New Jersey
Court of Errors and Appeals

CRAMP and COMPANY, Plaintiff-Respondent, vs. EDWARD DOUGHTY and JOHN F. NOTLEY, trading as Doughty & Notley, *et al.*, Defendants-Appellants.	On Appeal from Supreme Court.

BRIEF FOR DOUGHTY & NOTLEY, APPELLANTS, TWO OF THE DEFENDANTS BELOW

The defendants appeal from a judgment of Judge Carrow, without a jury, in the Supreme Court, Cumberland Circuit, entered September 30, 1915, against the defendants, principals, and Globe Indemnity Company, surety, touching an alleged breach of sub-contract for the excavation of the new hotel Traymore in Atlantic City.

The judgment (page 159) is for two sums: one for $3000 the penalty of a bond, and one for the excess of the bond up to the alleged full measure of damages, $12,674.66.

The sub-contract in suit in the court below bears date August 4, 1914, (page 8) and provides,

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among other things, that the sub-contractors shall furnish a bond for $3000, to guarantee the fulfillment thereof (page 14) and that all work is to be done in accordance with the contract, plans and details, and also including all other work of every description as called for in the specifications, under the heading "Part IV, Excavation," &c. (page 8)

On August 20, 1914, the sub-contractors, as principals, and Globe Indemnity Company, as surety, delivered to the contractors, Cramp and Company, (plaintiff below) a bond for $3000 which bond after reciting the sub-contract, was conditioned for the faithful performance by the sub-contractors of their contract, (page 16).

On August 20, 1914, or thereabouts, the sub-contractors began the performance of their contract, and continued in the same until October 17, 1914, when, or shortly thereafter, the contractor, Cramp and Company, took over and completed said work.

At the trial in the court below the contractor Cramp & Co., plaintiff, set up an abandonment on the part of the sub-contractors. The sub-contractors, defendants below, set up abrogation of the contract on the part of the plaintiff contractor. The sub-contractors requested in writing rulings upon several questions of law. These requests are found on page 152 of the case.

Attention is now directed to numbers one and two as follows:

> "1. That to entitle plaintiff to recover from defendants, Doughty & Notley, it must produce a written order signed by the architects, and acceded to by Doughty & Notley, stating the amount to be allowed or to be deducted for alterations in the

work, or prove a waiver of such order, or prove that defendants fraudulently lured plaintiff into making such alterations.

"2. That to entitle plaintiff to recover from defendants, Doughty & Notley, for alterations, it must produce a written order of the contractor stating the amount to be paid by the contractor or allowed by the sub-contractor by virtue of such alterations, or prove a waiver of such order, or prove that defendants fraudulently lured plaintiff into making such alterations.

The first of the foregoing requests referred respectively to the following provisions in the main contract between the owner and the contractor, namely: (p. 131, l. 25)

"Extras and Omissions: In any of the contracts, the owners shall have the right, subject to the approval of the architects, to make any alterations, additions to or omission from the work or materials specified or shown on the drawings, during the progress of the construction, that he may desire, and provided the order for said changes shall have been signed by the architects. The said changes shall be acceded to by the contractors in whose work it may occur, and shall be carried into effect without in any way violating or vitiating the contract. When such changes are made the costs of the same shall be approved by the architects who shall add the amount of said allowance to the contract price if the cost of the work has been increased, or shall deduct the amount if the cost of the

work has been lessened, as they, the said architects, may deem just and equitable."

The second request referred to the following provision in the sub-contract: (p. 10, article 3)-

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

Both of these requests were denied. (p. 152, 154).

Appellants contend that the learned Trial Court erred in refusing to find that the contract had been abrogated by respondent by failing to comply with the terms of the written contracts.

The contract in suit provides: (page 10)

"Art. III. No alterations shall be made in the work except upon written order of the contractor; the amount to be paid by the contractor or allowed by the sub-contractor by virtue of such alterations to be stated in said order. Should the contractor and sub-contractor not agree as to amount to be allowed or paid, the work

shall go on under the order required above, and in case of failure to agree, the determination of said amount shall be referred to arbitration, as provided for in Art. XII of this contract."

It also provides: (page 8).

"All work to be done in accordance with the contract, plans and details, and also including all other work of every description as called for in the specifications under the heading 'Part IV, Excavation, page 7' together with all sidewalk excavation."

Part IV, Excavation, page 7, provides: (page 131).

"Alterations. Extras and Omissions. In any of the contracts the owners shall have the right, subject to the approval of the Architects, to make any alterations, additions to or omissions from the work or materials specified or shown on the drawings, during the progress of the construction, that he may desire, and provided the order for said changes shall have been signed by the architects. The said changes shall be acceded to by the contractors in whose work it may occur, and shall be carried into effect without in any way violating or vitiating the contract. When such changes are made the costs of the same shall be approved by the Architects who shall add the amount of said allowance to the contract price if the cost of the work has been increased, or shall deduct the amount if the cost of the work has been lessened, as they, the said Architects, may deem just and equitable."

The pleadings filed by respondent in the Court below admit that changes were made. The admission is as follows: (page 25).

> "2. Under the terms of the contract in suit the Architects had a right to make changes in the plans and specifications, and plaintiff admits that the architects did make changes, from time to time, in said plans. Plaintiff denies that any of such changes were detrimental to defendants; denies that the making of such changes as were made justified defendants in abandoning their contract. Plaintiff avers that all such changes and modifications and terms of payment therefor, are provided for by the contract in suit."

The testimony of the appellants, (pages 67, 68 & 70) shows that they had never received any order, written or otherwise, from the contractor, or any one else, concerning the same. That testimony was not denied. The superintendent of the sub-contractor swore (p. 73) that when the change in the character of the required work was made, he objected.

The testimony of the Architect, Mr. Price, (pages 81, 82, 84, 87, 97, 105, 106 & 107) shows that many changes were made. His testimony also shows that the changes were made between the date of the signing of the contract in suit, and the date when appellants stopped work. (p. 84). See, also, Exhibit D-4 (page 149).

The main contract, the general conditions of which form a part of the sub-contract, was filed in the Clerk's office of Atlantic County before the making of the sub-contract.

In the case of *Builder's Material Supply Co. vs.*

Schoen, (Court of Errors and Appeals, 1914) 86 N. J. L. 290 it was held that an alteration in a building contract would not abrogate it if it were made in accordance with the terms thereof. In that case it was observed that the contract there under consideration especially reserved to the owner and contractor the right to make such changes; but, in the case at bar there was no such reservation without the consent of the sub-contractor. In the contract now under consideration, it is specifically provided that "the said changes shall be acceded to by the contractors in whose work it may occur, and shall be carried into effect without in any way violating or vitiating the contract. When such changes are made the costs of the same shall be approved by the architects who shall add the amount of said allowance to the contract x x x." (page 131).

Moreover, in the sub-contract itself there was a special provision that the contractor should not make any alterations in the work, except upon written order, which order should state the amount to be allowed or deducted for such changes. (page 10).

In the case of *Coles & Sons Co. v. Lothridge,* (Court of Errors and Appeals), 1911, 81 N. J. L. 406 it was decided that

> "A building contract which is altered in a material particular after it is filed, will not protect the building against the claim of a laborer or materialman for work done or materials furnished after such alteration, unless the contract, as altered, is filed in the office of the County Clerk." x x x "for once it is conceded that the original price may be reduced by a secret arrange-

ment between the parties, the amount of reduction is a matter entirely within their discretion x x x.''

If, therefore, a material alteration in the character or conditions of work to be performed under a contract made after the filing of the contract will nullify the effect of such filing, and enable the contractor to file a mechanics' lien, a *fortiori,* a change and increase in the character of the work to be performed, made after the performance of the contract is undertaken, and in a manner otherwise than as required by the contract, should abrogate the contract and authorize its rescission.

Departures from a building contract must be acceded to by the parties in interest to give them any validity.

Bond v. Newark, 19 N. J. Eq., 376.

The Architect has no authority to make alterations except in the manner prescribed by the contract.

Van Buskirk vs. Board of Education, (Court of Errors and Appeals), 78 N. J. L., 650, 655;
Denoth vs. Carter, 88 Atl. Rep., 835, 836; 85 N. J. L., 95.

The Architect has no authority, as agent, to bind the parties by changes not provided for by them.

Denoth vs. Carter, *supra.*

A written order is a condition precedent to the right to recover for alterations in a building contract.

Sheyer vs. Pinkerton Construction Co., (Court of Errors and Appeals), 59 Atl. Rep., 462, 463.

Van Buskirk vs. Board of Education, (Court of Errors and Appeals), 78 N. J. L., 650.

The learned Trial Court erred in finding (p. 157, l. 9), that there was no testimony before it that the work was more burdensome by reason of the alterations.

The testimony of the following witnesses shows that the alterations in the plans made the work more burdensome:

Mr. Price (Architect) pages 87, 97, 106 & 107.
Mr. Rightmire (Engineer) page 112.
Mr. Samuel Smith pages 73, 74 & 75.
Ex. D-4 p. 149.

The learned Trial Court also erred in finding that the defendants, by their conduct, had waived such rights as they might have had because of such alterations.

The case at bar is distinguishable from *Sun Dredging Co. v. Ottens,* 55 Vr., 740, in that the defendants there did not speak when they ought to have spoken, whereas, in this case, the defendants, through their superintendent objected to the changes immediately upon discovering them. (p. 73, State of Case).

It is respectfully submitted that there was no evidence whatever before the learned Trial Court to support such a finding.

Liability limited to penalty of bond.

In the case at bar a bond for "the just and full sum of $3000." was given by defendants to plain-

tiffs upon the following condition: (pages 16 & 17).

> "Now therefore the condition of this obligation is such, that if the said principal shall faithfully perform said contract on the principal's part, to be performed according to the terms, covenants and conditions thereof (except as hereinafter provided) then this obligation shall be void; otherwise to remain in full force and effect."

The bond recites the written contract between plaintiff and defendants, dated August 4th, 1914, and refers to the same for the purpose of explaining it. The written contract, Art. IX provides as follows: (page 17)

> "The party of the first part agrees to furnish a bond for three thousand dollars ($3000) to guarantee the fulfillment of this contract."

In the initial contract between the Hotel Traymore Company and Cramp & Company, the following language appears: (page 161)

> "It is agreed by the contractor that each sub-contractor must carry liability insurance against damages by reason of accident in accordance with the laws of the State of New Jersey, *also furnish bond, satisfactory to the contractor, for the completion of the work in their portion of the contract.*"

Aside from the fact, gathered from the bond and contracts in question, as to whether the liability of the defendants was to be limited to the sum of $3000, it is settled by statute, and by the

Court of Errors and Appeals of New Jersey, that the liability of a contractor under such bond is limited exclusively to the penalty thereof, plus interest thereon from the date of breach for detention thereof.

> 3 Comp. Stat. p. 3778, sec. 5. (Post 19)
> City of Camden v. Ward, 67 N. J. L., 558, 556.
> City of Summit v. Morris County Traction Co., 88 Atl. Rep., 1048.

In the City of *Summit v. Morris County Traction Co. supra* the Court of Errors said (page 1050) that the legislature had wisely limited the amount of the recovery to the penalty of the bond.

In the case of the City of *Camden v. Ward*, the Court of Errors said (page 566):

> "By the postea it appears that the jury assessed the difference between the actual cost of the work and the contract price as the damages of the plaintiff on occasion of the detention of the debt,—that is, the penal sum mentioned in the bond * * * The judgment ought to be that the plaintiff recover the debt and the damages for the detention of the debt, and that the plaintiff have execution for the damages arising from the breach.
>
> In the case of *Gloucester v. Eschback*, 25 Vroom 150, the Supreme Court held, and we think rightly, that if the damages arising from the breach of the condition exceed the penal sum mentioned in the bond, the plaintiff may recover interest on that sum so far as it is necessary to meet those damages * * *"

In *Gloucester City v. Eschback*, (*supra*)

the action was in contract with the declaration in the form of debt, founded upon the bond of defendants. See page 151 of that opinion.

Damages against the principal cannot be larger than the damages against the surety.

In the case of *Camden v. Ward,* (*supra*) the jury awarded a verdict against the principal for a sum larger than the verdict against the surety.

In deciding that case the Court said (page 566):

> "In the Broadway judgment there is another irregularity, for it entitles the plaintiff to recover one sum from the surety company, and a larger sum from the defendant, Ward. The declaration being against both defendants as joint contracors, every count in it to be valid, must be referable to some joint obligation, and the only joint obligation in the case was the bond. Under that bond the obligation of each was, of course, the same, and the judgment against both should be for the same amount."

The contract and bond are one entire and indivisible demand.

This defense was properly urged in the Court below (pages 28, 153).

In the case of *Summit vs. Morris County Traction Company,* (Court of Errors) 88 Atl. Rep., 1048, it appears that the City of Summit had granted a franchise to the defendant to build and operate a trolley line through

the city street, upon certain conditions specified in the ordinance, and that the ordinance provided that a bond, with sufficient surety, in the sum of $5,000, upon condition that the company and its successors should fully and faithfully keep, observe and perform all the provisions of said ordinance, should be given to the city. Upon a breach of some of the conditions of the ordinance, suit was brought upon the bond, and a verdict of six cents awarded. The Appellate Court reversed the Judgment and held that it should have been for the penalty of the bond.

In the case at bar the contract between plaintiff and defendants provided that defendants should give a bond for $3,000, "to guarantee the fulfillment of the contract" (p. 14) which bond, so given and accepted by the plaintiff recited that it was for the "full and just sum of $3,000" (p. 16), "for the faithful performance" of the said written contract (p. 16).

In the case of *City of Camdem v. Ward,* 67 N. J. L., 558 (Court of Errors), the facts were that Ward had entered into a written contract to pave certain streets of the City of Camdem, and gave his bond, with surety, for the faithful performance of that contract. The City accepted the bond and upon breach of the contract brought suit upon it against Ward and his surety. In deciding the case, the Court treated the contract and bond as one obligation, not as separate and distinct entities, and at page 566, said:

> "* * * The declaration being against both defendants as *joint contractors,* every count in it, to be valid, must be referable to some joint obligation, and the only joint obligation in the case was the bond. * * *"

The sub-contract in suit was not a sealed instrument. The bond in suit was a sealed instrument. It was excuted, delivered and accepted, several days after the signing of the sub-contract. It also made specific reference to the sub-contract, and, by its own terms made the contract a part thereof.

In *Hargrave vs. Conroy,* 19 N. J. Eq., 281, 282, Chancellor Zabriskie held:

> "Both [parties] agree that the agreement was in writing, signed by the parties. The bill sets forth in part, the substance of two agreements, the first of which was dated January 25, 1865, which, as the bill alleges, was not very skillfully drawn and expressed. The second was dated January 31st, 1865, was drawn by a person skilled in such matters, and was executed by both parties under their hands and seals. It has annexed to it a bond executed by the complainant, with a surety, to the defendant, for the faithful performance of his part of the contract. * * * This contract made subsequently under seal, and embracing the whole subject-matter contained in the first one, would be held to supersede the first, which would be merged into it. * * *"

And, in *Baker vs. Baker,* 28 N. J. L., 13, 14, it was held:

> "(p. 18) A bond extinguishes a simple contract debt. A judgment extinguishes a debt due by simple contract or by deed.
>
> "(p. 20) If the parties had the intention to merge the debt in the bond, it was merged because the parties were the same—the debt the same; it was an undi-

vided claim, entire in its foundation, form, and whole character; it was but one item. * * *"

The learned Trial Court in the case at bar (p. 157), found that nothing short of an express waiver upon the part of the plaintiff would preclude it from a recovery in excess of the penalty of the bond. That, undoubtedly, was error. The cases hold that when a bond or other higher security is given to secure a lesser or a simple contract debt the lesser merges in the higher and that no recovery except that provided for in the higher security is available, unless there should appear in the higher security some expression that the higher security was given as collateral to the lesser security. *Van Vliet v. Jones,* 20 N. J. L., 340, 342. In the case at bar there is no expression whatever that the bond was to be collateral to the contracts. On the contrary, the joining of the contracts in the bond, by specific reference made one the counter-part of the other and had the effect of absorbing one into the other, so that there could be no longer one complete transaction without either one of the counter-parts. In other words, one of the counter-parts would be inexplicable, and unenforceable, without the other counterpart.

It is manifest from the language of the main contract and sub-contract, wherein it appears (main contract, p. 160), that the sub-contractor shall,

> "furnish bond, satisfactory to the contractor, for the completion of the work in their portion of the contract,"

and (sub-contract, p. 14), that

> "the party of the first part agrees to

> furnish a bond for three thousand dollars ($3,000.00) *to guarantee* the fulfillment of this contract,''

that the transaction was to be one and inseparable.

That part of the main contract in the case at bar which provides that the sub-contractor shall give bond,

> ''satisfactory to the contractor, for the completion of the work,''

when read in connection with the provision of the sub-contract that the sub-contractor shall

> ''furnish a bond * * * to guarantee the fulfillment of this contract''

indicates that the bond is merely corollary with the contracts, and not collateral thereto.

See 5 Cyc., 757.

A technical construction has never been favored. See *Gibbs v. Cooper* (Court of Errors and Appeals, 90 Atl. Rep., 1115 1116; *Perkins-Goodwin v. Hart,* 83 N. J. L., 471.

In the former case it was held that if the parties to a contract agreed to pay ''liquidated'' damages, whereas, in fact, it should have been a penalty, or *vice versa,* the Court would disregard the mere words of the parties, and give it its proper application.

In *Perkins-Goodwin Co. v. Hart,* 83 N. J. L., 470, this Court distinctly held that a provision to ''guarantee the payment'' of a sum of money in a contract, imposed a direct undertaking to pay the sum in a given event, and it is not a mere promise to become answerable for the default of another.

So, in the case at bar, there can be no doubt that the parties to the contract intended that the sub-contractors, and their surety, should pay the

contractors the sum of $3,000 in case they did not fulfill their contract. There is nothing, it is submitted, in the contracts or bond, which indicate that the bond is a collateral security.

Upon the general question of the close relationship in this case between the contract and the bond, and the rule that they must be considered and construed together as one instrument, see:

Kimball Co. v. Baker, (Wis.), 22 N. W. Rep., 730;

Brown v. Markland, (Ind.), 53 N. E. Rep., 295;

Jenkins v. Phillips (Ind.), 48 N. E. Rep., 651;

Dunlap v. Eden (Ind.), 44 N. E. Rep., 560;

American Surety Co. v. Lauber (Ind.), 53 N. E. Rep., 793, 794;

Jordan v. Kavanagh (Ia.), N. W. Rep., 851, 853;

Mayor of New York v. New York Co., 31 N. Y. Supp., 714;

Watson v. O'Neill, 35 Pac. Rep., 1064;

See also:

Locke v. McVean, 33 Michigan, 473.

which reads:

> "A bond to secure the performance of a written contract is to be construed as if the contract were copied into the preambles of the condition of the bond."

Mr. Justice Pitney, speaking for the United States Supreme Court, in *United States v. United States Fidelity Co.*, 236 U. S., 512, discussing the liability of a principal and surety upon a contractor's bond held that the contract in that case provided for a recovery above the penalty of the bond. The words of the contract were:

"* * * In which event the said party of the second part and his sureties of the bond to be given for the faithful performance of this agreement shall be further liable for any damages incurred through such default and any and all other breaches of this contract."

Mr. Justice Pitney, after quoting the above provision, said, page 526:

"that phraseology indicates a purpose to give to the government a right additional to those it would otherwise have. * * *"

He also said (p. 530), that no local law of the State of California (where the bond had been made), to the contrary, had been called to the Court's attention.

If the contract in that case had been free from the words creating further liability, and if the State of California had had a local statute similar to our New Jersey Statute(3 Compl. Stat. pp. 3776, 3778), it is reasonable to suppose, from the reasoning of Mr. Justice Pitney, that the United States Supreme Court would have limited the liability of the principal and surety to the penalty of the bond.

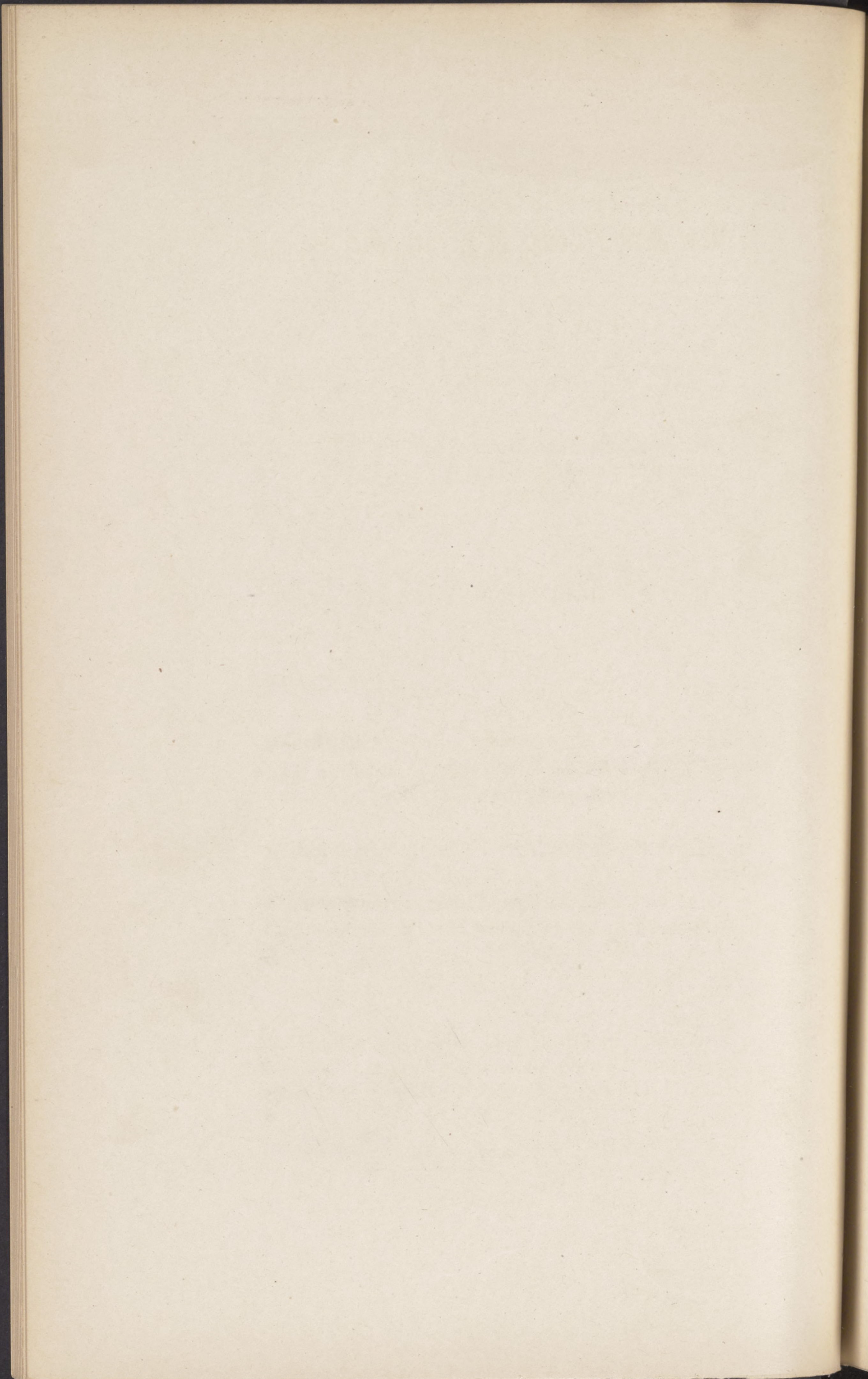
It is respectfully submitted that the judgment below is erroneous, and should be reversed, and that a judgment upon the defendants admitted counterclaim for $4,105.75 (due upon contracts having no relation to the sub-contract in suit), (p. 158), should be entered in favor of the appellants.

March Term, 1916.

DAVID R. ROSE,
ROBERT McCARTER,
Counsel for Appellants.

"Real sum due, and not penalty, considered as the debt; judgment to be for penalty; discharge by payment of real sum unless retained as further security. That where an action shall be brought on a bond, bill or other contract containing a penalty to secure or enforce the payment of money only, or if any bond, bill or contract with such penalty as aforesaid, shall be set off by the defendant in any action, the sum really and in equity due on such bond, bill or contract, and not the penalty, shall be deemed and taken to be the debt due; provided, that in all actions which shall be brought on any bond or obligation for the payment of money, wherein the plaintiff shall recover, judgment shall be entered for the penalty of such bond or obligation; to be discharged by the payment of the principal, or sum found by the verdict, as the case may require, with interest till paid, and costs, where costs ought to be awarded, unless it be proper that such judgment shall stand as a further security to the plaintiff, his executors and administrators."

3 Compiled Statutes, page 3778, Section 5.



New Jersey Court of Errors and Appeals

CRAMP AND COMPANY, *Plaintiff-Respondent,* vs. EDWARD DOUGHTY AND JOHN F. NOTLEY, TRADING, ETC., *Defendants-Appellants.*	ON APPEAL FROM SUPREME COURT

BRIEF FOR PLAINTIFF-RESPONDENT

FINDINGS OF FACT

This cause was referred to the Cumberland Circuit, and, by agreement, was tried before the Court without a jury.

Judge Carrow found the facts to be as follows:— (p. 155).

> "This is a suit for damages growing out of a breach of a sub-contract involving the excavations for the foundation of the Hotel Traymore on the beach front in Atlantic City, this state. The main facts, as I find them, may be stated as follows:—
>
> In the month of July, 1914, the plaintiff and the Hotel Traymore Company entered into a contract in writing for the construction of said Hotel

Traymore, which was to be built and ready for business by June first, 1915. Plaintiff on August fourth, 1914, sub-let all the excavation work by a contract in writing to defendants, Doughty & Notley, who will be referred to as the sub-contractors. Globe Indemnity Company, the other defendant, became surety to the extent of three thousand dollars for the faithful performance of said sub-contract. The sub-contractors were not to be paid a lump sum. They were only to be paid forty cents for each cubic yard of sand excavated. Said sub-contractors entered upon the performance of their contract in the month of August, 1914, and worked along on the same, though without due diligence, until the month of October, 1914, when they quit work and deliberately abandoned their contract without any justifiable cause, whereupon plaintiff was compelled to take over the unfinished portion of the sub-contract and perform the same according to the terms thereof and in doing so plaintiff lost, according to the admitted proof, $19,212.44.

Now, plaintiff sues for said loss upon two counts, one to recover three thousand dollars from the surety and sub-contractors and the other to recover $16,212.44 from the sub-contractors alone. Both counts, are, in my opinion, maintainable."

Inspection of this record fails to disclose any proper foundation for a review of the facts so found by the Trial Court.

Larned vs. MacCarthy, 85 *N. J. L.* 589.
Kargman vs. Carlo, 85 *N. J. L.* 632.
Webster vs. Freeholders of Hudson, 86 *N. J. L.* 256.
Lams vs. Fish, 86 *N. J. L.* 321.
Blanchard Brothers vs. Beveridge, 86 *N. J. L.* 561.

If defendants' position, as stated in their brief, is properly understood, the following is a concise,

STATEMENT OF QUESTIONS INVOLVED.

(*a*) *Were the sub-contractors relieved from their contract obligation by any act of plaintiff?*

(*b*) *Is recovery against the sub-contractors limited to the penalty of the bond?*

ARGUMENT

I.

(a) WERE THE SUB-CONTRACTORS RELIEVED FROM THEIR CONTRACT OBLIGATION BY ANY ACT OF PLAINTIFF?

