\$841.00) dollars justly due and owing to plaintiff by the defendant.

10

Plaintiff demands judgment against the defendant for the sum of eight hundred forty-one (\$841.00) dollars, with interest from June 20th, 1927, together with the costs of this action.

McDONALD & JOSEPH,
Plaintiff's Attorneys.

20

30

ANSWER AND COUNTER-CLAIM.

NEW JERSEY SUPREME COURT.

CLIFTON BURKET,	}	Action at Law.	10
<i>Plaintiff,</i>			
v.			
EDWARD H. ELLIS,	}	Answer and Counter-Claim.	
<i>Defendant.</i>			

The defendant, Edward H. Ellis, of the City and County of Camden, and State of New Jersey, says that:

1. This defendant denies the matters and things set forth in the complaint. 20

2. This defendant admits that the plaintiff was previously employed by him at a salary of \$75.00 a week, and says that the defendant paid to the plaintiff all moneys which were due and owing to him up until the time he quit said employment.

3. This defendant denies that he is indebted to the complainant in any amount. 30

By way of counter-claim against the plaintiff, the defendant says that:

1. He repeats the statements set forth in the answer.

2. The said plaintiff, while employed by the said defendant, was advanced the sum of \$500.00 in order to pay sundry small bills, and during the time of said employment expended therefrom for sundry bills amounting to the sum of \$340.43, leaving a balance on hand, due from the plaintiff to the defendant, of \$159.57.

10 3. On June 22, 1927, the plaintiff, in order to re-pay to the defendant the amount of money which he had previously under his control for the payment of the sundry bills aforesaid, gave to this defendant a check dated June 22, 1927, in the amount of \$159.57, in payment of the balance due to this defendant, as of the time when the employment of the plaintiff by this defendant ceased.

20 4. Said check for \$159.57 was deposited in due process and was protested for non-payment, and the protest fees amounted to \$2.48. The said check has not since been paid.

A copy of said check is hereto attached and marked Schedule "A."

5. This defendant counter-claims against the plaintiff the sum of \$159.57 damages, with interest from June 22, 1927.

.....
Attorney for Defendant.

SCHEDULE "A"

No.....
Vineland, N. J., June 22, 1927.
Pay to the order of Edward H. Ellis \$159.57
One Hundred Fifty Nine Dollars Fifty Seven
Cents Dollars.
.....
To The Tradesmens Bank, : 10
Vineland, N. J. :
C. T. Burket
.....

REPLY.

NEW JERSEY SUPREME COURT.

CLIFTON BURKET,)
Plaintiff,) Action at Law.
v.) Reply.
EDWARD H. ELLIS,)
Defendant.)

Plaintiff, replying to the answer and counter- 30
claim of the defendant, says:

- 1. Plaintiff denies that payment was made in full, as alleged in paragraph 2 of the answer.
- 2. Plaintiff admits the facts set forth in defendant's counter-claim.

3. Answering the allegations set forth by way of counter-claim plaintiff says that at the time of making and delivering of the check for \$159.57, mentioned in the counter-claim, the defendant was indebted to the plaintiff in the sum of \$1,000.00, balance due for services rendered. On said day plaintiff was called the defendant's office for the purpose of settlement and thereupon rendered his account of moneys received and disbursed and drew said check to the order of defendant for the sum of \$159.57 and delivered the same to him with the understanding that defendant would immediately pay the plaintiff the balance of \$1,000.00 which was due plaintiff as aforesaid. After said check had been made and delivered, the defendant refused to make payment of the sum of \$1,000.00 due plaintiff and the plaintiff thereupon stopped payment of said check and gave the defendant credit for the said sum of \$159.57 on account of said indebtedness of \$1,000.00 as appears by paragraph 2 of the complaint. No sum is due defendant by reason of said check and the said defendant is justly indebted to plaintiff as set forth in the complaint.

.....
Plaintiff's Attorneys.

TESTIMONY.

NEW JERSEY SUPREME COURT.
 CUMBERLAND COUNTY.

CLIFTON BURKET, }
 Plaintiff, } Action at Law. 10
 v. } On Reference to
 EDWARD H. ELLIS, } Common Pleas.
 Defendant. }

—————
 Bridgeton, N. J., March 12th, 1928.

TESTIMONY.

—————
 Before HON. HERBERT C. BARTLETT, Judge, and jury.

—————
 APPEARANCES:
 For plaintiff: MESSRS. McDONALD & JOSEPH.
 For defendant: OSCAR B. REDROW, ESQ.

—————
 Mr. Redrow: Since the filing of the pleadings in this cause, it has been ascertained that the plaintiff did not account for all the funds in his hands, and that there are known balances remaining due

from the plaintiff to the defendant, one item of \$39.50, and another item of \$34.20. These matters have been brought to the plaintiff's attention, and we would like to have these amounts, and any other amounts which may appear, determined with this issue.

10 Mr. McDonald: There was an additional credit found of \$39.50. We will agree that the additional amount of \$39.50 is to be credited, in addition to the amount of the check. The other amounts are denied.

The Court: The amount of \$39.50, which plaintiff agrees is due, may be credited. We cannot go into the other matters.

(Exception noted for defendant.)

20

CLIFTON BURKET, SWORN.

Direct examination.

By Mr. McDonald:

Q. You are the plaintiff in this action?

A. Yes, sir.

Q. Where do you live?

A. Vineland.

30

Q. What is your business?

A. Road building.

Q. By whom are you employed at present?

A. Burket Construction Company.

Q. In business for yourself?

A. Yes.

Q. When did you go in business for yourself?

A. Along the latter part of July of this year, or last year.

Q. 1927?

A. Yes.

Q. Was that immediately after terminating your employment with the defendant?

A. About a week or two weeks afterwards.

Q. Were you formerly employed by Edward H. Ellis, the defendant?

A. Yes, sir.

10

Q. In what capacity?

A. As superintendent of construction.

Q. When did you enter upon your employment?

A. Along in February, 1926.

Q. What were the terms of your employment when you first entered upon it?

A. When I was employed by Mr. Ellis he refused to pay me the salary that I demanded —

Mr. Redrow: I object to that. That is not responsive.

The Court: Yes. What was actually fixed, Mr. Burket?

A. It was fixed that I received a salary of sixty dollars a week and five hundred dollars at the completion of the laying of the concrete.

Q. What job was that known as?

A. That was known as the Devon job, Pennsylvania.

30

Q. Did you receive your weekly pay of sixty dollars a week during that work?

A. Yes, sir.

Q. And at the end of the work did you receive your additional —

Mr. Redrow: I assume from what Mr. McDonald has stated that there apparently were other contracts. He is bringing suit upon one particular contract, and I take it that he is limited to his proof upon this one particular contract.

The Court: I do not see where these contracts would have any bearing. I will sustain the objection.

10

Q. After entering upon your employment in 1926, how long did you remain in the employ of the defendant?

A. Along until about June twenty-third of last year, 1927.

Q. How long a period did you continue to be paid at the rate of sixty dollars weekly?

(Objected to.)

20

(Objection sustained.)

(Exception noted for plaintiff.)

Q. Did you have a further talk relative to your contract of employment in or about the month of April, 1927?

A. I did.

Q. Relating to the contract upon which you are suing now?

30

A. Yes, sir.

Q. Did you have a talk about the contract upon which you are suing?

A. Yes, sir.

Q. Tell the Court and jury what that conversation was.

A. Along in—I think it was about the first of

April, 1927, we got what is known as the Malaga to Vineland job, and on this job I was to receive a salary of seventy-five dollars a week and a thousand dollars when the concrete was completed.

Q. What job was that?

A. That is from Malaga to Vineland; Oak Road.

Q. How long a piece of road is that?

A. It is four and seven-tenths miles long.

Q. Extending from Malaga in Gloucester County to Oak Road in Cumberland County? 10

A. Yes, sir.

Q. After that contract did you commence the work?

A. Yes, sir.

Q. Did you complete it?

A. Yes, sir.

Q. When was the concrete completed.

A. Well, I can't give you the exact date. About two weeks previous to the time of our settlement.

Q. What was the date of your settlement? 20

A. It was the twenty-third of June.

Q. Twenty-third or twenty-second?

A. Well, it was the twenty-third. It was the day after this letter—I received the letter. I received the letter one day and settled the next day.

Q. During that time were you paid the seventy-five dollars weekly?

A. Yes, sir.

Q. After the completion of your work did you call on Mr. Ellis at his office in Camden? 30

A. Yes, sir.

Q. Have a talk with him there?

A. Yes, sir.

Q. What talk did you have there?

A. I went to Mr. Ellis' office to settle after receiving this insulting letter, and I called on Mr. Ellis and

settled with him and turned over the money that was due him, and asked him for the money that was due me, and Mr. Ellis says, "I owe you; go collect it." After that I gave three days for him to decide whether or not he wanted me to collect it, and he decided that he did.

Q. So you brought this action?

A. Yes, sir.

Q. Has any part of that balance been paid to you?

10 A. Well, just what was taken off the bill, that was all. There was \$159.57 that I stopped payment on the check, and we found some other bills that wasn't paid, and I wrote to him and took off \$39.50 more.

Q. Leaving what balance?

A. Leaving a balance of \$802.93.

Q. Which you now claim?

A. Yes, sir.

Q. With interest from what date?

20 A. With interest from the twenty-third of June.

Q. How much does the interest amount to?

A. Approximately \$35.68.

Cross-examination.

By Mr. Redrow:

Q. Mr. Burket, when did you go to work upon this position as superintendent for Mr. Ellis on this
30 Vineland-Malaga road?

A. Along the last of March.

Q. What were your duties as superintendent of construction?

A. My duties was to see that the road was put down.

Q. To see that the road was constructed?

A. Yes, sir.

Q. What was the first thing you did as superintendent in the construction of this road?

A. Well, the first thing I did was to set up our bins and lay our forms, as the grading and the shoulders was sublet to Mr. Lockey and we didn't have anything to do with that.

Q. You had nothing to do with the grading?

A. We had nothing to do with the grading or shoulders.

Q. You were superintendent of the job, I presume? 10

A. I was superintendent for Mr. Ellis and protested against the subletting, and he went ahead and sublet, which I had nothing to do with the grading and shoulders.

Q. Did you have any say in what was done with the grading and shoulders, as to where you would begin work or anything of that kind?

A. No. The Highway Department mostly tells you where to start your shoulders and how far you must keep them ahead. 20

Q. So that in superintending the work here you were not really superintendent of the whole job, were you?

A. No, not on this job. I was superintendent of just what Mr. Ellis was doing, that is, laying the concrete, and the fencing was sublet, too. We had nothing at all to do with the fencing. Nothing to do but laying the concrete and the fine grading which is connected with the concrete.

Q. You can't lay the fine grading until the other
30 grading is done?

A. No, sir.

Q. You didn't do anything about getting the other grading done, the rough grading?

A. It was separate. I would talk with the contractor and ask him whether he would work late or

something like that, and he did, but it was merely on his own consent that he would do it. I had no dealings with the subcontractor whatsoever. I wasn't there when the contract was made.

Q. And you had nothing at all to do with it?

A. No, sir.

Q. You had nothing at all to do with anybody except yourself and the men who were employed by you?

10 A. Mr. Ellis' men was the only men I was superintendent of.

Q. Did you handle the payroll?

A. Sometimes. The payroll was mostly handled by the timekeeper.

Q. Do you know who the timekeeper was?

A. Yes, sir.

Q. Who was it?

A. Mr. Loveland.

Q. Was he employed by you?

20 A. He was employed by Mr. Ellis, yes.

Q. Who is Mr. Loveland?

A. Well, he was the timekeeper on the job at that time. I hired him, but for Mr. Ellis.

Q. He is some relation of yours, isn't he?

A. He is now; not at that time.

Q. On or about the twentieth of June, perhaps the twenty-first of June, Mr. Ellis wrote you a letter addressed to the Utopia Hotel, did he not?

A. Yes, sir.

30 Q. I show you a letter for the purpose of identification. Was this the letter that Mr. Ellis wrote to you?

A. Yes, sir, that is the insulting letter I spoke about.

(The letter was marked D1 for identification.)

Q. After receiving that letter, Mr. Burket, you went up to see Mr. Ellis, did you not?

A. Yes, sir, I went the next day to settle.

Q. After you started work on this job did you have any difficulties with Mr. Ellis or with the State Highway Commission?

A. I didn't.

Q. You had none whatever?

A. No, sir. Well, just a minute. I will correct that statement. I at one time received a letter from 10 Mr. Williams in regard to the shoulders and the subgrade, and Mr. Williams is here now and probably can tell you about the letter, but it wasn't in regard to my work. It was in regard to the subcontractor.

Q. Still, you were superintendent of the job? You were Ellis' representative on the job?

A. I was superintendent of construction. I wasn't over—at no time was I over the subcontractor.

Q. You know, as a matter of fact, you couldn't put your concrete down unless you had the foundation 20 for it, could you?

A. Absolutely not.

Q. And you were superintendent of the job and Mr. Ellis' representative there, were you not?

A. I was superintendent for Mr. Ellis, in charge of the concrete.

Q. You were representing Mr. Ellis at all times on that job, were you not?

A. I was representing him as far as my authority would go, but my authority wasn't over the subcon- 30 tractor.

Q. Your authority was to build the road, wasn't it?

A. Absolutely, but we was held up numerous times by the subcontractor. If I could have helped it, I would have been very glad to do it.

Q. As a matter of fact, do you know whether work

was stopped on this road at any time by the State Highway Commission?

A. It was stopped several times.

Q. Do you know a total of how many times?

A. I couldn't—it was two or three times. I can't recall just exactly.

Q. What was the thickness of this road, Mr. Burket?

A. You mean the —

10 Q. Concrete.

A. Eight inches.

Q. Were you responsible for building it eight inches in thickness?

A. Well, my part was to see that we didn't get any more concrete in than was necessary. The inspector's part is to see that you don't get it too thin. If I recall, the average on that road—I will give it to you. It was seven and ninety-seven hundredths thick, if I am not mistaken. It was the nearest job laid to the specifications, I think, in this State.