Upon this point, Judge Carrow found as follows:— (p. 156)

> "In reaching the result which I have upon the merits proper consideration has been given to the contention that the architect, who was in charge of the enterprise, caused modifications to be made in the grade of the excavations different from that originally contracted for, whereby twenty-eight extra cubic yards of sand were excavated, but the modifications did not cause any material departures from the general scope of the sub-contract, nor can they be regarded as 'alterations, additions or omissions' within the contemplation of the contract, and even if they were, defendants are in no position to take advantage of the fact that they were not ordered in writing and signed by the architect because that feature of the contract was for the protection of the owner and further because the requirement was waived by the conduct of the parties. In my opinion the modifications were consistent with the reasonable interpretation of the sub-contract."

It is respectfully submitted that these findings are amply supported by the evidence.

By the terms of the contract in suit, (Exhibit A, p. 8), the sub-contractors agreed to

"Provide and pay for all of the labor, materials, and other equipment necessary to do all of the excavation of every kind, back filling, shoring and sheet piling, built so that excavation and all masonry work below grade can be readily done and all pumping of water that may be required while excavation is in progress and until all concrete work and waterproofing up to grade is completed.

All work to be done in accordance with the contract plans and details, and also including all other work of every description as called for in the specifications under the heading *'Part IV, Excavation'* page 7 together with all sidewalk excavation.

Party of the first part also agrees to remove all dirt from the site to a proper dump and pay all dumping privileges.

It is understood and agreed that all shoring and sheet piling is to be done in a manner satisfactory to the party of the second part and in such way as to permit the driving of all piling without obstruction.

This contract includes the taking out and removal of all old foundations, footings, old piling, old masonry or old floor that may be left after the buildings are torn down, also breaking up, taking out and removal of old floors and footings of present fireproof building, together with excavation as required therein."

It was further provided in the contract that the work was to be done as shown on the drawings and described in the specifications prepared by Price & McLanahan, architects for said building, and further (p. 9)

"Art. II. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction

of the said architects and that their decision as to the true construction and meaning of the drawings and specifications shall be final. It is also understood and agreed by and between the parties hereto that such additional drawings and explanations as may be necessary to detail and illustrate the work to be done are to be furnished by said architects, and they agree to conform to and abide by the same so far as they may be consistent with the purpose and intent of the original drawings and specifications referred to in Art. I."

The sub-contractors further agreed to (p. 12),

"Work night and day and dig and sheet pile the excavation as directed by the party of the second part and to do the work at such times as will not delay the driving of piles at an average speed of 200 piles per day and complete within four weeks after present frame building is torn down and rubbish removed."

Payment was agreed to be made upon the following basis (p 13),

"Price of all the above work to be forty cents (40c) per cubic yard for all excavation, calculated from the grade at the site and from the plans, allowing one foot extra width around the sides of the parts of the excavation which may have to be sheet piled; the forty cents (40c) per cubic yard for the excavation covers the cost to the party of the second part, not only of the excavation, but of all other work and things mentioned in this contract to be done and supplied by the party of the first part."

The provisions of the main contract referred to in the sub-contract under title "Part IV Excavation", will be found on pp. 129-134, state of case.

The plans offered in evidence and the testimony given in the cause, show that the excavation required to be done under this sub-contract was to be performed within a surface area of about 140 ft. x 500 ft.

Within this area there were about 150 holes to be sheet piled, pumped and excavated, so that the concrete foundations could be placed on piling driven in these holes. According to the original drawings some of the holes were as deep as 20 ft. below grade. The greater portion were from 14 to 16 ft. below grade, and the balance were shallower.

The elevator pits were to go about 16 ft. below grade.

The deepest holes which were dug by the sub-contractors before they abandoned the job, were only 12 ft. below grade, and there were only 9 or 10 of these. All the others were only from 6 to 9 ft. below grade. The water level was about 4½ ft. below grade. The sub-contractors removed the surface over the whole site down to about the water level and then worked on the shallow holes.

Mr. Price testified (pp. 85-110) that, from time to time, as the work progressed, the architects found it necessary to make some changes in the column depths and in the depths of the elevator pits. These changes were rendered necessary as new conditions developed in the progress of the work. He said the changes did not alter the character of the work; that some of the changes required the sub-contractors to dig a few inches deeper than the contract plan showed while other changes relieved them from going

so deep; that the changed work would not cost the sub-contractors any more money to do the complete job; that the changes were an evening up and that on final settlement between the owner and the contractor, no extra compensation was asked or allowed for the difference.

The contract plans called for a total excavation of 12,270 cubic yards (p. 89). In the work which the sub-contractors actually did, the combined changes involved the removal of 15 cubic yards more than the original plans showed (p. 121), and in the work of completion done by plaintiff, the changes involved the removal of only 13 yards more, making a total excess of 28 yards, the contract price for which would have been only $11.20.

That the doing of the 15 cubic yards of extra excavation, (for which they would of course have been entitled to receive payment) was not the real reason for the abandonment of the contract by the sub-contractors, abundantly appears from the testimony.

In their letter to plaintiff, under date of October 17, 1914, (Exhibit P 9 p. 144) the sub-contractors wrote,

> "We find that we are unable to complete the excavation work at the Traymore Hotel for which we have a contract with you, and hereby give you notice of the same."

In their testimony at the trial, neither of the defendants give this as the reason for abandonment. (pp. 67 and 70) They did not complain to the architects about the extra work (pp. 92. 93, 102).

They made no complaint to the men in charge of the work, (pp. 117, 124, 125, 62). The working plans were on the job all the time, and the sub-contractors and their foreman had access to the plans at all times (p. 125). These plans were the working drawings, and all the work done by the sub-contractors was done in accordance with these working drawings, (pp. 127, 128).

The changes made were essential to the safety of the building and were made from time to time as difficulties were encountered in the work below the surface which could not have been foreseen, (pp. 62, 63, 97). The changes involved nothing more than changing the depth of some of the holes (p. 64) and no change required going more than a few inches lower at any point, (pp. 87, 88).

Such changes as were made were in the plans, not in the work.

There is no testimony that after the sub-contractors had completed the digging of a hole, the depth of that hole was lowered and they required to do more work on that hole than the plans showed was to be done.

Nothing that was done by plaintiff or by the architects in making the changes in the foundation plans rendered performance of the contract impossible. Plaintiff afterwards performed it by the use of the same methods employed by the sub-contractors, (p. 99).

The sub-contractors were not legally justified in abandoning a contract which they had undertaken to perform.

Murtland vs. Atlantic City, 65 *Atl. Rep.* 1049.
Fry vs. Miles, 71 *N. J. L.* 293.

The trial court found as a fact that the sub-contractors abandoned their contract without any justifiable cause.

There being abundant evidence in support of this finding the same is not reviewable.

Coryell vs. Buffalo Union Furnace Co., 96 *Atl. Rep.* 55.
Claflin vs. Wolff, 96 *Atl. Rep.* 73.

(b) IS RECOVERY AGAINST THE SUB-CONTRACTORS LIMITED TO THE PENALTY OF THE BOND?

As to this claim the trial judge said (p. 157),

> "The sub-contractors contend that the damages should be limited to the penalty of the bond but I do not think that anything short of an express waiver would defeat plaintiff's right of action against the sub-contractors for the excess loss.
>
> * * * * *
>
> Plaintiff is entitled to recover from Globe Indemnity Company and Doughty & Notley $3000., and from Doughty & Notley alone $12,105.70. Interest may be added when computed." (p. 158)

Judgment was entered for $3000. against all the defendants, and for $12,674.66 against the sub-contractors alone, (p. 159)

By reference to the complaint (p. 5), it will be observed that the first count claims damages from Doughty & Notley only for non-performance of the contract, and

the second count claims damages from Doughty & Notley and the Globe Indemnity Company for breach of the conditions of the bond.

Prior to the passage of the Practice act of 1912, two suits would probably have been necessary. Since the adoption of that act, however, only one suit seems necessary or proper.

The pertinent sections of the Practice act and of the new Rules of the Supreme Court follow:

PRACTICE ACT.

"Sec. 6. Subject to rules, any person may be made a defendant, who, either jointly, severally or in the alternative, is alleged to have or claim an interest in the controversy, or in any part thereof, adverse to the plaintiff, or whom it is necessary to make a party for the complete determination or settlement of any question involved therein."

"The plaintiff may join separate causes of action against several defendants if the causes of action have a common question of law or fact and arose out of the same transaction or series of transactions."

"Sec. 9. No action shall be defeated by the non-joinder or misjoinder of parties. New parties may be added and parties misjoined may be dropped, by order of the court, at any stage of the cause, as the ends of justice may require."

"Sec. 11. Subject to rules, the plaintiff may join any causes of action."

"Sec. 21. Judgment may be entered in such form as may be required by the nature of the case and by the recovery or relief awarded."

"Sec. 27. No judgment shall be reversed, or new trial granted on the ground of misdirection, or the improper admission or exclusion of evidence, or for error as to matter of pleading or procedure, unless after examination of the whole case, it shall appear that the error injuriously affected the substantial rights of a party."

RULES.

"22. Objection for misjoinder of causes of action is waived unless made on motion, before answer or reply respectively." (Rule 15, Pr. Act 1912)

"23. When causes of action are joined, the defendant may answer to the several counts the same answers he might make thereto if such counts had not been joined, and the subsequent pleadings and the entry of judgment on the several issues shall be in conformity therewith; and the execution in such suit shall be in conformity with the judgment entered therein." (Rule 18, 1905, modified).

The bond in question contains the following provisions, (p. 19 line 30).

"That any suits at law or proceedings in equity brought on this bond to recover any claim hereunder must be instituted within twelve months after the completion of said contract."

"The said surety shall not be liable for an amount in excess of the penalty of this bond."

It is not perceived how any act of the plaintiff in bringing suit in the way it was brought can be said to preclude recovery in manner and form as judgment was rendered.

"By force of Sec. 27 of the new practice act (P. L. 1912, 377.) judgment will not be reversed for error as to matter of pleading or procedure unless on the whole case it shall appear that the error injuriously affected the substantial rights of the appellant; hence if such rights are not so affected the alleged errors need not be examined."
Ridgeley vs. Walker, 86 *N. J. L.* 590.

The only remaining question is whether there is anything in the contract in suit, which amounts to a waiver of the right to claim full damage for a breach of the contract.

Plaintiff is entitled to recover from the sub-contractors damages for the breach of their contract, and it is respectfully submitted that the taking of the bond was not a waiver of all damages in excess of the penalty of the bond, but was merely taking surety, to the amount of $3000., on account of such damages as might accrue.

There is nothing in this contract, nor in the evidence, which affords foundation for the claim that the contract was an alternative one, or one that gave the sub-contractors the option to pay $3000. and break their contract.

The answer to appellants' argument with respect to the amount of recovery on the bond is, that the judgment on the bond, against all the makers, is for the penalty of the bond.

The judgment for breach of the contract, is the amount of plaintiff's admitted damages, less the counter-claim, and less the amount of the judgment on the bond.

For these reasons, it is respectfully submitted, the judgment below should be affirmed.

WALTER H. BACON,
Respondents' Counsel.

March Term, 1916.

New Jersey Court of Errors and Appeals

CRAMP & COMPANY, Plaintiff-Respondent, vs. EDWARD DOUGHTY & JOHN F. NOTLEY, trading, etc., *et al.*, Defendants-Appellants.	No. 29. March Term, 1916.

SUPPLEMENTAL BRIEF FOR APPELLANTS

At the close of the oral argument leave was given appellants to file a supplemental memorandum.

POINTS

I

Were the appellants justified in rescinding their contract with Cramp & Company?

Their contract is dated August 4, 1914 (p. 8), and required its completion within four weeks after the tearing down of the present frame build-

ing (p. 12, l. 15). It required (p. 8, l. 30) all work to be done in accordance with the contract, plans and details which were filed in the county clerk's office of Atlantic County. The particular work to be done was the provision and payment for all the labor, material and equipment necessary to do all the excavation of every kind, back filling, shoring and sheet piling, etc. (p. 8, l. 22). As the work was to be paid for by the cubic yard and had to be completed within a definite time, it was essential that the sub-contractor rely upon these plans in order to make their bid, for, it is conceded that in excavation of this kind below tide water, the greater the depth the more difficult the work (p. 106, l. 38) and, of course, the greater the consumption of time.

There is no doubt that after the contract was signed and the work commenced, which was about August 20, 1914, the architect changed the plans. These changes occurred all through the job (pp. 62, 80, 81). These changes increased the depth in some places as much as three feet (p. 82), and they were made "because of conditions on the job, or changes on the part of the owner which modified the plans." (Evidence of the architect, Mr. Price, p. 87, l. 1.) He admits that he has no personal knowledge of the extent of these changes (p. 88, l. 20). See, also, p. 97 as to the cause of these changes.

The defendants' superintendent, Smith (p. 72, l. 40), objected to these changes, but they were insisted upon and ordered necessary, so that, on *October 17,* the defendants notified Cramp & Company that they had quit the job (p. 49, l. 25).

Meantime, Cramp & Company, the main contractors, learned of the changes—which were all that had as yet taken place—and wrote, on Octo-

ber 24, 1914, an important letter to the Architects protesting against them (Exhibit D 4, p. 149).

Cramp & Company, after the defendant had rescinded, completed the job themselves, but it is to be noted that these constant changes continued after they took hold, so that they did not complete the work according to the plans and specification (p. 51, l. 28), but in accordance with the revised plans *and the directions of the architect* (p. 51, l. 35).

The completion of the work under the revised plans, of course, does not furnish a proper measure of damage. See Mr. Justice Pitney's opinion in the United States Supreme Court, in *U. S. vs. U. S. Fid. Co.*, 236 U. S., 512.

It is sought to minimize the extent of these changes by showing that in the long run they amounted to very little. This may be true, for, after Cramp & Company took hold, compensatory shortenings were made, which tended to equalize things. But, no one says that this compensation commenced before the defendants withdrew.

No one testified as to the extent of the changes before and up to the time the defendants withdrew. Price, the architect, was only there "from time to time" and is utterly unable to calculate their extent (p. 103).

Bowden (Cramp & Company's estimator) undertakes to say that he measured up the extent of the changes before the defendants quit, but his work was done about October *first* (p. 120, l. 10), and the defendants worked until October *seventeenth*. Davie's estimate (which is all that it is, p. 61) is on the completed work with the compensatory shortenings in.

Now, what was the position of the defendants? They were limited to a period of four weeks

from the time of the removal of frame building in which to complete their work. By the terms of the contract in suit the penalty of the bond would have been due if the work were not completed by the end of said four weeks.

Were appellants obliged to gamble upon the extent of the changes in the work?

How would they have known that they could finish the work under the changed plans within the limited time?

How were they to know that the changed plans would not have entailed greater cost and greater difficulty?

How were they to recover for the alterations without a written order?

Article III of the sub-contract (p. 10) provides that no alterations shall be made in the work except upon the written order of the contractors, etc., and in case the contractor and sub-contractors cannot agree as to the value of such extra work, it shall be submitted to arbitration. At line 25 of page 131, is found the provision in the main contract with respect to alterations and additions, and when directed in the manner therein required, they

> "*shall be acceded to by the contractors in whose work it may occur,* and carried into effect without in any way violating or vitiating the contract."

Hence the way was plain for the sub-contractor to be paid for extra work directed to be done in the manner required by the contract.

But, neither the owner nor the contractor was responsible for any extra that was not thus authorized, and hence the subcontractors had but one redress, and that was to quit. Hence we con-

clude that they were justified in rescinding. The letter of Doughty & Notley, the appellants (p. 49) apprising respondent of their unwillingness to go on was the proper method to pursue. That letter, coupled with their superintendent's objection to such changes (p. 73, l. 1) precluded an *estoppel in pais* against them. Had they not objected, or apprised respondent of their unwillingness to proceed, they might have come within the principle of *Sun Dredging Co. vs. Ottens, 55 Vroom, 740.*

II

The extent of plaintiff's recovery in any event would be the penalty of the bond.

Prior to the recent changes in the practice, they could not have united both alleged claims in one action, and defendants' amended answer (p. 28, second defense) objects to the same. An inspection of the file will show that that amendment was filed by consent. Plaintiff joined issue upon that amendment by filing a reply thereto (p. 29).

What would have been the legal effect of a suit under the old practice upon the bond alone? If there had been a recovery upon it, it would have spelled *finis,* and two objections would then have lain against any subsequent suit upon the contracts, namely: (*a*) Merger of contractual rights under the sub-contract, upon which the suit upon the bond was predicated, in the judgment. (*b*) A judgment upon a whole and indivisible demand arising out of one and the same transaction, for a part only of such demand, bars recovery for the excess. *See 23 Cyc., 1106, et seq.*

Instead of affixing a penalty in the contract for its nonperformance they provided for the bond—

not as collateral, but to guarantee its performance; and Cramp & Company in their letter of October 14, 1914 (p. 140), recognizes this penalty as the extent of their possible recovery.

Mr. Justice Swayze, speaking for this Court in *Gibbs vs. Cooper, 90 Atl. Rep., 1115, 1116,* apropos a similar question, said:

> "It is well settled that the question whether a sum agreed to be paid in case of failure to perform is a penalty or liquidated damages depends upon the circumstances of the case, and not on the words used by the parties. They may call it a penalty, and it may be liquidated damages; they may call it liquidated damages, and it may in law be a penalty. *Whitfield v. Levy,* 35 N. J. Law, 149, at 156. *Monmouth Park Ass'n v. Wallis Iron Works,* 55 N. J. Law, 132, 26 Atl. 140, 19 L. R. A., 456, 39 Am. St. Rep. 626; *City of Summit v. Morris County Traction Co.* (Err. 7 App.), 88 Atl., 1048."

Whether, therefore, the penalty of the bond in question is to be construed as a penalty or liquidated damages depends upon the peculiar circumstances of this case. The respondents have called it a penalty. The appellants have called it liquidated damages. The second defense to the amended answer of appellants in the Court below was (page 28):

> "That plaintiffs may not split up their cause of action by suing for unliquidated damages for an alleged breach of contract in one count, and for liquidated damages in another count, when both causes arise out of one and the same transaction."

What, therefore, were the peculiar circumstances associated with the giving of the bond in suit. We may look to the contract itself for those circumstances where we find this pertinent provision (p. 14):

> "The party of the first part agrees to furnish a bond for three thousand dollars ($3,000.00) *to guarantee* the fulfillment of this contract."

"*To guarantee*," Mr. Justice Garrison, speaking for this Court in *Perkins-Goodwin Co. v. Hart*, 83 N. J. L., 471, 473, said:

> "This is a direct promise by the defendant to pay the plaintiff in a given event, based upon a specified consideration moving from the plaintiff, and is entirely independent of the enforceability of the 'within contract' against the other party thereto. The term 'guarantee' in such a context *imports an undertaking to pay in the given event,* which is one of its meanings (Webster's New International Dictionary), and not a promise to be answerable for the default of another, which is its technical meaning in an appropriate context. * * *"

Now, it is respectfully submitted, that the most reasonable interpretation to be put upon the language of the contract in suit is, that the parties thereto stipulated and agreed that the sum of $3000 should be fixed as liquidated damages in case the appellants should fail to perform their part of the contract, and that the reason for so fixing that sum was because the damages which might accrue in case of breach would not be readily susceptible of ascertainment. In situations

of that kind there is no doubt that the parties have a right to agree upon the damages which the one will pay to the other in case of breach.

Respectfully,

DAVID R. ROSE, and
ROBERT H. McCARTER,
Counsel for Appellants.

March Term, 1916.

New Jersey Court of Errors and Appeals.

CRAMP AND COMPANY, *Plaintiff-Respondent,* vs. EDWARD DOUGHTY AND JOHN F. NOTLEY, TRADING, ETC., *Defendants-Appellants.*	}	No. 29 MARCH TERM 1916.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

I

WERE APPELLANTS JUSTIFIED IN ABANDONING THEIR CONTRACT?

Appellants did not rescind. They quit.

Respondent respectfully insists that the judgment below should not be reversed for any reason advanced by appellants under their first point for the following reasons:

1. The trial court, after seeing and hearing the witnesses, found as a fact that appellants "quit work and deliberately abandoned their contract without any justifiable cause."

2. Appellants did not quit because of the changes in the plans. Their troubles were due to inadequate equipment and inefficient management.

See testimony of

Edward Doughty p. 70.
James W. Davie, pp. 46, 47.
John F. Notley, p. 71.
William L. Price, pp. 98, 100.
E. D. Rightmire, p. 114.
Michael J. O'Meara, pp. 116, 117.
Isaac C. Hull, p. 125.
Exhibit P 5, *pp.* 136 138.
Exhibit P 6, *p.* 140.
Exhibit P 8. *p.* 143.

3. Such changes as were made did not render the contract impossible of performance, nor more burdensome, nor require a different character of work, or additional equipment, nor cost more to do the completed job, either before or after appellants quit.

James W. Davie, pp. 61, 62, 64, 65.
William L. Price, p. 92, *line* 24, *p.* 93, *p.* 102,
Michael J. O'Meara, pp. 117, 118.

None of the holes were excavated to a greater depth than the greatest depth called for by the contract drawings. The lowest depth was the elevator pits (p. 104) and these were raised a foot, (p. 105). Some of the holes were lowered 3 feet from the original depth. That is, a hole that was originally designed to be 3 feet deep may have been lowered to 6 feet and another hole designed to be 6 feet

deep may have been correspondingly raised to 3 feet, but the evidence is conclusive that at no point were appellants required to go to a greater depth than the deepest point shown on the original plans.

If proper methods had been pursued, the cost of pumping out the lower depths would not have cost any more money. It was the "same kind of work only a little more of it."

E. D. Rightmire, p. 113.

The entire excavation *in the holes for the piles* was over 700 yards less than shown on the original plan. *Edward Bowden, p.* 123. The compensating yardage was obtained by making the boiler pits and elevator pits longer and wider, but not so deep. The changes therefore made the work less expensive, instead of more expensive.

4. The changes were made by the architects, not by respondent.

Samuel Smith, p. 74, *line* 13.
William L. Price, pp. 86, 97.
Exhibit D 4, *p.* 149.

5. Appellants are estopped by their conduct from now setting up the changes as an excuse for nonperformance. If they found, as the work progressed, that changes in the plans were being made which they considered detrimental to their interest, "duty, candor and fair dealing required them to speak out." (*Sun Dredging Co. vs. Ottens,* 84 *N.*

J L. 740.) They should have protested to the contractors or the architects. They did neither. They quit without giving any excuse for so doing.

James W. Davie, p. 59.
William L. Price, p. 92, *line* 24, *p.* 93, *p.* 102. *line* 21.
Michael J. O'Meara, p. 117.
Lewis A. Wills, p. 124 *line* 30.
Isaac C. Hull p. 125.
Exhibit P 9, *p.* 144.
Samuel Smith, p. 72.

Smith did not "object to the depth that they were giving us." His objection went only to the cutting off of the piles, which was not in this contract. Doughty, Notley and Smith had a pile driving sub-contract independent of the excavation contract, which pile driving contract was being performed at the same time as the excavation contract and for a portion of the contract price of which they counterclaim, (p. 23).

II.

IS RECOVERY LIMITED TO THE PENALTY OF THE BOND?

Under the old practice, respondent would have brought a suit on the contract against the sub-contractors alone, and another suit on the bond against the sub-contractors and the Indemnity Company. Under the new practice respondent brought but one suit, but set forth the claim against the respective parties in two separate and distinct counts. Appellants (*p.* 28 *line* 10) call this "splitting up" the cause of action. Whatever else respondent may have done, it certainly has not "split up" its cause of action.

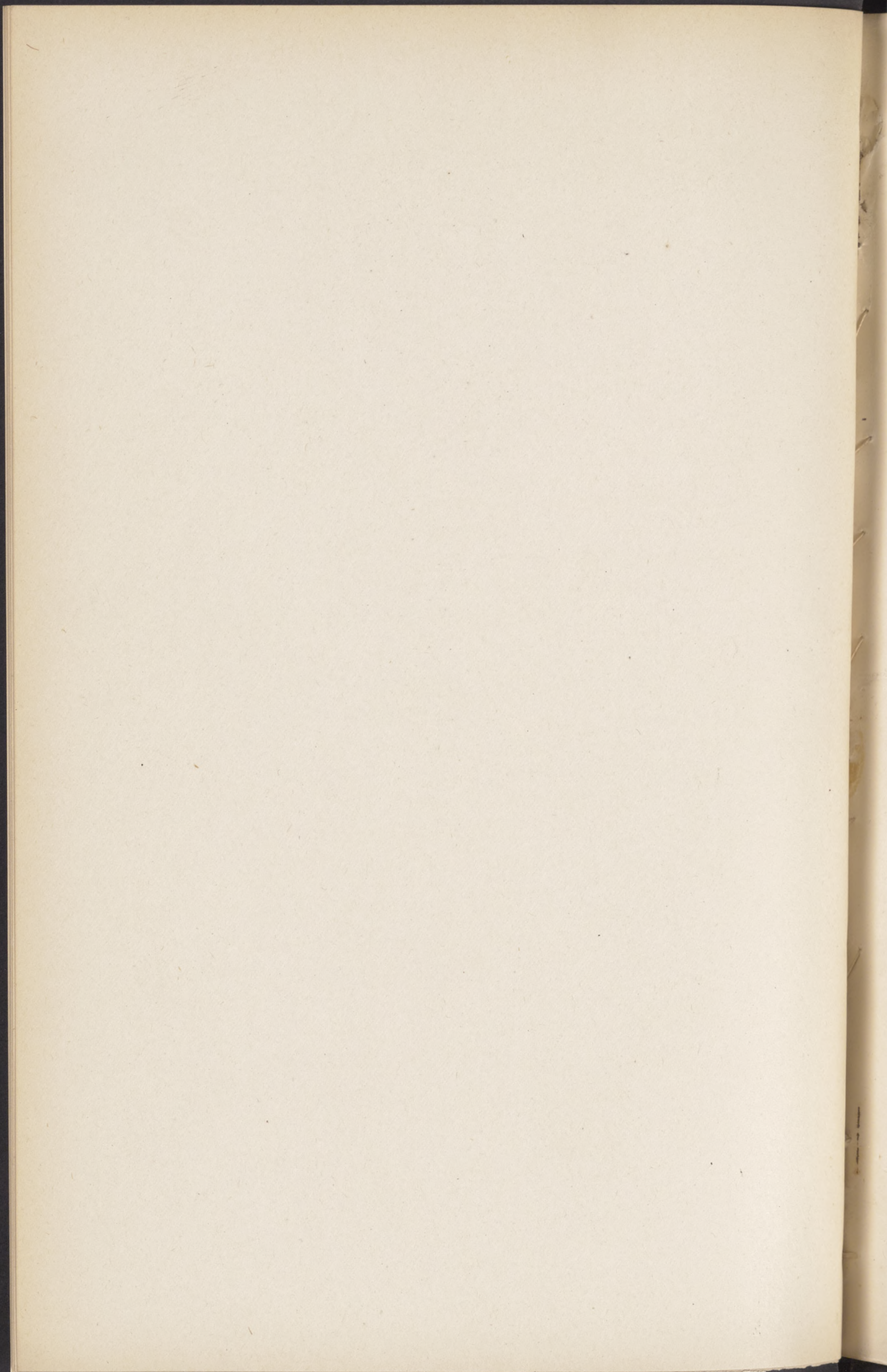
Appellants' contention with respect to the effect of giving a surety bond is certainly contrary to the usual practice in such matters. The authorities cited do not bear upon the point under discussion.

It surely cannot be the law that when one deals with an entirely solvent and responsible contractor, and for that reason takes only a small bond, he is thereby precluded from exacting from the contractor full performance of the contract.

There is certainly no evidence in this case which will warrant the conclusion that the parties to this excavation contract agreed that Doughty & Notley were at liberty to abandon their contract at any stage of the work, with or without cause, upon payment of $3000. as liquidated damages.

March Term, 1916.