20 Q. I show you a letter from the State Highway Commission to Mr. Ellis, in which they give it as an average of seven and eighty-four hundredths. Would you say that was the correct amount or not?

A. Seven and eighty-four hundredths? I can't recall. But they allow you—seven and twenty-five hundredths is the average the State allows.

Q. Seven what?

A. Seven and twenty-five hundredths, I think it is. We will have some of the State men here soon to verify that.

30 Q. Do you know of your own knowledge whether or not Mr. Ellis was penalized for not having the pavement of the thickness —

A. I don't know. There was a lot of things went on I don't know anything about, I will tell you that,

but, furthermore, it wasn't my duty to stand at a grade-board to see whether or not that grade-board was just down to eight inches or not. In other words, I had plenty of men working —

Q. Just a minute. If it wasn't your actual duty to be down there and see that this grade-board was fixed, it was up to you to see that you had men employed by you to do it, wasn't it?

A. There was nothing at all the matter with the grade-board. 10

Q. Then there may have been something the matter with something else?

A. Allow me to have a word, please.

Q. I am asking you a question.

(Question repeated.)

A. Well, that is a broad question. Probably the grade men left the board up sometimes. I don't know. 20

Q. Your job was superintendent. You confine it to the fact that you were there only to look after the concrete laying; that is right, isn't it?

A. Yes, sir.

Q. Now, if the concrete was laid and put in and wasn't as thick as the State required it to be, the responsibility was yours, was it not?

A. Not at all. I wouldn't say it was, because —

Q. Just a minute. Then your understanding is that while you were superintendent of this job for Ellis, you eliminate the fact that perhaps you had nothing to do with the grade of any subcontractors, but you do say you had entire charge of laying the concrete. You knew it had to be eight inches in thickness, and if it wasn't eight inches in thickness, who was responsible for it? 30

A. Well, I would say that is the chance a contractor takes when he takes a job. If I got over eight inches, if I laid eight and a half inches—it is really impossible to lay a road eight inches, and if I had laid eight and a half inches, Mr. Ellis would probably have been after me. I think the job was laid as near eight inches as it possibly could.

Q. That wasn't in your contract, was it?

A. In what contract?

10 Q. In the contract to build the road.

A. There was nothing said what I was to do. I was to receive a thousand dollars and seventy-five dollars a week at the completion of the concrete.

Q. We will come to that in a few minutes, Mr. Burket. Do you know who Mr. Higgins was?

A. Mr. Higgins was resident engineer on the job.

Q. Connected with the State Highway Commission?

A. Yes, sir.

20 Q. And Mr. Williams was the division engineer?

A. Division engineer.

Q. I presume Mr. Williams was actually in charge?

A. Mr. Williams was the divisional engineer, but Mr. Higgins was the engineer on the job and Mr. Williams was over Mr. Higgins, yes, sir.

Q. You say that the concrete work was completed some two weeks before you received this letter from Mr. Ellis?

A. Yes, sir.

30 Q. On the completion of the concrete work your job was finished?

A. Yes, sir.

Q. Were you paid for the additional two weeks that you stayed there?

A. I was.

Q. So you got two weeks additional compensation, according to your theory, after the concrete was completed; that is right, is it?

A. I received pay after the concrete was completed up until the time that I went up and settled, as I was still in the —

Q. Mr. Burket, why do you suppose Mr. Ellis would pay you for two weeks' services at seventy-five dollars a week if your job was merely to complete the concrete and you had that concrete completed two 10 weeks, at least, before you went up to see him and finally gave him a check?

A. Mr. Ellis was at that time trying to hold me in his employment, and even when I went to the office to settle Mr. Ellis says, "We will get together, and I don't want you to leave, and if you do leave you can come back to my employment at any time," as I made Mr. Ellis about ninety thousand dollars during my time with him.

Mr. Redrow: I move that be stricken out. 20

The Court: Strike it out.

Q. The contracting business was really so worth while you got into it yourself immediately, didn't you?

A. Yes, on account I thought if a man like Mr. Ellis could start out without any experience I could probably make something, with fifteen years' experience. 30

Q. So your answer to that is that Mr. Ellis was so anxious to retain you as superintendent, that he would be willing to pay you the additional seventy-five dollars after the work had been done?

A. Yes, sir.

Q. What work did you do, if anything, during that two weeks?

A. I would once in a while drive over the road; that is all.

Q. You would once in a while drive over to the office? During this time you also had an automobile, did you not, Mr. Burket?

A. There was an automobile, yes, that I used during the working hours. I had a car that I drove myself after six o'clock. 10

Q. You were always particular to get the car back at six o'clock and use your own car?

A. Well, during working hours. I never drove Mr. Ellis' car for any pleasure whatever.

Q. Your understanding of this contract might be different from other understandings of it, Mr. Burket, and this letter would indicate that Mr. Ellis had a different idea, would it not, that he wrote to you?

A. I don't know, only Mr. Ellis explained that he wrote that letter and he was angry at the time and told me just in the same words that I repeated here. 20

Q. He had been down to look you up a couple of days before he wrote the letter, had he not?

A. He was down the day previous.

Q. And he was also down the day he wrote the letter, trying to find you, was he not?

A. I do not know that.

Q. He says so in the letter, does he not? 30

A. Yes.

Q. Why do you suppose he was down there trying to find you?

A. I do not know.

Q. If you had your work done there wasn't anything you could do for him, was there?

A. No. My work was through.

Q. You were entirely completed?

A. Yes.

Q. But he did write to you and he did say to you that he was down there looking for you?

A. Absolutely.

Q. And he wanted to see you about this contract?

A. Yes, sir.

Q. And that was some two weeks after the job had been completed? 10

A. Yes, sir.

Q. Do you know Mr. Reeves, who is now a member of the State Highway Commission?

A. Yes, sir.

Q. Do you know whether or not he was instrumental in having the work stopped on this road?

A. I wouldn't be—I could not say. That isn't my business, to know what Mr. Reeves thinks.

Q. Just so we can know exactly, was there anything at all that you were required to do except just get the mix and put it in the mixer and put it on the road? Was that your duty and that is all? 20

A. In the laying of concrete you have bins. The bins was a distance of four mile and a half. We unload it. The hauling and the curing of the concrete, putting on the straw, the water, and that, was my duties.

Q. How about protection of the road?

A. That is the curing. Yes, sir.

Q. Beg pardon?

A. The curing of it, yes, sir. 30

Q. How about the protection of the road from travel?

A. The travel was left to Mr. Lockey. They traveled along the shoulders. The only thing we had was lanterns, which I spent many a time at ten and eleven

o'clock out there seeing whether the lanterns were placed right or not.

Q. They always were placed right when you were there?

A. When I can buy lanterns in this part of the country, as we have bought them by the thousands, and Mr. Ellis would send me some from Philadelphia once in a while after I had ordered them for two weeks, I would put up the lanterns. I always
10 put up all the lanterns we had.

Q. So in addition to laying the concrete you assumed the duty, at least, of protecting the road from travel?

A. Only the lanterns. They run on the shoulders, and that was Mr. Lockey's contract, and I wasn't responsible for it.

Q. Do you know Mr. Bedwell?

A. I have met Mr. Bedwell since I left Mr. Ellis' employment. Mr. Bedwell was on the job one day.

20 Q. You know, as a matter of fact, that the job was stopped several times by the State Highway engineer, or by the State Highway Commission?

A. Yes, sir.

Q. And you were stopped from pouring the concrete?

A. We were stopped from pouring the concrete because the shoulders was not in shape to drive on.

Q. When you would be laying concrete would you have a full force working trying to get it completed?

30 A. Mostly Mr. Lockey took the men—if he was short of men I gave him all the men he needed to complete the shoulders, which he paid for.

Q. But, nevertheless, Mr. Burket, every time the work was stopped it meant that the machinery of mixing was stopped, your grading was stopped, and every kind of work on the job was stopped, at a considerable loss, wasn't it, to the contractor?

A. I still think we have the State record, after holding it up.

Q. I am not asking you that. I am just asking you if that isn't so.

A. Certainly.

Q. And it was stopped four or five different times, and there was quite a loss to the contractor every time it was stopped?

A. It was a loss, yes, sir.

By the Court:

10

Q. Mr. Burket, Mr. Ellis advanced you five hundred dollars to pay different bills on this job?

A. Yes, sir.

Q. And you used up all but \$159 of that amount?

A. Yes, sir.

Q. Then you drew your check to him at this settlement?

A. Yes, sir.

Q. And afterwards when, as you claim, you didn't
20 receive your bonus, you stopped payment on that check?

A. Yes, sir.

By Mr. Redrow:

Q. Mr. Burket, as a matter of fact, there was more than five hundred dollars advanced to you, was there not?

A. Well, there was more, but that was taken care
30 of by the payrolls.

Q. This money was given to you to take care of incidental expenses as they came along, was it not?

A. Yes, sir.

Q. And you paid it out for Mr. Ellis and took in the receipts for it; that is true?

A. Yes, sir. Well, I didn't take any receipt, because it was for labor. It was pay envelopes, mostly.

Q. The amount due at that time was \$159.57, and you gave a check for that, and then there was \$39.50 additional, in accordance with one of your letters?

A. Yes, sir.

Q. And then since that time there has been a claim of a party by the name of Louis Danella for \$34.20, I think it is, and I think in some letter of yours you stated that you paid a man who you thought was the son of this man?

A. I did.

Q. And apparently you didn't pay the man who was entitled to it?

A. Well, we paid a man that was calling there to see him quite often, and we took it for granted it was his son, and we gave him the envelope, which I do not know whether it was his son or not or whether he ever received it. He claims that he hasn't.

Q. That was a man that you employed, was it not?

A. Beg pardon?

Q. That was one of your men you employed there on the job?

A. The one we paid?

Q. No. The one —

A. The one that got hurt? Yes, sir.

Q. Can you say now whether he got the money or whether he didn't? Do you know?

A. I could not say.

Q. You didn't give it to him?

A. It wasn't me that gave it to him at all. It was the timekeeper that gave it to him.

Q. But you are satisfied he didn't get the money?

A. I could not say, because I have never seen the man since. We heard that he didn't receive the money.

Q. Well, in your report to Mr. Ellis you have charged up that amount of money as having been paid to somebody?

A. Yes, sir.

Q. And that \$34.20—I think that is the exact amount—was paid out by you to somebody?

A. It was paid by the timekeeper. The timekeeper done most of the paying.

Q. And the checks were your checks? The money was in your account?

A. This money due him? It was delivered from Mr. Ellis in cash in an envelope; not from my account.

Q. That was all in your account with Ellis?

A. Well, it was brought down from Camden and the timekeeper did the paying and paid this man, as he had the money in the office.

Q. Is this a letter you sent to Mr. Ellis?

A. Yes.

(Letter marked D2 for identification.)

Q. This was the first time, I think, wasn't it, that the work was ever stopped?

A. No, it was stopped at Devon.

Q. Beg pardon?

A. It wasn't the first. Work was shut down at Devon, the first job, several times.

Q. The first in this State, however?

A. The first in this State.

Q. This is the check, is it not, Mr. Burket, that

A. Yes, sir, that is the one I stopped payment on.

Q. \$159 and some cents?

A. Yes.

(Check marked D3 for identification.)

Q. Do you know whether these are copies of a statement that you made out at the time you settled? I think the balance is \$159.57.

A. I am not sure of this, whether this is the one or not. It looks like the statement, but I am not sure of it. There was \$159 due at the time we settled this.

By the Court:

10 Q. What was the nature of this bonus? For completing it on specified time, or what was the reason for it?

A. Well, the reason for it, Mr. Ellis refused to pay me the salary I demanded at the time I went to work for him, and he said that he couldn't afford it but he would pay me at that time sixty dollars a week, on this job seventy-five dollars a week, and so much at the completion of the concrete.

20 Q. That is, he agreed to pay you seventy-five a week and when the concrete was completed he was to give you a bonus?

A. He was to give me a thousand dollars.

Q. Thousand dollar bonus?

A. I wouldn't know whether it was bonus or back salary.

The Court: Do you admit that this was the agreement, and claim that he failed to complete, or that there was no such agreement?

30 Mr. Redrow: There was absolutely no such agreement.

By Mr. Redrow:

Q. You had this agreement of seventy-five dol-

lars a week, and you say that Ellis told you that he would give you a bonus of a thousand dollars?

A. Mr. Ellis and I had a talk —

Q. Just a moment, please. Why was it that you didn't get that weekly? Why was not this thousand dollars split up and why didn't he pay you a couple of hundred dollars a week, instead of giving you seventy-five dollars a week?

A. As I stated, Mr. Ellis could not afford to pay me, as he said, the salary I demanded at the time that I was employed, but he would give me more if I would stick the job out. He would give me the balance of my salary, which on this job he said, "I will give you seventy-five dollars a week and a thousand dollars at the completion of the concrete."

Q. Why do you suppose it was that you—why did you agree to take this thousand dollars on completion of the contract? Why was that withheld until it was completed?

A. That is the way I was employed at the start with Mr. Ellis, the whole way through. Every job was worked that way.

Q. In order that we can find out, Mr. Burket, supposing that you had stopped work on the job the middle of May, either from sickness or from some other employment, how much money would you have been entitled to be paid?

A. I presume if I had quit the job—I don't know. Probably—it read on the completion of our contract, or the concrete.

Q. So if you had quit the job, say, the middle of May, you don't know what you would have been entitled to?

A. No.

Q. You would have had your seventy-five dollars a week?

A. Yes, seventy-five dollars a week.

Q. But outside of that you can't say now how much money you would have been entitled to, if any?

A. I would say that if I quit the job before it was completed with my contract, I wouldn't expect to receive any money, because it was a set sum.

10 Q. And the only reason you were entitled then to receive the thousand dollars, according to your theory, was on the completion of the job?

A. The completion of the concrete; not of the job.

Q. The completion of the concrete?

A. Yes, sir.

Q. And that was the consideration, as you saw it?

A. Yes, sir.

20 Q. And you still say you had nothing at all to do with anything else except laying concrete?

A. No, sir; that was sublet.

Re-direct examination.

By Mr. McDonald:

Q. Prior to receiving this letter which is marked D1, I believe, the letter of June twentieth, had you talked with Mr. Ellis about leaving?

30 A. Yes, sir.

Q. Were you planning then to go into business for yourself?

A. Well, I was planning at the time, yes.

Q. And Mr. Ellis knew that?

A. Yes, sir, because I gave Mr. Ellis the first proposition of going in business.

Q. What talk did you have with him about changing your business relations?

(Question objected to.)

(Question allowed.)

Q. Prior to the time this letter was written, what talk did you have with him?

A. Well, I talked about going in business. With my experience I could make more money than what I was getting, and Mr. Ellis at one time was sending me to another job — 10

(Objected to.)

(Objection sustained.)

Q. Just what you said about going into business and what he said to you.

A. Mr. Ellis said the way business was now he wouldn't take me in partners.

Q. Did you ask him to take you in partners? 20

A. Yes, sir.

Mr. Redrow: I object.

The Court: I will permit it.

Q. Was that just before this letter had been written?

A. Yes, sir.

Q. How long had you been working for Ellis before that time? 30

A. Since the last of February, 1926.

Q. How many road building jobs had you completed for him?

A. Four.

Q. Were you actually working building roads all the time during those two years?

A. No, sir. Two months during the winter time I didn't work.

Q. Did your salary continue during that period?

A. Yes, sir.

Q. Continuously from the time you went with him two years before?

A. Yes, sir.

Q. And it continued right down to the day you terminated your agreement on June twenty-second?

10 A. Yes, sir.

Q. Although you were not doing any work on this job for about two weeks?

A. Yes, sir.

Q. Was Mr. Ellis preparing to go on other jobs?

(Objected to.)

(Objection sustained.)

20 Q. How about the machinery?

(Objected to.)

(Objection sustained.)

Q. Did you have any talk with Mr. Ellis since the day you were in his office making settlement, or overhear any conversation between him and anybody else?

30 (Objected to.)

The Court: Any statements Mr. Ellis may have made as to this contract I will admit.

A. Yes, sir.

Q. Did you talk with him since that time?

A. I called Mr. Ellis' office three days after I was in it, and told him —

Mr. Redrow: Is this a telephone conversation?

A. Yes, sir.

Mr. Redrow: I object.

Q. Did you have a talk with Mr. Ellis by tele- 10
phone?

A. I did.

Q. What did you say to him?

Mr. Redrow: I object. In the first place, it is not re-direct examination. In the second place, I take it from Mr. McDonald's question that it leads to some statement that Ellis may have made in his own office to someone else in his office, and Mr. 20
Burket was not present in the office at that time, and it does not refer to a telephone conversation held between Mr. Burket and Mr. Ellis.

The Court: If it does not relate to that, it is not admissible. What you are trying to show is a conversation between Mr. Ellis and Mr. Burket direct, is it?

Mr. McDonald: Yes.

30

The Court: I will let you go ahead.

(Exception noted for defendant.)

Q. Did you have a personal talk with Mr. Ellis on the telephone?

A. I called Mr. Ellis' office. I am not positive whether it was Mr. Ellis or Mr. Ross. I asked

The Court: Do not go any further.

Q. Did you have a personal talk with Mr. Ellis, over the telephone or otherwise. If you didn't, we don't want anything else.

10 A. I called the office and asked —

The Court: That is not the question. Did you have a personal talk with Mr. Ellis?

A. I can't say.

Q. Then, to your knowledge, you don't know that you talked to Mr. Ellis?

A. No.

20 Q. Did you overhear a conversation between Mr. Ellis and somebody else?

(Objected to.)

(Objection sustained.)

Q. In your cross-examination you have been asked about delays in this contract. Was there any considerable delay at any time?

A. Not on my part. It was delayed on account of the subcontractor.

30 Q. Did that delay your work any considerable time?

A. Yes, sir; it delayed me, I think it was three or four days.

Q. The subcontractor had been employed to build shoulders?

A. Yes, sir, to do the shoulders and the grading, and he hadn't sufficient equipment to keep ahead.

Q. He couldn't keep ahead of your work?

A. No.

Q. You had nothing to do with that?

A. No, sir.

Q. In spite of that was this contract completed in record time?

A. Yes. Mr Ellis said he would like to have —

(Objected to.)

(Objection sustained.)

10

Q. You have been asked on your cross-examination in reference to why this thousand dollars was to be paid in a lump sum at the conclusion of the contract, and why it wasn't included as part of your salary as the work proceeded. Did you tell all the talk you had with Mr. Ellis about that, how that came about that you contracted that way?

A. Well, Mr. Ellis said he could not afford — 20

Mr. Redrow: I think this has already been covered.

The Court: This may enlarge it somewhat. It is not very clear.

Q. When was the first talk you had with Mr. Ellis about this system of payment?

A. When I was first employed at Devon.

Q. That was two years before?

30

A. The first was in Philadelphia, but it was the Devon job.

The Court: We want to get it clear on this job just what he told you about that thousand dollars. I think we have it. He said he was to get seventy-

five a week. He wanted more and Mr. Ellis wouldn't pay him that, but told him he would pay him a thousand dollars when the contract was completed. That was the agreement, wasn't it?

A. Yes, sir.

The Court: That is the agreement you are suing on here today?

10 A. Yes, sir.

By the Court:

Q. In other words, you wanted more money per week?

A. Yes, sir.

Q. He didn't feel like paying you over seventy-five dollars, but he was willing to give you this bonus at the end?

20 A. Yes, sir.

Q. Were any conditions attached to the bonus?

A. None whatever.

Q. When you got the concrete down?

A. Yes, sir.

By Mr. Redrow:

Q. Was there any time as to when you were to get this job finished?

30 A. No, sir.

Q. So you could take all summer or get it finished up as quickly as you could?

A. Well, there was no time limit. I think Mr. Ellis knew I wouldn't take all summer to put it in.

Q. Do you contend now you would have been entitled to the thousand dollars if you hadn't had the concrete laid until September first?

A. Yes, sir.

Q. And if you had it finished by the first of June it wouldn't have made a particle of difference?

A. Only as far as I could get to some other job and make money. It meant money for me to finish the job, the same as Mr. Ellis.

Q. So that the only condition, as the Court has suggested, was that this thousand dollars was payable to you, according to your contention, when the job was completed, regardless of any time? 10

A. There was no time limit set, no, sir.

Q. Or any other contingency?

A. No, sir.

FRANK W. HIGGINS, SWORN.

Direct examination.

By Mr. McDonald: 20

Q. What is your business, Mr. Higgins?

A. Resident engineer, State Highway Department.

Q. Were you in charge of the construction of this Malaga-Oak Road contract?

A. Yes, sir.

Q. Have you produced your records showing when the concrete was completed there?

A. Yes, sir. 30

Q. Will you please tell us?

A. It was completed June tenth, 1927, the concrete. That is your question, isn't it?

Q. That is the question. That is all.

Cross-examination.

By Mr. Redrow:

Q. Do you know when the road was accepted?

(Objected to as immaterial.)

10 (Objection sustained.)

EUGENE MORI, sworn.

Direct examination.

By Mr. McDonald:

Q. What is your business, Mr. Mori?

20 A. Automobile business.

Q. Are you connected with the Burket Contracting Company at present?

A. Yes, sir.

Q. That is the business now being managed by Mr. Burket, the plaintiff?

A. Yes, sir.

Q. You are interested in that business as a stockholder?

A. Yes, sir.

30 Q. During the month of June, 1927, were you negotiating with Mr. Burket in relation to the organization of this company?

(Question objected to as irrelevant and immaterial.)

The Court: Where would this have a bearing on the case?

Mr. McDonald: It leads up to a conversation Mr. Mori had with Mr. Ellis.

The Court: Then I will admit it.

(Exception noted.)

Q. Were there any such negotiations? 10

A. Yes, sir.

Q. Did you have a conversation with Mr. Ellis, the defendant, regarding Mr. Burket's balance of a thousand dollars, on or about the twenty-third day of June, 1927?

A. The first conversation, no.

(Question repeated.)

A. Yes. 20

Q. Just tell the Court what conversation you had with him?

A. Well, I called Mr. Ellis' office, because I knew Burket —

Mr. Redrow: Was this a telephone conversation?

A. Yes, and I talked to Mr. Ellis.

The Court: You did talk to Mr. Ellis? 30

A. Absolutely.

Mr. Redrow: It has not been established that he knew Mr. Ellis.

A. I am acquainted with Mr. Ellis and have been for some time. I know his voice.

The Court: And you know this was Mr. Ellis you talked with over the phone?

A. Absolutely. I called Mr. Ellis and I told him—I says, “I am considering going into a company with Mr. Burket, who is now in your employment; I know that you know more about him than I do; I have seen him around the place, you have been in here with him. How did you find him while he was in your employment?” He says, “You will have to call later, I will get in touch with you, because I can’t tell you now.” So the following morning —

Mr. Redrow: I ask that be stricken out.

The Court: No, I think it is admissible. It is leading up to the final conversation. That was the first conversation?

A. Yes.

Q. All right. Go ahead.

A. The following morning, while I wasn’t around, my wife called up and then the garage called up that Mr. Ellis was trying to get in touch with me, so finally the operator called me and said Mr. Ellis wanted to speak with me, and I started to talk to Mr. Eills.

By the Court:

Q. You are sure Mr. Ellis was on this phone?

A. Yes, sir.

Q. How are you sure of that?

A. I am so well acquainted with his voice. I know Mr. Ellis.

Q. All right. Go ahead.

A. He said, “I am sorry I couldn’t talk to you yesterday about this, but Mr. Burket was sitting at my desk and I couldn’t tell you exactly what I wanted to tell you,” so he went on discussing the qualities and the objections that he thought that he had, although I was just trying to balance the whole thing up to see whether I was investing my money wisely by going in with him. I said, “Is it true” —

Mr. Redrow: I object to that. I move that be stricken out.

The Court: I will strike that out. We want to get at this thousand dollars.

A. Then I says to him, “Is it true that you owe Mr. Burket a thousand dollars on this job at Malaga?” and he says, “I owe it to him, but let him try and get it.” That was, in other words, the conversation. He was wondering where Mr. Burket would get the money to go in the business, and this was what Mr. Burket said was a part of the money to make up his share.

Mr. Redrow: I move it all be stricken out.

The Court: Let this part stand, “I owe it to him, but let him try to get it.” Strike out after that.

(Exception noted.)

A. That was the end of our conversation.

Cross-examination.

By Mr. Redrow:

Q. And right after that you went in partners with Mr. Burket?

A. After inquiring of the various references, knowing him as much as I did, yes.

Q. And among your inquiries was Ellis?

A. Yes, sir.

10 Q. You discussed with him fully the merits of the man?

A. Yes, sir.

Q. And you are now in business with him?

A. Yes, sir.

Q. Did you ask him whether or not he was going to pay Burket the thousand dollars?

A. I asked him if he owed it to him. I didn't ask him if he was going to pay it to him. He told me that he owed it to him, but try and get it.

20 Q. Didn't he say to you, as a matter of fact, "Mori, he claims I owe it to him, but let him try and get it?"

A. No.

Q. How came you to testify for Mr. Burket here today? Are you under subpoena?

A. Why, I was subpoenaed, yes.

Q. To be here?

A. Yes.

Q. You are one of Mr. Burket's partners?

30 A. Yes, sir.

Q. In the road building business?

A. Yes, sir.

By Mr. McDonald:

Q. Was Mr. Burket present in your office at the time you had this telephone talk with Mr. Ellis?

A. Yes.

(Objected to.)

(Question allowed.)

Mr. Redrow: My objection is based on the fact that to charge this defendant the man must be in his presence, and he was not.

The Court: Of course, what we are basing it on largely is the conversation with Mr. Ellis, whose voice Mr. Mori knew. The fact that Mr. Burket was present has no bearing that I see, one way or the other. 10

By Mr. Redrow:

Q. Mr. Mori, had Mr. Burket asked you to ask him about that?

A. No, sir. He told me that he had that thousand dollars, together with other money, and I wanted to know where the money was coming from. 20

The Court: That is, the money to go in with you as a partner?

A. Yes.

Q. And he suggested to you that you ask Ellis about it?

A. No.

Q. How did you come to ask him about it? 30

A. In making up his affairs he had so much ready cash and he had this thousand dollars that he was depending upon, and I wanted to know whether it was right or not, naturally. I think I judged the man at the same time I inquired. If I didn't, I wouldn't have called various people.

Q. And Burket was right there when you were talking to him?

A. He happened to be there, because —

Q. Well, he was there?

A. Yes.

PLAINTIFF RESTS.

10

JOHN A. WILLIAMS, SWORN.

Direct examination.

By Mr. Redrow:

Q. Mr. Williams, you are the division engineer for the State Highway Commission located at Camden and for South Jersey?

A. Yes, sir, that is right.

20

Q. And you had entire charge of the construction of this Vineland-Malaga Road?

A. Yes, I did.

Q. And Edward H. Ellis was the contractor, was he not?

A. Yes.

Q. Do you know whether or not the work was stopped on this contract at any time?

A. Yes.

30

Q. I show you a letter signed by you and addressed to Mr. Ellis, with copies to Mr. Bedwell and Mr. Higgins, and ask you if that is a letter which you sent to Mr. Ellis in regard to this contract.

A. It is.

Q. What difficulties did you have in connection with this contract, if any, with the contractor or any of his employees?

Mr. McDonald: That is objected to as being irrelevant, incompetent and immaterial and not within the issues according to the pleadings.

(Question allowed.)

(Question repeated.)

A. Well, the work was not carried on uniformly and was in a very chaotic state quite a good deal of the time, which is what caused the writing of this letter that I identified a few minutes ago. 10

Q. The work was stopped, was it not?

A. The work was stopped, yes.

Q. Once or more than once?

A. I believe it was stopped twice, but I am not positive about that.

Q. Do you know when the road was completed, Mr. Williams? When was the entire road completed? 20

A. September or October of last year.

The Court: That is the entire road?

A. That is right.

Q. Do you know when the road was accepted by the State Highway Commission?

A. I don't have the exact date, no.

Q. In the construction of roads, does the end of the laying of concrete conclude that portion of the road? 30

A. No. The contract is for the road in its entirety, and every item has to be completed before it is accepted.

Q. I show you a letter sent by you to Mr. Ellis, dated October seventh, 1927. Did you write that letter?

A. Yes.

Q. That refers to a penalty of a thousand —

(Objected to.)