WALTER H. BACON,
Respondent's Counsel.



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Supreme Court
of the
State of New Jersey

CUMBERLAND COUNTY

CRAMP & COMPANY, Plaintiff-Respondent. vs EDWARD DOUGHTY and JOHN F. NOTLEY partners trading as Doughty & Notley, and GLOBE INDEMNITY COMPANY, Defendants-Appellants.	On Appeal.	20

Notice and Amended Grounds of Appeal

(*Filed*)

30

Walter H. Bacon, Esquire,
Plaintiff's Attorney.

Dear Sir:

Take notice that the defendants appeal to the Court of Errors and Appeals from the judgment entered in the above cause on the twenty-ninth day of September, nineteen hundred and fifteen, upon the following grounds:

40

Notice and Amended Grounds of Appeal

1. Because the learned trial Court erred in refusing to find that a written order, signed by the Architects and acceded to by defendants, stating the amount to be allowed or to be deducted for alterations in the work, or prove a waiver of such
10 order, or prove that defendants fraudulently lured plaintiff into making such alterations, was necessary to entitle plaintiff to recover.

2. Because the learned trial Court erred in refusing to find that a written order of the contractor stating the amount to be paid by the contractor or allowed by the sub-contractor by virtue of alterations in the work, or prove a waiver of such order, or prove that defendants fraudulently lured plaintiff into making such alterations, was nec-
20 essary to entitle plaintiff to recover.

3. Because the learned trial Court erred in refusing to find that the plaintiff must prove the difference between the contract price and the actual cost of completing the work under the original plans.

4. Because the learned trial Court erred in refusing to find that the cost of completing the work under the revised plans was not a proper measure
30 of damage.

5. Because the learned trial Court erred in refusing to find that only one cause of action arises out of the contract and bond in suit, which cannot be split up so as to permit a recovery on two counts: one for breach of contract, and one for breach of bond.

6. Because the learned trial Court erred in re-
40 fusing to find that the parties to a contract may

stipulate the amount of damages to be recovered in case of breach of contract, and that said sum may be recovered as liquidated damages, plus interest and costs, and no more.

7. Because the learned trial Court erred in refusing to find that the parties to a contract may stipulate the amount to be recovered in case of several breaches in a contract, and that said sum, plus interest from the date of breach, and costs, may be recovered as a penalty, and no more. 10

8. Because the learned trial Court erred in refusing to find that there could be no recovery if plaintiff altered the plans, or work, contrary to the terms of the written contracts, without the knowledge or assent of defendants. 20

9. Because the learned trial Court erred in refusing to find that the bond in suit limited the liability of defendants to the penalty thereof.

10. Because the learned trial Court erred in refusing to find that "An Act Concerning Obligations" of New Jersey limited the liability of defendants to the penalty of the bond, plus interest, and costs, and no more.

11. Because the learned trial Court erred in refusing to find that plaintiff was not entitled to recover if it prevented defendants from doing the work contracted for. 30

12. Because the learned trial Court erred in refusing to find that plaintiff was not entitled to recover if it altered the plans, or work, so that it became more burdensome than defendants had contracted for. 40

13. Because the learned trial Court erred in finding that the provision concerning alterations in the contracts in suit were for the benefit of the owner alone.

14. Because the learned trial Court erred in
10 finding that the "alterations, additions to or omissions" in proof were not within the contemplation of the contracts in suit.

15. Because there was no evidence before the learned trial Court upon which to base a finding that the sub-contractors had, by their conduct, waived the provision concerning alterations, additions to or omissions in the contracts in suit.

Your obedient servant,

20 DAVID R. ROSE and ROBERT H. MCCARTER
Counsel for Appellants,
Doughty & Notley.

Complaint

(*Filed Jan. 25, 1915.*)

SUPREME COURT OF NEW JERSEY

CUMBERLAND COUNTY

CRAMP AND COMPANY, Plaintiff, vs EDWARD DOUGHTY and JOHN F. NOTLEY, Partners, trading as Doughty and Notley, and GLOBE INDEMNITY COMPANY, Defendants.	Action at Law.

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Plaintiff, Cramp and Company, a corporation of the State of New Jersey, having its principal office in the City of Bridgeton, Cumberland County, New Jersey, says 20

FIRST COUNT

1. On August 4, 1914, plaintiff and defendants Doughty and Notley executed a written contract, a copy of which is hereto annexed and marked "A."

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2. Plaintiff duly performed all the conditions of said contract on its part.

3. Defendants Doughty and Notley entered upon the performance of the work under said contract and partly performed the same.

4. On October 17, 1914, defendants Doughty and Notley notified plaintiff, in writing, that they were unable to complete the said contract, and 40

thereupon entirely abandoned work upon said contract and refused to complete the same. The time for the completion of said contract expired before this action was begun.

5. Plaintiff was obliged to and did complete said contract and expended in so doing the sum of $22,080.44, the items of which are shown by the annexed statement, marked "B" and made part hereof.

6. If defendants Doughty and Notley had completed said contract, in accordance with the terms thereof, they would have been entitled to receive from plaintiff the sum of $2,868, in addition to the sums which plaintiff had already paid them. Plaintiff's loss is the sum of $19,212.44.

7. Included in said loss is the cost to plaintiff of sundry materials and supplies furnished by plaintiff to defendants Doughty and Notley, at their request, prior to October 17, 1914, to enable Doughty and Notley to perform the said contract, and for which Doughty and Notley agreed to pay in final settlement, but for which they did not pay. These items are those appearing in Exhibit "B" on dates prior to October 17, 1914.

Second Count

1. Plaintiff repeats all the allegations of the first Court.

2. On August 20, 1914, defendants Edward Doughty and John F. Notley, trading as Doughty and Notley, as principals, and defendant Globe Indemnity Company as surety, gave a bond to plaintiff, under their seals, for $3,000, conditioned

for the faithful performance of the above-mentioned contract. Copy of said bond is annexed and marked "C."

3. Plaintiff refers to the annexed copy of said bond, Exhibit "C," for the condition thereof, and assigns the following breaches of said condition of said bond. 10

A. That defendants did not, nor did any or either of them, faithfully perform said contract on the principals' part to be performed, according to the terms, covenants and conditions thereof.

B. That defendants Doughty and Notley abandoned said contract and defendant Globe Indemnity Company refused to perform the same when duly notified of such abandonment. 20

4. On October 19, 1914, plaintiff notified defendant Globe Indemnity Company that defendants Doughty and Notley had abandoned the said contract, and plaintiff otherwise duly performed all the conditions of said bond on plaintiff's part to be performed.

5. Defendants have not paid plaintiff its aforesaid loss nor any part thereof.

Plaintiff demands as damages on the first count $19,212.44 with interest from December 18, 1914, and on the second count the penalty of said bond, being $3,000, besides interest from October 17, 1914. 30

WATER H. BACON,
Attorney for Plaintiff.

[Itemized accounts omitted from printed book by consent.]

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Exhibit A

Annexed to Complaint

This Agreement, made the 4th day of August in the year one thousand nine hundred and four-
10 teen by and between Doughty and Notley, 2329 Atlantic Avenue, Atlantic City N. J. party of the first part (hereinafter designated the Sub-Contractor *), and Cramp and Company, 801 Denckla Building, Philadelphia, Pa., party of the second part (hereinafter designated the Contractor *),

Witnesseth that the Sub-Contractor, in consideration of the agreements herein made by the Contractor, agree with the said Contractor as fol-
20 lows:

Agrees to provide and pay for all of the labor, materials, and other equipment necessary to do all of the excavation of every kind, back filling, shoring and sheet piling, built so that excavation and all masonry work below grade can be readily done and all pumping of water that may be required while excavation is in progress and until all concrete work and waterproofing up to grade is completed.

30 All work to be done in accordance with the contract plans and details, and also including all other work of every description as called for in the specifications under the heading "Part IV, Excavation" page 7 together with all sidewalk excavation.

Party of the first part also agrees to remove all dirt from the site to a proper dump and pay all
40 dumping privileges.

It is understood and agreed that all shoring and sheet piling is to be done in a manner satisfactory to the party of the second part and in such way as to permit the driving of all piling without obstruction.

This contract includes the taking out and removal of all old foundations, footings, old piling, old masonry or old floor that may be left after the buildings are torn down, also breaking up, taking out and removal of old floors and footings of present fireproof building, together with excavation as required therein. 10

Sub-Contractor agrees to employ only men of such labor affiliations as will not cause the other mechanics employed on the building to abandon the work; and to carry liability insurance as called for by the laws of the State of New Jersey. 20

All the above work to be done for Hotel Traymore, Illinois Avenue and the Boardwalk, Atlantic City, N. J.

Article I. The Sub-Contractor shall and will provide all the materials and perform all the work for the ....

..................as shown on the drawings and described in the specifications prepared by Price & McLanahan, Architects for said building. 30

Art. II. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said Architects and that their decision as to the true construction and meaning of the drawings and specifications shall be final. It is also understood and agreed by and between the parties hereto that such additional drawings and explana- 40

tions as may be necessary to detail and illustrate the work to be done are to be furnished by said Architects, and they agree to conform to and abide by the same so far as they may be consistent with the purpose and intent of the original draw-
10 ings and specifications referred to in Art. I.

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

Art. IV. The Sub-Contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the Contractor, the Architects or their authorized representatives; shall, within twenty-four hours after receiving written notice from the Contractor to that effect, proceed to take down all portions of the
30 work, and remove from the grounds or buildings all material, whether worked or unworked, which the Architects shall condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications, and shall make good all work damaged or destroyed thereby.

Art. V. Should the Sub-Contractor at any time refuse or neglect to supply a sufficiency of proper-
40 ly skilled workmen, or of materials of the proper

quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, the Contractor, with the approval of the Architects, shall be at liberty, after .... days written notice to the Sub-Contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Sub-Contractor under this contract; and if such refusal, neglect or failure is sufficient ground for such action, the Contractor shall also be at liberty to terminate the employment of the Sub-Contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Sub-Contractor he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Contractor in finishing the work, such excess shall be paid by the Contractor to the Sub-Contractor; but if such expense shall exceed such unpaid balance, the Sub-Contractor shall pay the difference to the Contractor. The expense incurred by the Contractor as herein provided, either for furnishing materials or finishing the work, and any damage incurred through such default, shall be chargeable to the Sub-Contractor.

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

Party of the first part agrees to work night and day and dig and sheet pile the excavation as di- 10 rected by the party of the second part and to do the work at such times as will not delay the driving of piles at an average speed of 200 piles per day and complete within four weeks after present frame building is torn down and rubbish removed.

Art. VII. Should the Sub-Contractor be delayed in the prosecution or completion of the work by the act, neglect or default of the Owner, of the Architects, of the Contractor, or of any person 20 employed by the Contractor upon the work, or by any damage caused by fire or other casualty for which the Sub-Contractor is not responsible, or by combined action of the workmen, in no wise caused by or resulting from default or collusion on the part of the Sub-Contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all causes aforesaid; but no such allowance shall be made unless a claim 30 therefor is presented in writing to the Contractor within forty-eight hours of the occurrence of such delay.

Art. VIII. The Contractor agrees to provide all labor and materials essential to the conduct of this work not included in this contract in such manner as not to delay its progress, and in the event of failure so to do, thereby causing loss to 40 the Sub-Contractor, agrees that he will reimburse

the Sub-Contractor for such loss; and the Sub-Contractor, agree that if he shall delay the progress of the work so as to cause loss for which the Contractor shall become liable, then he shall reimburse the Contractor for such loss. Should the Contractor and the Sub-Contractor fail to agree as to amount of loss comprehended in this Article, the determination of the amount shall be referred to arbitration as provided in Art. XII of this contract.

Art. IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the Contractor to the Sub-Contractor for said work and materials shall be as follows:

Price of all the above work to be Forty Cents (40¢) per cubic yard for all excavation, calculated from the grade at the site and from the plans, allowing one foot extra width around the sides of the parts of the excavation which may have to be sheet piled; the Forty Cents (40¢) per cubic yard for the excavation covers the cost to the party of the second part, not only of the excavation, but of all other work and things mentioned in this contract to be done and supplied by the party of the first part.

Payments to be made about the 15th of each month equal to 85% of the value of the excavation done during the preceding calendar month, as measured by Cramp and Company. All measurements to be checked up at the time of presenting final bill to Cramp and Company; balance of 15% to be paid 60 days after all work in this contract is completed.

The party of the first part agrees to furnish a bond for Three Thousand Dollars ($3,000.00) to guarantee the fulfillment of this contract.

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

Art. XI. The Contractor shall during the progress of the work maintain insurance on the same against loss or damage by fire, the policies to cover all work incorporated in the building, and all materials for the same in or about the
20 premises, and to made payable to the parties hereto, as their interest may appear.

The Sub-Contractor agree to indemnify the Contractor against all claims or demands for damage arising from accidents to persons or property occasioned by the said Sub-Contractor or employees, and the Contractor agrees to indemnify the Sub-Contractor against all claims or demands for damage arising from accidents to persons or property occasioned by the said Con-
30 tractor or employees, during the performance of this contract.

Art. XII. In case the Contractor and Sub-Contractor fail to agree in relation to matters of payment, allowance or loss referred to in Arts. III or VIII of this contract, or fail to agree under the stipulations in Art. VII of this contract, then the matter shall be referred to a Board of Arbi-
40 tration to consist of one person selected by the

Contractor, and one person selected by the Sub-Contractor, these two to select a third. The decision of any two of this Board shall be final and binding on both parties hereto. Each party hereto shall pay one-half of the expense of such reference.

The said parties for themselves, their heirs, successors, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained. 10

In Witness Whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

CRAMP AND COMPANY,
Norman W. Cramp,
President. 20

In Presence of
Joseph W. Mott.

(Seal)

Attest:
Jas. W. Davis,
Asst. Secretary.

DOUGHTY & NOTLEY,
Edward Doughty. 30
J. F. Notley.

Exhibit C

Annexed to Complaint

A 3877
CONTRACTORS BOND

10 BOND No. 1625

GLOBE INDEMNITY COMPANY

OF NEW YORK

Home Office: New York City

Amount $3,000.00 Premium $30.00

KNOW ALL MEN BY THESE PRESENTS: That Edward Doughty and J. F. Notley, trading as Doughty and Notley, of the City of Atlantic City, 20 State of New Jersey (hereinafter called the Principal), and the GLOBE INDEMNITY COMPANY of New York, a corporation organized and existing under and by virtue of the laws of the State of New York, and duly authorized to transact a general surety business, whose principal office is located in New York City, State of New York (hereinafter called the Surety), are held and firmly bound unto Cramp and Company of the City of Philadelphia, State of Pennsylvania, (herein- 30 after called the Obligee) in the full and just sum of Three thousand and 00/100 Dollars ($3,000.00), lawful money of the United States of America for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Signed, sealed and delivered this 20th day of 40 August, A. D., 1914.

WHEREAS the PRINCIPAL has entered into a certain written contract bearing date the 4th day of August, A. D., 1914, with the OBLIGEE for providing all the labor, materials and other equipment necessary to do all of the excavating of every kind for the Hotel Traymore, Illinois Avenue and the Boardwalk, Atlantic City, New Jersey, in accordance with the plans and specifications prepared by Price & McLanahan, Architects, Philadelphia, Pa., which contract is hereby referred to for the purpose of explaining this obligation; 10

NOW THEREFORE THE CONDITION OF THIS OBLIGATION IS SUCH, that if the said PRINCIPAL shall faithfully perform said contract on the PRINCIPAL'S part, to be performed according to the terms, covenants and conditions thereof (except as hereinafter provided), then this obligation shall be void; otherwise to remain in full force and effect; 20

THIS BOND IS EXECUTED BY THE SURETY UPON THE FOLLOWING EXPRESS CONDITIONS, which shall be conditions precedent to the right of the OBLIGEE to recover hereunder.

THE OBLIGEE shall keep, do and perform each and every, all and singular, the matter and things set forth and specified in said contract, to be by the OBLIGEE kept, done and performed exclusively at the times and in the manner as in said contract specified; 30

THE said SURETY shall be notified in writing of any act on the part of said PRINCIPAL, or said PRINCIPAL'S agents or employees, which may involve a loss for which the said SURETY is respon- 40

sible hereunder, immediately after the occurrence of such act shall have come to the knowledge of said Obligee, or to any representative duly authorized to oversee the performance of said contract; and a registered letter mailed to the
10 Surety, at its principal office in New York City, State of New York, shall be the notice required within the meaning of this bond;

If the said Principal shall voluntarily abandon said contract, or be lawfully compelled by the Obligee to cease operations thereunder, by reason of the non-performance of any of its terms or conditions, by the Principal then the Surety shall have the right, in its option, to assume the said contract and to sublet or complete the same; and
20 if said contract shall be assumed by the Surety, then as such contract is duly performed, any reserve, deferred payments and all other monies provided by said contract to be paid to the Principal, shall be paid to the Surety, at the same times and under the same conditions as by the terms thereof, such monies would have been paid to the Principal had the contract been duly performed by said Principal. And if said Obligee shall complete or relet the said contract, then any
30 forfeitures provided in said contract against the Principal, shall not be operative as against the Surety, but all reserves, deferred payments and all other monies provided in said contract, which would have been paid to the Principal had the Principal completed the contract in accordance with its terms, shall be credited upon any claim the said Obligee may make upon said Surety;
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The Surety shall not be liable under this bond to any one except the Obligee, but it is agreed that the Obligee, in estimating his damage, may include the claims of mechanics and material men, arising out of the performance of the contract, and paid by said Obligee only when the same, by the Statutes of the State where the contract is to be performed, are valid liens against the property of the Obligee. 10

The Surety shall not be liable for any damages resulting from an Act of God, or from a mob, riot, civil commotion or a public enemy; or from so-called "strikes," or labor difficulties; or from accident, fire, lightning, tornado or cyclone, and the Surety shall not be liable for the reconstruction or repair of any work or materials damaged by said causes or any of them. 20

This bond does not cover any provisions of the contract or specifications respecting guarantees of efficiency or wearing qualities or for maintenance or repairs nor does it obligate the Surety to furnish any other bond covering such provisions of the contract or specifications.

That any suits at law or proceedings in equity brought on this bond to recover any claim hereunder must be instituted within twelve months after the completion of said contract; 30

The said Surety shall not be liable for an amount in excess of the penalty of this bond.

IN TESTIMONY WHEREOF, the said PRINCIPAL and the said SURETY have caused this instrument of writing to be signed and sealed at Philadelphia, Pa., the day and year first above written.

DOUGHTY AND NOTLEY, (Seal)
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Edward Doughty,
Principal.

GLOBE INDEMNITY COMPANY, (Seal)
By T. P. Murphy,
Attorney-in-fact.

Signed sealed and delivered
in presence of
Joseph J. Gillen.
20
(Seal)

Attest:
Chas. W. Kaeser, Jr.,
Attorney-in-fact.
(Seal)

Examined by C. W. K.

Answer and Counterclaim

SUPREME COURT OF NEW JERSEY

(*Filed, Feb. 9, 1915*)

10

CRAMP & COMPANY, Plaintiff, vs. EDWARD DOUGHTY and JOHN F. NOTLEY, partners, trading as Doughty & Notley, and GLOBE INDEMNITY COMPANY, Defendants.	Action at Law.

Defendant, Doughty & Notley, residing in Atlantic City, N. J., and Globe Indemnity Company, a corporation of New Jersey, say: 20

ANSWERS TO FIRST COUNT

1. They admit the truth of paragraph one of the first count.

2. They deny the truth of paragraph two of the first count.

On August 28, 1914, September 9th, 1914, September 12, 1914, and October 16, 1914, plaintiff altered the plans and specifications referred to in said contract without the knowledge or consent of defendants. 30

3. They admit the truth of paragraph three of the first count.

4. They admit the truth of paragraph four of 40

the first count, and say that plaintiff compelled them to excavate to a deeper depth than the plans and specifications called for.

5. As to the statements contained in the fifth paragraph of first count, defendant's have no
10 knowledge or information thereof sufficient to form a belief.

6. As to the statements contained in the sixth paragraph of the first count, defendants have no knowledge or information thereof sufficient to form a belief.

7. They deny the truth of paragraph seven of the first count.

20 ANSWERS TO SECOND COUNT

1. Defendants repeat all the answers to the first count.

2. They admit the truth of paragraph two of the second count.

3. (*a*) They deny the truth of Section "A" of third paragraph of second count, and for further answer say that plaintiff did not faithfully per-
30 form said contract on its part according to the terms, covenants and conditions thereof, by altering, changing and revising the plans and specifications accompanying said contract without the knowledge or consent of defendants.

(*b*) They admit the truth of Section "B" of second count.

4. As to the statements contained in the fourth paragraph of the second count, defendants have
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no knowledge or information thereof sufficient to form a belief.

5. Defendants admit the truth of paragraph five of the second count.

By way of counter-claim against the plaintiff, the defendants say, that: 10

1. They repeat the statements to the first count.

FIRST COUNT

That by virtue of said contract the plaintiff, Cramp & Company, owes defendants, Doughty & Notley for the following labor and materials:

To feet of lumber @ per foot		$2243.72
To excavating 7951 yards of sand @ 40¢	$3180.40	
Less credits of 9/16/14 and 10/1/14	2040.00	1140.40
		$3384.12

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SECOND COUNT

That plaintiff, Cramp and Company owe defendants, Doughty & Notley, the following sums:
(Itemized accounts omitted by consent.) $1579.19

Plaintiff has not paid defendants its aforesaid sums. 30

Defendants, Doughty and Notley, counter-claim damages against the plaintiff on the first count three thousand three hundred and eighty-four dollars and twelve cents, and upon the second count, the sum of fifteen hundred and seventy-nine dollars and nineteen cents.

And the defendant, Edward Doughty, counter-

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claims damages against the plaintiff on the third count, the sum of fourteen hundred and sixty dollars and forty-six cents.

DAVID R. ROSE,
10 Attorney for Doughty & Notley.

JAMES H. HAYES, JR.,
Attorney for Globe Indemnity Company.

Reply and Answer to Counterclaim of Doughty and Notley

Filed, March 15, 1915)

20 SUPREME COURT OF NEW JERSEY

CUMBERLAND COUNTY

CRAMP AND COMPANY, Plaintiff, vs. EDWARD DOUGHTY and JOHN F. NOTLEY, partners, trading as (30) Doughty & Notley, and GLOBE INDEMNITY COMPANY, Defendants.	Action at Law.

Plaintiff replying to the answer of the defendants, Doughty and Notley, says:

REPLY TO ANSWER TO FIRST COUNT:

1. Plaintiff denies that it at any time, altered
40 the plans and specifications referred to in the con-

tract in suit, and denies that it compelled defendants to excavate to a greater depth than called for by the plans and specifications.

2. Under the terms of the contract in suit, the Architects had a right to make changes in the plans and specifications, and plaintiff admits that the Architects did make changes, from time to time, in said plans. Plaintiff denies that any of such changes were detrimental to defendants; denies that the making of such changes as were made justified defendants in abandoning their contract. Plaintiff avers that all such changes and modifications and terms of payment therefor, are provided for by the contract in suit.

Reply to Answer to Second Count:

1. Plaintiff repeats all the statements made in paragraphs one and two of its reply to answer to first count.

Answer to Counter-claim:

1. Plaintiff repeats all the statements made in paragraphs one and two of its reply to answer to first count above.

First Count:

2. Plaintiff denies the allegations of the first count.

Second Count:

3. Plaintiff denies the allegations of the second count.

Third Count:

1. Plaintiff admits that Edward Doughty, individually, has hauled materials for plaintiff, under contracts and agreements other than the contract in suit. Plaintiff believes the bill of items form-
10 ing part of the Third Count of said counter-claim is correct and plaintiff is willing to credit the whole correct amount thereof on its claim in suit.

WALTER H. BACON,
Attorney of Plaintiff.

Reply to Answer to Counterclaim

20 *(Filed, March 15, 1915)*

SUPREME COURT OF NEW JERSEY

Cumberland County

Cramp & Company, Plaintiff, vs. Edward Doughty and John F. Notley, partners, trading as Doughty & Notley, and Globe Indemnity Company, Defendants.	Action at Law.

30

Replying to answer to counter-claim defendants say:

That they admit that the contract in suit pro-
40 vides for changes, modifications and terms of pay-

ment, but deny that plaintiffs, or the architects, complied with the terms of said contract in making such changes and alterations in said plans and specifications, by failing to obtain the consent of defendants to such changes and modifications.

DAVID R. ROSE, 10
Attorney for defendants,
Doughty & Notley.

Amendment to Answer of Doughty and Notley

(*Filed, May 25, 1915*)

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NEW JERSEY SUPREME COURT

CRAMP & COMPANY, Plaintiff, vs. EDWARD DOUGHTY and JOHN F. NOTLEY, partners, trading as Doughty & Notley, Defendants.	Action at Law.

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Defendants, Edward Doughty and John F. Notley, partners, trading as Doughty & Notley, amending their answer to the complaint say, by way of defense.

Amendment to Answer of Doughty and Notley

FIRST DEFENSE:

That there is no liability of defendants because of changes to the plans and specifications without their knowledge or consent.

10 SECOND DEFENSE:

That plaintiffs may not split up their cause of action by suing for unliquidated damages for an alleged breach of contract in one count, and for liquidated damages in another count, when both causes arise out of one and the same transaction.

THIRD DEFENSE:

That the work done by plaintiff under the re-
20 vised plans and specifications was not the same as contracted for by defendants.

FOURTH DEFENSE:

That if there is any liability at all upon the part of defendants it is fixed at the sum of three thousand dollars by the terms of the contract and bond.

DAVID R. ROSE,
Attorneys for Doughty & Notley.

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Reply to Amendment to Answer

(*Filed, May 27, 1915*)

SUPREME COURT OF NEW JERSEY

CUMBERLAND COUNTY

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CRAMP AND COMPANY, Plaintiff, vs. EDWARD DOUGHTY and JOHN F. NOTLEY, partners, trading as Doughty & Notley, Defendants.	Action at Law.

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Plaintiff denies every allegation in the amendment to answer.

WALTER H. BACON,
Attorney of Plaintiff.

Amended Answer and Counterclaim of Defendant Globe Indemnity Company

(*Filed, March 16, 1915*)

10 SUPREME COURT OF NEW JERSEY

CRAMP AND COMPANY, Plaintiff, vs. EDWARD DOUGHTY and JOHN F. NOTLEY, partners, trading as Doughty & Notley, and GLOBE INDEMNITY COMPANY, Defendants.	Action at Law.

20

Defendant, Globe Indemnity Company, a corporation, authorized to do business in the State of New Jersey, says:

FIRST DEFENSE:

1. It admits the truth of Paragraph One of the first count.

30 2. It denies the truth of Paragraph Two of the first count.

On August 28th, 1914, September 9th, 1914, September 12th, 1914, and October 16th, 1914, and on divers other dates since the execution of the contract between the plaintiff and the defendants Edward Doughty and John F. Notley, plaintiff altered the plans and specifications referred to in said contract without the knowledge or consent of

40 the defendants.

Amended Answer and Counterclaim of Defendant Globe Indemnity Company

3. It admits the truth of Paragraph Three of the first count.

4. It admits the truth of Paragraph Four of the first count, and says that the plaintiff compelled the defendants, Edward Doughty and John F. Notley, to excavate to a deeper depth than the plans and specifications called for. 10

5. As to the statements contained in Paragraph Five of the first count, defendant has no knowledge or information thereof sufficient to form a belief.

6. As to the statements in Paragraph Six of the first count, defendant has no knowledge or information thereof sufficient to form a belief. 20

7. It denies the truth of Paragraph Seven of the first count.

Second Defense:

1. Defendant repeats all the answers to the first count.

2. It admits the truth of Paragraph Two of the second count. 30

3. (*a*) It denies the truth of Section "A" of third paragraph of second count, and for further answer says that the plaintiff did not faithfully perform said contract on its part according to the terms, covenants and conditions thereof, by altering, changing and revising the plans and specifications accompanying said contract without the knowledge or consent of the defendant. 40

(*b*) It admits the truth of Section "B" of second count.

4. As to the statements contained in the Fourth Paragraph of second count, defendant has no
10 knowledge or information thereof sufficient to form a belief.

5. Defendant admits the truth of Paragraph Five of the second count.

THIRD DEFENSE:

Defendant makes a part of this Amended Answer the joint answer and counter-claim heretofore filed by the defendants Edward Doughty and
20 John F. Notley and Globe Indemnity Company.

BY WAY OF COUNTER-CLAIM against the plaintiff, the defendant says; that:

1. It repeats the statements in answer to the first count.

2. (*a*) In the bond marked "Exhibit C" in plaintiff's complaint, it is provided among other things, "if the said OBLIGEE shall complete or re-
30 let the said contract, then any forfeitures provided in said contract against the PRINCIPAL, shall not be operative against the Surety, but all reserves, deferred payments and all other monies provided in said contract, which would have been paid to the PRINCIPAL had the PRINCIPAL completed the contract in accordance with its terms, shall be credited upon any claim the said OBLIGEE
40 may make upon said SURETY."

(*b*) That said contract provided that, "payments to be made about the 15th of each month equal to 85% of the value of the excavation done during the preceding calendar month, as measured by Cramp and Company. All measurements to be checked up at the time of presenting final bill to Cramp and Company; balance of 15% to be paid 60 days after all work in this contract is completed." 10

(*c*) That said Obligee (plaintiff) completed said contract after contractor failed to perform the same.

(*d*) That the defendant, Globe Indemnity Company, is entitled to have credit upon any claim the said plaintiff may make upon it, the balance of fifteen per cent of the value of the excavation work done by the said defendants Edward Doughty and John F. Notley. 20

(*e*) That the defendant, Globe Indemnity Company, is entitled to have credited upon any claim the said plaintiff may make upon it, the balance of fifteen per cent of the value of the excavation work done by the plaintiffs to complete the said contract. 30

(*f*) That said contract provided for payment at the rate of Forty Cents per cubic yard for all excavation work done.

(*g*) That the defendant, Globe Indemnity Company, has no knowledge of the number of cubic yards of excavation work done by either the defendants Doughty and Notley or the plaintiff, Cramp and Company, but says affirmatively that 40

such work so done by them is of a sufficient value that upon crediting the fifteen per cent balance of the value thereof upon the claim of the plaintiff against the defendant, Globe Indemnity Company, the said claim would be extinguished.
10 Therefore, plaintiff is not entitled to any moneys from the defendant, Globe Indemnity Company.

Defendant, Globe Indemnity Company, counterclaims as damages the sum of Three Thousand Dollars.

JAMES H. HAYES, JR.,
Attorney for Globe Indemnity Company.

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20 **Reply and Answer to Amended Answer and Counterclaim of Globe Indemnity Company**

(*Filed, March 16, 1915*)

SUPREME COURT OF NEW JERSEY

CUMBERLAND COUNTY

CRAMP AND COMPANY, Plaintiff, vs. EDWARD DOUGHTY and JOHN F. NOTLEY, partners, trading as Doughty and Notley, and GLOBE INDEMNITY COMPANY, Defendants.	Action at Law.

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40 Plaintiff, replying to the amended answer of the defendant, Globe Indemnity Company, says:

Reply and Answer to Amended Answer and Counterclaim of Globe Indemnity Company

As to the First Defense:

1. Plaintiff denies that it at any time altered the plans and specifications referred to in the contract in suit, and denies that it compelled the defendants, Edward Doughty and John F. Notley to excavate to a greater depth than called for by the plans and specifications. 10

2. Under the terms of the contract in suit, the Architects had a right to make changes in the plans and specifications, and plaintiff admits that the Architects did make changes, from time to time, in said plans. Plaintiff denies that any of such changes were detrimental to defendants; denies that the making of such changes as were made justified defendants, Edward Doughty and John F. Notley in abandoning their contract. Plaintiff avers that all such changes and modifications and terms of payment therefor, are provided for by the contract in suit. 20

As to the Second Defense:

1. Plaintiff repeats all the statements made in paragraphs one and two of its reply to the first defense. 30

2. Plaintiff objects to paragraph four of the second defense on the ground that the defendant, Globe Indemnity Company does have knowledge as to whether or not plaintiff notified it on October 19, 1914, that defendants Edward Doughty and John F. Notley had abandoned the said contract, and does have knowledge as to whether or not plaintiff otherwise duly performed 40

all the conditions of said bond on plaintiff's part to be performed, as alleged in the complaint.

As to the Third Defense:

10 1. Plaintiff makes a part of this Reply the answer filed herewith by it to the joint answer and counter-claim of the defendants.

ANSWER TO COUNTER-CLAIM

First Defense:

1. Plaintiff will object that the counter-claim discloses no cause of action. It fails to show any 20 matter or thing which is the proper subject of a counter-claim on the part of the defendant, Globe Indemnity Company against the plaintiff, and motion will be made to strike out the same on the ground aforesaid.

Second Defense:

1. Plaintiff repeats all the statements made in paragraphs one and two of its reply to the first defense.

30 2. Plaintiff admits sub-divisions (*a*), (*b*), (*c*) and (*f*) of paragraph two of the counter-claim, and denies subdivisions (*d*), (*e*) and (*g*) of said paragraph.

WALTER H. BACON,
Attorney of Plaintiff.

Reply to Answer to Counterclaim

(Filed,)

SUPREME COURT OF NEW JERSEY

Cramp and Company, Plaintiff, vs. Edward Doughty and John F. Notley, partners, trading as Doughty and Notley, and Globe Indemnity Company, Defendants.	Action at Law.

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Replying to answer to counter-claim, defendant says: 20

That it admits that the contract in suit provides for changes, modifications and terms of payment, but deny that plaintiffs, or the architects, complied with the terms of said contract in making such changes and alterations in said plans and specifications, by failing to obtain the consent of defendant to such changes and modifications.

JAMES H. HAYES, JR., 30
Attorney for Defendant,
Globe Indemnity Company.

Testimony

NEW JERSEY SUPREME COURT

CUMBERLAND COUNTY

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CRAMP AND COMPANY, Plaintiff, vs. DOUGHTY AND NOTLEY and GLOBE INDEMNITY COMPANY, Defendants.	Action at Law. Testimony.

Atlantic City, New Jersey, June 21st, 1915.

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Before HON. HOWARD CARROW, Judge.

Appearances:
For Plaintiff: Walter H. Bacon, Esq.
For Defendants: David R. Rose, Esq., and Furman D. Willis, Esq., for Doughty & Notley. Messrs Hayes & Smathers, for Globe Indemnity Company.

30 JAMES W. DAVIE, sworn:

Direct-examination by Mr. Bacon:

Q. Mr. Davie, where do you live? A. Four thousand five hundred twenty-nine, Pine Street, Philadelphia.

Q. Are you an officer of Cramp and Campany? A. Yes, sir.

Q. What office do you hold in that company?
40 A. Assistant secretary.

Q. In what way are you connected with the company, that is what is your real position in the management of the affairs of the company? A. I am superintendent and engineer.

Q. What is the business of Cramp and Company? A. Building construction. 10

Q. How long have you been engaged in that business yourself? How long has Cramp and Company been engaged in that business? A. About fourteen years.

Q. How long have you been engaged in the building construction business as an engineer? A. About twenty years.

Q. Has Cramp and Company been actively engaged in that line of business for fourteen years? A. They have. 20

The Court: Are you a practical engineer? A. Civil Engineer, yes, sir.

Q. Graduate of what institution? A. Lafayette College.

Q. What is the general line of work of Cramp and Company? A. Buildings and bridges.

Q. Have you done construction work for the United States Government? A. Yes, sir.

Q. Built post offices where? A. In Tampa, Florida, Jacksonville, Florida, Wilkesbarre, West 30 Chester.

Q. Have you built any public schools? A. Yes, sir.

Q. How many? A. I think about twenty.

Q. In Philadelphia? A. Yes, sir.

Q. And elsewhere? A. And elsewhere. yes, sir.

Q. Have you built any large theatres? A. Yes, sir.

40

Q. Where? A. In New York, Boston, Philadelphia.

Q. How many theatres in New York? A. In New York and Brooklyn about eight.

Q. In Philadelphia? A. One.

10 Q. Which one? A. Forrest.

Q What other large buildings have you constructed in the last four or five years? A. Well, we built the Fire Association building.

Q. In Philadelphia? A. In Philadelphia; the addition to the Union League.

Q. The recent addition to the Union League Building, you mean? A. Yes, sir. And the Mall Building, Packard Building.

Q. Were you actively engaged in all of these 20 building enterprises as the superintendent and engineer? A. Except the theatres in New York and Boston.

Q. In all the others were you so engaged? A. Yes, sir.

Q. Did Cramp and Company enter into a contract with the Hotel Traymore Company for the erection of a hotel in Atlantic City? A. They did.

Q. Have you that contract with you? A. Yes, sir.

30 Q. Please produce it.

(Witness produces contract.)

The Court: Is the contract admitted by the pleadings?

Mr. Rose: Yes, sir.

Mr. Bacon: Well, the execution of the contract is admitted. I don't care so much about the contract as I do the specifica-40 tions. The contract itself refers to the specifications.

Mr. Rose: We have the original contract and specifications from the County Clerk's office here. We would like to put them in.

Mr. Bacon: Of the Hotel Traymore?

Mr. Rose: Yes, sir, the whole thing. 10

Mr Bacon: Suppose we put them in, if you will let me have it.

(A clerk from the office of the County Clerk of Atlantic County produces what he says are the contract, plans and specifications between Cramp and Company and the Hotel Traymore Company for the erection of the Hotel Traymore in Atlantic City and by consent of all counsel they are offered in evidence without formal proof 20 and marked Exhibit No. one on the part of the plaintiff.)

Q. Did Cramp and Company let sub-contracts for the doing of portions of the work required to be done by this principal contract and specifications? A. Yes, sir.

Q. Among other sub-contracts did they let a sub-contract for the doing of the excavation required to be done by the principal contract? A. They did. 30

Q. And was that sub-contract entered into with Doughty and Notley, two of the defendants in this suit, and does it bear date August 4th, 1914? A. Yes, sir, that is it.

Mr. Rose: I would suggest we call it the excavation sub-contract.

A. This is the contract.

Q. This is the contract? A. Yes, sir.

40

Sub-contract with Doughty and Notley offered in evidence and marked Exhibit P-2.

Q. The contract Exhibit No. 2 requires that the sub-contractor shall give a bond to Cramp and Company. Was such a bond given? A. It was.

10 Q. I show you bond made by Edward Doughty and J. F. Notley, principals, and Globe Indemnity Company, surety, to Cramp and Company for three thousand dollars, dated August 20th, 1914; is that the bond that was given to you pursuant to the terms of the contract? A. That is right, yes, sir.

(Bond offered in evidence and marked Exhibit P-3.

20 Q. Mr. Davie, after the making of this contract with Doughty and Notley did they enter into the performance of the contract? A. They did.

Q. Do you know of your own knowledge how much sand they actually did excavate? A. No, I didn't measure that up.

Q. Well, it was measured in the office, was it? A. Yes, sir.

Q. And were statements rendered to your office for the amount of money that was due to them

30 under the contract for the work that they did? A. Yes, sir.

Q. Have you those checks or have I? A. I have the checks here.

Q. How many payments did you make to Doughty and Notley? A. Two payments.

Q. Have you the vouchers there for them? A. Yes, sir.

Q. Please produce them.

40 (Vouchers produced.)

Mr. Bacon: The first one bears date September 17th, 1914, and is voucher number 2345 in favor of Doughty and Notley on account of excavation Hotel Traymore, Atlantic City, $1020.00. The receipt is signed Doughty and Notley and it is endorsed Doughty and Notley and E. Doughty and is marked canceled by the bank. 10

Q. Mr. Davie, look at that; is that the first payment that was made to Doughty and Notley on account of the work that they did under this contract? A. Yes, sir.

Q. I show you another voucher dated October 2d, 1914, being No. 2496, drawn to the order of Doughty and Notley, for $1020.00, receipted at the bottom by the signature Doughty and Notley, endorsed Doughty and Notley and E. Doughty and marked canceled by the bank, through the bank. 20

The Court: These two vouchers are for the same amount?

Mr. Bacon: They are for the same amount, but not for the same money, one of them is dated September, $1020.00, and the other is in October $1020.00, making a total of $2040.00. 30

The Court: What I am getting at, the total is $2040.00.

Mr. Bacon: Yes, for two vouchers.

Q. Is that the second voucher that was given them for the work that was done under this contract? A. Yes, sir.

Two vouchers offered in evidence and marked as one Exhibit P-4.

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Q. Those payments were based on what quanitity of excavation? A. Six thousand yards.

Q. At how much a yard? A. Forty cents.

Q. Was that the contract price? A. Yes, sir.

By the Court: Q. Based on what? A. Six thousand cubic yards.

10 Q. Yes. A. At forty cents.

By Mr. Bacon: Q. Six thousand cubic yards forty cents, makes $2400.00, does it not? A. Yes, sir.

Q. And they were paid $2040.00? A. Yes, sir.

Q. Making a difference of how much? A. Of $360.00.

Q. And why was that retained? A. That is the percentage, contract calls for a percentage to be held up.

20 Q. That is what you call the retained percentagt, is it not? A. Fifteen percent, yes, sir.

Q. Was that the only money that was ever paid to Doughty and Notley? A. Yes, sir.

Q. On account of this contract, I mean? A. On account of this contract.

Mr. Hayes: Q. How much was it, two thousand and what, $2040.00? A. $2040.00, yes, sir.

Tht Court: That is the sum which you have now? They are entitled to be credited with that?

30 Mr. Bacon: I don't admit that. They would have been entitled to have had that money paid to them if they had performed the contract.

Mr. Hayes: What, the $2040.00?

Mr. Bacon: No, the $360.00.

The Court: The fifteen percent was held back?

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Mr. Bacon: Under the terms of the contract.

By Mr. Bacon: Q. Did Doughty and Notley perform the contract? A. No, sir.

The Court: Won't you give me the date of the contract, Mr. Bacon?

Mr Hayes: Fourth of August. 10

Mr. Bacon: The date of the contract with the Hotel Traymore was July 31st 1914.

The Court: That is this?

Mr. Bacon: That is the contract, the main contract.

The Court: I don't care for that.

Mr. Bacon: The Doughty and Notley contract is dated four days later, August 4th, 1914. 20

The Court: Now when was work begun by Doughty and Notley?

Mr. Bacon: Can you answer that question, Mr. Davie? A. I think it was probably a week or ten days after that date. I don't remember just what the date was.

Q. You are familiar with the plans and specifications—A. Yes, sir.

Q. —on this job, are you not? A. Yes, sir. 30

Q Referring now to the contract to be performed by Doughty and Notley did that require any excavation to be made below the water line? A. Yes, sir.

Q. How close was this operation to the beach? A. Well, the front of the building is right at high tide, almost.

Q. Is it located directly on the Atlantic Ocean? A. Yes, sir. 40

Q. Did or did not the contract require the excavation of sand below the water line? A. It did.

Q. The contract, I observe, calls for piling the excavation; what does that mean? A. That means putting in wood piles and then the foundation is started on top of that, the concrete foundation.

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Q. No, but perhaps I didn't express that correctly. The thing I had in mind was sheet piling. I guess that is something else, isn't it? A Yes, sir, that is piling, that is casing in the holes with lumber of some kind before you start to excavate, to prevent the sand and water from coming in the excavation.

Q. And was this work of such a character that these holes had to be sheet piled before the sand could be taken out? A. Yes, sir.

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Q. Was this work of such a character that it could be performed by hand or was machinery necessary to do it? A. Machinery was necessary.

Q. What kind of machinery? A. Pumps principally.

Q. Were you on the job from time to time after the work was commenced by Doughty and Notley? A. Yes, sir.

Q. Did you observe the methods which they pursued in the performance of their contract? A. Yes. sir.

30

Q. This contract with them requires them to work at night—A. Yes, sir.

Q. —I observe. Did your contract with the Hotel Traymore require you to work at night? A. Yes, sir.

Q. Were you under penalty provided in that contract for failure to complete the building within a specified time? A. Yes, sir.

40

Q. State the methods that were actually pursued by Doughty and Notley for the performance of this contract and whether or not they did do the work promptly and satisfactorily. A. Well, the method used was by jetting in this sheet piling and casing the footings-in and then by pumping the water out until it would get to such levels as they could throw the sand out and throwing the sand out. First they took off the lot about four or five feet below the curb until they got down to water and then they came in and jetted sheet piling in and then pumped the water until it would get so they could excavate. 10

Q. Were you or were you not obliged to urge them somewhat in the performance of their work? A. We were. We were obliged to keep after them all the time. 20

Mr. Bacon: Mr. Rose, have you the letter of October 9th, 1914 addressed to Doughty and Notley?

Mr. Rose: No, I have not. I have the other two letters you called for, but I have not the one of October 9th.

Mr. Bacon: I have called for the production of the original and I have a carbon copy of it. 30

Q. I show you a carbon copy of this letter; is that a letter which was sent by Cramp and Company to Doughty and Notley under that date? A. Yes, sir.

Q. Was it sent by registered mail as appears by the card attached? A. Yes, sir.

Mr. Bacon: Mr. Hayes, will you admit that you got a copy of that letter? I have the registry receipt. 40

Mr. Hayes: Yes, sir. That is one you gave me notice about?

Mr. Bacon: Yes, these are the ones I gave you notice about. Mr. Hayes admits that the Globe Indemnity Company received a letter dated October 9th, 1914, by registered mail, which letter contained a copy of the letter which was sent to Doughty and Notley under the same date and, to avoid confusion, we will have this marked with your Honor's permission, as a single exhibit.

Two letters received in evidence and marked Exhibit P-5.

Mr. Bacon: Another letter dated October 14th, 1914, addressed to Doughty and Notley, together with a copy thereof, which was sent with a letter of the same date by registered mail to the Globe Indemnity Company.

Q. Those letters were sent, were they, Mr. Davie, to Doughty and Notley and the Globe Indemnity Company? A. Yes, sir.

Q. The initial at the bottom there indicates that they were dictated by you? A. Yes, sir.

Letter received and admitted in evidence and marked Exhibit P-6.

Q. Did you receive from the Globe Indemnity Company an answer to your letter of October 14th, and if so, is that it? A. Yes, sir.

Letter admitted in evidence and marked Exhibit P-7.

Q. Was a reply made by your company to the letter of October 14th, 1914, written by the Indemnity Company? A. Yes, sir.

Q. Is that a copy of it, carbon copy? A. Yes, sir.

Mr. Hayes agrees that the carbou copy shall go in instead of the original. Carbon copy of letter of October 15th, admitted in evidence and marked Exhibit P-8.

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Q. Did you receive a letter from the defendant, Doughty and Notley, dated October 17th, 1914, saying that they had abandoned the contract?

Mr. Rose: I object to the word "abandon." The letter speaks for itself.

Question withdrawn.

Q. Receive a letter from them under date of October 17th, 1914. A. Yes, sir.

Q. Is that it? A. Yes, sir.

Letter admitted in evidence and marked Exhibit P-9.

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Q. This letter, for the sake of having it on the record, reads as follows: "Atlantic City, New Jersey, October 17, 1914. Traymore Hotel Excavation Contract. Cramp and Company Denckla Building, Philadelphia, Pennsylvania. Gentlemen: We find that we are unable to complete the excavation work at the Traymore Hotel, for which we have a contract with you, and hereby give you notice of the same. Very truly yours, Signed E. Doughty, J. F. Notley."

30

Upon receipt of that letter, Mr. Davie, did you at once give the Globe Indemnity Company notice that you had received it? A. We did, sir.

Mr. Bacon: I ask you for your copy of the letter dated October 19th, 1914, or I will use this.

Mr. Hayes: That's all right. We will admit we got it.

40

Mr. Bacon: And that it was sent by registered mail?

Mr. Hayes: Yes.

Mr. Bacon: Mr. Hayes says that he will admit that the letter containing a copy of the letter from Doughty and Notley Exhibit P-9 was mailed by Cramp and Company to the Globe Indemnity Company by registered mail and was received by them and as a matter of convenience we will put in a carbon copy of it rather than the original, which he has, to which carbon copy I have attached our registry receipt both from the Philadelphia Post office and the New York Post office.

Carbon copy admitted in evidence and marked Exhibit P-10.

Q. Mr. Davie, the bond in suit provides that, speaking in general terms, in case the sub-contractor abandons the contract or otherwise, the work is required to be done by some person other than the sub-contractor, the surety company shall have the right to do the work at their election. Did you receive a letter from the surety company stating that they did not elect to perform the contract? A. We did.

Q. Is the letter which I show you the letter which you received from the Globe Indemnity Company?

Mr. Hayes: I admit it.

Letter admitted in evidence and marked Exhibit P-11.

Mr. Bacon: Now won't you let me have, Mr. Rose, our letter of November 3d, 1914?

Mr. Rose: Yes, that lead pencil memoranda was put there by someone else.

Mr. Bacon: Shall I use the carbon?

Mr. Hayes: Yes.

Q. After the receipt of the letter from Doughty and Notley, Exhibit P-9, did you write another letter to them on the subject matter of this contract under date of November 3d, 1914, and if so, is that it or a copy of it? A. Yes, sir. 10

Q. It is agreed that this copy shall be used in place of the original. Did you receive from Mr. Doughty an answer to that letter; and is that it? A. Yes, that is correct.

Both letters marked together as one Exhibit P-12.

Q. Mr. Davie, after the receipt of the notice from Doughty and Notley that they were unable to perform the contract what did Cramp and Company do with respect to the completion of their contract? A. We went ahead and completed it. 20

Q. And did you complete it? A. Yes, sir.

Q. Did you complete it in accordance with the plans and specifications? A. No, they were changed somewhat.

Q. Did you have a right to change them under the terms of the contract?

Mr. Rose: Objected to, the contract speaks for itself. 30

Mr. Bacon: That is very true, but perhaps this is a better question.

Q. Did you complete the Doughty and Notley contract according to the plans and specifications and the instructions of the architect? A. Yes, sir.

Q. What did it cost? A. The labor cost $14,135 .30.

The Court: Q. How much is that? Fourteen 40

thousand and how much? A. $14,135.30 was the labor. I have a summary sheet there some place, Mr. Bacon.

Q. Suppose you come and get that. What did it cost for the necessary plant and the maintenance of the same? A. Three thousand four- hundred-sixty dollars and fifty-three cents.

The Court: How much is that? A. Three thousand four-hundred-sixty dollars and fifty-three cents.

Q. Was all of that plant purchased by you after October 17th, 1914? A. Yes, sir.

Q. Or was some of it purchased before that at the request of Doughty and Notley? A. Well, that is—there was some purchased before and some afterwards, some pumps purchased before.

Q. At whose requests were those pumps purchased? A. Some of them at Mr. Notley's and some at Mr. Doughty's.

Q. What did they say to you about it, if the conversation was with you, as to why they wanted you to buy those pumps? A. They said we could get them quicker and they had to have them quickly and asked us if we could not get them for them.

Q. And what was the arrangement about the payment? A. We were to be paid for them.

Q. Were they charged against this contract? A. They were, yes, sir.

Q. What equipment did Doughty and Notley have on the job on October 17th, 1914? A. They had, with the equipment we bought, they had three or four diaphram pumps, and they had a sand pump rented, they had two or three other pumps there for pumping water and supplying water to the boilers.

Q. What did you buy after that in the way of machinery after you took charge? A. We bought another sand pump, we bought two or three centrifugal pumps and pipes and fittings and so forth, for connecting them up.

Q. Were all of those things necessary to the performance of the contract? A. Yes, sir. 10

Q. And you have charged the Doughty and Notley contract with the cost to Cramp and Company of the necessary plant and maintenance? A. We have, yes, sir.

Q. Did you have to buy any lumber for sheet piling? A. Yes, sir.

Q. What did it cost you? A. Two thousand six-hundred-ninety-four dollars and thirty-seven cents. 20

Q. Did you work at night? A. Yes, sir.

Q. In order to do that did you have to have lights? A. Yes, sir.

Q. What did it cost you for carbide for the lights? A. One-hundred-forty dollars.

Q. Now you have already given the item of labor. Did you haul away any of this sand in addition to that which you pumped out? A. Yes, sir.

Q. What did it cost you to haul it? A. One thousand six-hundred-fifty dollars and twenty-four cents. 30

Q. So that the total cost to complete was how much? A. Twenty-two thousand eighty dollars and twenty-four cents.

Q. Now, Mr. Davie, have you got—

The Court: Q. You mean that is the sum which it cost your concern to do the job which this contracting firm should have done? A. Yes, sir, after they had quit the work. 40

Q. Mr. Davie, have you got there in your hand the bills for all the material that Cramp and Company bought for this job, and have you got there the payrolls showing the expenditures by Cramp and Company of this amount of money? A. Yes,
10 sir.

Q. For the various items? A. Yes, sir.

Mr. Bacon: Now I offer to prove, if necessary, by other witnesses, namely the book keeper and the timekeepers and other persons connected with the company, all of the items of these various charges. I have got the books here, the accounts here, and got the men here, if counsel on the other side requires it.

20 The Court: I don't suppose Counsel will require that.

Mr. Rose: No, we won't require that.

Mr. Bacon: Will you make a statement that this is accepted as proof of the cost?

Mr. Rose: The proof of Mr. Davie is satisfactory.

Mr. Hayes: Positive.

Q. These letters that have been offered in evidence addressed by Cramp and Company to
30 Doughty and Notley indicate that Cramp and Company were urging them to do this work. Why were these letters necessary? A. Because they were not proceeding with sufficient equipment and men to complete the work in contract time, so we could complete in contract time.

Q. When did Doughty and Notley's time expire for the performance of their contract? A. I would like to look at that contract.

40 Q. Well the contract says it should be comple-

ted within four weeks from the time the building was torn down and the rubbish removed. A. The contract time for them would have expired about the fifteenth day of October.

Q. This suit was brought on the twenty-fifth day of January 1915. Had their time for the performance of the contract expired before that date? A. Yes, sir. 10

CROSS-EXAMINATION by Mr. Rose:

Q. Mr. Davie, at the time of these letters, P-6 which has been offered in evidence were sent, had you obtained the consent of the architects to put extra men at work there? A. Yes, sir, notified us too.

Q. The written consent? A. Verbal consent, and I think we also had a letter from them to put men on. 20

Q. Have you got that letter? A. I am not positive about that, but they notified us several times to put men on there, that the work was going too slowly before we did it.

Q. When was it your firm put a force of workmen on the job to complete the work? A. I think the day after or before they notified, or next day after they notified us that they were not going to go ahead any further with the work. 30

Q. You had charge of the work there, hadn't you? A. I was on the job all the time or had a superintendent there.

Q. And before the letter of October fourteenth was sent you had already put some men at work there on excavation, hadn't you? A. Well, we may have had a man in there at their request or something of the kind, to help them out, that they 40

had asked for it, we rendered them any assistance we could whenever they asked for it.

The Court Q. But did you ever take charge of the work to complete it? A. No, sir.

Q. Until after they notified you that they had quit? A. No, sir.

Q. Now I want you to refresh your recollection from this letter of October 14th, 1914. A. That is right, yes, sir.

Q. The notice which you got from Doughty and Notley is dated October 17th, 1914, isn't it? A. Yes, sir.

Q. In your letter of October 14th, 1914, you say —I will read you the whole letter—"We would call your attention to the fact that you have refused to put men on sheet piling on the night shift through your representative, Mr. Smith. We have, therefore, put men on this work"—A. Yes.