(Objection sustained.)

(Exception noted.)

10 Q. Do you know whether or not Mr. Ellis was penalized on this job for faulty concrete work?

(Objected to.)

The Court: You do not set that up in your pleadings. I will sustain the objection.

(Exception noted.)

20 Mr. Redrow: My understanding of the complaint is and was that it is for entire performance. The penalty shows non-performance.

The Court: You would surely be permitted to show that, but how are you going to show any damages against Mr. Burket in these proceedings as they stand, that is, because you were penalized or or anything like that?

30 Mr. Redrow: I am not asking for damages.

The Court: Are you going to offset those damages on the thousand dollars he claims is due him?

Mr. Redrow: No, but I think we are entitled to show that that was not the contract. That it was not completed.

The Court: You are entitled to show that it was a different contract, but I do not see where that question of being penalized enters into that at all. I will sustain the objection on that.

(Exception noted.)

Q. Mr. Willams, do you know the thickness of the concrete under this contract, required under this contract? 10

A. A minimum thickness of eight inches.

Q. Do you know whether that was carried out on this contract?

(Objected to as immaterial.)

(Objection sustained.)

(Exception noted.)

Cross-examination. 20

By Mr. McDonald:

Q. You know the shoulders were sublet by Mr. Ellis?

(Objected to as not proper cross-examination.)

(Objection sustained.) 30

EDWARD H. ELLIS, SWORN.

Direct examination.

By Mr. Redrow:

Q. Mr. Ellis, you are the defendant in this suit?

A. I am.

10 Q. And you were the contractor for the construction of this Malaga-Vineland road that has been spoken of?

A. Yes, sir.

Q. Who was in charge of the construction of this road?

A. Mr. Burket.

Q. What was your understanding of Mr. Burket's duties and his compensation in regard to this contract?

20

(Objected to.)

(Objection sustained.)

Q. What was the contract?

A. Mr. Burket was to be superintendent and have entire charge of the work.

Q. The entire construction?

A. Everything.

30 Q. Does that include the whole road, as well as the concrete work?

A. Everything.

Mr. McDonald: That is objected to as leading. I think we ought to have the conversation.

The Court: Yes; do not make your questions so leading.

Q. When you say complete charge of the construction of the road, Mr. Ellis, what do you mean?

Mr. McDonald: I object to that, as to what he means and what his understanding was.

The Court: Yes. Just what was the agreement there? He now says that Mr. Burket was to have charge of the entire construction of the road. Mr. Burket's story was that he was to have charge of the laying of the concrete, as I recall. What about compensation, Mr. Ellis? 10

A. I was to pay Mr. Burket seventy-five dollars a week. His salary was raised at the time he started that job.

Q. Were you to pay him any other compensation? 20

A. If the work was satisfactory to me, I was.

Q. What were you to pay him if the work was satisfactory to you?

A. A thousand dollars.

Q. Was this work satisfactory to you?

A. It was not.

Q. In what way was it not?

A. I was in hot water with the highway department at all times.

Mr. McDonald: I object to a general statement. 30

The Court: That is a general statement, it is true, but I take it he will specify what the trouble was.

Q. Just specify, Mr. Ellis, instead of generally,

as to what your trouble with the highway department may have been.

A. I received numerous letters from Mr. Williams and also from Mr. Bedwell at Trenton regarding this work, some of which I had to go to Trenton to have straightened out. We were held up on account of the road not being properly lighted at nights, we were held up for shoulders, and just a general condition of strife at all times.

10 Q. I show you a letter dated June second from the State highway engineer concerning the construction of that road. Is that a letter which you received from the State highway department?

A. Yes, from Mr. Williams, division engineer.

Q. I show you another letter dated October seventh, 1927, from the division construction engineer, Mr. Williams, to you. Is that a letter which you received from him?

A. Yes.

20

Mr. Redrow: I offer these letters.

Mr. McDonald: I object to the letters being offered in evidence on the ground that they are irrelevant, incompetent and immaterial, particularly the letter of October seventh, referring to penalties or something of that kind.

30 Mr. Redrow: In confirmation of the testimony of Mr. Ellis our offer was and is to show that there were not only delays in doing the work, and, as he testified, it was not satisfactory to him, and even under the general denial which we have tendered in this cause, we are entitled to have in evidence those things which verify his statement that it was not satisfactory.

Mr. McDonald: The letters would not be the proper evidence, anyway. He had the witness Williams here.

The Court: I will sustain the objection on that ground.

Mr. Redrow: I offer in evidence letters which were marked D1 and D2 for identification.

(The letters were marked Exhibits D1 and D2.) 10

Q. Mr. Ellis, what delays, if any, did you have in the construction of this road?

(Objected to as immaterial and not within the issues.)

(Question allowed.)

A. I was delayed four and a half days. 20

The Court: You were delayed four and a half days?

A. Yes, at two different times.

Q. Mr. Ellis, were you penalized by the State Highway Commission for this pavement not having the thickness that it should have?

Mr. McDonald: That is objected to as irrelevant, immaterial, incompetent and not within the pleadings, no counter-claim being alleged. 30

Mr. Redrow: On a general contract for services performed by any person, the law assumes, of

course, that those services are going to be performed to the best of the man's ability. His own contract in this case was that the pavement should extend a certain thickness and that he was to get a certain bonus of a thousand dollars if it was of that thickness. It is certainly relevant and pertinent to the issue to determine whether it was of that thickness, as bearing on the question of whether or not this man did perform the contract in accordance with the ordinary theory of one man working for another, that he is supposed to give his best services.

The Court: You do not set up in your answer any contract at all. You simply deny that the contract in question was made. I will sustain the objection.

(Exception noted for defendant.)

20 Q. Mr. Ellis, after you wrote this letter to Mr. Burket on June twentieth, 1927, did Mr. Burket come to the office?

A. He did.

Q. Who was there at the time he came besides yourself?

A. Mr. Ross and my brother. Mr. Ross' son was also there at that time.

Q. Was the question as to whether or not the road was completed discussed between Mr. Burket and yourself on that day?

30 A. I don't remember.

Q. Why had you sent for Burket to come to see you?

A. Because his performance hadn't been satisfactory.

Q. And as stated in the letter had you been down on the job?

A. Yes, twice.

Q. Did you find him?

A. No.

Q. What happened to the relationship between Mr. Burket and yourself after that time or at that time?

A. Mr. Burket simply quit his job.

Q. He quit his job?

A. Yes.

Q. What did he say about quitting?

A. Simply said he didn't want to work for me; that was all. 10

Q. Said he didn't want to work for you?

A. That is right.

Q. And he gave you a check, did he, that day?

A. Yes.

Q. And that check for \$159 and some cents you deposited, did you?

A. We deposited it, but it came back protested.

Q. He testified, as nearly as I can recall, that you made a statement at that time that you owed him a thousand dollars and "Let's see you get it." Did you make any such statement at that time? 20

A. I did not.

Q. Did he say anything about wanting a thousand dollars at that time?

A. While he was in the office?

Q. Yes.

A. Not that I remember.

Q. You don't recall any conversation about a thousand dollars at that time? 30

A. After he left the office.

Q. When was that?

A. Right immediately after he wrote this check out.

Q. What did he say then?

A. He wanted his bonus.

Q. What did you tell him?

A. I told him his work wasn't satisfactory and I wasn't going to give it to him.

Q. You didn't say at that time that you owed it to him?

A. No.

Q. Mr. Burket testified that his contract only provided for the completion of the concrete work. Is that true or not? 10

A. Mr. Burket was in entire charge of the job. Subcontractors or anybody else was under his supervision. He represented me on the ground.

Q. Do you know Eugene Mori?

A. Yes, very well.

Q. Do you recall having any telephone conversation with him sometime in June or July?

A. Yes. I don't know the date, but I had a conversation with him. I had frequent conversations with him. 20

Q. Did you or did you not say to him, "I owe him," referring to Burket, "a thousand dollars; let him try and get it?"

A. I did not.

Q. Do you recall what your conversation was with Mr. Mori?

A. Mr. Mori wanted to know something about Mr. Burket and his ability, what he could do, evidently with the idea of starting in business, which I answered to the best of my ability. I didn't at any time refer to any money that I owed Burket. 30

Q. And you didn't say to him that you owed him money and let him try and get it?

A. I did not.

Q. Do you know when the work was finally completed?

A. I haven't the date in my mind, Mr. Redrow.

Q. The division engineer testified sometime in October. Is that correct?

A. I think that is right.

Cross-examination.

By Mr. McDonald:

Q. Do you know when the concrete was finished? 10

A. In June.

Q. June tenth?

A. I can't swear to the date.

Q. Mr. Higgins, the engineer, said June tenth.

A. I have records there which will answer that.

Q. The concrete was all poured and laid before Mr. Burket left?

A. Yes.

Q. And the work of the shoulders was subcontracted? 20

A. That is right.

Q. That is, you didn't employ the men to do that work?

A. I employed the subcontractor.

Q. You let that out to the subcontractor to do all the shoulders?

A. That is right.

Q. So after the concrete was ready, all there was to the job was to complete the shoulders and the grading, wasn't it? 30

A. That is right.

Q. And that was done by the subcontractor?

A. Yes.

Q. And it took him until about October to complete his work before it was accepted by the State?

A. It didn't take him that long, but before it was

finally accepted by the Highway Department, it was October.

Q. It took several months to clear it up before it was finally accepted?

A. That is right.

Q. Mr. Ellis had been employed by you on three prior jobs, had he not?

A. Mr. Burket?

Q. Right.

10 A. Yes.

Q. Three other jobs?

A. That is right.

Q. Over a period of about two years?

A. No; one year.

Q. When did he go to work for you?

A. In February of 1926; February or March.

Q. You started his salary at sixty dollars a week?

A. As I recall it, that is right.

Q. Sixty weekly, and you paid him a bonus of —

20 (Objected to.)

(Objection sustained.)

Q. Did you pay him a bonus on the first job he did?

(Objected to.)

30 (Objection sustained.)

Q. You continued paying him a salary of sixty dollars a week down to the time you arranged for this contract?

A. At or about the time of his starting this concrete I increased his salary to seventy-five dollars a week.

Q. Up until that time he had been drawing sixty weekly?

A. That is my recollection of it.

Q. And you increased his salary on this job to seventy-five dollars a week?

A. That is right.

Q. And you had an understanding that you would give him a thousand dollars on condition if the work was satisfactory to you?

A. It was a voluntary thing on my part.

Q. The prior bonuses that you paid him, they were all voluntary? 10

A. Absolutely voluntary.

Q. But you had made him a payment of a bonus on each contract that he had performed for you?

(Objected to.)

(Objection sustained.)

Q. You say when Burket came to your office on the twenty-second of June you had some discussion with him about this thousand dollars? 20

A. Not in the office.

Q. Was it outside of the office?

A. Outside of the office.

Q. He asked you for the thousand dollars, claiming it was due him? Is that correct?

A. Yes, he did.

Q. And you refused to pay it to him?

A. I told him that he wasn't entitled to it, that I didn't think he was entitled to it. 30

Q. Because his work was not satisfactory?

A. Because his work wasn't satisfactory to me.

Q. That is the only complaint you made at the time?

- A. Absolutely.
- Q. And you didn't intend to pay it to him?
- A. No.
- Q. And when Mr. Mori called you up a day or two later, you say there was no talk at all about the thousand dollars?
- A. Mr. Mori was interested in Mr. Burket's ability. He wasn't interested in this thousand dollars.
- Q. Didn't he ask you whether or not it was true
10 that Mr. Burket had a thousand dollars coming to him?
- A. I don't remember it at all.
- Q. You don't recall his asking you that?
- A. No.
- Q. And you replied that he had it coming, but, "Let's see him get it?"
- A. I didn't make that statement.
- Q. Was there any talk at all with Mr. Mori about this thousand dollars?
- 20 A. I don't recall any.
- Q. Didn't he ask you anything about Mr. Burket's financial responsibility?
- A. Mr. Mori had nothing to do with my business.
- Q. No; with Mr. Burket's. He was looking for a reference for Mr. Burket, wasn't he?
- A. He was looking for a reference for Mr. Burket.
- Q. Mr. Mori's purpose in calling you was to inquire about Mr. Burket?
- A. That is right.
- 30 Q. He told you he was contemplating organizing a contracting company with him, did he not?
- A. I don't recall that he did.
- Q. Had Mr. Burket told you prior to that time that he was contemplating organizing a company?
- A. Mr. Burket had, yes.
- Q. He had told you that before you wrote the letter on June twentieth, had he not?

- A. He hadn't told me that he was expecting to organize a company.
- Q. He had talked to you about going into partnership with you, had he not?
- A. He made me that proposition.
- Q. That he thought he ought to be making more money.
- A. That was optional with him.
- Q. You refused to do it?
- A. Absolutely. I have no partners. 10
- Q. You have no partner in your business?
- A. No.

Mr. Redrow: This has no bearing on the contract whatever.

The Court: I cannot see where it has. Of course, you may test him.

Mr. McDonald: My only purpose is to test his 20 veracity.

Q. Mr. Mori called you at your office, as I understand, did he?

A. I believe so.

Q. And Mr. Burket was right there in your office at the time he telephoned, was he not?

A. According to Mr. Mori's statement that is right. I don't recall it.

Q. So you were not able to talk to him, or didn't 30 wish to talk to him in the presence of Mr. Burket?

A. When he was asking me for a recommendation, no.

Q. So later on, the following morning, perhaps, you called Mr. Mori?

A. I don't remember whether I called Mr. Mori or whether Mr. Mori called me.

Q. But you had a conversation on the following day?

A. I think that is right.

Q. Now, I want you just to remember, if you can, exactly what the conversation you had with Mr. Mori was, what he said to you and what you said to him.

10 A. Mr. Mori wanted to know whether Mr. Burket was an able man, and I told him he was, and I merely set down just what his limitations were and what he could do. Outside of that I don't recall any conversation with Mr. Mori.