Q. —"On night shift on sheet piling, and would charge your account with the same. We are sorry to have to take these steps, but owing to the fact that we are so far behind with the work that the penalty does not begin to pay us for the loss, we cannot tolerate this delay. We will, of course, remove these men whenever you say that you will put on the men and get through with the work. Yours truly, Cramp and Company, James W. Davie." A. Yes, sir.

Q. Now do you stand by the answer which you gave a moment ago, in which you said that you did not put on any men until after October 17th? A. I did not say that. I said we may have put men on from time to time, to help them out, is what I stated.

Q. How many men did you actually put on to

do that excavating work before October 17th, 1914? A. I couldn't say, probably in that gang there was probably five or six men, or seven men, something like that.

Q. Now you say that after October 17th, that Cramp and Company finished the work in accordance with some changes in the plans and specifications? A. Yes.

Q. Have you got the changed plans and specifications here? A I think likely we have.

Q. I sent you notice to produce them. Have you them here? A. We have got those sheets here that they asked for.

Mr. Bacon: Got the sheets you asked for but there are not anything like the number of plans and specifications that you asked for.

Mr. Rose: I call upon counsel to produce plans S7, dated June 24th, 1914, plan X3—

Mr. Bacon: Mr. Davie, suppose you come down here and get these right.

The Court: This cross-examination, I suppose, is for the purpose of showing such a change beyond what the contract contemplates that the contractor could not go on is that it?

Mr. Rose: No, the purpose of the cross-examination is to show that the architect and the contractor changed the plans and specifications so that they were not the same as the plans and specifications upon which our bid was made.

The Court: Now right on this, point

were the changes such as could be made under the terms of the contract?

Mr. Rose: No, they are not. They could not be made under the terms of the contract. These changes could not be made.

10 The Court: We will have to see about that.

Mr. Bacon: If that is the purpose of the cross examination I submit that it is not proper cross-examination but should be developel as a part of the main case of the defendant. That is the easiest way to get at it and keep it orderly.

The Court: Well, technically, that would be so but why is it necessary?

20 Mr. Bacon: Well, I don't know that it is.

The Court: Is there any disadvantage?

Mr. Bacon: I don't know that there is except this—

The Court: We are here trying to get at facts. There is no jury to be affected by anything.

Mr. Bacon: That is why I thought perhaps Mr. Price, who is the architect and

30 who knows all about these plans and knows precisely what he did would be a better witness to give this testimony and produce these plans than Mr. Davie would. That is all. I have no objection excepting that I think that would be the more orderly course to pursue, if they will develop their case and then they can call Mr. Price

40 if they want.

Mr. Rose: Suppose we lay this aside for the present then.

Q. Mr. Davie, didn't Mr. Smith, who was the superintendent of Doughty and Notley, object to your putting extra men at work there upon the excavation? A. Not that I know of. I don't remember him offering any objections. 10

Q. In regard to the pumps, where are those pumps now? A. We have them here in town.

Q. You have used them continuously in the building of the Hotel Traymore. A. We used them continuously in putting in the foundations there.

Q. Have you used them for anything else? A. Well, none of these pumps. They are in storage now. We had some other pumps on the job that were our pumps, we didn't charge them for. 20

Q. What other work were you doing there at the hotel Traymore at the time you took over this contract? A. Well, putting in the concrete and piling and centering and various other things.

Q. You were doing a number of other things then in addition to this excavation? A. Yes, sir.

Q. And it was necessary for you to use the machinery which you had on the ground at that time, wasn't it, to do all those things? A. Our machinery, which we used in our work, but we didn't use the pumps for putting up the centering or anything like that. 30

Q. Well, what about the engines? A. The engines we did not use except for their work, for heating and so forth.

Q. And you have charged Doghty and Notley for the light which was used there? A. Yes, sir, 40

not all of the light, only such light as we used.

Q. How much of it is for the light for the excavation? A. Only such carbide and so forth. There is no charge there for lamps at all. You will notice it is just the carbide.

Q. You have made a charge for light? A. Yes, that is for carbide for light, that is the carbide that we used.

Q. Well, but you used those lights for the purpose of doing other work there besides the work of excavating, didn't you? A. Might have been some man might have sawed off a board or something in the light of those lights, but this was a proportion of the carbide.

Q. You say that you bought some new lumber; there was some lumber lying on the ground there belonging to Doughty and Notley? A. Yes, sir.

Q. About how many thousand feet? A. Eight thousand feet, about.

Q. Does that include the lumber which went into the concrete mixer? A. I couldn't say about that. That was the lumber that was on the ground that we paid them for when we took the job over.

Q. Did you use all of the lumber that was there? A. How do you mean?

Q. That Doughty and Notley left there? A. Oh yes, we used it all. We used a lot of our scaffolding lumber that we didn't charge them with, and pulled it out.

Q. Now, Mr. Davie, do you know how much it would have cost to have completed the excavation work in accordance with the original plans and specifications? A. Well, I don't know how much it would have cost, no, but about the same

as it is here. I don't think the way they were, the foundations only run about, there is only a difference of about twenty-five or thirty yards, something like that, the way they were put in, and the way they were shown on the plans and bid on.

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Q. Well, do you know in round numbers, what it would have cost to have finished the work in accordance with the original plans and specifications? A. Well, I say there is only about thirty yards difference between the way they are put in and the plans and specifications, practically the same

By the Court: Q. You say the changes were not material? A. No, sir, about thirty yards, I think, is the total difference in the way they are put in and the way they are shown on the plans.

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Q. Well, do the change involve any difficulty in doing the work any more difficult, any more burdensome to the contractor? A. No, sir, no, there is no additional difficulties encountered that we have not encountered under our contract.

Q. Were the changes necessary to make the job effective? This is foundation work as I understand? A. Yes, sir.

Q. And did these changes have to be made to make this job right? A. They thought they would get better results by making various changes.

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Q. Make a better foundation for the superstructure? A. Yes, sir.

Q. And were they then, according to your view? You are a contractor and builder and engineer of experience as I understand? A. Yes.

Q. Were those changes within the contempla-

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tion of the contract? A. Yes, sir, they always occur on every contract I have ever been on, there has always been changes.

By Mr. Rose: Q. Well, weren't the changes made before October seventeenth, 1914? A. There was changes made from time to time all through the job.

Q. Well, back as early as June of 1914 weren't they? A. June?

Mr. Bacon: Well, I object to that, if the Court please, because the contract was not entered into until August.

The Court: August fourth.

Q. Well, weren't changes made between the date of this contract and October sevententh? A. Oh yes.

Q. Well, how many changes were made? A. Several.

By the Court: Q. Won't you right at this point, tell us what the changes were and why they were rendered necessary and whether there was any objection made to them? A. Tell us all about it, please, right at this point. A. The changes from time to time were made as they ran into different difficulties in the way of pipes, elevator pits and so forth, and in order to raise or lower the footing, so as to keep the line of rest and materials in the best position, and they raised a lot of them because along the old building, because they went down below the footings of the old building, which they did not think it advisable, they raised some in there and they lowered some to get them near the line of rest of soil, as they go around the elevator pits, and they thought they found that around the boiler rooms that it wasn't necessary to have

the foundation so deep, and they found that the soil was better and could get better results by keeping them up. That was the principal reason for shifting up and down of the foundations.

Q. Did they object to doing that? A. No, sir.

Q. I mean the contractors? A. No, sir. 10

Q. You say that is customary, of course, in all jobs? A. All jobs that I have ever been on, there has been changes in them for foundation, some material under the earth that you can't tell what you are getting and it is necessary to shift the designs frequently in foundation work, in fact all portions of the building.

Mr. Hayes: Mr. Bacon, I want to add to paragraph six of my answer. I think I have stated rather crudely. In your claim, 20 in paragraph six of your first complaint you say that if defendants Doughty and Notley had completed said contract in accordance with the terms thereof they would have been entitled to receive from the plaintiff the sum of $2868.00 in addition to the sums which plaintiff has already paid them. Plaintiff's loss is the sum of $19,212.44. My answer to that says, paragraph six, "As to the statements in 30 paragraph six, defendant has no knowledge or information thereof sufficient to form a belief," and I want to add to that, "But says that the said sum of $2868.00 which plaintiff says defendants Doughty and Notley would have been entitled to receive from the plaintiff had said Doughty and Notley completed the contract, should be credited upon the claim plain- 40

tiff makes against this defendant in accordance with the terms of said bond as shown in paragraph A of section two in their defenses, and therefore this defendant, if it owes anything to plaintiff at all, does not owe any more than the sum of $132.00."

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The Court: The amendment is allowed.

CROSS-EXAMINATION by Mr. Hayes:

Q. Mr. Davie, how many yards were excavated, do you know? Do you have that statement there? A. Why I think about 12270 yards.

Q. The contract basis with Doughty and Notley was forty cents per cubic yard? A. Yes, sir.

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Q. And you paid to Doughty and Notley the sum of $2040.00? A. Yes, sir.

Q. And what amount do you say Doughty and Notley would be entitled to be paid if the contract had been completed? A. $2868.00.

RE-DIRECT-EXAMINATION by Mr. Bacon:

Q. Did these changes that were made in the plans and specifications after August fourth 1914 involve the doing of work of a different character than that contemplated by the original contract? A. No, sir.

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Q. Were those changes anything more than changes in the depth of the various holes in which the foundations were to be placed or in which the boiler room and elevator pits were to be placed? A. No, sir.

Q. Were some of these holes made deeper? A. Yes, sir.

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Q. Were some of them made shallower? A. Yes, sir.

The Court: Then in doing the whole thing there was only a difference of thirty yards, is that it? A. Yes, sir.

Q. That is out of the entire twelve or thirteen thousand cubic yards, the difference between what the original plan calls for, and what was finally done you say was only about thirty yards? A Thirty yards. 10

Q. Thirty cubic yards? A. Thirty cubic yards, yes, sir.

RE-CROSS-EXAMINATION by Mr. Rose:

Q. By increasing the depth of the excavation it made it more difficult for the excavators to do their work, didn't it? A. Not the depths that these were increased. 20

Q. How much were they increased? A. Well the total, the deepest foundation, the depth that we sent down deeper than any foundation on the plans, shown on the plans, was about nine inches.

Q. It costs a great deal more to excavate the last foot than it does the excavation which is above it, doesn't it? A. No, not when you are down working your pumps, if you are within working distance of your pumps it doesn't cost so much more, if you are down eight or nine feet it does not cost so much more to do six or eight inches or a foot further. 30

Q. But doesn't the sea come rushing in faster? A. Not very much faster if you are prepared for it.

Q. Didn't Mr. Smith ask you to give him a 40

uniform depth of excavation? A. I don't know what he would mean, a uniform depth of excavation.

Q. Didn't you give him two depths, didn't you give him a sheet piling depth and didn't you give him a depth for the excavation? A. We didn't give him a depth for sheet piling, I suppose he gave it to him.

Q. But didn't you compel him to go a couple of inches deeper than the sheet piling? A. He would have to go deeper than the sheet piling, but he would have to go deeper than the footings.

Q. What was the purpose of having the sheet piling then? A. To keep the water and sand out.

Q. Then how could he keep the water and sand out if he would have to go below the bottom of the sheet piling? A. He wouldn't go below the bottom of the sheet piling if he took it off right.

Q. Didn't you require him to go below the sheet piling in excavating the elevator pits? A. No, sir, he didn't excavate the elevator pits.

Q. Number ninety-three then? A. I don't remember about number ninety-three.

Mr. Bacon: I offer to counsel, if they so desire, all of our books, and all of these bills, payrolls and vouchers for money spent, if they desire to look at them, but otherwise if they do not want to look at them I would like to let these men go back to their work.

Mr. Rose: We don't desire them.

Mr. Hayes: All right.

Plaintiff rests.

Defendant's Testimony

EDWARD DOUGHTY, sworn:

Direct-examination by Mr. Rose:

Q. Mr. Doughty, where do you live? A. Atlantic City.

Q. Are you one of the defendant's in this suit, the Edward Doughty in this suit? A. I am. 10

Q. Will you kindly tell the Court whether or not Cramp and Company at any time served upon you a written order for changes in the plans and specifications ? A. They did not.

Mr. Bacon: I object to that on the ground it is immaterial and unnecessary under the terms of the contract that a written order should be given.

The Court: Does the contract call for it. 20

Mr. Rose: Yes, the contract specially provides in order to change the plans and specifications it must be upon the written order of the contractor served upon the sub-contractor.

The Court: Point it out, will you please.

Mr. Rose: Article three, "No alterations shall be made in the work except upon written order of contractor, the amount to be paid by the contractor or allowed by the sub-contractor by virtue of such alterations to be stated in said order. Should the contractor and sub-contractor not agree as to amount to be paid or allowed the work shall go on in the way required above, and in case of failure to agree the determination of such amount shall be referred to by arbitration as provided for 30 40

in Article Twelve of this contract." And in addition to that—

The Court: Well, I am inclined to receive the proof.

Q. Answer the question, Mr. Doughty. A. I did not.

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Q. Did the architect of Cramp and Company at any time serve upon you detailed or illustrative plans? A. I didn't get that.

Q. After the signing of the contract did Cramp and Company or the architect serve upon you any plans which would detail or illustrate the work? A. No, they did not.

CROSS-EXAMINATION by Mr. Bacon:

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Q. Were you personally on this job? A. I was there mostly every day.

Q. Mostly every day? Who did you have in actual charge of the work? A. Samuel Smith was there all the time and Mr. Notley.

Q. Well, you didn't undertake yourself to manage the work, did you? A. I was there every day.

Q. Well, you were there, but you didn't undertake to manage and supervise the job yourself, did you? A. Well, when I was there. Not the whole thing, because I wasn't there the whole time.

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Q. Did you ever talk to Mr. Davie about this matter? A. Well, we never talked about that matter, no.

Q. Ever talk to him about these plans and specifications? A. No, I never did.

Q. Did you ever talk to Mr. O'Meara about the plans and specifications—

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The Court: Is this a firm?

Mr. Bacon: No, it is incorporated.

The Court: Doughty and Notley?

Mr. Rose: A partnership for this occasion only, for the excavation contract.

The Court: Was he the practical man of the firm? What does he say about that? 10

Q. The Judge wants to know whether you were the practical man?

The Court: Were you the practical man. Are you a practical man in that line of work?

A. Well, I do lots of that work, yes, hauling sometimes, yes.

The Court: This wasn't hauling, this was building a foundation.

A. The sand had to be hauled away, dug out and hauled away. You couldn't dig it out without you hauled it away. 20

Q. Who had charge of the digging? A. Digging? Why, I was there most of the time in the digging a good bit.

Q. Well, I didn't ask you that, Mr. Doughty. I asked who really had charge of it? Did you or Mr. Notley? A. Mr. Samuel Smith was the foreman of that sheet piling and digging holes out.

Q. Then he had charge of it, did he? A. He had that part, yes. 30

Q. Now you had an engine there, didn't you? A. Engine?

Q. Yes. A. We had our engines there to drive our piling, yes.

Q. Had engines there to drive the piling? A. Yes.

Q. But that wasn't in this contract, was it? A. No, it was not.

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Q. Did you have a sand pump? A. We had—no, no sand pump.

Q. No sand pump at all? A. We had one hired a while.

Q. Well, did you hire one? A. We hired one, yes.

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Q. Did you work that? A. We worked it two or three days and it didn't work and we didn't work it no more.

JAMES F. NOTLEY, sworn:

Direct-examination by Mr. Rose:

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Q. Mr. Notley, are you the John F. Notley, one of the defendants in this case? A. J. F. Notley, James F. Notley.

Q. After the signing of the contract between yourselves and Cramp and Company did Cramp and Company at any time serve upon you a written order providing for alterations in the work?

Mr. Bacon: Same objection heretofore made.

Objection overruled.

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A. Never did to my knowledge.

Q. Did the architect for Cramp and Company ever serve upon you plans to detail or illustrate the work?

Mr. Bacon: Objected to on the gound there is no such requirement in the contract.

A. Never did.

Mr. Bacon: And therefore the testimony is irrelevant, immaterial and has no bearing on the issue.

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The Court: Well, I think perhaps that is so if viewed from a technical standpoint, but I am inclined to receive the evidence.

Mr. Bacon: Your Honor understands I am simply putting this on the record. I expect this testimony to go in but I am only making the technical objection on the ground it has no bearing. 10

The Court: I think it is better to receive it It may have no legal bearing, but I don't feel inclined to leave it out.

CROSS-EXAMINATION by Mr. Bacon:

Q. When did you go to work on the job?

Mr. Rose: Objected to as not proper cross-examination.

The Court: This examination in chief was limited to two questions as I understand it. 20

Mr. Bacon: He is one of the defendants. Now the question is whether any plans and specifications were served on him. I want to know how long he was on the job.

A. From the first day it started.

The Court: Objection overruled.

Q. How long did you stay there? A. Until things were so unpleasant we couldn't stay any longer. 30

Q. How long did you stay there, I didn't ask you why? A. I would have to figure up. I can't just recall it. I can get it for you. Robert, what time—

The Court: Just wait a minute, just answer the question.

(Question repeated.) 40

A. Stayed there until it was so unpleasant for us we couldn't stay any longer.

Q. Do you know when that was that you quit, that is that you left, I mean? A. I have got it down there in my satchel, but I can't just recall it this minute.

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Q. That is all. A. It was—

The Court: That is all.

Recess taken until 1:15 o'clock p. m.

Afternoon Session.

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Hearing resumed at 1:15 p. m.

SAMUEL SMITH, sworn.

Direct-examination by Mr. Rose:

Q. Mr. Smith, where do you live? A. Ocean City.

Q. What is your business? A. Piling and cement work generally.

Q. Were you or were you not the manager or superintendent of Doughty and Notley in the excavation contract between them and Cramp and Company? A. I was.

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Q. Did you or did you not, while the work was in progress, object to the depth to which Mr. Davie or the engineer was requiring you to excavate? A. Well, not exactly object to the depth that they were giving us, only in this way, that we were given one depth to cut off the piling at, to put in our sheet piling, and when it came time

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to cut off the piling we would get another grade which was much lower, and I objected to that.

Q. To whom? A. Why to the superintendent on the job.

Q. What was his name? A. Why, Mr. Hull at the time.

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Q. Will you kindly state to the Court what difficulty it would be to increase the depth of the excavation a foot beyond the depth provided for by the plans and specifications? A. I don't quite get it clear. Do you mean if the grade he would give to us and keep to one grade, or the one grade given you for your sheet piling and another grade given for you to excavate?

Q. Well, we will take the latter proposition first. A. Why, it is impossible, practically impossible to do it without pulling the sheet piling and putting in new sheet piling to take care of your extra depth.

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Q. Well now, did you hear Mr. Davie testify here this morning to the effect that the plans and specifications were changed so that in some places it was required to excavate to a depth deeper than the original plans and specifications? A. I did.

Q. Well, kindly explain to the Court what difference that would make in the actual work and cost there? A. Well, as I said before, a great deal depends on the time when the change was made, whether the change was made after the sheet piling were in or before the sheet piling were in. If it were made before the sheet piling were in possibly it might make a difference of about two dollars and a half, three dollars to the yard.

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Q. Well, would it increase the number of yards to be taken out? A. Yes.

Q. Would the sea have any effect upon it? A. The deeper down the greater the pressure of the water, and the more volume the deeper down you go the more volume of water you would have pressing against the sheet piling and necessarily the more difficult.

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Q. Did you ever receive any notice from Cramp and Company as to changes or alterations in plans and specifications? A. No.

Q. Did you ever receive a detailed or illustrative drawing from them? A. Never received any drawing of any kind. I made a request for them, but I never got them.

By Mr. Bacon: Q. What did you work from? A. We worked from marks on batter boards and the boards themselves after the sheet piling were in.

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Q. Didn't you see any plans at all? A. There was plans up in the office but they were changed from time to time.

Q. Well, did you see any working plans of the building at all? A. There was working plans of the building.

Q. Well did you see them? A. I saw them, yes.

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Q. Well, did you go by them? A. No.

Q. What did you go by? A. I wasn't supposed to go by them. I was to go by their engineer.

Q. Who was the engineer? A. Mr. Wills was on the job and Mr. Hull.

Q. Mr. Hull didn't give you any orders, did he? A. What like?

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Q. Well, did he give you any orders? A. Yes.

Q. About what? A. Why, generally around the work.

Q. Did he tell you what depth to put your sheet piling? A. In some instances I think he did.

Q. That is Mr. Hull did? A. I think so, in some instances. 10

Q. Well, name the instances in which Mr. Hull gave you any instructions? A. Well, it was done in the work. I couldn't name any particular instance.

Q. Well, as a matter of fact, Mr. Wills was the man, wasn't he, that told you how deep to go with these holes? A. After he came on the job, yes.

Q. And you followed his instructions? A. We tried to.

Q. Who bought the sheet piling? A. Who bought the sheet piling? 20

Q. Yes. A. Doughty and Notley.

Q. Well, I mean who actually got the sheet piling on the job? A. Well, I ordered the sheet piling.

Q. You ordered it from the Somers Lumber Company? A. I did.

Q. And you bought it from time to time as you needed it? A. We did.

Q. Now, what is sheet piling? A. Sheet piling is two or more pieces of lumber nailed together and jetted in the ground for holding the sand out. 30

Q. And by jetted you mean that you let them down in the ground by a process, taking out the sand by water pressure or force of water and then sinking the sheet piling in the excavation thus made? A. Yes.

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Q. And what sort of lumber is that? A. Well, you can use any kind of lumber, really doesn't make any difference.

Q. What did you use on this job? A. We were using one inch boards and two inch planks and some that was an inch and a half.

10 Q. Mortised boards? A. No.

Q. I didn't understand then what you said. Where did you get the length of your sheet piling from? A. The lengths of the sheet piling, why, from the batter boards or from the engineer.

Q. What are the batter boards? A. The batter boards? They are grades that are carried around the building on a board, with the working points on that board.

20 Q. And on this job who made those up? A. Well, Mr. Wills, he made them up while he was there.

Q. Well, did you do any work before they got there? A. Yes, we did some work before they got there.

Q. That is did you dig any holes before he got there? A. Yes, sir.

Q. Isn't all the work that you did before he got there work that was done with scoops? A. No, sir.

30 Q. You did dig some holes? A. We did.

Q. Where did you get the instructions about those holes? A. We got those from Mr.—what is John's name? Johnny Zanger, mostly, and Mr. Hull gave us some, mostly came from John Zanger.

Q. How could you order your sheet piling from the batter boards? A. Well, it is from—you have

40 your batter boards go down a certain depth, and

your sheet piling must go at least two foot or three foot further, than the depth.

Q. And you make calculations for that, don't you? A. Make calculations right from that.

Q. And you have to use the plans to some extent to get those depths, don't you? A. You have to use them entirely to get those depths. 10

By Mr. Rose: Q. I wanted to ask you this, Mr. Smith, how much additional excavation would it require to excavate one foot deeper than the excavation depth given on the batter boards? A. Well that depends—

Mr. Bacon: Depends on the size of the hole, doesn't it? A. On the size of the hole considerably.

Q. And what else? A. And on the depth of the hole. 20

Q. Well, would it be easier or harder to excavate at that depth? A. Well, would be much harder.

ESTEL D. RIGHTMIRE, sworn:

Direct-examination by Mr. Rose:

Q. Mr. Rightmire, where do you live? A. Ventnor City. 30

Q. What is your business? A. Civil engineer and surveying.

Q. Did you have anything to do with the work at the Hotel Traymore in regard to the excavation for Doughty and Notley? A. I took the levels over the tract before they began and measured up some of the excavations and holes and piers, pier holes.

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Q. Have you seen the revised plans and specifications? A. I don't know. I have seen two or three different plans.

Q. Weren't you in the office of Cramp and Company last winter in Philadelphia at which time
10 they showed you some revised plans and specifications? A. Yes.

Mr. Rose: Will you produce them, please, the revised plans and specifications.

Mr. Bacon: As I say, if you will make your call now we will try and produce them. Mr. Price is here now.

Mr. Rose: I call upon the other side to produce plan S-7 dated June twenty-fourth 1914.

20 Mr. Bacon: S-7 is produced.

(Plan marked S-7 offered in evidence and marked Exhibit D-1.)

Mr. Rose: X-3 dated tenth twenty-sixth 1914.

Mr. Bacon: I object to that, if the Court please, on the ground that this was after the notice from Doughty and Notley that they would no longer do any work under the contract, as that notice is dated the
30 seventeenth of October.

The Court: Well, is that the plan that was used when the plaintiff was completing Doughty and Notley's contract?

Mr. Bacon: I think so. Yes, if it is offered for that reason I have no objection to it.

The Court: I should think it should be admitted.
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Mr. Bacon: X-3, ten twenty-sixth is produced.

(Plan admitted in evidence and marked Exhibit D-2.)

Mr. Rose: I call for plan dated sixth twenty-four 1914.

Mr. Davie: That is the date of the entire set of plans. 10

Mr. Rose: Plan dated August twenty-eighth 1914. Plan dated September ninth.

Mr. Davie: That is the date on sheet seven, three dates on there.

Mr. Rose: What are those dates?

Mr. Davie: August twenty-eighth 1914, September ninth, September twelfth, October sixteenth, November thirteenth.

Mr. Rose: They are all in the one? 20

Mr. Davie: Yes, sir.

(Plan of column sketches produced and offered in evidence and marked Exhibit D-3.)

Q. Now, Mr. Smith, will you come down here please for just a moment. Now, Mr. Smith, I call your attention to D-1 and call your attention to the blueprint marked "Structure foundation plan" and I also call your attention to Exhibit D-1 marked "Foundation plan" and ask you to 30 point out the difference between the foundation plan, the revised plan and the original plan as filed in the County Clerk's office.

Mr. Bacon: I object to that unless it is confined to the work done by Doughty and Notley.

The Court: Well, that is the only use it could have in this case. It must have ref- 40

erence, this testimony must be referable to the work that the defendant contractors did, or rather the plaintiff did in the completion of the work of the contractors.

Mr. Hayes: Now, if your honor please I think that the contract which Doughty and Notley made was made upon the original plans and their work was to be done according to the original plans. Now, as I understand, the purpose of Mr. Rose's proposition now is that he wants to show by the revised plans which were made after the original plans were filed just the changes that the plaintiff made.

The Court: He ought to show when the revision was made, when the change occurred and what the change amounted to.

Q. Now, Mr. Rightmire, will you please look down in the bottom of the corner and give us the dates of the revision, please. A. This date is June twenty-fourth 1914, that is on Exhibit D-1.

The Court: Is that when the revision was made?

Mr. Rose: There is another one besides that.

The Court: That was before the contract was entered into, wasn't it?

Mr. Rose: Yes.

Mr. Bacon: There never was any changed plan. All these plans bear date the same, that is June twenty-fourth 1914. There was certain modifications made in these various plans from time to time and those modifications appear on, of course, the same plan, the plan of the same date,

but the modification would be on that plan. No new plan was ever made.

Mr. Rose: Won't you give us the plan, then, on which all of these modifications appear?

Mr. Bacon: What modifications do you refer to? 10

Mr. Rose: Modifications made after August fourth, down to October seventeenth.

Witness withdrawn.

WILLIAM L. PRICE, affirmed:

Direct-examination by Mr. Rose: 20

Q. Mr. Price, where do you live? A. Morland, Pennsylvania.

Q. What is your business? A. Architect.

Q. And were you the architect in this Hotel Traymore transaction? A. My firm was.

Q. Between August fourth 1914 and October seventeenth 1914 please state what modifications were made in the work, excavation work at the Hotel Traymore. A. Between August fourth 30 and October nineteenth the changes made, so far as I can recall them, they are not on the plan. So far as they are on the plan, without the enlarging of the boiler room, which at the same time was leveled up in depth, decreased in depth, the change in the elevator pits, because of a change from one type of elevator to another not requiring so deep a pit, so those were leveled up eighteen inches, and made that much shallower than on the original contract drawings. 40

Q. And in some places the excavation was deeper, was it not? A. Yes, in some places it was deeper. I was coming to that.

Q. And how much deeper? A. It varied from a foot, six inches, I think as deep as three feet deeper.

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Q. And do you know in all, about how many changes were made in the excavation work? A. I don't know what you mean by that.

Q. Well, will you come here and look at one of these plans here and point out to the Court the changes which were made between August fourth 1914 and October seventeenth 1914.

Mr. Bacon: I object to that, if the Court please, for this reason. I understand the fact to be that there were changes made in these plans after Doughty and Notley quit work, as there were before they quit work, and I have no objection to testimony showing what was actually done, that is no objection to showing what differences there were between the contract plans and the completed work. The testimony, either while Doughty and Notley were on the job or after they quit, the testimony of Mr. Davie was that the difference, the total difference in the excavation between the contract plans and the completed work was thirty cubic yards. Now it may be, and I understand the fact to be, that changes were made lowering and raising while Doughty and Notley were on the job and after they left the job.

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The Court: Well, that is pertinent, isn't it?

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Mr. Bacon: That is pertinent, if the question is intended to cover the whole thing.

Mr. Rose: That is what I want to show, and I would like this witness to point out on this plan the changes which were actually made.

A. Now do you refer up to the time of the seventeenth of October or when?

Q. Yes, I am referring now— A. Changes actually made on plans or actually made in the work?

Q. Actually made in the work or on the plans too.

The Court: Would it show on the plans? A. Not all of it, your Honor, no.

Q. Suppose we confine it to the work—

The Court: If you could indicate on the plans what modifications were made in the work that might be useful. A. If I am to go into it technically, I would have to have two plans besides this, because on one of these plans the depths are figured, on this plan, and an another plan they are figured in connection with the column schedule which combined with this give the depth, so that it would be necessary to—

Q. Is this sheet S-7? Yes, it is. Now, Mr. Price, looking at sheet S-7, June twenty-fourth 1914, I wish you to say whether or not the depths of seventy-two columns were changed? A. Of seventy-two columns, or is that the number of column column seventy-two?

Q. No, seventy-two columns in all. A. Well, up to that time I doubt if there were seventy-two columns put in. Do you want me to count them?

Q. Yes, if you please, count the changes. A. I have no absolute record here of where the work

was at that time. I know where the columns were, but I have no absolute knowledge at that date as to where the work was. I know the work was in this section, that you had not yet reached these low columns by the elevators. They had just a-
10 bout reached these deeper columns by the elevators.

Q. Can't you point out, Mr. Price, the difference between this plan, S-7 and the plan which is on file in the County Clerk's office which is marked D-1? A. This is the one, isn't it? This is the same plan. Where is that column schedule, the original contract column schedule? That was put in.

(Exhibit D-3 handed to witness.)

20 Do you want to start right in here?

Q. Yes. A. Column fifty-one, haven't you got that column schedule?

Mr. Bacon: Yes, we have got it all figured out accurately.

A. Because this is a very difficult thing to figure out on this schedule. We have got to figure the height of the pieces of each one of these things, which vary on almost every column.

The Court: Why don't you call the engi-
30 neer?

Q. I just wanted to ask Mr. Price this one question if he knows about how many changes were made in the work between August fourth 1914 and October seventeenth 1914; do you know? A. No, I don't know how many changes were made in the actual work. I know that there were changes and I know what some of them are apart from the drawings. I know the difference between the—
40 I can work out the difference between the contract

plan and this plan, which was the only plan that we issued up to that time.

CROSS-EXAMINATION by Mr. Bacon:

Q. Mr. Price, your firm were the architects that drew the plans and specifications for this contract, for the Hotel Traymore, were you not? A. We were. 10

The Court: You also, your firm also drew the plans and specifications for the Marlborough Blenheim this city, didn't you? A. Yes, your Honor.

Q. How long have you been engaged in your present business? A. About thirty-two years.

By the Court: Q. Just briefly state your experience, what you have done in that line, Mr. Price, A. Well, the larger buildings we have built? 20

Q. Yes, A. The Marlborough, The Blenheim Hotel Atlantic City, Clarendon Hotel, Florida, the Allegheny Railroad Station for the Pennsylvania lines, the Fort Wayne Railroad Station Pennsylvania line, the old Kenilworth Inn in Ashville North Carolina, Jácob Reeds Sons stores in Philadelphia. Of course a very great number of houses and minor buildings.

Q. What is the name of your firm? A. Price and McLanahan. 30

Q. Where is your headquarters? A. At the Bellevue Court Building, Philadelphia.

By Mr. Bacon: Q. Were you also the supervising architects on this job? A. Yes, we were.

Q. Are you familiar with the standard form of contract between builders and their sub-contractors? A. I am.

40

Q. And you are familiar with the usual form of contracts used between the owners and the main contractor? A. I am.

Q. Who furnishes the plans from which the work is performed on a building job? A. The
10 architects furnish such plans.

Q. Who furnished the plans under which the Hotel Traymore was constructed? A. Price and McLanahan.

Q. Did you furnish any plans to or for the sub-contractors on that job? A. Sub-contractors?

Q. Yes. A. Not so far as I know. We don't directly furnish them. If they want the plans they apply to the contractor and not to us. We furnish plans for the general contractor.

20 Q. Did you furnish a working plan for the foundation of this building to Cramp and Company? A. We did.

Q. Is this plan which I show you the plan which you furnished to Cramp and Company as the working foundation plan for the Hotel Traymore? A. It is.

Q. Does that plan show changes in the excavation from the sheet attached to the original contract purporting to show the excavation plan? A.
30 It does.

Q. Was the building as finally completed built in accordance with that plan which you have in your hand? A. Not altogether.

Q. Did you or did you not make changes from time to time as the work progressed beginning with the time when Doughty and Notley started on their contract and ending when the building was completed? A. We did.

40 Q. Or when this work was completed; why did

you make those changes? A. Because of conditions on the job or changes on the part of the owner which modified the plans.

Q. Speaking from your knowledge and experience are changes such as you made here ordinary in work of that character?

Mr. Rose: Objected to. 10

Objection overruled.

A. They are.

Q. Why? A. Because of conditions, change of conditions during the job or conditions found in the ground.

Q. Was there any change made by you, Mr. Price, in the foundation plan of this building which altered in any way the character of the work required to be done by the original contract? 20

The Court: Or rendered the work more difficult?

Q. Or rendered the work more difficult? A. Not that changed the character. There were changes that rendered the work more difficult and changes that rendered it not so difficult, but not changed it in character.

Q. When you say it rendered the work more difficult, it what respect did it render it more difficult? A. Where foundations were put lower than shown, 30 it makes the work more difficult.

Q. Why? A. Because there is a greater pressure of water at that depth than there is at the top.

Q. Did you make any other change in the foundation plans which required the excavation contractor to go to a greater depth than depth shown on the contract plan? A. I believe not. I couldn't say to any change without verifying, but I be- 40

lieve not, certainly not over a few inches at any point.

Q. Then would you or would you not say that you made changes that rendered the general character of the work any more difficult? A. I would say that we did not.

10

Q. Did you make any change which would have required the contractor to procure additional or more powerful machinery to do the work than he would have had to procure to do it under the contract plans? A. No.

Q. Do you know how many more yards of excavation there were made by Doughty and Notley and Cramp and Company in the performance of Doughty and Notley's contract than were required by the original plans? A. Only from the estimates and figures of our engineer on the work.

20

Q. And what do they show? A. Twenty-seven yards additional excavation over that shown.

Q. Was there any additional excavation made for which an allowance was either claimed or made? A. No, there was not.

Q. I direct your attention to article three of the—

By the Court: Q. Would the changes cost the sub-contractor any more to do the work? A. You mean the complete job?

30

Q. Yes. A. No.

Q. You mean in the changes there was an evening up? A. Yes.

Q. Sometimes he was not required to go down to make his foundation as low as he would have been required to do under his contract; is that what you mean? A. Yes, your Honor.

40

Q. So that upon the whole, the general average

was not unfavorable to the contractor? A. It was not, and in making our settlement for the changes I say there was no extra asked for or credit asked for because our engineer and the engineers of Cramp and Company produced the same result, their figures tallied and found that there was nothing to give or take on this line. 10

Q. And there was simply a difference of about thirty yards? A. About thirty yards.

Q. On the whole thing? A. Yes.

By Mr. Bacon: Q. In a total excavation of how much? A. The figures have been given here.

Q. Well, between twelve thousand and thirteen thousand cubic yards? A. Yes.

Mr. Hayes: 12270?

Mr. Bacon: 12270 Cubic yards. 20

Q. I direct your attention to article three of the sub-contract, to the printed form thereof, "No alterations shall be made on the work except upon the written order of the contractor;" for whose benefit is that clause in the contract inserted?

Mr. Rose: Objected to. That is a question for the Court to determine, not for the witness to determine.

Mr. Bacon: I am only wondering whether or not this is such a matter as the Court desires to be informed about from an expert. 30

The Court: Well, he gets up contracts, he is a man of great experience in this line, and he gets up contracts while that is true it may be a Court question, but yet I don't know but what it might be a good thing to have his opinion. That is not saying the Court will be bound by it.

40

Mr. Bacon: I only direct your attention to the fact on the face it is based on the unit price approved by the American Institute of Architects and National Association of Builders. That is what suggested it to my mind that it might give your Honor some information. I don't know.

Exception noted for defendant.

Mr. Bacon: I don't want to take any chances. I don't regard it of enough importance.

Mr. Hayes: I object to it. I can't see how the bonding company can be bound by Mr. Price's opinion as to construction of the contract. The only way we can consider the contract is the plain words and not Mr. Price's opinion and it seems to me the testimony from Mr. Price as to what he considers it worth can have no binding force on the Globe Indemnity Company and I therefore object to the question.

(Question withdrawn.)

Q. Mr. Price, under the contract between Cramp and Company and the Hotel Traymore Company could the contractor get any money, any extra money, unless the work was approved by the architect? A. He could not.

Q. The architect acts as the agent of the owner, does he not, in passing upon questions of that sort? A. He does.

Mr. Hayes: If your Honor please, I object to the question there and the answer. I think there are cases that hold not always does the architect act as the agent of the owner and I will ask an exception to the question.

Mr. Bacon: I mean in this particular matter is all.

Q. Mr. Price, you are familiar in a general way with this sub-contract with Doughty and Notley, are you not, at least you know what the price was for the performance of this work? A. I have heard what it was. I had no knowledge of it as a matter of consultation beforehand. 10

Q. Do you know as a matter of fact whether it was to be paid for by the cubic yard or whether it was a lump sum contract? A. Yes, I know it was to be paid for by the cubic yard.

Q. Now where a contract is to be performed in that way and payment made by the cubic yard is it or is it not entirely feasible to determine how much money should be paid for the performance of a contract of that kind after the work is done as well as it is to undertake to figure it before the work is done? A. Yes, you can figure it before it is done but you cannot definitely what it will be until it is done. 20

Q. Is or is not the customary time to find out what, if anything, ought to be paid for an excavation contract that is to be done by the cubic yard to determine that after the work is done rather than before? A. I should suppose so. 30

Q. Take this contract, for instance, couldn't the amount to be paid for extra work, assuming that extra excavation was extra work, be determined better after the contract was performed than before? A. Undoubtedly, as to the amount of the extra work.

Q. Why? A. Because then the work would be done and beforehand you could not tell how much would be done or how much would not be done in extra work. 40

Q. Then would there be any reason why an order should be given for extra work under this contract before the work was actually done assuming that extra excavation could be regarded as extra work? A. I can see none, although the contract
10 calls for orders to be given for extra work for the protection of the owners.

Mr. Hayes: Alterations or changes.

Q. For the protection of the owners? A. Yes.

Q. Why for the protection of the owners? A. Because it is important that the owners interest shall be protected from contractors by doing extra work and claiming, or work that they claim to be extra work, claiming extra charges for that.

By the Court: Q. That feature of the contract
20 is for the protection of the owner? A. It is for the protection of the owner.

By Mr. Bacon: Q. And is so that the man who does the work can't come along and say this is an extra? A. Yes, if he finds extra work he must at that time say this is extra work and I must be paid for it, otherwise we are not entitled under the contract to allow him for extra work.

By the Court: Q. That also limits the authority of the architect? A. Yes, your Honor, he has
30 no right—

Q. He has no right to order work done unless he do it in writing and the contractor hasn't any right to do the work unless it is in writing? A. Yes.

Q. That is the protection of the owner? A. That is the protection of the owner.

By Mr. Bacon: Q. Was any request ever made
40 to you by Doughty and Notley to be allowed for

any extra work under this contract? A. There was not.

Q. Was your attention ever directed to the fact that they claimed they were doing extra work or were required to do extra work under this contract? A. It was not.

Q. Were you on the job from time to time while Doughty and Notley were at work there? A. I was.

Q. Are you familiar with the doing of that character of work? A. Yes.

Q. In your opinion, based upon your knowledge, experience, and your observation of other work, were they doing this work in a workmanlike and in an efficient manner? A. They were not doing it as fast as we were insisting that it should be done.

Q. What was the trouble?

The Court: Well, that may not be the question whether your insistment might not have been reasonable. Were they doing it as fast as the contract job required them to do? A. They were not.

Q. How fast did the contract job require them to do it? A. That is an impossible question to answer in words as far as I can see.

The Court: I think there was something about thirty days.

Q. Wasn't there some limit on it? A. On the whole work?

Q. Yes, there was a limit on the whole work, wasn't there? A. Yes, we had no limit on these contractors; we had no contract with them.

Q. You had a limit on Cramp and Company, didn't you? A. Yes, on Cramp and Company.

Q. And were the sub-contractors doing this work as fast as you expected Cramp and Company to do it? A. They were not.

Q. What was the penalty—

By the Court: Q. Here is something I would like to know. This is a summer hotel—this is for the benefit of the record—and within what time was that hotel required to be built? A. It was required to be built within ten months, your Honor, from the date of the signing of the contract.

Q. To get ready for the summer business of 1915? A. Yes, your Honor.

By Mr. Bacon: Q. Was it ready? A. It was opened.

Q. It was opened on June first? A. Yes.

Q. Was that the contract time? A. That was slightly before the contract time which had been changed to June the tenth, that is an extension had been granted to June tenth.

Q. Do you recall what the contract price was? A. Of the entire hotel?

Q. Of the entire hotel. A. As far as Cramp and Company is concerned?

Q. Yes. A. Or the total contract?

Q. Well, we will take both. A. About one-million-four-hundred-thousand dollars was the cost of the building including the heating, plumbing, and mechanical plant entire, and excluding the mechanical plant, the heating and plumbing, which were taken out of the contract amounting to two hundred and fifty thousand dollars.

Q. And what is the cost of the completed job? A. Do you mean furnished or finished?

Q. Yes, how large an enterprise is this? A. Nearly four million dollars, including the pur-

chase price; that is a fair account of the purchase price.

Q. How large a building is it?

Mr. Rose: I object as not proper cross examination. I thought there would be an end to it sometime, so I have not objected sooner, and I think the witness ought to be confined to the examination in chief. I didn't ask him the size of the building or the cost. 10

Mr. Bacon: I am going into the excuses for changes.

The Court: You see, Mr. Rose, you called Mr. Price as the architect, which was the proper thing to do, and he has been asked questions in regard to these changes and how your clients were carying on their contract and he is telling the reasons why this job was required to be completed, and it was a big enterprise and the architect and original contractor only had a limited time in which to finish the building and the reason for finishing the building was in order that it might be opened for business this year. I think that is reasonable testimony. Proceed. 20 30

(Question repeated.)

A. It is a building of about seven hundred rooms and seven hundred, or close to that, six hundred bath rooms.

Q. Of what material is it built? A. It is built of steel frame, and concrete frame, steel and concrete combined frame, and brick exterior walls, terra cotta, plastering, and ordinary wood trim. Those are the main features. 40

Q. Now what was the character of the foundation upon which this structure was built, that is how did you get your foundation?

The Court: Sand, Mr. Price will tell you.

10 Mr. Bacon: It was built on sand?

A. It was built on sand, your Honor.

Q. Didn't you drive piling? A. Yes, they are part of the buillding.

Q. You call them part of the building? A. Yes, your Honor.

Mr. Bacon. Q. What was the general character of the work that Doughty and Notley had to perform? A. As I understand their contract it was the excavation for the concrete footings which 20 were to be placed necessarily below water line, as they rested on the concrete piles driven into the sand, and which must be below water line to be preserved.

Q. You mean wood piles, don't you? A. Wood piles, yes.

Q. The wood piles were driven into the sand, were they? A. Yes.

Q. And then these concrete piers were placed on top of the piles that were so driven, is that 30 correct? A. Yes, sir.

Q. Now was this excavation that was required by the plans the excavation of a hole which would be covered by this entire structure or were there individual holes dug at different places within the limits of the foundation? A. It was in part both. The entire area of the ground was excavated to a depth of three or four feet, reaching down to water, below that individual holes.

40

Q. Now was any change at any time made in that part of the excavation? A. You mean in the method of doing that?

Q. No, I mean in the depth of it. A. Of which part?

Q. Of the part where you say that the sand was excavated off within the limits of the entire building. A. No, there was no change in that. 10

Q. Entire ground plan of the building. Now where were those changes made? Were they made above water line or below water line? A. Below water line.

Q. Below water line, and you say some of them were raised and some of them were lowered? A. Yes.

Q. And why were the changes made? A. The columns right next the old building were raised above their level because in getting down so close to the building, driving the piles, we found it was going to be very difficult to drive them without jarring the old building, and we therefore decided to cut them off higher up. The elevators, as I testified before, were changed in character and raised. At the same time there were parts of the building that were dropped down. There was a six inch, I think, made in the level of the Cafe which dropped down a number of the footings there by reason of that six inches. The elevator or boiler pit was nearly doubled in size, but was decreased about two or two and a half feet in depth, by reason of doubling it. We used another type of boiler and spread them out, and these things carried with them either up and down in sympathy other columns. If we went down in one place, we had to, 20 30 40

within the radius, go down with other columns, so the reasons might be quite local and the change quite spread.

Q. What method did Doughty and Notley pursue in geting the sand out of these holes that were below the water line? A. Well they used several methods. They pumped continually, of course, to keep the water out. They drove down sheet piling first, of course, from the surface or from this excavation which was possibly three or four feet depth without getting into water, they then dug down and as they got into more water they pumped and dug. They attempted to dig them out with sand pumps, pumping water in and at the same time taking it out. I am not certain that that method was followed while they were on the job, but that was attempted during the job, but I know that was a sand pump which was only usable in that way by the presence of a large percentage of water, as you are only able to pump out about fifteen or twenty percent of sand. I don't think they pursued that plan much. I think they rather abandoned that on account of the condition of the pump, and did the balance of the work by digging and throwing the sand out and then carting it away.

Q. Now leaving out the elevator pits and the boiler room, were these holes into which the piling were driven and which were to be prepared for the concrete piers all of a uniform size? A. No.

Q. What were the sizes, generally speaking, of these holes? A. They varied from four feet square to thirty feet by eight or ten, two or three columns resting on one foundation in some places.

Q. And was it necessary to sheet pile these holes? A. It was, below water line the sand would flow even with the surface; that is true.

Q. After Doughty and Notley surrendered their contract or at least ceased work under the contract and it was continued by Cramp and Company was there any difference in the general character of the work which they did—I am speaking now of the accomplishment and not the method—that differed from the contract plans? A. No, except that there was deeper work to do than any that had been reached. 10

Q. Well, did they use the same methods? A. Same methods.

Q. That Doughty and Notley used? A. Except that they used more pumps and used the sand pump more than had been done, but in the main it was the same method, digging and throwing out and sheet piling first. 20

Q. What have you to say as to the efficiency of the work done by Doughty and Notley as to whether they were accomplishing the desired result in the work that they were doing? A. They were not accomplishing the desired result as far as our desires and our understanding of the contract and our knowledge of the speed that it would have to be done to finish the building is concerned. 30

Q. And did you or did you not find fault with it? A. We did.

By the Court: Q. You mean to say the work was not done in a workmanlike way? A. It was not done fast enough. We don't critize a subcontractor's method of doing work. That is up 40

to the contractor. We criticise the contractor for not getting the work done in time. That is, of course, there are cases where—

Q. It is very necessary for you to have this foundation done or you could not go on with your building? A. Absolutely.

Q. It was holding you back, is that what you mean? A. Yes, it was holding us back on all the departments of our work. None of those could be done until this was in.

By Mr. Bacon: Q. I don't know whether you know about it or not; what I was trying to get at was whether or not these people were accomplishing all that they could have accomplished had they gone at it right. A. I couldn't say what they could accomplish.

Q. Well, were they doing it in the proper way which you regard to do work of this character? A. They were doing it in the way it was done all the way through but they were not getting the results which we were after.

Q. Did Cramp and Company get the result after they took hold of it? A. They did.

RE-DIRECT-EXAMINATION by Mr. Rose:

Q. Mr. Price did your firm receive a letter from Cramp and Company dated October 24th, 1914, protesting against these changes you have been testifying about? A. I can't tell without seeing it.

Mr. Rose: I call upon the other side to produce a letter dated October 24th, 1914, addressed to Price and McLanahan, 1418 Walnut Street, Philadelphia, and signed Cramp and Company, M. J. O.

Mr. Bacon: Of course, we can't produce a letter we sent, but we can produce a copy of it. It is produced. That is not the original but that is a copy of it.

(Letter marked Exhibit D4.)

Q. I show you Exhibit D4 which is a letter addressed to Price and McLanahan, 1418 Walnut Street, dated October 24th, 1914, and signed Cramp and Company and ask you whether or not you received that letter. 10

Mr. Hayes: Didn't you admit you sent it?

Mr. Bacon: When it is offered I am going to object to it. I will admit we wrote this letter. I will object to it on the ground it has no bearing on the issue whatever as it relates to other matters. 20

Mr. Rose: It is offered in evidence. I would like the witness to read that letter just a moment, please.

The Court: Is there an objection to its admission?

Mr. Bacon: Yes, I object to it on the ground it has no bearing on this issue.

The Court: Let me see the letter.

(Letter handed to the Court.) 30

(Objection overruled and letter admitted in evidence.)

Q. Read the letter, please. A. Read it aloud?

Q. No, read it to yourself. The letter is upon the letter-head of Cramp and Company, Building Construction, Denckla Building, 11th and Market Streets, Philadelphia, and has the names Norman W. Cramp, President and Treasurer, Wil- 40

liam M. Cramp, Vice-President, James W. Davie, Engineer and Superintendent. Letter dated October 24th, 1914—

The Court: Why not make it an exhibit like the other exhibits and proceed with the examination? Mr. Price is evidently familiar with it, takes so much time when you read the letters. I will read these letters all myself.

10

Q. I will ask the witness then have you read that letter then, Mr. Price? A. I have.

Q. Will you say now that Cramp and Company did not protest to your firm against these charges on the ground that they were material and required a great deal of extra work? A. I didn't say that.

20

Q. I understood you to say so. A. I was asked if the sub-contractors had objected to me about the work and I said no they had not.

Q. But the contractors did object to you, didn't they? A. At this time.

The Court: What is the date of that?

Mr. Rose: This is October 24th, 1914.

Mr. Bacon: Is it after Doughty and Notley stopped work.

30

The Court: That is while the contractor, Cramp and Company were finishing the job, is that it?

A. Yes, sir.

By Mr. Hayes: Q. Mr. Price, when did you notify Cramp and Company that you desired the changes to which their letter of October 24th, refers? A. Those changes were on the original working drawing, this drawing, from which they started to work when they started the work.

40

Q. And the changes to which they protest, were they changes which you desired made after Doughty and Notley had given up the work? A. They were not.

Q. What did these changes refer to then? A. They referred to the difference between this drawing and the drawing, the contract drawing. 10

Q. Then there was a difference between the drawing which is marked—what is it, that Exhibit there, do you know? A. S or C7.

Q. Plan S7, and the original plans which were filed in the County Clerk's office? A. There were.

Q. The modifications that you made from time to time to the excavation plans, were those modifications brought by you to the attention of the Globe Indemnity Company? A. Modifications 20 were made to the plans from time to time; they were made on the plans, they were made on the job.

Q. Made on the job? A. They were, all of them, raising of footings. We didn't lower any except on this drawing.

Q. Weren't any of the footings lowered except what the original plans called for? A. You mean the original contract plans?

Q. This plan? A. Yes, this plan shows differences from that plan; this is the working plan. 30

Q. Now, what differences does that plan show than what the contract plan filed at Mays Landing shows? A. Those were the matters that I was asked to go into and then it was referred to the engineer because it is a question of technical ups and downs. There are some of them deeper and some of them not so deep. 40

Q. Can you tell me if any of the points at which you had to excavate were the lowest excavation of the entire work or not? What I am trying to get at is this, certain points or certain footings, as you call it, I think, or depths were required by the original contract plan filed in Mays Landing? A. Yes.

Q. Can you tell me at any point where the required depth is the lowest? A. Which, the original plan?

Q. Some you have four feet here and some eight feet here and some ten feet. A. Yes.

Q. What particular point was the lowest depth required? A. What was the lowest depth?

Q. Yes. A. I can't tell you out of my knowledge.

Q. Can you tell from this plan? A. I can tell from that and I can tell from this, I think.

Q. Let's hear from that plan S7? A. Elevators 11.25, I think is the lowest depth in this; that is by the boiler room.

Q. Now did you still, after you refused—these were the final working plans you went by? A. Yes.

Q. Now what does it call for on this plan? A. I think the lowest depth there is eleven; there was about three inches difference between the lowest depth on that and the lowest depth on that.

Q. Now what other particular differences were there between the required depth on the original plans and on the revised plans? A. Well there were the depths I referred to around the elevator pits which were raised.

Q. What were they originally? A. They were originally minus, the elevator pit itself was originally minus or plus; that is I think it was 0 and it was raised to 8; we raised it a foot.

Q. Raised it a foot? A. Yes, that you can get off of that or at least you can get it from the column schedule. 10

Q. Now what other particular points did you make any changes, either increasing or decreasing the depth? A. Well, there were in this whole Cafe section, they were dropped about six inches.

Q. And it was revised calling for six inches deeper? A. Yes, some of those were and some of them are considerably more than that, some of them are as much as three feet deeper. 20

Q. What is that? A. I don't know as I can tell you, I think ninety, eighty-one, ninety and a hundred are three of those that were sent down about three feet, that they were originally minus 0, and were then made minus 3.

Q. What particular part of the building are they? A. They were close to the elevator pit, I think eighty-three, no eighty-one was also one of those and that one was in, I believe, at the time they abandoned the work. 30

Q. Now are there any other places that you can point out where it increased the depth or decreased it? A. Well, I think I certainly could by comparing schedules, but there is a schedule here of all these changes, raises and lowers, as I understand.

Q. Where is that; have you got it? A. I don't know.

40

Mr. Hayes: Have you got that, Mr. Bacon?

Mr. Bacon: Yes, I said I would produce a witness and show that.

Q. That is the reason I am not so definite on
10 this because it would take a long time to work out the differences, because you have to work out the excavation by the column and you have to work out the thickness of the column and get the excavation, so that is the reason it is so difficult but it has been tabulated by Cramp and Company and our engineers.

Q. Mr. Price, could you tell me whether the pressure per cubic yard or square inch of a uniform low pressure would be greater nearer the
20 beach than it would in the center of the town? A. It might be somewhat greater but I could not tell you that; I never built in the center of the town; in the both it is not very much different, so far as we could say.