Q. You don't recall anything about his asking you if he had a thousand dollars credited to him with you?

A. No. Mr. Mori didn't call me to ask about a thousand dollars as much as he called for a recommendation.

20 The Court: He testified like this: That he asked you, "Is it true you owe one thousand dollars to Mr. Burket?" and that you answered, "I owe it to him; let him try and get it." Is that true or not?

A. It isn't true.

Q. You had no such conversation whatever?

A. Referring to what his Honor said.

Q. Nothing said about a thousand dollars?

A. Nothing.

30 The Court: Was any mention made of a thousand dollars during this conversation between you and Mori?

A. Not that I recollect.

Q. Mr. Mori's statement in that respect is entirely wrong?

A. I beg your pardon?

Q. Mr. Mori's testimony in that respect is entirely wrong?

A. To the best of my knowledge, it is.

Q. You say to the best of your knowledge. You are testifying now.

The Court: We would like to know sure, yes or no, not to the best of your recollection or what you remember, but is it so or not? 10

A. It isn't so.

Q. You are positive he didn't say a word about this thousand dollars?

A. Absolutely.

Q. No mention of money made?

A. No.

Q. Just merely an inquiry about his ability as a road builder?

A. That is right. 20

Q. And you say that you did promise to give him a thousand dollars if his work was satisfactory?

A. It was entirely voluntary on my part.

Q. But you volunteered to give him a thousand dollars if the work was satisfactory?

A. If it was satisfactory.

Q. And you say now it wasn't satisfactory?

A. I do.

Q. And you decided it wasn't satisfactory after all the concrete work was laid on the Malaga road? 30

A. That is right.

Q. After his part of the work was completed, then you decided it wasn't satisfactory and you wouldn't give him a thousand dollars?

A. Mr. Burket's work was the entire job of completion, not only of the concrete. That is only an item in the contract.

Q. When he called at your office in response to your letter, you told him you were not going to give him a thousand dollars; is that right?

A. I told him that he wasn't entitled to it.

Q. You told him you didn't intend to give it to him?

A. That is right.

Q. And you didn't intend to?

A. That is right.

10 Q. And at that time all of his work was done?

A. All of his work constituted the entire contract, not just the concrete as specified.

Q. Did you want him to continue on at seventy-five dollars a week from that time until the subcontractor had finished the work?

A. I did.

Q. Did you ask him to?

A. I did.

Q. Did you ask him that day to continue his work?

20 A. I did.

Q. After you told him you were not going to give him a thousand dollars, you asked him to continue to work with you?

A. At the time when I told him that I didn't owe him a thousand dollars and he wasn't entitled to it, we were not in the office, and Mr. Burket at that time told me that he would sue me. This was outside of my office. There was nothing said about a thousand dollars in my office.

30 Q. At the time you had this talk it was after you had gone outside?

A. That is right.

Q. Then he told you he was going to sue you for the money?

A. Beg pardon?

Q. Did he tell you he would sue you for the money?

A. That is what he told me.

Q. After you had told him you didn't intend to pay him?

A. That is right.

Q. Well, is it true, as I understand, that you wanted Mr. Burket to continue with his employment?

A. I could have used him, yes.

Q. You would like to have had him continue indefinitely; is that right? 10

A. Under certain modifications, yes.

Q. Did you tell him any time he might wish to return to his employment you would be glad to have him?

A. I did not.

Q. Any words to that effect?

A. No.

Q. When he says you told him that, he testifies falsely; is that correct?

A. That is right. 20

Q. Still, you say you did want him to continue?

A. I could have used him.

Q. But you didn't want him to continue?

A. I didn't want him to continue? Mr. Burket quit his job. He didn't want to continue.

Q. You could have used him in your work, but you didn't wish him to continue any longer; is that correct?

A. I beg your pardon? Mr. Burket quit his job. I can't make a man work for me. 30

Q. You called him into the office for a settlement, did you not?

A. Yes, but I can't make a man work for me.

Q. When you wrote this letter of June twentieth, which has been marked in evidence, did you think then that he was going to continue in your employ?

A. I hadn't any idea.

Q. You sent this down special delivery on June twentieth?

A. That is right.

Q. Did you find out where Mr. Burket was the day before, when you had called there?

A. No, I didn't.

Q. Did you ask him?

A. Yes.

10 Q. What did he tell you?

A. He didn't think it was any of my business.

Q. Didn't he tell you, as a matter of fact, or didn't you know, as a matter of fact, that he had gone —

Mr. Redrow: I object. He has answered the question.

The Court: Wait until the question is completed.

20 Q. Did you not know, as a matter of fact, that Mr. Burket had gone to Philadelphia the day before?

(Objected to.)

(Question allowed.)

(Exception noted.)

A. No.

30 Q. Is it not a fact that he had told you that he intended going to Philadelphia the day before?

A. No.

Q. And that if you went down to the job on June twentieth, or June nineteenth, the day before this letter was written, you had no right to expect him there?

A. I beg your pardon?

Q. That you had no right to expect him there when you knew he was in Philadelphia?

A. He was on my payroll. I always expected him there.

Q. Did you have any men on the payroll after the concrete was finished?

A. Yes.

Q. What were they doing for you?

A. They were working around there on different 10 things.

Q. Doing what?

A. On one occasion when I went down there, which that letter states, they were standing around waiting for instructions to do something.

By the Court:

Q. Were they working on odds and ends or what? The concrete was finished then. What were they 20 doing?

A. They were working on guard-rails, taking up pipe line, and numerous things.

Q. Was that under your contract with them?

A. Absolutely.

Q. Or under the subcontract to shoulder the road?

A. Well, it might be anything. It wouldn't be any specific thing, because there are about thirty items in this work and it might be anything at all. It might have been putting in catch-basins. It might 30 have been putting in run-offs to catch-basins.

Q. Your contention is that he should have been there superintending that work.

A. Absolutely. My contract there—I don't remember the number of items but if I can look at the contract I can tell you what those things might have been.

By Mr. McDonald:

Q. You say in this letter "Saturday there were men standing around who didn't know what to do." What were those men employed on the job for?

A. To work.

Q. To lay concrete?

A. To work.

Q. Tell us the nature of the work those men were employed to perform?

A. The men are employed to perform whatever we want them to do.

Q. Was there any work for them to do on that stretch of road?

A. There was plenty of work.

Q. On the shoulders?

A. On anything that might have to be done.

Q. But your concrete was all poured, was it?

A. The concrete was in, absolutely. Had been in for some time.

Q. You say in this letter, "My conclusion is that you are no longer interested in my work, so please bring my car and the bank account to the office Wednesday morning at nine o'clock and we will have an understanding as to the future."

A. That is right.

Q. After that did you intend to have him continue in your employ?

A. Mr. Burket left my employ.

Q. At that time he hadn't left?

A. At that time he hadn't.

Q. But when he came into the office, then you ended your relations?

A. About that time.

Q. When he came into the office is the time you agreed to disagree, is it not?

A. That is right.

Q. But up to the time he came to the office he was still in your employ?

A. That is right.

Q. When you had ordered him to surrender the car and bring in the bank account, did you expect him to continue any longer in your employ?

A. Not without pay, I didn't.

Q. Well, with it? Did you expect to pay him longer?

A. If he had wanted to work and superintend the job and finish it, I would have paid him.

Q. At the time you wrote this letter you knew he was planning to organize his own company and go into business?

A. I didn't know that at all, except from hearsay.

Q. You had heard it?

A. I had heard rumors to that effect.

By Mr. Redrow:

Q. Mr. Ellis, is this the contract that you had with the State Highway Commission for that road?

A. That is right.

Q. I notice in that contract it provides for thirty-one different items in the matter of construction, including concrete work, shoulders and different things of that kind. How many of them were you to do yourself?

A. The question is how many did I do myself on this job?

Q. Yes.

A. There is thirty-one different items, Mr. Redrow. Some of those items were bridges, which were also sublet, and on the road work itself there are seventeen items, fifteen of which I did myself, with the exclusion of the excavation, shoulders and guard rail.

Q. Which were the fifteen items you did yourself?

A. Do you want me to read these?

Q. Yes, that is what we want to know.

A. Here is 18,308 cubic yards of excavation, unclassified.

Q. Was that subcontracted?

A. That was subcontracted. 59,468 square yards of gravel shoulders, also subcontracted. 56,000 square yards of surface, Type C concrete. That I did myself. 36 lineal feet of plain cement concrete curb. 128 lineal feet of 12-inch corrugated pipe. 252 lineal feet 18-inch corrugated pipe. All of these things I did myself. 39 lineal feet of 20-inch pipe; 96 lineal feet of 24-inch pipe; 19 cubic yards of class D concrete; 66 square yards of concrete aprons; 215 lineal feet of concrete steps; 1116 lineal feet of wire rope railing, which was subcontracted; 93 lineal feet of resetting concrete block wall. I don't remember whether that was eliminated from the contract or not. I can't recall.

Q. What I am trying to get at is, in addition to the laying of the concrete in the center of the road, you sublet the grading and shoulders of the road. These driveways into different houses, did that come in with your concrete work?

A. No, that was mostly gravel.

Q. How about curbs? Did you have any curbs?

A. The curbs went in with the concrete work. Here is another item of 2544 lineal feet of reset fence. That I did myself. 672 lineal feet of reset hedge; and 6 catch-basins. With the exception of three of those things, the work was done by me.

Q. And they weren't completed at the time you wrote the letter?

A. No.

(Recess taken until 1.30 P. M.)

(Afternoon Session, 1.30 P. M.)

CHARLES R. ROSS, sworn.

Direct examination.

By Mr. Redrow:

Mr. Redrow: I would like to offer the contract for this road. 10

(The contract was marked Exhibit D4.)

Q. Mr. Ross, you were employed by Mr. Ellis during the year 1927?

A. I was.

Q. Did you have charge of his office during that time?

A. Yes, sir.

Q. Were bills audited and paid through you? 20

A. Yes, sir.

Q. Mr. Burket testified that at times he wouldn't be able to go ahead with the concrete work for some reason or other, and that at those times the men were turned over to the grading contractor. Do you have any report and any charge against the grading contractor for any such work?

A. None whatever except in one instance a truck was charged.

Q. Were you present in Mr. Ellis' office on June twenty-second, 1927, at the time Mr. Burket was at the office? 30

A. Yes, sir.

Q. Was there an account prepared and checked up by you with Mr. Burket at that time?

A. Yes, sir.

Q. Have you the account?

A. Yes, sir.

Q. How much does that show was due, if anything?

A. At that time there was \$159.57 due Mr. Ellis from Mr. Burket.

Q. And a check was given Mr. Ellis for that amount?

10 A. Yes.

Q. How much other indebtedness have you ascertained since that time that was reported paid by Burket that you have since found out was not paid?

A. There is an item of \$39.50.

Q. Which he admits?

A. Yes, sir.

Q. Was there any other item?

A. Another item for which we are obliged —

20 Mr. McDonald: I object to any further items.

The Court: That was the only one that Mr. McDonald admits.

Mr. McDonald: That was not pleaded, but we agreed to allow that.

Mr. Redrow: This is an item that was brought up since the pleadings were disposed of, and I presume this is the proper place to have it taken care of.

30 The Court: Of course, if it is not pleaded we cannot take it into consideration unless Mr. McDonald consents to it, so I will have to exclude that.

(Exception noted.)

Q. On this day when Mr. Burket was there, the plaintiff testified in words to the effect that Mr. Ellis had said, "I owe you a thousand dollars; now let's see you get it." Was any such statement as that made while Mr. Burket was at the office?

A. No, there was not.

Q. And you were at the office when Mr. Burket came to the office, were you?

A. Yes, I believe I was in the office when he came.

Q. And were you there when he left? 10

A. Yes, sir.

Q. And you were there during all the time he was there?

A. Yes, sir.

Cross-examination.

By Mr. McDonald:

Q. You heard Mr. Ellis testify that this conversation took place outside of the office, did you not? 20
Didn't you hear Mr. Ellis testify that he had a further conversation outside of the office?

A. Yes, sir, I think I did.

Q. Were you present at the time that conversation took place between Mr. Ellis and Mr. Burket outside of the office?

A. No, I was not.

Q. You had a timekeeper on the job, did you not?

A. Yes, sir.

Q. And you made up your payroll from the time 30
book that he turned in?

A. I wouldn't say that was the case all through the job. I think in some instances the payroll was prepared on the job and sent to the office complete and paid directly.

Q. At any rate, if the men who were employed in the concrete work were turned over to the shoulder contractor and he put them on his payroll temporarily, they wouldn't appear on your record at all, would they?

A. It might be done that way.

Q. Wasn't it done that way, as a matter of fact?

A. Not to my knowledge.

Q. Do you know whether or not it was done that way?

A. No, I do not.

JOHN R. ELLIS, SWORN.

Direct examination.

By Mr. Redrow:

20

Q. You are a brother of the defendant?

A. I am.

Q. Do you know the plaintiff?

A. I met him one day in my brother's office.

Q. Was that day June twenty-second of last year?

A. It was.

Q. Were you in the office when Mr. Burket came in?

A. I was.

30 Q. For how long were you there, Mr. Ellis?

A. All the time he was there. I don't just recall how long it was.

Q. Did you go out?

A. I went out to lunch with my brother.

Q. You accompanied your brother out to lunch?

A. I did.

Q. Did Mr. Burket go to lunch with you?

A. No. He came down in the elevator with us and left us on the sidewalk.

Q. Mr. Burket testified that your brother Edward at that time, the defendant in this suit, said, either in the office or as he was leaving the office, words to the effect that, "I owe you the money; now let's see you get it." Did your brother make any statement of that kind or any statement that, "I owe you a thousand dollars; now let's see you get it," during the time that you were with your brother?

A. There was no statement of that kind made.

Q. There was no statement of that kind made?

A. Not while I was with him.

Q. And you were with him all the time that Mr. Burket was?

A. Yes, sir.

Cross-examination.

By Mr. McDonald:

Q. What did your brother say about the thousand dollars?

A. Mr. Burket asked for a settlement, as far as I know, that is, when he got outside of the office, and when we got on the sidewalk they started to arguing and of course it didn't interest me and I walked away.