Q. And how far from the high water mark was the front line of the excavation for this hotel, if you can tell? A. It was right, the front line right at high water mark.

Q. And the further you go down in the exca-
30 vation sand the greater the pressure is to the square inch of water raising? A. No doubt about it.

Q. Therefore the greater amount of skill and work would be required to excavate each inch or couple of inches, wouldn't it? A. Yes.

Q. So that when you require a man or a contractor to make a change in their contract which requires them to go to a greater depth than that
40

called in the contract, it means much more difficult work, doesn't it? A. It does.

RE-CROSS-EXAMINATION by Mr. Bacon:

Q. Mr. Price, after the receipt of the letter of Ocober 24th, 1914, which is marked Exhibit D4, were there again some changes and modifications made in the footing plans? A. There were. 10

Q. And was the work that was done by Cramp and Company done under the working drawings that you have in your hand or under the final modifications of them after that letter of October 24th? A. It was done under both; there were final modifications made, plans made for modifications and then the work on the actual ground was done differently from either of those because 20 piles were sent down from the surface.

By the Court: Q. Let me ask you this question; is that whole structure on piling? A. It stands on piling.

Q. Stands on piling? A. It, however, would stand on sand just the same as the piling if the piles were not there. There is the piles, or the sand would naturally—the piles are an assurance against the sea coming in and eating out.

By Mr. Hayes: Q. I think an answer to a 30 question of Mr. Bacon you said Cramp and Company had a certain time in which to finish the excavation. A. No.

Q. Was there any time fixed for the finishing by Cramp and Company of the excavation? A. No.

Q. Any stipulation in the contract which required any particular part of the work to be finished at any particular time? A. Yes. 40

Q. What part? A. The stores on the front of the building were to be finished at a certain time and the rest of the building at another time.

Q. And the rest of the building was to be finished by when? A. June 10th.

10 By the Court: Q. This sub-contractor's time was limited, wasn't is? A. Not by us, your Honor.

Q. Not by you, but by this contract, that is inside here?

Mr. Bacon: Yes.

Mr. Hayes: I couldn't find any limitation there.

Mr. Bacon: "Party of the first part agrees to work night and day and dig and

20 sheet pile the excavation as directed by the party of the second part and do the work at such times that will not delay the driving of piles at an average speed of two hundred piles per day and complete within four weeks after present frame building is torn down and rubbish removed."

Q. When was the frame building torn down, do you know, Mr. Price? A. It was started to be torn down at once. No, it wasn't for about

30 three weeks. There was a sale, I guess three weeks, on that part, the building on the front, the work on the front of the building was started at once, piling and excavations started there, almost as soon as the contract was signed. On the frame building not until the building, auction was held and the building torn down, or a part of it torn down. It wasn't—some of that work was quite well along before the rest of the building was torn down.

40

Q. How long after August 4th was it before the frame building was down so that Doughty and Notley could proceed with the excavation work there? A. I can't give you that date. We have records of that, but I don't carry them in my mind. It was some time— 10

Q. Some time, was it a month, do you know? A. I should say it was after the signing of the contract.

Q. Date of the contract August 4th; do you know the date that Cramp and Company took charge of this excavation work down there? A. I know it by hearing it here.

Q. What date have you heard here? A. Seventeenth of October.

Q. Seventeenth of October, and do you know 20 how long it took them to complete the excavation work? A. Yes, sir, the excavation work was finished about the, I should think the first week in December, or possibly the second week in December.

By Mr. Rose: Q. Then it would not have been possible for the subcontractor to have finished the excavation within four weeks? A. I can't say what it would have been possible.

Q. Well, the old structure was still there, 30 wasn't it, within four weeks from the signing of that contract? A. Yes, they could not have finished it from the signing of the contract in four weeks.

Mr. Bacon: Q. Well, the contract don't require the work to be done within four weeks of the time of the signing of the contract itself, does it, Mr. Price? A. No, it is four weeks from the time the old building was torn down. 40

Mr. Hayes: We were trying to locate the time of the tearing down of the old building. That is the time when we were trying to find out the condemned or old building was torn down.

10 Mr. Bacon: And the contract also calls for an allowance for delays, does it not? It does.

By Mr. Bacon: Q. And you say as a matter of fact there was an allowance made of ten days in the performance of the contract because of changes? A. Yes.

Mr. Hayes: Is there any information you can give us as to when the frame building was torn down?

Mr. Bacon: Mr. Davie testified about
20 that, didn't he?

Mr. Hayes: I didn't hear him.

By Mr. Hayes: Q. Do you know, Mr. Price? A. No, but this work didn't wait until the old building and stock was torn down. This was started long before the old building was torn down, work was started on this contract as I understand it at once, within the week.

Q. That is not the question, Mr. Price. The question is when was the frame building which
30 was supposed to be torn down so that Doughty and Notley could proceed with the excavation? A. They proceeded with the excavation before that was torn down.

Q. At the particular part where the frame building was? A. No.

Q. That is what I am asking you.

ESTEL D. RIGHTMIRE, resumed.

Direct-examination by Mr. Rose:

Q. Mr. Rightmire, you are familiar with the location of the Hotel Traymore and the excavation work? A. I am, yes. 10

Q. And you were there frequently supervising the excavation work, were you? A. No, I was there a number of times but not making—

Q. Observing it? A. Yes, that is all, yes.

Q. You say you are an engineer? A. Yes.

Q. What would you say would be the effect of excavating three holes three times deeper than the original plans and specifications called for?

Mr. Bacon: I object to that as being a question that can't, the answer to which 20 can't by any possibility inform the Court of anything. What would the effect be of excavating a hole three times deeper than the contract calls for? The hole might be a hundred feet, the effect of excavating that three times deeper would be to go down three hundred feet. There is no such condition of affairs existing here at all. There is no testimony in the case there was any holes three times deeper. 30

(Question repeated.)

Q. Three holes three times deeper—three feet deeper I meant to say.

Mr. Bacon: That is a different color.

Q. Three holes three feet deeper than what the original specification and plans called for.

Mr. Bacon: I object to that. If this was above the water line it would be one 40

thing. If it was all below the water line it would be an entirely different proposition.

The Court: I am inclined to receive the answer.

10 Q. Would it be easier? A. It would be more difficult to dig a hole deeper than one that is not so deep.

Q. Why would it be more difficult? A. Well, even though it was not water in it it would be more difficult to dig a hole deep than it would shallow.

Q. But taking these particular holes what would you say? A. Well, it would be more difficult—

20 Mr. Bacon: I object to that on the ground that counsel has not designated which particular holes, or designated any that were so dug.

(Question repeated.)

By the Court: Q. The kind of work that was done there, Mr. Rightmire? A. Make it more difficult on account of the water.

Q. But still you had water to deal with all the time, didn't you? A. Well, it would be a larger

30 quantity.

Q. And not only had water that was there, but you were pumping water in as I understand, so how could that make any difference? A. Deeper you go more water you would get, because when you get down below the water line on high water you get more water there than you do on low water.

40 Mr. Hayes: Pressure is greater, you mean?

A. Pressure is greater, and you get more water because when the tide rises the ground water rises.

Mr. Hayes: Q. That means the water will flow in quicker the deeper you get? A. Sure.

By Mr. Rose: Q. Well, would it cost a great deal more to excavate one foot below the water line or three feet below the water line? 10

Mr. Bacon: Objected to as leading and not the proper method of determination of the additional cost, the expression a great deal more being entirely relative.

Q. Well, would it cost more or cost less? A. It would cost more, but how much more I could not say.

By the Court: Q. Well, would there be any material difference in the work, Mr. Rightmire? That is what we are trying to get at. A. It would depend upon the method. 20

Q. We are trying to get at that, would there be any material difference in the work. A. It would depend upon the method, if they pumped it out it would not cost any more; if they dug it out it would.

Q. Well, the method they were using. A. I don't know just what method they used up there. I know the only time I was down there they were using shovels and spades shoveling it out, and of course it would cost more to shovel it out than it would to pump it out. 30

Q. You think then there was some difficulty, but not great sight of difficulty; is that what you mean? A. Not if they would use sand pumps.

Q. Same kind of work only a little more of it; is that it? A. Yes, sir.

40

By Mr. Hayes: Q. If they had used improved methods there would not be any material difference, is that it? A. Providing they had the sheet piling on it.

10 The Court: I guess that is the way he puts it, same kind of work only a little more of it.

CROSS-EXAMINATION by Mr. Bacon:

Q. The ordinary method of doing work of that character down here at the shore where the excavation is below the water line is to use pumps, is it not? A. Yes, sir.

Q. There are pumps that are used for that purpose? A. Yes, sir.

20 Q. What they call sand pumps? A. Yes, sir.

Q. And if a hole is to be dug three feet below the water line giving an additional foot and pumping out water and sand don't appreciably add to the cost, does it? A. Excepting to the sheet piling.

Q. All the difference is in the length of the sheet piling, isn't it? A. Yes, about all.

30

Mr. Rose: I want to read into the testimony from the contract between Cramp and Company, a corporation of New Jersey and the Hotel Traymore Company, dated July 31st, filed in the office of the County Clerk of Atlantic County, and offered in evidence in this case as Exhibit

40 D1.

The Court: Mr. Rose, that is an exhibit in the case and it will just simply double up the record twice by reading it in.

Defendants rest.

10

MICHAEL J. O'MEARA, sworn.

DIRECT-EXAMINATION by Mr. Bacon:

Q. Mr. O'Meara, what position do you occupy with the plaintiff corporation? A. I am secretary and general manager.

Q. Did you ever have any conversation with Mr. Doughty about the performance of this contract of Doughty and Notley? A. Several. 20

Q. Where did you have these conversations? A. The first conversation was on my porch on Tallahassee Avenue before we got the contract. It was brought about by a Mr. Notley and another gentleman coming there soliciting us to try and get the work from us if we were to get it, and I asked them for their qualifications and they told me Mr. Edward Doughty was going to be a partner in the business, and I asked them to 30 bring Mr. Doughty down, and next night Mr. Doughty came down and says, "Yes, if you get it and we get it," and we discussed the price, and I particularly asked Doughty if the price was not cheap and he said, "No, we understand the business and we pump this sand cheaply," and he also said, "if you use a higher price you won't get the contract." We probably spent an hour 40

discussing the business and I says, "Mr. Doughty, if we get the business I will give it to you."

Q. Did you make your bid on the Hotel Traymore based upon this bid of theirs being the price at which they would do the work for you
10 if you got the contract? A. We did.

Q. Now after the contract was awarded to them and they commenced work did you have conversations with Mr. Doughty? A. Yes, we had three or four on the building when I saw he wasn't going fast enough, I said, "What do you propose to do, Mr. Doughty?" He seemed to be up in the air. He said, "my man Notley, I don't know what to do. I didn't want to do this business." And I went to his store. He has a gro-
20 cery store on the avenue. I went there two or three evenings and I said, "If you don't want to finish, let me know and get busy." I think what—I said, "if that is all you want, come up to the place tomorrow morning and I will make a drawing myself." I said, "if that is all you want, come up to the building tomorrow morning and I will make a drawing for you," so he came there and I made a drawing on a piece of paper and listed the different size of sheet piling for
30 the boiler room and I says, "if you want to order lumber," and he said, "yes," and he sent for the representative of the Somers Lumber Company and gave him the order. So the work seemed to be demoralizing, and nobody seemed to help him with his other business and the result we had to finally take it away from him.

Q. Did they have a sufficient number of men on
40 the work? A. No.

Q. How many men did they employ? A. I don't know that.

Q. Do you know what holes they actually did excavate? A. We have a record in our files there.

Q. Your engineer has that, has he? A. Yes.

Q. At any of the times when you had these conversations with Mr. Doughty did he complain to you that the holes were deeper than he thought they were? A. No. 10

Q. Did he find any fault in any way with what your engineer or your employees were requiring him to do in the performance of the contract? A. Not that I ever heard of.

Q. I am talking about you. A. No.

Q. Did he in any conversation with you give that as an excuse for his failure to perform the contract in accordance with its terms? A. No. 20

Q. Did he ever say to you that the work was different than he supposed it would be? A. No.

Q. Who requested Cramp and Company to buy these pumps that were bought prior to the seventeenth of October? A. I was not a party to that pump matter.

Q. You hadn't anything to do with the pump matter? A. I think Mr. Davie and Mr. Doughty had those conversations. 30

By the Court: Q. Did you say that Mr. Doughty complained that his partner was not attending to business? A. I did.

Q. Did he tell you what—make any complaint about his partner? A. Nothing more than to say he was not attending to business.

Q. Well, something occurred here in my presence that makes me make this inquiry, whether there is anything about—Mr. Notley's habits 40

which interferred with the proper prosecution of this work. A. Mr. Doughty didn't say so to me, your Honor.

CROSS-EXAMINATION by Mr. Rose:

10 Q. How do you know, Mr. O'Meara, that they did not have enough men at work there? A. Because of the length of time they were working on the building in proportion to the contract time they had to finish all of the work.

Q. Well, that was a very difficult job they were undertaking, wasn't it? A. No.

Q. It was very difficult to excavate below the water line, wasn't it? A. No.

Q. Didn't you tell Mr. Marsteller and Mr. 20 Rightmire that it was a physical impossibility to excavate to the depths which were given to Doughty and Notley? A. No.

Q. Do you remember having a conversation with Marsteller and Rightmire in regard to the practicability of excavating to those depths? A. I have had several conversations with Mr. Rightmire. I don't know who Mr. Marsteller is.

Mr. Rose: Mr. Marsteller, will you stand up, please.

30 (Mr. Marsteller stands up in the court room.)

A. Yes, I know the genetleman.

Q. Do you remember having a conversation in your office in Philadelphia at which I was present? A. Several.

Q. In which you made such a statement? A. No, I don't remember making the statement at all because it was not so. We did it.

40 By Mr. Bacon: Q. You say that you did it.

What was it you did? A. In answer to Mr. Rose's question of being a physical impossibility I said it was not a physical impossibility for the reason of the fact we did it.

Q. That is you did the work required to be done by these plans and specifications? A. Yes, sir. 10

EDWIN BOWDEN, sworn:

Direct-examination by Mr. Bacon:

Q. Mr. Bowden, are you an employee of Cramp and Company? A. I am.

Q. How long have you been working for them? A. About four years.

Q. What is your business? That is what do you do? A. Estimating. 20

Q. Are you also an engineer? A. Yes, sir.

Q. What else do you do besides estimate? A. Superintend the work.

Q. Superintend the work? A. Yes, sir.

Q. An estimator does what? A. Figures quantities and prices and different kinds of work on the building.

Q. Did you go down to—did you come down to Atlantic City and go over the work that had been done by Doughty and Notley before the payments were made to them? A. I did. 30

Q. Whom did you meet on the job representing Doughty and Notley? A. Mr. Rightmire.

Q. The gentleman who was on the stand a while ago? A. Yes, sir.

Q. Did you and he measure up the work that had been done by Doughty and Notley? A. Yes, sir. 40

Q. Did you agree as to the quantity of the work that was done? A. Yes, sir.

Q. What was the total quantity of work that was done up to the time that you made your measurements? A. Six thousand yards.

10 Q. And when was that figure made? A. Somewhere around the first of October, I think it was.

Q. 1914? A. 1914.

Q. And they were paid in accordance with that estimate? A. Yes, sir.

Q. Now, Mr. Bowden, have you taken the working plans, being the plans that Mr. Price had here awhile ago, and have you also taken the contract plan and made figures on the differences in the quantity of excavation in the holes that Doughty

20 and Notley actually did excavate as between the two plans? A. Yes, sir.

Q. Have you got your calculations with you? A. Yes, sir, they are here.

Q. What is the difference? A. There was a difference of fifteen yards additional on those footings.

Q. Which way was that, more or less? A. More.

Q. That is Doughty and Notley excavated, in

30 the work that they actually did, fifteen yards more than the excavations as shown by the contract plan? Is that what you mean? A. Yes, sir.

CROSS-EXAMINATION by Mr. Rose:

Q. Does that apply to all of the work, to all of the excavation work? A. All of the excavation work?

40 Q. Yes. A. Completed by Doughty, yes.

Q. Agreed to be done by Doughty and Notley? A. Yes, sir.

The Court: Let us understand. That is all the extra excavation that Doughty and Notley did. Now, it may be useful to know whether his concern, Cramp and Company, did any extra excavating, and if so, how much in the finishing of this job? 10

Mr. Bacon: Mr. Price and Mr. Davie both testified as to that, that that was thirty yards. Now then, what I am asking him now is what Doughty and Notley actually did do, and they actually did do fifteen yards more than the contract plan called for.

The Court: I understand.

Mr. Bacon: Now, I didn't ask him about the rest of it because I thought Mr. Price covered that. I think he was covering the entire situation. I don't know but what he can answer that. 20

Q. Can you answer that? Do you know the whole thing? A. Yes, sir.

By the Court: Q. Whether Cramp and Company did any extra excavating and if so how much in the finishing of this job? A. My figures show twenty-eight yards additional. 30

By Mr. Bacon: Q. Is that in addition to Doughty and Notley or is that included? A. No, sir, that is included.

Q. How much did Cramp and Company do actually? A. Difference between fifteen and twenty-eight.

Q. Thirteen yards? A. Yes, sir.

Q. Now, is that all this extra excavation 40

amounted to in the whole thing, all the work that Doughty and Notley did and in the work that Cramp and Company did, twenty-eight yards? A. Yes, sir, it was so small we didn't bill the architects and owners for it.

10 Q. What? A. It was so small we didn't bill for the difference.

The Court: What do you mean, didn't bill for difference?

Mr. Bacon: The difference between the original plans and what we actually did was so small that Cramp and Company never made a claim on the Hotel Traymore for the twenty-eight yards of work.

The Court: That is what he says.

20 Mr. Bacon: Mr. Price testified the same thing, that the difference was so absolutely trifling nobody ever paid any attention to it. We never rendered a bill for it.

The Court: Well, is that so?

A. Yes.

By Mr. Rose: Q. Mr. Bowden, how much would Doughty and Notley have been entitled to if they had finished the excavation in accordance with the original plans and specifications? A. According

30 to my original figures 12270 yards.

Q. And how many yards were actually excavated under the revised plans and specifications? A. None. He didn't work according to the revised plans and specifications.

Q. Well, you heard Mr. Price testify a little while ago that there were three holes which were excavated three feet deeper than the original plan and specification, didn't you? A. There were several holes excavated deeper than the plans called

40 for, yes.

Q. Well, were there three holes where they had to go as much as three feet deeper than the original plans and specifications? A. Yes, sir.

By Mr. Hayes: Q. How much would that three feet deeper in cubic yards amount to? A. Specify which three holes and I will tell you.

Q. Any three. Take the smaller three holes and then take the larger three holes, Mr. Bowden, if you have got such a thing. A. In the larger holes it would be about thirty yards in each hole. 10

Q. Thirty cubic yards in each hole to be excavated? A. Yes, sir.

Q. And smaller holes how much? A. About eight yards in the smaller ones.

Q. About eight? A. Eight yards.

Q. Were all these increased excavations below the water line? A. Yes, sir. 20

Q. And were there any intermediate holes that you also had to excavate besides the smallest hole and largest hole? A. Yes, sir.

Q. Can you tell what they average? A. Well, anywhere at all between the eight and the thirty.

Q. And how many holes were there altogether? A. About a hundred and fifty.

By Mr. Bacon: Q. That is you mean on the whole job? A. Yes, sir.

Q. But you are not meaning what Doughty and Notley did, you mean there was a hundred and fifty holes shown by the entire plan? A. Yes, sir. 30

Q. Now, were there holes where the excavation was not as deep as shown on the plans? A. According to my figures the entire excavation in the holes was over seven hundred yards less than shown on the plan.

40

Mr. Hayes: That is not responsive to the question and I object to the answer, if your Honor, please.

Q. The question is whether there were holes where the excavation that was actually made was not as deep as shown on the plans? A. Yes, sir.

10

LEWIS A. WILLS, sworn:

Direct-examination by Mr. Bacon:

Q. Mr. Wills, you were foreman of carpenters for Cramp and Company? A. Yes.

Q. On this job down here in the Hotel Traymore? A. Yes, sir.

20

Q. When did you go to work? A. September sixteenth, 1914.

Q. What did you do there so far as Doughty and Notley were concerned? What supervision did you give to their work? A. I gave them, laid out all the foundation for holes, gave them the depth to cut off the piling.

Q. And where did you get your information from? A. From the plans and from the superintendent, Mr. Hull.

30

Q. Did Doughty and Notley make any complaints to you about being required to go to extra depth? A. No, sir.

No cross-examination.

ISAAC C. HULL, sworn:

Direct-examination by Mr. Bacon:

Q. Mr. Hull, were you superintendent of construction on this Hotel Traymore? A. I was.

Q. For Cramp and Company? A. Yes, sir. 10

Q. Were you there while Doughty and Notley were working on this contract? A. I was.

Q. Did you see them at work there? A. Yes.

Q. Did either of them or Mr. Smith ever make any complaints to you because they were required to go to greater depth than they thought the contract required? A. They did not.

Q. What was the trouble with them? A. Well, I really don't know more than I don't think they had the equipment and were in shape to do that kind of a job. 20

CROSS-EXAMINATION by Mr. Rose:

Q. Mr. Smith complained to you, didn't he? A. Mr. Smith never did.

Q. Well, didn't Mr. Smith ask you for the plans and specifications? A. Mr. Smith used the plans and specifications whenever he wanted them. The window was open and he would go in the office. The office was never locked. 30

By Mr. Bacon: Q. What office is that? A. The office on the job, where we had the plans and specifications and the 'phone in.

Q. And did you ever see Mr. Smith in there? A. I did.

Q. Did he ever look at the plans and specifications? A. Yes.

Q. Were they kept away from him in any way? A. No, sir, they were laying out openly on the table at all times. 40

Q. Any reason at all why he could not see the working drawings that you had there? A. No, he had the perfect right. They were laying out on top of the table, same as that table is, for him.

10 Mr. Rose: Q. Well, if he had looked at those working drawings would it have shown the changes? A. Well, he could see it.

Q. That is all you had to go by? A. That is all I had to go by, the same.

CROSS-EXAMINATION by Mr. Hayes:

Q. Now, Mr. Hull, Mr. Price said all the modifications were not shown on these plans? A. Modifications?

20 Q. Yes. A. The modifications may have been shown up until that time, when he left, up to that time there was no change so far as I know in the plans and specifications in footings.

Q. So far as you know? Well, do you know? A. I do know because I knew all the footings that was taken off up until that time.

Q. When were the modifications made? A. That I really could not tell you. They were made on the job.

30 Q. Were made on the job but were not made on the plans? A. The plans were changed at different times, as you see on that sheet seven off the working drawings.

Q. I say the modifications, Mr. Price testified were not shown on the plans but were done as they needed them on the job; is that right? A. No, I worked off of those working drawings.

Q. Again I say that Mr. Price testified—

40 Mr. Bacon: I object to that. Mr. Price's

testimony will have to be taken by your Honor and a proper interpretation placed on it. It is not for this witness to interpret Mr. Price's testimony.

The Court: It is not customary to base the question upon the testimony of a previous witness. He testifies from his own knowledge of the situation, Mr. Hayes, eliminating Mr. Price and asking the specific question. 10

Mr. Hayes: I tried to ask him that and I tried to help him out by telling him the testimony of Mr. Price.

Q. Mr. Hull, were all the modifications on the work shown on the plans?

Mr. Bacon: I object to that, if the Court please, on the ground that this man don't know anything about what Mr. Price may have done. 20

Mr. Hayes: He testified on direct-examination that the plan showed all the changes. Now, on cross-examination I am trying to find out whether that is a fact or not.

The Court: I think that is proper cross-examination.

Question allowed. 30

Q. Were all the modifications? A. On the working sheet, as far as I know, I got the drawings to work off of. I don't know what transpired or changes were made on the drawings. I had the working sheet to work off of and that is what I worked off of.

Q. And it might be possible for changes to have been made on the excavations or footings which 40

were not noted on the plans? A. That was not changed on the drawings that I had, I worked on, as long as I was on the job.

(Question repeated.)

The Court: Q. Can you answer it in any other way than you have? A. No.

10

Q. I am saying it would have been possible for modifications to have been made on the job, which modifications were not noted on the plans; isn't that a fact? A. It is a fact that I was not there for that purpose. I had to work to the drawings.

Q. I am not asking you that. I am asking you whether it is not possible for that to have happened?

The Court: All things might be possible, Mr. Hayes.

20

Mr. Hayes: I insist, if your Honor, please, I am entitled to an answer.

A. I beg your pardon. I am giving you an answer as well as I can express myself to you.

Q. That is as well as you can express yourself, is it? A. It decidedly is, as I told you, I worked off the drawings, and I went there, there was no change made off the drawings, or not, to the best of my knowledge, there wasn't any.

30

Q. But there could have been changes made of which you had no knowledge? A. There certainly could, but I had the drawing there of the same drawing all the time.

By Mr. Bacon: Q. How long were you there? Were you there as long as Doughty and Notley were there? A. I was.

Q. What was done after that you don't know anything about? A. No, sir.

40

Q. What we want to know is this, while you

were there and in charge of the work was the work that was actually done, performed in accordance with the plans that you had there? A. Yes.

By Mr. Rose: Q. Well, did you see the actual excavation work, the work? A. The actual?

Q. Yes, as the excavators were there at work did you see them excavating the holes? A. I did. 10

Q. And digging it out? A. I did.

Q. And did you know whther or not they were actually going down to the depth provided for by the plans which were hanging up in the room in which you spoke of? A. They were going according to those drawings.

Q. How do you know that? Did you measure? A. Did I measure?

Q. Yes. A. We had sticks on this, yes. 20

Q. Did you do it personally? A. I saw that it was done and measured. I checked them and give orders to Mr. Wills and I checked and followed them.

Plaintiff rests.

Globe Indemnity Company rests.

30

Exhibit P-2

Part 1—General Conditions

General: These conditions, and every part herein, are binding upon each contractor and upon each sub-contractor in so far as they can or do apply to him or his work, and he shall be respon- 40

sible for neglect to read or to attend to any part, paragraph or item contained herein; and the architects shall decide as to the meaning and applicability of any part of these General Conditions, or of anything in the specification, to each
10 case, and their decision shall be binding and final.

Whenever the word "contractor" occurs, it shall be held to apply to any or all contractors connected with the work * * *.

Drawings and Interpretation: The drawings accompanying these specifications are numbered to inclusive, and dated,

Additional drawings of details will from time to time be furnished, and the same, when made, are to constitute a part of this contract.

20 A copy of these specifications and at least one print of each drawing must at all times be kept at the building. No work is to be executed without the proper detail drawings or explanations, and any work which may have been done without them, or not in accordance with them, must be removed and replaced at the expense of the contractor who has done so * * *.

Should any error in or disagreement between the drawings, or the drawings and specifications,
30 exist or appear to exist, the contractor for the work in question must notify the architects in writing of the fact and have the same explained or adjusted, before proceeding with the work, or else the work thereafter must be changed at the expense of such contractor upon the architects' order.

The contract, these specifications, and all drawings with their explanatory notes and figures to
40 be furnished by the architects for this work, are

to be taken together as a whole and are to illus-trate each other. Anything shown on the drawings and not mentioned in the specifications, or *vice versa,* is to be included and executed without extra charge and in the same manner as if it were both shown on the drawings and mentioned in the specifications. (The drawings and specifications must be carefully followed in all respects, and the spirit of them is to be followed as well as the letter * * *). 10

The Architects: The architects are to have entire supervision of the work, and are to have full power at any time to reject all work and materials not in accordance with the drawings and specifications, and such work and materials as are condemned must be replaced at the contractor's expense. 20

Sub-Contractors: Should the architects so desire, they may correspond direct with the sub-contractors, provided they send the general contractor copies of all such correspondence * * *.