Q. And you didn't hear what was said about the thousand dollars?

A. I heard nothing about a thousand dollars.

Q. You didn't hear what your brother did say to Mr. Burket about the payment of a thousand dollars?

A. No, I didn't.

Q. You walked away while they were talking?

A. Yes.

DEFENDANT RESTS.

PLAINTIFF'S TESTIMONY IN REBUTTAL.

CLIFTON BURKET, recalled.

Direct examination.

By Mr. McDonald:

10

Q. There has been a letter offered in evidence here written to you by the defendant, bearing date June twentieth, in which Mr. Ellis says that he had called last Saturday and couldn't find you. Where were you on Saturday?

A. I was in Philadelphia.

Q. When did you go to Philadelphia?

A. I left Friday about three o'clock.

Q. What time did you return?

20

A. I returned Saturday about noon.

Q. Before you went did you speak to Mr. Ellis about it?

A. I spoke to Mr. Ellis before that. He knew I had a case up there where I was losing a thousand dollars, or twelve hundred dollars.

Q. Did you have his permission to go?

A. Yes.

Q. And on the way back to the job Saturday forenoon did you see him?

30

A. I passed Mr. Ellis at Clayton.

Q. Did he recognize you?

A. He waved and went on.

Q. Didn't stop?

A. Didn't stop.

Q. This letter says that he found men standing around who didn't know what to do. Were there

any men on your payroll who were not properly employed?

A. There was a couple of men on the payroll with a foreman over them.

Q. Was the foreman there?

A. The foreman was there.

Q. What were they engaged in doing?

A. They were loading up the last of the pipe line, the pipe line that supplies the water to the mixer.

Q. Part of your equipment for laying concrete? 10

A. Yes.

Q. Had they anything to do with laying concrete? Had these men that were there anything to do at that time —

A. No.

Q. That was all done?

A. That was all done.

Q. They were loading the pipe line for shipment to another job?

A. Yes. 20

Q. Where was it being shipped?

A. To Lakewood.

Q. Do you know what day they completed that work?

A. That day, I believe.

Q. Saturday morning?

A. Yes.

By the Court:

Q. Only two men? 30

A. Two men and a foreman.

By Mr. McDonald:

Q. Had they their proper instructions as to what to do?

A. They had.

Q. Who was the foreman?

A. Mr. Rossi.

Q. Whose car were you driving the day you went to Philadelphia?

A. I was driving my own car.

Cross-examination.

10 By Mr. Redrow:

Q. What day of the week was it?

A. I went up Friday and came back Saturday.

Q. Were you on the job Monday morning?

A. Monday morning—I can't tell you just what time. I was on the job Monday.

Q. Mr. Ellis in his letter says—this was written on Monday—"I was on the job last Saturday and again this Monday forenoon and couldn't find you or Loveland on either occasion, nor could I find anyone who knew where to locate you."

A. That isn't strange at all. He had been on the job a lot of times that probably he didn't find me, because there were parts of the job that he would never go to every day.

Q. It is entirely likely he wouldn't find you, then, on the job?

A. Beg pardon?

Q. It is entirely likely he wouldn't find you on the 30 job?

A. No. If he had probably gone over the job he would have found me. He mostly found me when he was looking for me.

Q. When did you see Mr. Ellis and ask his permission to go to Philadelphia?

A. Some time during the week I mentioned it to

him. I can't recall what day. It was the week I went up there, and he understood the case and knew it was coming up at that time.

Q. When did that case come up?

A. Well, it was applying for a settlement. It started Friday afternoon and continued on Saturday morning and I came home as soon as it was over.

Q. Why did you have to ask his permission to go?

A. Well, really, I don't know whether it was asking permission or not. I told him about losing this money up there and he understood it, because he mentioned it numerous times to me about it.

Q. You had nothing to do then, as I understand it?

A. No, there was nothing to do.

Q. These men whom you left on the job had nothing to do except put the pipe line on the car; is that it?

A. That is it. 20

Q. Everything, all driveways and everything —

A. Everything was completed but the shoulders at that time.

Q. Fence all built, pipes all put in?

A. Yes. Pipes must be put in before you lay your concrete.

Q. Approaches to the houses all put in?

A. Yes, all but the gravel the subcontractor was doing.

Q. All the concrete curbs laid? 30

A. Yes, sir.

Rocco Rossi, sworn.

Direct examination.

By Mr. McDonald:

Q. Were you employed by Mr. Ellis on the building of this road?

10 A. I was.

Q. What was your position?

A. Concrete mixer foreman.

Q. Were you there on Saturday morning before the twentieth of June, the Saturday previous to June twentieth?

A. I was.

Q. What were you doing that morning?

A. We were taking up pipe line, water line, and loading it on cars.

20

Mr. Redrow: This is irrelevant and immaterial and it is not rebuttal testimony.

The Court: I will admit it. Exception noted.

Q. What were you doing?

A. I was in charge of a couple of men and one truck. We were picking up pipe line and loading it on the cars to be shipped away to Lakewood.

30 Q. When did you finish that work?

A. That was the Saturday I finished. That was the last day I worked on that job.

Q. Were there any men standing around unemployed, who didn't know what to do?

A. There were men standing around there. There was about five or six men standing near the office who were waiting for money, as far as I know.

Q. Were they on the payroll?

A. Not that I know of.

Q. They were waiting for money that was previously earned?

A. They were waiting for money that was due them. They had been working after the concrete was laid.

Q. The only men employed were yourself and the two or three men picking up the pipe?

A. Yes, sir.

10

Q. And you finished that morning?

A. That was my last day, I think, that I worked on that job, if I am not mistaken.

Q. Did you continue your employment with the defendant after that?

A. I did.

Q. On another job?

A. Yes, sir.

Cross-examination.

20

By Mr. Redrow:

Q. Did you see Mr. Ellis that day?

A. I did.

Q. Did he ask you where Burket was?

A. Yes, sir.

Q. What did you tell him?

A. I didn't tell him where he was. I told him I didn't know where he was. In fact, I didn't.

30

PLAINTIFF RESTS.

DEFENDANT'S TESTIMONY IN SUR-
REBUTTAL.

EDWARD H. ELLIS, recalled.

Direct examination.

10 By Mr. Redrow:

Q. Mr. Burket just testified that he told you he was going to Philadelphia on Saturday, this particular Saturday, and that you knew about it. Did you have any conversation—did he make any statement to you that he was going away that week?

A. He did not. If I had known about it I wouldn't have been looking for him.

20 By the Court:

Q. What about the statement that there were only two men working there; is that correct?

A. I haven't the payrolls to verify that, but I don't think it is. I think there was more than that. Unless Mr. Ross has the payrolls—and I don't think he has.

Q. How many would you say were working there?

A. I should say there was six or eight.

30 Cross-examination.

By Mr. McDonald:

Q. Did you see some men standing around near the office waiting, doing nothing?

A. The men I had reference to before were on the job.

Q. What were they doing?

A. Nothing.

Q. They were standing around?

A. Yes, for lack of direction; didn't know what to do.

Q. Did you see any men working?

A. No.

Q. Was Mr. Rossi working? 10

A. He was in charge of the men.

Q. Well, was he working?

A. He himself doesn't work. He was a foreman.

Q. Well the men that were under him, were they working?

A. No.

Q. What was he supposed to be doing?

A. That was Mr. Burket's job to direct.

Q. Well, you as the boss knew something about it, didn't you? 20

A. About what?

Q. What he was supposed to do.

A. Not unless I knew what Mr. Burket had directed him to do.

Q. Did you inquire?

A. Did I? Yes, I asked the men and they didn't know. Didn't know what to do.

Q. Didn't have anything to do, did they?

A. Evidently plenty to do, but not doing it.

Q. Were they transferring the pipe and shipping it to the Lakewood job? Were they taking up pipe and carrying it by truck to the station so it could be shipped to another job? 30

A. I don't know.

Q. You don't know whether or not they were doing that?

A. No. I didn't see them doing that.

Q. You did have a contract up near Lakewood?

A. That is right.

Q. And you went to work on that immediately following the completion of this work, did you not?

A. Before that time.

Q. You had the work under way before this was completed?

A. Yes.

Q. And you transferred Mr. Rossi with his cement
10 workers up to the Lakewood job?

(Objected to.)

(Objection sustained.)

TESTIMONY CLOSED.

20 Mr. Redrow: We offer in evidence letters marked
for identification in connection with the uncompleted
contract and penalty.

The Court: The offer is denied. Exception noted.

30

COURT'S CHARGE TO JURY.

BARTLETT, J.: Ladies and gentlemen of the jury: The testimony of the plaintiff, Mr. Burket, is that he was employed at seventy-five dollars a week to work for the defendant; that he accepted this amount of wages, in view of the fact that the defendant promised to pay him one thousand dollars when the concrete work was finished. He testifies that the concrete work was finished on June tenth; also that he had completed his contract with the defendant and was entitled to his one thousand dollars. The testimony of Mr. Higgins is to the same effect. In addition to the testimony of Mr. Burket and Mr. Higgins there was the testimony of Mr. Mori, who stated that he carried on a conversation over the telephone with Mr. Ellis; in this conversation Mori said, "Is it true you owe one thousand dollars to Mr. Burket?" and Mr. Ellis replied, "I owe it to him; let him try to get it." 10 20

That sums up the testimony on behalf of the plaintiff, and if you find that that was the agreement, then the plaintiff is entitled to recover his contract price of one thousand dollars, less the \$159.57, which was the check he had given Mr. Ellis, on which he subsequently stopped payment, plus \$39 which was afterwards discovered that he owed, and plus the interest. That amounts to \$838.61. If you find in favor of the plaintiff, that will be the amount of your verdict. 30

The defendant testifies that the contract is not as stated by the plaintiff. His testimony is that if the work was satisfactory to him (the defendant), he was then to pay one thousand dollars. He testifies that the work was not satisfactory; that there had

been some conflict with the State Highway Department, and that it had been held up twice, as I recall; also that the contract was for the completion of the entire work, not the concrete work, as testified to by the plaintiff. That is the defendant's testimony. He also denies that he made the statement to Mr. Mori as Mr. Mori has testified. The defendant's brother and Mr. Ross also testify, and they deny that any such statement was made.

10 If you believe the testimony produced by the defendant that the contract was that the work was to be satisfactory, and it was not satisfactory, then you will find a verdict of no cause for action against the plaintiff, and you will find a verdict in favor of the defendant for the \$159.57, plus the \$39, plus interest. That would amount to \$207.15.

20 You will take the evidence and it is for you to say who is telling the truth in this case. It is a question of veracity. You have heard the testimony of the two parties and their witnesses. If you find for the plaintiff, find for the amount I have given you. If, on the other hand, you believe the story of the defendant and his witnesses, then find for the defendant for the amount I have given you.

I am requested by the defendant to charge as follows:

"A promise of the employer to pay extra wages for any work that it is already the duty of the employee to perform cannot be enforced."

30 That is correct and I so charge you. Bear in mind, this is a question of whether there was a contract made, that he was to accept seventy-five dollars a week, which was lower than he demanded, provided he got the bonus of one thousand dollars at the conclusion of the work.

"2. A promise of additional compensation in the

form of a bonus, to be enforceable must be clear and explicit, and based on a consideration."

That is true and I so charge you. In other words, the contract must be clear and must be proven.

"3. If Burket, the employee, left of his own volition or was discharged for cause, he is not entitled to the bonus."

That is, if you believe that the contract was as the defendant states, the work was to be satisfactory, and Burket left, he would not then be entitled 10 to recover.

"4. Where a bonus is given for satisfactory services it is within the discretion of the employer to determine whether the employee's service has been satisfactory."

That is correct, and I so charge you. In other words, if the contract was that the work was to be satisfactory to the defendant, it must be satisfactory to him. He would be the sole judge.

The case is now in your hands and awaits your 20 verdict.

EXHIBIT D1.

June 20, 1927

Mr. C. T. Burket,
c/o Utopia Hotel,
Vineland, N. J.

SPECIAL DELIVERY

10 Dear Sir:—

I was on the job at Malaga last Saturday, and again this (Monday) forenoon, and could not find you or Loveland on either occasion, nor could I find anyone who knew where to locate you.

Saturday there were men standing around who did not know what to do. My conclusion is that you are no longer interested in my work, so please bring my car and the bank account to the office Wednesday morning at nine o'clock, and we will have an understanding as to the future.

20

When men are in my employ and under pay I expect them to devote their time to my work, and it is not my intention to furnish a car for them to joy-ride around the country.

Yours very truly,
Edward H. Ellis.

EHE/CRR

30

EXHIBIT D2.

August 5, 1927

E. H. Ellis,
810 Wilson Building,
Camden, N. J.

Att. Mr. Ross.

Dear Sir:—

In reply to your letter of August 1st, #6, Harrison Taylor's money in amount \$6.05 was paid to Mr. Sealona for store bill and 198 Louis D'Annella in amount \$34.20 was given to a person whom I thought was his son.

In regards to #100, Steve Ricci, labor \$15.50, and Jos. Di Domenico for beer \$24.00 instead of \$31.00, the difference being \$7.00 was beer bought by Rocky Rossi from another party and paid for. This sum \$39.50 you may deduct from what Mr. Ellis owes me and pay these men.

Yours very truly,
C. T. Burket

20

EXHIBIT D3.

No.....

Vineland, N. J., June 22, 1927.

Pay to the order of Edward H. Ellis \$159.57
One Hundred Fifty Nine Dollars Fifty Seven
Cents Dollars.

30

.....
To The Tradesmens Bank, :
Vineland, N. J. :

C. T. Burket
.....

EXHIBIT D4.

This agreement made the 18th day of March, in the year of our Lord one thousand nine hundred and twenty-seven, between the State Highway Commission, party of the first part, and Edward H. Ellis, 810 Wilson Building, Camden, N. J., party of the second part.

10 WITNESSETH, that the said party of the second part, for and in consideration of the payments, hereinafter specified and agreed to be made by the party of the first part, hereby covenants and agrees to furnish and deliver all the materials, to do and perform all the work and labor required to be furnished and delivered, done and performed in and about the construction of Route No. 20, Section No. 7, Vineland-Malaga, beginning at Sta. 369 plus 0 at 20 Vineland, and extending to Sta. 621 plus 0 Malaga, in the counties of Gloucester & Cumberland, a distance of 25,201.44 feet, or 4.773 miles, in strict and entire conformity with the plans on file at the office of the State Highway Commission at Trenton and with the 1923 Specifications of the New Jersey State Highway Department (Form No. A) as amended by the Instructions to Bidders applying to this particular work, which were duly approved by the State Highway Commission by a resolution adopted for 30 that purpose, which said plans and specifications are hereby made part of this agreement as fully and with the same effect as if the same had been set forth at length in the body of this agreement.

The party of the second part agrees to make payment of all proper charges for labor and materials required in the aforementioned work, and indemnify

and save harmless the party of the first part, its officers, agents and servants, and each and every one of them, against and from all suits and costs of every name and description, and from all damages to which the said party of the first part, or any of its officers, agents or servants may be put, by reason of injury to the persons or property of others resulting from carelessness in the performance of said work, or through the negligence of said party of the second part or through any improper or defective 10 machinery, implements or appliances used by the said party of the second part in the aforesaid work, or through any act or omission on the part of the said party of the second part, or his agent or agents.

It is also agreed and understood that the acceptance of the final payment by the Contractor shall be considered as a release in full of all claims against the State Highway Commission out of, or by reason of, the work done and materials furnished under this contract. 20

In consideration of the premises the party of the first part hereby agrees to pay to the party of the second part for said work, when completed in accordance with the said plans and specifications, the sum of Two hundred Three thousand, two hundred thirty eight dollars and two cents (\$203,238.02), payments to be made as provided in said specifications upon presentation of the proper certificates of the Engineer and Resident Engineer and upon the terms set forth in the annexed specification.

This contract is to be binding upon the party of 30 the first part, its successors or assigns, and upon the party of the second part, his heirs, administrators, executors, successors or assigns.

IN WITNESS WHEREOF, The said party of the first part has caused this instrument to be signed

by its Chairman, attested by its Secretary, pursuant to a resolution of said party of the first part, passed for that purpose, and the said party of the second part has caused this instrument to be signed and his signature to be attested, the day and year first above written.

STATE HIGHWAY COMMISSION

(Seal)

H. L. SCOTT
Chairman

10

Attest:

A. LEE GROVER
Secretary

EDWARD H. ELLIS

(Seal)

Witness or attest:

C. R. ROSS

SPECIFICATIONS

20

56,000 Sq. Yds. "Surface, Type 'C' One Course Reinforced Cement Concrete Pavement," eight (8) inches uniform thickness (1:1-3/4:3-1/2 mix) with double line of reinforcement, as per plan, complete in place, including reinforcement, dowels, joints and headers, the sum of Two dollars eighty five cents per Sq. Yd. 159,600 00

30

POSTEA.

NEW JERSEY SUPREME COURT.
CUMBERLAND COUNTY.

CLIFTON BURKET,
Plaintiff,
v.
EDWARD H. ELLIS,
Defendant.

Action at Law. 10
Postea.

This case was tried before Judge Herbert C. Bartlett, with a jury at the Cumberland Circuit, on March 12, 1928.

The jury rendered a verdict against the defendant and in favor of the plaintiff for eight hundred and thirty-eight dollars and sixty-one cents (\$838.61), and costs. 20

HERBERT C. BARTLETT,
Judge.

30

GROUNDS FOR APPEAL.

COURT OF ERRORS AND APPEALS.

10

CLIFTON BURKET, <i>Appellee,</i>	}	Action at Law. Grounds for Appeal.
v. EDWARD H. ELLIS, <i>Appellant.</i>		

20 Now comes Edward H. Ellis, the appellant, and assigns the following reasons and grounds of appeal upon which he relies in support of his appeal in the above-entitled cause.

1. The Court overruled and denied the offer of the appellant to prove that the appellee had not completed his contracts in accordance with the terms as stated by the appellee, or the contract as stated by the appellant.

30 2. The offer of the appellant to prove that the appellee had not completed his contract in accordance with the terms as stated in the complaint by offering in evidence proof that the concrete work was not completed in accordance with the contract,

whereby the appellant was not able to recover the full contract price, he was penalized by the State Highway Commission for such faulty construction, was overruled by the Court.

3. The Court permitted a witness for the appellee to testify concerning a telephone conversation with the appellant, without proof of identity, and in violation of the rules of evidence.

4. The Court refused to hear any testimony involving any moneys which the appellee had in his possession belonging to the appellant, and not admitted or stated in the pleadings, which were payments reported by the appellee to the appellant to have been made by him to different persons, which, as a matter of fact, were not made, and after the filing of the pleadings in this cause, demands and suits were made against the appellant for such funds.

5. The allegations in the complaint were that the appellee was to receive the sum of one thousand dollars for superintending the construction of said paving, in accordance with a contract with the State Highway Commission for a certain road, there was not proof by the appellee that said contract was performed in accordance with the terms thereof, and the Court refused to permit the appellant to prove that said contract of the appellee was not completed, and that the appellant was penalized for faulty construction.

6. That there was no evidence to support the verdict of the Court below.

7. That the judgment of the Court below was against the weight of the evidence.

OSCAR B. REDROW,
Attorney and Counsel for Appellant.

[ENDORSED]

10 Service acknowledged April 14, 1928.
McDonald & Joseph,
Attorneys for Appellee.

20

30

NEW JERSEY COURT OF ERRORS
AND APPEALS.

CLIFTON BURKET,
Plaintiff-Appellee,

v.
EDWARD H. ELLIS,
Defendant-Appellant.

ACTION AT LAW.

BRIEF OF APPELLANT.

This is a suit brought by Clifton Burket, appellee, to recover from Edward H. Ellis, appellant, a bonus of one thousand dollars alleged to be due by reason of a verbal promise to pay such bonus for superintending the construction of Section 7 of Route No. 20 known, as Delsea Drive at Vineland, N. J. The appellant Edward H. Ellis, on March 18, 1927, made a contract with the State Highway Commission for the construction of this section of the road, and Mr. Ellis is a road building contractor. The Appellee Burket was employed by Ellis as superintendent of the construction of this section of the road. From

his testimony he was only employed to superintend the paving or laying of the concrete pavement. The contract was for the complete construction of the road which included grading, paving, bridges, culverts, guard fences, curbs, approaches, drainage, intakes and the various other necessary items that go to the completion of a modern concrete road. The appellee testified that the employment of Burket was as superintendent of all the construction for the concrete road. Burket testified that he was to receive seventy-five dollars per week during the construction, and a further sum of one thousand dollars when the paving was completed. He had received seventy-five dollars per week during the paving work and the same amount for two or three weeks after the paving was finished, or rather he received this money of seventy-five dollars a week for two or three weeks after he had claimed that the paving work was completed. The appellant Ellis testified there was no contract as to the payment of the thousand dollars, but that after the work had been completed, satisfactory to him, that he would have paid the appellee Burket one thousand dollars which was entirely a matter for him to determine. Whatever may have been the contract the appellee Burket was to perform (a) the contract for the making of the concrete pavement (b) the contract for the entire completion of the work, in accordance with the specifications of the State Highway Commission of such contract.

During the course of construction, the appellant, Ellis, gave to the appellee, Burket, as his agent, various sums of money aggregating perhaps one thousand or fifteen hundred dollars which the appellee, Burket, would use to pay, sometimes labor, and salaries, but mostly for miscellaneous bills, that he would contract as superintendent of this work. The

employment continued until about June 22, 1927, at which time the appellee, Burket made an accounting to the appellant, Ellis, and gave him a check for one hundred fifty-nine dollars and fifty-seven cents, which accounted for the money which Burket claimed was due Ellis out of the moneys which he had received. After this accounting, it developed that there were several claims which Burket had claimed he had paid, which were not apparently paid by Burket as they filed demands, claims and suits against Ellis to recover the respective amounts.

The appellee, Burket, contended at the trial that he was only employed to pour the concrete, and that he had nothing whatever to do with the remaining construction of the road. The fact is that the rough grading of the road was sub-let by Ellis, and all the other work on the road was done under the original contract.

The appellant, Ellis, contended that the contract with Burket provided that if he completed the contract satisfactorily to himself that he would pay him a bonus; that there was no contract in which he had agreed to pay him this bonus of one thousand dollars, but that it was a matter of his own discretion.

The appellant, Ellis, offered to prove at the trial of this case that the appellee, Burket, had misappropriated the funds which he had given him to pay bills, and further that the appellee, Burket, had never completed the contract set forth as the basis of his suit, by first offering testimony that several claims Burket claimed to have paid were, in fact not paid, and secondly by offering testimony of the State Engineer, in charge of the work, to the effect that the road never was completed in accordance with the plans and specifications, and that the ~~appellee,~~ *appellant* ~~Burket,~~ *Ellis* had been penalized for a large sum of money

for not completing the contract as provided by the terms thereof. Exclusion of all this testimony left the case go to the jury with only one fact to decide, and that was whether or not the pouring of the concrete had been made, and if so, was the appellee entitled to his bonus as he alleged. From a judgment in favor of the plaintiff below this appeal is taken.

ARGUMENT.

POINTS I AND II.

THE COURT DENIED THE OFFER OF APPELLANT TO PROVE THAT THE CONTRACT AS STATED (a) BY THE APPELLEE, (b) BY THE APPELLANT, HAD NOT BEEN COMPLETED.

The contract between the State Highway Commission and the appellant provided, among other things, for the construction of a concrete pavement (Case 90, l. 21) of "eight (8) inches uniform thickness".

The offer was to show by John A. Williams, State Highway Engineer in charge of the work for the State, that the contract was in fact never completed in accordance with its terms and that penalties were charged against the appellant and deductions made from the contract price because of the non-completion of the contract in accordance with its terms. (Case 46, l. 10 to 47, l. 18).

The testimony of Burket, appellee, as to what the contract really was, varied. In his direct examination, he testified (Direct) (Case 13, l. 2) "I was to

receive a salary of seventy-five dollars a week and a thousand dollars when the concrete was completed".

(Cross) (Case 17, l. 24) "I was superintendent for Mr. Ellis, in charge of the concrete".

(Cross) (Case 30, l. 5) "I would say that if I quit the job before it was completed with my contract, I wouldn't expect to receive any money, because it was a set sum."

(L. 12) "The completion of the concrete".

(Case 35, l. 33, 36—1 to 10) "The Court: We want to get it clear on this job just what he told you about that thousand dollars. I think we have it. He said he was to get seventy-five a week. He wanted more and Mr. Ellis wouldn't pay him that, but told him he would pay him a thousand dollars when the contract was completed. That was the agreement, wasn't it?"

Burket: "Yes, sir".

"The Court: That is the agreement you are suing on here today?"

Burket: "Yes, sir".

The complaint set forth that (Case 3, l. 33) "When his work, superintending the construction of said paving, was completed". From this testimony the contract as far as the bonus was concerned depended on the completion of the concrete, or the contract, and most certainly carried with it the completion of the concrete, or the contract, in accordance with its terms, and of "eight (8) inches uniform thickness". The testimony of Mr. Williams, as to the thickness of the concrete, as to penalties charged, and as to what portion of the concrete was condemned or rejected, or what, had to be relaid, or reconstructed, was proper testimony for the jury to consider in determining whether or not the contract was in fact performed.

“The appellee was bound to possess and to exercise with reasonable care, that degree of knowledge and skill in the laying the concrete road and in performing his contract, which was common to persons occupying such a position as the one he undertook to fill.”

Alpaugh v. Wood, 53 N. J. L. 638.

Testimony that he did not exercise with reasonable care, that degree of knowledge and skill, for such work, was proper testimony for the Jury. Such evidence being excluded by the trial Court prevented the Jury from knowing the facts.

“Facts indicating that plaintiff (appellee) did not fully perform his contract are admissible, such facts if proved, barring a recovery on the contract.”

39 Cyc 202.

“A contract to pay a gross sum for a certain definite consideration is an entire contract and is not apportionable.

Beach v. Mullin, 34 N. J. L. 343.

POINT III.

THE COURT ADMITTED TESTIMONY FOR THE APPELLEE CONCERNING A TELEPHON CONVERSATION WITHOUT PROOF OF IDENTITY, AND IN VIOLATION OF THE RULES OF EVIDENCE.

For telephone conversation to be admitted in evidence, it must not only show that the person testifying is familiar with the voice of the other party but that the statements made refer to the issue.

Mori did testify that he knew Ellis and knew his voice over the phone.

The statements allege to have been made by appellant (Case 41, witness Mori) had no connection whatever with the alleged contract of appellee. There was nothing to connect the bonus of one thousand dollars with the testimony of Mori. If we assume that Ellis did owe Burket one thousand dollars, the testimony would be irrelevant unless it was shown that the thousand dollars was the bonus on which this suit is brought. It is only by conjecture or by inference that such a conclusion could be made. Its admission was to prejudice the jury against Ellis.

“A promise of additional compensation in the form of a bonus, to be enforceable, must be clear and explicit and based on a consideration.”

39 C. J. 159.

Kerbaugh v. Gray, 212 Fed. 716.

Westinghouse v. Carlton, 202 Fed. 129.

POINT IV.

THE COURT REFUSED TO ADMIT TESTIMONY INVOLVING AN ACCOUNTING BETWEEN THE PARTIES, OF MONEY WHICH WAS GIVEN TO THE APPELLEE FOR THE PAYMENT OF BILLS DURING THE CONSTRUCTION OF THE ROAD.

The appellee as superintendent of the road, received about fifteen hundred dollars which was to be used to pay current bills he contracted on the job. When he quit work he claimed there was a balance on hand of this fund of about one hundred fifty-nine

dollars. This he gave appellant a check for and then stopped payment on the check. After this suit was brought several claims which were represented by the appellee as having been paid were filed with appellant, some a few days prior to trial. Although the appellee was entirely familiar with these claims, he having been notified of them, the Court refused to hear any testimony or amendment to provide for a settlement of all the accounts growing out of the same transaction. We contend that the appellant should have been permitted to amend the answer and counter-claim to include all accounts and circumstances arising out of this employment or contract in accordance with the well established principles of this Court. Unless there be a new trial of this case the appellant will be forced to go into the Court of Equity to require an accounting of the moneys which he gave appellee to carry on this particular job. In the meanwhile the appellant will be required to defend suits against him on claims appellee had reported paid.