Extras and Omissions: In any of the contracts, the owners shall have the right, subject to the approval of the architects, to make any alterations, additions to or omissions from the work or materials specified or shown on the drawings, during the progress of the construction, that he may desire, and provided the order for said changes shall have been signed by the architects. The said changes shall be acceded to by the contractors in whose work it may occur, and shall be carried into effect without in any way violating or vitiating the contract. When such changes are made the costs of the same shall be approved by the architects who shall add the amount of said al- 30 40

lowance to the contract price if the cost of the work has been increased, or shall deduct the amount if the cost of the work has been lessened, as they, the said architects, may deem just and equitable * * *.

10 *General:* Each contractor and sub-contractor shall fully finish his work thruout, and shall do everything necessary to complete all the work in his department, whether directly specified herein or not, or whether occurring in consequence of or in connection with the work of any other mechanic. Each contractor shall thoroughly examine the plans and the entire specification for the building, before submitting an estimate for the work.

20

Part IV—Excavation

The General conditions of these specifications, pages 1 to 4 inclusive, are hereby made a part of this specification for Excavation.

The Site: This contractor shall carefully examine the site in order to fully understand the conditions and character of the work.

This contractor shall make all excavations of 30 whatever kind and description required for the operation as shown on the drawings or described in the specifications, excepting for pipe trenches outside of the main masonry pipe duct.

Excavations must be large enough to allow room for shoring and concrete boxing and framing.

Excavations around walls waterproofed on the 40 outside must be large enough to allow room for

shoring and space for a man to work comfortably between shoring and wall.

(See specifications for Waterproofing.)

This contractor shall do all sheet piling and shoring required in connection with the operation. Sheet piling and shoring shall be removed before any back filing is done. He shall do all bailing and pumping that may be required to keep excavations clear of water, until masonry and waterproofing in excavation is completed. 10

Carefully fill up, ram and roughly level off around the new walls and piers.

No grading is included in this contract, except such as is necessary at all times to protect the walls from the action of the weather.

The contractor is to keep the ground immediately about the building, so graded that at all times the surface water shall run clear of walls and in no way work injury to the building. 20

Note: The contract for demolition of the old building will provide for removing all old buildings north of Adjoining Line (see plans) and clearing that part of the lot of all obstructions down to the level of the present basement floor, but does not provide for removing anything below that level. Therefore, this contractor will include everything not included in the contract for Demolition. 30

Disposition: All materials from excavation, except such as are required for filling in, will be removed from the premises.

Completion: Each contractor or sub-contractor shall do everything necessary to complete all the work in his department, whether directly specified herein or not, or whether occurring in consequence 40

of or in connection with the work of any other contractor.

Each contractor shall thoroughly examine the plans, the entire specification, and the building, before submitting an estimate for the work.

10

Exhibit P-4

Cancelled Check.

Philadelphia, Pa., Sept. 17, 1914.

No. 2345.

Cramp & Company

Denckla Building, 11th & Market Sts.

20 To Doughty & Notley Dr.

On a/c Excavation

Hotel Traymore, Atlantic City N. J. 1020.00

When the receipt is dated and properly signed this voucher is

Payable at the

Franklin National Bank,

30 Philadelphia.

NORMAN W. CRAMP,

Treasurer.

Received Sept. 17, 1914 from Cramp & Company

$1020.00/100

the Sum of One thousand twenty 00/100 Dollars

In Full of the Above Account

Not over twelve hundred $1200 Doughty & Notley. If this voucher is drawn in favor of a firm

40

or corporation the receipt must be signed by a member of the firm or by a duly authorized officer of the corporation.

ENDORSEMENTS

DOUGHTY & NOTLEY. P 4

E. DOUGHTY. 6/21/15 10

L.

CANCELLED CHECK.

Philadelphia, Pa., Oct. 2, 1914.

No. 2496

CRAMP & COMPANY

Denckla Building, 11th & Market Sts.

To DOUGHTY & NOTLEY DR.

20

On a/c Excavating on

Hotel Traymore 1020.00

When the receipt is dated and properly signed this voucher is

PAYABLE AT THE

FRANKLIN NATIONAL BANK,

Philadelphia.

NORMAN W. CRAMP,

Treasurer. 30

RECEIVED Oct. 2, 1914. from CRAMP & COMPANY,

$1020.00/100

THE SUM OF Ten hundred and twenty 00/100 DOLLARS

IN FULL OF THE ABOVE ACCOUNT

Not over twelve hundred $1200, DOUGHTY and NOTLEY. If this voucher is drawn in favor of a 40

firm or a corporation the receipt must be signed by a member of the firm or by a duly authorized officer of the corporation.

ENDORSEMENTS

DOUGHTY & NOTLEY,
E. DOUGHTY.

10

Exhibit P-5

P 5
6/21/15
L.

20

October 9, 1914.

Hotel Traymore

Messrs. Doughty & Notley,
2329 Atlantic Avenue,
Atlantic City, N. J.

Gentlemen:

Referring to your contract dated the 4th day of August, 1914, between yourselves and this Company, for the excavation, shoring and sheet piling on the Hotel Traymore, Atlantic City, we herewith beg to notify you, in accordance with Article 5 of the contract, that unless you, by the first part of the coming week, get more machinery and men to push the work in this contract much faster than you are now doing, we shall put on men and materials to prevent as much as possible the delay which you are now causing.

30

40

Exhibit P-5

You have not been carrying this work on at all in accordance with your contract. You know very well you have not enough pumping machinery on the ground, neither have you had enough men at any time. At the present time there are about 50 holes which are ready for sheet piling and digging, and about 45 of these you have not started. This is absolutely neglect on your part. You cannot, of course, do the digging fast enough unless you have more pumps on the job. Something will have to be done at once to have the work go on promptly. 10

We are sending a copy of this letter to the Globe Indemnity Company, so that they will have ample notice of what we propose to do.

Yours very truly, 20

CRAMP AND COMPANY.

MJO/M
Via Registered Mail
Copy to
Globe Indemnity Company,
45 William Street,
New York City.

(Attached to this exhibit and forming part thereof there is a U. S. Post office Registery return receipt signed "DOUGHTY AND NOTLEY, E. DOUGHTY.") 30

Exhibit P-5

October 9, 1914.

Hotel Traymore

Globe Indemnity Company,
45 William Street,
New York City.
10
Gentlemen:

Referring to the contract we have with Messrs. Doughty & Notley for excavating, shoring and sheet piling on the Hotel Traymore, Atlantic City, beg to advise you that they are extremely dilatory and we will have to take hold of the work ourselves and put on men and material unless they put on a large force of men and material at once, or by the fore part of the coming week. They are neglecting the work frightfully and do not seem to be interested enough to put on sufficient plant and men to have the work done. Enclosed please find copy of a letter we have sent to them today.
20

Do what you can at once to get a move on these people, as we have been trying to for about a week past and do not seem to be able to make them realize the importance of their contract.

30
Yours very truly,
CRAMP AND COMPANY,

MJO/M
Enclosure

Via Registered Mail

(Attached to this letter and forming part of the exhibit there is a U. S. Post office Registry receipt "signed GLOBE INDEMNITY Co.")
40

Exhibit P-5

October 9, 1914.

Hotel Traymore.

Messrs. Doughty & Notley,
2329 Atlantic Avenue,
Atlantic City, N. J. 10

Gentlemen:

Referring to your contract dated the 4th day of August, 1914, between yourselves and this Company, for the excavation, shoring and sheet piling on the Hotel Traymore, Atlantic City, we herewith beg to notify you, in accordance with article 5 of the contract, that unless you, by the first part of the coming week, get more machinery and men 20 to push the work in this contract much faster than you are now doing, we shall put on men and materials to prevent as much as possible the delay which you are now causing.

You have not been carrying this work on at all in accordance with your contract, you know very well you have not enough pumping machinery on the ground, neither have you had enough men at any time. At the present time there are about 50 holes which are ready for sheet piling and 30 digging, and about 45 of these you have not started. This is absolutely neglect on your part. You cannot, of course, do the digging fast enough unless you have more pumps on the job. Something will have to be done at once to have the work go on promptly.

We are sending a copy of this letter to the Globe Indemnity Company, so that they will have ample notice of what we propose to do.

Yours very truly,

CRAMP AND COMPANY,

10 MJO/M

Via Registered Mail

Copy to Globe Indemnity Company,
45 William Street,
New York City.

Exhibit P-6

20

October 14, 1914.

Traymore Hotel.

Doughty & Notley,
2329 Atlantic Ave.,
Atlantic City, N. J.

Gentlemen:

Would call your attention to the fact that you
30 have refused to put men on sheet piling on the night shift through your representative Mr. Smith, we have, therefore, put men on this work, a night shift on sheet piling, and will charge your account with the same. We are sorry to have to take these steps, but owing to the fact that we are so far behind with the work that the penalty does not begin to pay us for the loss, and we can not
40 tolerate this delay. We will, of course, remove

these men whenever you show us that you will put on the men to get through with this work.

Yours truly,

CRAMP AND COMPANY.

JWD/O

10

October 14, 1914.

Globe Indemnity Co.,
45 William St.,
New York City.

Gentlemen:

Enclosed find copy of letter sent this day to Doughty & Notley. The writer was in Atlantic City yesterday, and they have refused to put the men to the jetting of sheet piling, they haven't any on this day, and no men on last night. We have ordered two gangs of men to go on tonight, and have ordered these men on until such time as Doughty & Notley comply with the terms of the contract in reference to putting men on. They are considerably behind with their contract now. 20

Yours truly,

CRAMP AND COMPANY.

JWD/O 30

Registered Mail.

Exhibit P-7

Letter paper of

GLOBE INDEMNITY COMPANY

45 William Street
New York, Oct. 14, 1914.

10 149-QQ
Reply to
Fidelity & Surety
Department

CLAIM DIVISION

Messrs. Cramp & Company,
Denckla Building,
Philadelphia, Pa.

20 Gentlemen:

RE: DOUGHTY & NOTLEY—BOND #44565

We acknowledge receipt of your letter of the 9th inst. enclosing copy of your letter of the same date to Messrs. Doughty & Notley, and advising that they are dilatory and have not a sufficient force of men and sufficient material to carry on the work in the way in which it should be done. We immediately communicated with Mr. Notley over the telephone and he advises that he had on
30 the job all the men that could reasonably be used and that if any more were put on they would be in each others way. He says he will take the matter up with you at once and satisfy you as to the progress of the work. If the work under this contract is still not satisfactory, we shall be glad to hear from you.

Yours very truly,
K. R. OWEN,
Supt. Fidelity & Surety Dept.

ANS. 10/15/14
40 M. J. O.

Exhibit P-8

October 15, 1914.

Hotel Traymore.

Globe Indemnity Company,
45 William Street,
New York City.

10

Gentlemen:

We have yours of October 14th, referring to the Doughty & Notley contract on the Traymore Hotel, Atlantic City.

We note you state that Mr. Notley advised you that he had on the job all the men that could reasonably be used and that if any more were put on they would be in each others way.

20

This is a mere fabrication. The fact is they have not now, and never have had, sufficient pumps on the job so that the water could be pumped in order to put men in digging at the proper speed. They are simply not capable of handling this work in a practical manner, and we started to put on men last night because they were making no progress whatever to speak of, and we propose to continue putting on men and material to save as much delay as possible.

30

Yours very truly,

CRAMP AND COMPANY.

MJO/M

Exhibit P-9

Atlantic City, N. J.

October 17, 1914.

10

Traymore Hotel,
(Excavation Contract)

Cramp & Company,
Denckla Building,
Philadelphia, Pa.

Gentlemen:

We find that we are unable to complete the excavation work at the Traymore Hotel for which we have a contract with you, and hereby give you notice of the same.

20

Very truly yours,
E. DOUGHTY,
J. F. NOTLEY.

Exhibit P-10

October 19, 1914.

30

Hotel Traymore

Globe Indemnity Company,
45 William Street,
New York City.

Gentlemen:

Referring to the contract we have with E. Doughty & J. F. Notley for excavation, backfilling, shoring sheet piling, etc., beg to advise you

40

Exhibit P-10

that we have received from them this morning in the mail, and under date of October 17th, the following letter:

"Atlantic City, N. J.

"October 17, 1914. 10

"Traymore Hotel
"(Excavation Contract)

"Cramp and Company,
"Denckla Building,
"Philadelphia, Pa.
"Gentlemen:
"We find that we are unable to complete the 20 excavation work at the Traymore Hotel, for which we have a contract with you, and hereby give you notice of the same.
"Very truly yours,
(Signed) "E. DOUGHTY,
"J. F. NOTLEY.

We send this to you in accordance with the terms of the bond you have issued on this contract. The bond, as we understand it, is No. 1625. 30

On account of the water, etc., pumps will have to be kept going, and we should like to know from you at once what you propose to do in the matter.

Very truly yours,
CRAMP AND COMPANY.

MJO/M
Via Registered Mail
and Special Delivery
Copy to Philadelphia Office 40

Exhibit P-11

(Attached to this exhibit and forming part thereof is U. S. Post office Registry return receipt signed "Globe Indemnity Co.")

10

Exhibit P-11

Letter Paper of

Globe Indemnity Company

New York, Oct. 22, 1914.

140-QQ

20 Reply to
Fidelity & Surety
Department.

Messrs. Cramp & Company,
Denckla Building,
11th & Market Streets,
Philadelphia, Pa.

Gentlemen:

Referring to our recent correspondence relative 30 to bond executed on behalf of Doughty & Notley of Atlantic City for excavation work in connection with the foundation for the Traymore Hotel, would say that this Company does not elect to complete this contract. We therefore suggest that you pursue your remedy under the contract.

Yours very truly,
K. R. OWEN,
40 Supt. Fidelity & Surety Dept.

Exhibit P-12

November 3, 1914.

Hotel Traymore

Messrs. Doughty & Notley, 10
2329 Atlantic Avenue,
Atlantic City, N. J.
Gentlemen:

Referring to the question of the lumber which you had on the job at the time you abandoned the contract for the excavation, sheet piling, etc., on the Hotel Traymore, Atlantic City, the writer, when talking with your Mr. Doughty on the building yesterday, asked him if you had any lumber lying on the ground besides what was down in 20 the ground being used as sheet piling. He said there was about 8000 feet of sap pine material. Our men say there was not that much, but, however, in order to have the matter arranged between us, we will agree that there were 8000 feet of sap pine boards on the site that were not driven in the ground, and this is all of the lumber you had on the ground that was not driven.

We understand also that we are taking 616 of 6/4x10 sap pine 20 feet long from the Somers 30 Lumber Company, this material being part of the bill of lumber which you ordered from the Somers Lumber Company to be used in the sheet piling work. The balance of the material which you had on the site was driven down in the ground, and we want you to understand that we do not obligate ourselves to withdraw this material from the ground.

40

Exhibit P-13

Will you please write a letter to us and say this is your understanding in regard to the material there was in the ground, and on and around the site, as your Mr. Doughty said to the writer yesterday you would do.

10 Yours very truly,
CRAMP AND COMPANY.

MJO/M

Exhibit P-13

Letter paper of

20 Marter & Rose

November 5th, 1914.

Messrs. Cramp & Co.,
Denckla Building,
Philadelphia, Pa.

Gentlemen:

In answering your letter of November 3d, 1914, would say, that your estimate of eight thousand feet of sap pine material at the Traymore Hotel
30 is about correct, except the quantity of lumber which was used by you in erecting the approach to the concrete mixer, which we will have to agree upon before any settlement is made in the matter.

Yours truly,
E. DOUGHTY.

R/F

Exhibit D-4

Letter paper of

CRAMP & COMPANY

October 24, 1914. 10

In re Hotel Traymore

Messrs. Price & McLanahan,
1418 Walnut Street,
Philadelphia, Pa.
Gentlemen:

Referring to our contract on the Hotel Traymore, beg to advise you that a couple of days ago we discovered that the footing plan that you had 20 made, giving levels of the cut off of piles, and the levels of the bottoms of the columns, differs very seriously from the drawings which are the basis of the contract.

When we discovered this, as you know, the writer came to your office and explained that this would make a large extra expense, and also a very serious delay. It was then suggested by you as a means of avoiding the delay and expense as much as possible, that the steel columns be cut 30 off so that the bottom of the steel column or top of the cast steel base would be 6″ below the basement floor, excepting in the case of such columns which were under the elevator shafts, or columns which for some other reason could not be brought up to this point.

As you know, we are now working in accordance with the instructions from your office, in view of having these columns cut off, and we understand 40

from you that by Monday we will have the information for all of the columns. We have arranged with the Phoenix Iron Company to have the columns shipped back to them, and they will cut them off to the new lengths which will be
10 given. They say it will take about ten days to do this cutting off, but none can be shipped back for probably a week after they are received, and it will also take about ten days after you decide to have us go ahead, to get the columns to the Phoenix Iron Company, and some time to get them back to Atlantic City.

We were given this new footing plan by your office without being notified by you that there was any difference in the levels from the drawings
20 upon which we made the contract, and we have just discovered that this great amount of additional work was shown by your revised footing plan, and seeing that a great amount of expense and delay would be involved, brought the matter to your attention.

There will be extra expense involved even after the columns are raised up to within 6″ of the basement floor, because considerable additional work has been done already on the footings, which will
30 necessitate additional pumping, excavation and sheet piling; furthermore the reshipment of the columns, the making of details for the cutting off of these columns, as well as the expense of cutting them off and sending them back to the building, will have to be paid for by the owners, also if there is any additional charge for sheet piling or digging or concrete, this will have to be paid for by the Owners.

40 At the present time it is vital that the length

Exhibit D-4

of the cut off for the columns be determined at once, so that the Phoenix Iron Company can start to make details for these columns in order that they can proceed with the work at their shop as soon as the columns arrive.

We see no way at the present time for fixing 10 the amount of additional work involved, and suggest that the work be ordered by you to be paid for by the Owners, and that we measure up later on after the concrete footings have been designed to suit the new level, and that the Owners then pay for it in accordance with the terms of the contract. These changes are going to delay us, and we ask for an extension of time by reason of the time lost caused by this delay.

We are enclosing a summary which shows a 20 change in the level of the bottom of the steel cores as between the contract drawings and the footing plans you gave us to work by. From this you can readily see the great amount of additional work and time that will be required if the work were to go on as shown by these revised footing plans.

We should like to have an order for the doing of this work, at prices to be determined later on. In order to do this, you will have to get the 30 consent of the Guarantee Trust Company, and also the Hotel Traymore Company, to vary from the clause in the contract pertaining to extras in the sense that this order will not stipulate the exact price to be paid for this work, this being a matter for computation in the near future; and of course it must be agreed in giving us this order, that when we arrive at the cost of the work, the 40

money will be put up in accordance with the terms of the contract.

Yours very truly,
(Signed) CRAMP & COMPANY.

MJO/M
Enclosure

10

Request of Doughty & Notley for Rulings of Law

(Filed,   )

NEW JERSEY SUPREME COURT

20

CRAMP & COMPANY (A Corporation), Plaintiff, and EDWARD DOUGHTY and JOHN F. NOTLEY, trading as Doughty & Notley and GLOBE INDEMNITY COMPANY, Defendants.	Action at Law.

30

The defendants, Doughty & Notley, respectfully request your Honor to include in your findings in the above entitled cause, rulings upon the following questions of law:

1. That to entitle plaintiff to recover from defendants, Doughty & Notley, it must produce a written order signed by the architects, and ac-

40

ceded to by Doughty & Notley, stating the amount to be allowed or to be deducted for alterations in the work, or prove a waiver of such order, or prove that defendants fraudulently lured plaintiff into making such alterations.

2. That to entitle plaintiff to recover from defendants, Doughty & Notley, for alterations, it must produce a written order of the contractor stating the amount to be paid by the contractor or allowed by the subcontractor by virtue of such alterations, or prove a waiver of such order, or prove that defendants fraudulently lured plaintiff into making such alterations. 10

3. That to entitle plaintiff to recover from defendants, Doughty & Notley, it must prove the difference between the contract price and the actual cost of completing the work under the original plans. 20

4. That the cost of completing the work under the revised plans does not furnish a proper measure of damage.

5. That but one cause of action arises out of the contract and bond which cannot be split up so as to permit a recovery on two counts; one for breach of contract, and one for breach of bond. 30

6. That the parties to a contract may stipulate the amount of damages to be recovered in case of breach of contract, and that said sum may be recovered as liquidated damages, plus interest and costs, and no more.

7. That the parties to a contract may stipulate the amount to be recovered in case of several 40

breaches in a contract, and that said sum, plus interest from the date of breach, and costs, may be recovered as a penalty, and no more.

8. That to entitle plaintiff to recover it must show a breach of contract upon the part of de-
10 fendants, Doughty & Notley.

9. That defendants are not entitled to any recovery if they altered the plans, or work, contrary to the terms of the written contracts, without the knowledge or assent of defendants.

10. That the bond in suit limits the liability of defendants, Doughty & Notley, to $3,000.00.

11. That "An Act Concerning Obligations" of New Jersey limits the liability of defendants to
20 the penalty of the bond, plus interest, and costs, and no more.

12. That if plaintiff prevented defendants from doing the work contracted for, plaintiff cannot recover from defendants.

13. That if plaintiff altered the plans, or work, so that it became more burdensome than defendants had contracted for, there can be no recovery from defendants.

30 Respectfully submitted,

DAVID R. ROSE,

Counsel for Doughty & Notley.

The above requests where found to be inconsistent with the findings in my memo. are all denied and exceptions noted for said defendants.

HOWARD CARROW,

40 Circuit Judge.

Memorandum of Carrow, J.

NEW JERSEY SUPREME COURT

CRAMP & COMPANY,
vs.
EDWARD DOUGHTY, *et als.* 10

Walter H. Bacon, for plaintiff.
David R. Rose and E. F. Willis, for Doughty and Notley.
James H. Hayes, Jr., for Globe Indemnity Company.

CARROW, J.:

This is a suit for damages growing out of a 20 breach of a sub-contract involving the excavations for the foundation of the Hotel Traymore on the beach front in Atlantic City, this state. The main facts, as I find them, may be stated as follows:

In the month of July, 1914, the plaintiff and the Hotel Traymore Company entered into a contract in writing for the construction of said Hotel Traymore, which was to be built and ready for business by June first, 1915. Plaintiff on August 30 fourth, 1914, sub-let all the excavation work by a contract in writing to defendants, Doughty & Notley, who will be referred to as the sub-contractors. Globe Indemnity Company, the other defendant, became surety to the extent of three thousand dollars for the faithful performance of said sub-contract. The sub-contractors were not to be paid a lump sum. They were only to be paid forty cents for each cubic yard of sand excavated. 40

Said sub-contractors entered upon the performance of their contract in the month of August, 1914, and worked along on the same, though without due diligence, until the month of October, 1914, when they quit work and deliberately abandoned their contract without any justifiable cause, 10 whereupon plaintiff was compelled to take over the unfinished portion of the sub-contract and perform the same according to the terms thereof and in doing so plaintiff lost, according to the admitted proof, $19,212.44.

Now, plaintiff sues for said loss upon two counts, one to recover three thousand dollars from the surety and sub-contractors and the other to recover $16,212.44 from the sub-contractors alone. 20 Both counts, are, in my opinion, maintainable.

In reaching the result which I have upon the merits proper consideration has been given to the contention that the architect, who was in charge of the enterprise, caused modifications to be made in the grade of the excavations different from that originally contracted for, whereby twenty-eight extra cubic yards of sand were excavated, but the modifications did not cause any material departures from the general scope of the sub-30 contract, nor can they be regarded as "alterations, additions to or omissions" within the contemplation of the contract, and even if they were, defendants are in no position to take advantage of the fact that they were not ordered in writing and signed by the architect because that feature of the contract was for the protection of the owner and further because the requirement was 40 waived by the conduct of the parties. In my opin-

ion the modifications were consistent with a reasonable interpretation of the sub-contract.

Defendants also attack the measure of damages claimed by the plaintiff. They say that since more sand was excavated than was actually contracted for, and was excavated with more difficulty than the other, they should not be burdened with the additional expense occasioned thereby, but there was no tangible evidence before me showing that the removal of said extra twenty-eight cubic yards of sand increased the difficulties of the excavating, and in the absence of satisfying proof of that nature I see nothing wrong with said measure of damages. It is in line with the rule in Guttenberg v. Vassel, 74 N. J. L., 553.

The sub-contractors contend that the damages should be limited to the penalty of the bond but I do not think that anything short of an express waiver would defeat plaintiff's right of action against the sub-contractors for the excess loss.

The surety company contends that inasmuch as the bond provides that "if said obligee shall complete or re-let the said contract then any forfeitures provided in said contract against the principal shall not be operative as against the surety, but all reserves, deferred payments, and all other moneys provided in said contract, which would have been paid to the principal had the principal completed the contract in accordance with its terms, shall be credited upon any claim the said obligee may make upon said surety" and since the admitted portion of the counter-claim and credits which plaintiff allowed the sub-contractors in the complaint exceed the penalty of the bond, said company should either be discharged from li-

ability or at least be given the benefit of said credits, but the bond was given for the faithful performance of said sub-contract and the damages occasioned by the breach were in excess of the penalty; besides the counter-claim has no relation to
10 the contract, it is an independent cause of action and then the credits so called cannot be regarded in the present circumstances as "reserves" or back money belonging to the sub-contractors, because they were a part of the plaintiff's security and used in completing the sub-contract.

I, therefore, hold that the above quoted provision of said bond has no application to either the counter-claim or credits. Nor do I think there is any other legal way under the peculiar facts of
20 this case by which said counter-claim can be made available to defeat the suit against the surety company. In my opinion, the guarantee must be made effectual.

The counter-claim of the sub-contractors as originally filed was for a larger amount than that agreed upon at the argument. The revised counter-claim is for $5,203.34, $4,105.74, of which is admitted by plaintiff, so that the only dispute between the parties over this branch of the case
30 relates to a claim of $1,097.60 for work, etc., which I find plaintiff is not properly chargeable with and it is, therefore, not allowed.

Plaintiff is entitled to recover from Globe Indemnity Company and Doughty and Notley three thousand dollars, and from Doughty and Notley alone twelve thousand one hundred and five dollars and seventy cents. Interest may be added
40 when computed.

Postea and Judgment

NEW JERSEY SUPREME COURT

CRAMP AND COMPANY, vs. EDWARD DOUGHTY and JOHN F. NOTLEY, partners, trading as Doughty & Notley, and GLOBE INDEMNITY COMPANY.	On Postea. Walter H. Bacon, Attorney.

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$ 3,000.00	damages agst. all defendants	Judgment entered this thirtieth day of September, A. D. nineteen hundred and fifteen, for the sum of three thousand dollars damages against all defendants, and for the sum of twelve thousand six hundred and seventy-four dollars and sixty-six cents, damages against Doughty & Notley, and forty-eight dollars and sixty cents costs.
12,674.66	damages agst. Doughty & Notley.	
48.60	Costs.	

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WM. S. GUMMERE,
C. J.

I, William C. Gebhardt, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in above stated cause which said judgment

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is recorded in this office in Vol. 8 of judgments, page 473.

In testimony whereof I have hereunto set my hand and the seal of said Court at Trenton, this twenty-second day of December, A. D., nineteen
10 hundred and fifteen.

(Seal) WM. C. GEBHARDT,
Clerk.

Amendment to State of Case

As part of the general conditions of the main contract, Exhibit P-2, page 129, state of case, include the following:

"It is agreed by the contractor that each sub-contractor must carry liability insur- 10 ance against damages by reason of accident in accordance with the laws of the State of New Jersey, also furnish bond, satisfactory to the contractor, for the completion of the work in their portion of the contract."