The appellee was bound to know whether or not he had actually paid the bills he said he had paid. The appellant did not know when the pleadings were filed that some of the bills appellee had reported paid to him, were in fact not paid, and not until the persons, who were accounted for by appellee as having actually been paid, began to file claims with appellant did appellant know such claims in fact had not been paid.

The trial court should have permitted proper amendment so that all the matters arising out of the same contract should be disposed of in the same case, and not compel the appellant to proceed for an accounting in the Equity Court.

POINT V.

See argument under Points I and II.

The contract was one of entire performance. (Case 30, lines 5 to 18).

Entire performance of the paving contract.

It is not enough for the plaintiff to say that he finished his contract, but he must show that he did the work according to the contract. He is bound to exercise reasonable care, and knowledge and skill (*Alpaugh-Wood*, 53 N. J. L. 638). It is incumbent on appellee to prove complete performance, not only that his work was completed but that it was completed according to contract.

POINTS VI. and VII.

INSUFFICIENT EVIDENCE.

I am aware of a rule of law which has been followed by this court, not to disturb a verdict of a jury, if there was any evidence on which it could be sustained, even going so far as to say that, under the testimony of certain cases, this court might have found the facts differently.

In the present case the facts are different.

1. Because of the peculiar nature of a suit for a bonus, requiring clear and explicit proof based on a consideration, and

2. Lack of testimony showing completion according to the terms of contract.

I have in mind a brick municipal building requir-

ing under the contract a four ply brick wall from foundation to eaves. A superintendent on the job for the contractor is to receive a bonus of one thousand dollars on completion, (a) of the walls of the building (b) of the contract. In fact the brick wall for the first floor is constructed four ply brick, but the second and third floors are constructed three ply brick. The superintendent brings suit for bonus against contractor, he offers proof that the contractor promised payment; he offers proof that the brick work was done, and then rests his case. Can the jury infer from such testimony that the superintendent has proved his case sufficiently to sustain a verdict? We think not. Such a contract would require that the work be done in accordance to specifications and in order to sustain a verdict it would be necessary by proof that the work was done in accordance with the specifications and surely failure to prove that work was completed in accordance with contract would be a lack of proof of performance of contract.

Then suppose we go a step further and in the cited case assume the testimony of completion, could be inferred to mean that it was completed in accordance with the specifications, on such an assumption would you permit the contractor to rebut such an assumption on the general issue, by offering to show that the walls were three ply brick instead of four ply as provided in the contract.

For these reasons we feel that the judgment of the lower court should be reversed and a new trial awarded.

OSCAR B. REDROW,
*Attorney for and of Counsel with
Defendant-Appellant.*

NEW JERSEY COURT OF ERRORS
AND APPEALS.

CLIFTON BURKET,
Plaintiff-Appellee,

v.

EDWARD H. ELLIS,
Defendant-Appellant.

ACTION AT LAW.

BRIEF OF PLAINTIFF-APPELLEE.

STATEMENT OF FACTS.

This is an appeal from a judgment of the Supreme Court entered upon the verdict of a jury. The case was tried at the Cumberland Circuit on March 12, 1928, and the jury rendered its verdict for \$838.61, in favor of appellee, which was the amount claimed to be due.

The action was brought to recover this balance, which appellee claimed was due him as a balance on contract. (See complaint, Case, p. 3 and 4.) Appellee claimed that in April, 1927, he was employed by appellant to superintend the paving of the State road known as Delsea Drive, in the village of Malaga, Gloucester County, New Jersey, and Oak

Road, in Landis Township, Cumberland County, New Jersey, under an agreement pursuant to which appellee was to receive \$75.00 weekly while the work was under construction and the additional sum of \$1000.00 when the work was completed. Appellant's answer (Case, p. 5) is a general denial of the contract and an affirmative plea that appellee had been paid in full. There was a counter-claim set forth for \$159.57, concerning which there is no dispute, as appellee gave credit for this same item in his complaint and only asked judgment for the balance claimed to be due.

The case proceeded to trial on the issue thus framed by the complaint and the answer and the sole question for determination by the Court below was, did the appellant employ appellee under an agreement to make weekly payments of \$75.00 during course of construction of the work and a balance, or lump sum, of \$1000.00 upon completion? This was the claim of appellee, which was denied by appellant. It was the only issue raised by the pleadings and the only question for the jury to determine upon the trial.

Appellee testified as a witness in his own behalf that he first entered appellant's employ about February, 1926, at a salary of \$60.00 weekly and \$500.00 on completion of the first job, designated as the Devon job, Pennsylvania (Case, p. 11); that he thereafter continue in appellant's employ at \$60.00 weekly plus additional amounts for each separate job until about April 1, 1927, when he had a talk with appellant about the so-called Malaga to Vine-land job, concerning which he says (Case, p. 13), "and on this job I was to receive a salary of \$75.00 a week and a thousand dollars when the concrete was completed." He entered upon this employment and was paid \$75.00 weekly during the course of

construction. His work was completed about two weeks before June 23rd. On June 23rd, he went to the office of appellant for a settlement, who refused to pay. (Case, p. 13 and 14.)

On cross-examination (Case, p. 14 to 33), this testimony was amplified but in no way discredited or changed. Payment of this \$1000.00 was not a bonus, contingent upon the happening of any event. It was part of the contract price to be paid for the labor performed, as clearly stated by appellee in his cross-examination (Case, p. 29), and not seriously disputed by appellant. The payment became due when the laying of concrete was completed. It was shown by the testimony of Frank W. Higgins, resident engineer in charge of construction (Case, p. 37), that the laying of concrete was completed June 10, 1927. Therefore, pursuant to the terms of the contract, appellant became indebted to appellee in the sum of \$1000.00 on June 10, 1927.

The appellant, in testifying, admitted the contract claimed by appellee, that he agreed to pay \$75.00 during construction work and further compensation of \$1000.00, which he tried to qualify, by saying, "If the work was satisfactory to me." (Case, p. 49.) It is conceded, however, that appellee was continued in his employment and paid the regular weekly amount of \$75.00 until after the contract was completed, without complaint, which circumstance indicates in itself that appellant must have been satisfied with the service rendered, or he would have discontinued the weekly payments and discharged appellee.

Upon the issue framed by the pleadings, as above set forth, the facts as testified to by the witnesses, as briefly outlined above, were submitted to the jury in a fair and impartial charge and a verdict was thereupon rendered in favor of appellee for the balance claimed under his contract.

POINT 1.

NO ERROR WAS COMMITTED BY THE TRIAL COURT IN RECEIVING OR REJECTING EVIDENCE OFFERED.

It will be borne in mind that appellee was appellant's employee and not an independent contractor undertaking to perform a given contract according to plans and specifications. His duties, according to the pleadings and the evidence, were to superintend the laying of concrete. Appellant had contracted to build a road. He sublet grading and all work except laying concrete, which he did with his own employees, appellee being employed to superintend. Such are the allegations of the complaint relied upon and the admitted facts upon the trial. It is conceded that no complaint was ever made by appellant during the time appellee was employed by him. His services were accepted and payments on account made weekly until the laying of concrete was completed, at which time the balance of \$1000.00 became due.

On the trial, appellant tried to introduce evidence which might have shown that he was subjected to penalties and suffered some damage by reason of his failure to carry out his contract with the State according to its terms. On objection, such evidence was excluded on the ground that it had not been pleaded as a defense or counter-claim. (Case, pp. 46 and 52.) Within the most elementary rules of pleadings and evidence, such evidence was objectionable. The answer was a denial of the contract between appellee and appellant. There is nothing in the case to indicate that appellee undertook to carry out the terms of appellant's contract

with the State, or that he undertook to do anything other than render services as a superintendent during the laying of concrete. If appellant suffered damages by reason of the negligent or incompetent acts of appellee, he might possibly have been permitted to counter-claim against the balance due under contract for services rendered, but certainly he would be compelled to plead such a defense or counter-claim before being permitted to offer such proof. If such a defense or counter-claim was contemplated, appellee was entitled to notice before going to trial. He had a right to rely upon the pleadings. Appellant was content with a simple denial that he had ever engaged the services of appellee and his proof was properly limited to the issue raised by his answer.

Appellant did not ask permission to amend, which might have been granted on proper terms if the evidence he had to offer had been important.

The proof shows that appellee performed his contract in every particular. His contract was to labor for the number of weeks necessarily consumed in laying of concrete by appellant under his contract with the State. It is conceded that he did this. Appellant's obligation was to pay \$75.00 weekly and the additional lump sum of \$1000.00 on completion of this concrete work. It is conceded that he accepted the services rendered without complaint; that he paid the weekly stipend as agreed and that he refused to pay the additional balance of \$1000.00 without giving any specific reason for the refusal.

It may be conceded that if appellee had failed to continue in appellant's employ until the work was completed or had he been discharged for proper cause before completion, he might have forfeited his right to recover the lump sum of \$1000.00 due upon completion, but there is no such allegation, no

such proof and on the admitted facts, it seems perfectly clear that appellee was entitled to collect the balance due under his contract.

POINT 2.

THE TESTIMONY OF THE WITNESS MORI, OFFERED BY APPELLEE, WAS PROPERLY RECEIVED.

It appears that about the time of the termination of appellee's employment, he was negotiating with Eugene Mori and others, to organize a contracting company and engage in the contracting business. The evidence indicates that knowledge of this fact was undoubtedly the real underlying reason why appellant refused to pay appellee the balance due when they met for final settlement on June 23, 1927.

Mr. Mori was called as a witness by appellee and detailed a conversation which he had with the appellant during the month of June, 1927, in which appellant admitted to Mr. Mori that he owed appellee \$1000.00. "I owe it to him, but let him try and get it." (Case, p. 41.) This is the language attributed to appellant by Mr. Mori in a telephone conversation with appellee. Certainly it was permissible to show a statement of this kind at the time, which was a declaration by appellant against his interest. Appellee was about to engage in business with the witness and had represented that among other assets, he had \$1000.00 coming from appellant. There was no other sum of \$1000.00 involved. It was the identical \$1000.00 claimed in this suit. Mr. Mori testified that while the conversation took place over the telephone, he was well

acquainted with Mr. Ellis and knew his voice while speaking to him (Case, p. 41), and in answer to his inquiry appellant stated: (Case, p. 41.)

"A. Then I says to him, 'Is it true that you owe Mr. Burket a thousand dollars on this job at Malaga?' and he says, 'I owe it to him, but let him try and get it.' That was, in other words, the conversation. He was wondering where Mr. Burket would get the money to go in the business, and this was what Mr. Burket said was a part of the money to make up his share."

This statement shows clearly that the \$1000.00 under discussion was the \$1000.00 for the Malaga job and there is no force to the objection urged by appellant against the admission of the testimony of this witness.

POINT 3.

THE TRIAL COURT COMMITTED NO ERROR IN REJECTING EVIDENCE IN REFERENCE TO THE ITEM OF \$34.20 WHICH APPELLANT ASKED TO CHARGE AGAINST APPELLEE IN ADDITION TO HIS COUNTER-CLAIM.

Upon opening the case, counsel for appellant stated that it had been ascertained since the pleadings were filed that the appellant had additional claims amounting to \$39.50 and \$34.20. (Case, p. 9 and 10.) He did not ask to amend by setting these items up as further counter-claim, but merely made the assertion as to the existence of the claims. Appellee agreed that the item of \$39.50 was due and might be credited in addition to the counter-

claim pleaded. The Court thereupon properly ruled that the item of \$39.50, consented to, might be credited, but that they would not go into the other item of \$34.20 which should have been pleaded.

If appellant desired an amendment which would have permitted him to prove this additional item, he should have asked for the amendment, which undoubtedly would have been granted on proper terms, but the mere statement that he desired to offer proof as to this item, which was entirely foreign to the issue, amounted to nothing.

POINT 4.

THE VERDICT IS SUSTAINED BY THE EVIDENCE.

Counsel for appellant admits in Points 6 and 7 of his brief that, under the law, a verdict of a jury will not be disturbed on appeal to this Court, if there is any evidence in the case on which it can be sustained, so it is deemed unnecessary to cite authorities to sustain this well-known rule. The arguments under Points 6 and 7 of appellant's brief, attempting to show lack of proper evidence for the jury, has little or no bearing on the facts in the case at bar.

As above pointed out, the \$1000.00 claimed was not a bonus. It was not a gratuity or a payment to be made at the whim of appellant. It was a part of the contract price to be paid by appellant for services to be rendered and which were rendered according to the evidence in the case. There was no contention that appellee undertook to see that appellant's contract with the State of New Jersey to build a road according to plans and specifica-

tions would be carried out according to its terms. He was employed by the week to superintend the mixing and laying of concrete. This is the contract alleged in the complaint and not challenged by the answer, except to deny its existence. If appellant claimed a different contract, it was his duty to set forth his version of the terms of the agreement and charge a breach by appellee by way of defense or counter-claim. Counsel for appellant seems to overlook the fact that the appellant, and not the appellee, was engaged in building this road. Appellee was only an employee of appellant, subject to his orders at all times. If he failed to serve his master in a proper manner, he could have been discharged, but certainly the master could not accept the services rendered and make payment on account from week to week throughout the entire term of employment and in the end escape payment of the balance due by simply saying that he was dissatisfied with his work.

The only way appellant could escape payment of this balance would be by way of counter-claim for damages, based upon the fault or negligence or breach of contract of appellee and within the most elementary rules of practice, appellant could not be heard to urge such a claim in court without having apprised appellee of his intention by a proper pleading.

The evidence offered by appellee, coupled with the admissions of appellant, not only sustains the verdict, but is so conclusive and convincing that it is difficult to understand how a jury could have done other than render its verdict in favor of the appellee for the balance due under his contract.

POINT 5.

IT IS RESPECTFULLY SUBMITTED THAT
THE JUDGMENT OF THE COURT BELOW
SHOULD BE AFFIRMED.

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*Of Counsel with Plaintiff-
Appellee.*